SUMMARY
April 4, 2019

2019COA50M

No. 17CA2046, *Houchin v. Denver Health* — Government — Colorado Governmental Immunity Act — Colorado Anti-Discrimination Act — Job Protection and Civil Rights Enforcement Act of 2013 — Denver Health and Hospital Authority

A division of the court of appeals considers whether a plaintiff's claims for relief under the 2013 amendments to the Colorado Anti-Discrimination Act (CADA) brought against the Denver Health and Hospital Authority, a political subdivision of the State of Colorado, are subject to the Colorado Governmental Immunity Act (CGIA). The majority concludes that plaintiff's equitable claims are not subject to the CGIA, in accordance with the decision in *City of Colorado Springs v. Conners*, 993 P.2d 1167 (Colo. 2000). The majority also concludes that plaintiff's claims for compensatory relief are subject to the CGIA, and that the language

in section 24-34-405(8)(g), C.R.S. 2018, allowing such claims against the state applies only to claims against the State of Colorado.

The partial dissent concludes that none of plaintiff's CADA claims are subject to the CGIA, and that subsection (8)(g) excepts claims against political subdivisions, as well as the State of Colorado.

COLORADO COURT OF APPEALS **2019COA50M**

Court of Appeals No. 17CA2046
City and County of Denver District Court No. 17CV32286
Honorable David H. Goldberg, Judge

Brent M. Houchin

Plaintiff-Appellee,

v.

Denver Health and Hospital Authority,

Defendant-Appellant.

ORDER AFFIRMED IN PART, REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division V
Opinion by JUDGE RICHMAN
Román, J., concurs
Berger, J., concurs in part and dissents in part

Opinion Modified
On the Court's Own Motion

Announced April 4, 2019

EEO Legal Solutions LLC, Merrily S. Archer, Denver, Colorado, for Plaintiff-Appellee

Fairfield and Woods, P.C., Brent T. Johnson, Denver, Colorado, for Defendant-Appellant

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OPINION is modified as follows:

Footnote 7 in the partial dissent is now numbered as footnote 6 so that the footnote numbers run consecutively.

¶ 1 This case requires us to decide whether the claims of plaintiff, Brent M. Houchin, brought under the Colorado Anti-Discrimination Act (CADA) against defendant, Denver Health and Hospital Authority (Denver Health), a political subdivision of the State of Colorado, are subject to the Colorado Governmental Immunity Act (CGIA). In *City of Colorado Springs v. Conners*, 993 P.2d 1167 (Colo. 2000), the Colorado Supreme Court held that CADA claims were not subject to the CGIA.[1]

¶ 2 But CADA was amended in 2013 to include legal remedies for the first time. Denver Health thus claims that, applying the rationale in *Conners* to the amendments made to CADA in 2013, CADA claims are no longer exempt from CGIA coverage. Because we agree in part with Denver Health, we reverse that portion of the district court's order denying governmental immunity to plaintiff's claim seeking legal remedies. But, following *Conners*, we affirm the

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[1] In *City of Colorado Springs v. Conners*, the supreme court referred to sections 24-34-401 to -805, C.R.S. 2018, as the Colorado Civil Rights Act, or CRA. 993 P.2d 1167 (Colo. 2002). After *Conners,* courts have usually referred to sections 24-34-401 to -805 as the Colorado Anti-Discrimination Act, or CADA. *See, e.g.*, *Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, *rev'd sub nom. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 584 U.S. ____, 138 S. Ct. 1719 (2018). We follow the current usage.

district court's order to the extent it allows plaintiff to pursue equitable remedies against Denver Health.

I. Relevant Facts and Procedural History

¶ 3 Denver Health was created in 1994 by Colorado statute and is a political subdivision of the State of Colorado. § 25-29-103(1), C.R.S. 2018; *see also* Ch. 126, sec. 1, § 25-29-103(1), 1994 Colo. Sess. Laws 657. It owns and operates a major hospital in Denver and other health facilities in Colorado. Plaintiff is a former human resources manager at Denver Health. Denver Health terminated his employment, purportedly because he used confidential patient records of Denver Health employees for disciplinary purposes, in violation of the Federal Health Insurance Portability and Accountability Act of 1996.

¶ 4 Plaintiff filed a charge of discrimination with the Colorado Civil Rights Division (CCRD), asserting that the real reasons for his termination were sexual orientation discrimination and unlawful retaliation for asserting his CADA rights.[2] The charge of

[2] The detailed facts alleged by plaintiff and addressed by the district court are not pertinent to our resolution of the legal issues presented in this appeal.

discrimination was not timely resolved by the CCRD, and the agency issued a notice of right to sue. *See* § 24-34-306(15), C.R.S. 2018.

¶ 5 Plaintiff filed suit in district court. His operative complaint asserted six claims against Denver Health: sexual orientation discrimination in violation of CADA; two claims of retaliation under CADA; wrongful discharge in violation of public policy; whistleblower retaliation under the State Employee Protection Act (SEPA), section 24-50.5-101, C.R.S. 2018; and breach of implied contract or promissory estoppel.

¶ 6 Denver Health claimed governmental immunity under the CGIA and moved under C.R.C.P. 12(b)(1) to dismiss all but the implied contract/promissory estoppel claim for lack of subject matter jurisdiction.[3]

¶ 7 The district court held an evidentiary hearing on the CGIA defense, as authorized by *Trinity Broadcasting of Denver, Inc. v. City*

[3] Denver Health also moved to dismiss four of those claims under C.R.C.P. 12(b)(5) for failure to state a claim upon which relief can be granted. Those rulings are not before us on this interlocutory appeal, which is limited to subject matter jurisdiction. *See* § 24-10-108, C.R.S. 2018.

of Westminster, 848 P.2d 916 (Colo. 1993). Following the hearing, the district court issued a detailed, written order denying Denver Health's C.R.C.P. 12(b)(1) motion as to all claims asserted under CADA, ruling that those claims are not subject to or barred by the CGIA. The court granted Denver Health's jurisdictional motion as to plaintiff's common law claim for wrongful discharge in violation of public policy, ruling that that claim is barred by the CGIA. The court also granted Denver Health's jurisdictional motion as to plaintiff's whistleblower claim under SEPA, ruling that he had failed to give the required statutory written notice, which the court held was a jurisdictional prerequisite to claims under that statute. Finally, the court denied Denver Health's motion to dismiss for failure to state a claim.

¶ 8 As was its right, Denver Health filed this interlocutory appeal of the district court's denial of governmental immunity as to the CADA claims. See § 24-10-108, C.R.S. 2018. Denver Health contends that those rulings were erroneous for two reasons: (1) when the General Assembly amended CADA in 2013 to add legal remedies, it abrogated the supreme court's decision in *Conners*; and (2) Denver Health is not a state agency, within the meaning of

section 24-34-405(8)(g), C.R.S. 2018, and thus Denver Health retains immunity. Those are the only district court rulings before us in this interlocutory appeal. Plaintiff did not file a cross-appeal as to the dismissed claims.[4]

II. Applicable Law

¶ 9 Section 24-10-106(1), C.R.S. 2018, provides that a public entity such as Denver Health is immune from liability for all claims for injury that lie in tort, or could lie in tort, regardless of whether that may be the type of action or form of relief chosen by the claimant, except as otherwise provided in that section. The parties agree that the discrimination claims asserted by plaintiff are not listed among the types of claims as to which CGIA compliance is waived.

¶ 10 Section 24-10-104, C.R.S. 2018, provides that notwithstanding any provision of law to the contrary, the governing body of a public entity may, by resolution, waive the immunity

[4] Plaintiff did not cross-appeal the district court's adverse rulings respecting his retaliation claim under SEPA or his common law claim for wrongful discharge in violation of public policy. Therefore, we need not decide whether we would have had appellate jurisdiction to review those orders.

granted in section 24-10-106 for the types of injuries described in the resolution. The parties agree that Denver Health has not passed a resolution waiving the immunity granted in section 24-10-106 with respect to CADA claims.

¶ 11 In *Conners*, 993 P.2d at 1176, the supreme court concluded that

> [t]he CGIA's grant of immunity does not protect public entities from suits for non-compensatory relief deigned to redress general harms or prohibited conduct under statutes like the CRA, and Conners's claims for reinstatement, back pay, and other relief are distinct from the types of personal injury claims at which the CGIA is directed.

¶ 12 As a result, the supreme court held as follows:

> Because Conners's claims for reinstatement, back pay, and other relief under the CRA are equitable and non-compensatory in nature, they are not claims for injuries that "lie in tort or could lie in tort" within the meaning of the CGIA. The CGIA does not provide the government immunity from those claims. Hence, because the CGIA is not implicated by Conners's pursuit of these claims, her failure to comply with the notice provisions of the CGIA has no bearing on her right to bring this action against the City.

Id. at 1177.

¶ 13 But thirteen years after the *Conners* decision, the General Assembly amended CADA to (1) allow plaintiffs to seek compensatory and punitive damages against defendant employers who are found to have engaged in intentional discriminatory or unfair employment practices, § 24-34-405(3)(a); but (2) preclude recovery of punitive damages against state or political subdivision employers, § 24-34-405(3)(b)(I). Ch. 168, sec. 1, § 24-34-405, 2013 Colo. Sess. Laws 550.

¶ 14 And in the same legislation, the General Assembly added the following provision: "A claim filed pursuant to this subsection (8) by an aggrieved party against *the state* for compensatory damages for an intentional unfair or discriminatory employment practice is not subject to the 'Colorado Governmental Immunity Act.'" § 24-34-405(8)(g) (emphasis added); *see* 2013 Colo. Sess. Laws at 554. The subsection does not explicitly provide that similar claims against political subdivision defendants are also excluded from the CGIA.

¶ 15 Consequently, we are now faced with the following question: Does the *Conners* holding that the CGIA does not apply to CADA claims continue to apply after the passage of the 2013 amendments?

III. Analysis

¶ 16 The district court and plaintiff set forth persuasive reasons why plaintiff's claims under CADA should not be subject to the provisions of the CGIA. Indeed, we recognize the important remedial goals of CADA and agree that those goals should not be stymied by technical arguments over whether plaintiff's claims are torts, and what type of governmental entity defends those claims. Remediating discrimination in the workplace is a fundamental obligation of our state government, and we should particularly hold governmental employers, such as Denver Health, to the highest standards of fair employment practices.

¶ 17 However, as an appellate court, we are bound by the decisions of our supreme court and the unambiguous language used by the General Assembly. Due to these constraints, we disagree with the district court's order in part and agree with it in part.

¶ 18 In *Conners*, the supreme court concluded that the plaintiff's claims under the CRA (the version of CADA in effect at that time, *see supra* note 1) were not subject to the CGIA. In reaching that conclusion, the court repeatedly emphasized that the nature of the plaintiff's claims dictated that result. No fewer than three times,

the court stated that the type of claims asserted, and the nature of the relief sought by the plaintiff, determined the framework for deciding whether the CGIA applied:

> As demonstrated in [*United States v.] Burke* [, 504 U.S. 229, 234-35 (1992)] and [*State Board of Personnel v.*] *Lloyd*, [752 P.2d 559, 565 (Colo. 1988),] the trial court *must consider the nature of the injury and relief sought* to determine whether a particular claim is one for injuries which lie or that could lie in tort for the purposes of the CGIA. This must be done on a case-by-case basis because the same discriminatory conduct that violates a civil rights statute, for example, could also form the basis of a common-law suit for injuries in tort. If a plaintiff seeks to redress discriminatory conduct *and the relief does not compensate the plaintiff for any personal injuries*, a court should conclude that the claims are not for injuries which lie in tort or that could lie in tort within the meaning of the CGIA. Conversely, a claimant who seeks compensatory relief for personal injuries suffered as a consequence of prohibited conduct, has brought a claim which lies or could lie in tort for the purposes of the CGIA. Thus, *a court must examine the nature of the injury and remedy asserted in each case to determine whether a particular claim* is for compensatory relief for personal injuries and is therefore a claim which lies or could lie in tort for the purposes of the CGIA.
>
> We acknowledge that the practice of looking at the injury and remedy as part of the determination of whether a claim lies or could

> lie in tort is arguably inconsistent with the CGIA's language. The CGIA states that public entities are immune from suit for "injuries which lie in tort or could lie in tort regardless of whether that may be the type of action or *the form of relief* chosen by the claimant." §[§] 24-10-102, -106(1), -108 (emphasis added). This language could mean that a trial court must not look at the type of relief at issue when deciding whether the CGIA operates to bar a claim against the government. This interpretation is reasonable because some torts may involve equitable forms of relief, including nuisance, misrepresentation, invasion of privacy, and defamation. *See, e.g.*, W. Page Keeton[et al., *Prosser and Keeton on the Law of Torts*] § 89, at 640, § 105, at 729 [(5th ed. 1984)]; Dan B. Dobbs, *Remedies* § 7.9, at 532-34 (1973). Thus, the form of relief alone, whether damages or equitable relief, does not govern the categorization of a claim as a tort or other type of action.
>
> *Despite this language, however, the trial court must consider the nature of the relief sought to determine whether a particular action "lies in tort or could lie in tort" within the meaning of the CGIA*. As our discussion of *Burke* and *Lloyd* demonstrates, a trial court should determine whether an action is one for "injury which lies in tort or could lie in tort" under the Act by assessing whether the plaintiff seeks compensation for personal harms.

Conners, 993 P.2d at 1176 (emphasis added) (citation omitted).

¶ 19 Because the plaintiff in *Conners* was seeking "reinstatement, back pay, and other [equitable] relief under the CRA," the supreme court determined the claims were not subject to the CGIA because they were "equitable and non-compensatory in nature." *Id.* at 1177.

¶ 20 By contrast, plaintiff in this case filed his case under the 2013 amendments to CADA, seeking compensatory damages for discrimination, including "backpay, frontpay, [and] pecuniary and nonpecuniary compensatory damages" as authorized by section 24-34-405, as well as "any other equitable relief." Under the plain language of *Conners* as set forth above, these claims (other than back pay and equitable relief such as reinstatement) seek "compensatory relief for personal injuries suffered as a consequence of prohibited conduct" and are therefore subject to the CGIA. *Conners*, 993 P.2d at 1176.[5]

¶ 21 We recognize the anomalous consequences of this analysis. To the extent plaintiff asserts claims for reinstatement, back pay, and other equitable relief, as did the plaintiff in *Conners*, he is not

[5] Significantly, the General Assembly did not indicate that it was overturning this aspect of the *Conners* decision with its passage of the 2013 CADA amendments.

subject to the CGIA. To the extent he asserts the legal remedies available under CADA as amended, he is subject to the CGIA. This result does not seem logical or equitable, but nonetheless, in our view, it is mandated by the holding in *Conners*.

¶ 22 The language used by the General Assembly in section 24-34-405(8)(g) is also unfortunate for plaintiff. This subsection exempts from the CGIA claims for compensatory damages for discriminatory employment filed against the "state." This beneficent provision grants, under the amended CADA, the very benefit that the *Conners* decision gave to the plaintiff in that case — freedom from compliance with the CGIA. However, this provision applies only to "state" employees. For reasons not made clear in the legislative history,[6] the General Assembly did not expressly include an exemption from the CGIA for claims against political subdivisions, such as Denver Health, even though other CADA amendments refer to political subdivisions. *See* § 24-34-405(3)(b)(I) (exemption from punitive damages).

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[6] Denver Health contends that the General Assembly excluded political subdivisions from the CGIA exemption because of their fragile financial conditions. That may be so, but that reason is far from clear in any legislative history tendered to this court.

¶ 23 Thus, a second anomaly arises. While thousands of employees of the State of Colorado need not comply with the CGIA before filing CADA claims against their employer, the thousands of employees of political subdivisions apparently are barred from recovery for legal remedies for their discrimination claims. Again, this result does not seem logical or equitable, but that is the language the General Assembly chose to employ in drafting the exemption in section 24-34-405(8)(g). And if that was not its test, it is up to that body, not us, to amend the statute.

¶ 24 Troubled by this inequitable result, we asked, sua sponte, for the parties to submit supplemental briefs on the issue whether section 24-34-405(8)(g) constitutes a denial of equal protection because it differentiates between state employees and employees of political subdivisions without a rational basis, or without a sufficient nexus to a legitimate governmental interest. Both parties advanced reasons and asserted factual bases for why the General Assembly used the language it did. But because we have no findings by the district court, or any legal conclusion as to what rationale, if any, led to the General Assembly's decision to use the language that it used, we disagree with the partial dissent and

cannot conclude on the undeveloped record before us that the statute denies plaintiff's right to equal protection.

¶ 25 Thus, we must conclude that plaintiff's claims against Denver Health for compensatory relief are subject to the requirements of the CGIA, and that the district court's conclusion to the contrary is incorrect.

¶ 26 However, we do not agree with Denver Health that requiring plaintiff to comply with the CGIA entirely precludes him from asserting claims against it. As noted above, both the CGIA and *Conners* plainly allow equitable claims to be brought against Denver Health. To the extent plaintiff's complaint seeks equitable relief, such as back pay or reinstatement, his claims may proceed independently of compliance with the CGIA, including any notice requirement.

¶ 27 Accordingly, we reverse the district court's order denying Denver Health's motion to dismiss plaintiff's CADA claims under the applicable immunity afforded to Denver Health by the CGIA, but affirm its order to the extent it denied the motion as to plaintiff's requests for equitable relief. We remand the remaining claims to the district court.

JUDGE ROMÁN concurs.

JUDGE BERGER concurs in part and dissents in part.

JUDGE BERGER, concurring in part and dissenting in part.

¶ 28 I agree with the majority that the CGIA is wholly inapplicable to the equitable remedies Houchin has pleaded,[1] but I disagree that the CGIA applies to or bars the legal remedies that were authorized by the General Assembly in 2013 (the 2013 Amendments) and pleaded by Houchin in his complaint.[2]

¶ 29 My disagreement with this portion of the majority opinion rests on three separate bases. First, I think the majority misconstrues the supreme court's opinion in *City of Colorado Springs v. Conners*, 993 P.2d 1167 (Colo. 2000), and ignores later cases that applied *Conners* to determine when the CGIA provides immunity. Certainly I do not dispute the accuracy of the portions of *Conners* quoted by the majority. But I believe other language in *Conners*, read in context, overcomes the language quoted by the majority and leads to the conclusion that *all* claims under CADA,

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[1] So that there is no confusion on remand, when the CGIA is inapplicable to a class of claims, a claimant is not required to comply with any aspect of the CGIA, including the jurisdictional notice requirements.

[2] Like any other litigant, Houchin should be afforded the right to amend his complaint under C.R.C.P. 15(a). No responsive pleading has been filed by Denver Health, meaning that he may amend as a matter of right.

and *all* remedies — legal and equitable — may proceed against all Colorado public entities without compliance with the CGIA.

¶ 30 Second, and completely apart from the effect of *Conners*, I disagree with the majority that the term "state" as used in section 24-34-405(8)(g), C.R.S. 2018 (subsection (8)(g)), does not include political subdivisions of the state. CADA does not define "state," and the purposes of the 2013 Amendments and the effect of the majority's construction support a broader reading of the term.

¶ 31 My third disagreement with the majority is that a construction that concludes that public employees of the State of Colorado itself have the full panoply of rights and remedies under CADA, while those public employees unfortunate enough to be employed by a political subdivision of the state have very truncated rights and remedies, violates the rights of those latter public employees to equal protection of the law, as guaranteed by both the Federal and Colorado Constitutions.

¶ 32 Accordingly, while I concur in the affirmance of the district court's order to the extent it relates to equitable remedies claimed by Houchin, I respectfully dissent from the majority's reversal as to legal remedies. I would affirm the district court's order in its

entirety (though partially on different grounds than relied on by the district court).

I. *Conners* Continues to Apply to CADA Claims and Requires Us to Hold that the CGIA is Inapplicable to CADA Claims

¶ 33 The majority quotes from the *Conners* opinion at length to support its conclusion that the *Conners* court based its decision entirely on the type of relief sought by the plaintiff in that case. But the *Conners* analysis was broader and more comprehensive than that. The majority's interpretation ignores both substantial portions of the analysis undertaken in *Conners* and later Colorado Supreme Court cases applying *Conners*.

¶ 34 Just as we are not at liberty, as an intermediate appellate court, to disregard holdings of the supreme court, we are similarly not permitted to disregard the relevant reasoning and rationale of a supreme court decision. *See Krause v. Columbia Sav. & Loan Ass'n*, 631 P.2d 1158, 1160 (Colo. App. 1981), *aff'd*, 661 P.2d 265 (Colo. 1983).

¶ 35 After the portion of the *Conners* opinion quoted by the majority, the *Conners* court explained its holding in more expansive terms: "[W]e hold that the CGIA does not provide the government

immunity from claims for relief under [CADA] when such claims are not based on providing compensatory relief to individuals but instead *focus on the anti-discrimination purposes of the statute*." *Conners*, 993 P.2d at 1176-77 (emphasis added). Thus, the court considered not only the form of relief sought, but also the "purposes of [CADA]" and the "nature of the injuries." *Id.* at 1173, 1175.

¶ 36 Supreme court decisions after *Conners* have embraced this more comprehensive analysis. Thus, in *Robinson v. Colorado State Lottery Division*, 179 P.3d 998, 1006 (Colo. 2008), the supreme court concluded that the "nature of the relief is not dispositive"; rather, it is "merely an aid" in the broader inquiry of "understanding the duty breached or the injury caused to determine if the claim lies or could lie in tort."

¶ 37 Similarly, in *Colorado Department of Transportation v. Brown Group Retail, Inc.*, 182 P.3d 687, 690 (Colo. 2008), the supreme court observed that it has "long held that neither the form of the claim itself nor the relief requested is determinative of the [CGIA's] applicability." The court "emphasized the multiplicity of considerations that may be relevant in any particular case," and "made clear that the question of coverage by the [CGIA] ultimately

turns on the source and nature of the government's liability, or the nature of the duty from the breach of which liability arises." *Id.*

¶ 38 I acknowledge that the *Conners* court devoted part of its opinion to contrasting the "legal" remedies available under ordinary tort claims with the "equitable" remedies then available under CADA.[3] *Conners*, 993 P.2d at 1174-76. But, as both the *Conners* court and later supreme court decisions concluded, the form of relief sought or available is not dispositive. *Id.* at 1176. "The nature of the injury alleged — not the relief requested — is the primary inquiry to determine whether the CGIA applies to the claim." *Open Door Ministries v. Lipschuetz*, 2016 CO 37M, ¶ 16.

¶ 39 Applying the analysis employed in *Conners* and later supreme court cases considering the applicability of the CGIA, we must also give substantial consideration to the purpose of CADA and the nature of the underlying injury.

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[3] I note the anomalous nature of resolving important legal questions based on the long archaic distinction between legal and equitable remedies, which arose from the existence of two separate courts — courts of law and courts of equity. Most American jurisdictions, including Colorado and the federal system, have long since abrogated that distinction, making the distinction between law and equity immaterial for almost all purposes. *See* C.R.C.P. 2; Fed. R. Civ. P. 2. *But see* C.R.C.P. 38; *People v. Shifrin*, 2014 COA 14, ¶ 16.

¶ 40 The *Conners* court recognized that, while CADA claims may have some attributes in common with standard tort claims, they nevertheless differ fundamentally from such claims. The age-old fundamental purpose of true tort claims is to compensate persons injured by wrongful conduct that has been recognized as detrimental to an ordered society. *See Castro v. Lintz*, 2014 COA 91, ¶ 27.

¶ 41 CADA claims, on the other hand, are "not designed primarily to compensate individual claimants," *Conners*, 993 P.2d at 1174, but have an even higher purpose — "to fulfill the 'basic responsibility of government to redress discriminatory employment practices on the basis of race, creed, color, sex, age, national origin, or ancestry,'" *id.* (quoting *Colo. Civil Rights Comm'n ex rel. Ramos v. Regents of the Univ. of Colo.*, 759 P.2d 726, 731 (Colo. 1988)).

¶ 42 CADA claims, and the statutory framework that authorizes such claims, effectuate a fundamental function of government — to wipe out the scourge of discrimination in employment (and other parts of life). These claims, the court reasoned, were not typical tort claims and thus were not subject to the CGIA. *Id.* at 1177.

¶ 43 When the General Assembly expanded the remedies available under CADA in 2013 to provide victims of discrimination based on sexual orientation remedies unavailable to them under federal civil rights law,[4] it did not change the fundamental purpose of CADA. Ch. 168, sec. 1, § 24-34-405, 2013 Colo. Sess. Laws 549-554; Bill Summary on H.B. 13-1136 to S. Judiciary Comm., 69th Gen. Assemb., 1st Reg. Sess. (Apr. 22, 2013).

¶ 44 That purpose was, and continues to be, to fulfill the government's fundamental obligation to "eliminate discriminatory practices" in the workplace. *Conners*, 993 P.2d at 1174. The remedies authorized by CADA, including the enhanced remedies added in 2013, remain "'merely incidental' to [CADA's] greater purpose of eliminating workplace discrimination." *Id.* (quoting *Brooke v. Rest. Servs., Inc.*, 906 P.2d 66, 71 (Colo. 1995)).

¶ 45 Contrary to Denver Health's arguments, the decisions in *State Personnel Board v. Lloyd*, 752 P.2d 559 (Colo. 1988), and *First National Bank of Durango v. Lyons*, 2015 COA 19, support this

[4] Title VII of the Civil Rights Act of 1964 does not provide explicit protection from employment discrimination on the basis of sexual orientation. 42 U.S.C. §§ 2000e to 2000e-17 (2018).

analysis. At issue in *Lloyd* was a statute that protects government whistleblowers. *Lyons* involved claims arising under the Colorado Securities Act. Neither the *Lloyd* court nor the *Lyons* court limited its analysis to the relief sought by or available to the plaintiff. Rather, both cases turned on the nature of the underlying injury. This inquiry, unless the injury "clearly arises out of tortious conduct," necessarily involves consideration of the statute that forms the basis of the plaintiff's claims. *Lyons*, ¶ 27. While the protections under Colorado's whistleblower and securities statutes are indisputably important, the teaching of *Conners*, ignored by Denver Health and the majority, is that such statutes do not rise to the level of a fundamental governmental function in the same manner that CADA does.

¶ 46 Moreover, the injuries addressed by CADA are fundamentally different from "tort-like personal injuries." *Conners*, 993 P.2d at 1176. Injuries that are covered by the CGIA but for which the CGIA waives immunity further illustrate the kinds of injuries that "lie in tort or could lie in tort." § 24-10-106(1), C.R.S. 2018. These injuries include those resulting from the operation of a state-owned or -operated motor vehicle; the operation of various public facilities;

and dangerous conditions of public roads, buildings, or other facilities. § 24-10-106(1)(a)-(f). Such injuries also include, as discussed in cases relied on by the *Conners* court, those related to damage to a telephone cable, *State Dep't of Highways v. Mountain States Tel. & Tel. Co.*, 869 P.2d 1289 (Colo. 1994); a vehicle impounded by the police, *City & Cty. of Denver v. Desert Truck Sales, Inc.*, 837 P.2d 759 (Colo. 1992); and an allegedly retaliatory employment termination, a statutory tort, *Lloyd*, 752 P.2d 559.

¶ 47 In short, none of these tort-like injuries resemble what we have here: alleged discrimination against a statutorily protected class that the state has a "basic responsibility" to correct. *Conners*, 993 P.2d at 1174.

¶ 48 For these reasons I conclude that claims asserted under CADA, irrespective of the equitable or legal nature of the remedies either authorized by the statute or pleaded by a plaintiff, are not claims that sound or could lie in tort. As a result, I further conclude that CADA claims under the 2013 Amendments are not subject to the CGIA.

II. CADA Subsection (8)(g) Does Not Render the CGIA Applicable to CADA Claims Against Denver Health

¶ 49 Subsection (8)(g) states: "A claim filed pursuant to this subsection (8) by an aggrieved party against the state for compensatory damages for an intentional unfair or discriminatory employment practice is not subject to the 'Colorado Governmental Immunity Act.'"

¶ 50 The majority concludes, without explanation, that subsection (8)(g) renders the CGIA inapplicable to claims against the state itself, but not against the political subdivisions of the state like Denver Health.

¶ 51 Presumably, the majority is relying on the rationale supplied by Denver Health to reach this conclusion. Denver Health argues that because subsection (8)(g) references only the "state," and section 24-34-405(3)(b)(I) references the "the state or any political subdivision, commission, department, institution, or school district of the state," subsection (8)(g) renders the CGIA inapplicable only to the state, but not the state's political subdivisions, commissions, departments, institutions, or school districts.

¶ 52 This is wrong for two reasons. First, the meaning of the undefined term "state" in subsection (8)(g) is ambiguous. Applying familiar principles of statutory interpretation, "state" means the state and its political subdivisions, commissions, departments, institutions, and school districts. Second, even if "state" does not include those other public entities, this distinction violates constitutional equal protection guarantees.

A. The Term "State" in Subsection (8)(g) Includes Denver Health

1. The Term "State" Is Ambiguous

¶ 53 CADA does not define the word "state." While the definition of "state" under the CGIA does not include political subdivisions, § 24-10-103(7), C.R.S. 2018, other Colorado statutes explicitly include political subdivisions within the meaning of the word "state." *See* § 5-16-103(14), C.R.S. 2018 (The Colorado Fair Debt Collection Practices Act defines "State" as "any state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of them."); § 13-82-103(2), C.R.S. 2018 (The Uniform Conflict of Laws – Limitations Act defines "State" as "a state, commonwealth, territory, or possession of the United States, the District of Columbia, the

Commonwealth of Puerto Rico, a foreign country, or a political subdivision of any of them."). Thus, the General Assembly's use of the word "state" is not uniform. For these reasons, subsection (8)(g) is ambiguous regarding the meaning of the word "state."

2. The Majority's Construction Is Inconsistent With the Legislative Intent Behind the 2013 Amendments

¶ 54 Read in context, the use of the word "state" in subsection (8)(g) does not bear the weight placed on it by the majority. Restricting an award of punitive damages against all public entities is consistent with the common law. But limiting many public employees' recourse to compensatory damages only because they happen to be employed by one of Colorado's numerous political subdivisions, as opposed to the state itself, makes little sense.[5]

¶ 55 This is particularly true if we consider the consequences of the majority's construction of the statute. *See Hunsaker v. People*,

[5] In a similar case, the Colorado Supreme Court concluded that Colorado prohibitions against discrimination applied to the Regents of the University of Colorado, observing that "[i]t would make little sense for the General Assembly to broadly define 'employer' so as to include the state and all its political subdivisions . . . and yet not to have intended that the Regents of the University of Colorado be subject to the statutory prohibition against discriminatory employment practices." *Colo. Civil Rights Comm'n ex rel. Ramos v. Regents of Univ. of Colo.*, 759 P.2d 726, 732 (Colo. 1988).

2015 CO 46, ¶ 46. The majority's interpretation leaves victims of sexual orientation-based employment discrimination without legal remedies under both federal and state law because Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2018), does not apply to claims for sexual orientation-based discrimination, except perhaps in two federal circuits that do not include Colorado. *E.g.*, *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005) (affirming dismissal of Title VII claims based on sexual orientation); *cf. Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351-52 (7th Cir. 2017) (en banc) (holding that Title VII covers claims for employment discrimination on the basis of sexual orientation).

¶ 56 It is nearly inconceivable that the General Assembly intended to broadly expand the remedies under CADA to afford victims of sexual orientation-based discrimination the same remedies available to other protected classes under federal law, and at the same time to deny those remedies to a multitude of public employees. *See* Bill Summary on H.B. 13-1136 to S. Judiciary Comm., 69th Gen. Assemb., 1st Reg. Sess. (Apr. 22, 2013).

¶ 57 If the General Assembly intended to legislatively overrule *Conners* in whole or in part, one would expect the legislature to have done so clearly and without ambiguity. *See In re Marriage of Ciesluk*, 113 P.3d 135, 141 (Colo. 2005); *Vaughan v. McMinn*, 945 P.2d 404, 409 (Colo. 1997); *Przekurat v. Torres*, 2016 COA 177, ¶ 23, *aff'd*, 2018 CO 69. Whatever can be said about the wording of subsection (8)(g), it cannot, in context, reasonably be said that it is clear and unambiguous. *Conners*, on the other hand, clearly held that the CGIA did not apply to CADA claims.

B. The Majority's Construction Violates the Equal Protection Rights of Colorado Public Employees Who Do Not Work Directly for the "State"

¶ 58 The majority's construction of subsection (8)(g) leaves every employee of the state's political subdivisions, commissions, departments, institutions, and school districts without legal remedies against unlawful discrimination under CADA, while at the same time affording that same protection to those employees' counterparts who work directly for the "state." Even applying the lowest level of constitutional scrutiny — rational basis review — this

distinction violates the Federal and Colorado Equal Protection Clauses.[6] *See* U.S. Const. amend. XIV; Colo. Const. art. II, § 25.

¶ 59 Under rational basis review, statutes are presumed constitutional and will be upheld if there is any reasonably conceivable set of facts leading to the conclusion that the classification serves a legitimate governmental objective. *Dean v. People*, 2016 CO 14, ¶¶ 8, 13. Even applying this lowest level of scrutiny, Colorado courts have consistently recognized that classifications among similarly situated workers that bear no rational relationship to a legitimate government interest violate the Federal and Colorado Equal Protection Clauses.

¶ 60 In *Pepper v. Industrial Claim Appeals Office*, 131 P.3d 1137, 1140 (Colo. App. 2005), *aff'd on other grounds sub nom. City of Florence v. Pepper*, 145 P.3d 654 (Colo. 2006), the court concluded that a statute that allowed public entities to exclude police

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[6] Though the parties did not raise equal protection arguments either below or in initial briefing on appeal, once a court determines that a statute is ambiguous, the court has a duty to avoid a construction that violates the constitution. *State, Dep't of Labor & Emp't v. Esser*, 30 P.3d 189, 194 (Colo. 2001). Analysis of the constructions offered by the parties without consideration of whether those constructions pass constitutional muster risks adopting a construction that violates the constitution. This is not tenable.

volunteers from workers' compensation coverage while requiring coverage for other public volunteers, such as volunteer firefighters and members of volunteer rescue, disaster, and ambulance teams, violated equal protection guarantees. The court stated that while controlling costs was a legitimate government objective, the distinction between police volunteers and other public volunteers who face similar risks and serve similar vital functions bore no rational relationship to that objective. *Id.*

¶ 61 Similarly, in *Industrial Claim Appeals Office v. Romero*, 912 P.2d 62, 69-70 (Colo. 1996), the supreme court held that a statutory classification that eliminated workers' compensation benefits for workers over the age of sixty-five with a total disability while allowing benefits to those with a partial disability bore no rational relationship to the interests of avoiding payment of duplicative benefits and cost reduction. The court concluded that the legislature cannot achieve cost cutting by "arbitrarily denying benefits to one class of workers while providing such benefits to other workers." *Id.* at 69.

¶ 62 And in *Stevenson v. Industrial Commission*, 190 Colo. 234, 238, 545 P.2d 712, 716 (1976), the supreme court struck down a

requirement that a claimant under the Colorado Occupational Disease Disability Act must have worked in Colorado for at least five years because the length of time worked bore no rational relationship to the viability of a claim under the Act.

¶ 63 In each case, the impermissible statutory classifications "eliminate[d] benefits for a particular group of injured workers while affording coverage to similarly situated workers" without any rational relationship to a legitimate government objective. *Pepper*, 131 P.3d at 1141.

¶ 64 Similarly, both the Colorado Supreme Court and the United States Supreme Court struck down on equal protection grounds an amendment to the Colorado Constitution that would have prohibited special legislative protections for those of homosexual, lesbian, or bisexual orientation. *Romer v. Evans*, 517 U.S. 620 (1996); *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994). The Supreme Court held that the amendment failed to meet the rational basis standard because it deprived the targeted class of the protections of various anti-discrimination laws and ordinances without any rational relationship to a legitimate government objective. *Romer*,

517 U.S. at 629-32. The majority's interpretation of subsection (8)(g) will have the same effect.

¶ 65 In supplemental briefing, Denver Health relies on *Bloomer v. Board of County Commissioners*, 799 P.2d 942, 947 (Colo. 1990), *overruled by Bertrand v. Bd. of Cty. Comm'rs*, 872 P.2d 223 (Colo. 1994). In *Bloomer*, the Colorado Supreme Court applied rational basis review and concluded that the CGIA's distinction between county roads and municipal, state, and federal roads for purposes of immunity from tort recovery did not violate equal protection guarantees. *Id.*

¶ 66 *Bloomer* does not require a different result here. In *Bloomer*, 799 P.2d at 947, the court observed that county roads are "less traveled, have less funds for maintenance, and include about 10,000 miles of unmaintained roads." In short, the statute created a rational distinction between two different types of roads — one type that was more likely to produce injury and one that was less likely to produce injury.

¶ 67 There is no such rational basis available for the distinction at issue here. While county roads may be inherently less safe, employees of the state's political subdivisions are not inherently

more likely to be victims of prohibited discrimination than employees of the state.

¶ 68 Denver Health posits that the General Assembly might have rationally decided to absolve political subdivisions and other public entities (but not the "state") from compensatory damages liability under CADA because those entities may have fewer financial resources. But the resources of these various public entities can be worlds apart. Compare, for instance, the resources of the Town of Lakeside, population eight, cited by Denver Health, and the resources of Denver Health itself — a sprawling medical organization with thousands of employees.

¶ 69 Given the vast range of resources available to various public entities, splitting off employees of the "state" from employees of other public entities bears no rational relationship to the goal of sparing cash-strapped public entities from CADA damages liability. This crude distinction between similarly situated workers is no less arbitrary than the distinctions between volunteer police officers and volunteer firefighters in *Pepper*, between benefits claimants with different levels of disability in *Romero*, and between workers who

had been working in Colorado for more than five years and those who had not in *Stevenson*.

¶ 70 The majority contends that we cannot reach this conclusion because the district court made no findings on this issue and we do not have sufficient facts before us. But rational basis review calls on the court to consider *any conceivable* sets of facts that might support the distinction at issue. In light of the supreme court precedent cited above, I am not able to conceive, and the parties have not been able to provide, any set of facts supporting a rational basis for such a distinction.

¶ 71 Denver Health also claims that the General Assembly's determination that, under subsection (8)(g), the CGIA does not apply to the "state" cannot implicate equal protection rights because public entities have the right under the CGIA to waive CGIA immunity. Denver Health argues that it would make little sense if the Town of Lakeside, population eight, could cause other public entities to violate the equal protection clause if it waived its own CGIA immunity.

¶ 72 This argument misses the mark in two ways. First, the General Assembly did not "waive" the state's immunity. Subsection

(8)(g) says that a claim against the "state . . . is not subject to" the CGIA. Thus, there is no immunity to be waived, and the fact that the CGIA permits individual public entities to waive CGIA immunity has no effect here.

¶ 73 Second, while the Town of Lakeside may waive its own CGIA immunity, it cannot create Colorado law. More specifically, the Town of Lakeside cannot absolve all public entities but the "state" of compensatory damages liability for illegal and unconstitutional employment discrimination. That is what the majority and Denver Health claim that the General Assembly did in subsection (8)(g). And that law, not a waiver of immunity by an individual public entity, is what is at issue here.

¶ 74 Denver Health also claims that distinctions between employers of different sizes under Title VII justify the distinction between different types of public employees at issue here. First, that is not the issue before us. Second, those employers are not similarly situated; the employees that would be affected by the majority's construction of the statute are.

¶ 75 Finally, Denver Health's reliance on SEPA's distinction between different types of public employers for purposes of

whistleblower protection is similarly unpersuasive. There, where the statute is concerned with good governance, the distinction between employees who are more likely to be involved in actual governance and employees who are not makes sense. And, again, the nature of the injury is fundamentally different.

¶ 76 It is well established that when a court is faced with two interpretations of a statute, one constitutional and the other unconstitutional, it must choose the interpretation that renders the statute constitutional or avoids the constitutional issue. *State, Dep't of Labor & Emp't v. Esser*, 30 P.3d 189, 194 (Colo. 2001).

¶ 77 Accordingly, I would construe the word "state" in subsection (8)(g) to include the state and all of its political subdivisions, including Denver Health.

III. Conclusion

¶ 78 For these reasons, I would affirm the district court's order in its entirety.