Good afternoon, my name is Ashley Graves and I am a DU law student, and the former Vice President and current member of the Black Law Student Association. I will be testifying with the Colorado Women's Bar Association in favor of the POWR Act.

While working for Rathod Mohamedbhai, I had the privilege of researching how the severe or pervasive standard operates in the 10th Circuit. I was so shocked by some of the outcomes that I then wrote a 30-page paper analyzing the issue.

Currently, it is incredibly difficult for a plaintiff to succeed on a harassment claim, and oftentimes, that failure is unrelated to the legitimacy of the claim itself.

Before the claim can even be put before a jury, a plaintiff must meet the subjective and objective components of the standard to survive the motion to dismiss stage. At issue is often the objective element, which requires a finding that a reasonable person would find the harassing conduct so severe or pervasive so as to alter the plaintiff's terms and conditions of employment.

Currently, judges are the ones who decide who the reasonable person is. This is problematic because, while great strides have been made in diversifying the judiciary, it still is not reflective of the populations it serves.

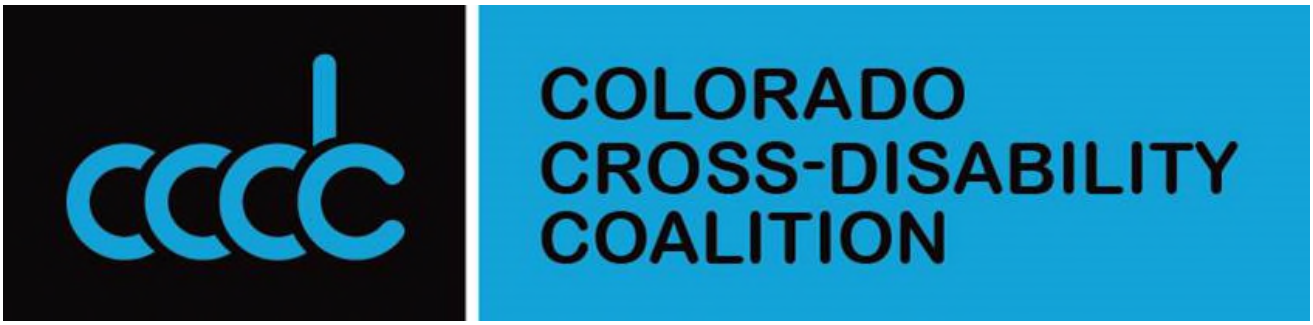
With this context in mind, it is more likely that a plaintiff's claim will be put before a judge who may lack relevant lived experiences that would be useful, and necessary, to provide an informed and fair evaluation of whether conduct is harassing. In essence, it is simply hard to evaluate something you may have never experienced personally. This lack of personal experience contributes to the likelihood that a judge may struggle to truly understand the significance and effect of harassing conduct, which leads to a spectrum of harassing conduct being labelled as trivial.

The standard, in operation, tends to normalize even egregious instances of harassing behavior, and dismisses Plaintiffs' realities.

In fact, there is consensus among the judiciary that some harassment should be tolerated in the workplace. This understanding of the standard's operation is misguided and undermines the very purposes and mandates of Title VII.

In conclusion, we must evaluate what a more manageable standard could look like to address these concerns, and the POWR Act does exactly that.

The POWR Act provides much needed reform in this area of the law and ensures that the main purposes of Title VII are fulfilled. Without this legislation, deserving plaintiffs will continue to be harmed by the standard's application



April 5, 2023

Members of Senate Judiciary

The Colorado Cross-Disability Coalition and arc Thrift Stores supports the goals and objectives of SB 23-172. We agree that no one should be harassed in the workplace. We also appreciate the extensive work and discussions the proponents have had working with our concerns. While we are eager to get to a full support, we are currently pleased to offer conditional support of SB 23-172 based on the amendments we believe will be offered in committee. We submit this written testimony to outline our concerns and detail how we believe they are addressed by changed language for the record.

The Colorado Cross-Disability Coalition is the state's only disability led social justice organization run by and for people with all types of disabilities. Employment of people with disabilities and access to long term care services (particularly community based) are both priority areas in our current strategic plan. We have also been given authorization to represent the views of arc Thrift Stores. They are the largest employer of people with Intellectual and Developmental Disabilities in the state. They also employ people with other disabilities, people who are 2nd or 3rd chance employees including people who are justice involved, immigrants and refugees and those who have struggled with other employment.

Again, we are in a position of support but wanted to have our concerns noted in the record. We appreciate the work done to mitigate those concerns.

Our concerns are around two classes of people or job types:

The Care Environment: People who are in a nursing facility, group home, other residential setting - or even the home - who are not able to control their behavior. There are people who have cognitive disabilities that limit their ability to behave appropriately. These include people with disabilities like dementia, traumatic brain injuries and other cognitive disabilities. Unfortunately, people with these disabilities sometimes say vile things, or even grab people inappropriately. There is, unfortunately, often very little that can be done to modify this behavior, which means that it becomes part of a care worker's job. We need to be sure that the behavior of patients that is beyond their control is not going to be something an employer can be sued over. Without this protection, our fear is that an overburdened system will simply evict or refuse to admit some of these clients/patients who are already very limited in their options. Expecting employers to move staff around or have a second worker available is simply not realistic in today's care environment given the current shortage of healthcare and support workers. While we understand that the language in the bill that says an industry cannot say "this is part of the job" was aimed at other industries, we need to know employers will not be liable for

something that they cannot control in a setting where providing care is part of the job duties. We worry about unintended consequences to the care of those with dementia and memory issues, those with traumatic brain injuries and those with other cognitive disabilities. We hope that the language making it clear that this bill applies to those who have control over the employee's job mitigates this.

Workers who are second (and third) chance employees, many of whom have disabilities that impair their social skills. It is fair to expect a manager, supervisor or someone else in organizational leadership to have the ability to understand social norms and expectations as well as enforce socially acceptable behavior as an essential function of their job. However, there are jobs that do not require this, such as stocking, bagging, cleaning, ranch and farm work, etc. We want to support the employers that hire people who traditionally have a hard time getting jobs. Some people do not have well developed social skills, including people with cognitive disabilities, people who have been incarcerated or otherwise institutionalized, and people with psychiatric disorders. We need to know that employers who hire these individuals will not be subject to litigation because other more privileged workers (yet who may be part of a protected class) are uncomfortable. We appreciate the inclusion of language that says petty slights or annoyances do not equal harassment. We are worried about the language stating that harassment can be based on subjective concerns of the alleged victim and objective concerns of people who are from the same protected class. Our concern is that people from the same group will share the same biases. We appreciate the inclusion of the language that the power dynamic is considered in the totality of the circumstances, and clarification in the definition that it is ONLY harassment if the alleged harasser has an influence on the job of the alleged victim. We agree that someone that has any sort of positional power should be expected to know and follow social norms. That could be a direct supervisor, a shift lead, a scheduler, dispatcher, or member of senior management. This would make it clear that employees at the bottom levels who are likely to have the issues with social interactions are not in a position to harass in a way that could lead to litigation. They might be in a position to annoy and their behavior might raise issues that HR needs to address, and it might take time to address these issues. Since these employees have no ability to affect the duties, schedule, pay, or promotion of their fellow employees, we do not think it is appropriate to include them in this new standard. If they are to be included at all, the severe and persistent standard should remain ONLY for this population. We believe the bill is close to this, and if people from this class of employees are targeted or employers become reluctant to hire people from the protected class of disability, or the unprotected but marginalized class of people who are justice involved, we will seek legislative redress in the future.

Our final concern, which we believe the proponents are working to address, is the communication of the new requirements to employers and employees. We are particularly concerned about individuals with disabilities who hire our own care providers, either through a Medicaid program like the Consumer Directed Attendant Support Services (CDASS) program or privately. These disabled individuals usually hire between 2-6 people, most of whom work part time providing care, and they would need information about how to comply with this new law. We think many other small businesses and small nonprofits also could benefit from this information. The language currently in the bill says that employers should have a "program" about harassment and should have documentation. Specifics around what a program means, what needs to be documented and how it needs to be documented needs to be provided to those who hire people to provide care in their homes. We understand the details of this may not be written in statute, but we need to put it on the record that if compliance is

expected, people need a way to know what the law says and what to do. The Colorado Department of Labor and Employment put out a wonderful tool kit sent to employers about FAMLI. It told us what the law was, what we had to do, and what we had to tell our employees. I received one as a director of a small nonprofit but I did not receive this information as a CDASS client. We need something like this should the act pass and it needs to be provided to ALL employers in the state, as well as people who may only use contractors.

We are supportive of removing the training language in the pre-amended version and understand that an amendment to do that will be offered.

In summary,we appreciate the changes made by the sponsors and proponents and would like to continue working to address communication as this moves through the process. We are pleased to be able to offer our conditional support today.

If you have any questions please feel free to reach out to me at jreiskin@ccdconline.org or 303-667-4216

Thank you Mr. Chair and Members of the Committee,

I had been managing a catering office for three years. It was convenient and had flexible hours so I could work school drop offs and pickups. The owner operator was prone to making inappropriate comments, but when he was around he was often in the kitchen. I worked in the restaurant industry for a long time, so I am desensitized to poor taste comments because it is so standard in many places. I maintain my line specifically at unwanted sexual touching. This guy actually waited until he verbally confirmed that my husband was off CONUS on his second deployment before he ran his hand up my inner thigh, which I physically stopped and jumped away. Obviously, my husband being around had been the real deterrent over the past three years. I left and quit. I collected unemployment and noted the experience in my unemployment application.

The reason I did not invest time or effort into pursuing legal action against the caterer was due to the fact that I had just gone through that three years earlier with my previous job at a local restaurant. Though the job was unremarkable for a year, the last couple weeks the longtime cook decided it was ok to come up behind me and put his whole hand around my waist. I would remove his hand, tell him he did not need to touch me and walk away. He refused to get the hint and this happened a couple times before I went to the general manager and told him it needed to stop. These things do not happen just once, these things only escalate, and the harassed employee is then further slandered as if they "allowed" the abuse. I went to the GM right away, and was absolutely clear that I did not want to be touched. The GM had worked with this cook for decades by then and just blew me off. The owner fired me a week later for "not fitting in". After a year of working there, this was obvious retaliation.

I documented my experience in writing and started interviewing lawyers. I drafted but did not submit an EEOC complaint due to the restaurant not having enough employees to meet the criteria to file. I finally found one employment lawyer in Denver willing to actually meet with me. I wanted to send the message that people are not going to accept this treatment. The meeting with the lawyer in Denver was a disappointing waste of time. Now I was paying for childcare without a job and driving an hour only to be told my situation did not meet the state's statutory definition of a hostile work

environment. The lawyer started telling me stories of other cases he was familiar with where woman were baraged with constant sexually explicit comments, routine threats of rape, questions about their sexual experiences, unwanted touching and molestation over long periods of time. Some of the cases he mentioned did not meet the legal requirement to pursue lawsuits; others had already failed in court.

Fast forward three years, when I quit managing the catering office, I already knew Colorado's laws were weak. My husband had just left, my son was worried, I didn't have energy to try to pursue a pointless case. I was fortunate enough to have free healthcare at the time which even gave me space to finally quit. My old boss is a uniquely slimy person. I've heard more about labia from this man than any doctor I have ever had. He would create excuses to squeeze by me in tight spaces and brush my butt with the back of his hand and pretend like he didn't notice what he had done, then lie when confronted. Three years sounds like a lot of time to work for someone like this, and I navigated it because he wasn't around the office much, traveled for two months every winter, and I actively avoided him. I also interviewed for a few other jobs and was accepted to CU's engineering program while I worked there. I was trying to get away and still juggle my life. I figured as long as he didn't try to touch me, I could collect a paycheck until I could find another job.

Shortly after I quit, another female employee texted me about him grabbing her backside at an event. A year and a day later another coworker called me and told me that a different previous employee I had never met, had settled her sexual harassment lawsuit against him for measly $15,000. Apparently, that case was active much of the time I was working there. This particular individual has learned over the years that he can get away with tons of harassing behavior. What's one little lawsuit when he has been able to grope dozens upon dozens of employees over forty years in business?

I had wanted to testify because there needs to be safe standards in the workplace. It is so disgusting and frustrating. Teenage girls and women shouldn't have to be groped at work. The current law protects the status of people who do this to multiple coworkers or employees. Without the pressure of real accountability there is no reason for the bad apples to change their behavior.

AAUW of Colorado

March 2023

To: Senate Judiciary Committee
Re: SB23-172—POWR Act

Dear Committee Members,

The American Association of University Women (AAUW) is one of the oldest women's organizations in the country, empowering women since 1881. The mission of AAUW is to advance equity for women and girls through research, education and advocacy.

AAUW has led the fight for economic empowerment for women, and we have made progress over the years. Yet there is still work to do. Senate Bill 172 adds new definitions for harassment and new protections against employment discrimination.

AAUW of Colorado believes Senate Bill 172 incorporates modest, but important, steps toward creating a work environment every employee deserves.

For these reasons, AAUW of Colorado strongly supports Senate Bill 172 and requests your AYE vote in committee and throughout the process of becoming law.

Respectfully submitted,

Su Ryden
AAUW Colorado Public Policy Co-Director

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Aurora, CO 80017
303.898.5797
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American Association of University Women--AAUW is a top-rated 501(c)3 charitable organization whose mission is to advance gender equity for women and girls through research, education, and advocacy.

The POWR Act: Protecting Opportunities and Workers Rights

SB23-172 by Sens. Winter & Gonzales, Reps. Weissman & Bacon

1. Replace "Severe or Pervasive" with a Modernized Definition of "Harass" and "Harassment"

The Problem: The "severe or pervasive" standard was established by the U.S. Supreme Court *more than three decades ago*. The standard *assumes that some harassment is tolerable as long as it is not "severe" and does not happen frequently.* It allows employers to tolerate a level of groping, touching, crude sexual or racist comments, and other offensive behavior despite the harm of such a toxic work environment on the targets of this offensive behavior. It severely restricts victims of discriminatory harassment from being able to receive justice.

While society has evolved in our understanding of acceptable workplace behavior, the courts continue to apply the outdated and unacceptable standard of severe or pervasive.

The Solution: The bill eliminates the excessive "severe or pervasive" hostile work environment requirements and replaces them with clear standards for "harass" and "harassment". This standard will consider the totality of the circumstances, including whether the conduct would be offensive to a reasonable person with the same or similar protected class characteristics.

States with same or similar protections: California, Maryland, New York, Washington D.C.

2. Modernize Non-Disclosure Agreements

The Problem: All too often, people who bring claims of harassment against their employer under CADA are *denied the opportunity* to resolve their claims with the company unless they agree to terms and conditions that would prohibit employees from disclosing to anyone the facts of the harassment they experienced. This leads to *a lack of accountability* on the part of the employer, protects serial predators, provides little to no incentive for the company to correct what may be a systemic and cultural problem, *and leaves the door open for harassment to continue.*

The Solution: The bill amends the Colorado Anti-Discrimination Act to solve this problem by:

- Allowing those employees to discuss the discrimination and harassment they suffered with family members, religious advisors, mental health providers, and other advisors.
- Allowing employees to disclose the facts of the discrimination or harassment to governmental agencies or in response to legal process.
- Requiring any non-disclosure provisions to apply equally to all parties to the agreement and voiding those provisions if either party makes material misrepresentations about what happened.

States with same or similar protections: Arizona, California, Hawaii, Illinois, Louisiana, Maine, Maryland, Nevada, New Jersey, New Mexico, New York, Oregon, Tennessee, Vermont, Virginia, Washington State

For questions, please contact:
Danny McCarthy: 303.960.8818, danny@mendezbarkis.com -- Ruth Aponte: 303.907.1980, aponte@aponte-busam.com
Kjersten Forseth: 719.641.4674, kjersten@redrocksstrategies.com -- Eliza Schultz: 720.732.1955, eliza@schultzpa.com

3. Expand Protections for People with Disabilities

The Problem. CADA contains language stating disability discrimination cannot be claimed if "the disability has a significant impact on the job". This phrase can be interpreted as allowing employers to discriminate in ways prohibited by federal law. This language improperly takes the focus off whether the individual can perform the job with reasonable accommodation.

The Solution. Remove the language in CADA that permits employers to discriminate against covered individuals or refuse to accommodate them if "the disability has a significant impact on the job". This aligns CADA with the federal standard prohibiting discrimination and requiring accommodation unless doing so causes an "undue hardship" for the employer. It also aligns CADA with current Colorado Code of Regulations 3 C.C.R. 708-1, 60.6.

States with same or similar protections: Most states align with federal law and focus on reasonable accommodation.

4. Modernize an Employer's Affirmative Defense

The Problem: Currently, under CADA an employer is not liable for harassment if the employee who was harassed fails to report the harassment to an appropriate authority at the workplace. Essentially, *without a report, the harassment is not illegal.* In many cases, employees would have to report their harassment to the superior harassing them. Even if the employee reports the harassment, "an employer may avoid liability by arguing that it initiated a "reasonable investigation" and that "prompt remedial action," was taken if appropriate. Often, remedial action is never taken, and the employee must choose between repeatedly facing their harasser at work or finding new employment.

The Solution: Raise the threshold for an employer to qualify for an affirmative defense by requiring the implementation of a program designed to prevent harassment, deter future harassers, and protect employees from harassment. The program must be communicated to both supervisory and nonsupervisory personnel. Employers also must keep records of unlawful employment practice complaints and conduct reasonable investigations of those complaints.

States with same or similar protections: New York, California

5. Treat Marital Status Consistently

The Problem: CADA currently mentions "marital status" inconsistently, *e.g.*, prohibiting discrimination in public accommodation and housing on that basis, but not in employment.

The Solution: The bill treats "marital status" in employment situations the same as every other protected characteristic.

States with same or similar protections: Most states have marital status laws that are more robust than federal law.

POWR Act Coalition Partners

COLORADO PELA
ATTORNEYS FOR COLORADO EMPLOYEES

CWBA
COLORADO WOMEN'S BAR ASSOCIATION
Advancing Women AS LEADERS IN THE LAW

COLORADO AFL-CIO

PNC

Women's Lobby of Colorado

DISABILITY LAW COLORADO
Protecting the rights of Coloradans of all ages since 1976

COLORADO CHILDREN'S CAMPAIGN
Every Chance for Every Child

cobalt | Advancing Abortion Access and Reproductive Rights

Colorado Organization for Latina Opportunity and Reproductive Rights

ONE COLORADO

CTLA
COLORADO TRIAL LAWYERS ASSOCIATION
Protecting People. Righting Wrongs

SEIU LOCAL 105

NAACP
Colorado / Montana / Wyoming
State Area Conference

The Bell Policy Center

9 TO 5 COLORADO

COLORADO COALITION AGAINST SEXUAL ASSAULT

AFSCME

Colorado Fiscal Institute

BPW
Business and Professional Women of Colorado

The Arc.
Colorado

COLORADO WORKING FAMILIES PARTY

COLORADO HISPANIC BAR ASSOCIATION
Serving Colorado, Promoting Justice

NEW ERA COLORADO

TOWARDS JUSTICE
DEFENDING THE DIGNITY OF WORK

CCAT
Counties & Commissioners Acting Together

April 5, 20213
303 E. 17th Avenue
Suite 400
Denver, CO 80203

Madam Chair and members of the Senate Judiciary Committee,

Thank you for allowing me to submit testimony supporting SB23-172: Protecting Opportunities And Workers' Rights Act. One Colorado supports this legislation because it makes important updates to Colorado's workplace harassment and anti-discrimination policies, which protect Colorado workers.

Ensuring that our state has comprehensive anti-discrimination policies is a top priority for many LGBTQ+ people, who are disproportionately impacted by discrimination and harassment, including in the workplace. Research shows that employment discrimination remains prevalent for LGBTQ+ people, which limits opportunities and contributes to elevated rates of economic instability. Consider the following:

- One Colorado's *Closing the Gap: The Turning Point for LGBTQ Health* found that in 2018, 28% of LGBTQ+ Coloradans reported experiencing homophobic workplace harassment or discrimination and 29% reported experiencing transphobic workplace harassment or discrimination.
- UCLA's Williams Institute's 2021 *LGBT People's Experiences of Workplace Discrimination and Harassment* found that:
    - LGBT employees of color are more likely to report being denied jobs and verbal harassment; and
    - Transgender employees are significantly more likely to experience discrimination based on their LGBT status than cisgender LGB employees: Nearly half of transgender employees reported experiencing discrimination based on their LGBT status, compared to 27.8% of cisgender LGB employees.
- The National Center for Trans Equality's *2015 U.S. Transgender Survey* found that one in six respondents who have ever been employed reported losing a job because of their gender identity or expression in their lifetime.
- The Center for American Progress' *Discrimination and Barriers to Well-Being: The State of the LGBTQI+ Community in 2022* found that 50 percent of LGBTQI+ respondents, including 7 in 10 transgender respondents (70 percent), reported experiencing some form of workplace discrimination or harassment in the past year because of their sexual orientation, gender identity, or intersex status.

All workers deserve safe, respectful workplaces. This legislation updates the Colorado Anti-discrimination Act to strengthen protections for workers across the state, improving CCRD reporting of harassment claims; rejecting and replacing the harmful "severe or pervasive" harassment standard; removing unfair barriers to harassment claims and bringing equity to non-disclosure agreements; consistently addressing marital status discrimination across the Colorado Anti-discrimination Act; and fixing a discrepancy between CADA and the Americans with Disabilities Act (ADA) by improving required accommodations for workers with disabilities.

This bill is one of the many steps we can take to advance opportunities for workers in Colorado and help make our workplaces and communities safer. Thank you for your time, and I ask for your support of SB23-172.

Sincerely,

Nadine Bridges
Executive Director
One Colorado

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