

Supporting students with a disability in clinical practice



THE LEGAL PERSPECTIVE

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Sources of Law/Legislative provisions

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- **Council Directive 2000/78:** EU Directive which establishes a general framework for equal treatment in employment and vocational training on a number of grounds, including DISABILITY.
- **Employment Equality Acts 1998-2011**
- **Equal Status Acts 2000-2011:**
Key Features: Statutory Prohibition on Discrimination on nine grounds, one of which is DISABILITY, the hallmarks of which are an *inclusive* definition of disability and a requirement for *reasonable accommodation provision*.

Sources of Law/Legislative Provision

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- **Disability Act 2005:** Statutory provision to support and protect the participation of disabled persons in everyday living, including education and employment.
- **EU Charter on Fundamental Rights: Article 21- Non Discrimination:** Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, **disability**, age or sexual orientation shall be prohibited.

Sources of Law/Legislative Provision

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- **UN Convention on Rights of Persons with Disabilities:** Ratified by the EU in December 2010. Establishes Disability not only as a social welfare matter but as a **human rights** issue and a matter of **law**.
- **Contract of Employment:** Express and implied rights and duties.
- **Safety, Health and Welfare at Work Act 2005 & attendant Regulations:** **S. 8** General duty of care owed to employees, **S. 13** Intoxicants, **S. 22** Health Surveillance, **S. 23** Medical Fitness for Work.

Sources of Law/Legislative Provisions

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- **Data Protection Acts 1988-2003:** Statutory provision to protect individuals personal data which is processed.
- **Constitution: Article 40.3** (qualified) right to privacy.
- **European Convention on Human Rights: Article 8 – Privacy:** (1) Everyone has the right to respect for his private and family life, his home and his correspondence.

Safety, Health & Welfare At Work Act 2005

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- **S. 8:** General duties on an employer to ensure, so far as is reasonably practicable, the ***safety, health and welfare at work of his employees.***
- **S.13:** An employee has an obligation to ensure they are not under the influence of any ***intoxicants*** (S.2 defines intoxicants as: “*alcohol and drugs and any combination of drugs or of drugs and alcohol*”). *
- **2005 Act places clear demands on employer organisations to carry out health surveillance, medical checks and other examinations.**

*No Regulations or Code of Practice on testing of employees to date.

Safety, Health & Welfare at Work Act 2005

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- **S. 22: Health Surveillance** This general duty requires that an *Employer ensures that health surveillance appropriate to the risks to safety, health and welfare that may be incurred at the place of work (identified by risk assessment per S. 19), and any specific requirement for health surveillance required by relevant health and safety legislation is made available to employees.*
- If Regulations e.g. Carcinogen Regs require particular surveillance, it must be carried out.

Safety, Health & Welfare At Work Act 2005

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- **S. 23 Medical Fitness for Work**

(i) An employer ***may require an employee to undergo an assessment*** by a medical practitioner, nominated by the employer, of his fitness to perform work activities referred to in subsection (ii) ***and the employee will co-operate*** with such assessment,

(ii) Work activities which when performed give rise to ***critical risks*** to the safety, health and welfare of persons at work.

(iii) Where following an assessment, a medical practitioner is of the opinion that an employee is unfit to perform such work activities, ***he will notify the employer and the employee*** of that opinion, the reasons for it and the likelihood of early resumption of work for rehabilitative purposes.... .

Safety, Health & Welfare At Work Act 2005

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- If an employee becomes aware that he is suffering from ***any disease or physical or mental impairment*** which, should he perform a work activity, would be likely to cause him to expose himself or another person to danger or risk of danger, he ***will immediately notify the employer concerned.***
- (v) Where an employer receives a notification under subsection (iii) or (iv) he will ***immediately take appropriate action*** to comply with his general duties under *section 8*.

Safety, Health & Welfare At Work Act 2005

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Issues raised by these provisions:

- Employee may not agree that health surveillance is required.
- Employer is protected in requiring compliance where surveillance is *necessitated under Regulations.*
- The position of the employer regarding health surveillance as an outcome of risk assessment or a perceived change in the employee by the organisation is less certain.

Privacy

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- An employee may invoke their right to privacy as grounds for objecting to the collection of data regarding their health status.
- **Article 40.3** Unenumerated right to privacy.

- *Herrity v Associated Newspapers Irl Ltd 2008 IEHC 249*

Dunne J :“ There is a Constitutional right to privacy. The right to privacy is not an unqualified right. The right to privacy may have to be balanced against other competing rights or interests...”

- **Article 8 ECHR** (1) Everyone has the right to respect for his private and family life, his home and correspondence.
- This right is also tempered by what is in accordance with the law and in the interests of the common good.

Employment Equality Acts

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- **Significant** legislative provisions promoting equality & prohibiting discrimination.
- **Relevance of provisions for you:**
- Hospital is employer for the purposes of the Act.
- 9 distinct grounds, including *disability* which Prohibits *providers of vocational training* from discrimination re access to or provision of such training.
- *Vicarious Liability*: Employer is liable for the acts of employees done in the course of employment

Employment Equality Acts

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Comparatively broad definition of Disability:

- (a) *The total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body.*
 - (b) *The presence in the body of organisms causing, or likely to cause, chronic disease or illness,*
 - (c) *The malfunction, malformation or disfigurement of a part of a person's body,*
 - (d) *A condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or*
 - (e) *A condition, illness or disease which affects a persons thought processes, perception of reality, emotions or judgements which result in disturbed behaviour,*
- And shall be taken to include a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person.*

Disability Discrimination

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- The question for the tribunal is whether the complainant's condition falls within one of these sub-paragraphs. E.g. Employment Equality Act Section.2(1) (a) **the presence in the body of organisms causing or likely to cause chronic disease or illness,**

EPILEPSY: *A Computer Co v A Worker 2001*

CEREBAL PALSY: *Kehoe v Convertec Ltd 2001*

ADDISON'S DISEASE: *A Firm of Solicitors v A Worker, 2004*

Disability Discrimination

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- **Section.2(1)(c) the malfunction, malformation or disfigurement of a part of a person's body.**

HEARING IMPAIRMENT: *A Motor Co v A Worker 2006.*

VISUAL IMPAIRMENT: *Gorry v Manpower 2001*

CAR ACCIDENT INJURIES: *Customer Perception Ltd v Leydon 2003.*

Disability Discrimination

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- Section.2(1)(d) **A condition or malfunction which results in a person learning differently from a person without the condition or malfunction**

A.D.H.D. *Mr X v A Third Level Educational Establishment, 2008.*

DYSLEXIA: *Two named complainants v Minister for Education and Science*

Disability Discrimination

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- Section.2(1)e) **a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour**

DEPRESSION: *Mr C V Iarnród Eireann, 2000.*

ALCOHOLISM: *A Complainant v Café Kylemore, 2002*

ANOREXIA: *Humphries v Westwood Fitness Club 2004*

Disability Discrimination

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- **Section.2 Imputed Disability**

Ms X v An Electronic Component Company.

Complainant was dismissed for failing to disclose her “back problem” on a pre-employment medical questionnaire. A back problem was imputed to complainant following her attendance at a manual- handling course during which the trainer formed the view that the complainant had such a condition because of her tendency to slouch. Complainant rejected the accusation of failure to disclose on basis that no such problem existed. In evidence she submitted that she had a natural tendency to slouch because of the size of her chest: this was a cosmetic issue, not a medical issue and she did not suffer from a back condition.

Held: the complainant’s imputed disability was a significant factor in the respondent’s decision to dismiss her.

Obesity?

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- *A Care Attendant v HSE (Dec –E2006-013)*

A Care Attendant who undertook a conversion course allowing her English nursing qualifications to meet the An Bord Altranais standards, applied for the position of staff nurse. She was offered a post as a staff nurse in a temporary capacity subject to Garda and Occupational Health Clearance. She was subsequently advised that she was “morbidly obese” and referred to a health physician amid concerns re her weight and its impact on her ability to perform her job. It was suggested by the physician that she would have difficulty in accessing patients and be unable to run fast enough in case of emergencies. (However, since her registration with the Nursing Board she had regularly been deployed when there was a shortage of staff – without any concerns over her weight).

The complainant referred a complaint under the EEA alleging that the HSE directly discriminated against her on the disability ground under section 6(2)(g) (IMPUTED Disability).

Held; The HSE had discriminated against the complainant on the alleged ground: Ordered to pay €3,000 compensation and appoint her to the post of Staff Nurse in a temporary capacity from the date of her health clearance deferral and to make the necessary salary adjustments.

Equal Status Acts

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- These Acts extend the Equality legislation to cover organisations engaged in business, the provision of services and education.
- The same 9 grounds apply, hence: the educational and health care sectors are prohibited from discriminating against you in relation to course access, nor may they discriminate in respect of access to any benefit or facility nor discriminate vis a vis the application of any sanction or expulsion.

Reasonable Accommodation

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- For the purposes of the Employment Equality Acts, a person who has a disability is fully competent to undertake and fully capable of undertaking any duties if the person would be so fully competent and capable on reasonable accommodation being provided by the persons employer.

Reasonable Accommodation

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- The employer shall take appropriate measures, where needed in a particular case, to enable a person who has a disability –
 - (i) to have access to employment
 - (ii) to participate or advance in employment
 - (iii) to undergo training.
- Unless the measures would impose a **disproportionate burden** on the employer – this is determined by regard to:
 - The financial and other costs,
 - The scale and financial resources of the employer
 - Access to public funding.

Reasonable Accommodation

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- ***‘Appropriate measures’***: this may include adapting premises or equipment, patterns of working time, distribution of tasks or providing training or integration resources, but do not include any treatment, facility or thing that the person might ordinarily provide for themselves.
- ***Subsection 16(3)(b) of the 2004 EEA-*** imposes a positive duty on employers to take appropriate measures where needed in a particular case to enable a person with a disability to have access to, participate in or advance in employment.

Reasonable Accommodation

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- **Knowledge**
- The Employer must have knowledge of the Disability to trigger the reasonable accommodation.
- Knowledge may be
 - Actual
 - Constructive (employer ought reasonably to have known of existence of disability)
- Duty to disclose not without its own concerns

Reasonable Accommodation Provision

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- **Practical Measures:**
- **Constructive Dialogue:** individual must be party to the accommodation. Employers enquiry can only be adequate if employee can fully participate.

Bowes v Southern Regional Fisheries Board, 2004

Equality officer found the employer had failed to engage in any real dialogue with the complainant in terms of providing him with reasonable accommodation amounting to fitting hand controls to steering wheel of company vehicle.

Reasonable Accommodation Examples

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- A student with dyslexia on clinical placement may find it difficult to write down handover information at report time: A reasonable accommodation could be a handover template.
- A student with a hearing impairment may have difficulty taking blood pressure and apex beats. A reasonable accommodation could be a specially adapted stethoscope to enable the vital signs to be heard.

Reasonable Accommodation Cases

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- **Return to work to “light duties” before returning to full duties:** *Feore v Alzheimer Society of Ireland*
- **Alterations to interviews/selection tests:**
O’ Sullivan v Siemens Business Services Ltd 2006.
A Complainant v Civil Service Commissioners 2002.
- **Requirement only to do essential functions of the post:** *A Computer Component Company v A Worker.*
- **Provision of equipment:** *A Motor Company v A Worker.*

Disclosure of Disability

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- The initial decision around disclosure of course, rests with the individual. Where a student discloses to the college, they should be advised per the provisions of the **Data Protection Act 2003**, as to any relevant third party dissemination and should be requested to expressly consent or dissent to same in writing.

Disclosure of Disability

- As such disclosure relates to ***sensitive personal data***, the data controllers are required to register with the Data Protection Commissioner.
- A ***data controller*** is defined as a person who either alone or with others, controls the contents and use of personal data.
- Additionally, the data controller must ensure that the individual's information is obtained and processed fairly, is accurate and not excessive, is up to date, securely transmitted and securely stored.
- If organisations contract out this activity they must ensure that the third party treats the data in compliance with the Act. Equally, the party to whom the information is disseminated (clinical partner), they too have compliance and confidentiality obligations under the Act.

Disclosure of Disability

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- So long as the disability has been disclosed to the college and such disclosure consents to dissemination to appropriate parties, there is no specific requirement in law on the individual to disclose (again) to the clinical contact person and the hospital may not ignore the students disability.
- However, the practical benefits of such discussion are obvious – as the organisation is enabled to provide the optimum accommodation for the individual and there is a reduction in stress levels for the student as they are not second guessing the organisations interpretation of their disability and the reasonable adjustments that it requires

Disclosure of Disability

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- There is no necessity for members of staff in each clinical area to be informed about the students disability, unless it concerns ***‘Where a person has a disability that, in the circumstances could cause harm to the person or to others, treating the person differently to the extent reasonably necessary to prevent such harm does not constitute discrimination. S 4 (4) Equal Status Act***
- The organisation would have to prove such treatment was reasonably necessary to enable them to discharge their duty of care to the individual, other staff members or patients.

Disclosure of Disability

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- Any organisational policy or procedure that would purport to reserve the right to address non-disclosure, could only address this matter in the context of how the non-disclosure jeopardised the duty of care the organisation owed to the individual, other employees and patients

Disclosure of Disability

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- **Does the clinical staff member have the right to override the students decision not to disclose their disability to a patient or colleague?**
- An Bord Altranais requires that registered nurses be competent and fit to practice i.e. that they have an ability to practice safely and effectively, fulfilling their professional responsibility within the scope of their practice.
- Students with a disability have to meet the same competencies as their non-disabled peers.
- Where the clinical staff member can objectively justify why the disclosure was necessary either to ensure the health, safety and welfare of the patient/colleague or to ensure compliance with some other statutory obligation, such disclosure is acceptable.

Conclusion

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- In any profession there are core competencies and there should be no difference in the competency standards applied for students, with or without a disability.
- Competence and fitness to practice is a requirement of the nursing profession: whether this is to be achieved with or without the intervention of a reasonable accommodation is irrelevant. Once the required reasonable accommodation is not a disproportionate burden on the clinical partner, they are required to facilitate the disabled student to engage in clinical practice.

QUESTIONS?