

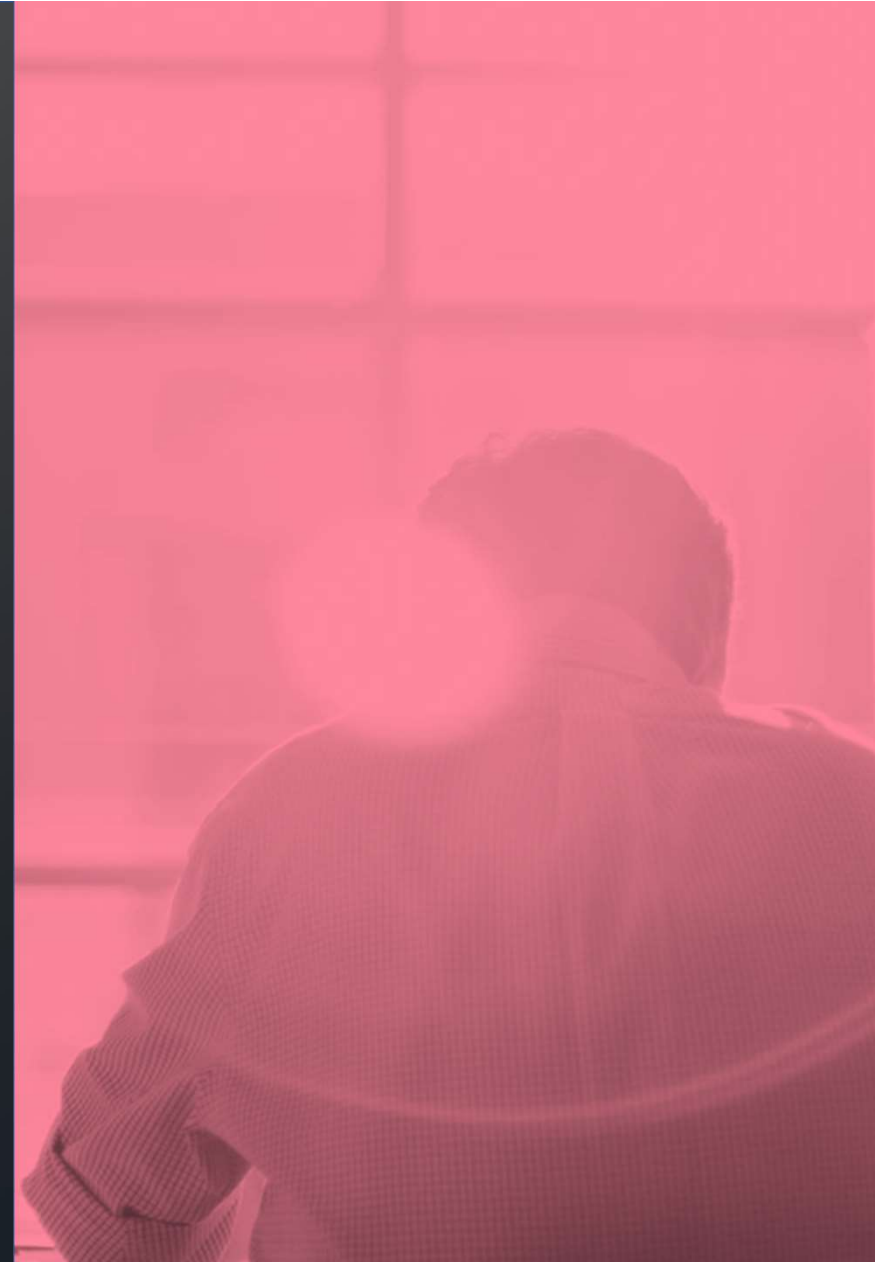


EBA

Employment Bar Association

EBA Equality Spotlight: Neurodiversity and Equality in the Workplace

Wednesday 12 March 2025



Brendan Kirwan SC
Chair, Employment Bar Association



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NEURODIVERSITY IN
THE WORKPLACE -
DEFINITIONS,
DETECTIONS AND
DIAGNOSIS - HOW
DELAYED DIAGNOSTIC
ROUTES IMPACT
EMPLOYER'S NOTICE

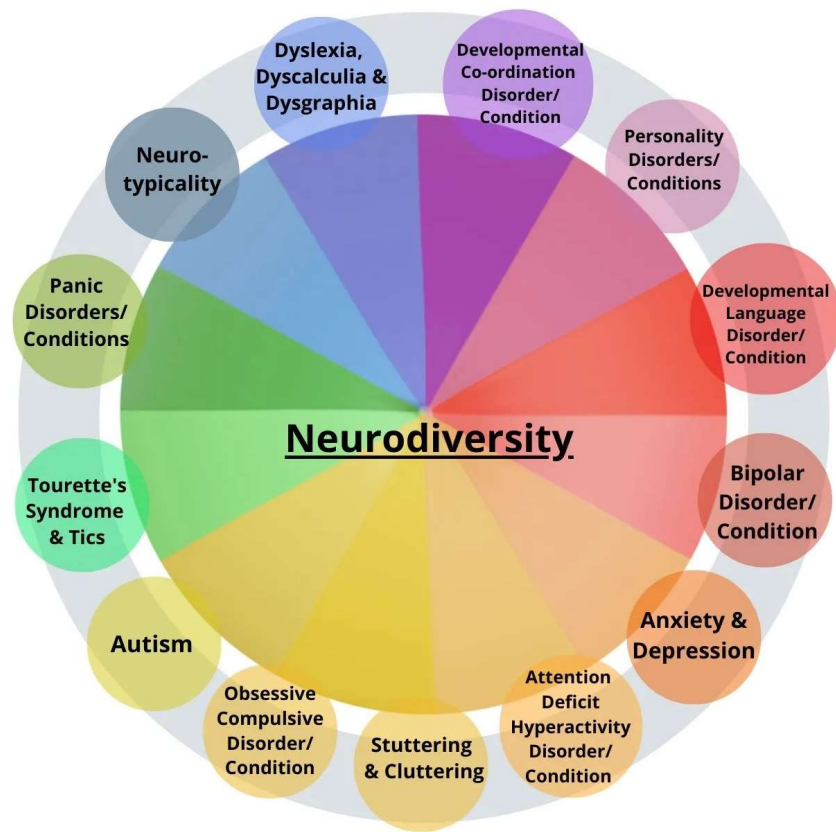
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.....WHAT IS MEANT BY NEURODIVERSITY.....

- ▶ Everyone has a neurotype
- ▶ Default (about 80%) of the adult population are likely neurotypical
- ▶ About 20% are neurodiverse
- ▶ Neurodiversity/neurodiverse is a term used to describe a group of neurodivergent individuals

WHAT IS MEANT BY NEURODIVERSITY.....



➤ Includes;

➤ autistic persons, persons with ADHD/ADD, AuDHD, dyslexia, dyspraxia, dysgraphia, dyscalculia, OCD, ODD, PDA, Tourette's Syndrome

BUT AREN'T WE ALL ON THE SPECTRUM?..... (AND OTHER THINGS NOT TO SAY)

- ▶ Importance of adopting terms appropriate to the neurodivergent employee
- ▶ Person-first language or identity-first language
- ▶ Support needs versus functioning range

Evolution of language

- ▶ ASD vs Autistic
- ▶ Asperger syndrome and incorporation as autism in the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5)
- ▶ **And the critical question - is a neurodivergent condition a disability?**

DEFINING DISABILITY.....

- ▶ EEA - a condition ... which affects a person's thought processes, perception of reality, emotions or judgement....
- ▶ Social model of disability - CRPD approach
- ▶ Employee may identify as disabled
- ▶ Legal vs social definition



NEURODIVERGENCE AND DISABILITY.....

- The Workplace Relations Commission and/or the Labour Court have accepted;
- That autism is a disability for the purposes of the ESA (*Mangan v University Hospital Limerick* ADJ-00041556) and the EEA (*A Prospective Employee v A Company* ADJ-00004761)
- That ADD/ADHD is a disability for the purposes of the ESA (*Public Appointments Service v Flynn* DEC-E2016-065) and the EEA (*Sanders v Neutrapharma* ADJ-00044632)

NEURODIVERGENCE AND DISABILITY.....

- ▶ That *Dyslexia* is a disability for the purposes of the ESA (*A Complainant v An Irish Language College* DEC-S2010-027) and the EEA (*A Complainant v A Retail Organisation* ADJ-00024028)
- ▶ That *Dyspraxia* is a disability for the purposes of the EEA (*A Complainant v A Retail Organisation* ADJ-00024028)



NEURODIVERGENCE - SPECIFIC..... DIAGNOSTIC CHALLENGE

- ▶ Differs from other disabilities where employees may self-diagnose or have difficulty accessing diagnosis
- ▶ No public pathway for adult autism diagnosis in Ireland
- ▶ Significant delays for diagnosis of ADD/ADHD and other conditions
- ▶ Costs of pursuing diagnosis can be prohibitively high

- ▶ Diagnosis = knowledge?

NEURODIVERGENCE AND NOTICE.....

- ▶ **Knowledge or notice is the gateway to protection for an employee**
- ▶ The Labour Court has held that an employer must be able to demonstrate that it had no actual or constructive knowledge of the employee's disability in order to demonstrate that it was not aware of the employee's disability (*Connacht Gold Co-Operative Society v A Worker* EDA0822)
- ▶ *“signs, symptoms or indications of disability could contribute to an employer being fixed with constructive knowledge of disability.”*

WHAT THE CASE LAW TELLS US.....

- ▶ ***Christian Goulart Mcnerney v Dept Of The Environment, Climate And Communication (ADJ-00033757)***
- ▶ Reaffirms finding in *A Worker v An Employer* EDA 1927 that an employer is not expected to accept the employee's assertions that they had a disability in the absence of medical evidence.
- ▶ In this case the Complainant informed the employer of his autism diagnosis in December 2020 and requested reasonable accommodations that month, however the date the AO considered the employer to have been on notice of the complainant's autism diagnosis was 7 January 2021, that being the date medical evidence was received by the employer.
- ▶ The WRC held that as the alleged failures to provide reasonable accommodation took place prior to 7 January 2021, the complainant failed to establish a *prima facie* case of failure to provide reasonable accommodations.

WHAT THE CASE LAW TELLS US.....

➤ ***Patrick McElhinney v EI Electronics (ADJ-00037768)***

- The employee confirmed he had Crohn's in a pre-medical questionnaire and also informed his supervisor a week before his dismissal. No medical evidence was produced by the employee but the AO found that the employer was on notice of the employee's disability as he had brought that disability to the attention of his employer at pre-employment stage and further when he told his line manager about it one week before he was dismissed. (The claim failed on other grounds)
- In ***A Cleaning Operative v A Contract Cleaning Company DEC-E2010-089***, the employer argued that he was not aware that the employee had a disability. The medical certificates supplied by the employee stated that she had an illness, but did not specify that it was high blood pressure.
- The Equality Officer found that the employer "did not ask the [employee] about her health nor did they request further certification". That was against background where the employer had previously facilitated the employee's request to transfer from night shifts to day shifts (requested on foot of a medical report stating that night shifts were having a negative impact on the employee's health).
- The Equality Officer was satisfied that the employer was aware that the employee had a disability.

WHAT THE CASE LAW TELLS US.....

➤ ***John-Paul Barbour-Hyland v DAA ADJ-00048082***

- Employer was not considered to be on notice of an employee's IBS as it was not contained in occupational health report and no other medical evidence was produced by the employee. Employee had informed his employer of his IBS.

➤ ***Oisín Gourley v Mason Hayes & Curran LLP (ADJ-00049048)***

- Here, the employee did not produce medical evidence of his disability (long covid and depression), nonetheless the AO found that the disclosure of his disabilities ought to have been taken into consideration in assessing whether or not he had passed his probation period with the Respondent.

CASE LAW FROM OTHER JURISDICTIONS.....

➤ ***Godfrey v NatWest Market plc* [2024] EAT 81**

- Here, the Employment Appeals Tribunal ruled that a former employer did not have either actual or constructive knowledge of the employee's post-employment diagnosis of autism spectrum disorder.

➤ ***Morgan v Buckinghamshire County Council* [2022] EAT 160**

- A social worker with a diagnosis of autism and dyslexia was dismissed for inappropriately giving gifts to children. The claimant had refused an occupational health assessment which allowed the employer to successfully argue that any unfavourable treatment was objectively justified. However, a manager had criticised Ms Morgan's "choice" to mask her autism, describing this as deliberately withholding her condition and putting children at risk, and that was found by the first instance tribunal, and upheld on appeal by the Employment Appeals Tribunal, to be harassment.

- ***Borg-Neal v Lloyds Banking Group* 2003 2202667/2022** Here a manager was dismissed for using a hate term in a race awareness training session. The Employment Tribunal found that this was disability discrimination because the manager's dyslexia impeded his ability to properly express himself. It resulted in an award of £490,00.

DIAGNOSIS AND KNOWLEDGE.....

- ▶ Diagnosis is only part of the picture
- ▶ A employer is unlikely to defend a claim by refusing to accept a disclosure of a disability only by reference to an absent diagnosis
- ▶ Support led assessment of disability rather than diagnostic/deficiency approach consistent with CPRD
- ▶ Cultivating a culture where disclosure is not hindered is crucial
- ▶ Consider requirement of requiring diagnosis and CRPD lens





THANK YOU

.....*questions and comments welcome*
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*Neurodiversity, discrimination,
reasonable accommodation and
disproportionate burden*



Setting the scene

- Framework Directive

Recital 20 in the preamble to Directive 2000/78 provides:

- 'Appropriate measures should be provided, ie effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources'.

Article 5 of Directive 2000/78 provides, under the heading 'Reasonable accommodation for disabled persons', as follows:

- 'In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall 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, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.'

Setting the scene (contd)

Paragraph (e) in the preamble to the United Nations Convention of 13 December 2006 on the Rights of Persons with Disabilities reads:

'[r]ecogni[s]ing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'.

The second paragraph of Article 1 of the Convention contains the following definitions:

- 'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.

Setting the scene (contd)

Section 16(3) EEA

(b) 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, or
- (iii) to undergo training,

unless the measures would impose a disproportionate burden on the employer.

(c) In determining whether the measures would impose such a burden account shall be taken, in particular, of —

- (i) the financial and other costs entailed,
- (ii) the scale and financial resources of the employer's business, and
- (iii) the possibility of obtaining public funding or other assistance.”

Case law: background

- *HK Danmark v Dansk almennyttigt Boligselskab* (C-335/11 and C-337/11)

CJEU: reduction in working hours may constitute an accommodation measure under Article 5. Article 2 of the UN Convention prescribes a broad definition of the concept of “reasonable accommodation”.

Broad definition of reasonable accommodation

“...Directive requires an appropriate balance to be struck between the interest of the disabled employee in benefiting from measures to support him and that of the employer in not being compelled to accept interferences with the organisation of his business and economic losses without further consideration.

Nano Nagle: Supreme Court observations

- ***Nano Nagle School v Daly*** [2019] IESC 63

The question of “disproportionate burden” under s.16(3)(b) is to be evaluated by taking into account *financial and other costs, the scale and financial resources of a business, and the possibility of obtaining public funding or assistance.*

...to create a new job will almost inevitably raise the question as to whether what is in contemplation is a disproportionate burden ... degree of rearrangements necessary by allocation of tasks, or otherwise, might be such as to be disproportionate. It is a matter of degree, capable of being determined objectively.

They place a duty on the employer to show that, if they have not carried out such a process, then it is only because the re-organisation necessary would be disproportionate or unduly burdensome. What is essential is that it be shown, objectively, that the employer has, in fact, given the question of redistribution full consideration.

Disability: reasonable accommodation: CJEU

- Does the obligation of reasonable accommodation extend to provision of alternative position? Balancing of needs: size of employer?
- **XXXX v HR** CJEU C-485/20 : CJEU held that where a worker permanently incapable of undertaking their role/essential functions due to disability-reasonable accommodation may require assignment to a different role where employee had necessary competency, capability and availability. unless this imposed a disproportionate burden. **Caveat : there was a vacancy and worker capable.** Reasonable accommodation must be assessed on the facts of the case and the employee must have the necessary competence, capability and availability for the alternative role

Disability: reasonable accommodation: CJEU

- [C-631/2022 JMAR v Ca Na Negreta SA \[2024\] IRLR 928](#)

CJEU national legislation cannot contravene the Directive by making a worker's disability a ground for dismissal, without the employer first being required to make or maintain reasonable accommodation in order to enable that worker to keep his or her job, or to demonstrate, where appropriate, that such accommodation would constitute a disproportionate burden

The concept of 'reasonable accommodation' requires that a worker who, owing to his or her disability, has been declared incapable of performing the essential functions of the post that he or she occupies, be assigned to another position for which he or she has the necessary competence, capability and availability, unless that measure imposes a disproportionate burden on the employer ...”

Disability reasonable accommodation

- ***Collins v HSE Saolta Group ADJ-00052283*** refusal of transfer to different nursing position (palliative care) no breach of s. 16 as employer could show no vacancy, employee not competent and disproportionate burden. Employee suffered musculoskeletal injury. Employee took stance that alternative position was only reasonable accommodation suitable to her-ignored correspondence where employer set out that no such vacancy existed. No compensation ordered but employer directed to assess reasonable accommodation with her.
- ***Tracy v Smurfit Kappa Ireland Ltd AD-00046740***: Lupus. Reassignment to a different role can be appropriate measure but only where permanently incapable of performing contractual role: medical evidence required. AO not satisfied complainant completely incapable of educational sales representative role, driver provided for 6 months to assist with lifting. alternative role not appropriate measure. Failure to provide proper consideration and exploration of accommodation or imposition of “massive burden”. Consultation re assignment also required, along with work site inspection.
€29,000 awarded.

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Disability and reasonable accommodation, the Irish approach

- *Kinsella v HSE* –ADJ-000038938 re assignment to a different role, likely to be beyond Nano Nagle and “*probably broader than many interpretations of Nano Nagle.*” Employee had back pain, care operative. Occupational health recommended modified work no lifting. Employer did not follow this advice.AO: employee would have succeeded on failure to reassign or consider alternative roles-large employer-no alternative role offered. €8,000 awarded as compensation

Disability discrimination and neurodiversity

- *O’Riordan v Omniplex Cork* ADJ-00051601

Employee with autism disclosed at recruitment stage but no reasonable accommodation sought or required. Deterioration in mental health, sought accommodation: consistent scheduling, two consecutive days off to rest and not placed exclusively on closing shifts.

Some engagement with employer re accommodations during sick leave, but resigned.

AO: noted accommodation for shifts for student employees and pregnant staff . Criticised failure to follow occupational health report recommendation of 2 consecutive days off. But engagement by employer, 16 grievances raised complicated matters.

€12,000 awarded

Q&A/observations

Many thanks

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Q&A



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NEURODIVERSITY AND EMPLOYMENT EQUALITY

THE INTERNATIONAL AND EUROPEAN PERSPECTIVES



**EBA EQUALITY SPOTLIGHT:
NEURODIVERSITY AND EQUALITY IN THE
WORKPLACE - A GROWING AREA OF
CHALLENGE**

**12 MARCH 2025
DUBLIN**

3 MAIN TOPICS



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1. International and EU legal framework
2. Case law from different European jurisdictions
3. Examples of good practices from EU and US



- **Articles 5 and 27 of the UN CPRD**
- [General comment No. 6 \(2018\) on equality and non-discrimination](#)
 - a) Constructive knowledge of disability (point 24.b)
 - b) Key elements that guide the implementation of the duty to provide reasonable accommodation (point 26)
- [General comment No. 8 \(2022\) on the right of persons with disabilities to work and employment](#)
- **Individual decisions of the CRPD Committee**
 - a) Reasonable accommodation as an essential tool for retention and continuance of existing employment
 - b) V.F.C. v. Spain, [CRPD/C/21/D/34/2015](#), point 8.7
*„The process of seeking reasonable accommodation should be **cooperative and interactive** and aim to strike **the best possible balance** between the needs of the employee and the employer.“*



- CRPD incorporated into EU law through Council Decision 2010/48/EC
- status of so called “mixed agreement”
- EU and all EU member states are parties to CRPD

EU Directive 2000/78/EC (EED, Employment Equality Directive)

- Recital 17, 20 and 21 – important interpretation guidelines

Relevant CJEU case law

- [C-397/18](#), DW v Nobel Plastiques Ibérica SA, ECLI:EU:C:2019:703

termination of employment for “objective” reasons and potential indirect disability discrimination

- [C-38/24](#), G. L. v AB SpA (pending case)

duty to provide RA to care givers of children with disabilities – clarification of the scope of application of the [Coleman judgement \(discrimination by association\)](#)

CASE LAW, GOOD PRACTICES, GUIDELINES



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Equinet Discussion Paper
2021
Annex
(very useful tool)

Including summary

Court practices regarding disability discrimination, including reasonable accommodation, at EU and Member State level, and in light of the UN CRPD

Court practices regarding disability discrimination (including reasonable accommodation)
2024



Reasonable accommodation at work
Guidelines and good practices
2024

CASE LAW FROM DIFFERENT EUROPEAN JURISDICTIONS



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Spain Constitutional Court

15 March 2021

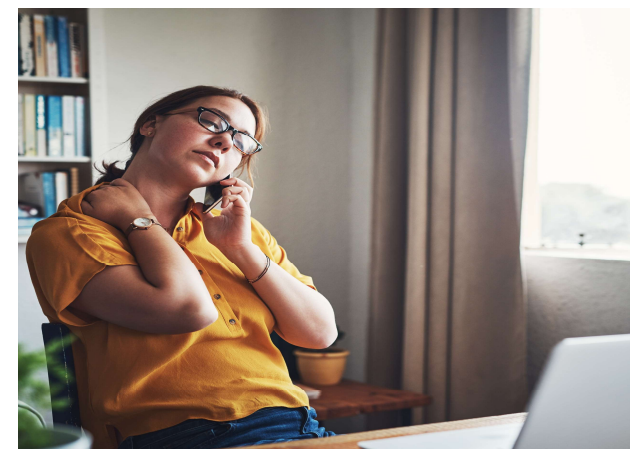
[Nº 51/2021](#)



Norway

Equality and Anti-Discrimination Tribunal

9 September 2013 [Case 11/2013](#)



Sweden

Labour Court

18 November 2020

[Decision No. 58](#)

GOOD PRACTICES AND COMPLEMENTARY METHODS EU



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- PROVIDING ASSISTIVE TECHNOLOGY
- PERSONAL ASSISTANCE
- ADJUSTING WORKSPACE
- FLEXIBLE WORKING HOURS
- FLEXIBLE TASK ARRANGEMENTS

Illustrative examples

- Project Manager on the autism spectrum in the pharmaceutical industry (Austria)
- Computer engineer with autism in the multinational company in the energy sector (Portugal)

GOOD PRACTICES FROM US



”

JAN helps employers recognize the valuable contributions that qualified workers with disabilities add to the workforce.

“

Job Accommodation Network (JAN)

- <https://askjan.org/index.cfm>
- A to Z lists (by disability/limitation/work-related function/topics/accommodation)
- JAN is a service of the U.S. Department of Labor's Office of Disability Employment Policy

GOOD PRACTICES FROM US CASE STUDIES FROM JAN



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Autism

- A lab employee who is autistic is highly **sensitive to smells**. She has used a certain scent found in shampoos and body lotions to calm herself when the smells of the workplace were **overwhelming**.
- A newly adopted **fragrance-free workplace policy** created concerned the employee. JAN suggested an **aromatherapy necklace or bracelet** that would allow her access to the scent when needed but would not be an irritation to others. Flavored gum and hard candy also were recommended.

ADHD

- A retail employee with ADHD often forgot the **closing and cash-out procedures**, which resulted in missed printouts of daily sales reports.
- The employer created a **numbered checklist** that identified each step for proper closing procedures and identified which reports to run from cash registers. This accommodation **benefited all employees**.

CONCLUDING REMARKS



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Legal Frameworks Exist – International and EU law provide tools for balancing rights and responsibilities (e.g., reasonable accommodation).

Lack of Awareness & Data – Neurodiversity is still not well understood in the EU, and comprehensive data is missing.

Good Practices Exist – Assistive technologies, flexible work arrangements, and tailored support help inclusion.

Inspiration from the US – The Job Accommodation Network (JAN) offers practical solutions for employers and employees.

Challenges: Stigma & Prejudice – Neurodivergent individuals still face misconceptions in the workplace.

Key to Inclusion – Employers need an inclusive approach, and neurodivergent employees should feel empowered to express their needs.

Final Goal – Recognizing neurodivergent talents and fostering an equitable and inclusive workforce.

THANK YOU FOR YOUR ATTENTION!



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