



ISSUE 3

VOLUME 3

STATE EEO COORDINATOR

Greetings,

I recently (or we recently) attended the Southern Region International Public Management Association conference in Louisville, Kentucky. There were 12 states represented and there were even some people from the Eastern and Central Region present. By now you may be saying, what does this have to do with equality and diversity? It is called the opportunity to network with your peers and to find best practices from other, similarly situated employers. Networking is a huge part of professional development and making the right contacts can be beneficial to us and our employers. There were pertinent workshops on the GINA regulations, best practices in the selection process, H1B Visa Certification, I-9 verification and many other workshops which allowed attendees the opportunity to share best practices.

We in ODE try to connect with as many outside sources as possible. We enjoy working with the Kentucky Commission on Human Rights and the Commission on Women. We work with groups affiliated with the University of Kentucky. We meet quarterly with the Business Diversity Network out of Louisville. We have relationships with the NAACP and the Urban Leagues and many other organizations. These contacts are valuable to the work we do every day and it keeps us abreast on the latest trends and issues in the field.

As the EEO contact for your agencies we urge you to also make that extra contact and get out and see what others are doing. I know funds are tight everywhere but if you can find a little extra time to get out of the office and see things from another perspective, there is no telling what type of good information you may gain. Even if it is just spending lunch with a colleague from another agency, they may have already dealt with a problem you are now facing or you may be able to help them with an issue as well. I hope everyone who reads this takes a moment to think about where their next networking opportunity can occur. It will pay dividends to you and your agency in the future.

Regards,
Singer

ODE TRAINING NEWS

— 2011 ODE Training Schedule —

Date	Audience	Title	GSC Room	Time
2/09/11	State Employees	Anti-Harassment	5th Floor	9am - 12 pm
	State Employees	Diversity	5th Floor	1pm - 4 pm
3/09/11	State Employees	Anti-Harassment	5th Floor	9am - 12 pm
	State Employees	Diversity	5th Floor	1pm - 4 pm
4/13/11	State Employees	Anti-Harassment	5th Floor	9am - 12 pm
	State Employees	Diversity	5th Floor	1pm - 4 pm
5/11/11	State Employees	Anti-Harassment	5th Floor	9am - 12 pm
	State Employees	Diversity	5th Floor	1pm - 4 pm
6/15/11	State Employees	Anti-Harassment	5th Floor	9am - 12 pm
	State Employees	Diversity	5th Floor	1pm - 4 pm
7/13/11	State Employees	Anti-Harassment	5th Floor	9am - 12 pm
	State Employees	Diversity	5th Floor	1pm - 4 pm
8/10/11	State Employees	Anti-Harassment	5th Floor	9am - 12 pm
	State Employees	Diversity	5th Floor	1pm - 4 pm
9/14/11	State Employees	Anti-Harassment	5th Floor	9am - 12 pm
	State Employees	Diversity	5th Floor	1pm - 4 pm
10/12/11	State Employees	Anti-Harassment	5th Floor	9am - 12 pm
	State Employees	Diversity	5th Floor	1pm - 4 pm



Questions & Answers on the Final Rule Implementing the ADA Amendment Act of 2008

From the Equal Employment Opportunity Commission

The ADA Amendments Act of 2008 (ADAAA) was enacted on September 25, 2008, and became effective on January 1, 2009. This law made a number of significant changes to the definition of “disability.” It also directed the U.S. Equal Employment Opportunity Commission (EEOC) to amend its ADA regulations to reflect the changes made by the ADAAA. The final regulations were published in the Federal Register on March 25, 2011.

The EEOC is making changes to both the Title I ADA regulations and to the Interpretive Guidance (also known as the Appendix) that was published with the original ADA regulations. The Appendix provides further explanation on how the regulations should be interpreted.

The questions and answers below provide information on the changes made to the regulations as a result of the ADAAA and identify certain regulations that remain the same. The answers below also note where the final regulations differ from what appeared in the Notice of Proposed Rulemaking (NPRM) that was published September 23, 2009. Finally, answers to certain questions provide citations to specific sections of the final regulations and the corresponding section of the Appendix (29 C.F.R. section 1630).

1. Does the ADAAA apply to discriminatory acts that occurred prior to January 1, 2009?

No. The ADAAA does not apply retroactively. For example, the ADAAA would not apply to a situation in which an employer, union, or employment agency allegedly failed to hire, terminated, or denied a reasonable accommodation to someone with a disability in December 2008, even if the person did not file a charge with the EEOC until after January 1, 2009. The original ADA definition of disability would be applied to such a charge. However, the ADAAA would apply to denials of reasonable accommodation where a request was made (or an earlier request was renewed) or to other alleged discriminatory acts that occurred on or after January 1, 2009.

2. What is the purpose of the ADAAA?

Among the purposes of the ADAAA is the reinstatement of a “broad scope of protection” by expanding the definition of the term “disability.” Congress found that persons with many types of impairments – including epilepsy, diabetes, multiple sclerosis, major depression, and bipolar disorder – had been unable to bring ADA claims because they were found not to meet the ADA’s definition of “disability.” Yet, Congress thought that individuals with these and other impairments should be covered. The ADAAA explicitly rejected certain Supreme Court interpretations of the term “disability” and a portion of the EEOC regulations that it found had inappropriately narrowed the definition of disability. As a result of the ADAAA and EEOC’s final regulations, it will be much easier for individuals seeking the law’s protection to demonstrate that they meet the definition of “disability.” As a result, many more ADA claims will focus on the merits of the case.

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3. Do all of the changes in the ADAAA apply to other titles of the ADA and provisions of the Rehabilitation Act prohibiting disability discrimination by federal agencies, federal contractors, and recipients of federal financial assistance?

Yes. The ADAAA specifically states that all of its changes also apply to:

- section 501 of the Rehabilitation Act (federal employment),
- section 503 of the Rehabilitation Act (federal contractors), and
- section 504 of the Rehabilitation Act (recipients of federal financial assistance and services and programs of federal agencies).

The changes to the definition of disability also apply to all of the ADA's titles, including Title II (programs and activities of State and local government entities) and Title III (private entities that are considered places of public accommodation). A few provisions of the ADAAA affect only the portions of the ADA and the Rehabilitation Act concerning employment, such as a provision that requires covered entities to show that qualification standards that screen out individuals based on uncorrected vision are job-related and consistent with business necessity, and changes to the general prohibition of discrimination in § 102 of the ADA.

The EEOC's final regulations apply to Title I of the ADA and section 501 of the Rehabilitation Act, but they do not apply to Titles II and III of the ADA, or sections 503 and 504 of the Rehabilitation Act.

4. Who is required to comply with these regulations?

These regulations apply to all private and state and local government employers with 15 or more employees, employment agencies, labor organizations (unions), and joint labor-management committees. [Section 1630.2(b)] Additionally, section 501 of the Rehabilitation Act applies to federal executive branch agencies regardless of the number of employees they have. The use of the term "covered entity" in this Q&A and the Appendix refers to all such entities.

5. How does the ADAAA define "disability?"

The ADAAA and the final regulations define a disability using a three-pronged approach:

- a physical or mental impairment that substantially limits one or more major life activities (sometimes referred to in the regulations as an "actual disability"), or
- a record of a physical or mental impairment that substantially limited a major life activity ("record of"), or
- when a covered entity takes an action prohibited by the ADA because of an actual or perceived impairment that is not both transitory and minor ("regarded as"). [Section 1630.2(g)]

6. Must individuals use a particular prong of the definition of disability when challenging a covered entity's actions?

Not necessarily. Claims for denial of reasonable accommodation must be brought under one or both of the first two prongs of the definition of disability (i.e., an actual disability and/or a record of a disability) since the ADAAA specifically states that those covered under only the "regarded as" definition are not entitled to reasonable accommodation. While other types of allegations (e.g., failure to hire or promote, termination, harassment) may be brought under any of the definitions, an individual may find it easier to claim coverage under the "regarded as" definition of disability. An individual only has to meet one of the three prongs of the definition of "disability." [Section 1630.2(g)(3) and Appendix Section 1630.2(g)]

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For the Answers to Questions 7-33 please visit the EEOC's *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008* page at:

http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm

Questions:

7. How do the regulations define the term “physical or mental impairment”?
8. What are “major life activities”?
9. When does an impairment “substantially limit” a major life activity?
10. Do the final regulations require that an impairment last a particular length of time to be considered substantially limiting?
11. Can impairments that are episodic or in remission be considered disabilities?
12. What are mitigating measures?
13. May the positive effects of mitigating measures in limiting the impact of an impairment on performance of a major life activity be considered when determining whether someone has a disability?
14. Does the rule concerning mitigating measures apply to people whose vision is corrected with ordinary eyeglasses or contact lenses?
15. May the negative effects of a mitigating measure be taken into account in determining whether an individual meets the definition of “disability”?
16. May the positive or negative effects of mitigating measures be considered when assessing whether someone is entitled to reasonable accommodation or poses a direct threat?
17. Can a covered entity require that an individual use a mitigating measure?
18. After an individualized assessment is done, are there certain impairments that will virtually always be found to result in substantial limitation in performing certain major life activities?
19. Do the regulations give any examples of specific impairments that will be easily concluded to substantially limit a major life activity?
20. May the condition, manner, or duration under which a major life activity can be performed be considered in determining whether an impairment is a disability?
21. When is someone substantially limited in the major life activity of working?
22. Does the ADA still exclude from coverage a person who is illegally using drugs?
23. Is pregnancy a disability under the ADAAA?
24. When does an individual have a “record of” a disability?
25. What does it mean for a covered entity to “regard” an individual as having a disability?
26. If a covered entity regards an individual as having a disability, does that automatically mean the covered entity has discriminated against the individual?
27. Does an individual have to establish coverage under a particular definition of disability to be eligible for a reasonable accommodation?
28. What do the final regulations say about qualification standards based on uncorrected vision?
29. Does the ADAAA change the definitions of “qualified,” “direct threat,” “reasonable accommodation,” and “undue hardship,” or does it change who has the burden of proof in demonstrating any of these requirements?
30. Why do the regulations no longer refer to a “qualified individual with a disability”?
31. Do any of the ADAAA’s changes affect workers’ compensation laws or Federal and State disability benefit programs?
32. May a non-disabled individual bring an ADA claim of discrimination for being denied an employment opportunity or a reasonable accommodation because of lack of a disability?
33. Will the EEOC be updating all of the ADA-related publications on its website to be consistent with the final ADAAA regulations?

May is Asian/Pacific American Heritage Month. In celebration, ODE has included an article from the *Smithsonian Folkways* website on the musical traditions of Hawaii. For additional information, including an informative video and other articles pertaining to Asian American Pacific Islander Heritage Month, please visit: http://www.folkways.si.edu/explore_folkways/hawaii.aspx.

Na Leo Hawai'i

Musics of Hawai'i

Asians and Pacific Islanders make up the majority of the population of Hawai'i. Music has always played a central role for all these communities. In early Hawai'i, *mele*, or chant, was the most important means of remembering myths of gods and deeds of powerful people. Today, Hawaiians continue to use music to define themselves and celebrate *aloha 'aina*, or love of land. And thousands of immigrants have adapted their lives as well as their music to this delicate land.

Mele

Early Hawaiians recorded their literature in memory, not writing. They composed and maintained an extensive oral tradition, a body of literature covering every facet of Hawaiian life. Chants, called *mele*, recorded thousands of years of ancient Polynesian and Hawaiian history. Chants also recorded the daily life of the Hawaiian people, their love of the land, humor or tragedy, and the heroic character of their leaders. A *mele* chant is a poetic form of song that tells a story. They can be classified into two general categories, *mele oli* and *mele hula*. *Mele oli*, as heard in "[*Mele Pule*](#)" and "[*Mele Kāhea*](#)," is an unaccompanied chant, usually performed by one person at ritual occasions such as a birth, a death, or the departure of a ranking chief. *Mele oli* also recounts historical events and tells stories and legends. *Mele hula*, as heard in "[*Anoai \(Hula Uliuli\)*](#)" and "[*Hole Waimea*](#)" is accompanied by dance movements alone, or by dance movements with musical instruments such as the drum, *pahu*, and gourd rattle, *'uli'uli*.

Himani

Western string instruments and Christian hymns, or *himani*, introduced to Hawaii in the nineteenth century, transformed earlier forms of Hawaiian music and provided ingredients for new musical forms. In 1820, Congregationalist missionary Hiram Bingham introduced "singing schools" at the site of Kawaiaha'o Church on O'ahu island. He taught native Hawaiians Western music and hymnody. These "singing schools" emphasized congregational singing with everyone actively participating, not just passively listening to a designated choir. The Reverend Bingham and others composed Hawaiian hymns from previous melodies, sometimes borrowing an entire tune, using Protestant hymn styles. In spite of the use of English throughout Hawaii, the Hawaiian language continues to be used in Bible reading and in the singing of *himani* (hymns) in many Christian churches. Himani still preserve the beauty of the Hawaiian language.

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Slack-key Guitar

Spanish and Mexican cowboys who worked on the numerous cattle ranches throughout Hawaii introduced the guitar to the islands. They brought a playing style that influenced the development of *kī hō 'alu* (slack-key guitar). They say that the art of the slack-key guitar is to Hawai'i as the flamenco guitar is to Spain and the Delta blues guitar is to Mississippi. Slack-key guitar music is a uniquely Hawaiian synthesis of traditional Hawaiian vocal styles with elements of Western music. In slack-key guitar, the six strings are loosened or "slackened" to produce an open chord when strummed. This remarkable and creative style is traditionally learned by imitation, without tablature or scores.

Falsetto Singing

Hawaiian music emphasizes the voice. Many Hawaiian songs feature falsetto, called *leo ki'eki'e*, a term coined in Hawaiian in 1973. Falsetto singing, most often used by men, extends the singer's range to notes above their ordinary vocal range. The voice makes a characteristic break during the transition from the ordinary vocal register to the falsetto range. In Western falsetto singing, the singer tries to make the transition between registers as smooth as possible. In Hawaiian-style falsetto, the singer emphasizes the break between registers. Sometimes the singer exaggerates the break through repetition, as a yodel. As with other aspects of Hawaiian music, it is probable that falsetto developed from a combination of sources, including pre-European Hawaiian chanting and early Christian hymn singing. Falsetto may have been a natural and comfortable vocal technique for early Hawaiians, since a similar break between registers called *ha'iha'i*, is used as an ornament in some traditional chanting styles.

Immigrant Influences

With the development of a plantation-based economy, other cultural groups came to Hawaii, bringing their own musical forms. These included immigrants from Puerto Rico, Portugal, China, Okinawa, Korea, Japan, and the Philippines. Playing their music for community events, each of these immigrant traditions has contributed to the cultural life of the islands.

EEOC SPOTLIGHT

EEOC Obtains \$451,000 Jury Verdict Against Boh Brothers Construction Co. For Male-On-male Sexual Harassment

Ironworker Abused on I-10 Project, Federal Agency Charged

<http://www.eeoc.gov/eeoc/newsroom/release/3-29-11.cfm>

Walmart to Pay \$440,000 to Settle EEOC Suit for Harassment of Latinos

Mexican-American Subjected Other Hispanic Employees to Ethnic Slurs at Fresno Sam's Club, Federal Agency Charged

<http://www.eeoc.gov/eeoc/newsroom/release/4-14-11.cfm>

Minnesota Department of Human Services Must Pay More Than \$467,000 For Age Bias

Consent Decree Requires Agency to Pay Damages and Provide Insurance Coverage for Former Employees

<http://www.eeoc.gov/eeoc/newsroom/release/4-8-11.cfm>

QUOTATION OF THE MONTH



People may be said to resemble
not the bricks of which a house is built,
but the pieces of a picture puzzle,
each differing in shape, but matching the rest,
and thus bringing out the picture.

Felix Adler
Philosopher & Ethicist



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