Department of Regulatory Agencies

Office of Policy, Research and Regulatory Reform

2008 Sunset Review: Colorado Civil Rights Commission and the Colorado Civil Rights Division

October 15, 2008

Consumer Protection

Department of Regulatory Agencies

Executive Director's Office
D. Rico Munn
Executive Director

Bill Ritter, Jr.
Governor

October 15, 2008

Members of the Colorado General Assembly
c/o the Office of Legislative Legal Services
State Capitol Building
Denver, Colorado 80203

Dear Members of the General Assembly:

The mission of the Department of Regulatory Agencies (DORA) is consumer protection. As a part of the Executive Director's Office within DORA, the Office of Policy, Research and Regulatory Reform seeks to fulfill its statutorily mandated responsibility to conduct sunset reviews with a focus on protecting the health, safety and welfare of all Coloradans.

DORA has completed the evaluation of the Colorado Civil Rights Commission (Commission) and the Colorado Civil Rights Division (Division). I am pleased to submit this written report, which will be the basis for my office's oral testimony before the 2009 legislative committee of reference. The report is submitted pursuant to section 24-34-104(8)(a), of the Colorado Revised Statutes (C.R.S.), which states in part:

> The department of regulatory agencies shall conduct an analysis of the performance of each division, board or agency or each function scheduled for termination under this section...
>
> The department of regulatory agencies shall submit a report and supporting materials to the office of legislative legal services no later than October 15 of the year preceding the date established for termination….

The report discusses the question of whether there is a need for the enforcement of the protections provided under Parts 3 through 8 of Article 34 of Title 24, C.R.S. The report also discusses the effectiveness of the Commission and staff of the Division in carrying out the intent of the statutes and makes recommendations for statutory and administrative changes in the event this regulatory program is continued by the General Assembly.

Sincerely,

D. Rico Munn
Executive Director

1560 Broadway, Suite 1550 Denver, Colorado 80202 Phone 303.894.7855
Fax 303.894.7885 Toll Free 800.866.7675 www.dora.state.co.us V/TDD 711

Consumer Protection

Department of Regulatory Agencies

Bill Ritter, Jr.
Governor

D. Rico Munn
Executive Director

2008 Sunset Review:
Colorado Civil Rights Commission and the Colorado Civil Rights Division

Summary

What Is Regulated?
Colorado's anti-discrimination laws seek to redress cases of discrimination in employment, housing or public accommodations.

Why Is It Regulated?
To protect the civil rights of Colorado residents and the public welfare in general by allowing those who believe they have been discriminated against to have an independent third party conduct an investigation and make a determination as to whether discrimination occurred, all outside of the court system.

Who Is Regulated?
Individuals, such as employers, housing providers, owners/operators of places of public accommodations, who may be in a position to discriminate against a member of one or more of the following protected classes: ancestry, age, color, creed, familial status, marriage to a co-worker, national origin, mental or physical disability, race, religion, sex and sexual orientation.

How Is It Regulated?
The Colorado Civil Rights Commission (Commission) and the Colorado Civil Rights Division (Division) are located in the Department of Regulatory Agencies. The Division investigates charges of discrimination, mediates and conciliates settlements, issues findings of probable cause and right to sue letters, and refers cases to the Attorney General. The Commission, among other duties, acts as the appellate body of the Division. The Division works collaboratively with the U.S. Equal Employment Opportunity Commission and the U.S. Department of Housing and Urban Development.

What Does It Cost?
During fiscal year 07-08, the Division received $1,523,866 from the state General Fund and $659,519 from the federal government, and there were 29 full-time equivalent employees dedicated to the Division.

What Disciplinary Activity Is There?
Between fiscal years 06-07 and 07-08, the Division investigated 1,563 cases. Of these, Division staff mediated or conciliated 140 settlements, found no probable cause in 631 cases, and found probable cause in 75 cases. In total, the Division potentially prevented the filing of 771 law suits, and may have assisted 215 victims of discrimination obtain redress.

Where Do I Get the Full Report?
The full sunset review can be found on the internet at: www.dora.state.co.us/opr/oprpublications.htm.

Key Recommendations

Continue the Colorado Civil Rights Commission for nine years, until 2018.
The process administered by the Commission and the Division is one that serves the public interest by allowing those who believe they have been discriminated against to have an independent third party conduct an investigation and make a determination as to whether discrimination occurred, all outside of the court system. This system grants to such individuals, a low cost, easily accessible system to redress their grievances. Similarly, respondents, too, benefit from this system in terms of reduced legal expenses and expeditious resolution of charges. Since the Commission continues to review appeals, set cases for hearing and engage in education and outreach efforts, it is reasonable to conclude that the Commission should be continued.

Continue the Division for nine years, until 2018.
Although many of the points in favor of continuing the Commission are equally applicable to the continuation of the Division, the Division merits continuation on several independent grounds. The Division is, first and foremost, the investigatory arm of the Commission. Without it, the Commission would have no appeals to review, no cases to set for hearing, and no staff to assist in its education, outreach and enforcement efforts. Therefore, if the Commission is to be continued, the Division, too, must be continued.

Continue the Director's subpoena powers in employment cases, expand such power to include all settings of discrimination, and repeal the separate sunset review provision for employment cases.
Since the subpoena power is a vital component of administrative enforcement, the General Assembly should continue the power with respect to employment cases and expand it to encompass all areas that fall within the Division's jurisdiction. Since the subpoena power will be reviewed as a part of any future sunset review of the Division and since the subpoena power with respect to housing is not subject to repeal and individual sunset review, the General Assembly should repeal the sunset clause on the Director's subpoena power.

Authorize the Commission to initiate complaints on its own motion.
Since it is reasonable to conclude that the General Assembly's original intent was for the Commission to initiate complaints on its own motion, and since the Colorado Supreme Court has limited that intent, the General Assembly should clarify that the Commission has the authority to file charges on its own motion in those cases that can reasonably be construed to have societal or community-wide impact and where the authorized remedy is solving the issue, rather than monetary damages.

Major Contacts Made During This Review

AARP
American Civil Liberties Union of Colorado
American Jewish Committee
Anti-Defamation League, Mountain States Region
Aurora Asian Pacific Community Partnership
Aurora Neighborhood Services Department
Boulder Pride
Boulder Shelter for the Homeless
Center for People with Disabilities
Civil Justice League
Colorado AIDS Project
Colorado Anti-Violence Program
Colorado Association of Commerce and Industry
Colorado Association of Mortgage Brokers
Colorado Association of Mortgage Lenders
Colorado Association of Realtors
Colorado Attorney General's Office
Colorado Bar Association
Colorado Catholic Conference
Colorado Children's Campaign
Colorado Cross Disability Coalition
Colorado Council of Churches
Colorado Defense Lawyers Association
Colorado Department of Education
Colorado Department of Higher Education
Colorado Department of Labor and Employment
Colorado Hospital Association
Colorado Interfaith Alliance
Colorado Muslim Society
Colorado Plaintiff Employment Lawyers Association
Colorado Restaurant Association
Communidad Integrada
Cortez Chamber of Commerce
Denver Anti-Discrimination Office
Fair Employment for Cancer Patients and Survivors
Ft Collins Human Relations Commission
Ft Collins Not in Our Town Alliance
Gay, Lesbian, Bisexual & Transgender Community Center of Colorado
Gender Identity Center of Colorado, Inc.
Governor's Minority Business Office
Greater Metro Denver Ministerial Alliance
Latin American Research and Service Agency (LARASA)
League of Women Voters of Colorado
Longmont Community Neighborhood Resources
Metro Denver Apartment Association
Mountain States Employers Council, Inc.
National Association for the Advancement of Colored People-Denver Branch
National Federation of Independent Business
Rocky Mountain Resource Center
Rocky Mountain SER Jobs for Progress, Inc.
San Juan Citizen's Alliance
Senior Housing Options
Southwest Intertribal Voice
Tribal Employment Rights Office
U.S. Department of Education
U.S. Department of Housing and Urban Development
U.S. Department of Justice
U.S. Department of Labor
U.S. Equal Employment Opportunity Commission
9 to 5, National Association of Working Women

What is a Sunset Review?

A sunset review is a periodic assessment of state boards, programs, and functions to determine whether or not they should be continued by the legislature. Sunset reviews focus on creating the least restrictive form of regulation consistent with protecting the public. In formulating recommendations, sunset reviews consider the public's right to consistent, high quality professional or occupational services and the ability of businesses to exist and thrive in a competitive market, free from unnecessary regulation.

Sunset Reviews are Prepared by:
Colorado Department of Regulatory Agencies
Office of Policy, Research and Regulatory Reform
1560 Broadway, Suite 1550, Denver, CO 80202
www.dora.state.co.us/opr

Table of Contents

Background

Introduction

Enacted in 1976, Colorado's sunset law was the first of its kind in the United States. A sunset provision repeals all or part of a law after a specific date, unless the legislature affirmatively acts to extend it. During the sunset review process, the Department of Regulatory Agencies (DORA) conducts a thorough evaluation of such programs based upon specific statutory criteria[1] and solicits diverse input from a broad spectrum of stakeholders including consumers, government agencies, public advocacy groups, and professional associations.

Sunset reviews are based on the following statutory criteria:

- Whether regulation by the agency is necessary to protect the public health, safety and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen which would warrant more, less or the same degree of regulation;
- If regulation is necessary, whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, considering other available regulatory mechanisms and whether agency rules enhance the public interest and are within the scope of legislative intent;
- Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures and practices and any other circumstances, including budgetary, resource and personnel matters;
- Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively;
- Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates;
- The economic impact of regulation and, if national economic information is not available, whether the agency stimulates or restricts competition;
- Whether complaint, investigation and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession;
- Whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action;
- Whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest.

[1] Criteria may be found at §24-34-104, C.R.S.

Types of Regulation

Regulation, when appropriate, can serve as a bulwark of consumer protection. Regulatory programs can be designed to impact individual professionals, businesses or both.

As regulatory programs relate to individual professionals, such programs typically entail the establishment of minimum standards for initial entry and continued participation in a given profession or occupation. This serves to protect the public from incompetent practitioners. Similarly, such programs provide a vehicle for limiting or removing from practice those practitioners deemed to have harmed the public.

From a practitioner perspective, regulation can lead to increased prestige and higher income. Accordingly, regulatory programs are often championed by those who will be the subject of regulation.

On the other hand, by erecting barriers to entry into a given profession or occupation, even when justified, regulation can serve to restrict the supply of practitioners. This not only limits consumer choice, but can also lead to an increase in the cost of services.

Regulation, then, has many positive and potentially negative consequences.

There are also several levels of regulation.

Licensure

Licensure is the most restrictive form of regulation, yet it provides the greatest level of public protection. Licensing programs typically involve the completion of a prescribed educational program (usually college level or higher) and the passage of an examination that is designed to measure a minimal level of competency. These types of programs usually entail title protection – only those individuals who are properly licensed may use a particular title(s) – and practice exclusivity – only those individuals who are properly licensed may engage in the particular practice. While these requirements can be viewed as barriers to entry, they also afford the highest level of consumer protection in that they ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

Certification

Certification programs offer a level of consumer protection similar to licensing programs, but the barriers to entry are generally lower. The required educational program may be more vocational in nature, but the required examination should still measure a minimal level of competency. Additionally, certification programs typically involve a non-governmental entity that establishes the training requirements and owns and administers the examination. State certification is made conditional upon the individual practitioner obtaining and maintaining the relevant private credential. These types of programs also usually entail title protection and practice exclusivity.

While the aforementioned requirements can still be viewed as barriers to entry, they afford a level of consumer protection that is lower than a licensing program. They ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

Registration

Registration programs can serve to protect the public with minimal barriers to entry. A typical registration program involves an individual satisfying certain prescribed requirements – typically non-practice related items, such as insurance or the use of a disclosure form – and the state, in turn, placing that individual on the pertinent registry. These types of programs can entail title protection and practice exclusivity. Since the barriers to entry in registration programs are relatively low, registration programs are generally best suited to those professions and occupations where the risk of public harm is relatively low, but nevertheless present. In short, registration programs serve to notify the state of which individuals are engaging in the relevant practice and to notify the public of those who may practice by the title(s) used.

Title Protection

Finally, title protection programs represent one of the lowest levels of regulation. Only those who satisfy certain prescribed requirements may use the relevant prescribed title(s). Practitioners need not register or otherwise notify the state that they are engaging in the relevant practice, and practice exclusivity does not attach. In other words, anyone may engage in the particular practice, but only those who satisfy the prescribed requirements may use the enumerated title(s). This serves to indirectly ensure a minimal level of competency – depending upon the prescribed preconditions for use of the protected title(s) – and the public is alerted to the qualifications of those who may use the particular title(s).

Licensing, certification and registration programs also typically involve some kind of mechanism for removing individuals from practice when such individuals engage in enumerated proscribed activities. This is generally not the case with title protection programs.

Regulation of Businesses

As regulatory programs relate to businesses, they can enhance public protection, promote stability and preserve profitability. But they can also reduce competition and place administrative burdens on the regulated businesses.

Regulatory programs that address businesses can involve certain capital, bookkeeping and other recordkeeping requirements that are meant to ensure financial solvency and responsibility, as well as accountability. Initially, these requirements may serve as barriers to entry, thereby limiting competition. On an ongoing basis, the cost of complying with these requirements may lead to greater administrative costs for the regulated entity, which costs are ultimately passed on to consumers.

Many programs that regulate businesses involve examinations and audits of finances and other records, which are intended to ensure that the relevant businesses continue to comply with these initial requirements. Although intended to enhance public protection, these measures, too, involve costs of compliance.

Similarly, many regulated businesses may be subject to physical inspections to ensure compliance with health and safety standards.

Sunset Process

Regulatory programs scheduled for sunset review receive a comprehensive analysis. The review includes a thorough dialogue with agency officials, representatives of the regulated profession and other stakeholders. To facilitate input from interested parties, anyone can submit input on any upcoming sunrise or sunset review via DORA's website at: www.dora.state.co.us/pls/real/OPR_Review_Comments.Main.

The functions of the Colorado Civil Rights Commission (Commission) and the Colorado Civil Rights Division (Division), though not technically regulatory in nature, relating to Parts 3 through 8 of Article 34 of Title 24, Colorado Revised Statutes (C.R.S.), shall terminate on July 1, 2009, unless continued by the General Assembly. During the year prior to this date, it is the duty of DORA to conduct an analysis and evaluation of the Commission and the Division pursuant to section 24-34-104, C.R.S.

The purpose of this review is to determine whether the currently prescribed enforcement of civil rights should be continued for the protection of the public and to evaluate the performance of the Commission and staff of the Division. During this review, the Commission and the Division must demonstrate that each serves to protect the public health, safety or welfare, and that their enforcement of civil rights are the least restrictive mechanisms consistent with protecting the public. DORA's findings and recommendations are submitted via this report to the legislative committee of reference of the Colorado General Assembly.

Methodology

As part of this review, DORA staff attended Commission meetings; interviewed individual members of the Commission, Division staff, chambers of commerce, various business associations, representatives of state and national civil rights advocates, representatives of those in a position to discriminate, and officials with federal agencies; and reviewed Commission records and minutes, including complaint and enforcement actions, Colorado statutes, Commission rules, and the laws of other states.

Overview of Civil Rights

When discussing civil rights and discrimination under Colorado law, several issues are critical. First, the individual claiming to have been discriminated against must be a member of a protected class and the discriminatory conduct must have been perpetrated because of the individual's membership in a protected class. Second, the discriminatory conduct must have resulted in some kind of tangible harm, unless it is a case of harassment. Finally, the discriminatory conduct must have occurred in an employment, housing or public accommodations setting.

The employment setting includes traditional employers, employment agencies and labor organizations, but not religious organizations or associations.

The housing setting includes selling, leasing, renting or transferring ownership in any building, structure or vacant land. Importantly, the housing setting does not include a room offered for rent in a single-family home that is occupied by the owner or lessee of the home (i.e., a roommate situation).

The public accommodations setting includes any place of business that is open to the public at large. Examples include stores, restaurants, hotels, hospitals, parks, theaters, museums, libraries, and schools.

Several protected classes are recognized, though not all are well defined:

Ancestry – the ethnic group from which an individual and his or her ancestors are descended.[2]

Age – being between 40 and 69 years old.[3]

Color – the pigmentation, complexion or skin shade or tone.[4]

Creed – a religious, moral or ethical belief that is sincerely held, and includes all aspects of religious observance and practice.[5]

Disability, Mental – any mental or psychological disorder, such as developmental disability, organic brain syndrome, mental illness, or specific learning disability, or being regarded as having such.[6]

Disability, Physical – a physical impairment which substantially limits one or more of a person's major life activities, or being regarded as having such.[7]

Familial Status – one or more individuals under the age of 18 living with a parent or legal guardian.

[2] St. Francis College v. Al-Khazraji, 481 U.S. 604, 614 (1987).
[3] § 24-34-301(1), C.R.S.
[4] U.S. Equal Employment Opportunity Commission. *Compliance Manual Section 15: Race & Color Discrimination*. Retrieved July 10, 2008, from www.eeoc.gov/policy/docs/race-color.html
[5] Commission Rule 50.1.
[6] § 24-34-301(2.5)(b)(III), C.R.S.
[7] § 24-34-301(2.5)(a), C.R.S.

Marriage to a Co-worker – being married to, or planning to marry, another employee of the same employer, unless such marriage would create a situation where one spouse would directly or indirectly exercise supervisory, appointment, dismissal or disciplinary authority of the other spouse; where one spouse would audit, verify, receive or be entrusted with money received or handled by the other spouse; or where one spouse has access to the employer's confidential information, including payroll and personnel records.[8]

National Origin – place of origin of an individual or his or her ancestors, or having the physical, cultural, or linguistic characteristics of a national origin group.[9]

Race – Being genetically part of an ethnically and physiognomically distinctive group of people.[10]

Religion – a religious, moral or ethical belief that is sincerely held, and includes all aspects of religious observance and practice.[11]

Sex – gender as male or female.

Sexual Orientation – a person's orientation toward heterosexuality, homosexuality, bisexuality or transgender status, or being perceived as such.[12]

In addition to having somewhat vague definitions, protected classes are often so similar that they can be difficult to distinguish from one another. For example, national origin and race often overlap because people who are, or whose ancestors were, of the same national origin are frequently of the same race.[13] The same is often the case for claims involving race and color. As a result, many charges of discrimination have multiple bases – they allege discrimination based on membership in multiple protected classes.

Not all of the above defined protected classes are protected in each of the three settings of employment, housing and public accommodations. Specifically, marriage to a co-worker is a protected class in the employment setting only, and familial status is a protected class in housing only. Age is a protected class in employment only.

In the employment setting, it is discriminatory to refuse to hire, discharge, promote or demote, harass during the course of employment or discriminate in the matter of compensation based on the employee's membership in a protected class.

In the housing setting, it is discriminatory to refuse to show, sell, transfer, rent or lease, or to refuse to receive and transmit any *bona fide* offer to buy, sell, rent or lease, or otherwise make unavailable or deny or withhold from any person such housing because of the person's membership in a protected class.

---

[8] § 24-34-402(1)(h), C.R.S.
[9] U.S. Equal Employment Opportunity Commission. *Compliance Manual Section 15: Race and Color Discrimination*. Retrieved on July 10, 2008, from www.eeoc.gov/policy/docs/race-color.html
[10] Al-Khazraji at 613.
[11] Commission Rule 50.1.
[12] §§ 24-34-301(7) and 24-34-401(7.5), C.R.S.
[13] U.S. Equal Employment Opportunity Commission. *Compliance Manual Section 15: Race and Color Discrimination*. Retrieved on July 10, 2008, from www.eeoc.gov/policy/docs/race-color.html

In the public accommodations setting, it is discriminatory to refuse, withhold from or deny to an individual or group the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of a place of public accommodation because of the person's membership in a protected class.

History of Civil Rights Legislation in Colorado

The Colorado Anti-Discrimination Act (Act), enacted in 1951, created the Fair Employment Practices Office (Office) in the Colorado Department of Labor, and made Colorado only the third state to create an agency to protect the civil rights of its residents.

The Act directed the Office to investigate charges of employment discrimination based on race, creed, color, national origin and ancestry. The Office had the authority to file civil suits on behalf of public employees, but its ability to assist private sector employees was limited to arbitration.

In 1955, the Office was renamed the Colorado Anti-Discrimination Commission and its jurisdiction was expanded to include private employers with six or more employees. Further, the Act enabled the agency to issue cease and desist orders and to order employers to rehire, reinstate or promote the employee who filed the charge of discrimination.

In the ensuing years, the Act was amended to prohibit discrimination in housing and in public accommodations, and the remedies available under the Act were also expanded. Additional protected classes were also introduced, including religion and those with handicaps.

In 1965, the Colorado Anti-Discrimination Commission was renamed the Colorado Civil Rights Commission (Commission), and as part of the Administration Organization Act of 1968, it was transferred to DORA along with the Division of Civil Rights.

In 1979, the Act was repealed and re-enacted. The Division of Civil Rights was renamed the Colorado Civil Rights Division (Division), and the Division and the Commission were scheduled for their first sunset reviews, to take place in 1984, with the agencies repealing in 1985.

The Commission and the Division were continued in 1985, and in 1986, age was added as a protected class in the employment setting.

The definition of handicap was amended to include mental impairments in 1989. Additionally, the specific grounds upon which the Governor can remove a member of the Commission were enumerated to include misconduct, incompetence and neglect of duty.

Several housing provisions were amended in 1990. Familial status was added as a protected class. Additionally, several timing issues were addressed. The Director of

the Division (Director) was directed to issue his or her determination as to whether there is probable cause to believe that discrimination occurred within 100 days of the filing of the charge with the Division. A statute of limitations was also established under which the Attorney General's Office (AGO) must file any civil action claiming discrimination in housing, if at all, within 18 months of the occurrence of the discriminatory act.

House Bill 91-1322 expanded the Director's subpoena powers to include the employment setting, rather than just the housing setting. These powers apply to both documents and people, and the bill scheduled the subpoena power in the employment setting to sunset in 1996.

In 1992, the protected class of handicap was limited to exclude anyone illegally using or addicted to a controlled substance.

The protected class of handicap was again the subject of legislation in 1993, when the Act was amended such that the term "handicap" was replaced with the term "disability."

The timeframes under which the Division processes charges of discrimination in employment were extended in 1993, from 180 days to 270. So as not to adversely impact those who file charges of discrimination, the Act was also amended to specify that requests for letters granting the right to sue in court within 180 days of the filing of charge are to be granted at the discretion of the Commission. Such requests made after 180 days must be granted.

In 1995, the Act was amended to specifically grant disabled people utilizing or training assistance dogs to have such dogs in housing, public accommodations and at their places of employment.

The Director's subpoena powers, as they relate to employment, were continued in 1996, and were scheduled to sunset in 2002.

The Commission and the Division were continued in 1999, and both were scheduled to sunset in 2009.

Also in 1999, harassment was included as a discriminatory employment practice.

In 2000, the requirement that the Commission annually prepare a report was continued. However, this requirement was limited to requiring an annual report to the Governor; provisions requiring such reports to the General Assembly were repealed.

The Director's subpoena powers, as they relate to employment, were again continued in 2002, and were scheduled to sunset in 2009.

Senate Bill 07-025 added sexual orientation as a protected class in the employment setting, and the settings in which this class of people are protected was expanded to include housing and public accommodations in Senate Bill 08-200.

Legal Framework

The universe of civil rights laws is vast. It encompasses state and federal laws, as well as countless local ordinances and provisions.

At the local level, many local governments have offices dedicated to investigating allegations of discrimination within their respective jurisdictions, and human relations commissions to conduct similar activities, or both.

At the federal level, many laws passed by Congress contain aspects involving civil rights and the principles of non-discrimination, including:

- The Age Discrimination in Employment Act of 1967;
- The Age Discrimination Act of 1975;
- The Americans with Disabilities Act of 1990;
- The Civil Rights Act of 1964;
- The Equal Credit Opportunity Act;
- The Equal Pay Act of 1963; and
- The Fair Housing Act.

Many departments and agencies of the federal government maintain staff to receive and investigate complaints of discrimination. However, only two of these directly impact the Colorado Civil Rights Commission (Commission) and the Colorado Civil Rights Division (Division): the U.S. Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Housing and Urban Development (HUD).

As their names imply, EEOC has jurisdiction over cases involving discrimination in the employment setting, and HUD has jurisdiction over cases involving discrimination in the housing setting. In some cases the jurisdiction of these federal agencies overlaps with that of the Commission, and in some cases one or the other agency has exclusive jurisdiction.

Colorado's anti-discrimination laws (Act) were originally enacted in 1951, and they have been extensively amended since then. Regardless, the Act, which is codified in Parts 3 through 8 of Article 34 of Title 24, Colorado Revised Statutes (C.R.S.) covers:

Part 3 – Division and Commission Procedures;

Part 4 – Employment Practices;

Part 5 – Housing Practices;

Part 6 – Discrimination in Places of Public Accommodation;

Part 7 – Discriminatory Advertising; and

Part 8 – Persons with Disabilities.

In addition, the Commission has promulgated rules. Some rules directly implement various statutory provisions, while others are more altruistic in nature. The rules cover the following topics:

Rule 10 – Rules of Practice and Procedure;

Rule 20 – General Provisions;

Rule 30 – Housing Discrimination Rules;

Rule 40 – Age Discrimination Rules;

Rule 50 – Creed and Religious Discrimination Rules (Guidelines);

Rule 60 – Rules Prohibiting Discrimination on Account of Mental or Physical Disability;

Rule 70 – National Origin Discrimination Rules;

Rule 80 – Sex Discrimination Rules;

Rule 81 – Sexual Orientation Discrimination Rules;

Rule 85 – Workplace Harassment Rules; and

Rule 90 – Employment Testing Rules.

The discussion that follows is a mere overview of these laws and how they interrelate with one another; it is not intended to be a comprehensive legal analysis.

Administration

The Commission consists of seven members who are appointed by the Governor, with the consent of the Senate, to four-year terms.[14] These seven appointments must comply with the following specifications:[15]

- Two members representing the business community, at least one of which must represent the small business community;
- Two members representing state or local government entities; and
- Three members representing the public at large.

Additionally, four of these must be members of a protected class and no more than four can belong to the same political party. In making appointments, the Governor is directed to ensure adequate geographical representation insofar as it may be practicable.[16]

The Division is headed by a director (Director), who is appointed by the Executive Director of the Department of Regulatory Agencies (DORA), in consultation with the Commission.[17]

[14] § 24-34-303(1), C.R.S.
[15] § 24-34-303(1), C.R.S.
[16] § 24-34-303(1), C.R.S.
[17] § 24-34-302, C.R.S.

The Commission is empowered to:[18]

- Promulgate rules;
- Receive, investigate and pass upon charges alleging unfair or discriminatory practices;
- Investigate and study the existence, character, cause and extent of unfair or discriminatory practices, and to formulate plans to eliminate such practices by educational or other means;
- Hold hearings, or to delegate to an administrative law judge, any charge of discrimination filed against a respondent;
- Issue publications and reports of investigations and research to promote goodwill among the various protected classes and that will tend to minimize or eliminate unfair or discriminatory practices;
- Prepare and transmit annually, a report accounting to the Governor for the efficient discharge of all responsibilities assigned by law or directive to the Commission;
- Recommend policies to the Governor, and submit recommendations to persons, agencies, organizations and other entities in the private sector to effectuate such policies;
- Recommend to the General Assembly legislation concerning discrimination;
- Cooperate with other agencies or organizations, both public and private, the purposes of which are consistent with the Commission's;
- Intervene in racial, religious, cultural, age and intergroup tensions or conflicts for the purpose of informal mediation; and
- Adopt an official seal.

Any person can, either directly or through an attorney, file a charge of discrimination with the Commission. Any such charge must:[19]

- Be filed in duplicate;
- State the name and address of the respondent (the entity alleged to have engaged in the discriminatory conduct);
- Set forth the particulars of the charge of discrimination; and
- Be signed by the party causing the charge to be filed.

The deadlines under which a charge of discrimination is filed are determined by the setting in which the alleged discrimination occurred:

- Charges of discrimination in the employment setting must be filed within six months after the alleged action occurred.[20]

[18] § 24-34-305(1), C.R.S.
[19] § 24-34-306(1), C.R.S.
[20] § 24-34-403, C.R.S.

- Charges of discrimination in the housing setting must be filed within one year after the alleged action occurred.[21]
- Charges of discrimination in the public accommodations setting must be filed within 60 days after the alleged action occurred.[22]
- Charges of discrimination with respect to advertising must be filed within 60 days after the alleged action occurred.[23]

In cases involving charges of discrimination in the employment or housing settings, the Director may subpoena witnesses and compel the testimony of witnesses and the production of books, papers and records directly related to the charge.[24] All respondents are presumed to be innocent of having engaged in unfair or discriminatory activity unless proven otherwise.[25]

Prior to the Director's written determination, the staff of the Division is prohibited, except for certain, limited circumstances, from disclosing the fact that a charge has been filed.[26]

If the Director determines that there is no probable cause to believe that discrimination has occurred, the Director must dismiss the charge and advise the charging party that the charging party has the right to file an appeal with the Commission within 10 days of the date of the mailing of the dismissal.[27] If the charging party desires to file a civil suit in state district court, the charging party must do so within 90 days of the mailing of the dismissal, or, if the charging party appeals the dismissal to the Commission, within 90 days of the Commission's dismissal.[28]

If the Director determines that there is probable cause to believe that discrimination has occurred, the Director must provide the respondent a notice of such, in writing, that outlines, with specificity, the legal authority of the Commission and the relevant matters of fact and law that led to such a determination. Additionally, the Director must order that the respondent and the charging party participate in compulsory mediation.[29]

If compulsory mediation fails to settle the matter, the Commission may issue a written notice and complaint requiring the respondent to answer the charges in a formal hearing before the Commission or an administrative law judge.[30] Such a hearing must commence within 120 days of the service of the notice[31] and must be held in accordance with the provisions of the Administrative Procedure Act.[32]

[21] § 24-34-504(1), C.R.S.
[22] § 24-34-604, C.R.S.
[23] § 24-34-706, C.R.S.
[24] § 24-34-306(2)(a), C.R.S.
[25] § 24-34-305(3), C.R.S.
[26] § 24-34-306(3), C.R.S.
[27] § 24-34-306(2)(b)(I)(A), C.R.S.
[28] § 24-34-306(2)(b)(I)(B), C.R.S.
[29] § 24-34-306(2)(b)(II), C.R.S.
[30] § 24-34-306(4), C.R.S.
[31] § 24-34-306(4), C.R.S.
[32] § 24-34-306(8), C.R.S.

The jurisdiction of the Commission is lost in any matter if any of the following occurs:[33]

- The Director has not issued a decision within 271 days of the filing of the charge (or up to 450 days if extensions of time have been obtained);
- The notice for a formal hearing is not served within 270 days of the filing of the charge (or up to 450 days if extensions of time have been obtained);
- The charging party was granted a request to withdraw his or her charge;
- The hearing is not commenced within 120 days of the notice; or
- The charging party requested and received a notice of right to sue.

In housing cases, however, the Director must determine whether there is probable cause within 100 days of the filing of the charge.[34] If the Director finds that there is probable cause, the Commission must set the case for hearing[35] and that hearing must commence within 120 days after the service of a written notice and complaint.[36] The Attorney General may also separately file a civil action.

With few exceptions, this process must be followed before any charging party may file a civil suit in state district court.[37] Exceptions to this general rule include those circumstances in which:

- The charging party shows, by clear and convincing evidence, that the charging party is in poor health and that pursuing the administrative remedies would not provide timely and reasonable belief and would cause irreparable harm;[38]
- The charging party has requested and received a notice of right to sue from the Commission;[39] and
- The charge of discrimination pertains to housing, in which case the charging party may file a civil suit in district court without first filing a charge of discrimination with the Commission.[40]

A request for a notice of right to sue may be granted if it is made within 180 days of filing the charge, and it must be granted if it is made after such time.[41] Additionally, a charging party and a respondent may each request one, 90-day extension of time.[42]

All appeals of Commission decisions are brought to the Colorado Court of Appeals.[43] All determinations made by the Court of Appeals are based on the record submitted. No new testimony or evidence is permitted.

[33] § 24-34-306(11), C.R.S.
[34] § 24-34-504(4), C.R.S.
[35] § 24-34-504(4.1), C.R.S.
[36] § 24-34-306(4), C.R.S.
[37] § 24-34-306(14), C.R.S.
[38] § 24-34-306(14), C.R.S.
[39] § 24-34-306(15), C.R.S.
[40] § 24-34-505.6(3), C.R.S.
[41] § 24-34-306(15), C.R.S.
[42] Commission Rule 10.7(B).
[43] § 24-34-307(2), C.R.S.

Employment

An employer is:

> [T]he State of Colorado or any political subdivision, commission, department, institution, or school district . . . and every other person employing persons within the state; but it does not mean religious organizations or associations, except such organizations or associations supported in whole or in part by money raised by taxation or public borrowing[44]

Although not employers, employment agencies,[45] labor organizations[46] and apprenticeship programs[47] are also, in general, subject to the anti-discrimination laws as if they were employers.

In general, it is a discriminatory employment practice for an employer to refuse to hire, to discharge, to promote or demote, to harass or to discriminate in a matter of compensation because of disability, race, creed, color, sex, sexual orientation, religion, age, national origin or ancestry.[48] It is also a discriminatory employment practice to retaliate against an employee for filing a charge of discrimination or for opposing a discriminatory employment practice.[49]

It is also a discriminatory employment practice for an employer to advertise or to make any inquiry in connection with prospective employment that expresses any limitation as to eligibility because of disability, race, creed, color, sex, sexual orientation, religion, age, national origin, or ancestry, unless such limitation is based upon a *bona fide* occupational qualification.[50]

"Sexual orientation" means a person's orientation toward heterosexuality, homosexuality, bisexuality, or transgender status, or an employer's or another person's perception of such.[51]

With regard to harassment, an employee is harassed when he or she works in a hostile work environment based upon his or her race, national origin, sex, sexual orientation, disability, age or religion. Harassment cannot serve as the basis for a charge of discrimination unless the employee notifies the employer of the harassment, and the employer fails to investigate the complaint and fails to take the appropriate remedial action.[52]

[44] § 24-34-401(3), C.R.S.
[45] § 24-34-402(1)(b), C.R.S.
[46] § 24-34-402(1)(c), C.R.S.
[47] § 24-34-402(1)(f), C.R.S.
[48] § 24-34-402(1)(a), C.R.S.
[49] § 24-34-402(1)(e)(IV), C.R.S.
[50] § 24-34-402(1)(d), C.R.S.
[51] §§ 24-34-301(7) and 24-34-401(7.5), C.R.S.
[52] § 24-34-402(1)(a), C.R.S.

With regard to sex, it is a discriminatory employment practice to exclude from employment, applicants or employees because of pregnancy, or their gender in general.[53]

With regard to disability, a charging party must show that he or she has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or being regarded as having such an impairment.[54]

It is not a discriminatory employment practice for an employer to refuse to hire, to discharge, or to promote or demote because of the disability if:[55]

- There is no reasonable accommodation that the employer can make;
- The disability actually disqualifies the person from the job; or
- The disability has a significant impact on the job.

However, an employer must allow a disabled employee with a service dog to keep the service dog with the employee at all times.[56]

With regard to age, the anti-discrimination provisions apply to those between 40 and 69 years old.[57]

It is not a discriminatory employment practice for an employer to refuse to hire, to discharge, or to promote or demote because of age:[58]

- If age is a *bona fide* occupational qualification;
- To observe the terms of a *bona fide* seniority system; or
- To compel an employee to retire who is between 65 and 70 years old, and who is employed in a *bona fide* executive or high policy-making position.

With regard to religion and creed, these terms are defined as, “a religious, moral or ethical belief which is sincerely held and includes all aspects of religious observance and practice.”[59]

It is also a discriminatory employment practice for an employer with more than 25 employees, to refuse to hire a person solely because he or she is married to, or plans to marry, an employee of the employer.[60]

[53] Commission Rule 80.8.
[54] § 24-34-301(2.5), C.R.S.
[55] § 24-34-402(1)(a), C.R.S.
[56] § 24-34-803(3)(a), C.R.S.
[57] § 24-34-301(1), C.R.S.
[58] § 24-34-402(4), C.R.S.
[59] Commission Rule 50.1.
[60] § 24-34-402)1)(h)(I), C.R.S.

However, it is not a discriminatory employment practice for an employer, regardless of size, to refuse to hire or to discharge a person who is married to, or plans to marry, an employee of the employer where one spouse would:[61]

- Exercise supervisory authority over the other spouse;
- Audit, verify, receive or be entrusted with money received or handled by the other spouse; or
- Have access to the employer's confidential information, including payroll and personnel records.

Finally, it is a discriminatory employment practice for an employer to discharge, discipline, discriminate against, coerce, intimidate, threaten or interfere with an employee, regardless of whether the employee is a member of a protected class, for inquiring about, disclosing, comparing or otherwise discussing the employee's wages.[62]

Included in the anti-discrimination statutes are several provisions that are defined as constituting discriminatory employment practices, but over which neither the Commission nor the Division have jurisdiction. Rather, an employee impacted by one of these practices must bring a civil suit in a state district court, if the employee desires to hold the employer legally accountable.[63] These include terminating an employee because the employee:

- engages in a lawful activity off the premises of the employer during nonworking hours;[64] or
- takes more than three days off from work, with or without pay, to protect himself or herself where the employee is the victim of domestic abuse, stalking, sexual assault, or any other crime the basis of which includes an act of domestic violence.[65]

The remedies available to the victim of a discriminatory employment practice depend upon whether the practice was committed by an employer, an employment agency or a labor organization. In general, these remedies include:[66]

- Receiving back pay;
- Being hired to the position, with or without back pay;
- Being reinstated, with or without back pay;
- Receiving the promotion, with or without back pay;
- Receiving the referral for employment from the employment agency;
- Having membership in the labor organization restored;

[61] § 24-34-402(1)(h)(II), C.R.S.
[62] § 24-34-402(1)(i), C.R.S.
[63] §§ 24-34-402.5(2) and 24-34-402.7(4), C.R.S.
[64] § 24-34-402.5(1), C.R.S.
[65] § 24-34-402.7(1), C.R.S.
[66] § 24-34-405, C.R.S.

- Being admitted to, or being allowed to continue in, the apprenticeship program; and
- Receiving the training that was previously denied.

Additionally, a respondent to a charge of employment discrimination may be ordered to post notices and to make reports as to the manner of compliance.[67]

Although state and federal law are remarkably consistent in many respects, some important differences include,

- Size of employer – While Colorado law covers all employers, regardless of size, federal law applies only to those employers with 15 or more employees.[68]
- Protected classes – While Colorado law includes sexual orientation and marriage to a co-worker as protected classes, federal law does not.[69]
- Deadlines for filing charges of discrimination – While Colorado law requires charges to be filed within six months of the alleged discriminatory act, federal law requires charges that fall under the EEOC's and the Division's joint jurisdiction to be filed with EEOC within 300 days of the alleged discriminatory act.[70]
- Deadlines for findings – While Colorado law requires findings of probable cause to be issued "as promptly as possible," all findings must be issued within 270 days (up to 450 days if extensions have been obtained).[71] Federal law requires the EEOC to issue such findings "as promptly as possible," with a stated goal of 120 days.[72]
- Remedies – While the remedies available under Colorado law are essentially limited to actual damages (i.e., back pay), federal law authorizes actual damages,[73] reinstatement,[74] compensatory damages,[75] punitive damages,[76] attorney fees and reasonable expert witness fees.[77]
- Disparate impact – While Colorado law essentially applies to actions that impact the pay, tenure or status of an employee, federal law also applies to those actions that have a disparate impact[78] as well as to training opportunities.[79]

[67] § 24-34-405, C.R.S.
[68] 42 U.S.C. § 2000e(b).
[69] 42 U.S.C. § 2000e-2(a).
[70] 42 U.S.C. § 2000e-5(e) and U.S. Equal Employment Opportunity Commission. "Filing a Charge of Employment Discrimination." Retrieved July 8, 2008, from www.eeoc.gov/charge/overview_charge_filing.html
[71] § 24-34-306(2)(b), C.R.S.
[72] 42 U.S.C. § 2000e-5(b).
[73] 42 U.S.C. § 2000e-5(g)(1).
[74] 42 U.S.C. § 2000e-5(g)(1).
[75] 42 U.S.C. § 1981a(b).
[76] 42 U.S.C. § 1981a(b)(1).
[77] 42 U.S.C. § 2000e-5(k).
[78] 42 U.S.C. § 2000e-2(k).
[79] 42 U.S.C. § 2000e-3.

Housing

"Housing means any building, structure, vacant land, or part thereof offered for sale, lease, rent or transfer of ownership…."[80]

In general, it is a discriminatory housing practice to refuse to show, sell, transfer, rent, or lease, or to refuse to receive and transmit any *bona fide* offer to buy, sell, rent or lease any housing because of disability, race, creed, color, sex, sexual orientation, marital status, familial status, religion, national origin or ancestry.[81] It is also a discriminatory housing practice to retaliate against a person for filing a charge of discrimination or for opposing a discriminatory housing practice.[82]

Some notable exemptions to this general prohibition include:

- Situations in which making available to a person a tenancy that would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others;[83]
- Housing that is operated or controlled by a religious or denominational organization;[84]
- Housing that is designed or intended for the disabled;[85]
- Housing that is designed or intended for people who are at least 62 years old, or for occupancy by at least one person who is at least 55 years old;[86] and
- Situations in which a room is offered for rent in a single-family dwelling that is occupied by the owner or lessee of the dwelling.[87]

The housing anti-discrimination laws also apply to mortgage lenders and brokers,[88] real estate brokers,[89] and advertising,[90] but not real estate appraisals when such appraisals take into consideration access for the disabled.[91]

With regard to familial status, which is defined as one or more people under the age of 18 living with a parent or guardian,[92] it is not a discriminatory housing practice when:

- The housing involves a single-family home that is sold or rented by an owner who does not own more than three single-family homes at any one time;[93] or

[80] § 24-34-501(2), C.R.S.
[81] § 24-34-502(1)(a), C.R.S.
[82] § 24-34-502(1)(e), C.R.S.
[83] § 24-34-502(1)(a), C.R.S.
[84] § 24-34-502(3), C.R.S.
[85] § 24-34-502(5), C.R.S.
[86] § 24-34-502(7)(b), C.R.S.
[87] § 24-34-501(2), C.R.S.
[88] § 24-34-502(1)(g), C.R.S.
[89] §§ 24-34-502(1)(h) and 24-34-503, C.R.S.
[90] § 24-34-502(1)(d), C.R.S.
[91] § 24-34-502(6), C.R.S.
[92] § 24-34-501(1.6), C.R.S.
[93] § 24-34-502(8)(a)(I), C.R.S.

- The rooms or units in the housing contain living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his or her residence.[94]

With regard to disability, discrimination includes:

- A refusal to permit the person with a disability to make reasonable modifications, at his or her own expense, to the premises;[95]
- A refusal to make reasonable accommodations to rules, policies, practices or services;[96] and
- A failure to design and construct the common areas of multi-family dwellings such that they are accessible and usable by the disabled.[97]

Further, a disabled person with an assistance dog must not be required to pay any extra charges for the assistance dog.[98]

If a housing provider is found to have engaged in a discriminatory housing practice, the following may be ordered:

- Actual and punitive damages;[99]
- Permanent or temporary injunction;[100]
- Specific performance with respect to the granting of financial assistance or the showing, sale, transfer, rental or lease of the housing;[101]
- Permanent or temporary restraining order;[102]
- Reimbursement of any expenses incurred in obtaining comparable, alternate housing;[103]
- The making of reports to the Commission regarding compliance;[104]
- Civil penalties of between $10,000 and $50,000, depending upon the history of the respondent;[105] and
- Attorney fees and costs to the prevailing party.[106]

[94] § 24-34-502(8)(a)(II), C.R.S.
[95] § 24-34-502.2(2)(a), C.R.S.
[96] § 24-34-502.2(2)(b), C.R.S.
[97] § 24-34-502.2(2)(c), C.R.S.
[98] § 24-34-803(1)(c), C.R.S.
[99] §§ 24-34-505.6(6)(a) and 24-34-508(1)(e), C.R.S.
[100] §§ 24-34-505.6(6)(a), 24-34-507 and 24-34-508(1)(e), C.R.S.
[101] § 24-34-508(1)(b), C.R.S.
[102] § 24-34-505.6(6)(a), C.R.S.
[103] § 24-34-508(1)(d), C.R.S.
[104] § 24-34-508(1)(c), C.R.S.
[105] § 24-34-508(1)(f), C.R.S.
[106] § 24-34-505.6(6)(b), C.R.S.

Public Accommodations

A "place of public accommodation" is any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including any:[107]

- Place offering wholesale or retail sales;
- Place to eat, drink, sleep or rest;
- Sporting or recreational area or facility;
- Public transportation facility;
- Barber shop, bathhouse, swimming pool, bath, steam or massage parlor, gymnasium or other establishment that serves the health, appearance or physical condition of the person;
- Campsite or trailer camp;
- Dispensary, clinic, hospital, convalescent home or other institution for the sick, ailing, aged or infirm;
- Mortuary, undertaking parlor or cemetery;
- Educational institution; or
- Public building, park, arena, theater, hall, auditorium, museum, library, exhibit or public facility of any kind.

A place of public accommodation does not include a church, synagogue, mosque or other place that is principally used for religious purposes.[108]

It is a discriminatory practice to refuse, withhold from or deny to any person, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of the place of public accommodation because of disability, race, creed, color, sex, sexual orientation, marital status, national origin or ancestry.[109] It is also a discriminatory practice to discriminate against someone for filing a charge of discrimination or for opposing a discriminatory practice.[110]

With respect to disability, a disabled person with an assistance dog must not be required to pay any extra charges for the assistance dog,[111] and the mere presence of the service dog is not grounds for violation of any sanitary standard, rule or regulation.[112]

In addition, no place of public accommodation may post a sign which states or implies, "We reserve the right to refuse service to anyone."[113]

[107] § 24-34-601(1), C.R.S.
[108] § 24-34-601(1), C.R.S.
[109] § 24-34-601(2), C.R.S.
[110] § 24-34-601(2.5), C.R.S.
[111] § 24-34-803(1)(b), C.R.S.
[112] § 24-34-803)(6), C.R.S.
[113] Commission Rule 20.4.

However, it is not a discriminatory practice to restrict admission to a place of public accommodation to people of one sex if such a restriction has a *bona fide* relationship to the goods, services, facilities, privileges, advantages or accommodations of the place of public accommodation.[114]

If a place of accommodation is found to have engaged in a discriminatory practice, the place of public accommodation may be ordered to pay damages of between $50 and $500 for each offense.[115] Additionally, every such offense constitutes a misdemeanor, which is punishable by a fine of between $10 and $300, by imprisonment of not more than one year, or both.[116]

Any civil action must be brought in the county court in the county where the alleged discriminatory practice occurred.[117]

Advertising

In general, no person may publish any communication regarding the furnishing, or neglecting or refusing to furnish any lodging, housing, schooling, or tuition or any accommodation, right, privilege, advantage or convenience offer to or enjoyed by the general public because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry.[118]

If a person is found to have issued discriminatory advertising, the Commission may order the person to cease and desist from such conduct. Further, such conduct constitutes a misdemeanor that is punishable by a fine of between $100 and $500, or imprisonment of between 30 and 90 days, or both.[119]

[114] § 24-34-602(3), C.R.S.
[115] § 24-34-602(1), C.R.S.
[116] § 24-34-602(2), C.R.S.
[117] §§ 24-34-602(1) and 24-34-603, C.R.S.
[118] § 24-34-701, C.R.S.
[119] § 24-34-705, C.R.S.

Program Description and Administration

The Colorado Civil Rights Commission (Commission) comprises seven, Governor-appointed members representing a diverse community of Coloradans. In addition to the statutorily mandated constituencies that must be represented (two members representing business, two members representing local government and three members representing the public at large), the Commission's membership also includes three males and three females; two White members, three Hispanic members and one African American member; and two members of the gay, lesbian, bi-sexual and transgender community. Additionally, one member is from Aurora, one member is from Castle Rock, two members are from Denver, one member is from Grand Junction, and one member is from Pueblo. As of this writing, and since February 2008, there is one vacancy on the Commission.

The Commission generally meets the last Friday of each month in Denver. Although members of the public rarely attend these meetings, each Commission member attends, on average, 78 percent of the meetings.

The Commission routinely holds at least one meeting each year at a location other than Denver. Table 1 illustrates the location and dates of these meetings.

Table 1
Commission Meetings Held Outside of Denver

Date	Location
July 2004	Pueblo
September 2005	Cortez
May 2006	Greeley
May 2006	Ft. Morgan
September 2006	Longmont
February 2007	Greeley
May 2007	Cortez

The Colorado Civil Rights Division (Division) investigates charges of discrimination. The Commission, among other duties, acts as the appellate body of the Division. Table 2 illustrates the Division's staffing and funding levels for the fiscal years indicated.

Table 2
Agency Fiscal Information

Fiscal Year	State General Funds	Federal EEOC Funds	Federal HUD Funds	Total Funding	FTE
02-03	$1,612,350	$380,139	$578,736	$2,571,225	26.5
03-04	$1,214,477	$277,001	$416,974	$1,908,452	25.0
04-05	$1,238,766	$242,800	$358,830	$1,840,396	25.0
05-06	$1,798,283	$266,736	$348,455	$2,413,474	25.0
06-07	$1,585,032	$305,784	$505,830	$2,396,646	29.0
07-08	$1,523,866	$311,064	$348,455	$2,183,385	29.0

In addition to receiving funds from the state's General Fund, the Division has also entered into contracts with the U.S. Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Housing and Urban Development (HUD).

Under the Division's contract with EEOC, the Division is paid $550 for each charge of discrimination that it investigates and closes, provided that the charge involves allegations that bring the case under the dual jurisdiction of both the Division and EEOC. EEOC does not pay the Division to investigate charges over which the Division has exclusive jurisdiction. In addition, the EEOC pays the Division $50 for each intake service taken exclusively on the EEOC's behalf.

Under the Division's contract with HUD, the Division is also paid to investigate HUD cases. The Division can receive up to $2,400 per case, depending on how long it takes the Division to complete its investigation, plus an additional $500 for each case in which it finds probable cause.

In fiscal year 06-07, HUD also awarded the Division a grant of $299,600 to address discriminatory/predatory lending practices in Colorado. Specifically, the grant enabled the Division to study predatory lending, to provide some education and outreach, and to increase enforcement efforts.

During the reporting period reflected in Table 2, the Division has been staffed with between 25 and 29 full-time equivalent (FTE) employees. The Division is organized into three basic workgroups working in three offices (Denver, Grand Junction and Pueblo), and is headed by the Division Director (Director).

The Deputy Director (1.0 FTE General Professional VI) reports directly to the Director. The Deputy Director is responsible for the day-to-day operations of the Division, including supervising three senior staff positions: three Program Managers (2.0 FTE Compliance Investigator III and 1.0 FTE General Professional VI). The Deputy Director also supervises a Budget Analyst (1.0 FTE Program Assistant II).

One Program Manager oversees the Outreach and Education unit (1.0 FTE General Professional IV), the Alternative Dispute Resolution unit (1.0 FTE Compliance Investigator I) and the head of the Intake unit (1.0 FTE Compliance Investigator Intern).

The Alternative Dispute Resolution unit is responsible for conducting all mediations and conciliations within the Division.

Reporting to the head of the Intake unit are those responsible for drafting charges (2.0 FTE), case control (1.0 FTE), data entry, scanning (1.0 FTE) and reception (1.0 FTE).

Another Program Manager oversees an investigations unit that focuses primarily on those charges of discrimination over which the Division has exclusive jurisdiction and housing complaints. This unit is staffed by four Investigators and a Housing Specialist.

The final Program Manager also serves as the Chief of Investigations and Enforcement and oversees the Director's Assistant (1.0 FTE Administrative Assistant III) and four Investigators in the Division's Denver office (4.0 FTE Compliance Investigator I).

Additionally, this Program Manager oversees the Division's two regional offices: one each in Pueblo and Grand Junction. The Pueblo office opened in spring 2008, and the Grand Junction office opened in summer 2008.[120]

The Pueblo office is staffed by an Assistant (0.5 FTE Program Assistant I) and an Investigator (Compliance Investigator II). The Grand Junction office is staffed by an Assistant (0.5 FTE Program Assistant I) and an Investigator (General Professional III).

Finally, as of this writing, the Division has four vacant positions.

Charges of Discrimination

The process for filing a charge of discrimination, as well as for investigating such a charge, is relatively consistent across the settings under which a charge can be filed: employment, housing, public accommodations, and advertising.

Generally, the process begins when a person believes that he or she has been discriminated against and initiates contact with the Division. This initial contact most often comes in the form of a telephone call. Division staff estimates that it receives between 30 and 50 such telephone calls per day. However, the initial inquiry may also come by letter or email, or the individual may simply walk into one of the Division's offices.

[120] Previously, the Division maintained five offices, one each in Denver, Colorado Springs, Grand Junction, Greeley and Pueblo. The Colorado Springs office closed in May 2003. The Grand Junction office closed in March 2004, before reopening in summer 2008. The Greeley office closed in November 2003. The Pueblo office closed in April 2003, before reopening in spring 2008.

Regardless of the form this initial inquiry takes, Division staff screens the information provided for jurisdictional purposes only. Charges of discrimination must be filed with the Division within the following time limits, or they are barred:

- Employment – charge must be filed within six months of the alleged discriminatory conduct.
- Housing – charge must be filed within one year of the alleged discriminatory conduct.
- Public Accommodations – charge must be filed within 60 days of the alleged discriminatory conduct.
- Advertising – charge must be filed within 60 days of the alleged discriminatory conduct.

If the jurisdictional time limits are satisfied, then the inquiry is sent to the Intake unit, which will send an intake packet to the individual.

The intake packet solicits basic information so that a charge of discrimination may be drafted and filed. Once the intake packet is received by the Division, Intake staff drafts the charge of discrimination, which provides the basis for the charge.

The charge of discrimination is then sent to the individual to be signed and returned. Table 3 illustrates, for the five years indicated, the number of charges drafted and mailed out relative to the number of charges that are ultimately filed.

Table 3
Inquiry and Cases Information

Fiscal Year	Employment		Housing		Public Accommodations		Total	
	Inquiries Not Resulting In Charge	Charges Filed	Inquiries Not Resulting In Charge	Charges Filed	Inquiries Not Resulting In Charge	Charges Filed	Inquiries Not Resulting In Charge	Charges Filed
03-04	219	760	10	73	4	37	233	871
04-05	210	695	20	94	7	42	237	831
05-06	135	584	25	128	15	53	175	765
06-07	170	593	11	85	13	55	194	733
07-08	212	492	27	96	14	48	253	636
TOTAL	**946**	**3,124**	**93**	**476**	**53**	**235**	**1,092**	**3,835**

Although the vast majority of inquiries result in charges that are signed and returned, a substantial number are not.

On average, then, the Division receives and investigates approximately 767 charges of discrimination each year.

Importantly, Table 3, and throughout this sunset report, numbers regarding charges of discrimination in advertising are omitted due to the fact that fewer than five such charges have been filed during the review period.

The number of charges filed by county can be found in Appendix A, on page 59.

Furthermore, the number of charges filed, by setting and basis, can be found in Appendix B, on page 61.

Importantly, each charge may allege multiple bases of discrimination. As a result, the numbers reported in Table 3 above do not equate to the numbers reported in the tables in Appendices A and B beginning on page 59.

Depending on the type of charge, the Division may share jurisdiction with either EEOC or HUD. In employment cases, the Division and EEOC have joint jurisdiction over all cases except those over which the Division has exclusive jurisdiction. These cases are limited to those that:

- Allege discrimination because of marriage to a co-worker, regardless of the size of the employer;
- Allege discrimination because of sexual orientation, regardless of the size of employer;
- Allege discrimination because of age by an employer with 19 or fewer employees;
- Allege discrimination because of an employee's status as a member of any protected class by any employer with fewer than 15 employees;
- Allege discrimination in housing based on marital status; and
- Allege discrimination in housing based on sexual orientation.

Additionally, EEOC has exclusive jurisdiction over those cases in which the Division and EEOC would ordinarily have joint jurisdiction, but which are not filed within the Division's jurisdictional time limit of six months, but which are filed within EEOC's jurisdictional time limit of 300 days.

Other examples of situations in which EEOC would have exclusive jurisdiction include, in very general terms, those that involve:

- Federal employees;
- Certain issues related to airlines;
- Religious organizations that receive public funds;
- Age claims where the charging party is older than 70 years; and
- Equal Pay Act claims.

The number of cases filed with EEOC, by basis and type of jurisdiction, can be found in Appendix C on page 62.

Once the Division receives the signed charge, it is deemed to have been filed. In those cases in which the Division and EEOC have joint jurisdiction, Division staff enters information regarding the charge into a computer database maintained by EEOC. Both EEOC and Division staff monitor the database and take steps to avoid having a charge filed by the same charging party at both the Division and EEOC.

With limited exceptions, under the terms of the Division's contract with EEOC, in those cases in which the two agencies have joint jurisdiction, the agency that takes the charge investigates it. In other words, if the charging party files with EEOC, EEOC will investigate the case. If the charging party files with the Division, the Division will investigate the case.

Table 4 illustrates, for the fiscal years indicated, the number and types of Colorado charges filed with and investigated by EEOC.

Table 4
Number of Colorado-Based Cases Investigated by EEOC

Type of Jurisdiction	FY 03-04	FY 04-05	FY 05-06	FY 06-07	FY 07-08	Total
Exclusive	422	716	1,770	1,779	1,920	**6,607**
Joint	102	103	79	86	48	**418**
Total	**524**	**819**	**1,849**	**1,865**	**1,968**	**7,025**

Importantly, the data reported in Table 4, like the data reported in Table 3, represent the number of cases investigated, not the number of allegations. Each case may allege discrimination on multiple bases. Data related to the bases of discrimination may be found in Appendices A, B and C beginning on page 59.

The data in Tables 3 and 4 reveal a number of interesting facts. First, EEOC continues to investigate a substantial number of charges over which it has exclusive jurisdiction. During the five-year period reported here, EEOC investigated 6,607 cases in Colorado over which it had exclusive jurisdiction.

Perhaps more importantly, during the five-year period reported, EEOC investigated 418 cases in which it had joint jurisdiction with the Division. This is important, because when added with the 3,835 cases investigated by the Division during the same period, several issues become apparent.

First, the vast majority of joint jurisdiction cases are filed with and investigated by the Division. Second, the two figures taken together reveal that during the five-year period under review, 4,253 joint jurisdiction cases were investigated by the two agencies.

More telling, however, is the fact that 10,860 Colorado cases were investigated by the two agencies in just five years. Combined with the data in Appendices A. B, and C, it becomes apparent that discrimination continues to be an issue in the state.

The computer database maintained by EEOC allows EEOC to monitor the Division's cases so that payment can be made to the Division under the terms of the contract, and to ensure that charging parties do not file their respective charges with both agencies.

For this later reason, both EEOC and the Division send the charging party in each case a letter stating that in filing with either agency, the charge is deemed to have been dually filed with the other agency.

In those cases that involve housing, the Intake unit enters information regarding the charge into a computer database maintained by HUD. Importantly, HUD typically does not investigate cases of housing discrimination in Colorado under the Fair Housing Act. All such cases are investigated by the Division.

Regardless of the type of charge, once the Division receives the signed charge, the charge is served on the respondent and the case is assigned to an investigator. In general, the respondent has 30 days within which to respond to the charge.

The Division's Alternative Dispute Resolution unit then offers mediation to both parties. This is an entirely voluntary process, and both parties must agree to it. Table 5 illustrates, for fiscal years 06-07 and 07-08, the number of mediations conducted and the results thereof.

Table 5
Mediations

Fiscal Year	Number of Mediations Held	Number of Mediations Settling a Charge	Percent of Mediations Settling a Charge	Total Value of All Mediated Settlements	Average Value of Mediated Settlements
06-07	75	55	73.33	$392,530	$7,137
07-08	77	46	59.74	$1,025,527	$22,294

This mediation process was implemented during fiscal year 06-07. As a result, data for mediations conducted prior to fiscal year 06-07 are not available. Additionally, this helps to explain the drastic increase in monetary values from one year to the next, as Division staff became more comfortable and effective at mediating settlements.

Additionally, due to recordkeeping practices, the data for fiscal year 07-08 are more reliable than those for fiscal year 06-07. The data reported for fiscal year 07-08 are based on actual records, whereas the data reported for fiscal year 06-07 are based on the memory of Division staff.

Regardless, the data that are available demonstrate the success of this mediation process in resolving charges of discrimination early, before the Division has invested its limited resources in investigating such charges.

If the respondent fails to submit a response to the charge within 30 days, or within 21 days if the parties went to mediation and it failed, the Division will issue a demand letter that informs the respondent that the Division will either issue a subpoena or issue a letter of determination based on the charging party's allegations alone. Additionally, the Division's investigator may call the respondent to see if there are some extenuating circumstances that would warrant giving the respondent additional time.

Once the respondent's position statement is received, the charging party has 30 days to rebut it. Upon receipt of the rebuttal, the investigator determines whether additional investigation is necessary. Such an investigation could include, but is not limited to:

- Production of documents;
- Identifying and interviewing witnesses; and
- On-site visits.

At anytime during this process, the Director can subpoena documents and witnesses, so long as the charge of discrimination pertains to housing or employment. Table 6 illustrates, for the fiscal years indicated, the number of subpoena's issued and the types of cases for which they were issued.

Table 6
Subpoenas

Fiscal Year	Number of Subpoenas Issued		
	Employment	Housing	Total
03-04	0	2	2
04-05	2	0	2
05-06	3	0	3
06-07	1	0	1
07-08	2	3	5

Given the number of charges filed with the Division each year, it is clear that the Director has used the subpoena power sparingly. This is both a positive reflection on Division staff, in that it is able to obtain necessary information without resorting to issuing a subpoena, as well as of respondents, who clearly provide requested information far more often than not.

Once the investigation is complete, the investigator drafts the letter of determination for review by, and signature of, the Director. The letter of determination notifies the parties as to the Division's findings in the case, which become the Director's findings, and whether there is probable cause.

Table 7 illustrates, for the fiscal years indicated, the number and types of cases in which the Director found probable cause.

Table 7
Probable Cause Findings

		Probable Cause	No Probable Cause
FY 03-04	Employment	21	433
	Housing	5	49
	Public Accommodations	1	28
	Total	27	510
FY 04-05	Employment	38	635
	Housing	5	114
	Public Accommodations	2	23
	Total	45	772
FY 05-06	Employment	52	439
	Housing	2	84
	Public Accommodations	1	25
	Total	55	548
FY 06-07	Employment	49	322
	Housing	9	70
	Public Accommodations	2	38
	Total	60	430
FY 07-08	Employment	12	129
	Housing	5	100
	Public Accommodations	3	19
	Total	20	248

If there is no probable cause, the letter of determination includes a notice that the charging party may appeal the decision to the Commission, or if it is an employment case, to EEOC. This appeal must be filed within 10 days, and may include any new information that was not presented to the Division during the investigation, as well as an explanation as to why the charging party believes the finding of no probable cause was made in error.

If the appeal is to EEOC, EEOC conducts a “substantial weight review” of the case. If EEOC finds that the Director was in error in finding no probable cause, the EEOC can then conduct its own investigation. Data regarding the number of Division-investigated cases in which EEOC has conducted such a review are not available.

If the appeal is to the Commission, the members review the case file and it can uphold the Director’s finding of no probable cause, overturn the Director and issue a probable cause finding, or it may send the case back to the Division for further investigation.

Table 8 illustrates, for fiscal years 04-05 through 07-08, the number of such appeals reviewed by the Commission and the number of instances in which the Commission reversed the Director's finding of no probable cause.

Table 8
Appeals to the Commission and the Results

Fiscal Year	Number of Cases Appealed to the Commission	Number of Reversals
04-05	63	1
05-06	94	0
06-07	80	2
07-08	95	1
Total	**332**	**4**

Clearly, in the vast majority of cases, the Commission upholds the Director's findings.

In the case of a probable cause finding, the process that comes next depends, in part, on the nature of the case. Employment and public accommodations cases follow one path, and housing cases follow another path.

Regardless of whether the case is an employment case, a housing case or a public accommodations case, if the Director finds probable cause, the Division's Alternative Dispute Resolution unit schedules a mandatory conciliation conference to try to resolve the matter. If the conciliation is successful, the charging party withdraws the complaint and waives his or her right to pursue any further legal action and the Division closes the case.

Table 9 illustrates, for the fiscal years indicated, the number of conciliations held, the success rate and the monetary results of those conciliations.

Table 9
Conciliations

Fiscal Year	Number of Conciliations Held	Number of Conciliations Settling a Charge	Percent of Conciliations Settling a Charge	Total Value of all Conciliated Settlements	Average Value of Conciliated Settlements
06-07	60	26	43.33	$398,710	$15,335
07-08	54	13	24.07	$311,118	$23,932

As with the mediations offered on the front end of the process, data regarding conciliations conducted prior to fiscal year 06-07 are not available. Additionally, due to recordkeeping practices, the data for fiscal year 07-08 are more reliable than those for fiscal year 06-07. The data reported for fiscal year 07-08 are based on actual records, whereas the data reported for fiscal year 06-07 are based on the memory of Division staff.

If conciliation is unsuccessful in an employment or public accommodations case, Division staff convenes an informal review panel consisting of several investigators who did not investigate the case. One investigator advocates the position of the charging party and one advocates the position of the respondent to a panel of five other investigators. The panel then discusses the merits of the case and recommends to the Director whether the Director should recommend to the Commission that the case should be set for hearing.

Unlike in housing cases, where the Commission must set the case for hearing if there is a probable cause finding, in employment and public accommodations cases, the Commission has discretion as to whether to set the case for hearing.

If the case is not set for hearing, the Director issues a "right to sue" letter to the charging party and the case is closed. The "right to sue" letter represents an exhaustion of administrative remedies and enables the charging party to file a civil suit in any court of competent jurisdiction.

If the Commission elects to set the case for hearing, it is formally referred to the Attorney General's Office (AGO) and the case is heard by an administrative law judge in the Office of Administrative Courts in accordance with the Administrative Procedure Act.

Between January 1, 2007 and June 30, 2008, the Commission set a total of 25 cases for hearing: 19 employment cases and 6 housing cases.

Regardless of whether the Director finds probable cause, once the letter of determination is issued, the charging party may request from the Division a "right to sue" letter. If the Director found probable cause, the Commission elected to set the case for hearing, and the charging party requests a "right to sue" letter, the Commission will terminate its efforts to take the case to hearing.

The charging party may request the "right to sue" letter at any time 180 days after the charge is filed. Prior to issuing the letter of determination, the Director has discretion as to whether to issue the "right to sue" letter, but after the letter of determination is issued, the Director must issue the "right to sue" letter upon request, so long as the Division still has jurisdiction over the case.

Table 10 illustrates the number of "right to sue" letters issued by the Division during the years indicated.

Table 10
Right to Sue Letters

Type of Action	FY 03-04	FY 04-05	FY 05-06	FY 06-07	FY 07-08
Early Right to Sue	6	26	1	2	1
Right to Sue	8	71	28	30	40

As these figures indicate, remarkably few "right to sue" letters are issued, relative to the overall number of charges filed. This seems to indicate that charging parties prefer the Division to investigate their charges rather than proceeding directly to court. This makes sense since the charging party must bear the total cost of litigation.

Division jurisdiction, in general, expires 270 days after the charge is filed. Each party is entitled to extensions up to 90 days, so that the Division may retain jurisdiction for up to 450 days. Final agency action, whether it be a no probable cause finding or setting the case for hearing, must occur within these jurisdictional time limits.

Table 11 illustrates, for the fiscal years indicated, the percentage of cases closed by the Division within the 270-day jurisdictional time limitation, as well as the percentage of cases that took longer than 270 days to close.

Table 11
Case Closure Information

Fiscal Year	Percentage of Cases Closed within 270 Days	Percentage of Cases Closed after 270 Days
03-04	41.9	58.1
04-05	39.2	60.8
05-06	49.0	51.0
06-07	49.1	50.9
07-08	79.1	20.9
Five Year Average	51.7	48.3

On average, then, for the period indicated, the Division closes approximately half of its cases within the jurisdictional 270-day time limitation. Division staff attributes the improvement in fiscal year 07-08 to increased staffing levels, the quality of staff recently hired and more effective management.

If a case cannot be closed within the 270-day jurisdictional time limitation, an extension of time must be obtained. Table 12 illustrates, for the fiscal years indicated, the number of cases in which motions for extensions of time (METs) were granted, as well as the number of cases in which the Division failed to take final agency action before losing jurisdiction.

Table 12
Timeliness

Fiscal Year	Number of Motions for Extension of Time Granted	Number of Cases in Which Division Jurisdiction was Lost
03-04	Not Available	2
04-05	192	6
05-06	669	1
06-07	516	2
07-08	326	1

Although METs are technically made by the parties to the case, in practice, it is Division staff that typically approaches either party with a request to file a MET. This is often done when time is running short and further investigation remains to be done. As a result, it is not surprising to see a correlation between a high number of METs and a low number of cases in which jurisdiction is lost. However, substantially fewer METs were granted in fiscal year 07-08.

Unfortunately, reliable data regarding the average amount of time it takes to completely investigate and close a case are not available.

In employment cases that are dually filed with EEOC, EEOC staff reviews a random sample of 10 percent of the cases closed by the Division each month. The EEOC can deny payment if they determine that the Division's investigation was in any way inadequate or that the Director's finding was not supported by the facts.

In housing cases, once final agency action has been taken, Division staff sends the case file to HUD for review and eventual payment under the terms of the Division's contract with HUD. Although HUD reviews all of the Division's cases, and can deny full payment if HUD finds that the Division's investigation was in any way inadequate or that the Director's findings were not supported by the facts, HUD cannot overturn the Division's final disposition of the case.

Rather, HUD can "reactivate" the case and direct the Division to conduct further investigation or conduct the investigation themselves. Table 13 illustrates, for the fiscal years indicated, the number of cases reactivated by HUD.

Table 13
HUD Reactivations

Fiscal Year	Number of Cases Closed by CCRD and Reactivated by HUD
02-03	19
03-04	11
04-05	3
05-06	0
06-07	3
07-08	0

Remedies

According to Division staff, as well as others interviewed during the course of this sunset review, most charging parties file charges of discrimination to seek redress, to ensure that others do not suffer similar fates, or both. As a result, it is reasonable to include a brief discussion as to the financial remedies that are available to those who have been found to be the victims of discrimination.

Regardless of whether the Commission sets a case for hearing before an administrative law judge, or whether the charging party proceeds to the court system, the following remedies are available under Colorado law for the setting indicated:

- Employment – actual damages, including back pay, benefits and other tangible benefits, from the time of the discriminatory conduct until entry of judgment;
- Housing – actual damages, which may include the cost of comparable housing, moving expenses, reimbursement for longer commutes, etc.; punitive damages (There is no cap on the amount of punitive damages that may be awarded.); specific performance; injunctive relief; civil penalties; and attorney fees and costs;
- Public Accommodations – civil penalty of between $50 and $500; and
- Advertising – criminal fine of between $100 and $500.

Trainings

The Division's Outreach and Education unit provides trainings to members of protected classes, as well as to those who are in a position to discriminate.

Trainings provided to protected classes often include presentations as to what rights individuals have under Colorado's anti-discrimination laws and how to file charges with the Division.

Trainings provided to those who are in a position to discriminate, such as employers, housing providers and owners/operators of places of public accommodation, include presentations as to the rights and responsibilities of such entities.

These trainings may be purely voluntary, or they may come as the result of a settlement agreement.

Table 14 illustrates, for the fiscal years indicated, the number and types of trainings offered.

Table 14
Trainings

Fiscal Year	Voluntary Trainings	Trainings Provided as Part of a Settlement	Total Number of Trainings Provided
04-05	16	1	17
05-06	37	2	39
06-07	22	2	24
07-08	28	2	30

Data are not available for years prior to fiscal year 04-05. As these data demonstrate, though, most trainings are voluntary. Additionally, trainings are rarely part of a settlement agreement.

Discriminatory Predatory Lending

In July 2007, HUD issued a request for proposals for studies that would explore any connection between discrimination and predatory lending practices. The Division applied for and received one of four such grants. The other three states receiving similar grants were Massachusetts, Ohio and Pennsylvania.

The grant provided the Division with $299,600 to conduct research, outreach and education, and enforcement.

To conduct the research, the Division contracted with BBC Research to collect and analyze Home Mortgage Disclosure Act (HMDA) data. HMDA requires financial institutions to maintain and disclose data on loan applications for home purchases, home improvement loans and refinances. The data required by HMDA includes:[121]

- County in which the property is located;
- Metropolitan statistical area in which the property is located;
- Loan type;
- Property type;
- Loan purpose;
- Ethnicity of the borrower;
- Race of the borrower;
- Sex of the borrower; and
- Reason why a loan was denied

Noticeably missing from this data are the credit scores and income-to-debt ratios of borrowers**,** which are not publicly available data. To address this gap in data, the Division contracted with the University of Colorado Denver to conduct a series of surveys.

The preliminary research findings were released in February 2008, and the final report is scheduled for release by the end of March 2009. Preliminary data indicates that Latino and African American citizens are 2.5 times more likely to receive a high interest rate loan than Anglo citizens. The data are striking and suggest further investigation is warranted to explain the differences.

To conduct the outreach and education required by the grant, the Division contracted with four community-based partners:

- The Latin American Research and Services Agency (LARASA) to assist in outreach to the Hispanic community;
- The Financial Empowerment Economic Transformation (FEET) Center to assist in outreach to the African American community;
- The City of Longmont to assist in outreach to northern Colorado; and
- The Pueblo Human Relations Commission to assist in outreach to southern Colorado.

Each of these partners is expected to host between four and six community meetings by the end of December 2008, at which information will be disseminated to help consumers avoid predatory lending and to determine whether they may have been the victim of discriminatory predatory lending and if so, how to contact the appropriate state agencies, including the Division and the Colorado Division of Real Estate.

[121] BBC Research and Consulting, "Discriminatory Predatory Lending in Colorado: An Analysis of Mortgage Lending," Draft Report, February 29, 2008, Appendix A, p. 2.

To conduct the enforcement required by the grant, the Division anticipates contracting with the National Community Reinvestment Coalition, a non-profit fair housing advocate, to engage in testing efforts throughout the state. Such testing would include sending individuals from different protected classes, with identical financial numbers, to lenders to determine the types of loan products they are offered.

Analysis and Recommendations

Recommendation 1 - Continue the Colorado Civil Rights Commission for nine years, until 2018.

The first sunset criterion asks two questions that are particularly relevant to a discussion of whether to continue the Colorado Civil Rights Commission (Commission):

- Is the agency necessary to protect the public health, safety and welfare?
- Have the conditions that led to the initial creation of the agency changed?

In order to answer the first of these questions, it is necessary to examine what the Commission does, on an on-going basis, as well as the Commission's various issue-specific activities.

The Commission acts as an appellate body for decisions issued by the director of the Colorado Civil Rights Division (Division). Recall that the director of the Division (Director) issues a letter of determination with respect to each charge of discrimination investigated by the Division. This letter documents the Division's findings and determines whether there is probable cause to believe that discrimination occurred.

According to the data reported in Table 8 on page 31, the Commission reviewed 332 appeals between fiscal years 04-05 and 07-08. In 328 of those cases, the Commission upheld the Director's determination, but in four cases, the Commission reversed the Director's determination and found that probable cause existed. Since the Commission reversed at least a few of the Director's determinations, it is clear that the Commission, as an appellate body, remains necessary to protect the civil rights of charging parties, and the public welfare in general.

In addition to reviewing letters of determination on appeal, the Commission is also charged with determining whether to set for hearing those cases in which probable cause has been found.

Between January 1, 2007, and June 30, 2008, the Commission set a total of 25 cases for hearing: 19 employment cases and 6 housing cases.

Based on these statistics of statutorily required duties, it is reasonable to conclude that the Commission is still necessary to protect the public welfare. Indeed, this sentiment was echoed throughout the sunset review process, during which a representative of the Department of Regulatory Agencies (DORA) met with or spoke with over 100 interested parties and stakeholders. Representatives of, and advocates for, the various protected classes, as well as those in a position to discriminate, i.e., employers, housing providers and owners and operators of places of public accommodation, almost unanimously advocated for the continuation of the Commission, as well as the Division.

The process administered by the Commission and the Division is one that serves the public interest by allowing those who believe they have been discriminated against to have an independent third party conduct an investigation and make a determination as to whether discrimination occurred, all outside of the court system. This system grants to such individuals, a low cost, easily accessible system to redress their grievances.

Similarly, respondents, too, benefit from this system in terms of reduced legal expenses and expeditious resolution of charges.

In addition, the Commission has engaged in a variety of education and outreach efforts. Between July 2004 and May 2007, the Commission held seven public meetings at various locations around the state. These include one each in Pueblo, Fort Morgan and Longmont, and two each in Cortez and Greeley.

Such meetings facilitate greater communication and larger conversations between the Commission and the Division on the one hand, and the community at large on the other hand. Members of the public can air their general grievances about particular issues in their communities, and the Commission can process these issues and draw upon them in the development of polices for state-wide application.

The Commission has also inserted itself into at least two major controversies in recent years. In September 2005, the Commission held several meetings in Cortez, following a number of issues that arose in that community.

Partially as a result of the Commission's involvement, various grass roots organizations have had recent success in establishing local human relations commissions to address community-based discrimination issues at the local level.

Additionally, in 2001 and 2002, the Commission commissioned a report to investigate concerns about achievement gaps and access to advanced educational programs in Denver Public Schools. The resulting report contained 12 recommendations, termed "The Denver Dozen."

Although Commission follow-through on this has been lacking, the Commission recently expressed interest in contacting Denver Public Schools to inquire as to the status of these issues.

Since the Commission continues to review appeals, set cases for hearing and engage in education and outreach efforts, it is reasonable to conclude that the Commission should be continued.

Further evidence in favor of continuing the Commission can be discovered upon exploration of the second clause of the first sunset criterion: have conditions changed since the creation of the agency? With respect to the Commission, it is reasonable to rephrase this question to ask whether discrimination continues to exist in 21st century Colorado.

Unfortunately, discrimination, in its many forms, remains. According to a survey commissioned by the Division in 2003, 17 percent of Colorado's minority population, and 13 percent of its general population, reported having experienced some form of housing discrimination in the past.[122] While this report was confined to housing, it is telling and indicative of the fact that discrimination continues to be an issue in the state.

More telling, however, is the number of charges of discrimination filed by Colorado residents. Between fiscal years 03-04 and 07-08, 3,835 charges were filed with the Division and 7,025 cases were filed with the U.S. Equal Employment Opportunity Commission (EEOC), for a combined total of 10,860 cases. These figures do not include the number of cases filed with a multitude of federal agencies, many of which have their own offices of civil rights enforcement. These include, but are by no means limited to, the U.S. Department of Education, the U.S. Department of Transportation and the U.S. Department of Labor.

While many of these cases are ultimately dismissed for lacking probable cause, the numbers are enlightening because a large number of people at least suspect that they have been discriminated against, and feel strongly enough to actually file a charge of discrimination.

As Colorado's population grows and becomes increasingly diverse, it is only reasonable to conclude that the face of discrimination will also change.

As these few examples illustrate, discrimination in Colorado continues to exist and continues to evolve. Whereas discrimination was once blatant, it now tends to be more subtle. Whereas the classes of individuals protected by civil rights law were once relatively few, they are now numerous.

As Colorado continues to grow, it is reasonable to conclude that its population will become increasingly diverse. Diversity can breed fear, which tends to breed discrimination.

For all of these reasons, the General Assembly should continue the Commission for nine years, until 2018.

[122] *Colorado Fair Housing Survey: Final Report*, BBC Research & Consulting (2003), Section V, p. 1.

Recommendation 2 - Continue the Division for nine years, until 2018.

Although many of the points raised in favor of continuing the Commission are equally applicable to the continuation of the Division, the Division merits continuation on several independent grounds.

The Division is, first and foremost, the investigatory arm of the Commission. Without it, the Commission would have no appeals to review, no cases to set for hearing, and no staff to assist in its education, outreach and enforcement efforts.

Therefore, if the Commission is to be continued, the Division, too, must be continued.

As an enforcement and investigatory agency, the Division merits continuation. Between fiscal years 06-07 and 07-08, the Division investigated 1,369 cases. Of these, Division staff mediated or conciliated 140 settlements, found no probable cause in 678 cases, and found probable cause in 80 cases. In total, the Division potentially prevented the filing of 771 law suits, and may have assisted 215 victims of discrimination obtain redress.

This represents a savings to charging parties and respondents in terms of legal expenses and expeditious resolution of disputes, as well as the state's court system in terms of avoided lawsuits.

On the other hand, it is highly unlikely that every charging party who filed a charge with the Division would have filed a civil suit. For many such individuals, the legal system is inaccessible because they simply cannot afford the requisite legal services. The administrative process afforded by the Division and the Commission provide an inexpensive avenue for redress.

Similarly, respondents benefit from the administrative process because it is generally less expensive than a full-blown civil suit and resolves disputes within a year, whereas the court system often takes several years to resolve such issues.

All of this makes it clear that Coloradans benefit from the Division, and the Commission, but are they necessary? This is a particularly salient question since at least two federal agencies, the U.S. Department of Housing and Urban Development (HUD) and EEOC, have mandates that significantly overlap with those of the Division and the Commission.

Without question, if the Commission and the Division were to sunset, HUD and EEOC would step in to partially fill the void. The real question, then, becomes the quality of the protection that these federal agencies could provide to Coloradans.

Since HUD does not actually investigate any Colorado-based cases, it is impossible to predict the impact on housing discrimination cases in this scenario. However, during the course of this sunset review, a representative of DORA met with representatives of HUD who indicated that it would likely take the agency quite some time to properly staff for such an eventuality. As a result, a significant backlog of cases would be anticipated.

EEOC does investigate Colorado-based cases. However, EEOC has unlimited time frames to complete an investigation. Interviews conducted as part of this sunset review reveal that stakeholders perceive pros and cons of both the Division and EEOC. Advantages of the Division include local knowledge, local focus, rapid resolution of cases, and willingness to set a case for hearing, even if the case is low profile.

In the end, then, the real question is whether the State of Colorado finds value in protecting its denizens from discrimination. In originally creating the Division and the Commission, and in repeatedly continuing them, the General Assembly has found that such an effort is desirable.

For all of these reasons, the Division should be continued for nine years, until 2018.

Recommendation 3 – Continue the Director's subpoena powers in employment cases, expand such power to include all settings of discrimination, and repeal the separate sunset review provision for employment cases.

In cases alleging employment or housing discrimination,

> the director may subpoena witnesses and compel the testimony of witnesses and the production of books, papers and records, if the testimony, books, papers, and records sought are limited to matters directly related to the charge.[123]

However, the Director's subpoena powers in cases of employment discrimination are specifically scheduled to repeal on July 1, 2009, but this power as it relates to housing cases is not scheduled for independent repeal. Similarly, the General Assembly has directed DORA to specifically examine the subpoena power with respect to employment cases, not housing cases, in this sunset review.[124]

First, then, the Director's subpoena power should be continued. The Director has exercised this power only five times between fiscal years 03-04 and 07-08. Although some may argue that this power has been used too sparingly, it is also indicative of a power that has not been abused.

Respondents are notified of the Director's subpoena power in the initial correspondence they receive from the Division. As a result, it is logical to conclude that the prospect of a subpoena is sufficient motivation to voluntarily comply with the Division's requests for information.

[123] § 24-34-306(2)(a), C.R.S.
[124] § 24-34-306(2)(c), C.R.S.

Additionally, it is exceedingly common for state agencies to have the authority to issue subpoenas if respondents are not forthcoming with information. At least 26 state programs authorize the administering agency to issue subpoenas. A small sampling of such programs includes the Commissioner of Insurance,[125] the Commissioner of Financial Services,[126] the Director of the Division of Registrations,[127] the Commissioner of Agriculture,[128] and at least 14 professional and occupational regulatory boards,[129] including the Board of Medical Examiners[130] and the Board of Nursing.[131] Subpoena power is common because the refusal to comply with administrative demands delays, and potentially derails, the administrative process.

Therefore, the Director's subpoena power should be continued. In fact, it should be expanded to include all areas that fall within the Division's jurisdiction.

Additionally, this is the third time the Director's subpoena power in employment cases has specifically been the subject of a sunset review. On each of the previous two occasions, the power was continued.

Since this sunset review, too, recommends continuation of the power, it is logical to question the value of continuously reviewing this single power independent of the Division as whole. Indeed, this issue was not at all controversial during the course of this sunset review, and, as a result, received relatively little attention.

To schedule future reviews of this single power seems an inefficient use of state resources. Therefore, the subpoena power should be continued, and the legislative directive that it be reviewed independent of the Division should be repealed.

Any future sunset review of the Division will include a review of the subpoena power, as was the case in this sunset review with respect to the Director's subpoena power in housing and employment cases.

[125] § 10-1-204(3), C.R.S.
[126] § 11-30-106(6), C.R.S.
[127] The Director of the Division of Registrations has subpoena powers under the statutes that regulate at least six occupations and professions, including Audiologists (§ 12-5.5-106(3), C.R.S.), Barbers and Cosmetologists (§ 12-8-108(1)(f)(II), C.R.S.), Boxing (§ 12-10-107.1(3), C.R.S.), Acupuncturists (§ 12-29.5-106(3), C.R.S.), Lay Midwives (§ 12-37-107(6), C.R.S.), and Physical Therapists (§ 12-41-117(5), C.R.S.).
[128] The Commissioner of Agriculture has subpoena powers under the statutes that regulate at least two industries, including farm products (§ 12-16-107(3)(c), C.R.S.) and commodity warehouses (§ 12-16-215(3), C.R.S.).
[129] These boards include the Banking Board (§ 11-102-202(1), C.R.S.); Board of Accountancy (§ 12-2-125(4), C.R.S.); Motor Vehicle Dealer Board (§ 12-6-104(3)(f)(I), C.R.S.); Collection Agency Board (§ 12-14-130(7), C.R.S.); Board of Pharmacy (§ 12-22-110(1)(i)(II)(A), C.R.S.); Electrical Board (§ 12-23-104(2)(d), C.R.S.); Board of Licensure for Architects, Professional Engineers and Professional Land Surveyors (§§ 12-25-109(7), 12-25-209(7) and 12-25-309(3), C.R.S.); Podiatry Board (§ 12-32-104(1)(d)(II), C.R.S.); Board of Chiropractic Examiners (§ 12-33-119(7), C.R.S.); Board of Dental Examiners (§ 12-35-109(1), C.R.S.); Board of Examiners of Nursing Home Administrators (§ 12-39-105(1)(b), C.R.S.); and Board of Optometric Examiners (§ 12-40-107(1)(m), C.R.S.).
[130] § 12-36-104(1)(b)(II), C.R.S.
[131] § 12-38-116.5(13), C.R.S.

Since subpoena power is a vital component of administrative enforcement, the General Assembly should continue the power with respect to employment cases and expand it to encompass all areas that fall within the Division's jurisdiction. Since the subpoena power will be reviewed as a part of any future sunset review of the Division and since the subpoena power with respect to housing is not subject to repeal and individual sunset review, the General Assembly should repeal the sunset clause on the Director's subpoena power.

Recommendation 4 – Authorize the Commission to initiate complaints on its own motion.

Section 24-34-306(1), Colorado Revised Statutes (C.R.S.), provides,

> Any person claiming to be aggrieved by a discriminatory or unfair practice . . . may . . . sign, and file with the Commission a verified written charge… which shall state the name and address of the respondent alleged to have committed the discriminatory or unfair practice and which shall set forth the particulars thereof and contain such other information as may be required by the Commission. *The Commission, a commissioner, or the Attorney General may in like manner make, sign, and file such charge.* (emphasis added)

A plain reading of this statutory provision would seem to indicate that the Commission as a whole, or an individual member of the Commission, is able to file a charge of discrimination to initiate the Division's investigatory process.

However, the Colorado Supreme Court has interpreted this statutory provision narrowly, finding that references to "such" and "in like manner" limit any such Commission-initiated complaint to those instances in which a specific person or persons have been aggrieved by the alleged discriminatory practices charged.[132]

The Court was not unanimous in its holding. The dissent found that,

> Surely, if the legislature had intended the narrow interpretation adopted by the majority, the sentence in question would have read, "The commission, a commissioner, or the attorney general may in like manner make, sign and file such complaint *on behalf of a named aggrieved person.*" [ ] Where an employer has regularly discriminated against an entire sex or ethnic group, the discrimination may be of the most obvious and invidious kind, yet there may be no identifiable "aggrieved person" since, for obvious reasons none has applied. Moreover, minority group members and women having difficulty finding employment understandably may be reluctant to be branded as litigious "troublemakers" by becoming named plaintiffs in discrimination cases.[133] (emphasis in original)

[132] *Sisneros v. Woodward Governor Co.*, 560 P.2d 97, 99 (Colo. 1977).
[133] *Sisneros* at 100.

Situations arise where there are not necessarily any identifiable victims, but where it is reasonably logical to question whether discrimination is occurring, or where the payoff for filing a charge is so low as to deter the filing of a charge. One such example is in the area of achievement gaps in Colorado's public schools.

2007 CSAP data demonstrate that there are achievement gaps across all races and all subjects in Colorado's schools.[134] This same data set illustrates race-based discrepancies in high school graduation rates, as well, where 82.5 percent of Asian and 80.8 percent of White students, but only 62.7 percent of African American, 56.9 percent of Native American and 56.7 percent of Hispanic students graduate from high school.[135]

While these statistics are alarming, and very clearly seem to indicate that something is going on, there is no specific, identifiable person to file a complaint with the Division. This is a larger, systemic issue that would seem to fall within the auspices of the Commission, yet the Commission is powerless to initiate a formal investigation.

Additionally, the Commission and the Division occupy a unique position in the state which enables them to identify patterns and issues that might not be readily apparent to the individuals impacted by such practices.

Granted, certain restrictions on Commission-initiated complaints are reasonable. Such restrictions should mandate this authority be limited to those cases that have greater societal or community impact, as opposed to circumstances of a relative few.

Similarly, the remedies available should be limited to equitable relief, since damages would be virtually impossible to calculate, and would not be the ultimate goal of the Commission. Rather, the goal of these types of cases should be to effect change, eliminate discrimination and improve the quality of life of all Coloradans, not to punish.

Importantly, this would not be an authority that is unique to the Commission. At least 21 other boards, commissions and regulatory agencies throughout state government can initiate complaints on their own motion. These include, but are not limited to, the Commissioner of Insurance;[136] the Banking Board;[137] the Board of Accountancy;[138] the Limited Gaming Control Commission;[139] the Private and Occupational School Board;[140] and the Racing Commission.[141]

[134] *No Child Left Behind: State Report Card 2006-2007*, Colorado Department of Education (2008), pp. 6 – 40.
[135] *2008 KidsCount in Colorado*, Colorado Children's Campaign (2008), p. 27.
[136] § 10-1-110(4), C.R.S.
[137] § 11-102-104(8), C.R.S.
[138] § 12-2-125(1)(a), C.R.S.
[139] § 12-47.1-302(1)(i), C.R.S.
[140] § 12-59-125(1), C.R.S.
[141] § 12-60-507(1), C.R.S.

Since it is reasonable to conclude that the General Assembly's original intent was for the Commission to initiate complaints on its own motion, and since the Colorado Supreme Court has limited that intent, the General Assembly should clarify that the Commission has the authority to file charges on its own motion in those cases that can reasonably be construed to have societal or community-wide impact and where the authorized remedy is solving the issue, rather than monetary damages.

Recommendation 5 – Authorize the Director to delegate to a member of the Division staff, the authority to sign letters of determination on behalf of the Division.

Section 24-34-306(2)(b), C.R.S., states, "The Director shall determine as promptly as possible whether probable cause exists for crediting the allegations of the charge, ..."

This has consistently been interpreted, by past and current Directors and past and current Attorneys General, to mean that only the Director can sign letters of determination, the vehicle by which the Director communicates whether there is probable cause or no probable cause.

Almost as consistently, past and current Directors have deemed it necessary to read each case file before signing such letters, rather than rely upon the competence of their staff, and more particularly, senior staff.

As a result, the Director spends an inordinate amount of time sifting through case files, investigatory reports and the letters of determination themselves.

A reasonable alteration would be to authorize the Director to delegate to a member of the Division's staff, the authority to sign the letters of determination. This would allow the Director more time to engage in larger policy issues, as well as education and outreach efforts.

At the same time, the Director, as the head of the Division and the staff under him or her, would retain ultimate responsibility for the letters of determination.

Additionally, the parties to a case would retain their rights to appeal any determination to the Commission, so no substantive rights would be abrogated by this change. If anything, letters of determination would likely issue a bit more quickly, since the Director would no longer serve as a choke point in the system.

Since the current practice of authorizing only the Director to sign letters of determination represents an inefficient use of the Director's time, the General Assembly should authorize the Director to delegate this authority to a member of the Division's staff.

Recommendation 6 – Clarify the roles and responsibilities of the Commission on the one hand, and the Division on the other hand.

Over the years, the state's anti-discrimination statutes have been amended and revised. Additionally, certain practices have evolved over time. As a result, some of the roles and responsibilities of the Division and the Commission *vis-à-vis* one another have become confused.

Examples of this include:

> Section 24-34-305(1)(b), C.R.S., authorizes the Commission to receive complaints, but it is the Division that actually receives complaints and drafts charges of discrimination;
>
> Section 24-34-306(1), C.R.S., outlines the process the Commission is to follow in receiving charges of discrimination, but, in practice, the Division performs these functions; and
>
> Section 24-34-306(15), C.R.S., authorizes the Commission to issue a right to sue letter prior to the 180th day after a complaint was filed, but, in practice, the Director makes this determination.

These are but a few examples of where the lines between the Commission and the Division have become blurred.

To help the Commission, the Division and, most importantly, the public at large, better understand which civil rights entity is responsible for which functions, the General Assembly should revise the state's anti-discrimination laws to reflect the actual procedural practices of these two entities:

- In general, the Division is responsible for everything up to and including the Director's issuance of the letter of determination, and in cases in which the Director finds probable cause, for the conciliation process as well.
- In general, the Commission is responsible for everything else, including reviewing cases on appeal, determining whether to set individual cases for hearing, etc.

Recommendation 7 – Repeal the requirement that charges of discrimination be filed with the Division in duplicate.

Section 24-34-306(1), C.R.S., requires charges to be filed with the Division in duplicate. In all likelihood, this requirement harkens back to the days of mimeograph machines and carbon paper, when making duplicates was more difficult. In today's modern world, where reproductive capabilities are ubiquitous and where charges could very well be filed electronically, this requirement has become anachronistic and should be repealed.

Recommendation 8 – Include in the definition of unfair and discriminatory employment practices adverse employment actions that impact a charging party's terms, conditions or privileges of employment.

Under section 24-34-402(1)(a), C.R.S., it is a discriminatory act for an employer to,

> refuse to hire, to discharge, to promote or demote, to harass during the course of employment, or to discriminate in matters of compensation . . . [based on an employee's status as a member of a protected class].

Colorado's courts have interpreted this to mean that in order to prove a case of discrimination, a charging party must show, among other things, that he or she "suffered an adverse employment decision, e.g., a demotion or discharge or a failure to hire or promote."[142]

In other words,

> The Act does not provide redress to an employee for discriminatory conduct that does not result in an employment-related decision affecting the employee's pay, status or tenure.[143]

Federal law, on the other hand, states that it is a discriminatory act for an employer to

> fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . .[144]

Key to the distinction between state and federal law is the inclusion in federal law of "terms, conditions or privileges of employment." These include decisions impacting an employee's work environment and non-tangible benefits. They are issues that do not impact the employee's pay, status or tenure, but they certainly impact the employee's conditions or privileges of employment.

Since such acts are just as discriminatory as those that impact pay, status and tenure, they should be included in Colorado law. Additionally, this would also further harmonize Colorado and federal law on this issue. Therefore, the General Assembly should amend the definition of employment discrimination to include decisions that impact an employee's terms, conditions or privileges of employment.

[142] *George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1197 (Colo. App. 1997).
[143] Brooke v. Restaurant Services, Inc., 906 P.2d 66, 68 (Colo. 1995).
[144] 42 U.S.C. § 2000e-2(a).

Recommendation 9 – Remove from Commission jurisdiction those cases involving employees who are terminated or suffer other adverse employment actions due to inquiring about salary.

In 2008, the General Assembly passed, and the Governor signed, Senate Bill 08-122, which made it a discriminatory and unfair employment practice for an employer to discharge, discipline, discriminate against, coerce, intimidate, threaten or interfere with an employee for inquiring about, disclosing, comparing or otherwise discussing the employee's wages.[145] This is regardless of the employee's status as a member in a protected class.

However, there are provisions in the anti-discrimination laws which are declared to be unfair and discriminatory practices, but over which the Commission and Division do not have jurisdiction. In these situations, the available remedies lie in a private cause of action.

The primary difference then, is one of Commission and Division jurisdiction. In no other area does the jurisdiction of Commission and the Division extend to cases that are not premised on the victim's membership in a protected class. Indeed, this has been the traditional foundation of most civil rights laws and procedures.

Because the role of the Commission has always been focused on elimination of discrimination against protected classes and that distinction was not included in Senate Bill 08-122, the General Assembly should amend the relevant statutory provisions such that victims of this type of unfair employment practice must seek redress, through the civil court system, not through the administrative process afforded by the Commission and the Division.

Recommendation 10 – Harmonize the conflicting definitions of discrimination with respect to public accommodations.

Section 24-34-601, C.R.S., defines place of public accommodation, and goes on to define what constitutes a discriminatory practice in such a place:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of a place of public accommodation or, directly or indirectly, to publish, circulate, issue, display, post, or mail any written, electronic, or printed communication, notice, or advertisement that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused, withheld from, or denied an individual or that an individual's patronage or

[145] § 24-34-402(1)(i), C.R.S.

> presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of disability, race, creed, color, sex, sexual orientation, marital status, national origin or ancestry.[146]

Importantly, section 24-34-601(2.5), C.R.S., also makes it a "discriminatory and unlawful for any person to discriminate against any individual or group because such person or group has opposed any practice made a discriminatory practice" under section 24-34-601, *et seq.*, C.R.S.

In short, section 24-34-601, C.R.S., makes it unlawful to discriminate in places of public accommodation and to retaliate against those who complain of unlawful discrimination.

However, section 24-34-602, C.R.S., outlines the circumstances under which a perpetrator of such discrimination may be required to pay a civil penalty. Rather than simply referencing section 24-34-601, C.R.S., and spelling out the applicable penalties, section 24-34-602, C.R.S., references section 24-34-601, C.R.S., but goes on to restate the circumstances under which a civil penalty may be imposed.

In short, section 24-34-602, C.R.S., allows the imposition of a civil penalty when a place of public accommodation has been found to have denied to any "citizen," based on his or her status as a member of a protected class,

> The full enjoyment of any of the accommodations, advantages, facilities, or privileges in [section 24-34-601, C.R.S.] or by aiding or inciting such denial . . .

This is problematic for two reasons. First, it allows the imposition of a civil penalty only when the victim of discrimination is a citizen. No other provision of the anti-discrimination laws is so limited; all other provisions apply to people, not citizens.

Second, it precludes the imposition of a civil penalty in cases involving retaliation. In the end, section 24-34-601, C.R.S., makes it unlawful to retaliate, but section 24-34-602, C.R.S., precludes any penalties for doing so.

For these reasons, the General Assembly should harmonize these two sections to allow for the imposition of a civil penalty in cases involving non-citizens and in those cases involving retaliation.

[146] § 24-34-601(2), C.R.S.

Administrative Recommendation 1 – Resume publishing annual reports, as required by statute.

The Commission is required to produce annual reports.[147] However, the Commission has not fulfilled this statutory duty since 2001. In fact, the individual members of the Commission, and most Division staff members, were unaware of the requirement until brought to their attention during the course of this sunset review.

As a result, it is logical to ask two questions:

1) Should this provision be repealed, since it has not been complied with and no one seems to have noticed?
2) Should the Commission resume publishing such reports?

Annual reports can tend to be published simply for the sake of publishing them, communicating little of real value.

However, given the Commission's mandate, and the broad spectrum of individuals and organizations that have a stake in what the Commission does, this would likely not be the case with an annual report produced by the Commission.

Indeed, during the course of this sunset review, many interested parties and stakeholders from around the state expressed a high level of interest in such a report. It could include the traditional statistics, many of which can be found throughout this sunset report. Examples include the number and types of charges filed, the value of mediated settlements, the county of origin for complaints and the number of cases in which probable cause is found.

Additionally, an annual report could include descriptions of the Commission's major accomplishments over the course of the year, recaps of education and outreach efforts and the like.

This would help the Commission and the Division engage in an annual self-examination to see where they have been and where they are going. Analyzing complaint-origination information could help the Division and the Commission more precisely target education and outreach efforts.

Furthermore, an annual report could prove to be a valuable outreach tool to the various, community-based human relations commissions and others across the state. Based on anecdotal evidence, these important stakeholders, and potential partners, feel alone and isolated and are, generally, unaware of the Commission's and the Division's activities.

Additionally, an annual report need not be expensive. It could be posted to the Division's website, emailed to interested parties, or both. Physical printing of such reports should be kept to an absolute minimum.

[147] § 24-34-305(1)(f), C.R.S.

Since an annual report would be valuable to the community at large, as well as to the Division and the Commission, the production of annual reports should resume.

Administrative Recommendation 2 – Increase education and outreach efforts.

One of the general, non-specified duties of the Commission is to engage in education and outreach efforts. The focus of such efforts is two-fold: inform individuals of their rights and how to access the administrative system; and to prevent discrimination by informing those who are in a position to discriminate of their obligations and rights under the law. Both aspects of these efforts – enforcement and prevention – are integral to the Commission's mission of addressing discrimination in the state. While the Commission is presently conducting some education and outreach, an opportunity exists to significantly increase the Commission's effectiveness in this area.

But what does "education and outreach" look like? While there are many possibilities, some more efficient, and most likely effective, practices would entail the Commission partnering with existing organizations to present informational seminars.

For example, the Commission could partner with various grass roots, community and religious organizations to better inform Coloradans of their rights, how to file a complaint, and what is required to prevail in a case of discrimination.

Additionally, the Commission could partner with professional and industry associations, as well as chambers of commerce around the state, to present informational seminars to such organizations' membership to help increase their awareness of their legal rights, responsibilities and obligations.

It may seem odd to discuss the rights of such entities, but there is, generally, a great deal of confusion regarding what employers, housing providers and owners and operators of places of accommodations must tolerate and what they do not need to tolerate.

For example, in the housing setting, must a housing provider tolerate a mentally ill tenant who continuously threatens or disrupts other tenants?

Recall that, in the employment setting at least, the Commission's exclusive jurisdiction includes small businesses. In many instances, small business owners know their respective businesses, but not necessarily the multitude of laws with which they must comply.

Granted, ignorance of such laws is not an excuse for noncompliance, but given the Commission's larger mission on addressing discrimination in Colorado, it seems reasonable to conclude that efforts to educate small businesses on their obligations under the state's anti-discrimination laws could go a long way in preventing discrimination from occurring in the first place.

Partnerships with such organizations could provide many benefits. First, partnerships represent an efficient way to reach a large number of interested parties because these types of organizations tend to have extensive networks.

Second, such partnerships would likely lend credibility to the Commission and the Division. Many groups tend to have an innate fear of government. Partnering with local, known organizations could help the Commission and the Division begin to break down these fears to better facilitate vital communications.

Finally, the Commission and the Division could learn quite a bit from interacting with these organizations and their members. These types of organizations tend to possess a considerable amount of knowledge and expertise about the communities they serve, knowledge and expertise that could be tapped by the Commission and the Division.

Increased attention should be focused on education and outreach for another important reason – to raise the Commission's and the Division's level of visibility.

During the course of this sunset review, DORA made an alarming discovery – many in the state are not even aware that the Commission and the Division exist.

During the course of this sunset review, a representative of DORA spoke with a former fair housing officer in Greeley, who had never heard of the Commission or the Division. In fact, the conversation was a bit comical for a short period since the fair housing officer associated references to "the Commission" with the Colorado Real Estate Commission. Regardless, when this individual learned of the Commission, he expressed regret at having missed opportunities to refer potential victims to the Commission and the Division.

Further, according to the survey commissioned by the Division in 2003, only 44 percent of Colorado's general population, and 36 percent of its minority population, had ever heard of the Division.[148] When asked to name an agency that investigates cases of housing discrimination, the Division received equal ranking with the Colorado Real Estate Commission and KUSA/Channel 9 in Denver, among others.[149]

People cannot file charges of discrimination, if they are not even aware that the Commission and Division exist to enforce their rights. People cannot work to assert their rights, outside of the enforcement context, if they do not know what those rights are. Similarly, those in a position to discriminate cannot take steps to prevent discrimination from occurring if they do not know what their obligations are.

Discrimination in Colorado continues. Increased education and outreach efforts, coupled with continued enforcement of existing law, could go a long way in reducing it substantially. As a result, the Commission should increase its education and outreach efforts.

[148] *Colorado Fair Housing Survey: Final Report*, BBC Research and Consulting (2003), section VI, p. 4.
[149] *Colorado Fair Housing Survey: Final Report*, BBC Research and Consulting (2003), section V, p. 5.

Administrative Recommendation 3 – Conduct a comprehensive overhaul of all Commission rules.

Many of the Commission's rules contain phrases such as "the Commission believes" or "the Commission finds."[150] As a result, many of these rules read more like policy statements, as opposed to rules.

Policy statements generally state altruistic principles and goals. Rules, on the other hand, should clearly and concisely convey what those required to comply with them are required to comply with.

Maximum compliance with rules necessitates the elimination of the element of guessing what a particular rule is trying to state. Rather, a rule should state simply and clearly, the expectation, for it is inherently unfair to punish someone for failing to comply with a vague, altruistic rule.

Rewriting all of the Commission's rules will likely be a time-consuming process, but one that is well worth the while. Likely, there are many rules that should be repromulgated as policy statements and still others that can be more succinctly stated.

The Commission should, therefore, immediately undertake the task of rewriting all of its rules.

Administrative Recommendation 4 – The Division should revise its intake process to focus on the acquisition of any evidence of a* prima facie *case at the time the charge is filed.

Section 24-34-306(1), C.R.S., reads, in pertinent part,

> Any person claiming to be aggrieved by a discriminatory or unfair practice . . . may . . . file with the Commission a verified written charge . . .

This language makes it clear that the General Assembly desired to make it easy for potential charging parties to file charges of discrimination. As a result, however, the Division must accept charges that have no merit, based on an initial reading of the facts. Examples of such cases include those in which there are no comparators, or, in the case of a disability claim, where the potential charging party cannot establish that he or she is disabled within the meaning of the law.

Regardless, Division staff must accept these charges and conduct an investigation, thereby expending resources that could otherwise be spent focusing on cases with greater merit. The fact that the vast majority of cases investigated by the Division result in findings of no probable cause is further evidence that something must be done to enable the Division to make better use of its resources.

[150] *See* Rule 50.3(B), Rule 70.1, Rule 80.2 and Rule 80.4.

While the Division should do nothing to discourage a potential charging party from filing a charge, the Division could, in those circumstances in which it is practicable, inform a potential charging party of the type of evidence that will be necessary to establish a *prima facie* case of discrimination. If the potential charging party can present such evidence immediately, or believes that such evidence can be obtained, then the charge could be filed and properly investigated. If not, then the potential charging party would still be free to decide whether to move forward.

This approach would not only conserve Division resources, it would spare potential charging parties the disappointment that can accompany a finding of no probable cause, and it can spare respondents from incurring legal expenses to defend baseless claims. Additionally, by having such evidence up front, investigations would likely run more smoothly and could potentially be resolved more expeditiously.

The Division should revise its intake process to focus on the acquisition of any evidence of a *prima facie* case at the time the charge is filed.

Administrative Recommendation 5 – Send all information submitted by a charging party in a case to the respondent in the case to facilitate a more thorough defense, thereby helping to reduce the amount of staff time needed to conduct any subsequent investigation.

The typical investigation begins with a potential charging party contacting the Division and Division staff drafting a charge of discrimination based on the evidence provided by the potential charging party. This evidence can be written or oral. The charge of discrimination that is drafted is typically general in nature, and does not include the specific facts leading to the allegation.

The charge of discrimination, but none of the supporting evidence, is then sent to the respondent, who is given a limited amount of time in which to respond. Since the charge of discrimination is fairly general in nature, it can be difficult to mount a meaningful defense.

Anecdotal evidence indicates that there is confusion among attorneys representing respondents as to whether the charging party's evidence in a particular case can be obtained from the Division. Division staff maintains that if the information is requested, it will be provided. Some defense attorneys, however, maintain that they cannot obtain the information, even upon request.

The more troubling aspect of this scenario is the fact that the charging party automatically receives a copy of the position statement and relevant documents, i.e., copies of reprimands, termination letters, etc., submitted by the respondent. In order to make the process as fair, and as efficient as possible, the respondent should likewise receive everything submitted by the charging party.

Providing both parties with all of the information submitted by the other party should help to make for a more efficient investigatory process, since less time will be spent defending vague claims and allegations and both parties can limit their submissions to those that address relevant points only.

To make the system more fair and expeditious, the Division should, as a matter of practice, send to both parties all of the information and evidence submitted by the other party to a case.

Administrative Recommendation 6 – Improve recordkeeping procedures.

Throughout this sunset review, obtaining certain, basic information from the Division was, at times, difficult. This was due to the simple fact that the Division has not, historically, tracked many of its operations. For example, the only way to determine the number of cases reviewed by the Commission on appeal, and the number of cases set for hearing by the Commission was to manually review the minutes of each Commission meeting.

Similarly, many complaint statistics for the period prior to fiscal year 03-04 were not available because the Division did not previously track this information. Data for the period commencing with fiscal year 03-04 were available only because the Division installed a computerized case management system at that time. While the statistics were not readily available, they were ultimately retrievable.

Additionally, the only way to determine the number of cases appealed to the Commission, as well as the number of Director findings reversed by the Commission, was to manually review the minutes from each Commission meeting. While it took an inordinate amount of time to establish this basic accountability measure, it also revealed the lack of attention to detail that previously went into the preparation of Commission minutes.

For example, the minutes for at least two Commission meetings in 2006 were duplicates of one another; all that had been changed were the dates. As a result, it is no longer possible to determine what occurred at those meetings.

Tracking such statistics is important for a state agency for several reasons. First, and perhaps most importantly, they provide a certain level of accountability. They inform policy-makers, and taxpayers, of what the agency is accomplishing.

Second, they can help the agency identify areas in which it may need to improve. For example, the data in Appendix A reveals that after the various regional offices were closed between fiscal years 02-03 and 03-04, the number of charges filed in the counties in which those offices had been located plummeted over the course of the subsequent two years, the lone exception being in Mesa County.

Such data could be used by the Division and the Commission to justify opening additional offices across the state, but without any statistical data to analyze, it is difficult to determine where those offices could have maximum impact.

Therefore, the Division should enhance its recordkeeping and tracking systems so that such data are more readily available to the public, policy-makers, the Commission and Division staff.

Appendix A – Charges of Discrimination, by County, Investigated by CCRD

County	Population of County[151]	FY 03-04	FY 04-05	FY 05-06	FY 06-07	FY 07-08	Total
Adams	363,857	304	224	255	221	165	1,169
Alamosa	14,996	4	7	16	23	11	61
Arapahoe	487,967	434	349	407	253	222	1,665
Archuleta	9,898	7	9	10	3	0	29
Baca	4,517	0	0	2	0	0	2
Bent	5,998	9	3	8	8	0	28
Boulder	291,288	265	139	203	101	96	804
Broomfield	N/A[152]	24	9	29	14	8	84
Chaffee	16,242	4	16	0	1	2	23
Cheyenne	2,231	0	0	0	0	0	0
Clear Creek	9,322	7	2	5	0	3	17
Conejos	8,400	1	1	2	0	1	5
Costilla	3,663	0	3	0	0	18	21
Crowley	5,518	7	0	0	1	0	8
Custer	3,503	0	0	0	0	0	0
Delta	27,834	34	21	29	9	5	98
Denver	554,636	1,018	835	852	627	599	3,931
Dolores	1,844	0	0	2	0	1	3
Douglas	175,766	98	59	94	86	62	399
Eagle	41,659	23	6	28	4	11	72
Elbert	19,872	6	5	2	12	2	27
El Paso	516,929	698	312	380	268	216	1,874
Fremont	46,145	76	44	28	19	34	201
Garfield	43,791	20	28	24	30	11	113
Gilpin	4,757	18	2	18	2	1	41
Grand	12,442	1	13	6	0	1	21
Gunnison	13,956	11	1	0	0	1	13
Hinsdale	790	0	0	0	0	0	0
Huerfano	7,862	14	3	9	0	5	31
Jackson	1,557	0	0	0	0	0	0
Jefferson	527,056	350	253	330	230	223	1,386
Kiowa	1,622	10	0	0	0	0	10
Kit Carson	8,011	0	0	0	0	1	1
Lake	7,812	2	5	6	0	2	15
La Plata	43,941	15	13	11	8	7	54
Larimer	251,494	265	150	191	98	86	790
Las Animas	15,207	21	41	18	12	9	101
Lincoln	6,087	14	5	8	1	0	28
Logan	20,504	27	9	6	13	13	68
Mesa	116,255	93	91	94	104	79	461
Mineral	831	4	0	0	0	5	9
Moffat	13,184	1	8	12	6	1	8

[151] "2000 Population by Race and Hispanic Origin: Colorado Counties – Total Population," Colorado Department of Local Affairs downloaded from www.dola.state.co.us/dlg/demog/population/race/colrace.pdf on May 21, 2008.
[152] Broomfield did not become a county until November 15, 2001. As a result, census data from 2000 is not available.

ty	Population of County[151]	FY 03-04	FY 04-05	FY 05-06	FY 06-07	FY 07-08	Total
Montezuma	23,830	2	1	9	16	12	40
Montrose	33,432	25	13	18	14	5	75
Morgan	27,171	29	21	15	8	8	81
Otero	20,311	18	16	11	15	0	60
Ouray	3,742	0	2	9	0	3	14
Park	14,523	3	3	6	2	4	18
Phillips	4,480	0	1	0	0	0	1
Pitkin	14,872	11	8	0	9	6	34
Prowers	14,483	23	4	16	7	10	60
Pueblo	141,472	315	126	224	99	71	835
Rio Blanco	5,986	0	1	1	0	1	3
Rio Grande	12,413	10	5	7	4	5	31
Routt	19,690	3	1	1	1	4	10
Saguache	5,917	5	0	1	4	0	10
San Juan	558	0	0	0	0	0	0
San Miguel	6,594	0	5	0	0	1	6
Sedgwick	2,747	0	0	0	0	0	0
Summit	23,548	9	21	19	11	6	66
Teller	20,555	16	8	32	28	14	98
Washington	4,926	0	4	0	0	0	4
Weld	180,936	264	157	137	193	124	875
Yuma	9,841	3	5	5	0	1	14
Unknown	Not Applicable	7	0	5	5	0	17

Source: Colorado Civil Rights Division

Appendix B – Charges of Discrimination, by Setting and Basis, Investigated by CCRD

BASIS	FY 03-04			FY 04-05			FY 05-06			FY 06-07			FY 07-08			TOTAL
	Employment	Housing	Public Accommodations	Employment	Housing	Public Accommodations	Employment	Housing	Public Accommodations	Employment	Housing	Public Accommodations	Employment	Housing	Public Accommodations	
Age (40-69)	151			210			151			152			110			774
Color	84	13	15	147	0	26	100	0	18	62	0	18	66	9	14	572
Creed/Religion	24	1	2	36	4	1	25	1	2	22	3	2	22	2	2	149
Disability	164	33	10	217	64	17	133	36	26	118	41	14	117	51	21	1,062
Familial Status[153]	N/A	10	N/A	N/A	8	N/A	N/A	7	N/A	N/A	8	N/A	N/A	8	N/A	41
Marriage to a Co-Worker[154]	5	N/A	N/A	8	N/A	N/A	7	N/A	N/A	7	N/A	N/A	7	N/A	N/A	34
Marital Status	5	4	0	0	3	0	0	1	1	2	0	1	0	2	1	20
National Origin/Ancestry	96	8	9	165	26	5	123	22	4	105	24	13	98	13	4	715
Race	103	25	19	184	39	28	123	30	21	94	17	22	101	34	19	859
Retaliation	174	8	3	237	11	7	173	5	9	181	7	12	155	5	10	997
Sex	195	7	2	305	9	2	219	4	2	218	3	14	180	9	8	1,177
Sex: Pregnancy	38		0	59		0	31		0	35		0	30		0	193
Sexual Orientation[155]	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	23	N/A	N/A	23
Other	32	2	1	12	0	0	2	0	0	2	1	0	0	0	0	52

Source: Colorado Civil Rights Division

[153] Familial status is not a protected class in employment or public accommodations settings, and, therefore, cannot serve as a basis upon which a charge of discrimination can be filed in these two settings.

[154] Marriage to a Co-Worker is not a protected class in housing or public accommodations settings and, therefore, cannot serve as a basis upon which a charge of discrimination can be filed in these two settings.

[155] Sexual Orientation was not added as protected class and, therefore, could not serve as a basis upon which a charge of discrimination could be filed, until fiscal year 07-08 for the employment setting, and fiscal year 08-09 for housing and public accommodations settings.

Appendix C – Charges of Discrimination, by Basis, Investigated by EEOC

		Age	Disability	National Origin	Race	Religion	Retaliation	Sex	Totals
FY 03-04	Exclusive	120	105	57	77	11	169	152	**691**
	Joint	37	41	13	16	4	38	32	**181**
FY 04-05	Exclusive	228	182	99	150	18	265	269	**1,211**
	Joint	22	24	25	19	2	39	33	**164**
FY 05-06	Exclusive	492	424	289	409	45	612	577	**2,848**
	Joint	22	17	23	7	2	25	24	**120**
FY 06-07	Exclusive	533	457	316	425	60	712	563	**3,066**
	Joint	29	25	13	13	1	28	29	**138**
FY 07-08	Exclusive	549	593	297	495	78	789	628	**3,429**
	Joint	20	10	9	11	4	16	12	**82**
Total	Exclusive	1,922	1,761	1,058	1,556	212	2,547	2,189	**11,245**
	Joint	130	117	83	66	13	146	130	**685**
	Grand Total	**2,052**	**1,878**	**1,141**	**1,622**	**225**	**2,693**	**2,319**	**11,930**

Source: Colorado Civil Rights Division