


# The Colorado Anti-Discrimination Act and the Federal Anti-Discrimination Laws: Lesser-Known Differences

By Ariana Fuentes and Sarah Parady

Since the expansion of remedies available under the Colorado Anti-Discrimination Act ("CADA"), C.R.S. § 24-34-401 *et seq.*, effective in 2015, employment practitioners have faced a strategic decision about whether to bring claims under CADA, the corresponding federal anti-discrimination laws (primarily Title VII, 42 U.S.C. § 2000e *et seq.*; the Americans with Disabilities Act, 42 U.S.C. § 42101 et seq. ("ADA"), and the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq.) ("ADEA")), or both.

Practitioners are well aware of certain key differences—such as CADA's coverage of sexual orientation and transgender discrimination and application to smaller employers; CADA's provisions addressing lawful off-duty conduct, pregnancy accommodation, and wage transparency; the longer period to exhaust claims under the federal anti-discrimination laws; and the availability of causes of action for aiding/abetting, obstruction, and attempt under CADA—but other, more technical differences may be less appreciated. This article, though by no means exhaustive, identifies some distinctions that could have a real impact on the outcome of your client's claims.

## CADA's Broader Scope for Retaliation Claims

The text of CADA provides that it is illegal for "any person, whether or not an employer. . . [t]o discriminate against any person because such person has" opposed discrimination, filed a Charge with the Colorado Civil Rights Division ("CCRD"), or participated in an investigation or hearing authorized by CADA.[1]

Under Title VII and the ADEA, it is illegal for "an employer to discriminate against any of his employees or applicants for employment" for the same reasons.[2] Although the Supreme Court has interpreted this provision liberally in some respects, for example allowing an employee who was terminated due to his fiancée's protected conduct to bring a claim,[3] there is little doubt that the statute is limited to employers and employees, not to third parties who might participate in or be subject to retaliation. (The ADA has broader language similar to CADA, because its anti-retaliation provision applies to all titles of the ADA, including those addressing public entities and public accommodations).[4]

## CADA's More Stringent Defense to Sexual Harassment

Under the federal anti-discrimination laws, a court-developed defense for employer liability in sexual harassment cases, known as the *Faragher/Ellerth* defense, provides that when no tangible employment action is taken the employer may be insulated from liability.[5] The *Faragher/Ellerth* defense requires two elements, (1) that the employer exercised reasonable care to prevent and promptly correct any harassing behavior, and (2) that the plaintiff employee failed to take advantage of any preventive or corrective opportunities which were provided by the employer to avoid the harassment.[6] The employer must prove both of these elements by a preponderance of the evidence.[7] This defense is available in both cases of hostile work environment and quid pro quo sexual harassment.[8] The most common way that employers can take advantage of the *Faragher/Ellerth* defense is by establishing and enforcing anti-harassment policies and complaint procedures.

An employer will mount a successful *Faragher/Ellerth* defense when no supervisor or other employees empowered to make a tangible employment action has perpetrated the harassment and the complaining employee fails to take advantage of the internal complaint procedures. The *Faragher/Ellerth* defense, however, is not available to employers when the hostile work environment culminates in termination.

By contrast, the statutory language of CADA provides that harassment is not an illegal act in the first place unless

a complaint is filed with the appropriate authority and such authority fails to initiate a reasonable investigation and take prompt remedial action.[9] This means that an employer may not be liable even if they do not have an anti-harassment policy or an internal complaint procedure in place. Furthermore, the language of CADA suggests that a formal complaint of harassment may be part of the plaintiff's initial burden of proof when asserting a claim of harassment, rather than a defense. The CCRD has promulgated regulations interpreting this portion of CADA in line with *Faragher/Ellerth* in most respects,[10] but a judge might disagree that CCRD's interpretation is reasonable given the very different statutory language.



## CADA's Unclear Coverage for Claims of Failure to Accommodate a Disability Absent an Adverse Action

Under the ADA, it is disability discrimination not to "mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity."[11]

CADA, by contrast, states that it is an unfair employment practice to harass or take a listed series of adverse employment actions against an employee "because of" a protected status, including disability, and raises the concept of reasonable accommodation only as an employer's potential defense to a claim that an adverse employment action was discriminatory:

> . . . but, with regard to a disability, it is not a discriminatory or an unfair employment practice for an employer to act as provided in this paragraph (a) if there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the person from the job, and the disability has a significant impact on the job.[12]

CADA could therefore be read only to only to prohibit a failure to accommodate when it leads to a failure hire, a demotion, a termination, etc.—that is, when an employee claims that the adverse action was because of disability and the employer cannot show that no reasonable accommodation of that disability was possible. Such an interpretation could put a freestanding claim of failure to accommodate at risk.[13] Again, the CCRD regulations interpret this provision in line with the ADA, indicating that failure to accommodate is itself a violation,[14] but a judge might conclude otherwise.

PRACTICE POINTER:

If you face an argument that a claim of failure to accommodate is not actionable under CADA unless it led to a demotion, termination, or the like, argue that the good faith defense specific to failure accommodate claims laid out at C.R.S. 24-34-405(3)(b)(II) demonstrates the legislature's intent to include such a claim.

A panel of the Tenth Circuit recently held that an adverse action is an element of a failure to accommodate claim under the ADA, in contravention of longstanding circuit precedent and seemingly the plain language of the ADA, but that opinion has been reheard by the en banc Tenth Circuit and may soon be reversed.[15] Although beyond the scope of this article, if the panel opinion in *Exby-Stolley* is reversed, practitioners will be able to point to similarities between the panel's reasoning, and the reading of CADA that would put a freestanding accommodation claim at risk, to combat any such interpretation.

## CADA's Potentially Lower Burden for an Employer's Defense to Disability Accommodation

The language of CADA requires a different showing by employers to justify failing to accommodate a disabled employee than that in the ADA—a "significant impact on the job" rather than an "undue hardship on the operation of the business" of the employer.[16] On its face, a "significant impact" could be considerably easier for employers to demonstrate than an "undue hardship." Worse, CADA contains an umbrella provision that "no person shall be required to alter, modify, or purchase any building, structure, or equipment or incur any additional expense which

would not otherwise be incurred in order to comply" with CADA.[17] If employers are not required to incur any expense to accommodate disabled employees, their accommodation duties could be limited indeed.

## CADA's Broader Tolling Justifications

Under CADA, an employee may toll the limitation period for filing a Charge of Discrimination with the CCRD due to an employer's failure to post a notice of discriminatory practices. CCRD regulations mandate that all employers post and maintain a notice which informs employees of the six-month statute of limitations to file a Charge of Discrimination.[18] The notices must be posted somewhere where they will be easily accessible to employees.[19] If an employee fails to post this notice, the employee is entitled to equitable tolling of the six-month statute of limitations.[20] The statute of limitations begins to run after the employee becomes aware of should have become aware of his or her rights under CADA.[21]

PRACTICE POINTER:

The CCRD has shown a trend of resisting tolling based on an employer's failure to post notices despite the clear caselaw on point. Don't risk missing the six-month deadline to file a Charge in reliance on a failure to post.

Title VII is far less generous to employees in regard to tolling the statute of limitations for failure to post notices. Under the federal statute, employees have 300 days to file a Charge of Discrimination with the Equal Employment Opportunity Commission. Even if an employer fails to post a notice of discriminatory and unfair practices, the employee is not entitled to equitable tolling of the claim unless the employer had the intent to actively mislead the employee.[22]

## CADA's Protection for Service Animals in Employment

Neither the employment portions of the ADA, nor its implementing regulations, address when or whether the use of service animals in the workplace could constitute a reasonable accommodation. (By contrast, regulations regarding the public accommodation portions of the ADA provide that "a public accommodation shall modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability.")[23] CADA, however, has an entire subsection dedicated only to the use of service animals, including in employment. This subsection, which is outside the portion of the statute that otherwise addresses unfair employment practices, provides that employer must allow a disabled employee accompanied by a service animal "to keep the employee's service animal with the employee at all times in the place of employment;" states that employer may not discriminate against an individual with a disability because of use of a service animal; and specifically requires that employers accommodate service animals, subject only to a defense of "undue hardship."[24]

PRACTICE POINTER:

CADA's service animal provisions are subject to different remedies provisions than that applicable to most employment claims, and violations regarding service animals also carry criminal penalties.[25]

## Conclusion

Because of the relative dearth of cases interpreting CADA, especially when compared to the federal anti-discrimination laws, all potential pitfalls addressed in this article are subject to good lawyering. The authors welcome readers' input on other distinctions between our state law and the corresponding federal laws, or on cases that may limit the impact on some of the apparent statutory differences discussed herein. ▲▲▲

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**Endnotes:**

[1] C.R.S. § 24-34-402(1)(e)(IV) (emphases added).

[2] 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 623(d).

[3] *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 178 (2011).

[4] 42 U.S.C. § 12203.

[5] *Faragher v. City of Boca Raton,* 524 U.S. 775, 777-78 (1998).

[6] *Id.*

[7] *Id.* at 807.

[8] *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 733-734 (1998).

[9] C.R.S. § 24-34-402(1)(a).

[10] 3 CCR § 708-1 § 85.1(G).

[11] 42 U.S.C. § 12112.

[12] C.R.S. § 24-34-402(1)(a).

[13] *See also, e.g., Colorado Civil Rights Comm'n v. N. Washington Fire Prot. Dist.*, 772 P.2d 70, 75–76 (Colo. 1989) (stating that an adverse action is part of a prima facie case of disability discrimination in employment under CADA, though not in a case where plaintiff had attempted to raise a freestanding accommodation claim).

[14] 3 CCR 708-1 § 60.6(A).

[15] *See Exby-Stolley v. Bd. of Cty. Comm'rs,* 906 F.3d 900, 905 (10th Cir.), reh'g en banc granted sub nom. *Exby-Stolley v. Bd. of Cty. Comm'rs*, 910 F.3d 1129 (10th Cir. 2018).

[16] *Compare* C.R.S. § 24-34-402(1)(a) with 42 U.S.C. § 12112(b)(5)(A) *and Punt v. Kelly Servs*. 862 F.3d 1040, 1049 (10th Cir. 2017).

[17] C.R.S. § 24-34-305(2); *see also Coski v. City & Cty. of Denver*, 795 P.2d 1364, 1368 (Colo. App. 1990) (relying on this provision in a reasonable accommodation case).

[18] 3 CCR 708-1 § 20.1.

[19] *Id*. § 85.1(B).

[20] *Quicker v. Colorado Civil Rights Comm'n*, 747 P.2d 682, 683–84 (Colo. App. 1987).

[21] *Id.*

[22] *Wilkerson v. Siegfried Ins. Agency, Inc.,* 683 F.2d 344, 347 (10th Cir. 1982).

[23] 28 C.F.R. § 36.302.

[24] C.R.S. § 24-34-803(1)(a); (3).

[25] *Compare* C.R.S. § 24-34-802 (civil remedies for violations of the civil rights of persons with disabilities, including with respect to service animals) and § 24-34-804 (penalties, including criminal penalties, specific to rights to utilize service animals) with § 24-34-405 (remedies for unfair employment practices).