First Regular Session
Sixty-eighth General Assembly
STATE OF COLORADO

INTRODUCED

LLS NO. 11-0170.01 Christy Chase **SENATE BILL 11-072**

SENATE SPONSORSHIP

Carroll, Bacon, Boyd, Giron, Hodge, Hudak, Morse, Steadman, Tochtrop, Aguilar, Guzman, Johnston

HOUSE SPONSORSHIP

Levy, Court, Fields, Tyler

Senate Committees
Judiciary

House Committees

A BILL FOR AN ACT

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

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at http://www.leg.state.co.us/billsummaries.)

Current law does not permit an award of compensatory or punitive damages or attorney fees and costs to a plaintiff who prevails in a complaint before the Colorado civil rights commission (commission) or in a lawsuit alleging a discriminatory or unfair employment practice under state law, even in cases of intentional discrimination. While federal

employment antidiscrimination laws allow such damages in cases where intentional discrimination is found, and allows an award of reasonable attorney fees and costs, only employers who employ 15 or more employees are subject to federal law. Moreover, victims of employment discrimination on the basis of sexual orientation are not afforded protections under federal law. Thus, employees who work for employers with fewer than 15 employees or who claim employment discrimination on the basis of sexual orientation are not allowed compensatory or punitive damages or to recover reasonable attorney fees and costs when they prove a case of intentional employment discrimination.

Section 1 of the bill establishes the "Job Protection and Civil Rights Enforcement Act of 2011", which would allow the additional remedies of compensatory and punitive damages in employment discrimination cases brought under state law against employers where intentional discrimination is proven. These damages would be in addition to the remedies allowed under current law, namely, front pay, back pay, interest on back pay, reinstatement or hiring, and other equitable relief that may be awarded. Compensatory damages are to compensate a plaintiff for other pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. If the plaintiff shows by a preponderance of the evidence that the defendant engaged in a discriminatory or unfair employment practice with malice or reckless indifference to the rights of the plaintiff, the plaintiff may recover punitive damages.

The bill limits the amount of compensatory and punitive damages to the amounts specified in the federal "Civil Rights Act of 1991" and instructs the commission or court to consider the size and assets of the defendant and the egregiousness of the discriminatory or unfair employment practice when determining the amount of damages to award the victim.

When a plaintiff claims compensatory or punitive damages in a civil lawsuit, either party to the action is entitled to demand a jury trial. Additionally, the court may award the prevailing party reasonable attorney fees and costs.

Section 2 of the bill authorizes the commission to appoint a working group of employers and employees to assist in education and outreach efforts to foster compliance with laws prohibiting discriminatory or unfair employment practices.

The remedies available under the bill would apply to causes of action alleging discriminatory or unfair employment practices accruing on or after January 1, 2013.

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

SECTION 1. 24-34-405, Colorado Revised Statutes, is REPEALED AND REENACTED, WITH AMENDMENTS, to read:

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 2011".

(2) (a) IN ADDITION TO THE RELIEF AUTHORIZED BY SECTION 24-34-306 (9), THE COMMISSION OR THE COURT MAY ORDER AFFIRMATIVE RELIEF THAT THE COMMISSION OR COURT DETERMINES TO BE APPROPRIATE, INCLUDING, WITHOUT LIMITATION, THE FOLLOWING:

(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, IN A PROCEEDING OR CIVIL ACTION

BROUGHT BY A COMPLAINING PARTY OR PLAINTIFF UNDER THIS PART 4 AGAINST A RESPONDENT OR DEFENDANT WHO IS FOUND TO HAVE ENGAGED IN AN INTENTIONAL DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE, THE COMPLAINING PARTY OR PLAINTIFF MAY RECOVER COMPENSATORY AND PUNITIVE DAMAGES AS SPECIFIED IN THIS SUBSECTION (3). A COMPLAINING PARTY OR PLAINTIFF SHALL NOT BE AWARDED COMPENSATORY OR PUNITIVE DAMAGES WHEN THE RESPONDENT OR DEFENDANT IS FOUND TO HAVE ENGAGED IN AN EMPLOYMENT PRACTICE THAT IS UNLAWFUL SOLELY BECAUSE OF ITS DISPARATE IMPACT.

(b) EXCEPT AS LIMITED BY THE "COLORADO GOVERNMENTAL IMMUNITY ACT", ARTICLE 10 OF TITLE 24, C.R.S., A COMPLAINING PARTY OR PLAINTIFF MAY RECOVER PUNITIVE DAMAGES AGAINST A RESPONDENT OR DEFENDANT IF THE COMPLAINING PARTY OR PLAINTIFF DEMONSTRATES BY A PREPONDERANCE OF THE EVIDENCE THAT THE RESPONDENT OR DEFENDANT ENGAGED IN A DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE WITH MALICE OR RECKLESS INDIFFERENCE TO THE RIGHTS OF THE COMPLAINING PARTY OR PLAINTIFF.

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

(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); EXCEPT THAT, FOR EMPLOYERS THAT EMPLOY FEWER EMPLOYEES THAN THE NUMBER SPECIFIED IN 42 U.S.C. SEC. 1981a (b) (3) (A), THE TOTAL

AMOUNT OF COMPENSATORY AND PUNITIVE DAMAGES AWARDED PURSUANT TO THIS SUBSECTION (3) SHALL NOT EXCEED THE AMOUNT SPECIFIED IN 42 U.S.C. SEC. 1981a (b) (3) (A). IN DETERMINING THE APPROPRIATE LEVEL OF DAMAGES TO AWARD A COMPLAINING PARTY OR PLAINTIFF WHO HAS BEEN THE VICTIM OF AN INTENTIONAL DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE, THE COMMISSION OR COURT SHALL CONSIDER THE SIZE AND ASSETS OF THE RESPONDENT OR DEFENDANT AND THE EGREGIOUSNESS OF THE INTENTIONAL DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE.

(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.

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

(5) (a) IN ANY PROCEEDING OR CIVIL ACTION UNDER THIS PART 4, THE COMMISSION OR COURT MAY AWARD REASONABLE ATTORNEY FEES AND COSTS TO THE PREVAILING PARTY.

(b) IT IS THE INTENT OF THE GENERAL ASSEMBLY THAT THE COMMISSION'S OR COURT'S DISCRETION TO AWARD REASONABLE ATTORNEY FEES AND COSTS SHALL BE GUIDED BY STANDARDS ESTABLISHED THROUGH JUDICIAL INTERPRETATION OF THE DISCRETION GIVEN TO COURTS TO MAKE SUCH AWARDS IN CASES BROUGHT UNDER TITLE VII OF THE FEDERAL "CIVIL RIGHTS ACT OF 1964", 42 U.S.C. SEC.

2000e, AS AMENDED.

SECTION 2. 24-34-305 (1) (c), Colorado Revised Statutes, is amended to read:

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) IN FURTHERANCE OF ITS EDUCATIONAL EFFORTS TO REDUCE INSTANCES OF DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICES, THE COMMISSION MAY CREATE A VOLUNTEER WORKING GROUP REPRESENTING BOTH EMPLOYER AND EMPLOYEE INTERESTS TO ASSIST IN EDUCATION AND OUTREACH EFFORTS TO FOSTER COMPLIANCE WITH PART 4 OF THIS ARTICLE.

SECTION 3. Act subject to petition - effective date - applicability. (1) This act shall take 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 10, 2011, if adjournment sine die is on May 11, 2011); 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 shall not take effect unless approved by the people at the general election to be held in November 2012 and shall take effect on the date of the official declaration of the vote thereon by the governor.

(2) The provisions of this act shall apply to causes of action

alleging discriminatory or unfair employment practices accruing on or after January 1, 2013.