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STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203

On appeal from:
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The Honorable David H. Goldberg
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<tr><td>Appellee:
BRENT M. HOUCHIN,

v.

Appellant:
DENVER HEALTH AND HOSPITAL AUTHORITY.</td><td>▲COURT USE ONLY▲</td></tr>
<tr><td>Attorneys Appellant:

Brent T. Johnson, 12337
FAIRFIELD and WOODS, P.C.
1801 California Street, Suite 2600
Denver, Colorado 80202
Telephone: (303) 830-2400
E-mail: bjohnson@fwlaw.com</td><td>Court of Appeals
Case No.: 2017 CA2046</td></tr>
<tr><td colspan="2">OPENING BRIEF

OF DENVER HEALTH AND HOSPITAL AUTHORITY</td></tr>
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g).

> It contains 9,490 words (principal brief not to exceed 9,500 words; reply brief not to exceed 5,700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(b).

> For each issue raised by Appellant, the brief provides under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

By: *s/ Brent T. Johnson*
Attorney for Appellant
Denver Health and Hospital Authority

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ISSUES PRESENTED FOR REVIEW

This appeal addresses whether an individual's claims against a public entity for tort remedies under the recently amended Colorado Anti-Discrimination Act ("CADA")[1] are barred by the Colorado Governmental Immunity Act ("CGIA")[2].

1. The Colorado Supreme Court ruled in 2000 that CADA claims against public entities were not barred by the CGIA, because of the limited equitable remedies that were available under CADA at that time. The Colorado General Assembly later amended CADA to provide a full panoply of tort remedies, effective January 1, 2015. *Did the trial court err in ruling that Mr. Houchin's claims against Denver Health and Hospital Authority ("Denver Health") for tort remedies under the amended CADA are not barred by the CGIA?*

2. The General Assembly by statute created Denver Health as a political subdivision of the State of Colorado, but it expressly provided in the statute that Denver Health is not an agency of the State. *Did the trial court err in ruling that Denver Health is an agency of the State of Colorado?*

3. The trial court dismissed a separate claim by Plaintiff, ruling that Plaintiff failed to give adequate written notice of claim as required by the CGIA for that claim. *In the event that this Court were to hold that Mr. Houchin's CADA claims are tort claims under the CGIA, but that Denver Health is an agency of the*

[1] C.R.S. §24-34-301 *et seq.*
[2] C.R.S. §24-10-101 *et seq.*

State of Colorado and therefore its immunity was waived, should Mr. Houchin's CADA claims be dismissed for failure to give adequate written notice of claim as required by the CGIA?

STATEMENT OF THE CASE

Denver Health is a public "safety net" health care organization that includes a 500-bed main hospital, the Rocky Mountain Regional Trauma Center, 911 medical response system for the City and County of Denver, Denver Public Health Department, numerous neighborhood and school-based clinics, the Rocky Mountain Poison and Drug Center, NurseLine, Denver Cares, and Correctional Care.

At the *Trinity* hearing[3] held in this case on October 27, 2017, Denver Health's General Counsel, Scott Hoye, testified to the history and operations of Denver Health. TR 61:12 – 62:8. Prior to January 1, 1997, Denver Health was part of the Denver city government. TR 62:12-19. Effective January 1, 1997, Denver Health became a political subdivision of the State of Colorado, created by statute, C.R.S. §25-29-101 *et seq.* TR 62:9 – 63:11. The statute that created Denver Health as a political subdivision expressly states that Denver Health "shall not be an agency of the state or local government." C.R.S. §25-29-103(1).

[3] An evidentiary hearing to enable the trial court to make a final determination on the defense of CGIA immunity, pursuant to *Trinity Broadcasting of Denver v. City of Westminster,* 848 P.2d 916, 025 (Colo. 1993).

Mr. Hoye's uncontroverted testimony was that Denver Health is not operated as a state agency. Existing employees as of January 1, 1997, could elect to remain employees of Denver or to become employees of Denver Health, and all employees hired after that date are Denver Health employees. None of Denver Health's employees are employees of the State, none fall within the state personnel system, and none are paid by the State. Denver Health has its own retirement plan, and none of its employees are participants in the State's retirement plan. TR 63:17 – 65:20.

The State of Colorado does not exercise control over Denver Health's operations, and Denver Health is not part of any State agency, whether judicial, legislative, or executive. TR 65:21 – 66:8. Denver Health's Board of Directors are appointed by Denver's Mayor and confirmed by the Denver City Council. TR 66:9-16. It is authorized to and has issued its own notes and bonds, which include a statement that the State of Colorado is not liable on such bonds. TR 66:17 – 67:5. No evidence whatsoever was presented at the hearing that Denver Health is an agency of the State of Colorado.

Mr. Houchin, Plaintiff in this case, is a former Human Resources manager of Denver Health who sues over his employment termination. His First Amended Complaint alleges that Denver Health advised him in August of 2015 and February of 2016 that using confidential patient records of Denver Health employees for HR

disciplinary purposes would violate HIPAA (the federal Health Insurance Portability and Accountability Act of 1996), CF, p. 280, ¶26, CF, p. 281, ¶29, that he later recommended suspension of an employee based on methadone test results obtained when the employee was treated as a patient, CF, p. 283, ¶39 –p. 285, ¶46, and that he was then terminated on September 7, 2016, for violating HIPAA, CF, p. 287, ¶¶ 56 - 57.

Mr. Houchin filed a Charge of Discrimination with the Colorado Civil Rights Division ("CCRD") on December 1, 2016 (amended on April 18, 2017), asserting sexual orientation discrimination and retaliation under CADA. CF, p. 274, ¶¶7-8. On June 5, 2017, Mr. Houchin requested that the CCRD issue a Notice of Right to Sue since his Charge had been pending for more than 180 days. Denver Health's Ex. B, EX, pp. 51-52. The CCRD issued that Notice on June 15, 2017, noting that such issuance "shall terminate all further processing of any charge by the Division; shall cause jurisdiction to cease; and shall constitute final agency action . . . ." *Id.*, at EX, p. 50.

Mr. Houchin then filed this lawsuit. His First Amended Complaint asserted six claims against Denver Health: sexual orientation discrimination under CADA; two claims of retaliation under CADA; wrongful discharge in violation of public policy; whistleblower retaliation under the State Employee Protection Act

("SEPA")[4]; and breach of implied contract or promissory estoppel. CF, p. 274-306. Mr. Houchin also asserts claims against an individual defendant, Tim Hansen, that are not involved in this appeal.

Denver Health moved to dismiss the first five of Mr. Houchin's claims under C.R.C.P. 12(b)(1) for lack of subject matter jurisdiction, asserting that those five claims are barred by governmental immunity under the CGIA. Denver Health also moved to dismiss four of Mr. Houchin's claims under C.R.C.P. 12(b)(5) for failure to state a claim upon which relief can be granted. The trial court held an evidentiary *Trinity* hearing on October 27, 2017, with respect to Denver Health's CGIA defense. TR, pp. 1-102. That is the only hearing which has been held in this case with respect to the motion to dismiss.

By Order dated November 7, 2017, CF, pp. 810-825, the trial court:

1. denied Denver Health's Rule 12(b)(1) motion as to Mr. Houchin's First, Second, and Third Claims, all asserted under CADA, ruling that such claims are not subject to or barred by the CGIA, CF, pp. 817-19;

2. granted Denver Health's Rule 12(b)(1) motion as to Mr. Houchin's Fourth Claim, asserting common law wrongful discharge in violation of public policy, ruling that this claim is barred by the CGIA, CF, p. 10;

[4] C.R.S. §24-50.5-101 *et seq.*

3. granted Denver Health's Rule 12(b)(1) motion as to Mr. Houchin's Fifth Claim, asserting whistleblower retaliation under the SEPA, ruling that Denver Health is a state agency subject to SEPA but that Mr. Houchin failed to provide adequate written notice of this claim to Denver Health as required by the CGIA, CF, pp. 820-23; and

4. denied Denver Health's Rule 12(b)(5) motion as to Plaintiff's Second Claim, asserting unlawful retaliation under CADA, and as to Plaintiff's Sixth Claim, asserting breach of implied contract and promissory estoppel, CF, pp. 823-25, ruling that both sufficiently stated claims upon which relief can be granted.

Pursuant to the CGIA's provision for an immediate appeal from any ruling with respect to a CGIA immunity defense, C.R.S. §24-10-108, Denver Health filed its Notice of Appeal on November 13, 2017. CF, pp. 826 - 833. Denver Health challenges the ruling that Mr. Houchin's three CADA claims are not barred by the CGIA and the ruling that Denver Health is a state agency. Although the trial court's ruling that Denver Health is a state agency was made in connection with its discussion of Mr. Houchin's SEPA claim, which was dismissed, the General Assembly expressly waived the *State's* CGIA immunity as to the newly available tort remedies under the amended CADA. Thus, Denver Health also appeals the ruling that it is a state agency, as that ruling would otherwise be an alternative

ground for affirming the trial court's refusal to dismiss Mr. Houchin's CADA claims.

The trial court's rulings with respect to Denver Health's Rule 12(b)(5) motion to dismiss certain claims for failure to state a claim are not appealable, so they are not addressed in this Opening Brief. Mr. Houchin did not file a cross-appeal with respect to the dismissal of his Fourth and Fifth Claims.

SUMMARY OF ARGUMENT

Mr. Houchin's CADA claims against Denver Health are tort claims that are barred by the CGIA. The Colorado Supreme Court's decision in *City of Colorado Springs v. Conners*, 993 P.2d 1167, 1171 (Colo. 2000), that claims under CADA as it then existed were not subject to the CGIA, is not binding with respect to Mr. Houchin's claims because of amendments to CADA in 2013 to add full tort remedies, which Mr. Houchin seeks. The Supreme Court's analysis in *Conners* demonstrates that it would have reached the contrary result if CADA had then allowed recovery of compensatory and punitive damages, as it now does under the 2013 amendments.

The Supreme Court's holding in *State Pers. Bd. v. Lloyd*, 752 P.2d 559, 563-64 (Colo. 1988), that a claim by a terminated employee for compensatory damages under SEPA constitutes a statutory tort claim that is subject to the CGIA, is fully applicable to Mr. Houchin's claims under the newly amended CADA. Federal

court decisions also recognize that claims for damages under numerous federal civil rights statutes are tort claims. In addition the Colorado General Assembly expressly acknowledged in the 2013 amendments that claims for the newly added tort remedies are subject to the CGIA. Denver Health is a public entity entitled to the CGIA's protections against tort liability.

The trial court erred in ruling that Denver Health is a state agency. Although the General Assembly expressly waived the *State's* CGIA immunity from CADA claims for the new tort remedies, that waiver does not apply to Denver Health. Under the statute creating Denver Health, under the CGIA, and under other Colorado statutes, there is a clear distinction between political subdivisions such as Denver Health and agencies of state government. Nor has Denver Health otherwise waived its CGIA immunity. Therefore Mr. Houchin's CADA claims against Denver Health must be dismissed.

Alternatively, if this Court were to rule that Denver Health is a state agency, notwithstanding all of the statutes and uncontroverted evidence to the contrary, then Mr. Houchin's CADA claims must still be dismissed, due to his failure to serve adequate written notice of claim as required by the CGIA. None of the emails which Mr. Houchin claims to have constituted notice came close to meeting the requirements of the CGIA.

ARGUMENT

I. Mr. Houchin's Claims Under The Newly Amended CADA Are Tort Claims That Are Barred By The CGIA.

A. Standard of Review and Preservation

Whether the CGIA deprives the trial court of jurisdiction to hear Mr. Houchin's CADA claims against Denver Health is a question of statutory construction that is a matter of law subject to *de novo* review, and this Court is not bound by the trial court's determination. *City of Colorado Springs v. Conners*, 993 P.2d 1167, 1171 (Colo. 2000). Denver Health preserved this issue in its Motion to Dismiss, CF, pp. 351 – 354, in its Reply in support of its Motion to Dismiss, CF, pp. 649 – 651, and in its argument at the *Trinity* hearing, TR, pp. 20:1 – 23:24. Ruling below: CF, pp. 817-819.

B. Argument

The Colorado Supreme Court ruled in 2000 that CADA claims were not tort claims barred by the CGIA. That ruling was expressly based upon the limited equitable remedies (back pay, reinstatement, and non-monetary orders) that were then available under CADA:

> We hold that claims for non-compensatory equitable relief based on violations of civil rights statutes such as the CRA are not claims for "injuries which lie in tort or could lie in tort" for the purposes of the CGIA. Accordingly, actions under the CRA that are equitable and non-compensatory in nature are not claims for which the CGIA provides public entities immunity from suit. Therefore, these claims do not have to comply with the notice provisions of the CGIA.

City of Colorado Springs v. Conners, 993 P.2d 1167, 1168-69 (Colo. 2000). But the Supreme Court recognized that the result would be different if tort-like remedies were available:

> **Conversely, a claimant who seeks compensatory relief for personal injuries suffered as a consequence of prohibited conduct, has brought a claim which lies or could lie in tort for the purposes of the CGIA.**

[emphasis added] *Id*. at 1176.

Thirteen years after *Conners*, the General Assembly enacted the Job Protection and Civil Rights Enforcement Act of 2013, House Bill 13-1136 (the "2013 Act," Addendum), which repealed and re-enacted in its entirety a key section of CADA, C.R.S. §24-34-405, to newly provide a full range of tort remedies to individual plaintiffs:

(i) future economic losses ("front pay"), C.R.S.§24-34-405(2)(a)(II);

(ii) compensatory damages for emotional pain and suffering and other nonpecuniary losses, C.R.S.§24-34-405(3)(c); and

(iii) punitive damages, C.R.S.§24-34-405(3)(b)(I).

The 2013 Act for the first time authorized trial by jury, a hallmark of legal as opposed to equitable claims, C.R.S.§24-34-405(4), and recovery of attorney fees. C.R.S.§24-34-405(5). These new tort remedies became effective with respect to

alleged discriminatory or unfair employment practices accruing on or after January 1, 2015. C.R.S. §24-34-405(3)(f).

As a result of full tort remedies available under CADA as amended by the 2013 Act, the Supreme Court's analysis in *Conners* compels the conclusion that an individual's claims for such tort remedies constitute claims that lie or could lie in tort. Thus, such claims against public entities are subject to the CGIA, and Mr. Houchin's CADA claims against Denver Health must be dismissed.

In *Conners,* the Supreme Court ruled, at 993 P.2d 1176:

> [T]he trial court must consider the nature of the relief sought to determine whether a particular action "lies in tort or could lie in tort" within the meaning of the CGIA. As our discussion of *Burke* and *Lloyd* demonstrates, a trial court should determine whether an action is one for "injury which lies in tort or could lie in tort" under the Act by assessing whether the plaintiff seeks compensation for personal harms.

The Court's reference to its prior decision in *State Pers. Bd. v. Lloyd,* 752 P.2d 559, 563-64 (Colo. 1988) is instructive. That case involved a whistleblower retaliation claim under SEPA, C.R.S. §24-50.5-101, *et seq*. The Court rejected Lloyd's argument that SEPA created a new, statutory cause of action and not a common law tort falling within the CGIA, at 752 P.2d 562-563:

> In enacting section 24-50.5-103, the General Assembly created a noncontractual, statutory action for retaliatory discharge that is tortious in nature. *Julesburg School Dist. No. RE-1 v. Ebke,* 193 Colo. 40, 562 P.2d 419 (1977); *Newt Olson Lumber Co. v. School Dist. No. 8,* 83 Colo. 272, 263 P. 723 (1928). Because section 24-50.5-103 is a statutory tort, the expressed intent of the General Assembly requires

> that actions under the statute be subject to the notice of claim provision of the Governmental Immunity Act. [footnote omitted]

Because Lloyd failed to comply with the CGIA's notice requirement, the Supreme Court ruled that his whistleblower claim under SEPA was properly dismissed.

In *Conners*, the Supreme Court distinguished *Lloyd* on the basis of the different remedies available to plaintiffs under SEPA and under CADA as it existed at that time. Because SEPA allows recovery of compensatory money damages for injuries suffered such as damage to reputation and pain and suffering, *Lloyd* found that claims under SEPA are subject to the CGIA:

> In *Lloyd*, we held that the plaintiff's claims were to be categorized based in part on the specific relief sought. *See Lloyd*, 752 P.2d at 565. The plaintiff in that case sought monetary damages for harm to his professional reputation and ability to earn a living, for pain and suffering, and for destruction of the value of his professional education. *See id.* We held that these specific types of claims were included within the definition of "injury" under the CGIA and therefore subject to the Act's notice provisions. *See id.*

993 P.2d 1176. That precise analysis now fully applies to CADA as amended by the 2013 Act. In amending CADA in 2013, the General Assembly essentially created a new, individual tort claim for the full range of tort remedies, including economic damages, compensatory damages, punitive damages, jury trial, and attorney fees.

Here, Mr. Houchin's First Amended Complaint seeks all of these tort remedies except for punitive damages. CF, p.306. Indeed, Mr. Houchin's original

Complaint in this action also sought punitive damages under CADA. CF, p. 34. It was only after Denver Health filed its motion to dismiss that original Complaint, asserting the CGIA defense, CF pp. 42, 47 – 49, that Mr. Houchin filed his First Amended Complaint, which deleted his request for punitive damages.

Just as the Colorado Supreme Court ruled in *Lloyd* that a whistleblower claim for damages under SEPA is a "noncontractual, statutory action for retaliatory discharge that is tortious in nature," after the 2013 Act's addition of tort remedies a CADA claim such as asserted by Mr. Houchin is a noncontractual, statutory action for discriminatory discharge that is tortious in nature. As such, his CADA claims are subject to the CGIA under the Supreme Court's analysis in *Conners*.

In *Conners*, the Supreme Court looked to the U.S. Supreme Court's interpretation of the nature of a discrimination claim under federal law:

> Assessing the statutory scheme for relief in discrimination suits under Title VII, the Supreme Court held that the "conception of injury and remedy" expressed in such cases is not directed at compensating individuals with money damages for personal, tort-like injuries. *See United States v. Burke*, 504 U.S. 229, 234-35, 239, 112 S.Ct. 1867, 119 L.Ed.2d 34 (1992). The Court held that the relief authorized under Title VII does not "recompense a ... plaintiff for any of the other traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, or other consequential damages."

Significantly, however, *Burke* involved the tax treatment of monies paid in settlement of a Title VII claim filed in 1984, long before the U.S. Congress amended Title VII to allow for the recovery of compensatory and punitive

damages and provide for trial by jury in the Civil Rights Act of 1991 – Pub. L. 102-166; 42 U.S.C. §1981a. Thus, *Burke* is not determinative of whether a discrimination claim seeking a full range of tort remedies constitutes a claim that lies in tort under Title VII as amended by the Civil Rights Act of 1991, or under CADA as amended by the 2013 Act.

After *Burke,* the U.S. Supreme Court has not reconsidered the tort/non-tort nature of a Title VII claim under the Civil Rights Act of 1991. A U.S. District Court has ruled, however, that the expanded remedies under Title VII provided by the Civil Rights Act of 1991 constitute tort damages as recognized and defined in the common law of torts. *U.S. v. City of New York,* F. Supp. 2d 30, 36-37 (E.D. N.Y. 2012). The Court cited to legislative history that the new remedies constitute "a 'tort-style approach' to employment law." *Id.* At 37.

The U.S. Supreme Court has ruled that discrimination claims under the federal fair housing provisions of the Civil Rights Act of 1968, 42 U. S. C. §3612, sound in tort, because the statute authorizes actual and punitive damages. The Court expressly contrasted this with the exclusively equitable remedies then available under Title VII (before the passage of the Civil Rights Act of 1991):

> Whatever may be the merit of the "equitable" characterization in Title VII cases, there is surely no basis for characterizing the award of compensatory and punitive damages here as equitable relief.

Curtis v. Loether, 415 U.S. 189, at 197, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974).

In *Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (U.S. 1985), the U.S. Supreme Court addressed a claim for money damages for deprivation of civil rights under 42 U.S.C. §1983. Under that statute, compensatory and punitive damages were recoverable even before the passage of the Civil Rights Act of 1991. The Supreme Court held, for purposes of applying the proper state statute of limitations to a §1983 claim, that the claim should be considered a tort claim for personal injuries:

> After exhaustively reviewing the different ways that §1983 claims have been characterized in every Federal Circuit, the Court of Appeals concluded that the tort action for the recovery of damages for personal injuries is the best alternative available. 731 F.2d, at 650-651. We agree that this choice is supported by the nature of the §1983 remedy . . . .

471 U.S. at 276.

Similarly, the Tenth Circuit has ruled that a claim of racially discriminatory discharge under 42 U.S.C. §1981 sounds in tort. Like a §1983 claim, that federal statute allowed recovery of compensatory and punitive damages even prior to the enactment of the Civil Rights Act of 1991. *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1255 (10th Cir. 1988).

Even in *Burke*, upon which the Colorado Supreme Court heavily relied in *Conners*, the U.S. Supreme Court distinguished those other federal antidiscrimination statutes from Title VII based precisely on the exclusively equitable remedies then available under Title VII:

> **Indeed, the circumscribed remedies available under Title VII stand in marked contrast not only to those available under traditional tort law, but under other federal antidiscrimination statutes, as well.** [footnote omitted] For example, Rev. Stat. §1977, 42 U. S. C. §1981, permits victims of race-based employment discrimination to obtain a jury trial at which "both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages" may be awarded. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 460, 44 L. Ed. 2d 295, 95 S. Ct. 1716 (1975). The Court similarly has observed that Title VIII of the Civil Rights Act of 1968, whose fair housing provisions allow for jury trials and for awards of compensatory and punitive damages, "sounds basically in tort" and "contrasts sharply" with the relief available under Title VII. *Curtis* v. *Loether*, 415 U.S. at 195, 197; 42 U. S. C. §3613(c). [footnote omitted]
>
> Notwithstanding a common-law tradition of broad tort damages and the existence of other federal antidiscrimination statutes offering similarly broad remedies, **Congress declined to recompense Title VII plaintiffs for anything beyond the wages properly due them -- wages that, if paid in the ordinary course, would have been fully taxable.** [citation omitted] **Thus, we cannot say that a statute such as Title VII,** [footnote omitted] **whose sole remedial focus is the award of back wages, redresses a tort-like personal injury within the meaning of §104(a)(2) and the applicable regulations.** [footnote omitted]

[emphasis added] 504 U.S. at 240.

Thus, there can be no doubt that the U.S. Supreme Court would have found the Title VII claim in *Burke* to be a tort claim if the tort remedies later provided in the Civil Rights Act of 1991 had applied in *Burke*. The Colorado Supreme Court's reliance on *Burke*, and its own reasoning with respect to the limited equitable remedies then available under CADA, demonstrate that the holding in *Conners* no longer applies in the face of the tort remedies now available under

CADA.[5] This Court should now follow the analytical approach of the U.S. Supreme Court and the Colorado Supreme Court and rule that an individual's claim for tort remedies under CADA is a tort claim, and thus it is subject to the CGIA.

The conclusion that Mr. Houchin's CADA claims are tort claims subject to the CGIA is further reinforced by two provisions in the 2013 Act explicitly recognizing that individual damage claims under CADA as amended are subject to the CGIA. First, in C.R.S. §24-34-405(3)(b)(I), the General Assembly newly provided for recovery of punitive damages from defendants "except as limited by the 'Colorado Governmental Immunity Act.'" That language would be totally unnecessary if the General Assembly did not recognize and intend that the CGIA would apply to the new CADA tort claims. Indeed, if such a CADA claim were not a tort claim, the CGIA would not even apply to it, and the General Assembly's stated intent that punitive damages be limited by the CGIA would be wholly ineffective.

Second, the General Assembly expressly provided for a waiver of CGIA immunity as to claims for compensatory damages, but only *by the State*:

> A claim filed pursuant to this subsection (8) by an aggrieved party *against the state* for compensatory damages for an intentional unfair

[5] *See, Friedland v. Travelers Indem. Co.*, 105 P.3d 639, 644 (Colo. 2005) ("[C]ourts must take into account statutory or case law changes that undermine or contradict the viability of prior precedent.")

> or discriminatory employment practice is not subject to the "Colorado Governmental Immunity Act", article 10 of this title.

[emphasis added] C.R.S.§24-34-405(8)(g). The only reason for the State to expressly waive its own immunity from CADA claims[6] is that the General Assembly knew that CGIA immunity would otherwise apply to those claims.

In rejecting Denver Health's argument that Mr. Houchin's CADA claims are subject to the CGIA, the trial court relied upon the public interest in eliminating workplace discrimination, CF, p. 818, as discussed in *Conners*, 993 P.2d at 1174. But those statements by the Supreme Court were intertwined with its discussion of the limited equitable remedies then available under CADA. It was precisely because of the absence of compensatory and punitive tort damages that the Court found CADA's purpose to be the elimination of discrimination rather than providing relief to individuals. If a claim is properly analyzed as a tort claim because of the availability of full tort money damages to individuals, nothing in *Conners* suggests a public policy supporting such a claim can override the CGIA.

If that were the case, the Supreme Court would have reached a different conclusion in *Lloyd, supra.* That case involved SEPA, which itself embodies a strong public policy to encourage state workers to report instances of waste and mismanagement of public funds, and "to ensure that any employee making such

[6] As discussed in Section II below, Denver Health is not a state agency or part of the State, so the State's waiver of immunity does not apply to it.

disclosures shall not be subject to disciplinary measures or harassment by any public official." C.R.S. §24-50.5-101(1). That public policy in favor of providing a remedy to state employee whistleblowers did not deter the Colorado Supreme Court from ruling in *Lloyd* that such a whistleblower claim *is* a tort claim subject to the CGIA.

Similarly, Mr. Houchin *conceded* below that his claim for wrongful discharge in violation of public policy is barred by the CGIA. TR, p. 4:14-20. That wrongful discharge claim by definition requires that there be a strong public policy of the State of Colorado that was violated by the employee's termination.[7] Nevertheless, the mere fact that a plaintiff's claim may reflect a strong public policy of the State is insufficient to override the applicability of the CGIA to that claim.[8]

Further, if this Court agrees, as Denver Health submits it must, that Mr. Houchin's CADA claims are subject to the CGIA, the public interest in eliminating employment discrimination may yet remain enforceable against public entities *by the Colorado Civil Rights Commission* ("CCRC"), because CADA provides dual

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[7] *See, e.g., Crawford Rehabilitation Servs. v. Weissman*, 938 P.2d 540, 552-53 (Colo. 1997), requiring a "fundamental, substantial public policy" to support this claim.

[8] In its Motion to Dismiss this claim under CADA, Denver Health cited *Holland v. Bd. Of Cty. Commissioners of Cty. Of Douglas*, 883 P.2d 500, 508 (Colo. App. 1994) and *Jeffers v. Denver Pub. Sch.*, 2017 U.S. Dist LEXIS 72873, at *18 (D. Colo., Civil Action No. 16-cv-02243, May 11, 2017). CF, p. 350.

enforcement mechanisms. The CCRC has independent equitable enforcement power without any of the new tort remedies created by the 2013 Act. Under CADA, even prior to the 2013 Act, the CCRC may itself file a charge of discrimination if the alleged discrimination imposes a significant societal impact, but the remedies are limited to equitable relief. C.R.S. §24-34-306(1)(b). The CCRC may hold an evidentiary hearing, make findings and conclusions, and grant equitable relief, not including the new tort remedies. C.R.S. §24-34-306(4)-(10); C.R.S. §24-34-405(2).

The 2013 Act expressly provided that the new tort remedies of compensatory and punitive damages could *only* be sought by an individual plaintiff in a civil action filed in court. C.R.S. §24-34-405(8)(b). An individual plaintiff's claim for the new tort damages is outside of the authority of the CCRC.

Thus, to the extent that the State may have had any public interest in determining whether Mr. Houchin was subjected to employment discrimination, it was foreclosed from pursuing that interest not by the CGIA nor by Denver Health, but by Mr. Houchin. Mr. Houchin chose to terminate all further involvement of the CCRC in order to pursue purely personal claims under CADA for tort-like remedies, in a civil action with a jury trial.[9] The issue before this Court is limited

[9] A trial by jury is generally allowed only as to legal claims, not equitable issues. *See, Colo. Coffee Bean, LLC v. Peaberry Coffee, Inc.*, 251 P.3d 9, 27 (Colo. App. 2010). The 2013 Act's provision for a jury trial for an individual's claim for

to whether Mr. Houchin now asserts *individual tort claims* against Denver Health under CADA that are subject to the CGIA. He does.[10]

Further, the CGIA itself fulfills important public policies. As stated by the Supreme Court in *Conners*:

> A central legislative purpose of the CGIA is to limit the potential liability of public entities for compensatory money damages in tort. *See* §24-10-102. [footnote omitted] Such liability poses a problem for public entities sued in tort because "unlimited liability could disrupt or make prohibitively expensive the provision of ... essential public services and functions." *Id.* This form of liability places a burden upon taxpayers, who ultimately face the "fiscal burdens of unlimited liability" incurred by the state in tort suits. *See id.*

993 P.2d at 1172. The natural and intended effect of the CGIA is to provide immunity to public entities against tort claims asserted by plaintiffs for injuries, even though that results in those plaintiffs having no remedy for claims that could otherwise have been brought in the absence of the CGIA. Because Mr. Houchin now asserts tort claims that are subject to the CGIA, this Court should not deviate

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compensatory and punitive damages further reinforces the conclusion that the result in *Conners* does not apply to Mr. Houchin's CADA claims.

[10] This Court need not address whether the alternative mechanism for enforcement, by the CCRC for equitable remedies only, continues to fall within the Supreme Court's holding in *Conners*, *i.e.*, such a claim *by the CCRC against a public entity for equitable remedies only* may not be a tort claim that is subject to the CGIA. That issue is not presented in this case, because Mr. Houchin *requested* that the CCRD cease its investigation so that he could pursue his private court action, and the CCRD did so, issuing a right to sue notice that stated that *the jurisdiction of the CCRD had ceased* based on Mr. Houchin's request.

from the clear mandate of the CGIA but should apply it, as the Supreme Court did in *Lloyd, supra.*

There is no question in this case that Denver Health is entitled to the CGIA's protections. The CGIA provides sovereign immunity to *all public entities*, under C.R.S. §24-10-106, which provides in pertinent part, "A public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort . . ." The CGIA defines "public entity" in pertinent part as follows:

> (5) "Public entity" means the state, the judicial department of the state, any county, city and county, municipality, school district, special improvement district, and every other kind of district, agency, instrumentality, **or political subdivision thereof** organized pursuant to law . . . . [emphasis added]

C.R.S. §24-10-103(5).

Denver Health is a "public entity" under that definition. It was created by statute as a "political subdivision" of the State of Colorado. C.R.S. §25-29-103(1) ("There is hereby created the Denver health and hospital authority, which shall be a body corporate and **a political subdivision of the state**, which shall not be an agency of the state . . . .") [emphasis added] It is thus entitled to immunity under the CGIA.

For all of the foregoing reasons, this Court should reverse the decision of the trial court and rule that Mr. Houchin's CADA claims against Denver Health are tort claims subject to the CGIA, which are barred: (1) since Denver Health has not

waived its immunity; OR (2) since Mr. Houchin failed to give adequate notice of his claims as required by the CGIA, as discussed below.

II. Denver Health Is A Political Subdivision Of The State Of Colorado, Not A State Agency.

A. Standard of Review and Preservation

The statute that created Denver Health provides that it is a political subdivision of the State of Colorado, but not an agency of the State. The CGIA and other state statutes distinguish political subdivisions from state agencies. Interpretation of a statute is a question of law, and an appellate court is not bound by the trial court's interpretation. *Gorman v. Tucker ex rel. Edwards,* 961 P.2d 1126, 1128 (Colo.1998). Denver Health preserved this issue in its Motion to Dismiss, CF, pp. 349, 351, 353-354, in its Reply in support of its Motion to Dismiss, CF, pp. 646-650, and in its argument at the *Trinity* hearing, TR, pp. 15:20- 16:3, 19:13-23, 23:8 -25:10, 96:3 – 97:6. Ruling below: CF, pp. 820-821.

B. Argument

In connection with Mr. Houchin's SEPA claim, the trial court ruled that Denver Health is an agency of the State of Colorado. CF, pp. 820-821. As discussed above, *the State* has waived its immunity from CADA tort claims newly created by the 2013 Act. Thus, the trial court's ruling on this point, if correct,

would be an alternative grounds for affirming the non-dismissal of Mr. Houchin's CADA claims, and Denver Health therefore appeals that ruling.[11]

The trial court erred in ruling that Denver Health is a state agency. The statute creating Denver Health, the CGIA, and other state statutes all make clear, as a matter of law, that Denver Health is only a political subdivision of the State, and it is *not* a state agency.

Denver Health was created by the General Assembly in C.R.S. §25-29-103(1), which expressly provides that it is *not* an agency of the State:

> (1) **There is hereby created the Denver health and hospital authority, which shall be a body corporate and a political subdivision of the state, which shall not be an agency of the state** or local government, and which shall not be subject to administrative direction or control by any department, commission, board, bureau, or agency of state or local government. [emphasis added]

The CGIA also distinguishes between political subdivisions and the State or state agencies, at C.R.S. §24-10-103(7):

> (7) "State" means the government of the state; every executive department, board, commission, committee, bureau, and office; and every state institution of higher education, whether established by the state constitution or by law, and every governing board thereof. **"State" does not include** the judicial department, a county, municipality, city and county, school district, special district, or **any other kind of district, instrumentality, political subdivision, or public corporation organized pursuant to law.** [emphasis added]

[11] Denver Health also submits that this ruling is erroneous as a matter of law with respect to Mr. Houchin's SEPA claim and should be reversed to avoid any future confusion over whether Denver Health is subject to SEPA.

A separate Colorado statute, C.R.S. §24-77-101 *et seq.*, relates to state fiscal policies. That statute also expressly distinguishes between state agencies and Denver Health as a special purpose authority, in C.R.S. §24-77-102 (15-16):

> (15)(a) "**Special purpose authority**" **means any entity** that is created pursuant to state law to serve a valid public purpose, which is either a political subdivision of the state or an instrumentality of the state, **which is not an agency of the state, and which is not subject to administrative direction by any department, commission, bureau, or agency of the state.**
>
> (b) "**Special purpose authority" includes, but is not limited to**:
>
> * * *
>
> **(x) The Denver health and hospital authority** created pursuant to section 25-29-103 (1), C.R.S.;
>
> * * *
>
> (16)(a) **"State" means the central civil government of the state of Colorado, which shall consist of the following:**
>
> **(I) The legislative, executive, and judicial branches of government established by article III of the state constitution;**
>
> *** * ***
>
> (b) **"State" does not include:**
>
> *** * ***
>
> **(II) Any special purpose authority;**

[emphasis added]

In statute after statute, the General Assembly has made absolutely clear that Denver Health is not an agency of the State. The trial court's Order ignores these statutes, all of which were cited and discussed below by Denver Health. CF, pp.

646 – 648. Instead of interpreting and giving effect to the clear meaning of these statutes, the trial court engaged in an erroneous results-driven approach. The trial court stated:

> If the Court were to find that the definition of "state agency" did not encompass DHHA, then DHHA would be exempt from all whistleblower retaliation claims. This would set Defendant apart from all other public and private employers in the State of Colorado – an illogical and absurd result that could not have been intended by the legislature when it enacted the CGIA and SEPA. Therefore, the Court finds that the definition of "state agency" is broad enough to encompass Defendant, meaning that Plaintiff has a cause of action under SEPA.

CF, p. 821. The decision of whether Denver Health is a state agency and is therefore subject to SEPA cannot be driven by a judge's conclusion that it *should be* subject to SEPA, and therefore it *must be* a state agency. That is a backwards analysis based on a policy preference, not on the clear meaning of the statutes.

Even in this analysis, the trial court erred. SEPA applies *only* to employees of the State:

> (3) "Employee" means any person employed by a state agency.
> (4) "State agency" means any board, commission, department, division, section, or other agency of the executive, legislative, or judicial branch of state government.

C.R.S. §24-50.5-102(3)-(4). Thus, SEPA does not apply to *any* private employers, nor does it apply to cities, counties, water districts, or any other public entities that are not part of the State. The General Assembly's deliberate decision to have the State Employee Protection Act provide protection *only* to employees of the State

does not in the least give Denver Health unique and preferential treatment "apart from all other public and private employers in the State of Colorado," as the trial court erroneously asserted in its Order.

Beyond the express statement in the statute creating Denver Health that it "shall not be an agency of the state or local government," C.R.S. §25-29-103(1), the General Assembly made this separation clear in the following sections of Title 25, Article 29:

§102(5) acknowledges that the Denver health system was operated by the City of Denver prior to creation of Denver Health as an authority;

§101(2) provides that all new employees of the Denver health system will be employees of Denver Health as an authority;

§107(1) provides that existing employees of the Denver health system were entitled to elect to remain employees of the City of Denver or become employees of Denver Health as an authority;

§107(5) provides that Denver Health as an authority shall establish its own personnel program for authority employees;

§108 provides for Denver Health as an authority to establish its own retirement plan;

§103(2) provides for Denver Health as an authority to be governed by a board of directors to be appointed by the mayor of the City of Denver;

§113 authorizes Denver Health as an authority to issue its own notes and bonds; and

§118 provides that the state of Colorado will not be liable on any bonds issued by Denver Health as an authority.

Although all of these statutory provisions establish *as a matter of law* that Denver Health is separate and distinct from the state government and is not an agency of the State, the uncontroverted evidence at the *Trinity* hearing also established that Denver Health in fact operates as prescribed in these statutes. *See,* pp. 2-3, *supra.*

Because Denver Health is not a state agency or a part of state government, it is not subject to the *State's* waiver of immunity with respect to tort claims *against the State* for compensatory damages under CADA:

> A claim filed pursuant to this subsection (8) by an aggrieved party *against the state* for compensatory damages for an intentional unfair or discriminatory employment practice is not subject to the "Colorado Governmental Immunity Act", article 10 of this title.

[emphasis added] C.R.S.§24-34-405(8)(g). The General Assembly clearly could have said that such a claim against "any public entity" would not be subject to the CGIA, but instead it chose to limit this waiver of immunity to *the State* alone.

There is a good reason why that waiver is limited to the State. The General Assembly recognized that such claims could have a substantial financial impact

upon public entities if they are not protected by CGIA immunity.[12] Section 2 of the 2013 Act amended C.R.S. §24-30-1510(3)(A), relating to the State's risk management fund, to now provide that expenditures may be made out of that fund to pay for "claims for compensatory damages against the state, its officials, or its employees pursuant to Section 24-34-405."

The General Assembly thus made financial provision for the State's exposure to the new tort remedy for compensatory damages, but it undoubtedly recognized the potential financial impact of such exposure on all of the other diverse public entities in this state, some of whom might not be financially able to bear such liability. It therefore confined the waiver of CGIA immunity from the new CADA claims to the State alone, and not all of the other non-state public entities such as cities, counties, and political subdivisions like Denver Health.

Nor has Denver Health itself waived its sovereign immunity from SEPA whistleblower claims or any other claims. Under the CGIA, C.R.S. §24-10-104, public entities other than the State may make their own decisions about whether to waive CGIA immunity:

> 24-10-104. Waiver of sovereign immunity
> Notwithstanding any provision of law to the contrary, **the governing body of a public entity, by resolution, may waive the immunity**

[12] Under the applicable sliding scale, 42 U.S.C. §1981a (b)(3), that the 2013 Act incorporated by reference in C.R.S.§24-34-405(3)(d), a public entity with more than 500 employees, such as Denver Health, could face exposure for compensatory damages up to $300,000.

> **granted in section 24-10-106 for the types of injuries described in the resolution.** Any such waiver may be withdrawn by the governing body by resolution. A resolution adopted pursuant to this section shall apply only to injuries occurring subsequent to the adoption of such resolution.

As noted above, the governing body of Denver Health is its Board of Directors. C.R.S. §25-29-103(2). The uncontroverted evidence at the *Trinity* hearing in this case was that Denver Health's Board of Directors has *never* waived any immunity to which it is entitled under the CGIA. TR, p. 73:23 – 75:11. The trial court expressly found Mr. Hoye's testimony on the subject of non-waiver of immunity to be credible. CF, p. 819.

As discussed above in Section I, Mr. Houchin's CADA claims against Denver Health are tort claims subject to the CGIA. The trial court erred in ruling that Denver Health is a state agency. Because Denver Health is not a state agency, the State's waiver of its own immunity with respect to individual CADA claims such as Mr. Houchin's does not apply to Denver Health, and Denver Health never independently waived its CGIA immunity with respect to such claims. Mr. Houchin's CADA claims should therefore be dismissed. If this Court agrees with Denver Health on these two issues, it is not necessary for this Court to consider the third issue presented in this case and argued in Section III, below.

III. Mr. Houchin's CADA Claims Are Barred By His Failure To File Adequate Written Notice Of Claim As Required By The CGIA.

A. Standard of Review and Preservation

Whether a claimant has satisfied the CGIA timely notice requirement is a mixed question of law and fact. When the jurisdictional issue involves a factual dispute, a reviewing court employs the clearly erroneous standard of review in considering the trial court's findings of jurisdictional fact. However, if the alleged facts are undisputed and the issue is purely one of law, the appellate court reviews the jurisdictional matter *de novo*. *Springer v. City & County of Denver*, 13 P.3d 794, 799 (Colo. 2000). Denver Health preserved this issue in its Motion to Dismiss, CF, pp. 354-358, in its Reply in support of its Motion to Dismiss, CF, pp. 651-654, and in its argument at the *Trinity* hearing, TR, pp. 25:11 – 27:10, 97:11 – 99:24. Ruling below: CF, pp. 821-823.

B. Argument

When a plaintiff asserts a tort claim that is subject to the CGIA and as to which governmental immunity has been waived, the plaintiff must still serve a timely and adequate written notice of claim as required by the CGIA, or that claim must be dismissed. *Lloyd*, *supra*, 752 P.2d at 563, 565.[13] Thus, if this Court were to agree with Denver Health's argument that Mr. Houchin's CADA claims are tort

[13] *Lloyd* involved a claim under SEPA, and the State waived its immunity from SEPA claims. *Ferrel v. Colo. Dep't of Corr.*, 179 P.3d 178, 183 (Colo. App. 2007).

claims subject to the CGIA, but this Court were to *reject* Denver Health's argument that it is not a state agency, that would mean that the State's waiver of its immunity from such CADA claims also applies to Denver Health. In that case, Mr. Houchin's CADA claims must still be dismissed, because he failed to fulfill the CGIA's requirement of providing written notice of his claims as required by the CGIA, C.R.S. §24-10-109.

Denver Health moved to dismiss Mr. Houchin's first five claims based in part on his failure to give adequate notice as required by the CGIA. The trial court set and held a *Trinity* hearing to receive evidence on the CGIA jurisdictional issues. At that hearing, Mr. Houchin offered three exhibits (the "Emails") that were admitted into evidence:

- Plaintiff's Hearing Exhibit 1, EX, pp. 7-10, an email from Mr. Houchin's counsel to Karen McTavish[14] dated September 28, 2016, admitted at TR, p. 54:2;
- Plaintiff's Hearing Exhibit 2, EX, p. 11, an email from Mr. Houchin's counsel to Karen McTavish dated September 20, 2016, admitted at TR, p. 34:6-11; and
- Plaintiff's Hearing Exhibit 6, EX, pp. 31-32, an email from Mr. Houchin's counsel to Karen McTavish dated November 21, 2016, admitted at TR, p. 45:1-5.

[14] Ms. McTavish is a Senior Assistant General Counsel at Denver Health. TR, p. 30:14-15.

No other documents were offered by Mr. Houchin and admitted at the hearing as purported written notice of his claims pursuant to the CGIA.[15]

The trial court ruled with respect to Mr. Houchin's SEPA claim that the Emails failed to constitute adequate written notice of claim as required by the CGIA, CF, pp. 821- 823. Because the trial court erroneously ruled that the CADA claims are not subject to the CGIA, the trial court's Order did not expressly address the adequacy of these emails as CGIA notice with respect to the CADA claims, but its ruling on the inadequacy of notice applies equally to Mr. Houchin's CADA claims.

The CGIA requires that written notice of claim be filed within 182 days after the date of discovery of the injury, and it provides:

(2) The notice shall contain the following:

- (a) The name and address of the claimant and the name and address of his attorney, if any;
- (b) A concise statement of the factual basis of the claim, including the date, time, place, and circumstances of the act, omission, or event complained of;
- (c) The name and address of any public employee involved, if known;
- (d) A concise statement of the nature and the extent of the injury claimed to have been suffered;
- (e) A statement of the amount of monetary damages that is being requested.

[15] Mr. Houchin's counsel brought twelve marked potential exhibits to the hearing, all of which are contained in the record on appeal, EX, pp. 1-53, but only Exhibits 1, 2, and 6 were offered and admitted into evidence.

C.R.S. §24-10-109. The written notice must be filed with the proper representative, and there must be a good faith effort to include each item of information listed in Section 109(2), including a concise statement of the factual basis for the claim. *Conde v. State Dept.*, 872 P.2d 1381, 1386 (Colo. App. 1994). After considering the Emails and the testimony presented at the *Trinity* hearing, the trial court found that the Emails were "insufficient to demonstrate a good faith effort to identify each item required by the CGIA." CF, p. 822-823.

None of the Emails state that they are intended to constitute a notice of claim pursuant to the CGIA. None of them state the name and address of Mr. Houchin and his attorney. The trial court noted that some of them "allude to possible claims," CF, p. 822, but a review of the emails shows that they fail to provide a concise statement of the factual basis of the claims as required by the CGIA. Although a possible discrimination claim under CADA is mentioned, there is no mention whatsoever of a retaliation claim under CADA. Further, this Court has held that it is not enough to simply mention that a whistleblower claim is asserted, if the factual basis for that claim is not provided. *Conde v. State Dept.*, 872 P.2d 1381, 1385 (Colo. App. 1994). Indeed, the specificity required is demonstrated by *Hamon Contrs., Inc., v. Carter & Burgess, Inc.*, 229 P.3d 282 (Colo. App. 2009). There the Court affirmed dismissal of pre-contractual negligence and negligent misrepresentation claims because neither of the two purported CGIA notice letters

specifically referred to "'the circumstances of the act [or] omission' about which the allegations in Hamon's first amended complaint relate, namely, the inadequate drainage design." *Id.* at 298. Here, nothing in the Emails comes close to the required specificity. Merely mentioning a cause of action is not enough.

Although a few employees of Denver Health are mentioned in the Emails, there is no concise statement of their alleged roles in any alleged discrimination or retaliation, and no addresses are provided for any of them. There is no concise statement of injury nor any demand for payment of damages. One of the Emails (Ex. 1, p. 3, EX, p. 7) states that Mr. Houchin lost a deal to refinance his home "worth $460,000," which he will seek as damages, with no explanation of how that number was derived or how a refinancing could possibly be worth that much,[16] nor any amount stated for any other damages. Mr. Houchin's counsel then conveys a *settlement offer* of $470,000, but no demand for payment of damages.

The trial court correctly found that "Asking a public entity such as DHHA to interpret emails sent as settlement negotiations as formal notice under the CGIA is not only inconsistent with the requirements of the statute, it would also adversely affect DHHA's ability to defend the claim." CF, p.823. That finding is supported by uncontroverted testimony at the *Trinity* hearing, thus it is not clearly erroneous,

[16] Perhaps Mr. Houchin was seeking to refinance a $460,000 mortgage to a lower interest rate, but damages then would at most be the lost reduction in total interest payments, not the principal amount of the loan.

and it is binding on appeal. Mr. Hoye, Denver Health's General Counsel, testified that he is the formally designated representative of Denver Health for purposes of receiving CGIA notices of claim, but Mr. Houchin and his attorney never sent him any document addressing Mr. Houchin's termination, much less purporting to be a CGIA notice of claim. TR, pp. 68:8 – 69:13; Denver Health Exhibit D, EX, p. 69, admitted at TR, p. 76:1.

When Mr. Hoye receives from any party a CGIA notice of claim, he directs it to Denver Health's Risk Management Department and asks them or someone in the legal department to investigate the matter. Although *some* of the Emails from Mr. Houchin's attorney were forwarded to him, he never considered them to be notice of a claim under the CGIA, because they did not meet the requirements of the CGIA. He testified that this prejudiced Denver Health, because an adequate notice of claim triggers the internal investigation process and helps Denver Health try to resolve the matter prior to trial. "When you don't receive notice of claim, your ability to go through that process is – it doesn't happen because you didn't get notice." TR, pp. 69:14 – 71:14.

The context of the Emails to Ms. McTavish is important. Ms. McTavish testified that her first day of employment as Senior Assistant General Counsel at Denver Health was September 19, 2016. TR, p. 11-15. On or about that day, she was instructed to communicate with Mr. Houchin to try to negotiate a standard

severance agreement for a departed employee. TR, pp. 55:20-56:20. At that time, she did not know anything about Mr. Houchin or the case. TR, p. 39:2-12. She then communicated with Mr. Houchin's attorney for about a week to see whether such a severance agreement could be reached. TR, p. 56:15-24.

Prior to starting at Denver Health, Ms. McTavish had never worked as an attorney for a public entity, and she had no prior experience with the CGIA. TR, p. 55:3-16. Her duties at Denver Health have never included receiving or evaluating written notices of claim under the CGIA, and she never considered any of the Emails to constitute notice of claim under the CGIA. TR, p. 57:2-12. Thus, from Denver Health's perspective, the Emails from Mr. Houchin's attorney were simply for the purpose of negotiating a standard severance/settlement agreement. The September 28, 2016 email (Exhibit 1, EX, pp. 7-10) states in bold type near the top, "***Protected FRE/CRE 408."*** The trial court properly found that these Emails, sent as part of settlement negotiations, did not constitute adequate notice of claim under the CGIA. CF, pp. 822-833.

Further, C.R.S. §24-10-109(3)(b) states that notice may be given to the public entity's agent listed pursuant to C.R.S.§24-32-116, which for Denver Health was Scott Hoye, its General Counsel. Denver Health Exhibit D, EX, p. 69, admitted at TR, p. 76:1. Under C.R.S. §24-10-109(3)(a), notice may also be served upon "**the** attorney representing the public entity" [emphasis added], not

upon "**an** attorney representing the public entity." **The** attorney representing Denver Health is Scott Hoye, its General Counsel and its officially designated agent for receipt of CGIA notices of claim. Emails sent to Ms. McTavish were not sent to the proper person as required by the CGIA.

The trial court's findings were not clearly erroneous, and the trial court's ultimate conclusion that Mr. Houchin failed to provide adequate written notice of claim under the CGIA is correct as a matter of law. All tort claims that Mr. Houchin asserts that are subject to the CGIA should be dismissed, including his CADA claims.

CONCLUSION

This Court should reverse the ruling below and hold that Mr. Houchin's individual claims under CADA as amended by the 2013 Act are tort claims subject to the CGIA. This Court should also reverse the ruling below and hold that Denver Health is not a state agency, and the State's waiver of its own immunity from CADA claims does not apply to Denver Health. Since Denver Health has not waived its CGIA immunity, this case should be remanded to the trial court with directions to dismiss Mr. Houchin's CADA claims against Denver Health. Alternatively, even if this Court were to rule that Denver Health is a state agency, the Court should apply the ruling below that Mr. Houchin failed to give adequate written notice of his claims as required by the CGIA, and on that basis this case

should be remanded to the trial court with directions to dismiss Mr. Houchin's three CADA claims against Denver Health.

Respectfully submitted this 20th day of March, 2018.

FAIRFIELD AND WOODS, P.C.

By: *s/ Brent T. Johnson*
Brent T. Johnson

ATTORNEYS FOR APPELLANT
DENVER HEALTH AND
HOSPITAL AUTHORITY

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was e-filed through the Colorado Court's E-filing system this 20th day of March, 2018, and thereby e-served upon the following:

Merrily S. Archer
EEO Legal Solutions, LLC
600 17th Street, Suite 2800-South
Denver, CO 80202
archerm@eeolegalsolutions.com

By: *s/ Sharon A. Chiecuto*
Sharon A. Chiecuto

NOTE: The governor signed this measure on 5/6/2013.

HOUSE BILL 13-1136

BY REPRESENTATIVE(S) Levy and Salazar, Buckner, Court, Duran, Exum, Fields, Fischer, Garcia, Ginal, Hullinghorst, Kagan, Labuda, Lebsock, McCann, Melton, Mitsch Bush, Moreno, Peniston, Pettersen, Primavera, Ryden, Schafer, Singer, Tyler, Vigil, Williams, Ferrandino, Foote, Pabon, Rosenthal, Hamner;
also SENATOR(S) Carroll and Guzman, Aguilar, Giron, Hodge, Hudak, Jones, Kefalas, Morse, Newell, Nicholson, Steadman, Tochtrop, Todd, Ulibarri, Heath, Johnston, Schwartz.

CONCERNING THE CREATION OF REMEDIES IN EMPLOYMENT DISCRIMINATION CASES BROUGHT UNDER STATE LAW.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, **repeal and reenact, with amendments,** 24-34-405 as follows:

24-34-405. Relief authorized - short title. (1) THIS SECTION SHALL BE KNOWN AND MAY BE CITED AS THE "JOB PROTECTION AND CIVIL RIGHTS ENFORCEMENT ACT OF 2013".

(2) (a) IN ADDITION TO THE RELIEF AUTHORIZED BY SECTION 24-34-306 (9), THE COMMISSION OR THE COURT MAY ORDER AFFIRMATIVE

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

RELIEF THAT THE COMMISSION OR COURT DETERMINES TO BE APPROPRIATE, INCLUDING THE FOLLOWING RELIEF, AGAINST A RESPONDENT WHO IS FOUND TO HAVE ENGAGED IN AN UNFAIR OR DISCRIMINATORY EMPLOYMENT PRACTICE:

(I) REINSTATEMENT OR HIRING OF EMPLOYEES, WITH OR WITHOUT BACK PAY. IF THE COMMISSION OR COURT ORDERS BACK PAY, THE EMPLOYER, EMPLOYMENT AGENCY, OR LABOR ORGANIZATION RESPONSIBLE FOR THE DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE SHALL PAY THE BACK PAY TO THE PERSON WHO WAS THE VICTIM OF THE PRACTICE.

(II) FRONT PAY; OR

(III) ANY OTHER EQUITABLE RELIEF THE COMMISSION OR COURT DEEMS APPROPRIATE.

(b) IF THE COMMISSION OR COURT ORDERS BACK PAY, THE LIABILITY FOR BACK PAY ACCRUES FROM A DATE NOT MORE THAN TWO YEARS PRIOR TO THE FILING OF A CHARGE WITH THE DIVISION. THE COMMISSION OR COURT SHALL REDUCE AN AWARD OF BACK PAY BY ANY AMOUNT OF ACTUAL EARNINGS OF, OR AMOUNTS THAT COULD HAVE BEEN EARNED WITH REASONABLE DILIGENCE BY, THE PERSON WHO WAS THE VICTIM OF THE DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE.

(3) (a) IN ADDITION TO THE RELIEF AVAILABLE PURSUANT TO SUBSECTION (2) OF THIS SECTION, AND EXCEPT AS PROVIDED IN PARAGRAPH (g) OF THIS SUBSECTION (3), IN A CIVIL ACTION BROUGHT BY A PLAINTIFF UNDER THIS PART 4 AGAINST A DEFENDANT WHO IS FOUND TO HAVE ENGAGED IN AN INTENTIONAL DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE, THE PLAINTIFF MAY RECOVER COMPENSATORY AND PUNITIVE DAMAGES AS SPECIFIED IN THIS SUBSECTION (3). THE COURT SHALL NOT AWARD A PLAINTIFF COMPENSATORY OR PUNITIVE DAMAGES WHEN THE DEFENDANT IS FOUND TO HAVE ENGAGED IN AN EMPLOYMENT PRACTICE THAT IS UNLAWFUL SOLELY BECAUSE OF ITS DISPARATE IMPACT.

(b) (I) EXCEPT AS LIMITED BY THE "COLORADO GOVERNMENTAL IMMUNITY ACT", ARTICLE 10 OF THIS TITLE, AND EXCEPT AS PROVIDED IN SUBPARAGRAPH (II) OF THIS PARAGRAPH (b), A PLAINTIFF MAY RECOVER PUNITIVE DAMAGES AGAINST A DEFENDANT, OTHER THAN THE STATE OR ANY POLITICAL SUBDIVISION, COMMISSION, DEPARTMENT, INSTITUTION, OR

SCHOOL DISTRICT OF THE STATE, IF THE PLAINTIFF DEMONSTRATES BY CLEAR AND CONVINCING EVIDENCE THAT THE DEFENDANT ENGAGED IN A DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE WITH MALICE OR RECKLESS INDIFFERENCE TO THE RIGHTS OF THE PLAINTIFF. HOWEVER, IF THE DEFENDANT DEMONSTRATES GOOD-FAITH EFFORTS TO COMPLY WITH THIS PART 4 AND TO PREVENT DISCRIMINATORY AND UNFAIR EMPLOYMENT PRACTICES IN THE WORKPLACE, THE COURT SHALL NOT AWARD PUNITIVE DAMAGES AGAINST THE DEFENDANT.

(II) THE COURT SHALL NOT AWARD PUNITIVE DAMAGES IN A CIVIL ACTION INVOLVING A CLAIM OF FAILURE TO MAKE A REASONABLE ACCOMMODATION FOR A PERSON WITH A DISABILITY IF THE DEFENDANT DEMONSTRATES GOOD-FAITH EFFORTS TO IDENTIFY AND MAKE A REASONABLE ACCOMMODATION THAT WOULD PROVIDE THE PERSON WITH A DISABILITY AN EQUALLY EFFECTIVE OPPORTUNITY AND WOULD NOT CAUSE AN UNDUE HARDSHIP ON THE OPERATION OF THE DEFENDANT'S BUSINESS.

(c) A PLAINTIFF MAY RECOVER COMPENSATORY DAMAGES AGAINST A DEFENDANT FOR OTHER PECUNIARY LOSSES, EMOTIONAL PAIN AND SUFFERING, INCONVENIENCE, MENTAL ANGUISH, LOSS OF ENJOYMENT OF LIFE, AND OTHER NONPECUNIARY LOSSES.

(d) (I) EXCEPT AS PROVIDED IN SUBPARAGRAPH (II) OF THIS PARAGRAPH (d), THE TOTAL AMOUNT OF COMPENSATORY AND PUNITIVE DAMAGES AWARDED PURSUANT TO THIS SUBSECTION (3) SHALL NOT EXCEED THE AMOUNTS SPECIFIED IN 42 U.S.C. SEC. 1981a (b) (3).

(II) FOR EMPLOYERS WHO EMPLOY FEWER THAN FIFTEEN EMPLOYEES, THE TOTAL AMOUNT OF COMPENSATORY AND PUNITIVE DAMAGES AWARDED PURSUANT TO THIS SUBSECTION (3) SHALL NOT EXCEED THE FOLLOWING AMOUNTS:

(A) IF THE DEFENDANT HAS ONE OR MORE EMPLOYEES BUT FEWER THAN FIVE EMPLOYEES IN EACH OF TWENTY OR MORE CALENDAR WEEKS IN EITHER THE CURRENT OR PRECEDING CALENDAR YEAR, TEN THOUSAND DOLLARS; OR

(B) IF THE DEFENDANT HAS FIVE OR MORE EMPLOYEES BUT FOURTEEN OR FEWER EMPLOYEES IN EACH OF TWENTY OR MORE CALENDAR WEEKS IN EITHER THE CURRENT OR PRECEDING CALENDAR YEAR,

TWENTY-FIVE THOUSAND DOLLARS.

(III) IN DETERMINING THE APPROPRIATE LEVEL OF DAMAGES TO AWARD A PLAINTIFF WHO HAS BEEN THE VICTIM OF AN INTENTIONAL DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE, THE COURT SHALL CONSIDER THE SIZE AND ASSETS OF THE DEFENDANT AND THE EGREGIOUSNESS OF THE INTENTIONAL DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE.

(IV) IF A PLAINTIFF ASSERTS CLAIMS OF INTENTIONAL DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICES UNDER THIS ARTICLE AND UNDER APPLICABLE FEDERAL ANTI-DISCRIMINATION LAWS, THE PLAINTIFF MAY RECOVER RELIEF UNDER THIS SECTION ONLY ONCE FOR THE SAME INJURIES, DAMAGES, OR LOSSES.

(e) COMPENSATORY OR PUNITIVE DAMAGES AWARDED PURSUANT TO THIS SUBSECTION (3) ARE IN ADDITION TO, AND DO NOT INCLUDE, FRONT PAY, BACK PAY, INTEREST ON BACK PAY, OR ANY OTHER TYPE OF RELIEF AWARDED PURSUANT TO SUBSECTION (2) OF THIS SECTION.

(f) THE REMEDIES SPECIFIED IN THIS SUBSECTION (3) APPLY TO CAUSES OF ACTION ALLEGING DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICES ACCRUING ON OR AFTER JANUARY 1, 2015.

(g) IN A CIVIL ACTION INVOLVING A CLAIM OF DISCRIMINATION BASED ON AGE, THE PLAINTIFF IS ENTITLED ONLY TO THE RELIEF AUTHORIZED IN SUBSECTION (2) OF THIS SECTION AND IN 29 U.S.C. SEC. 626 (b) AND 29 U.S.C. SEC. 216 (b) IF THE COURT FINDS THAT THE DEFENDANT ENGAGED IN A DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE BASED ON AGE. IF, IN ADDITION TO ALLEGING DISCRIMINATION BASED ON AGE, THE PLAINTIFF ALLEGES DISCRIMINATION BASED ON ANY OTHER FACTOR SPECIFIED IN SECTION 24-34-402 (1), THIS PARAGRAPH (g) DOES NOT PRECLUDE A PLAINTIFF FROM RECOVERING THE RELIEF AUTHORIZED BY THIS SECTION FOR THAT DISCRIMINATION CLAIM.

(4) IF A PLAINTIFF IN A CIVIL ACTION FILED UNDER THIS PART 4 SEEKS COMPENSATORY OR PUNITIVE DAMAGES PURSUANT TO SUBSECTION (3) OF THIS SECTION, ANY PARTY TO THE CIVIL ACTION MAY DEMAND A TRIAL BY JURY.

(5) IN ANY CIVIL ACTION UNDER THIS PART 4, THE COURT MAY AWARD REASONABLE ATTORNEY FEES AND COSTS TO THE PREVAILING PLAINTIFF. IF THE COURT FINDS THAT AN ACTION OR DEFENSE BROUGHT PURSUANT TO THIS PART 4 WAS FRIVOLOUS, GROUNDLESS, OR VEXATIOUS AS PROVIDED IN ARTICLE 17 OF TITLE 13, C.R.S., THE COURT MAY AWARD COSTS AND ATTORNEY FEES TO THE DEFENDANT IN THE ACTION.

(6) EXCEPT WHEN FEDERAL LAW IS SILENT ON THE ISSUE, THIS SECTION SHALL BE CONSTRUED, INTERPRETED, AND APPLIED IN A MANNER THAT IS CONSISTENT WITH STANDARDS ESTABLISHED THROUGH JUDICIAL INTERPRETATION OF TITLE VII OF THE FEDERAL "CIVIL RIGHTS ACT OF 1964", AS AMENDED, 42 U.S.C. SEC. 2000e ET SEQ.; THE FEDERAL "AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967", AS AMENDED, 29 U.S.C. SEC. 621 ET SEQ.; TITLES I AND V OF THE FEDERAL "AMERICANS WITH DISABILITIES ACT OF 1990", AS AMENDED, 42 U.S.C. SEC. 12111 ET SEQ.; AND THE FEDERAL "CIVIL RIGHTS ACT OF 1991", 42 U.S.C. SEC. 1981a.

(7) NOTHING IN THIS SECTION PRECLUDES A PARTY FROM ASSERTING ANY OTHER AVAILABLE STATUTORY OR COMMON LAW CLAIMS.

(8) (a) AS USED IN THIS SUBSECTION (8), "AGGRIEVED PARTY" MEANS A PERSON WHO HAS FILED A COMPLAINT ALLEGING AN INTENTIONAL DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE, INCLUDING AN APPLICANT FOR A POSITION IN THE STATE PERSONNEL SYSTEM OR AN EMPLOYEE IN THE STATE PERSONNEL SYSTEM.

(b) THE COMMISSION, A COMMISSIONER, AN ADMINISTRATIVE LAW JUDGE APPOINTED PURSUANT TO PART 10 OF ARTICLE 30 OF THIS TITLE, OR, IN CASES INVOLVING APPLICANTS FOR POSITIONS IN OR EMPLOYEES IN THE STATE PERSONNEL SYSTEM, THE STATE PERSONNEL BOARD ESTABLISHED PURSUANT TO SECTION 14 OF ARTICLE XII OF THE STATE CONSTITUTION SHALL NOT AWARD DAMAGES TO AN AGGRIEVED PARTY ALLEGING AN INTENTIONAL DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE. AN AGGRIEVED PARTY WHO IS SEEKING DAMAGES AS AUTHORIZED IN SUBSECTION (3) OF THIS SECTION MUST FILE A CIVIL ACTION IN A COURT OF COMPETENT JURISDICTION TO RECOVER THOSE DAMAGES; EXCEPT THAT PUNITIVE DAMAGES ARE NOT RECOVERABLE AGAINST THE STATE OR ANY POLITICAL SUBDIVISION, COMMISSION, DEPARTMENT, INSTITUTION, OR SCHOOL DISTRICT OF THE STATE.

(c) (I) UPON ISSUANCE OF AN ORDER BY THE COMMISSION PURSUANT TO SECTION 24-34-306 (9) AND SUBSECTION (2) OF THIS SECTION OR OF A WRITTEN DECISION BY THE STATE PERSONNEL BOARD PURSUANT TO SECTION 24-50-125.4 IN WHICH THE COMMISSION OR STATE PERSONNEL BOARD MAKES A FINDING OF AN INTENTIONAL DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE, AN AGGRIEVED PARTY MAY FILE A CIVIL ACTION IN A DISTRICT COURT IN THIS STATE SEEKING DAMAGES AS AUTHORIZED IN SUBSECTION (3) OF THIS SECTION.

(II) FOR COMPLAINTS FILED WITH THE COMMISSION, THE AGGRIEVED PARTY MUST FILE THE ACTION FOR DAMAGES WITHIN THIRTY DAYS AFTER THE DATE THE COMMISSION MAILS NOTICE OF THE ORDER ISSUED PURSUANT TO SECTION 24-34-306 (9) AND SUBSECTION (2) OF THIS SECTION. IF THE AGGRIEVED PARTY FAILS TO FILE AN ACTION FOR DAMAGES WITHIN THIRTY DAYS AFTER THE DATE THE NOTICE OF THE ORDER IS MAILED, THE ACTION IS BARRED, NO DISTRICT COURT HAS JURISDICTION TO HEAR THE ACTION, AND THE COMMISSION'S ORDER BECOMES FINAL AND IS SUBJECT TO JUDICIAL REVIEW PURSUANT TO SECTION 24-34-307.

(III) (A) FOR COMPLAINTS FILED WITH THE STATE PERSONNEL BOARD, IF AN ADMINISTRATIVE LAW JUDGE ISSUES THE INITIAL WRITTEN DECISION ON BEHALF OF THE STATE PERSONNEL BOARD, THE AGGRIEVED PARTY MAY NOT FILE A CIVIL ACTION UNTIL AFTER THE EXPIRATION OF THE THIRTY-DAY PERIOD SPECIFIED IN SECTION 24-50-125.4 (4) FOR FILING AN APPEAL. IF A PARTY DOES NOT FILE AN APPEAL OF THE ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION WITH THE STATE PERSONNEL BOARD IN ACCORDANCE WITH SECTION 24-50-125.4 (4), THE AGGRIEVED PARTY MUST FILE THE CIVIL ACTION FOR COMPENSATORY DAMAGES WITHIN THIRTY DAYS AFTER THE EXPIRATION OF THE APPEAL PERIOD SPECIFIED IN SECTION 24-50-125.4 (4). IF A PARTY FILES AN APPEAL WITH THE STATE PERSONNEL BOARD IN ACCORDANCE WITH SECTION 24-50-125.4 (4), THE AGGRIEVED PARTY MUST FILE THE CIVIL ACTION FOR COMPENSATORY DAMAGES WITHIN THIRTY DAYS AFTER THE DATE THE STATE PERSONNEL BOARD TRANSMITS THE NOTICE OF ITS DECISION ON THE APPEAL IN ACCORDANCE WITH SECTION 24-50-125.4 (6).

(B) IF THE AGGRIEVED PARTY FAILS TO FILE AN ACTION FOR COMPENSATORY DAMAGES WITHIN THIRTY DAYS AFTER THE APPEAL PERIOD EXPIRES OR THE DATE THE STATE PERSONNEL BOARD'S NOTICE OF DECISION IS TRANSMITTED, WHICHEVER IS APPLICABLE PURSUANT TO

SUB-SUBPARAGRAPH (A) OF THIS SUBPARAGRAPH (III), THE ACTION FOR COMPENSATORY DAMAGES IS BARRED, NO DISTRICT COURT HAS JURISDICTION TO HEAR THE ACTION, AND THE STATE PERSONNEL BOARD'S DECISION BECOMES FINAL AND IS SUBJECT TO JUDICIAL REVIEW PURSUANT TO SECTIONS 24-50-125.4 (3) AND 24-4-106 (11).

(d) (I) IF THE AGGRIEVED PARTY INITIALLY FILED A COMPLAINT WITH THE COMMISSION, THE AGGRIEVED PARTY AND THE DISTRICT COURT SHALL SERVE A COPY OF THE CIVIL ACTION COMPLAINT ON THE COMMISSION, AND UPON RECEIPT OF THE CIVIL ACTION COMPLAINT, THE COMMISSION'S ORDER IS AUTOMATICALLY STAYED PENDING THE OUTCOME OF THE CIVIL ACTION, IN WHICH CASE THE COMMISSION'S DECISION IS NOT A FINAL ORDER SUBJECT TO JUDICIAL REVIEW PURSUANT TO SECTION 24-34-307 UNTIL THE DISTRICT COURT ISSUES A FINAL JUDGMENT IN THE CIVIL ACTION FOR DAMAGES.

(II) IF THE AGGRIEVED PARTY IS AN APPLICANT FOR A POSITION IN OR AN EMPLOYEE IN THE STATE PERSONNEL SYSTEM, THE AGGRIEVED PARTY AND THE DISTRICT COURT SHALL SERVE A COPY OF THE CIVIL ACTION COMPLAINT ON THE STATE PERSONNEL BOARD, AND UPON RECEIPT OF THE COMPLAINT, THE STATE PERSONNEL BOARD'S DECISION IS AUTOMATICALLY STAYED PENDING THE OUTCOME OF THE CIVIL ACTION, IN WHICH CASE THE STATE PERSONNEL BOARD'S DECISION IS NOT A FINAL ORDER SUBJECT TO JUDICIAL REVIEW PURSUANT TO SECTIONS 24-50-125.4 (3) AND 24-4-106 (11) UNTIL THE DISTRICT COURT ISSUES A FINAL JUDGMENT IN THE CIVIL ACTION FOR COMPENSATORY DAMAGES.

(e) (I) IN A CIVIL ACTION BROUGHT PURSUANT TO THIS SUBSECTION (8) FOR DAMAGES AFTER THE COMMISSION OR STATE PERSONNEL BOARD MAKES A FINDING OF AN INTENTIONAL DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE, THE DISTRICT COURT SHALL CONSIDER THE ISSUE OF WHETHER THE AGGRIEVED PARTY IS ENTITLED TO DAMAGES AND THE AMOUNT OF DAMAGES, IF AWARDED.

(II) THE DISTRICT COURT MAY AWARD ATTORNEY FEES AND COSTS IN CONNECTION WITH THE ACTION FOR DAMAGES CONSISTENT WITH SUBSECTION (5) OF THIS SECTION.

(III) THE DISTRICT COURT SHALL EXPEDITE THE ACTION FOR DAMAGES AND SET THE MATTER FOR TRIAL AT THE EARLIEST PRACTICAL TIME.

(f) UPON ENTERING A FINAL JUDGMENT IN A CIVIL ACTION BROUGHT PURSUANT TO THIS SUBSECTION (8), THE DISTRICT COURT SHALL SERVE NOTICE OF THE JUDGMENT ON THE PARTIES AND THE COMMISSION OR STATE PERSONNEL BOARD, AS APPROPRIATE. ONCE THE COMMISSION OR STATE PERSONNEL BOARD RECEIVES A FINAL JUDGMENT FROM THE DISTRICT COURT, THE COMMISSION OR STATE PERSONNEL BOARD SHALL INCORPORATE THE DISTRICT COURT JUDGMENT IN ITS ORDER OR DECISION, WHICH BECOMES A FINAL ORDER SUBJECT TO JUDICIAL REVIEW IN ACCORDANCE WITH SECTION 24-34-307 OR SECTIONS 24-50-125.4 (3) AND 24-4-106 (11), AS APPLICABLE.

(g) A CLAIM FILED PURSUANT TO THIS SUBSECTION (8) BY AN AGGRIEVED PARTY AGAINST THE STATE FOR COMPENSATORY DAMAGES FOR AN INTENTIONAL UNFAIR OR DISCRIMINATORY EMPLOYMENT PRACTICE IS NOT SUBJECT TO THE "COLORADO GOVERNMENTAL IMMUNITY ACT", ARTICLE 10 OF THIS TITLE.

SECTION 2. In Colorado Revised Statutes, 24-30-1510, **amend** (3) (a) as follows:

24-30-1510. Risk management fund - creation - authorized and unauthorized payments. (3) Expenditures shall be made out of the risk management fund in accordance with subsection (1) of this section only for the following purposes:

(a) To pay liability claims and expenses related thereto, brought against the state, its officials, or its employees pursuant to the "Colorado Governmental Immunity Act", article 10 of this title; ~~and~~ claims against the state, its officials, or its employees arising under federal law, which the state is legally obligated to pay and which are compromised or settled pursuant to section 24-30-1515 or in which a final money judgment against the state has been entered; OR CLAIMS FOR COMPENSATORY DAMAGES AGAINST THE STATE, ITS OFFICIALS, OR ITS EMPLOYEES PURSUANT TO SECTION 24-34-405;

SECTION 3. In Colorado Revised Statutes, 24-34-301, **amend** (1) as follows:

24-34-301. Definitions. As used in parts 3 to 7 of this article, unless the context otherwise requires:

(1) "Age" means a chronological age of at least forty years. ~~but less~~

~~than seventy years.~~

SECTION 4. In Colorado Revised Statutes, 24-34-305, **amend** (1) (c) as follows:

24-34-305. Powers and duties of commission. (1) The commission has the following powers and duties:

(c) (I) To investigate and study the existence, character, causes, and extent of unfair or discriminatory practices as defined in parts 4 to 7 of this article and to formulate plans for the elimination ~~thereof~~ OF THOSE PRACTICES by educational or other means.

(II) (A) IN FURTHERANCE OF ITS EDUCATIONAL EFFORTS TO REDUCE INSTANCES OF DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICES, THE COMMISSION SHALL CREATE A VOLUNTEER WORKING GROUP REPRESENTING BOTH EMPLOYER AND EMPLOYEE INTERESTS, INCLUDING HUMAN RESOURCE PROFESSIONALS, TO ASSIST IN EDUCATION AND OUTREACH EFFORTS TO FOSTER UNDERSTANDING OF AND COMPLIANCE WITH PART 4 OF THIS ARTICLE. THE COMMISSION MAY ACCEPT AND EXPEND GIFTS, GRANTS, AND DONATIONS TO ASSIST IN ITS DUTIES PURSUANT TO THIS SUBPARAGRAPH (II).

(B) THE COMMISSION SHALL CREATE THE VOLUNTEER WORKING GROUP BY SEPTEMBER 1, 2013. THE WORKING GROUP SHALL DEVELOP AND SUBMIT TO THE COMMISSION, BY JANUARY 1, 2014, AN EDUCATION AND OUTREACH PLAN FOR THE COMMISSION TO IMPLEMENT FOR PURPOSES OF EDUCATING EMPLOYERS AND PROVIDING OUTREACH REGARDING PART 4 OF THE ARTICLE.

(C) IN ADDITION TO THE OUTREACH PLAN REQUIRED BY SUB-SUBPARAGRAPH (B) OF THIS SUBPARAGRAPH (II), THE WORKING GROUP SHALL COMPILE AND PROVIDE TO THE COMMISSION INFORMATION ON EDUCATIONAL RESOURCES AVAILABLE TO EMPLOYERS REGARDING THE REQUIREMENTS OF AND COMPLIANCE WITH PART 4 OF THIS ARTICLE, INCLUDING RESOURCES FOR EMPLOYERS ON PREVENTION OF DISCRIMINATORY EMPLOYMENT PRACTICES. THE COMMISSION SHALL POST THE INFORMATION ON ITS WEB SITE AND SHALL MAKE THE INFORMATION AVAILABLE IN AN ELECTRONIC FORMAT TO ALL STATE DEPARTMENTS AND AGENCIES THAT INTERACT WITH PRIVATE BUSINESSES IN THE STATE, INCLUDING THE DEPARTMENTS OF LABOR AND EMPLOYMENT, REGULATORY

AGENCIES, REVENUE, AND STATE AND THE GOVERNOR'S OFFICE OF ECONOMIC DEVELOPMENT. THOSE DEPARTMENTS AND AGENCIES, WITHIN EXISTING RESOURCES, SHALL POST THE INFORMATION PROVIDED BY THE COMMISSION, OR LINKS TO THAT INFORMATION, ON THEIR WEB SITES.

SECTION 5. Act subject to petition - effective date - applicability. (1) This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly (August 7, 2013, if adjournment sine die is on May 8, 2013); except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November 2014 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

(2) This act applies to causes of action alleging discriminatory or unfair employment practices accruing on or after January 1, 2015.

Mark Ferrandino SPEAKER OF THE HOUSE OF REPRESENTATIVES	John P. Morse PRESIDENT OF THE SENATE
Marilyn Eddins CHIEF CLERK OF THE HOUSE OF REPRESENTATIVES	Cindi L. Markwell SECRETARY OF THE SENATE

APPROVED_____

John W. Hickenlooper
GOVERNOR OF THE STATE OF COLORADO