Hearing Loss in the Workplace: Rights and Obligations
Mid-Atlantic ADA Update Conference
September 18, 2014

Lise Hamlin,
Director of Public Policy
David Gayle, Esq.

The HLAA mission is to open the world of communication to people with hearing loss through information, education, support and advocacy.

• Founded in 1979 as SHHH, HLAA has a national support network which includes local chapters nationwide, state organizations and an office in Bethesda, MD.
People with Hearing Loss

About 48 million American adults report a hearing loss that affects their ability to communicate.

- At age 65, one out of three people has a hearing loss.
- 60% of the people with hearing loss are either in the work force or in educational settings.

---

The Nation’s Voice for People with Hearing Loss
Hearing Loss

• What is hearing loss?
  – Damaged hearing: no “cure” for hearing loss
  – Treatments: hearing aids, cochlear implants, accommodations, do not provide “20/20 hearing”
• “You can hear when you want to”
  – Configuration, type and degree of loss
  – Age of onset, interventions
  – Environment, accommodations - or not

Hearing Loss

• Speechreading
  – Only about 35-40% of spoken English is visible
  – People who grew up with HL are more skilled than older adults aging into HL
• Sign languages (ASL, Signed English, PSE, etc.)
  – A learned skill: it takes years to become fluent
  – Those who age into hearing loss typically don’t sign, don’t have people to sign to
Hearing Loss and the ADA

• Hearing loss can qualify as a “disability” within the meaning of the ADA.
• Individuals with hearing loss must show that they are substantially limited in the major life activity of “hearing.” 42 USC §12102(1) and (2). See 29 CFR §1620.2(j)(3)(iii).
• Appropriate reasonable accommodations for people with hearing loss typically relies on technology that
  – Augments residual hearing
  – Translates speech to text

ADAAA

• Prior to ADAAA, courts often said
  o Hearing loss is NOT a “disability”
  o The use of hearing aids and other assistive devices correct the deficiency (like eyeglasses) and enable individuals with hearing loss to function normally.
  o In fact, hearing aids do not restore normal hearing
• Under ADAAA
  o A determination of disability cannot take into consideration mitigating measures such as hearing aids or cochlear implants. See 29 CFR §1630.2(j)(5)(i).
Reasonable Accommodations for People with Hearing Loss

• Assistive listening devices; e.g., FM, IR, or hearing induction loop systems
• Appropriate telephone; e.g., captioned telephones, amplified phones, HAC phones
• Communication access real-time translation (CART): voice to text at real-time speeds
• Appropriate emergency notification system; e.g., strobe lighting on fire alarms

Job Accommodation Network (JAN) (http://askjan.org) includes information about accommodations for people with hearing loss.

Complaints from Individuals Seeking Assistance from HLAA

• Most complaints arise when the economic stakes are highest: getting hired for a job or getting terminated from a job.
• Some complaints involve conditions of employment
• A few situations include harassment of the employee
Complaints from Individuals Seeking Assistance from HLAA

A common theme is twofold:

• Employers
  – Do not understand their legal obligations to accommodate employees.

• Employees
  – Are unaware of their legal rights and/or
  – Do not know the kinds of accommodations that would be effective for their hearing loss.

Hearing Aids and Job Qualification Testing

• Hiring: prohibiting applicants from using their hearing aids during medical qualification testing is the primary complaint raised.

• For certain jobs: a specified level of hearing acuity is a valid physical requirement for performance of essential job functions: public safety, e.g., police, FBI, firefighters, etc.
Hearing Aids and Job Qualification Testing

Reasons given for refusal to allow hearing aids:

- Hearing aids being dislodged
- Possible battery failure
- Diminished hearing caused by ear wax
- Incompatibility with some mobile phones
- Inability to detect environmental sounds

- These fears are largely unfounded and insufficient to support a total ban on testing with the use of hearing aids.

Case Example 1: Mr. P

Medical Qualification Testing

- Mr. P: 35 year old man, moderate to severe hearing loss in his left ear, normal hearing in his right ear.
- Applied for a position as a Special Agent with the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), a component of the Department of Justice.
- These positions have a valid standard of hearing acuity, specifying a minimum hearing loss at various frequencies. The written standard is silent on the use of hearing aids during testing.
Case Example 1: Mr. P
Medical Qualification Testing

• Mr. P notified ATF of his hearing loss, was permitted to be tested with and without his hearing aid.

• He was disqualified after he failed the hearing test without his hearing aid. No mention made of the test he passed with his hearing aid.

• Mr. P requested reconsideration of his rejection according with OPM regulations (5 CFR §339.306).

Case Example 1: Mr. P
Medical Qualification Testing

• After repeated inquiries by Mr. P, he was invited to take a specialized hearing test, without his hearing aid. The test would allow Mr. P to move his head to listen for sounds.

• ATF’s approach is inconsistent with the requirements of the ADA as articulated by the Civil Rights Division of DOJ, of which the ATF is a component.
Medical Testing and ADA Enforcement

- Charges of discrimination have been filed with EEOC involving state or local police officers.
- EEOC: denying applicants the use of hearing aids during testing violated the ADA.
- EEOC rejected the business necessity defense asserted by police departments, found the claim that officers using hearing aids would pose a “direct threat” to be speculative.

Medical Testing and ADA Enforcement

- Civil Rights Division of the Department of Justice: settlement agreements were reached in which the EEOC findings were confirmed.
- Civil Rights Division settlements: required applicants to be assessed on a case-by-case basis, with or without their hearing aids to determine their qualifications, including whether applicants pose a direct threat to the health and safety of themselves and others.
Medical Testing and ADA Enforcement

• Federal agencies are also inconsistent in their testing procedures.
  – Some permit the use of hearing aids (e.g., Mine Safety and Health Inspectors);
  – Some prohibit their use (e.g., Customs and Border Protection Officers; FBI Agents); and
  – Some are silent about the use of this reasonable accommodation (e.g., Border Patrol Agents; ATF Special Agents).

The Nation’s Voice for People with Hearing Loss

Medical Testing and ADA Enforcement

• Office of Personnel Management (OPM) regulations are old and obsolete. Title 5 CFR, Part 339, Medical Qualification Determinations, was issued in 1989 and is not in conformance with current law.
• OPM also turned down HLAA’s request to issue specific guidance to agencies consistent with DOJ’s application of the law to medical testing of job applicants.
Case Example 2: Mr. D
Termination of Employment

- Mr. D, a NYC police officer starting in 1989. In 1996, his partner fired a gun 5 times about 18 inches from his right ear causing hearing loss in that ear.
- Without accommodation, Mr. D advanced to the rank of Deputy Inspector in 2008.
- Mr. D requested and was authorized to obtain a hearing aid for his right ear, which he started using in early 2009.

In 2009, a medical doctor with NYPD recommended Mr. D be “involuntarily retired” on the basis of disability. No testing or other assessment was made of Mr. D’s ability to perform the essential functions of his job.
- Mr. D vigorously protested the recommendation and continued to perform his duties successfully using his hearing aid.
Case Example 2: Mr. D  
Termination of Employment

- In 2009, a written policy was issued _for the first time_, stating that police officers on duty may not wear hearing aids. No factual basis was given.
- In early 2010, his hearing was tested with a hearing aid by audiologists: his hearing was “excellent.”
- Mr. D’s formal request for a reasonable accommodation was rejected. NYPD also refused to allow him to demonstrate his ability to perform his essential job functions, ignoring his 2010 testing.

Case Example 2: Mr. D  
Termination of Employment

- Mr. D’s employment was terminated in 2011.
- His subsequent discrimination complaint is still pending in federal court.
- NYPD’s 2009 policy prohibiting the use of hearing aids has no requirement that incumbent police officers have their hearing tested. Police do incur hearing loss while on the job, but do not use hearing aids, thus jeopardizing public safety.
Case Example 2: Mr. D
Termination of Employment

• HLAA believes that the actions taken by the NYPD in the case of Mr. D violate the ADA.
• The DOJ requires police departments to test the hearing of applicants and employees, with or without hearing aids, and make individual assessments (no blanket exclusions) of whether applicants or employees can perform the essential functions of the jobs in question.

Case Example 3: Mr. S
Termination of Employment

• Mr. S, a 51 year old man, has progressive hearing loss since childhood. He began work with a power company in 1984 as an Electronic Technician.
• Mr. S worked in electrical substations, near communications transmitters and towers, and other locations where he was exposed to high voltage and radio frequency environments.
• Early in his employment, Mr. S did not need accommodations to perform his duties.
Case Example 3: Mr. S
Termination of Employment

• About 1995, Mr. S was promoted to Engineering Assistant. His hearing significantly diminished, Mr. S found it difficult to communicate in meetings and in the field. He made a non-specific request for accommodations, which was dismissed.

• Unable to effectively function in that job, Mr. S was told that his only option was take a demotion back to his previous position as an Electronic Technician. He accepted the demotion.

• Neither Mr. S nor his employer were aware of the requirements of the ADA to explore specific accommodations to enable him to stay in his position as an Engineering Assistant.

• Even with hearing aids, Mr. S struggled to communicate on the job. He used text, instant messaging, and email to communicate with co-workers in the field. Another non-specific request for accommodations was rejected in 2008.
Case Example 3: Mr. S
Termination of Employment

• Mr. S received a cochlear implant near the end of 2012.
• Prior to his surgery, Mr. S raised no questions concerning his ability to return to work with his cochlear implant.
• After surgery, Mr. S asked his physician and the provider of the device about using the CI at work; he discovered the environment at work could pose a risk to him and his cochlear implant.

• Exposure to electromagnetic fields existing in high voltage and radio frequency environments in which Mr. S worked could induce electric currents in the cochlear implant circuit or electrode leads that could cause the implant to fail and/or damage surrounding tissues in his head.
• There was no reasonable accommodation that would have enabled Mr. S to perform all the essential functions of his job as an Electronic Technician.
Case Example 3: Mr. S
Termination of Employment

• Mr. S desired to continue to work for this employer: he requested reassignment to another position which he was capable of performing and which did not entail any risk to his health and safety.
• His request for another position was rejected. Mr. S was notified that his employment would be terminated.
• Mr. S filed a charge of discrimination with the EEOC. Mediation resulted in a confidential settlement agreement.

Responsibilities of the Employer

Avoiding a pattern and practice of discrimination.

• The employer should have been responsive to early requests for reasonable accommodations.
• When a reasonable accommodation would no longer allow Mr. S to continue to perform his job, the employer should have considered reassignment to a position that was vacant, or that may become vacant in a reasonable time. See 29 CFR §1630.2(o)(2)(ii).
Responsibilities of the Employee

Becoming a self-advocate

- The question of the impact of the cochlear implant on his ability to effectively perform his job should have been raised before undergoing surgery.
- Research into available types of accommodations and self-advocacy should have been addressed well before he faced the possibility of termination.

Case Example 4: Ms. K

Reasonable Accommodations

- Ms. K, a 56 year old woman, with lifelong hearing loss in both ears, uses hearing aids.
- Ms. K has worked in a public school system for 14 years. She primarily worked in the library as an assistant.
- When Ms. K was transferred to the classroom as a substitute teacher she submitted a non-specific request for an accommodation or a return to her prior duties.
Case Example 4: Ms. K
Reasonable Accommodations

• Acknowledging her hearing loss as a disability under the ADA, and after “much review” of her situation, the school system offered the following:
  – In the copying room, remove your hearing aids or wear noise protection earmuffs to avoid damaging your hearing.
  – In the classroom, remove your hearing aids or use earmuffs.
  – In case of an emergency requiring evacuation of the building or a lockdown, a particular [named] colleague will alert you and assist you.

Hearing Loss in the Workplace:
Rights and Obligations

*HLAA has found:*

• Many employers lack knowledge of reasonable accommodations to enable employees with hearing loss to effectively perform their duties and responsibilities.

➢ HLAA has worked with and will continue to work with employers seeking a better understanding of the accommodations that enable their staff to do their job well.
Hearing Loss in the Workplace: Rights and Obligations

HLAA has found:

• Employees often do not know what accommodations will work for them (e.g., accessible telephones, CART services, written assignments, work space adjustments, elimination of non-essential functions, and reassignment to a vacant position).

➢ HLAA will continue to empower consumers to become knowledgeable self-advocates.

Questions?
Lise Hamlin
Director of Public Policy
David Gayle, Esq.
Hearing Loss Association of America
7910 Woodmont Avenue, Suite 1200
Bethesda, MD 20814
www.hearingloss.org
LHamlin@hearingloss.org
Dgayle@hearingloss.org