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Are employees suffering from depression in the South African workplace protected by the existing disability provisions within employment law?

Mini – thesis submitted in fulfilment of the requirement for the LLM degree in Labour Law.

BY

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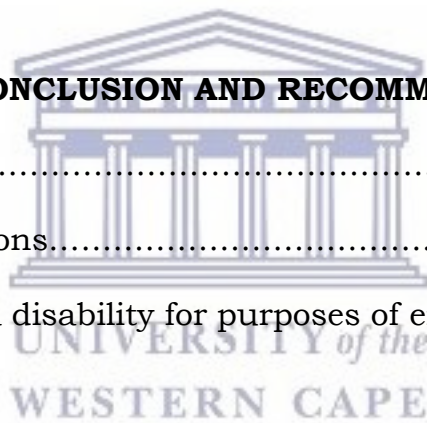
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DEDICATION

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PLAGIARISM DECLARATION

I, **Bernice Welgemoed**, declare that the thesis title: **Are employees suffering from depression in the South African workplace protected by the existing disability provisions within employment law?** is my own work and that it has not been submitted for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Signed by Bernice Welgemoed

November 2017

Signed by Supervisor, Elsabe Huysamen



ABSTRACT

Depression is a mood disorder that negatively affects the way in which a person feels about himself or herself. This can ultimately affect an employee's ability to work, through reducing his or her capabilities to perform within the workplace. Individuals who suffer from depression are often discriminated against due to the societal prejudice that continues to exist about depression. In the workplace such discrimination often prevents employees from qualifying for promotions, or prospective employees from being offered employment. The fear of being subjected to unfair discrimination because of depression frequently results in employees not disclosing their mental health status to their employers, which often then causes the depression to become worse.

In order to effectively address this issue, the legislative framework in South Africa dealing with employment rights can be broadened to include depression as a disability, thereby also further protecting depressed employees from discrimination in the workplace.



KEYWORDS

Depression

Disability

Discrimination

Convention on the Rights of Persons with Disabilities

Labour law

Unfair Dismissal

Unfair Treatment

United Kingdom

United Nations,

United States

World Health Organisation

LIST OF ABBREVIATIONS

ADA	-	AMERICAN WITH DISABILITIES ACT
ADAAA	-	AMERICAN WITH DISABILITIES AMENDMENT ACT
BCEA	-	BASIC CONDITIONS OF EMPLOYMENT ACT 75 OF 1997
CEDAW	-	CONVENTION ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMAN
CRPD	-	CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES
DDA	-	DISABILITY DISCRIMINATION ACT OF 1995
EA	-	EQUALITY ACT OF 2010
EAT	-	EMPLOYMENT APPEAL TRIBUNAL
EEA	-	EMPLOYMENT EQUITY ACT 55 OF 1998
EED	-	EMPLOYMENT EQUITY DIRECTIVE
EEOC	-	EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
LRA	-	LABOUR RELATIONS ACT 66 OF 1995
SREOPD	-	STANDARD RULES IN EQUALIZATION OF OPPORTUNITIES FOR PEOPLE WITH DISABILITIES
UK	-	UNITED KINGDOM
UN	-	UNITED NATIONS
USA	-	UNITED STATES OF AMERICA
WHO	-	WORLD HEALTH ORGANISATION

CHAPTER ONE

INTRODUCTION

1.1 RATIONALE/BACKGROUND

The World Health Organisation (WHO)¹ estimates that around 350 million people worldwide suffer from depression.² Depression is one of the main causes of employee absenteeism,³ both in South Africa and internationally. During 2014 it was found that employee absenteeism related costs in the South African economy amounted to roughly around R19 billion.⁴ From these statistics it is evident that depression is a ‘costly illness among South Africa’s workforce’.⁵ The way in which depression should be dealt with in the South African workplace will largely depend on whether it is classified as incapacity in the form of ill-health or incapacity in the form of a disability.

If regarded as merely an ill-health issue, employees will simply be protected against unfair dismissals in terms of s 188 of the LRA. If depression is regarded as a disability within the South African workplace, the situation should be dealt with in terms of the Code of Good Practice on the Employment of People with Disabilities (hereinafter referred to as ‘the CGP on Disability’). Employees with disabilities are furthermore protected against automatically unfair dismissals in terms of s 187(1)(f) of the LRA. They are also part of the protected group of ‘designated employees’ for purposes of the EEA,⁶ and protected against unfair discrimination in terms of s 6 of the EEA. In order for an employee to be considered disabled for purposes of the CGP on Disability, the following criteria must be satisfied: the disability must be a ‘long term or recurring, physical or mental impairment, which substantially limits’⁷ the employee’s daily activities, such as ‘caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working’.⁸ In the case of *Standard Bank of SA v Commissioner*

¹ World Health Organisation available at <http://www.who.int/topics/depression/en/> (accessed on (07 March 2015)).

² World Health Organisation *Mental Health and Development* available at http://www.who.int/mental_health/management/depression/who_paper_depression_wfmh_2012.pdf (accessed on 07 March 2015).

³ Smit D & Fourie L ‘A Labour Law Perspective on Employees with Depression’ (2014) 2 *IJPLR* 68 69.

⁴ Smit D & Fourie L ‘A Labour Law Perspective on Employees with Depression’ (2014) 2 *IJPLR* 68 69.

⁵ Carvalheira R *Depression, Dismissals and Disability* (unpublished LLM thesis, Witwatersrand University, 2011) 4.

⁶ Employment Equity Act 55 of 1998 s1

“designated groups means black people, women and people with disabilities”.

⁷ Code of Good Practice on the Employment of Persons with Disabilities Item 5.1.

⁸ Kobayashi T ‘Employers’ Liability for Occupational Stress and Death from Overwork in the United States and the United Kingdom’ (2009) 38 2 *CLWR* 137 142.

for Conciliation, Mediation & Arbitration,⁹ the court lay down a four stage test¹⁰ for employers on how to deal with employees with physical disabilities. South Africa's law is therefore well established ensuring that employees with physical disabilities are not unfairly discriminated against within the workplace. However, when it comes to mental health, South Africa's law is not as well established in protecting an individual who suffers from a mental impairment, such as depression.¹¹

In comparison, the United States of America (USA) and United Kingdom (UK) have fairly well established legal disciplines that ensure that employees who suffer from depression are protected. The ratification of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) by these respective countries has altered their approach in dealing with depression. Depression is no longer viewed as an individualistic problem, but rather as a social problem where 'environmental barriers'¹² are addressed,¹³ restoring the 'dignity and humanity of people with disabilities'.¹⁴ Applicable disability laws within these jurisdictions will be considered in order to determine what SA might learn from them.

1.2 AIM/S OF THE RESEARCH

Depression is a 'mood disorder'¹⁵ that normally has a negative effect on the way in which a person eats, sleeps and generally, the way that the person feels about him-/herself.¹⁶ Many external and internal factors may affect an individual's mood which may ultimately reduce an employee's competency within the workplace.¹⁷ Depression is one of the primary grounds for

⁹ *Standard Bank of SA v Commissioner for Conciliation Mediation & Arbitration & others* (2008) 29 ILJ 1239 (LC).

¹⁰ *Standard Bank of SA v Commissioner for Conciliation Mediation & Arbitration & others* (2008) 29 ILJ 1239 (LC) 1258.

¹¹ Carvalheira R *Depression, Dismissals and Disability* (unpublished LLM thesis, Witwatersrand University, 2011) 4.

¹² Traustadottir R 'Disability Studies, the Social Model and Legal Developments' in Arnardottir OM and Quinn G (ed) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* 100ed (2009) 5.

¹³ Traustadottir R 'Disability Studies, the Social Model and Legal Developments' in Arnardottir OM and Quinn G (ed) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* 100ed (2009) 5.

¹⁴ Kobayashi T 'Employers' Liability for Occupational Stress and Death from Overwork in the United States and the United Kingdom' (2009) 38 2 *CLWR* 137 142.

¹⁵ Sandoval NJ 'Disabled Yet Disqualified: Is it "Unreasonable" to Demand Accommodations for Employees with Depression Under the Americans with Disabilities Act?' (2013-2014) 17 *Chap. L. Rev* 687 701.

¹⁶ The South African Depression and Anxiety Group available at <http://www.sadag.org/images/brochures/Depression%20Brochure.pdf> (accessed on 06 November 2014).

¹⁷ Smit D & Fourie L 'A Labour Law Perspective on Employees with Depression' (2014) 2 *IJPLR* 68 69.

employee absenteeism within the workplace.¹⁸ Individuals who suffer from depression are potentially also ‘subject to high levels of discriminatory treatment,’¹⁹ due to stereotypes attached to mental illnesses.²⁰ Due to these social prejudices, many employees or prospective employees are reluctant to disclose to their employers that they suffer from depression.²¹ In 2007 South Africa signed the United Nations Convention on the Rights of Persons with Disabilities (CRPD).²² South Africa’s labour law framework should give effect to the CRPD, as per section 54(1)(a) of the Employment Equity Act²³ (EEA). The Code of Good Practice on the Employment of People with Disabilities²⁴ (hereinafter referred to as ‘the CGP on Disability’) was issued in terms of section 54(1)(a) of the EEA. The EEA and the CGP on Disability is in compliance with the Constitution of the Republic of South Africa of 1996 (Constitution), particularly section 9,²⁵ which protects any person from being unfairly discriminated against based on, amongst others, the ground of disability.²⁶

The CGP on Disability’s main focus is on the effect an employee’s impairment has on the working environment, rather than the effect the impairment itself has on the individual.²⁷ The CGP on Disability defines mental impairment as ‘an impairment which is a clinically recognised condition or illness, that effects a person’s thought processes, judgement or emotions’.²⁸ Mental impairments may include anxiety, depression and bi-polar disorders.²⁹

This mini-thesis will firstly consider what legislative protection is already in place in the SA workplace for persons suffering from depression. The research will consider the available

¹⁸ Smit D & Fourie L ‘A Labour Law Perspective on Employees with Depression’ (2014) 2 *IJPLR* 68 69.

¹⁹ Sheldon CT ‘It’s Not Working: Barriers to the Inclusion of Workers with Mental Health Issues’ (2011) 29 *Windsor Y.B Access Just.* 163 164.

²⁰ Sheldon CT ‘It’s Not Working: Barriers to the Inclusion of Workers with Mental Health Issues’ (2011) 29 *Windsor Y.B Access Just.* 163 165.

²¹ Smit D & Fourie L ‘A Labour Law Perspective on Employees with Depression’ (2014) 2 *IJPLR* 68 74.

²² South Africa became a signatory to in March 2007. In November 2007, South Africa ratified the convention. <http://www.un.org/esa/socdev/enable/rights/convtexte.htm#convtext>. (accessed on 24 November 2017)

²³ Employment Equity Act 55 of 1998 s54(1)(a)

“(1) The Minister may, on the advice of the Commission –

(a) Issue any code of

(b) good practice

The comments provided on this particular section, states that the code of good practices are implement to provide employer with assistance in implementing the Employment Equity Act, predominantly the provisions of contained in Chapter III. These codes are likely to address issues where special measures need to be taken in realties to persons with disabilities including benefit schemes”.

²⁴ The Code of Good Practice: Employment of People with Disabilities, available at <http://www.ccma.org.za/Display.asp?L1=34&L2=76> (accessed on 24 February 2015).

²⁵ The Constitution of the Republic of South Africa, 1996 s9(3):

‘(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth’.

²⁶ Code of Good Practice on the Employment of Persons with Disabilities Item 4.

²⁷ Code of Good Practice on the Employment of Persons with Disabilities Item 5.1.

²⁸ Code of Good Practice on the Employment of Persons with Disabilities Item 5.1.2 (iii).

²⁹ Kobayashi T ‘Employers’ Liability for Occupational Stress and Death from Overwork in the United States and the United Kingdom’ (2009) 38 2 *CLWR* 137 142.

legislative protection in the jurisdictions of the USA and United Kingdom. These jurisdictions were chosen, as both the USA and United Kingdom are the leaders in offering protection to persons with disabilities. The lessons learnt from the USA and UK could assist South Africa in drafting comprehensive legislative frameworks. Finally, the research will aim to establish how workplace/employment legislative frameworks in South Africa could be extended to further protect employees who suffer from disability in general, as well as considering how those suffering from depression specifically could be better protected under disability provisions.

1.3 PROBLEM STATEMENT

As already indicated earlier, depression is a global problem. The World Health Organisation has indicated that by 2020 depression will be the ‘leading contributor’³⁰ in diseases that affect individuals’ mental health.³¹ The South African Depression and Anxiety Group³² found that people suffering from mental illness is amongst one of the highest groups within South Africa.³³ It is clear that South Africa needs to implement legislative measures to effectively address the issue of depression in the workplace, and subsequently also protect employees from discrimination.

South African courts have to date mostly addressed depression as an ill-health issue, and not necessarily a disability issue. The court in *New Way Motors v Marsland*³⁴ held that ‘the respondent’s depression could not be considered a form of disability as set out in s 187(1)(f) of the Labour Relations Act’,³⁵ as the respondent’s depression was considered to fall within incapacity due to ill-health. The court did however find that an employee who suffered from a mental impairment was discriminated against where such discrimination negatively affected the employee’s dignity.³⁶ Similarly, the court in *Independent Municipal & Allied Trade Unions v Witzenberg Municipality*³⁷ held that where an employee who suffered from depression was permanently incapacitated, such an employee could be dismissed under incapacity due to ill-

³⁰ Smit D & Fourie L ‘A Labour Law Perspective on Employees with Depression’ (2014) 2 *IJPLR* 68 68.

³¹ Smit D & Fourie L ‘A Labour Law Perspective on Employees with Depression’ (2014) 2 *IJPLR* 68 68.

³² The South African Depression and Anxiety Group available at <http://www.sadag.org/#> (accessed on 07 March 2015).

³³ Hamdulay A ‘Proactive Management is the Best Medicine for Mental Illness in the Workplace’ available at http://www.sadag.org/index.php?option=com_content&view=article&id=2279:manage-mental-illness-in-the-workplace&catid=61&Itemid=143 (accessed on 22 February 2015).

³⁴ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC).

³⁵ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2876.

³⁶ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2877.

³⁷ *Independent Municipal & Allied Trade Union on behalf of Strydom v Witzenberg Municipality & Others* (2012) 33 ILJ 1081 (LAC).

health.³⁸ Due to the view that our courts mostly regard depression as an ill-health issue, but not a disability issue, it means that employees who are dismissed because of depression will not be protected under the automatically unfair dismissal and unfair discrimination provisions of the LRA and EEA respectively. The comparative study embarked upon will therefore serve the purpose of establishing whether South Africa can learn anything from the legal principles in the USA and UK in dealing with depressed employees. This comparative study will form the basis for making recommendations on how South Africa can better protect employees with depression in the workplace.

1.4 RESEARCH QUESTION

Should employees who suffer from depression in the South African workplace be classified as employees with disabilities, and thereby be protected under South Africa's existing disability provisions within employment law?

1.5 RESEARCH HYPOTHESIS

Depression is a primary contributor to mental diseases³⁹ and with '27% of South Africans suffering from depression'⁴⁰ it is evident why depression is a major cause of employee absenteeism. While depression is already considered under ill-health principles, depression is not specifically included in disability provisions in any employment legislation, including the CGP on Disability. Our courts have also favoured the approach of dealing with depression as a pure ill-health issue, with only a few judgements having considered depression within disability provisions. By extending the definition of disability within the CGP on Disability to specifically include depression as a form of mental impairment, employees suffering from depression will enjoy greater legal protection in the South African workplace.

³⁸ *Independent Municipal & Allied Trade Union on behalf of Strydom v Witzenberg Municipality & Others* (2012) 33 ILJ 1081 (LAC) 1087.

³⁹ Smit D & Fourie L 'A Labour Law Perspective on Employees with Depression' (2014) 2 *IJPLR* 68 69.

⁴⁰ Smit D & Fourie L 'A Labour Law Perspective on Employees with Depression' (2014) 2 *IJPLR* 68 68.

1.6 SCOPE/LIMITATION OF RESEARCH

The mini-thesis will set out to consider depression as a mental impairment within the workplace only, and the environmental barriers that employees with depression face in this regard. Environmental barriers refer to those obstacles that prevent a person living with a disability from actively participating in society.⁴¹

The comparative research will only consider the applicable legal principles in the jurisdictions of the United States of America and United Kingdom on how to deal with employees who suffer from depression in the workplace. These jurisdictions are however not without shortfalls. These shortcomings will be discussed to ensure that, in making recommendations for South Africa, so as to ensure that South Africa does not fall into similar traps.

1.7 SIGNIFICANCE OF RESEARCH

The significance of this research is that many authors have written on the topic of depression in the workplace, however none have conclusively addressed the issue of whether an employee suffering from depression can be protected under the Code of Good Practice on the Employment of People with Disabilities. The importance of this research is that depression is one of the leading causes of employee absenteeism.⁴² Often such absenteeism results in substantial financial loss for the employer. Thus, extending the protection afforded under workplace disability provisions to employee's suffering from depression, will be to the benefit of these individuals as well as their employers.

1.8 RESEARCH METHODOLOGY

⁴¹ Butlin SF & College C 'The UN Convention of the Rights of Persons with Disabilities: Does the Equality Act 2010 Measure up to UK International Commitments?' (2011) 40 (4) *Ind Law J* 428 432.

⁴² Smit D & Fourie L 'A Labour Law Perspective on Employees with Depression' (2014) 2 *IJPLR* 68 69.

This research will be conducted by analysing literature that has been published through secondary sources, such as journal articles, academic books, newspapers, web publications. Primary sources such as policies, laws, international conventions and original narratives by independent researchers and academic scholars will also be utilised.⁴³ National and international case law will be identified and discussed. A comparative study will be conducted by considering the United States of America's and United Kingdom's legal principles on how employees suffering from depression are protected under their respective workplace disability laws.

1.9 PROPOSED CONTENT

Chapter one will set out the introduction to the study. This includes, but is not limited to, explaining the outline of the study, the background to the study, the problem statement and research question, the aims of the study, as well as further relevant issues.

Chapter two will consider South Africa's current legal framework in addressing depression as a workplace issue. Where the protection against unfair discrimination afforded to employees emanates from s 23 of the Constitution,⁴⁴ this provision has been given effect to through both the Labour Relations Act and the Employment Equity Act. Both pieces of legislation aim to protect employees against unfair discrimination, and even deem certain acts to be automatically unfair, which usually results in punitive results for the employer. This chapter will consider the Code of Good Practice on the Employment of People with Disabilities that has been enacted to ensure that the principles of substantive and procedural fairness are adhered to. Lastly, this chapter will consider the impact the CRPD has had on South African legislation, and if South Africa has measured up to these international standards.

Chapter three will consider the enactment and provisions of the United Nations Convention on the Rights of Persons with Disabilities (CRPD). This will include looking at the significance of the CRPD, in that it brought about a shift from the previously used medical model for classifying depression to a more inclusive social model.

⁴³ Mickey PF & Pardo M 'Dealing with Mental Disabilities Under the ADA' (1993) 9 Lab. Law 531 532.

⁴⁴ The Constitution of the Republic of South Africa, 1996 s23
“(1) Everyone has the right to fair labour practices”.

Chapter four will serve as the comparative chapter. An analysis will be done on the applicable United States of America legislation, namely the Americans with Disabilities Act⁴⁵, as well as the United Kingdom's Disability Discrimination Act (DDA).⁴⁶ The impact of these pieces of legislation on the treatment of employees who suffer from depression, as well as how the courts have interpreted the legislation will be considered. The shortcomings of these pieces of legislation will also be highlighted and discussed.

Chapter five will conclude with a summary of the current protection of employees with depression in the workplace. Additionally, it will contain concluding remarks and recommendations. This will include suggested possible solutions on how employment legislation in South Africa can better protect employees with depression in the workplace.



⁴⁵ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (1990).

⁴⁶ Disability Discrimination Act 135 of 1992.

CHAPTER TWO

SOUTH AFRICA'S POSITION ON DEPRESSION AND DISABILITY IN THE WORKPLACE

2.1 INTRODUCTION

The Constitution of the Republic of South Africa, 1996, contains the fundamental rights and freedoms of all those present within South Africa's borders.⁴⁷ There are however some rights that belong to South African citizens alone, e.g. the right to vote⁴⁸ and freedom of trade, occupation and profession.⁴⁹ The protection afforded to employees specifically emanates from section 23 of the Constitution. Section 23 states that '(1) Everyone has the right to fair labour practices'. Consequently the legislator enacted three main pieces of legislation to give effect to section 23, being, the Labour Relations Act 66 of 1995 (LRA), the Employment Equity Act 55 of 1998 (EEA) and the Basic Conditions of Employment Act 75 of 1997 (BCEA).

In particular, the LRA and EEA aim to protect employees against unfair discrimination in the workplace. In terms of the LRA certain acts by employers are regarded as automatically unfair (automatically unfair dismissals),⁵⁰ which usually results in punitive consequences for the employer. Through a study of the LRA and EEA specifically, this chapter will consider South Africa's current legal framework in addressing depression in the workplace. Part of the legislative discussion will include also considering the CGP on Disability, which emanated from the EEA. The CGP on Disability was enacted to ensure that the principles of substantive and procedural fairness are adhered to. The legislation discussed in this chapter must also be considered in conjunction with the United Nations Convention on the Rights of Persons with Disabilities, which South Africa signed and ratified on 30 March 2007.⁵¹

⁴⁷ The Constitution of the Republic of South Africa, 1996 s 7(1).

⁴⁸ The Constitution of the Republic of South Africa, 1996 s 19.

⁴⁹ The Constitution of the Republic of South Africa, 1996 s 22.

⁵⁰ Labour Relations Act 66 of 1995 s 187.

⁵¹ The CRPD is discussed in chapter 3.

2.2 A BRIEF OVERVIEW OF DEPRESSION

While there is not one dedicated definition in labour law for depression and the effects thereof, in consulting various sources one can attempt to obtain a clear meaning. Depression may be understood to be the emotional state of an individual, where such individual continually experiences moments of despondency, sadness, discouragement and hopelessness.⁵² Others view depression as a mood disorder,⁵³ which reaffirms the above notion that depression weighs heavily on an individual's mood.

The South African Depression and Anxiety Group has held that depression is more than a mere mood disorder, depression is an illness that affects the entire body and mind.⁵⁴ The effects of depression could be far reaching. It potentially affects an individual's appetite, sleeping patterns, self-esteem and self-confidence.⁵⁵ If left untreated, feelings of sadness and low self-confidence could begin to influence an individual's work and sleep, and often these individuals lose interest in activities that they used to find joy in.⁵⁶ Depression may also take the form of an individual experiencing extreme high and low emotional changes.⁵⁷ These mood changes might happen instantly or over a period of time.⁵⁸ The fluctuation in mood is often referred to as bi-polar disorder or manic-depression.⁵⁹

According to one study done by the World Health Organisation (WHO), depression will by 2020 be a primary contributor to the global health burden.⁶⁰ It is therefore clear that depression requires the attention and input of both the medical and legal professions within the realm of employment. It is argued that the effects of depression on an individual's mind and body show

⁵² Sallis A & Birkin R 'Experiences of Work and Sickness Absence in Employees with Depression: An Interpretative Phenomenological Analysis' (2013) 24 *J Occup Rehabil* 469 470.

⁵³ Sandoval NJ 'Disabled Yet Disqualified: Is it "Unreasonable" to Demand Accommodations for Employees with Depression Under the Americans with Disabilities Act?' (2013-2014) 17 *Chap. L. Rev* 687 701.

⁵⁴ The South African Depression and Anxiety Group available at <http://www.sadag.org/images/brochures/Depression%20Brochure.pdf> (accessed on 06 November 2014).

⁵⁵ The South African Depression and Anxiety Group available at <http://www.sadag.org/images/brochures/Depression%20Brochure.pdf> (accessed on 06 November 2014).

⁵⁶ The South African Depression and Anxiety Group available at <http://www.sadag.org/images/brochures/Depression%20Brochure.pdf> (accessed on 06 November 2014).

⁵⁷ The South African Depression and Anxiety Group available at <http://www.sadag.org/images/brochures/Depression%20Brochure.pdf> (accessed on 06 November 2014).

⁵⁸ The South African Depression and Anxiety Group available at <http://www.sadag.org/images/brochures/Depression%20Brochure.pdf> (accessed on 06 November 2014).

⁵⁹ The South African Depression and Anxiety Group available at <http://www.sadag.org/images/brochures/Depression%20Brochure.pdf> (accessed on 06 November 2014).

⁶⁰ Smit D & Fourie L 'A Labour Law Perspective on Employees with Depression' (2014) 2 *IJPLR* 68 74.

that depression falls within the definition of mental impairment as contained in the CGP on Disability.⁶¹

2.3 THE EFFECTS OF DEPRESSION IN THE WORKPLACE

Effects of depression reach further than the individual alone. Depression could have a negative effect on the climate and economy of a company as well.⁶² When discussing the economic effect, one cannot only refer to the direct financial loss that a company would suffer, but must also consider the indirect loss suffered through a loss in labour and productivity.⁶³

Indirect costs are not easily calculated, as it is more complicated to calculate the financial cost of low levels of productivity and high levels of absenteeism.⁶⁴ Employee work engagement and productivity is fundamental to the success of any company, as this element is what allows a company to have a competitive edge.⁶⁵ Employee engagement is an indication of the employee being immersed into his or her work, which often results in an employee having positive feelings towards his or her work.⁶⁶ Having mentioned the negative effect of depression on the positivity of an employee, depression often leads to low engagement levels and could ultimately leave the employee feeling drained and unexcited about his or her work.⁶⁷ A direct consequence of this might be that the employer will witness increasing levels of absenteeism.⁶⁸

Because of the effects that depression might potentially have on an employee in the workplace, South African employment law must protect persons suffering from depression, particularly

⁶¹ The CGP on Disability defines mental impairment as:

“a clinically recognised condition or illness that affects a person’s thought processes, judgement or emotions.”

⁶² Welthagen C & Els C ‘ Depressed, not depressed or unsure: Prevalence and the Relation to well-being across sectors in South Africa’ (2012) 38 *South African Journal of Industrial Psychology* 984 984.

⁶³ Welthagen C & Els C ‘ Depressed, not depressed or unsure: Prevalence and the Relation to well-being across sectors in South Africa’ (2012) 38 *South African Journal of Industrial Psychology* 984 984.

⁶⁴ Welthagen C & Els C ‘ Depressed, not depressed or unsure: Prevalence and the Relation to well-being across sectors in South Africa’ (2012) 38 *South African Journal of Industrial Psychology* 984 984.

⁶⁵ Welthagen C & Els C ‘ Depressed, not depressed or unsure: Prevalence and the Relation to well-being across sectors in South Africa’ (2012) 38 *South African Journal of Industrial Psychology* 984 984.

⁶⁶ Welthagen C & Els C ‘ Depressed, not depressed or unsure: Prevalence and the Relation to well-being across sectors in South Africa’ (2012) 38 *South African Journal of Industrial Psychology* 984 985.

⁶⁷ Welthagen C & Els C ‘ Depressed, not depressed or unsure: Prevalence and the Relation to well-being across sectors in South Africa’ (2012) 38 *South African Journal of Industrial Psychology* 984 985.

⁶⁸ Welthagen C & Els C ‘ Depressed, not depressed or unsure: Prevalence and the Relation to well-being across sectors in South Africa’ (2012) 38 *South African Journal of Industrial Psychology* 984 985.

since it is a no-blame situation the employee finds him or herself in. Such protection will be beneficial to both employees suffering from depression and their employers.

2.4 ANALYSIS OF SOUTH AFRICA'S EXISTING LEGISLATIVE FRAMEWORK

South Africa reached the end of the apartheid era with the adoption of the interim constitution.⁶⁹ With the welcoming of the interim constitution, and later its successor the final Constitution of the Republic of South Africa of 1996 (the Constitution), fundamental rights became a reality for everyone, regardless of race, gender, religion etc.⁷⁰ The Constitution is the supreme law of the country and no act or legislation may breach any of the fundamental rights contained therein.

2.4.1 *The Constitution of the Republic of South Africa, 1996*

The Constitution introduced constitutional supremacy as a way of safeguarding against human rights abuses, and made it clear that such abuses would not be tolerated.⁷¹ The concept of constitutional supremacy ensures that the Constitution remains the 'supreme law of the Republic and that any law or conduct that is inconsistent with it, will be invalid'.⁷²

The Constitution's founding provisions declare that the Republic of South Africa is a democratic state, founded on the values of human dignity, equality, fundamental rights and freedoms.⁷³ All of these fundamental rights and freedoms are contained in the Bill of Rights.⁷⁴ The Bill of Rights is regarded as the cornerstone of South Africa's democracy.⁷⁵ The Bill of Rights applies to all laws and binds all branches of government (including organs of State), as well as all natural and juristic persons.⁷⁶ Not only does it specify the basic human rights that everyone is entitled to, it also instructs the State on how to use its powers, which powers have been distributed equally amongst the three branches of government: the executive, the legislature and the judiciary.⁷⁷ The

⁶⁹ Currie I & De Waal J *The Bill of Rights Handbook* 6 ed (2013) 1.

⁷⁰ Currie I & De Waal J *The Bill of Rights Handbook* 6 ed (2013) 2.

⁷¹ Currie I & De Waal J *The Bill of Rights Handbook* 6 ed (2013) 2.

⁷² The Constitution of the Republic of South Africa, 1996 s2.

⁷³ The Constitution of the Republic of South Africa, 1996 s1(a).

⁷⁴ The Constitution of the Republic of South Africa, 1996 chapter 2.

⁷⁵ The Constitution of the Republic of South Africa, 1996 s7(1).

⁷⁶ The Constitution of the Republic of South Africa, 1996 s8(2).

⁷⁷ Currie I & De Waal J *The Bill of Rights Handbook* 6 ed (2013) 2.

Bill of Rights allows for any person to challenge any legislation or action of either the government or any person which infringes any of the fundamental rights contained therein.⁷⁸

The court in *Minister of Finance v Van Heerdan*⁷⁹ held that the achievement of equality is the core foundation upon which South Africa's Constitution is built.⁸⁰ The Constitutional Court further confirmed that the right to equality is the standard against which all South Africa's laws must be tested.⁸¹ South Africa's Constitution thus aims for social justice which aids in the restoration of past injustices caused by the previous government regime during the apartheid era.⁸² In achieving this aim the Constitution has gone beyond the mere notion of formal equality, which simply allows for identical treatment, to the notion of substantive equality, which recognises that social differentiation exists as a result of past injustices.⁸³ The right to equal treatment is guaranteed in section 9 of the Constitution (known as 'the equality clause'), which provides that everyone is equal before the law.⁸⁴ Within the equality clause the Constitution proscribes that neither the State nor any person may unfairly discriminate against any individual on any or more of the listed grounds.⁸⁵ Included in the list of grounds upon which unfair discrimination is prohibited is disability.

It has been held that disability is one of the most "under-litigated" grounds.⁸⁶ The court in *Singh v Minister of Justice and Constitutional Development and others*⁸⁷ held that when employing a prospective employee, it is the duty of the employer to promote and advance the position of persons with disabilities.⁸⁸ The court further held that the duty to reasonably accommodate persons with disabilities within the workplace is a responsibility which stems from South Africa being a signatory to the Convention on the Rights of Persons with Disabilities (CRPD).⁸⁹ This duty is of vital importance as persons with disabilities have often been unable to actively participate in society.⁹⁰ This is largely due to the infrastructure within society which caters

⁷⁸ Grogan J *Workplace Law* 11 ed (2014) 6.

⁷⁹ *Minister of Finance and other v Van Heerdan* 2004 (11) BCLR 1125 (CC).

⁸⁰ *Minister of Finance and other v Van Heerdan* 2004 (11) BCLR 1125 (CC) 1137.

⁸¹ *Minister of Finance and other v Van Heerdan* 2004 (11) BCLR 1125 (CC) 1137.

⁸² *Minister of Finance and other v Van Heerdan* 2004 (11) BCLR 1125 (CC) 1138.

⁸³ *Minister of Finance and other v Van Heerdan* 2004 (11) BCLR 1125 (CC) 1138.

⁸⁴ The Constitution of the Republic of South Africa, 1996 s 9(1).

⁸⁵ The Constitution of the Republic of South Africa, 1996 s 9(3).

⁸⁶ Currie I & De Waal J *The Bill of Rights Handbook* 6 ed (2013) 234.

⁸⁷ *Singh v Minister of Justice and Constitutional Development and others* 2013 (3) SA 66 (EqC).

⁸⁸ *Singh v Minister of Justice and Constitutional Development and others* 2013 (3) SA 66 (EqC) 75.

⁸⁹ *Singh v Minister of Justice and Constitutional Development and others* 2013 (3) SA 66 (EqC) 75.

⁹⁰ *MEC for Education, Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) 501.

mostly for able-bodied persons.⁹¹ One way in which the Constitution strives to allow persons with disabilities to actively contribute to, and participate in, society is through guaranteeing that everyone has the right to fair labour practices.⁹² This protection of employment and labour rights is a unique feature of the Constitution.⁹³ In response to this right the legislature, amongst others, enacted the LRA, the BCEA and the EEA.

The LRA was promulgated to give effect to section 23(5) of the Constitution, while the BCEA ensures that everyone has the right to basic benefits within the workplace, all of which is guaranteed in section 23(1) of the Constitution.⁹⁴ The EEA was enacted in order to provide a framework which would specifically deal with the achievement of equality and the prohibition of unfair discrimination in the workplace.⁹⁵

2.4.2 The Labour Relations Act 66 of 1995 and the Code of Good Practice: Dismissal

The LRA was enacted to ‘advance economic development, social justice, labour peace and the democratisation of the workplace’.⁹⁶ The purpose of the LRA will be achieved if the LRA ‘gives effect to and regulates the fundamental rights conferred in section 23 of the Constitution’.⁹⁷

The LRA, in giving effect to section 23 of the Constitution, amongst others provides that an employee has the right not be unfairly dismissed or subjected to unfair labour practices.⁹⁸ The LRA provides that where an employer fails to prove that he or she dismissed the employee based on misconduct, incapacity or the employer’s operational requirements, such a dismissal will be considered unfair (substantive fairness).⁹⁹ Such a dismissal will furthermore also only be considered fair where the employer followed the correct procedure in dismissing the employee (procedural fairness). Substantive and procedural fairness is fully addressed in schedule 8 of the

⁹¹ *MEC for Education, Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) 501.

⁹² The Constitution of the Republic of South Africa, 1996 s 23(1).

⁹³ Currie I & De Waal J *The Bill of Rights Handbook* 6 ed (2013) 473.

⁹⁴ Grogan J *Workplace Law* 11 ed (2014) 7.

⁹⁵ Ngwena C ‘Interpreting Aspects of the Intersection between Disability, Discrimination and Equality: Lessons from the Employment Equity Act from Comparative Law. Part I (Defining Disability)’ (2005) 16 *Stellenbosch Law Review* 210 215.

⁹⁶ Labour Relations Act 66 of 1995 s 1.

⁹⁷ Labour Relations Act 66 of 1995 s 1(a).

⁹⁸ Labour Relations Act 66 of 1995 s 185.

⁹⁹ Labour Relations Act 66 of 1995 s 188(a)(i) and (ii).

LRA. Schedule 8 is referred to as the Code of Good Practice: Dismissal (hereinafter referred to as ‘the Code on Dismissal’).

Where an employee is however dismissed on any of the grounds listed in section 187(1)(f) of the LRA, which grounds include disability, such a dismissal will be considered automatically unfair.¹⁰⁰ Save for two exceptions, this means that dismissal on such a prohibited ground can never be justified by the employer. The only two exceptions, or defenses, against a claim for automatic unfair dismissal are where the employee reached the agreed or normal retirement age,¹⁰¹ or where the dismissal was based on an inherent requirement of the specific job.¹⁰² As far as disability is concerned, it means that disability as the reason for dismissal can only be justified where the disability prevented the individual from fulfilling an inherent requirement of the job. The court in *Department of Correctional Services v Police and Prisons Civil Rights Union*¹⁰³ held that an inherent requirements of the job is regarded as ‘a permanent attribute or quality forming an essential element and an indispensable attribute which must relate in an inescapable way to the performing of a job’.¹⁰⁴

The focus of this research is however not whether the dismissal of an employee suffering from depression was substantially and procedurally fair, but rather what protection there is available for employees suffering from depression. The South African judiciary to date has largely dealt with depression under the ground of incapacity, particularly incapacity as a result of ill-health (and not necessarily as part of disability).

The Code on Dismissal provides that incapacity takes one of two forms, namely incapacity due to ill health or injury, or incapacity based on poor work performance.¹⁰⁵ The Code on Dismissal further sets out guidelines which employers have to follow when effecting dismissal for incapacity.

¹⁰⁰ Labour Relations Act 66 of 1995 s 187(f):

“that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility”.

¹⁰¹ Labour Relations Act 66 of 1995 s 187(2)(b).

¹⁰² Labour Relations Act 66 of 1995 s 187(2)(a).

¹⁰³ *Department of Correctional Services and Another v Police and Prisoners Civil Rights Union (POPCRU) and Others* (2013) 34 ILJ 1375 (SCA).

¹⁰⁴ *Department of Correctional Services and Another v Police and Prisoners Civil Rights Union (POPCRU) and Others* (2013) 34 ILJ 1375 (SCA) 1382.

¹⁰⁵ Code of Good Practice on Dismissals clause 8 and clause 10.

In terms of Item 8 of the Code on Dismissal an employee may not be dismissed for poor work performance without the employer having completed a full inquiry into the reasons(s) for the poor performance.¹⁰⁶ In the case of *L S v Commission for Conciliation, Mediation and Arbitration*,¹⁰⁷ the employee was called to a hearing due to her work performance being poor. The court concluded that the employer in this matter wrongly dismissed the employee, who was suffering from depression, on the ground of misconduct instead of incapacity.

2. 4.2.1 *L S v Commission for Conciliation, Mediation and Arbitration & others*

In the case of *L S v Commission for Conciliation, Mediation and Arbitration*, the employee suffered from severe depression due to several personal incidents which ultimately lead to the continuous deterioration of her work performance¹⁰⁸.

The employee on several occasions tried to acquire medical support, both internally and externally to the work environment, in order to ensure that she would remain focused and not under perform.¹⁰⁹ After a period of about six months of performance issues, the employee was given notice to attend a disciplinary hearing. The employer argued that this happened after the employee failed to attend and participate in the assistance programme offered to her by the employer.¹¹⁰ The charges brought against the employee was based on misconduct, particularly her 'inability to render services in line with her employment contract'.¹¹¹

At the disciplinary hearing the employee was afforded legal representation which, although unusual, was allowed by the employer because of her mental status.¹¹² The employee argued before the chairperson that the hearing should perhaps rather be dealt with in terms of incapacity, instead of misconduct.¹¹³ The chair however held that the employee's personal circumstances were improbable, and proceeded to dismiss her for misconduct based on her under performance.¹¹⁴ The employee consequently referred an unfair dismissal dispute to the CCMA.

¹⁰⁶ Code of Good Practice on Dismissals clause 8(1) and clause 8(2).

¹⁰⁷ *L S v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 2205 (LC).

¹⁰⁸ *L S v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 2205 (LC) 2209.

¹⁰⁹ *L S v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 2205 (LC) 2209 and 2210.

¹¹⁰ *L S v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 2205 (LC) 2210 and 2214.

¹¹¹ *L S v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 2205 (LC) 2214.

¹¹² *L S v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 2205 (LC) 2215.

¹¹³ *L S v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 2205 (LC) 2215.

¹¹⁴ *L S v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 2205 (LC) 2216.

After conciliation failed¹¹⁵ the matter was referred to arbitration. At arbitration the employee again argued that her work performance should have been dealt with under incapacity, as opposed to misconduct.¹¹⁶ The employee argued that she was not unwilling to work, but rather that she was unable to do so.¹¹⁷ The arbitrator rejected the employee's argument and held that she had failed to produce independent evidence indicating that her mental illness was the cause of her poor work performance.¹¹⁸

The employee thereafter referred her matter to the Labour Court. The court held that the arbitrator had not considered the assessment and true reason for the employee's incapability to perform her work, which lay at the heart of her claim of unfair dismissal.¹¹⁹ The court held that the employer did not conduct a proper investigation as to why the employee was under performing. To simply avoid the consequences of such failure to investigate by categorising the issue as that of misconduct was unfair.¹²⁰ The court held that a dismissal under misconduct was not the correct approach where the employee's medical incapacity was in question.¹²¹ The court continued to discuss the different approaches that misconduct and incapacity cases required. In the court's view incapacity 'require[d] an approach of understanding, where dismissing an employee due to misconduct require[d] a more rigid disciplinary approach'.¹²² The court held that the dismissal was both substantively and procedurally unfair, and that the arbitrator's finding was grossly irregular and proceeded to set it aside.¹²³

This case illustrates that where an employee suffers from depression, the employer cannot merely classify the consequences thereof on the employee's performance as misconduct. As the court correctly held, when someone suffers from a mental illness there might not be a willful denial in performing, but rather the inability of the employee to perform. The Labour Court correctly held that persons who suffer from mental impairments should be dealt with under incapacity rather than misconduct.

The court in *L S v Commission for Conciliation, Mediation and Arbitration* did not however consider what effect the EEA, or a claim of automatic unfair dismissal in terms of s 187(1)(f) of

¹¹⁵ *L S v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 2205 (LC) 2216.

¹¹⁶ *L S v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 2205 (LC) 2216.

¹¹⁷ *L S v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 2205 (LC) 2216.

¹¹⁸ *L S v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 2205 (LC) 2217.

¹¹⁹ *L S v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 2205 (LC) 2217.

¹²⁰ *L S v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 2205 (LC) 2222.

¹²¹ *L S v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 2205 (LC) 2218.

¹²² *L S v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 2205 (LC) 2217.

¹²³ *L S v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 2205 (LC) 2221.

the LRA, might have had on the outcome of this matter. While the outcome must be agreed with, the question remains whether, had the matter been instituted as a discrimination claim under the EEA or as an automatic unfair dismissal claim under the LRA, the court would have found that depression forms part of the listed ground of disability.

2.4.3 The Employment Equity Act 55 of 1998 and the Code of Good Practice: Key Aspects on the Employment of People with Disabilities

The purpose of EEA is to give effect to the equality clause of the Constitution in the workplace by ‘promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination’.¹²⁴ The EEA’s purpose is furthermore to ‘implement affirmative action measures to redress the disadvantages in employment experienced by designated groups’¹²⁵. Designated groups are defined as ‘black people, women and people with disabilities.’¹²⁶ The EEA defines persons with disabilities as ‘people who have long-term or recurring physical and mental impairment which substantially limits their prospects of entry into, or advancement in, employment’.¹²⁷

The EEA must be understood in supporting substantive equality rather than the notion of formal equality.¹²⁸ The EEA, much like section 9 of the Constitution, lists the grounds on which an employee may not be unfairly discriminated against.¹²⁹ It is not unfair discrimination to take affirmative action consistent with the purposes of the EEA.¹³⁰ The EEA aims to protect persons with disabilities by including disability as one of the grounds within section 6 on which an employee may not be unfairly discriminated.¹³¹

The CGP on Disability was published in terms of section 54(1) of the EEA. Section 54(1) of the EEA allows the Minister of Labour, on the advice of the Commission of Employment Equity, to

¹²⁴ Employment Equity Act 55 of 1998 s 2(a).

¹²⁵ Employment Equity Act 55 of 1998 s 2(b).

¹²⁶ Employment Equity Act 55 of 1998 s 1.

¹²⁷ Employment Equity Act 55 of 1998 s 1.

¹²⁸ Ngwena C ‘Interpreting Aspects of the Intersection between Disability, Discrimination and Equality: Lessons from the Employment Equity Act from Comparative Law. Part I (Defining Disability)’ (2005) 16 *Stellenbosch Law Review* 210 215.

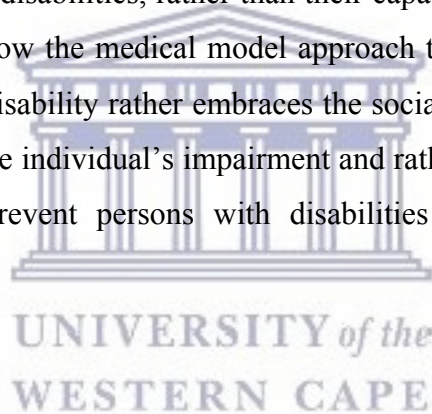
¹²⁹ Employment Equity Act 55 of 1998 s 6(1).

¹³⁰ Employment Equity Act 55 of 1998 s 6(2)(a).

¹³¹ Employment Equity Act 55 of 1998 s 6(1).

issue any code of Good Practice.¹³² The Minister of Labour issued the CGP on Disability during 2002 to further address the definition of persons with disabilities contained in the EEA.¹³³ The CGP on Disability was issued with the aim of assisting and educating employers on the role they play in the inclusion of persons with disabilities within the workplace.¹³⁴ The CGP on Disability's key focus is creating awareness in the employment of persons with disabilities, as these individuals have historically been disadvantaged, impoverished and marginalised.¹³⁵ As a result of past, and continued, marginalisation, a large percentage of persons with disabilities remain living in a state of poverty partly due to the reluctance on the part of employers to employ these individuals.¹³⁶

The EEA and the CGP on Disability has thus aimed to eliminate the social barriers created by many workplace policies that still primarily focus on able-bodied and able-mindedness of both job applicants and employees.¹³⁷ Many workplace policies are designed to place emphasis on the incapacity of employees with disabilities, rather than their capacities.¹³⁸ It can therefore be said that employment policies follow the medical model approach to disability, while the definition of disability in the CGP on Disability rather embraces the social model approach.¹³⁹ The social model shifts the focus from the individual's impairment and rather considers the barriers that are created by society which prevent persons with disabilities from actively participating in society.¹⁴⁰



¹³² Employment Equity Act 55 of 1998 s 54(1).

¹³³ Ngwena C 'Interpreting Aspects of the Intersection between Disability, Discrimination and Equality: Lessons from the Employment Equity Act from Comparative Law. Part I (Defining Disability)' (2005) 16 *Stellenbosch Law Review* 210 211.

¹³⁴ Ngwena C & Pretorius L 'Code of Good Practice on the Employment of People with Disabilities: An Appraisal' (2003) 24 *ILJ* 1816 1817.

¹³⁵ Ngwena C 'Interpreting Aspects of the Intersection between Disability, Discrimination and Equality: Lessons from the Employment Equity Act from Comparative Law. Part I (Defining Disability)' (2005) 16 *Stellenbosch Law Review* 210 216.

¹³⁶ Ngwena C & Pretorius L 'Code of Good Practice on the Employment of People with Disabilities: An Appraisal' (2003) 24 *ILJ* 1816 1817.

¹³⁷ Ngwena C 'Interpreting Aspects of the Intersection between Disability, Discrimination and Equality: Lessons from the Employment Equity Act from Comparative Law. Part I (Defining Disability)' (2005) 16 *Stellenbosch Law Review* 210 218; Ngwena C & Pretorius L 'Code of Good Practice on the Employment of People with Disabilities: An Appraisal' (2003) 24 *ILJ* 1816 1818.

¹³⁸ Ngwena C & Pretorius L 'Code of Good Practice on the Employment of People with Disabilities: An Appraisal' (2003) 24 *ILJ* 1816 1818.

¹³⁹ Ngwena C & Pretorius L 'Code of Good Practice on the Employment of People with Disabilities: An Appraisal' (2003) 24 *ILJ* 1816 1819. For a fuller discussion on the two approaches to disability see chapter 3.

¹⁴⁰ Ngwena C 'Interpreting Aspects of the Intersection between Disability, Discrimination and Equality: Lessons for the Employment Equity Act from Comparative Law. Part I (Defining Disability)' (2005) 16 *Stellenbosch L. Rev.* 201 222.

The definition of disability contained in the CGP on Disability lays down certain criteria that an individual will have to satisfy in order to be protected thereunder.¹⁴¹ The CGP on Disability provides that a person will be considered disabled provided that the impairment must be long standing or recurring,¹⁴² a mental or physical impairment,¹⁴³ and substantially limits the individual's capabilities.¹⁴⁴ The CGP on Disability further defines what mental and physical impairments are. The aim of limiting disability to either of these two forms of impairments allows for legal certainty to be created.¹⁴⁵ Physical impairment is the 'partial or total loss of bodily function or part of the body, including sensory impairment'.¹⁴⁶ Mental impairment is a 'clinically recognised condition or illness that affects a person's thought processes, judgement or emotions'.¹⁴⁷

2.4.4 The Difference between Incapacity based on Ill-health and Disability

Incapacity is one of three grounds on which an employer may dismiss an employee.¹⁴⁸ The Code on Dismissal further categorises incapacity into incapacity based on poor work performance¹⁴⁹ and incapacity based on ill-health or injury.¹⁵⁰ Incapacity (specifically in the form of ill-health and injury) and disability are not interchangeable terms.¹⁵¹ In South Africa's legal system these two terms, while not always easily distinguishable from each other, are separate issues.¹⁵² An employee will be deemed to be incapacitated where he or she cannot perform the essential

¹⁴¹ Code of Good Practice on the Employment of Persons with Disabilities clause 5.1.

¹⁴² Code of Good Practice on the Employment of Persons with Disabilities clause 5.1.i.

¹⁴³ Code of Good Practice on the Employment of Persons with Disabilities clause 5.1.ii

¹⁴⁴ Code of Good Practice on the Employment of Persons with Disabilities clause 5.1.iii.

¹⁴⁵ Ngwena C & Pretorius L 'Code of Good Practice on the Employment of People with Disabilities: An Appraisal' (2003) 24 *ILJ* 1816 1821.

¹⁴⁶ Code of Good Practice on the Employment of Persons with Disabilities clause 5.1.1.i.

¹⁴⁷ Code of Good Practice on the Employment of Persons with Disabilities clause 5.1.1.ii.

¹⁴⁸ Labour Relations Act 66 of 1995 s188(1).

¹⁴⁹ Code of Good Practice on Dismissals clause 8.

¹⁵⁰ Code of Good Practice on Dismissals clause 10.

¹⁵¹ Bassuday K & Rycroft A 'Incapacity or Disability? The Implications for Jurisdiction Ernstzen v Reliance Group Trading (Pty) Ltd (C717/13) [2015] ZALCCT 42' (2015) 36 *ILJ* 2516 2516.

¹⁵² Bassuday K & Rycroft A 'Incapacity or Disability? The Implications for Jurisdiction Ernstzen v Reliance Group Trading (Pty) Ltd (C717/13) [2015] ZALCCT 42' (2015) 36 *ILJ* 2516 2516.

requirements of the position that they are in.¹⁵³ Disability is viewing the potential employee as being ‘suitably qualified for the position but who requires reasonable accommodation’.¹⁵⁴

In cases of incapacity due to ill-health dismissal must be the last resort after all reasonable alternatives short of dismissal were considered.¹⁵⁵ These alternatives need to consider certain factors around the employee’s incapacity.¹⁵⁶ These factors mainly stem around whether the employee’s incapacity is temporary or permanent, and the effect of the incapacity on the employee’s ability to perform.

Where the incapacity is of a permanent nature, the Code on Dismissal stipulates that the employer is required to either find alternative employment for the employee, or adapt the employee’s working duties so as ‘to accommodate the employee’s disability’.¹⁵⁷ Reasonable accommodation is discussed below. Item 10 is the first time that disability as a separate term is referred to in the Code on Dismissal. Disability therefore seems to form part of incapacity for ill-health and injury as it is referred to in that context. The Code on Dismissal however does not allude to what disability means, nor does it elaborate in any meaningful terms on how disability should be dealt with. One is therefore required to turn to the CGP on Disability. In terms of this code the employer is required to reasonably accommodate people with disabilities.¹⁵⁸

Neither the Code on Dismissal, nor the CGP on Disability are classified as legislation, but rather act as quasi-legislation in that employers have to follow them. The Code on Dismissals has been effectively used in the South Africa’s judicial system. The CGP on Disability was established to serve as a guide to employers in promoting awareness around the equalisation of opportunities for persons with disabilities.

The case of *Standard Bank of SA v Commissioner for Conciliation, Mediation & Arbitration*,¹⁵⁹ serves as a landmark judgement relating to disability and how employer’s should approach such issues. The employee in this matter suffered from severe back pain after she had been in a motor

¹⁵³ Bassuday K & Rycroft A ‘Incapacity or Disability? The Implications for Jurisdiction *Ernstzen v Reliance Group Trading (Pty) Ltd* (C717/13) [2015] ZALCCT 42’ (2015) 36 *ILJ* 2516 517.

¹⁵⁴ Bassuday K & Rycroft A ‘Incapacity or Disability? The Implications for Jurisdiction *Ernstzen v Reliance Group Trading (Pty) Ltd* (C717/13) [2015] ZALCCT 42’ (2015) 36 *ILJ* 2516 2517.

¹⁵⁵ Code of Good Practice on Dismissals clause 10(1).

¹⁵⁶ Code of Good Practice on Dismissals clause 10(1).

¹⁵⁷ Code of Good Practice on Dismissals clause 11(ii).

¹⁵⁸ Code of Good Practice on the Employment of Persons with Disabilities clause 6.1. See discussion on ‘Reasonable Accommodation’ below under paragraph 5.

¹⁵⁹ *Standard Bank of SA v Commissioner for Conciliation Mediation & Arbitration & others* (2008) 29 *ILJ* 1239 (LC).

vehicle accident.¹⁶⁰ After the motor vehicle accident she was placed in various positions by the employer in an attempt to cater for her disability.

While the case does not specifically deal with mental impairment, the court in this case established a four-stage enquiry¹⁶¹ on how to deal with employees with physical disabilities. The first stage of the four-stage enquiry requires the employer to determine ‘whether or not the employee with a disability is able to perform his or her work’.¹⁶² If the employer finds that the employee with a disability is able to perform his or her duties, then the enquiry ends there, and the employee must be restored to his or her previous position.¹⁶³ If however the employer during this stage determines that ‘the employee is unable to perform his or her work’ then the next stages must follow’.¹⁶⁴

The second stage requires that the employer embarks on a factual enquiry to determine to what extent the employee is able to perform his or her duties.¹⁶⁵ During the third stage the employer will need to assess how to adapt the employee’s current working conditions to accommodate the employee’s disabilities.¹⁶⁶ If the employer is unable to adapt the employee’s working conditions, then the employer must consider all alternatives that are short of dismissing the employee.¹⁶⁷ The fourth, and final, stage of the enquiry provides that if an employer is unable to adapt the employee’s working conditions, then the employer is required to provide other suitable employment.¹⁶⁸ The court in this matter erred by creating a fourth stage, when the fourth stage is directly linked to the third stage of the enquiry, the court should have connected these two stages into one.

¹⁶⁰ *Standard Bank of SA v Commissioner for Conciliation Mediation & Arbitration & others* (2008) 29 ILJ 1239 (LC) 1245.

¹⁶¹ *Standard Bank of SA v Commissioner for Conciliation Mediation & Arbitration & others* (2008) 29 ILJ 1239 (LC) 1258.

¹⁶² *Standard Bank of SA v Commissioner for Conciliation Mediation & Arbitration & others* (2008) 29 ILJ 1239 (LC) 1257.

¹⁶³ *Standard Bank of SA v Commissioner for Conciliation Mediation & Arbitration & others* (2008) 29 ILJ 1239 (LC) 1257.

¹⁶⁴ *Standard Bank of SA v Commissioner for Conciliation Mediation & Arbitration & others* (2008) 29 ILJ 1239 (LC) 1257.

¹⁶⁵ *Standard Bank of SA v Commissioner for Conciliation Mediation & Arbitration & others* (2008) 29 ILJ 1239 (LC) 1258.

¹⁶⁶ *Standard Bank of SA v Commissioner for Conciliation Mediation & Arbitration & others* (2008) 29 ILJ 1239 (LC) 1258.

¹⁶⁷ *Standard Bank of SA v Commissioner for Conciliation Mediation & Arbitration & others* (2008) 29 ILJ 1239 (LC) 1258.

¹⁶⁸ *Standard Bank of SA v Commissioner for Conciliation Mediation & Arbitration & others* (2008) 29 ILJ 1239 (LC) 1258.

The court held that when an employee is dismissed, the fairness of such a dismissal has to be in line with the Constitution, as well as foreign and international instruments that aim at protecting employees with disabilities.¹⁶⁹ The court held that where an employee with a disability is dismissed based on the ground of incapacity, such a dismissal affects the employee's¹⁷⁰ rights to 'equality, human dignity, the right to choose a trade, occupation or profession freely and right to fair labour practices'. The court thus applied the social model approach to disability. Judge Pillay held that as persons with disabilities already have a burden of complying with "mainstream society", the least that employers could do is to adapt and embrace such persons' differences, and through this also achieve substantive equality as protected in the Constitution.¹⁷¹ The court further held that where an employer accommodates an employee with disabilities, it also serves as a means through which to restore dignity to that employee.¹⁷² While the court treated the employee's disability as an incapacity enquiry, the court held that 'disability is not synonymous with incapacity'.¹⁷³

While at first glance it may seem as if there are distinct differences between disability and incapacity for ill-health or injury, practically the lines between these two concepts often becomes blurred, such as in the case of depression. In assessing the differences between incapacity and disability, one of the most noticeable differences is that there is a dedicated Code of Good Practice dealing with disability.

Whilst depression can clearly be regarded as an ill-health issue, the question is whether it should be dealt with under the wider notion of ill-health, or whether it should rather be dealt with under the more narrow understanding of disability. To date there has been no clear guidance in this regard from either the legislature or South Africa's court system. Considering the definition of mental impairment in the CGP on Disability, as well as the effect that mental impairments have on individuals, it might be argued that depression falls under a mental impairment. And as

¹⁶⁹ *Standard Bank of SA v Commissioner for Conciliation Mediation & Arbitration & others* (2008) 29 ILJ 1239 (LC) 1254.

¹⁷⁰ *Standard Bank of SA v Commissioner for Conciliation Mediation & Arbitration & others* (2008) 29 ILJ 1239 (LC) 1254.

¹⁷¹ *Standard Bank of SA v Commissioner for Conciliation Mediation & Arbitration & others* (2008) 29 ILJ 1239 (LC) 1256.

¹⁷² *Standard Bank of SA v Commissioner for Conciliation Mediation & Arbitration & others* (2008) 29 ILJ 1239 (LC) 1257.

mental impairments fall within the definition of disability under the CGP on Disability, depression could therefore be regarded as a disability.¹⁷⁴

2.5 REASONABLE ACCOMMODATION

It seems trite (when considering the CGP on Disability) that where an employee is incapacitated and the employer, after having conducted a thorough investigation, cannot reasonably accommodate the employee in performing his or her work duties, or where the employee does not accept the accommodation offered by the employer, such a dismissal will be considered to be fair.¹⁷⁵ An employer is not required to provide reasonable accommodation where the reasonable accommodation required will place an undue hardship on the employee.¹⁷⁶ When referring to undue hardship, the CGP on Disability provides that this is where the accommodation required will cause the employer 'significant or considerable difficulty or expense, which will seriously disrupt the operation of business'.¹⁷⁷

The CGP on Disability requires that the employer looks at ways in which to reduce the impact that the impairment will have on the employee, while still ensuring that the employee can meet the essential requirements of the job.¹⁷⁸ While the CGP on Disability places a burdensome duty on the employer to make reasonable accommodation, the CGP on Disability acknowledges that such accommodations must be cost effective.¹⁷⁹ Reasonable accommodation must also be extended towards prospective employees who are found to be suitably qualified for the position during the selection and recruitment process.¹⁸⁰ Whilst the CGP on Disability places great emphasis on the fact the employer is required to make reasonable accommodation, the CGP on Disability acknowledges that there is a duty on the employee to disclose the disability and the need for reasonable accommodation.¹⁸¹ Reasonable accommodation includes:

- (i) *adapting existing facilities to make them accessible;*

¹⁷⁴ Refer to paragraph 4 below where this issue is further addressed.

¹⁷⁵ Christianson M 'Incapacity and Disability: A Retrospective and Prospective Overview of the Past 25 Years (2004) *ILJ* 879 889.

¹⁷⁶ Code of Good Practice on the Employment of Persons with Disabilities clause 6.11

¹⁷⁷ Code of Good Practice on the Employment of Persons with Disabilities clause 6.12.

¹⁷⁸ Code of Good Practice on the Employment of Persons with Disabilities clause 6.1

¹⁷⁹ Code of Good Practice on the Employment of Persons with Disabilities clause 6.2

¹⁸⁰ Code of Good Practice on the Employment of Persons with Disabilities clause 6.3.i

¹⁸¹ Code of Good Practice on the Employment of Persons with Disabilities clause 6.4

- (ii) *adapting existing equipment or acquiring new equipment including computer hardware and software;*
- (iii) *re-organizing workstations;*
- (iv) *changing training and assessment materials and systems;*
- (v) *restructuring jobs so that non-essential **functions** are r e assigned;*
- (vi) *adjusting working time and leave; and*
- (vii) *providing specialized supervision, training and support in the workplace.*¹⁸²

2.6 SOUTH AFRICAN CASE LAW AND DEPRESSION

South Africa's courts remain undecided whether an employee suffering from depression should be protected under the CGP on Disability, or whether an employer should use incapacity for ill-health proceedings in terms of the Code on Dismissal.

Most of South Africa's available literature is largely based on providing reasonable accommodation for persons with physical disabilities, with very little acknowledgment being given to persons who suffer from mental impairments. South African courts to date seem to favour the approach that depression is mostly an ill-health issue. There however seems to be a steady increase in the number of cases in which depression is being accepted as part of disability protection.

2.6.1 *New Way Motors v Marsland*¹⁸³

In the case of *New Way Motors v Marsland*, the respondent, Mr Marsland, fell into a state of depression after his wife of 24 years suddenly left him in 2001.¹⁸⁴ On returning to work, after being hospitalised for four days, Mr Marsland was treated with great hostility by his employer.¹⁸⁵ He was isolated and branded for having a 'contagious disease'.¹⁸⁶ Prior to his

¹⁸² Code of Good Practice on the Employment of Persons with Disabilities clause 6.9.

¹⁸³ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC).

¹⁸⁴ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2877.

¹⁸⁵ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2877.

hospitalisation Mr Marsland was actively involved in many of the employer's core operations. After his return to work, Mr Marsland found that he was excluded from performing the essential requirements of his job.¹⁸⁷ He alleged that the employer's managing director began threatening and verbally abusing him.¹⁸⁸

As a result Mr Marsland relapsed into a state of severe depression.¹⁸⁹ Mr Marsland was booked off from work for a week, and upon his return he was handed a notice to attend a disciplinary enquiry.¹⁹⁰ The grounds for the disciplinary enquiry were indicated as poor work performance, breaching of company rules and misuse of company benefits.¹⁹¹ The chairperson of the enquiry found Mr Marsland 'guilty of poor work performance',¹⁹² and required the employer to provide Mr Marsland with counseling.¹⁹³

Subsequent to the above hearing Mr Marsland was prevented from performing any of his duties and was subjected to continuous threats and verbal abuse.¹⁹⁴ Mr Marsland eventually resigned.¹⁹⁵ He lodged a claim of unfair dismissal against the employer based on constructive dismissal.¹⁹⁶ The Labour Court held that the conduct of the employer towards Mr Marsland amounted to unfair discrimination based on a mental impairment.¹⁹⁷ Judge Stein held that Mr Marsland's mental health was the factual basis for his dismissal, and therefore it amounted to an automatically unfair dismissal.¹⁹⁸

On appeal to the Labour Appeal Court, the latter found that an employee who suffered from a mental impairment was discriminated against where such discrimination negatively affected the employee's dignity.¹⁹⁹ The Labour Appeal Court agreed that the employer's conduct impaired the dignity of Mr Marsland based on the fact that the employee suffered from depression.²⁰⁰ The Labour Appeal Court further found that the employer's treatment of the employee was

¹⁸⁶ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2877.

¹⁸⁷ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2877.

¹⁸⁸ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2878.

¹⁸⁹ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2878.

¹⁹⁰ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2878.

¹⁹¹ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2878.

¹⁹² *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2880.

¹⁹³ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2880.

¹⁹⁴ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2880.

¹⁹⁵ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2881.

¹⁹⁶ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2881.

¹⁹⁷ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2882.

¹⁹⁸ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2882.

¹⁹⁹ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2877.

²⁰⁰ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2883.

appalling²⁰¹ and confirmed that the employee's dismissal was automatically unfair since the dismissal was based on s187(1)(f) of the LRA.²⁰²

2.6.2 *Independent Municipal & Allied Trade Unions v Witzenberg Municipality*²⁰³

The court in *Independent Municipal & Allied Trade Unions v Witzenberg Municipality* held that where an employee who suffered from depression was permanently incapacitated, such an employee might be dismissed under incapacity due to ill-health.²⁰⁴ Such a dismissal would be considered fair if substantive and procedural requirements were met.²⁰⁵

Mr Strydom, the first respondent, held the position of municipal manager within the employer's operations.²⁰⁶ Mr Strydom was booked off from work for a period of about eight months between May 2014 and January 2005 due to major depression.²⁰⁷ In January 2005 Mr Strydom applied to be medically boarded based on ill-health.²⁰⁸ During July 2005 the employer held an enquiry into Mr Strydom's capacity, and found that he was incapacitated to the extent that he could not perform the essential requirements of his employment.²⁰⁹ Mr Strydom was subsequently dismissed.²¹⁰ Mr Strydom instituted an unfair dismissal claim against his employer.²¹¹ The Labour Court found that the dismissal of Mr Strydom had been both

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²⁰¹ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2886.

²⁰² *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2886.

²⁰³ *Independent Municipal & Allied Trade Union on behalf of Strydom v Witzenberg Municipality & Others* (2012) 33 ILJ 1081 (LAC).

²⁰⁴ *Independent Municipal & Allied Trade Union on behalf of Strydom v Witzenberg Municipality & Others* (2012) 33 ILJ 1081 (LAC) 1087.

²⁰⁵ *Independent Municipal & Allied Trade Union on behalf of Strydom v Witzenberg Municipality & Others* (2012) 33 ILJ 1081 (LAC) 1087.

²⁰⁶ *Independent Municipal & Allied Trade Union on behalf of Strydom v Witzenberg Municipality & Others* (2012) 33 ILJ 1081 (LAC) 1084.

²⁰⁷ *Independent Municipal & Allied Trade Union on behalf of Strydom v Witzenberg Municipality & Others* (2012) 33 ILJ 1081 (LAC) 1084.

²⁰⁸ *Independent Municipal & Allied Trade Union on behalf of Strydom v Witzenberg Municipality & Others* (2012) 33 ILJ 1081 (LAC) 1084.

²⁰⁹ *Independent Municipal & Allied Trade Union on behalf of Strydom v Witzenberg Municipality & Others* (2012) 33 ILJ 1081 (LAC) 1084.

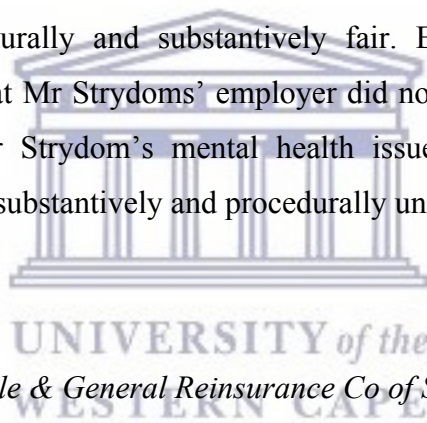
²¹⁰ *Independent Municipal & Allied Trade Union on behalf of Strydom v Witzenberg Municipality & Others* (2012) 33 ILJ 1081 (LAC) 1084.

²¹¹ *Independent Municipal & Allied Trade Union on behalf of Strydom v Witzenberg Municipality & Others* (2012) 33 ILJ 1081 (LAC) 1084.

substantively and procedurally unfair.²¹² The employer thereafter took the matter on appeal to the Labour Appeal Court.

The Labour Appeal Court held that when dismissing an employee based on incapacity the ‘enquiry considers whether the employee is capable of performing his or her duties before the enquiry took place or whether the employee is suitable for an alternative position’.²¹³ The court went further to hold that where the employee was found to be permanently incapacitated, the enquiry did not automatically end.²¹⁴ In such instance the employer was required to determine whether the employee required adjustments to be made to his current employment conditions or whether an alternative position is available which will be suited to the employee’s incapacity.²¹⁵

Judge Molemela held that where the employer through a thorough investigation concluded that it was unable to adapt the employee’s working conditions in order to accommodate the incapacity, or where it was unable to offer the employee a suitable alternative position, such dismissal would be considered procedurally and substantively fair. Based on the medical evidence submitted, the court found that Mr Strydom’s employer did not actively take steps to eliminate the stressors that caused Mr Strydom’s mental health issues.²¹⁶ The court found that the dismissal of Mr Strydom was substantively and procedurally unfair.²¹⁷



2.6.3 *Hendricks v Mercantile & General Reinsurance Co of SA*²¹⁸

In the case of *Hendricks v Mercantile & General Reinsurance* the court found the dismissal of the appellant to have been substantively and procedurally fair.²¹⁹ The appellant had been dismissed based on the ground of incapacity.²²⁰ The previous industrial court system found that

²¹² *Independent Municipal & Allied Trade Union on behalf of Strydom v Witzenberg Municipality & Others* (2008) 29 ILJ 2947 (LC) 2962.

²¹³ *Independent Municipal & Allied Trade Union on behalf of Strydom v Witzenberg Municipality & Others* (2012) 33 ILJ 1081 (LAC) 1086.

²¹⁴ *Independent Municipal & Allied Trade Union on behalf of Strydom v Witzenberg Municipality & Others* (2012) 33 ILJ 1081 (LAC) 1086.

²¹⁵ *Independent Municipal & Allied Trade Union on behalf of Strydom v Witzenberg Municipality & Others* (2012) 33 ILJ 1081 (LAC) 1086.

²¹⁶ *Independent Municipal & Allied Trade Union on behalf of Strydom v Witzenberg Municipality & Others* (2012) 33 ILJ 1081 (LAC) 1093.

²¹⁷ *Independent Municipal & Allied Trade Union on behalf of Strydom v Witzenberg Municipality & Others* (2012) 33 ILJ 1081 (LAC) 1092.

²¹⁸ *Hendricks v Mercantile & General Reinsurance Co of SA Ltd* (1994) 15 ILJ 304 (LAC).

²¹⁹ *Hendricks v Mercantile & General Reinsurance Co of SA Ltd* (1994) 15 ILJ 304 (LAC) 317.

²²⁰ *Hendricks v Mercantile & General Reinsurance Co of SA Ltd* (1994) 15 ILJ 304 (LAC) 315.

the respondent had exhausted all possible solutions in an attempt to accommodate the appellant's depression and anxiety, while at the same time offering the appellant medical treatment.²²¹ The court found that the appellant's unwillingness to repair the relationship between himself and his fellow colleagues and employer would have required the employer to restructure the entire department.²²² The court found that to have expected this from the employer would have been unreasonable.²²³ The respondent offered the appellant an alternative position, one which would not have negatively affect his salary, and also agreed that no probation period would have applied to the appellant in the new position. The court found that the appellant's rejection of the solutions offered by the employer was unreasonable and resulted in the dismissal of the appellant being fair.²²⁴

2.7 CONCLUSION

The enactment of the Constitution has entrenched the right to equality. While the right to equality includes a list of grounds on which no person may be discriminated against, this is not a closed list of grounds. This is evident by the word "including".²²⁵ While the Constitution expressly protects the right to equality and fair labour practices, it is unable to cater for day-to-day governance of these rights. The Constitution has therefore tasked the legislature with enacting legislation to give effect to these rights.

The legislation that aims at protecting persons with disabilities in the workplace is the EEA, LRA and the BCEA. Employees suffering from depression are able to find protection under any of the three legislative frameworks. Uncertainty however remains whether an employee should bring depression related claims under ill-health arguments or based on disability. The effects of depression are far reaching and would therefore require South Africa's legal system to develop greater protection mechanisms for this marginalised group of people. While, as indicated in this chapter, one could perhaps argue that the EEA and the CGP on Disability aim at protecting employees suffering from depression under disability provisions, depression is not expressly

²²¹ *Hendricks v Mercantile & General Reinsurance Co of SA Ltd* (1994) 15 ILJ 304 (LAC) 315.

²²² *Hendricks v Mercantile & General Reinsurance Co of SA Ltd* (1994) 15 ILJ 304 (LAC) 316.

²²³ *Hendricks v Mercantile & General Reinsurance Co of SA Ltd* (1994) 15 ILJ 304 (LAC) 316.

²²⁴ *Hendricks v Mercantile & General Reinsurance Co of SA Ltd* (1994) 15 ILJ 304 (LAC) 317.

²²⁵ The Constitution of the Republic of South Africa, 1996 s9(3).

mentioned in the definition of mental impairment in either of these documents.²²⁶ There remains a substantial amount of local literature on physical disability, but not much on mental impairments and even less on depression. From the viewpoints of the courts it is evident that there is much uncertainty as to how to deal with depression. Depression can be viewed as either a disability or ill-health incapacity issue. The manner in which our courts deal with depression largely depends on the ground the complainant basis his or her claim on.²²⁷ The South African judiciary is yet to clarify under exactly which ground a person suffering from depression is protected. Although the courts have not yet set a consistent precedent in this regard, it is noted that depression is increasingly being recognised as a mental impairment.

The case of *Standard Bank of SA v Commissioner for Conciliation, Mediation & Arbitration* (hereinafter referred to as the “*Standard Bank case*”) as discussed in paragraph 2.4.4 above, provides a four-stage enquiry with which an employer has to comply with before dismissing an employee. While the case of *Standard Bank* mainly focuses on physical impairment, it provided the foundational groundwork on which an employee who suffers from depression can be afforded protection under, provided that South Africa’s courts recognise depression as a disability. This then indicates that South Africa has already placed the basic protection mechanisms in place for persons with disabilities, including employees suffering from depression.

The case of *New Way Motors v Marsland*, as discussed in paragraph 2.6.1 above, provided employees suffering from depression some hope as the court recognised depression as a disability. The court emphasised that dismissing an employee for reasons related to depression (which in terms of the CGP on disabilities is considered to be a disability) amounts to automatically unfair discrimination.

The case of *Independent Municipal & Allied Trade Unions v Witzenberg Municipality*, as discussed in paragraph 2.6.2 above, considered depression as an incapacity issue. This is unfortunately indicative that South African courts still differ in their approach to depression. This still leaves employees suffering from depression in a position of uncertainty as to the protection available to them under employment law.

The case of *Hendricks v Mercantile & General Reinsurance* reasoned along similar lines to the case of *Independent Municipal & Allied Trade Unions v Witzenberg Municipality*. In the

²²⁶ Bassuday K & Rycroft A ‘Incapacity or Disability? The Implications for Jurisdiction Ernstzen v Reliance Group Trading (Pty) Ltd (C717/13) [2015] ZALCCT 42’ (2015) 36 *ILJ* 2516 2518.

²²⁷ Bassuday K & Rycroft A ‘Incapacity or Disability? The Implications for Jurisdiction Ernstzen v Reliance Group Trading (Pty) Ltd (C717/13) [2015] ZALCCT 42’ (2015) 36 *ILJ* 2516 2521.

Hendricks case the dismissal of the employee was considered fair based on the appellant's rejection of the employer's attempts at making working conditions reasonable. The court however did not challenge the ground on which the employee brought the claim of the unfair dismissal, which was based on incapacity.

It is unfortunate that South Africa's courts still remain undecided on whether or not depression should be considered to be a disability, especially in light of the fact that the CGP on disability has alluded to depression falling within the definition of disability. The indecisiveness of South Africa's courts has allowed for employees suffering from depression to remain in a vulnerable position. South Africa presently offers minimalistic protection to employees suffering from depression,

The position in South Africa will be addressed and considered in the next chapter. In order to determine how South Africa has incorporated the provisions of the CRPD into national laws, it will be seen that South Africa has been criticised for not being able to give full effect to the CRPD. This is partly due to the fact that South Africa does not have a dedicated national set of laws that deals with disability.



CHAPTER THREE

CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

3.1 INTRODUCTION

The enactment of the Convention on the Rights of Persons with Disabilities²²⁸ (CRPD) has brought about significant change in how society approaches and views disability.²²⁹ The main theme addressed within the CRPD is to empower persons with disabilities, with an ancillary theme being to create awareness around the diversity of humanity within society.²³⁰ While the CRPD's predecessors contained provisions which aimed at preventing discrimination against persons with disabilities, these conventions failed in safeguarding against the violations of fundamental human rights and freedoms.²³¹

Persons with disabilities have traditionally been viewed as being dependant,²³² with the result that governments had to provide these individuals with financial assistance as a result of the belief that they were unable to actively participate in society.²³³ Persons with disabilities were viewed as 'objects that required care, rather than legal subjects who are entitled to the full and equal enjoyment of human rights'.²³⁴ While, as will be seen below, historically many persons living with disabilities were in theory, and on paper, entitled to basic human rights, the reality was that these individuals were often denied basic rights as a result of disability.²³⁵

This chapter will provide a brief overview of the history of the CRPD's predecessors and the enactment of the CRPD. The chapter will further consider how the CRPD differs from its predecessors. In particular the CRPD is different in that it shifted away from the restrictive medical model approach adopted in earlier documents to a more inclusive social model approach. While the CRPD has largely been praised for the effort it has made in bringing about such shift, it is not without shortcomings, which will also be discussed in this chapter.

The chapter will also consider the significance of the CRPD, particularly how it has empowered the lives of persons living with disabilities. Finally, the chapter will also examine whether the CRPD has in fact successfully empowered persons living with disabilities.

²²⁸ The Convention on the Rights of Persons with Disabilities was enacted 13 December 2006 can be accessed at <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>. (accessed on 24 November 2017).

²²⁹ Bielefeldt H 'New Inspiration for the Human Rights Debate: The Convention on the Rights of Persons with Disabilities' (2007) 25 *Neth. Q. Hum. Rts* 397 397.

²³⁰ Bielefeldt H 'New Inspiration for the Human Rights Debate: The Convention on the Rights of Persons with Disabilities' (2007) 25 *Neth. Q. Hum. Rts* 397 397.

²³¹ Waterstone M 'Foreword: The Significance of the United Nations Convention of the Rights of Persons with Disabilities' (2010) 33 *Loy L.A Int'l & Comp. L. Rev.* 1 2.

²³² Hendricks A 'United Convention on the Rights of Persons with Disabilities' (2007) 14 *Eur. J. Health L.* 273 273.

²³³ Hendricks A 'United Convention on the Rights of Persons with Disabilities' (2007) 14 *Eur. J. Health L.* 273 273.

²³⁴ Hendricks A 'United Convention on the Rights of Persons with Disabilities' (2007) 14 *Eur. J. Health L.* 273 273.

²³⁵ Mégret F 'The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?' (2008) 30 *Hum. Rts. Q.* 494 500.

3.2 THE ENACTMENT OF THE CRPD AND THE PROTECTION AFFORDED BY THE CRPD

3.2.1 A brief overview of the history leading up to the enactment of the CRPD

It was only from the 1960's that the United Nations (UN) began focusing on restoring the dignity and enjoyment of fundamental freedoms of person with disabilities.²³⁶ Since then the UN has continuously aspired to protect vulnerable groups of individuals in society.²³⁷ This was done through adopting various conventions. The first of these were 'two twin covenants',²³⁸ namely the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.²³⁹

During the 1970's the UN adopted the Rights of Mentally Retarded Persons²⁴⁰ and the Declaration on the Rights of Disabled Persons.²⁴¹ Both these documents, although very ambitious for their time, failed to fully protect persons with disabilities.²⁴² The protection only extended as far as the medical care and rehabilitation of persons with disabilities were concerned.²⁴³

The 1980's was marked as the turning point in affording protection of fundamental freedoms to persons with disabilities, during which an international decade of disabled persons was embarked on.²⁴⁴ During the decade of disabled persons an action programme was established which called upon the public to participate and assist in affording full and equal protection to persons with disabilities.²⁴⁵ The international decade of disabled persons encouraged

²³⁶ Hendricks A 'United Convention on the Rights of Persons with Disabilities' (2007) 14 *Eur. J. Health L.* 273 274.

²³⁷ Hendricks A 'United Convention on the Rights of Persons with Disabilities' (2007) 14 *Eur. J. Health L.* 273 274.

²³⁸ Hendricks A 'United Convention on the Rights of Persons with Disabilities' (2007) 14 *Eur. J. Health L.* 273 274.

²³⁹ Cole W.M 'Politics, Profit, Propriety, or Propinquity? Predicting State Ratification of the International Human Rights Covenants' available at web.stanford.edu/group/csw/Cole.doc (accessed on 02 March 2016).

²⁴⁰ Hendricks A 'United Convention on the Rights of Persons with Disabilities' (2007) 14 *Eur. J. Health L.* 273 274.

²⁴¹ The Declaration on the Rights of Disabled Persons can be accessed at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RightsOfDisabledPersons.aspx>. (accessed on 24 November 2017).

²⁴² Hendricks A 'United Convention on the Rights of Persons with Disabilities' (2007) 14 *Eur. J. Health L.* 273 274.

²⁴³ Hendricks A 'United Convention on the Rights of Persons with Disabilities' (2007) 14 *Eur. J. Health L.* 273 274.

²⁴⁴ Hendricks A 'United Convention on the Rights of Persons with Disabilities' (2007) 14 *Eur. J. Health L.* 273 275.

²⁴⁵ Hendricks A 'United Convention on the Rights of Persons with Disabilities' (2007) 14 *Eur. J. Health L.* 273 275.

international participation in putting forward recommendations to the UN to encourage the active involvement of disabled person in society.²⁴⁶ The UN campaigned to promote the equalisation of opportunities for persons with disabilities.²⁴⁷

During the 1990's Italy and Sweden made a recommendation that the UN should adopt a convention aimed at protecting the rights and freedoms of persons with disabilities specifically.²⁴⁸ The majority of the UN member states however rejected this recommendation, as they felt that such convention would be a duplication of mechanisms already contained in the then-existing conventions.²⁴⁹ Most treaties at the time however failed to allow for the full and equal enjoyment of rights and freedoms²⁵⁰ and the empowerment of persons with disabilities.²⁵¹

Subsequently the Standard Rules on the Equalization of Opportunities for People with Disabilities (SREOPD)²⁵² was enacted from the experiences gained during the international decade for disabled persons. The SREOPD aimed to eliminate the discrimination suffered by persons with disabilities.²⁵³ Although the standards contained in the SREOPD were headed in the right direction, they were not legally binding on member states. Therefore whilst good on paper, the standards contained in the SREOPD practically failed to eliminate discrimination suffered by persons with disabilities.²⁵⁴

Another predecessor of the CRPD was the UN Millennium Goals Convention.²⁵⁵ Although persons with disabilities received protection under the broad standards of the convention, there was no explicit reference made to disability.²⁵⁶ Persons with disabilities found protection under the UN Millennium Goals Convention, specifically under the goal to eradicate extreme poverty

²⁴⁶ Hendricks A 'United Convention on the Rights of Persons with Disabilities' (2007) 14 *Eur. J. Health L.* 273 274.

²⁴⁷ Hendricks A 'United Convention on the Rights of Persons with Disabilities' (2007) 14 *Eur. J. Health L.* 273 274.

²⁴⁸ Hendricks A 'United Convention on the Rights of Persons with Disabilities' (2007) 14 *Eur. J. Health L.* 273 275.

²⁴⁹ Hendricks A 'United Convention on the Rights of Persons with Disabilities' (2007) 14 *Eur. J. Health L.* 273 275.

²⁵⁰ Kanter AS 'The Promise and Challenge of the United Nations Convention of the Rights of Persons with Disabilities' (2007) 34 *Syracuse J. Int'l. & Com* 287 287 289.

²⁵¹ Waterstone M 'Foreword: The Significance of the United Nations Convention of the Rights of Persons with Disabilities' (2010) 33 *Loy L.A Int'l & Comp. L. Rev.* 1 2.

²⁵² The Standard Rules on the Equalization of Opportunities for Persons with Disabilities can be accessed at <http://www.un.org/esa/socdev/enable/dissre00.htm>. (accessed on 024 November 2107).

²⁵³ Hendricks A 'United Convention on the Rights of Persons with Disabilities' (2007) 14 *Eur. J. Health L.* 273 275

²⁵⁴ Hendricks A 'United Convention on the Rights of Persons with Disabilities' (2007) 14 *Eur. J. Health L.* 273 275.

²⁵⁵ United Nations Millennium Convention can be accessed at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/55/2. (accessed on 24 November 2017).

²⁵⁶ Waterstone M 'Foreword: The Significance of the United Nations Convention of the Rights of Persons with Disabilities' (2010) 33 *Loy L.A Int'l & Comp. L. Rev.* 1 2.

and hunger.²⁵⁷ Persons with disabilities historically lacked the ability to access state resources such as “education, employment, health care and the social and legal support systems”.²⁵⁸ This resulted in high levels of poverty amongst persons with disabilities.

While all of the above treaties offered persons with disabilities some form of protection, these treaties did not contain appropriate protective mechanisms in safeguarding the human rights and fundamental freedoms of persons with disabilities.²⁵⁹

3.2.2 The enactment of the CRPD

The United Nations General Assembly in 2001 established the Committee on the Rights of Persons with Disabilities. This committee comprised of eighteen independent members,²⁶⁰ which all acted in their personal capacities and not in the capacity of government representatives.²⁶¹ The committee was mandated to accept ‘proposals for an international convention which would ultimately protect and promote the rights and dignity of persons with disabilities’.²⁶² The international community actively responded to this mandate. The proposals made were compiled and, to a large extent, formed the substantive content of the final text of the CRPD, which was adopted by the UN General Assembly on 13 December 2006.

The CRPD was enacted with the purpose to,

“promote, protect and ensure that persons with either mental or physical impairments, have the full enjoyment of all human rights and fundamental freedoms, while aiming to

²⁵⁷ Millennium Development Goal 1 can be accessed at http://www.undp.org/content/undp/en/home/sdgoverview/mdg_goals/mdg1/ (accessed on 24 November 2017).

²⁵⁸ The Department of Economic and Social Affairs of the United Nations Secretariat *Disability and the Millennium Development Goals – A Review of the MDG’s Process and Strategies for inclusion of Disability Issues in Millennium Development Goals Efforts* (2011) The Department of Economic and Social Affairs of the United Nations Secretariat: New York.

²⁵⁹ Waterstone M ‘Foreword: The Significance of the United Nations Convention of the Rights of Persons with Disabilities’ (2010) 33 *Loy L.A Int’l & Comp. L. Rev.* 1 2.

²⁶⁰ Committee on the Rights of Persons with Disabilities Members consist of: Mr Ahmad Al Saif, Mr Danlami Umaru Basharu, Mr Monthian Buntan, Mr Imed Eddine Chaker and Ms Theresia Degener. A complete list of all eighteen members can be accessed at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Membership.aspx>. (accessed on 24 November 2017).

²⁶¹ Committee of the Rights of Persons with Disabilities <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx> (accessed on 12 May 2017).

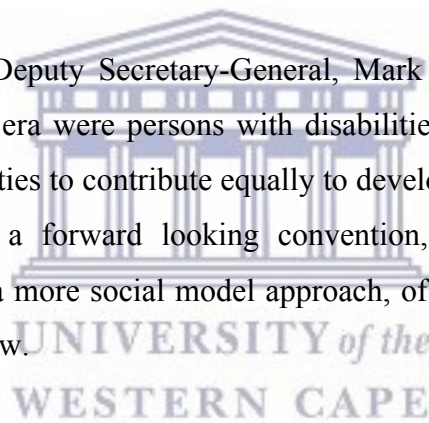
²⁶² Hendricks A ‘United Convention on the Rights of Persons with Disabilities’ (2007) 14 *Eur. J. Health L.* 273 275.

remove the various barriers that may hinder an individual's full and effective participation in society, placing individuals on an equal basis with others".²⁶³

The CRPD remains the fastest negotiated convention in UN history, as well as the convention which received the highest number of member state signatures on the day it was published for ratification.²⁶⁴ This supports the view that there was indeed a worldwide need for the protection offered by the CRPD.²⁶⁵

The CRPD is the first convention which comprehensively aims at realising the rights of nearly 650 million people (that is, nearly ten percent of the world's population).²⁶⁶ Of the ten percent of people that are now afforded protection under the CRPD, twenty percent are living in a state of poverty.²⁶⁷ This places persons with disabilities as one of the largest, if not the largest, minority groups globally.²⁶⁸

The United Nations former Deputy Secretary-General, Mark Malloch Brown, stated that the CRPD has 'put an end to an era where persons with disabilities are discriminated against, thus allowing persons with disabilities to contribute equally to development of society'.²⁶⁹ The CRPD has been praised for being a forward looking convention, which moved away from the traditional medical model to a more social model approach, of which a detailed discussion will follow in paragraph 3.2.3 below.



3.2.3 The revolutionary departure from the medical model approach to disability to a social model approach

²⁶³ United Nations Convention of the Rights of Persons with Disabilities, 2008 Art. 1.

²⁶⁴ Waterstone M 'Foreword: The Significance of the United Nations Convention of the Rights of Persons with Disabilities' (2010) 33 *Loy L.A Int'l & Comp. L. Rev.* 1 2.

²⁶⁵ Waterstone M 'Foreword: The Significance of the United Nations Convention of the Rights of Persons with Disabilities' (2010) 33 *Loy L.A Int'l & Comp. L. Rev.* 1 2.

²⁶⁶ Kanter AS 'The Promise and Challenge of the United Nations Convention of the Rights of Persons with Disabilities' (2007) 34 *Syracuse J. Int'l. & Com* 287 287.

²⁶⁷ Waterstone M 'Foreword: The Significance of the United Nations Convention of the Rights of Persons with Disabilities' (2010) 33 *Loy L.A Int'l & Comp. L. Rev.* 1 1.

²⁶⁸ Waterstone M 'Foreword: The Significance of the United Nations Convention of the Rights of Persons with Disabilities' (2010) 33 *Loy L.A Int'l & Comp. L. Rev.* 1 1.

²⁶⁹ Kanter AS 'The Promise and Challenge of the United Nations Convention of the Rights of Persons with Disabilities' (2007) 34 *Syracuse J. Int'l. & Com* 287 293.

The CRPD has taken a revolutionary stance in moving away from the traditional medical model approach to disability to a more objective, social model, approach where disabilities are viewed from the perspective of society's social construction.²⁷⁰

The medical model approach is the analysis of disability from a medical perspective. Within this approach the disability is viewed from an individual's inability to participate in everyday, what is perceived as "normal", anatomical functions.²⁷¹ The CRPD's predecessors aimed at protecting persons with disabilities using the medical model approach. The individual's disability, and consequently the inability to do certain "normal" things, formed the basis for most of these conventions' provisions.

In terms of the CRPD the focus shifted away from the individual's abilities, or inabilities, and rather considered society's infrastructure as the main source of an individual's disability.²⁷² This approach has been termed the social model approach to disability. The social model therefore extends beyond physical barriers that prevent persons with disabilities from actively participating in society. It extends beyond the opinions of society, which have often contributed to the re-enforcement of stereotypes and stigmas against persons with disabilities.²⁷³

The social model embraced by the CRPD aims to restore the dignity and rights of persons with disabilities, and to integrate them as active participants in society. These mechanisms are not aimed at trying to "fix" persons with disabilities so that they can fit, what is regarded to be, the "social norm". They are rather there to break down the barriers that have historically prevented these individuals from enjoying the benefits of equal opportunities.²⁷⁴ The CRPD therefore aims at promoting the integration of persons with disabilities into society, and allowing persons with disabilities to lead a "normal life".²⁷⁵

3.3 MONITORING AND IMPLEMENTATION OF THE CRPD

²⁷⁰ Kanter AS 'The Promise and Challenge of the United Nations Convention of the Rights of Persons with Disabilities' (2007) 34 *Syracuse J. Int'L. & Com* 287 287 291.

²⁷¹ Lord JE, Suozzi D & Taylor AL 'Lessons from the U.N. Convention on the Rights of Persons with Disabilities: Democratic Deficit on Global Health Governance' (2010) 38 *J.L. Med. & Ethics* 564 566.

²⁷² Kanter AS 'The Promise and Challenge of the United Nations Convention of the Rights of Persons with Disabilities' (2007) 34 *Syracuse J. Int'L. & Com* 287 287 291.

²⁷³ Kanter AS 'The Promise and Challenge of the United Nations Convention of the Rights of Persons with Disabilities' (2007) 34 *Syracuse J. Int'L. & Com* 287 287 291.

²⁷⁴ Lord JE, Suozzi D & Taylor AL 'Lessons from the U.N. Convention on the Rights of Persons with Disabilities: Democratic Deficit on Global Health Governance' (2010) 38 *J.L. Med. & Ethics* 564 568.

²⁷⁵ Lord JE, Suozzi D & Taylor AL 'Lessons from the U.N. Convention on the Rights of Persons with Disabilities: Democratic Deficit on Global Health Governance' (2010) 38 *J.L. Med. & Ethics* 564 566.

One critique of previous conventions²⁷⁶ was that these conventions were largely “teethless”. While many member states, in ratifying these conventions, seemed eager to empower and restore the dignity of persons with disabilities, attempts to actually do so often ended up being abandoned. Conventions were often only ratified to show that member states were attempting to deliver on the promises set out in the CRPD predecessors.²⁷⁷ Practically however the implementation of these conventions was largely left in the discretion of member states (as many previous human rights conventions tried to avoid political debate), which achieved little success.²⁷⁸

Article 33 of the CRPD lays down four key obligations imposed on member states in the implementation and monitoring of the CRPD at a national level.²⁷⁹ The first obligation is that the member states should identify one or more focal points which their respective national governments will be responsible for implementing.²⁸⁰ Secondly, member states are responsible for the establishment of structures that will facilitate the implementation and monitoring of the CRPD at different levels within different sectors.²⁸¹ Thirdly, member states must set up an independent organisation that oversees the promotion, protection and monitoring of the CRPD.²⁸² Lastly, an important process in the monitoring of the CRPD at national level is that civil society, more specifically persons with disabilities, are allowed to actively participate in these processes.²⁸³

With the introduction of the Optional Protocol to the Convention on the Rights of Persons with Disabilities (herein referred to as “Optional Protocol”),²⁸⁴ the CRPD created an additional feature which introduced monitoring provisions to ensure that the CRPD is implemented at a national level,²⁸⁵ as well as ensuring that implementation does not conflict with the purpose of

²⁷⁶ Conventions as mentioned in paragraph 3.2.1 above.

²⁷⁷ Mégret F ‘The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?’ (2008) 30 *Hum. Rts. Q.* 494 504.

²⁷⁸ Mégret F ‘The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?’ (2008) 30 *Hum. Rts. Q.* 494 504.

²⁷⁹ Lord JE, Suozzi D & Taylor AL ‘Lessons from the U.N. Convention on the Rights of Persons with Disabilities: Democratic Deficit on Global Health Governance’ (2010) 38 *J.L. Med. & Ethics* 564 570.

²⁸⁰ United Nations Convention of the Rights of Persons with Disabilities, 2008 Art. 33(1).

²⁸¹ United Nations Convention of the Rights of Persons with Disabilities, 2008 Art. 33(1).

²⁸² United Nations Convention of the Rights of Persons with Disabilities, 2008 Art. 33(2).

²⁸³ United Nations Convention of the Rights of Persons with Disabilities, 2008 Art. 33(3).

²⁸⁴ Optional Protocol to the Convention on the Rights of Persons with Disabilities can be accessed at <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf> (accessed on 24 November 2017).

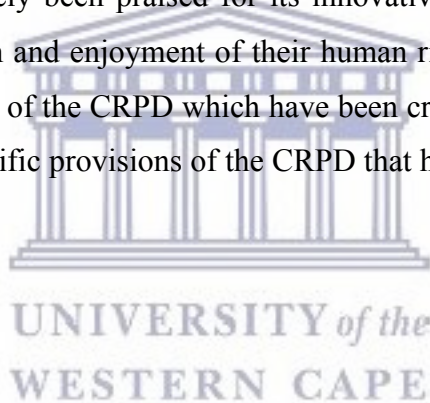
²⁸⁵ Lord JE, Suozzi D & Taylor AL ‘Lessons from the U.N. Convention on the Rights of Persons with Disabilities: Democratic Deficit on Global Health Governance’ (2010) 38 *J.L. Med. & Ethics* 564 570.

the CRPD.²⁸⁶ These monitoring mechanisms ensure that the convention will remain effective in affording persons with disabilities protection, as well as ensuring that the convention does not become outdated as was the case with many of the CRPD predecessors.²⁸⁷

The Optional Protocol has been ratified by 105 countries out of the 153 member states which ratified the CRPD.²⁸⁸ The Optional Protocol allows member states to lodge a complaint with the Committee on the Rights of Persons with Disabilities in cases where either an individual's or group of persons with disabilities, rights have been violated.²⁸⁹ The complaint will only be entertained if the complainant can prove that all national remedies have been exhausted,²⁹⁰ but failed.

3.4 SHORTCOMINGS OF THE CRPD

Although the CRPD has largely been praised for its innovative approach in affording persons with disabilities the protection and enjoyment of their human rights and fundamental freedoms, there has been certain features of the CRPD which have been criticised. What follows below is a detailed discussion of the specific provisions of the CRPD that have been critiqued.



3.4.1 Persons with disabilities lack the necessary legal capacity to make their own decisions

²⁸⁶ Hendricks A 'United Convention on the Rights of Persons with Disabilities' (2007) 14 *Eur. J. Health L.* 273 276.

²⁸⁷ Lord JE, Suozzi D & Taylor AL 'Lessons from the U.N. Convention on the Rights of Persons with Disabilities: Democratic Deficit on Global Health Governance' (2010) 38 *J.L. Med. & Ethics* 564 570.

²⁸⁸ Waterstone M 'Foreword: The Significance of the United Nations Convention of the Rights of Persons with Disabilities' (2010) 33 *Loy L.A Int'l & Comp. L. Rev.* 1 2.

²⁸⁹ Hendricks A 'United Convention on the Rights of Persons with Disabilities' (2007) 14 *Eur. J. Health L.* 273 276.

²⁹⁰ Hendricks A 'United Convention on the Rights of Persons with Disabilities' (2007) 14 *Eur. J. Health L.* 273 276.

The CRPD not only provides protection to individuals with physical disabilities, but extends its protection to persons with mental impairments. This includes individuals who suffer from psychological disabilities such as depression.²⁹¹

Article 12 of the CRPD has taken a novel approach in Mental Health law, which allows ‘persons with disabilities to enjoy legal capacity on an equal basis with others on all aspects of life’.²⁹² This allows for a person to make his or her own decision, and to have those decisions respected.²⁹³

To appreciate this approach, consideration needs to be given to how most state laws approach legal capacity. Within most jurisdictions legal capacity is determined by age and mental health.²⁹⁴ Incapacity is commonly associated with mental impairments, thus persons with mental impairments are often viewed as having to be controlled, and their decision making restricted.²⁹⁵ Many state laws view persons suffering from psychological disabilities as being unable to make their own decisions.²⁹⁶

The CRPD adopted the interpretation of legal capacity as contained in Article 15 of the Convention on the Elimination of Discrimination against Women (CEDAW). In terms of this article, legal capacity needs to be understood in terms of an individual’s autonomy - thus having the legal capacity to make one’s own decisions.²⁹⁷ Article 12 upholds the autonomy of the individual,²⁹⁸ rebutting the presumption that an individual who suffers from a mental impairment lacks the ability to make his or her decisions.²⁹⁹ Article 12 allows an individual to either consent

²⁹¹ Morrissey F ‘The United Nations Convention on the Rights of Persons with Disabilities: A New Approach to Decision-Making in Mental Health Law’ (2012) 19 *Eur. J. Health L.* 423 423.

²⁹² United Nations Convention of the Rights of Persons with Disabilities, 2008 Art.12(2).

²⁹³ Morrissey F ‘The United Nations Convention on the Rights of Persons with Disabilities: A New Approach to Decision-Making in Mental Health Law’ (2012) 19 *Eur. J. Health L.* 423 427.

²⁹⁴ Wildeman S ‘Protecting Rights and Building Capacities: Challenges to Global Mental Health Policy in Light of the Convention on the Rights of Persons with Disabilities’ 41 *J.L. Med. & Ethics* 48 58.

²⁹⁵ Morrissey F ‘The United Nations Convention on the Rights of Persons with Disabilities: A New Approach to Decision-Making in Mental Health Law’ (2012) 19 *Eur. J. Health L.* 423 424.

²⁹⁶ Morrissey F ‘The United Nations Convention on the Rights of Persons with Disabilities: A New Approach to Decision-Making in Mental Health Law’ (2012) 19 *Eur. J. Health L.* 423 423.

²⁹⁷ Schulze M *Understanding the UN Convention on the Rights of Persons with Disabilities* 3ed (2009) 63.

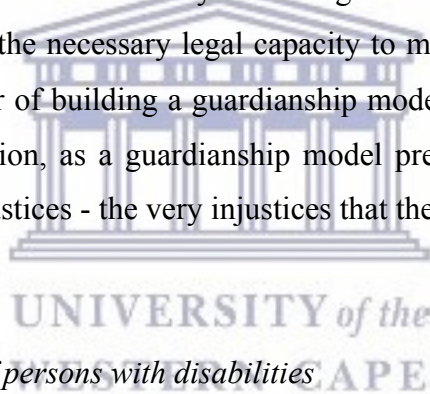
²⁹⁸ Morrissey F ‘The United Nations Convention on the Rights of Persons with Disabilities: A New Approach to Decision-Making in Mental Health Law’ (2012) 19 *Eur. J. Health L.* 423 426.

²⁹⁹ Morrissey F ‘The United Nations Convention on the Rights of Persons with Disabilities: A New Approach to Decision-Making in Mental Health Law’ (2012) 19 *Eur. J. Health L.* 423 428.

or refuse treatment.³⁰⁰ This provision ultimately allows for the individual concerned to enjoy legal independence including the right to make his or her own decisions.³⁰¹

Article 12 of the CRPD strives to restore the inherent dignity and autonomy of persons with disabilities which, amongst others, allows for persons with disabilities to make their own decisions.³⁰² The CRPD however overlooks the fact that many of those suffering from mental impairments may be hindered from being able to make sound decisions, which decisions may have a negative impact upon their lives.³⁰³ The inability of these individuals to make sound decisions is the reason why persons with mental impairments are often the subjects of abuse. This renders them a vulnerable group of individuals in society, and who requires extensive protection.³⁰⁴ The CRPD fails to consider the fact that not all forms of care will be a threat to an individual's dignity and independence, but rather a vital aspect in the repairing/healing of the individual.³⁰⁵

Article 12 caused majority of the debate by the delegates on whether persons with mental impairments did indeed have the necessary legal capacity to make sound decisions.³⁰⁶ Many of these delegates were in favour of building a guardianship model into the provision.³⁰⁷ This was rejected by the UN Commission, as a guardianship model previously caused individuals with mental impairments grave injustices - the very injustices that the CRPD aimed at eliminating.³⁰⁸



3.4.2 Institutionalisation of persons with disabilities

Article 14 of the CRPD protects persons with disabilities from torture or cruel, inhuman or degrading treatment or punishment. Article 15 of the CRPD further provides that:

³⁰⁰ Morrissey F 'The United Nations Convention on the Rights of Persons with Disabilities: A New Approach to Decision-Making in Mental Health Law' (2012) 19 *Eur. J. Health L.* 423 428.

³⁰¹ Schulze M *Understanding the UN Convention on the Rights of Persons with Disabilities* (2009) 60.

³⁰² Hendricks A 'United Convention on the Rights of Persons with Disabilities' (2007) 14 *Eur. J. Health L.* 273 278.

³⁰³ Hendricks A 'United Convention on the Rights of Persons with Disabilities' (2007) 14 *Eur. J. Health L.* 273 278.

³⁰⁴ Hendricks A 'United Convention on the Rights of Persons with Disabilities' (2007) 14 *Eur. J. Health L.* 273 279.

³⁰⁵ Hendricks A 'United Convention on the Rights of Persons with Disabilities' (2007) 14 *Eur. J. Health L.* 273 279.

³⁰⁶ Schulze M *Understanding the UN Convention on the Rights of Persons with Disabilities* 3ed (2009) 60.

³⁰⁷ Schulze M *Understanding the UN Convention on the Rights of Persons with Disabilities* 3ed (2009) 60.

³⁰⁸ Schulze M *Understanding the UN Convention on the Rights of Persons with Disabilities* 3ed (2009) 61.

- “1. States Parties shall ensure that persons with disabilities, are on an equal basis with others:*
- (a) Enjoy the right to liberty and security of person;*
 - (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.*
- 2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.”³⁰⁹*

Article 15 aims at preventing individuals who are suffering from a mental impairment from being a danger to either themselves or others, to be placed in treatment without obtaining their consent.³¹⁰ This has been argued to be involuntary treatment.

The UN High Commissioner held that any law, be it international or national, which allows for institutionalisation without obtaining the individual’s consent, must conform to both national laws³¹¹ and international human rights standards. If not the institutionalisation of the individual will be in direct contravention of the CRPD and must be abolished.³¹² Many have argued that national mental health laws call for the institutionalisation of mentally ill persons as these laws aim to protect mentally impaired individuals from themselves where appropriate. This idea was rejected by the UN High Commissioner of Human Rights who claimed that such analysis would be no justification for the deprivation of liberty.³¹³ The CRPD makes a shift away from the traditional harm-preventative measures as contained in many national mental health laws, as these laws only further endorse the stigmas and stereotypes persons with mental impairments are subjected to.³¹⁴

³⁰⁹ United Nations Convention of the Rights of Persons with Disabilities, 2008 Art. 14.

³¹⁰ Szmukler G, Daw R & Callard F ‘Mental Health Law and the UN Convention on the Rights of Persons with Disabilities’ (2014) 37 *J. Int. J. Law Psychiatry* 245 246.

³¹¹ Schulze M *Understanding the UN Convention on the Rights of Persons with Disabilities* 3ed (2009) 67.

³¹² Wildeman S ‘Protecting Rights and Building Capacities: Challenges to Global Mental Health Policy in Light of the Convention on the Rights of Persons with Disabilities’ 41 *J.L. Med. & Ethics* 48 57.

³¹³ Callaghan SM & Ryan C ‘Is There a Future for Involuntary Treatment in Rights-based Mental Health Law?’ (2014) 21 *Psychiatry, Psychology and Law* 747 751.

³¹⁴ Callaghan SM & Ryan C ‘Is There a Future for Involuntary Treatment in Rights-based Mental Health Law?’ (2014) 21 *Psychiatry, Psychology and Law* 747 752.

Article 17 provides that ‘every person with disabilities has the right to the respect of his or her physical or mental integrity on an equal basis with others’.³¹⁵ Article 17 prevents the use of ‘forced interventions, forced institutionalisation, equal treatment and limitation on involuntary treatment’,³¹⁶ all of which proved to be problematic. The construction of this provision was found to be problematic as most of this provision has already been covered by articles 12 and 25 of the CRPD.³¹⁷ Article 25 provides that persons with disabilities receive the highest possible standard of health care.³¹⁸ Health care services which promote the fundamental rights, ‘dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care’.³¹⁹

Articles 12, 14 and 17 of the CRPD are interrelated as they all aimed to protect an individual from involuntary treatment. The question that needs to be asked is whether there ‘is a reasonable basis for singling out persons with mental impairments, when it comes to intrusive interventions’?³²⁰ Answering this question needs to be done in light of national mental health laws which allow for involuntary psychiatric hospitalisation. The High Commissioner for Human Rights held that the involuntary treatment of persons with mental impairments is the general practice within the Mental Health profession.³²¹ This is based on the stereotype that persons suffering from mental health impairments are dangerous, and lack the required capacity to make informed decisions.³²²

Articles 14 and 17 further entrench the principles set out in article 12, in restoring the legal capacity of individuals with mental impairments, and thus allowing these individuals to make their own decisions.

The issue on whether there is a need for ‘harm-prevention’³²³ mechanisms on the one hand, while on the other hand mentally impaired individuals should have the right to make their own

³¹⁵ United Nations Convention of the Rights of Persons with Disabilities, 2008 Art. 17.

³¹⁶ Schulze M *Understanding the UN Convention on the Rights of Persons with Disabilities* 3ed (2009) 75.

³¹⁷ Schulze M *Understanding the UN Convention on the Rights of Persons with Disabilities* 3ed (2009) 75.

³¹⁸ United Nations Convention of the Rights of Persons with Disabilities, 2008 Art. 25.

³¹⁹ United Nations Convention of the Rights of Persons with Disabilities, 2008 Art. 25.

³²⁰ Wildeman S ‘Protecting Rights and Building Capacities: Challenges to Global Mental Health Policy in Light of the Convention on the Rights of Persons with Disabilities’ 41 *J.L. Med. & Ethics* 48 57.

³²¹ Szmukler G, Daw R & Callard F ‘Mental Health Law and the UN Convention on the Rights of Persons with Disabilities’ (2014) 37 *J. Int. J. Law Psychiatry* 245 246.

³²² Wildeman S ‘Protecting Rights and Building Capacities: Challenges to Global Mental Health Policy in Light of the Convention on the Rights of Persons with Disabilities’ 41 *J.L. Med. & Ethics* 48 57.

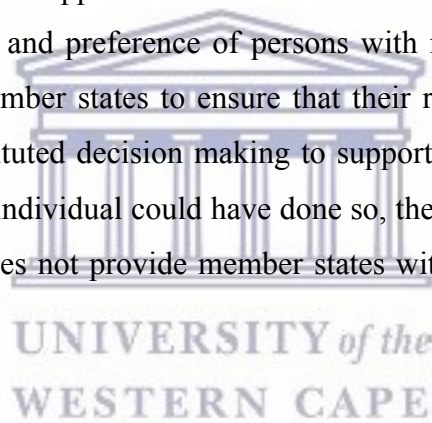
³²³ Callaghan SM & Ryan C ‘Is There a Future for Involuntary Treatment in Rights-based Mental Health Law?’ (2014) 21 *Psychiatry, Psychology and Law* 747 748.

decisions, has created tension between the implementation of these provisions by member states into national laws.³²⁴

Much of the tension hinges on the provisions of article 12 of the CRPD granting persons with mental impairments the ability to make their own decisions, and having those decisions respected regardless of whether an individual's decision-making capability is impaired.³²⁵

The CRPD does however allow for supportive decision making. This is not to be confused with substitute decision making which the CRPD strongly prohibits.³²⁶ Supportive decision making ensures that the 'will and preferences'³²⁷ of the individual is considered when making a decision on behalf of another.³²⁸ Supportive decision making will only be allowed where an individual is unable to understand material information in order to make any decisions, and equally unable to appreciate the consequences of such decisions.³²⁹

The problem that arises with this approach is that the CRPD is silent on what amount of respect needs to be given to the will and preference of persons with mental impairments.³³⁰ Thus the CRPD passes the buck to member states to ensure that their respective national mental health laws make a shift from substituted decision making to supportive decision making methods,³³¹ while also ensuring that if an individual could have done so, the individual would have made the same decision. The CRPD does not provide member states with clear guidelines on how to go about this.



³²⁴ Callaghan SM & Ryan C 'Is There a Future for Involuntary Treatment in Rights-based Mental Health Law?' (2014) 21 *Psychiatry, Psychology and Law* 747 748.

³²⁵ Callaghan SM & Ryan C 'Is There a Future for Involuntary Treatment in Rights-based Mental Health Law?' (2014) 21 *Psychiatry, Psychology and Law* 747 750.

³²⁶ Callaghan SM & Ryan C 'Is There a Future for Involuntary Treatment in Rights-based Mental Health Law?' (2014) 21 *Psychiatry, Psychology and Law* 747 753.

³²⁷ Callaghan SM & Ryan C 'Is There a Future for Involuntary Treatment in Rights-based Mental Health Law?' (2014) 21 *Psychiatry, Psychology and Law* 747 754.

³²⁸ Callaghan SM & Ryan C 'Is There a Future for Involuntary Treatment in Rights-based Mental Health Law?' (2014) 21 *Psychiatry, Psychology and Law* 747 754.

³²⁹ Callaghan SM & Ryan C 'Is There a Future for Involuntary Treatment in Rights-based Mental Health Law?' (2014) 21 *Psychiatry, Psychology and Law* 747 756.

³³⁰ Callaghan SM & Ryan C 'Is There a Future for Involuntary Treatment in Rights-based Mental Health Law?' (2014) 21 *Psychiatry, Psychology and Law* 747 755.

³³¹ Callaghan SM & Ryan C 'Is There a Future for Involuntary Treatment in Rights-based Mental Health Law?' (2014) 21 *Psychiatry, Psychology and Law* 747 760.

3.5 CONCLUSION

With the CRPD's revolutionary move away from the medical model approach to disability to the social model approach to disability, the focus has shifted away from the individual's inability, and rather moved towards the hurdles created by society's attitude and barriers. The CRPD's adoption of the social model has allowed for persons with disabilities to actively participate in society. The CRPD witnessed the largest amount of ratifications on its first day of ratification, which indicates that states were eager to ratify the CRPD. After ratification of the CRPD many member states however objected to allowing persons with mental impairments exactly the same legal capacity, on an equal basis with others. The CRPD has remained silent on remedying the confusion around the full incorporation of article 12 into national laws, which article grants persons with mental impairments the ability to make their own decisions. The CRPD however requires that member states are responsible for the incorporation of the supportive- decision making model into their national laws, without offering guidance.

When embarking on a determination of how South Africa has incorporated the provisions of the CRPD into national laws, it will be seen that South Africa has been criticised for not having contributed to the area of disability, as one would have hope South Africa would.³³² This criticism has largely emanated from the fact that South Africa does not have 'all-inclusive disability legislation'.³³³ The uncertain position in South Africa was addressed in chapter 2.

The next chapter looks at the United States of America and the United Kingdom. In assessing these jurisdictions, the research will consider what laws these nations have set in place in affording protection to persons with disabilities. This will be done in an attempt to establish what SA can do to further to protect employees suffering from disability and whether protecting them under disability laws might be feasible.

³³² Van Reenen TP & Combrinck H 'The UN Convention on the Rights of Persons with Disabilities in Africa: Progress After 5 Years' (2011) 14 *Sur International Journal on Human Rights* 133 146.

³³³ Van Reenen TP & Combrinck H 'The UN Convention on the Rights of Persons with Disabilities in Africa: Progress After 5 Years' (2011) 14 *Sur International Journal on Human Rights* 133 146.

CHAPTER FOUR

EXAMINING THE DISABILITY LAWS OF THE UNITED STATES OF AMERICA AND THE UNITED KINGDOM

4.1 INTRODUCTION

Having considered the South African position on disability in the work environment specifically, some might argue that South Africa still has a far way to go in affording persons with disabilities adequate protection. This chapter will examine the disability laws of the United Kingdom and United States of America. The examination will serve as an indication as to how far South Africa has already come, but also how far it still has to go when it comes to disability protection in the workplace.

The United Kingdom has since as early as 1944 acknowledged that persons with disabilities should be allowed a fair opportunity to contribute to the economy of the country. This was done by means of the Disabled Persons (Employment) Act.³³⁴ This Act was later repealed by the Disability Discrimination Act of 1995 (DDA), while the latter again was repealed by the Equality Act of 2010. With each new enacted piece of legislation further improvement was made in the disability law of the United Kingdom. The case of the UK could serve as great insight for South Africa on how to better protect persons with disabilities and further advance them in the workplace.

The United States of America is another country which clearly acknowledges that persons with either a physical or mental disability (or both) require protection. In particular, the Rehabilitation Act of 1973 was praised for its ability to break barriers. Today the USA is one of the forerunners of disability protection by means of the American with Disabilities Act (ADA) of 1990.

The chapter will now turn to a more detailed discussion of the relevant disability legislation of the UK and the USA.

³³⁴ Mansfield G & Bowers J 'Disabled Persons Under the Disability Discrimination Act 1995' (2002 – 2003) 24 *Comp. Lab. L. & Pol'y. J.* 631 631.

4.2 THE UNITED STATES OF AMERICA

For years the United States of America (USA), like so many other countries, excluded people with disabilities from actively participating in society.³³⁵ As a result many people with disabilities were left socially and economically dependent on others.³³⁶ The unemployment rate of people with disabilities was amongst the highest when compared to other marginalised minority groups within the USA.³³⁷ This also contributed to the rise in labour shortages experienced in the USA. Subsequently the USA government proceeded to enact the Americans with Disabilities Act (ADA) of 1990.

4.2.1 The Americans with Disabilities Act (ADA)

4.2.1.1 Introduction to the ADA

The ADA came into operation on 26 July 1990. The main aim of the Act was to present equal employment opportunities and new employment rights to people with disabilities.³³⁸ The ADA set forth a national mandate to end discrimination against people with disabilities, thus allowing people with disabilities to gain social and economic independence.³³⁹

The USA in enacting the ADA aimed at creating legislation that would offer equal employment opportunities for people with disabilities.³⁴⁰ The ADA further extended and secured the civil rights of people with disabilities.³⁴¹ The ADA was not legislation passed to simply prevent discrimination against people with disabilities, but rather legislation aimed at empowering people with disabilities to seek and find employment, thus re-gaining their independence.³⁴² The USA government in enacting the ADA was of the view that neither physical nor mental

³³⁵ Fersh D & Thomas PW *Complying with the Americans with Disabilities Act: A Guide for Management and People with Disabilities* 1 ed (1993) 1.

³³⁶ Fersh D & Thomas PW *Complying with the Americans with Disabilities Act: A Guide for Management and People with Disabilities* 1 ed (1993) 1.

³³⁷ Fersh D & Thomas PW *Complying with the Americans with Disabilities Act: A Guide for Management and People with Disabilities* 1 ed (1993) 2.

³³⁸ Fersh D & Thomas PW *Complying with the Americans with Disabilities Act: A Guide for Management and People with Disabilities* 1 ed (1993) 3.

³³⁹ Fersh D & Thomas PW *Complying with the Americans with Disabilities Act: A Guide for Management and People with Disabilities* 1 ed (1993) 3.

³⁴⁰ Fersh D & Thomas PW *Complying with the Americans with Disabilities Act: A Guide for Management and People with Disabilities* 1 ed (1993) 15.

³⁴¹ Fersh D & Thomas PW *Complying with the Americans with Disabilities Act: A Guide for Management and People with Disabilities* 1 ed (1993) 4.

³⁴² Fersh D & Thomas PW *Complying with the Americans with Disabilities Act: A Guide for Management and People with Disabilities* 1 ed (1993) 21.

impairment³⁴³ reduced the capabilities of an individual to actively participate in society, but that such individual was rather prevented from doing so due to societal and institutional barriers stemming from archaic attitudes and stereotypes.³⁴⁴ The ADA aimed at removing these outdated prejudices suffered by people with disabilities by shedding light and promoting the capabilities of people with disabilities.³⁴⁵ It is however argued by some that despite the broad scope given to employers in offering employment to people with disabilities, the employment of people with disabilities still remains problematic even after the enactment of the ADA.³⁴⁶

4.2.1.2 Title I of the ADA and the Equal Employment Opportunity Commission (EEOC)

The ADA was not enacted with the purpose of creating quotas, which would have required employers to employ a certain number of people with disabilities.³⁴⁷ Title I of the ADA specifically deals with non-discriminatory practices in the employment, promotion,³⁴⁸ and any other privileges associated with employment of persons with disabilities.³⁴⁹ The non-discriminatory practices to which Title I mainly refers are ‘job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms and conditions’.³⁵⁰

Title I fulfils the ADA’s aim of providing equal employment opportunities to people with disabilities. Section 102(b) of Title I of the ADA provides several methods by which an employer may not discriminate against an employee or a potential employee on the basis of disability.³⁵¹ The methods included within section 102(b) of Title I are that an employer may not prevent an employee with disability from seeking promotion opportunities.³⁵² Nor may an

³⁴³ Paragraph 4.2.1.3 below discusses whether depression is considered to be a mental impairment.

³⁴⁴ American with Disabilities Act of 1990 s 2(a)(2).

³⁴⁵ Fersh D & Thomas PW *Complying with the Americans with Disabilities Act: A Guide for Management and People with Disabilities* 1 ed (1993) 32.

³⁴⁶ Fersh D & Thomas PW *Complying with the Americans with Disabilities Act: A Guide for Management and People with Disabilities* 1 ed (1993) 32.

³⁴⁷ Fersh D & Thomas PW *Complying with the Americans with Disabilities Act: A Guide for Management and People with Disabilities* 1 ed (1993) 15.

³⁴⁸ Fersh D & Thomas PW *Complying with the Americans with Disabilities Act: A Guide for Management and People with Disabilities* 1 ed (1993) 25.

³⁴⁹ American with Disabilities Act of 1990 s 102(a).

³⁵⁰ American with Disabilities Act of 1990 s 102(a).

³⁵¹ American with Disabilities Act of 1990 s 102(b).

³⁵² American with Disabilities Act of 1990 s 102(b)(1).

employer deny an employee with a disability employment in hopes to avoid providing reasonable accommodation to such an employee.³⁵³

The ADA prevents an employer or potential employer from discriminating against any qualified person with disabilities through simply refusing to provide reasonable accommodation in response to the individual's mental or physical impairment.³⁵⁴ *Reasonable* accommodation however means that the ADA does not prohibit the refusal of accommodation to an employee where the accommodation will impose an undue hardship on the operation of the employer's business.³⁵⁵

Upon the enactment of the ADA, most claims of discrimination emanated from Title I of the ADA. In response to this the Equal Employment Opportunity Commission (EEOC) was established.³⁵⁶ The EEOC is an agency that was established to deal with both interpretative and enforcement powers.³⁵⁷ The EEOC was granted interpretative powers, to assist employers and federal governments through various educational programmes to ensure that federal organisations and employers policies and practices are in compliance with the provisions of the ADA.³⁵⁸

The EEOC's enforcement powers allows the EEOC to 'receive and investigate charges of employment discrimination filed against private sector employers, employment agencies, labour unions, and state and local governments'³⁵⁹ The EEOC upon receiving these charges will attempt to resolve these disputes through either conciliation methods or in serious cases by instituting legal proceedings against the party responsible for alleged discrimination.³⁶⁰

In March 1997 the EEOC published a detailed guideline which comprehensively dealt with how provisions within the ADA protected and applied to those employees who suffered from mental

³⁵³ American with Disabilities Act of 1990 s 102(b)(5)(A).

³⁵⁴ American with Disabilities Act of 1990 s 102(b)(5)(A).

³⁵⁵ American with Disabilities Act of 1990 s 102(b)(5)(A).

³⁵⁶ Sandoval NJ 'Disabled Yet Disqualified: Is It "Unreasonable" to Demand Accommodations for Employees with Depression under the Americans with Disabilities Act?' (2013-2014) 17 *Chapman Law Review* 687 690.

³⁵⁷ Sandoval NJ 'Disabled Yet Disqualified: Is It "Unreasonable" to Demand Accommodations for Employees with Depression Under the Americans with Disabilities Act?' (2013-2014) 17 *Chapman Law Review* 687 690.

³⁵⁸ U.S. Equal Employment Opportunity Commission available at <https://www.eeoc.gov/federal/index.cfm> (accessed on 27 September 2017).

³⁵⁹ U.S. Equal Employment Opportunity Commission available at https://www.eeoc.gov/eeoc/enforcement_litigation.cfm (accessed on 27 September 2017).

³⁶⁰ U.S. Equal Employment Opportunity Commission available at https://www.eeoc.gov/eeoc/enforcement_litigation.cfm (accessed on 27 September 2017).

health disabilities.³⁶¹ The guidelines were enacted to provide employers with clarity regarding the terminology used within the ADA which specifically relates to mental impairment.³⁶² With the release of the EEOC guidelines in 1997 the courts experienced an influx of cases.³⁶³ Majority of the cases related to mental impairments, particularly depression.³⁶⁴

4.2.1.3 Definition of Disability within the ADA

When the ADA was enacted, the USA Congress intended for the definition of disability in terms of the ADA to be interpreted broadly.³⁶⁵ Such broad interpretation of the definition of disability would have allowed for many people with disabilities to be protected under the ADA.³⁶⁶ However, a narrow interpretation given to disability by the courts resulted in many persons with disabilities being excluded from the protection offered by the ADA.³⁶⁷

The ADA defines disability as ‘a physical or mental impairment that substantially limits one or more major life activities of such an individual, a record of such impairment; or being regarded as having such an impairment.’³⁶⁸ The definition of disability is divided into three parts.³⁶⁹ The first part of the definition is where an impairment “substantially limits one or more major life activities”. The ADA further defines major life activities by dividing them into two categories, namely, general life activities and those activities related specifically to major bodily functions.³⁷⁰ General life activities that the ADA refers to are activities such as “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and

³⁶¹ Weber PS, Davis E & Sebastian RJ ‘Mental Health and the ADA: A Focus Group Discussion with Human Resource Practitioners’ (2001) 14 *Employee Responsibilities and Rights Journal* 45 45.

³⁶² Weber PS, Davis E & Sebastian RJ ‘Mental Health and the ADA: A Focus Group Discussion with Human Resource Practitioners’ (2001) 14 *Employee Responsibilities and Rights Journal* 45 46.

³⁶³ Weber PS, Davis E & Sebastian RJ ‘Mental Health and the ADA: A Focus Group Discussion with Human Resource Practitioners’ (2001) 14 *Employee Responsibilities and Rights Journal* 45 47.

³⁶⁴ Weber PS, Davis E & Sebastian RJ ‘Mental Health and the ADA: A Focus Group Discussion with Human Resource Practitioners’ (2001) 14 *Employee Responsibilities and Rights Journal* 45 47.

³⁶⁵ Barry K ‘Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights’ (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 206.

³⁶⁶ Barry K ‘Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights’ (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 206.

³⁶⁷ Barry K ‘Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights’ (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 206.

³⁶⁸ American with Disabilities Act s 3(1).

³⁶⁹ McDevitt WJ ‘Defining the Term “Disability” Under the Americans with Disabilities Act’ (1997-1998) 10 *St. Thomas Law Review* 281 284.

³⁷⁰ American with Disabilities Act s 3(2).

working”.³⁷¹ The major bodily functions that the ADA refers to are not a closed list, but include “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions”.³⁷²

The extent to which an individual’s physical or mental impairment will substantially limit their ability to perform a major life activity is the crux in determining whether such an individual will qualify as disabled under the ADA. The extent to which a major life activity is limited will differ from person to person.³⁷³ Generally, mental impairment negatively affects a person from learning, thinking, concentrating, interacting with others, caring for oneself, speaking, performing manual tasks, or working and sleeping’.³⁷⁴ Working is a highly contested area, as many have argued whether it is indeed a major life activity.³⁷⁵

The term “substantially limits” means that an individual is unable to perform a major life activity which the average person is able to perform.³⁷⁶ Two factors are considered in assessing whether the impairment substantially limits an individual’s performance of a major life activity, namely, duration and impact.³⁷⁷ Duration refers to the length that the impairment is likely to persist. Impact again refers to the lasting effect that the impairment is likely to have on the individual. Determining how an individual is likely to be limited by the impairment is by far the most challenging task within this first requirement of the definition of disability.³⁷⁸

The term mental impairment has been defined by the EEOC in the *EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities* (hereinafter referred to as “the guide”) as any ‘mental or psychological disorder, such as emotional or mental illness’.³⁷⁹ Emotional and mental illness includes ‘major depression, bipolar disorder, anxiety disorders (which includes panic disorder, obsessive compulsive disorder, and post-traumatic stress disorder), schizophrenia, and personality disorders’.³⁸⁰ In order for an individual suffering from a mental impairment to be protected under the ADA, the mental impairment must be considered a disability. In proving that

³⁷¹ American with Disabilities Act s 3(2)(A).

³⁷² American with Disabilities Act s 3(2)(B).

³⁷³ EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities Item 1.

³⁷⁴ EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities Item 1.

³⁷⁵ Fersh D & Thomas PW *Complying with the Americans with Disabilities Act: A Guide for Management and People with Disabilities* 1 ed (1993) 27.

³⁷⁶ McDevitt WJ ‘Defining the Term “Disability” Under the Americans with Disabilities Act’ (1997-1998) 10 *St. Thomas Law Review* 281 289.

³⁷⁷ McDevitt WJ ‘Defining the Term “Disability” Under the Americans with Disabilities Act’ (1997-1998) 10 *St. Thomas Law Review* 281 291.

³⁷⁸ McDevitt WJ ‘Defining the Term “Disability” Under the Americans with Disabilities Act’ (1997-1998) 10 *St. Thomas Law Review* 281 289.

³⁷⁹ EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities Item 1.

³⁸⁰ EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities Item 1.

the mental impairment is a disability, the mental impairment must satisfy the definition of disability as set out in the ADA.

The requirement of ‘regarded as’ of the definition of disability was included in the definition of disability in the ADA to ensure that employees who may suffer from temporary impairments, such a broken limb, will also be regarded as an employee who has a disability, although these employees may be considered “healthy”.³⁸¹ Thus the ADA in inserting the term ‘regarded as’ aligns itself with the ADA’s broader aim of eradicating ‘discriminatory practices and attitudes’ within the society.³⁸² The ‘regarded as’ requirement widens the class of persons that the ADA offers protection to.³⁸³ The term of “regarded as” wishes to replace the idea that persons will only be considered disabled if their conditions are medically recognised as disabilities, to the idea of persons who display the effects of being disabled to be regarded as being disabled.³⁸⁴ Therefore, persons who may be temporarily limited from performing the major life activities, will be regarded as being disabled, under the ‘regarded as’ requirement of the definition of disability.

An essential element of the definition of disability is reasonable accommodation. While the term reasonable accommodation does not explicitly appear in the definition of disability, it is an essential element of Title I of the ADA.³⁸⁵ The ADA unlike its predecessor, the Rehabilitation Act, developed the concept of reasonable accommodation, to a broader and more interactive process, whereby both employer and employee could engage in determining the needs of the employee.³⁸⁶ This means an employer is required to make reasonable accommodation to either the employer’s premises or employee’s working conditions, which ultimately contributes to a favourable working environment for the employee with disabilities.³⁸⁷ The purpose of reasonable accommodation is to identify and eliminate possible barriers that will prevent an employee from

³⁸¹ Simmons T “Working” with the ADA’s “Regarded as” Definition of a Disability’ (2000) 5 *Texas Forum on Civil Liberties & Civil Rights* 27 31-32.

³⁸² Simmons T “Working” with the ADA’s “Regarded as” Definition of a Disability’ (2000) 5 *Texas Forum on Civil Liberties & Civil Rights* 27 32.

³⁸³ Simmons T “Working” with the ADA’s “Regarded as” Definition of a Disability’ (2000) 5 *Texas Forum on Civil Liberties & Civil Rights* 27 33.

³⁸⁴ Simmons T “Working” with the ADA’s “Regarded as” Definition of a Disability’ (2000) 5 *Texas Forum on Civil Liberties & Civil Rights* 27 43.

³⁸⁵ Sanford PS ‘The ADA and Psychiatrically Disabled Workers’ (1995) 5 *San Francisco Law Review* 49 56.

³⁸⁶ Fersh D & Thomas PW *Complying with the Americans with Disabilities Act: A Guide for Management and People with Disabilities* 1 ed (1993) 45.

³⁸⁷ Fersh D & Thomas PW *Complying with the Americans with Disabilities Act: A Guide for Management and People with Disabilities* 1 ed (1993) 14.

performing the essential requirements³⁸⁸ of the job.³⁸⁹ Although the ADA places a duty on the employer to reasonably accommodate employees with disabilities, the ADA does not require that the employer in doing so suffer an undue hardship.³⁹⁰ In terms of the ADA, undue hardship is defined as measures ‘that require significant difficulty or expense’³⁹¹ on behalf of the employer to reasonably accommodate an employee with disabilities. In assessing whether an employer will suffer undue hardship, the following factors will be considered, the nature and cost of the accommodation,³⁹² the complete costs involved in providing the accommodation to the employee,³⁹³ the overall size of the company³⁹⁴ and the type of business concluded by the employer.³⁹⁵

4.2.1.4 Interpretation of the Definition of Disability according to the Universal Approach and Minority Group Approach

The ADA’s definition of disability was constructed on the social model of disability.³⁹⁶ Within the social model approach there are two different approaches namely, the universal approach and the minority group approach.³⁹⁷

The minority group approach is where society identifies disabled persons as a group of persons whose impairments result in them consistently remaining a disadvantaged group within society.³⁹⁸ These disadvantages are usually based on impairments which have historically been stigmatised.³⁹⁹ These stigmas often centre on the idea that those with disabilities are different

³⁸⁸ The essential requirements of the job are those functions that are fundamental to the employee completing the tasks that his or her position requires, as mentioned in Mickey PF & Pardo M ‘Dealing with Mental Disabilities Under the ADA’ (1993) 9 *The Labor Law* 531 540.

³⁸⁹ Sanford PS ‘The ADA and Psychiatrically Disabled Workers’ (1995) 5 *San Francisco Law Review* 49 57.

³⁹⁰ Fersh D & Thomas PW *Complying with the Americans with Disabilities Act: A Guide for Management and People with Disabilities* 1 ed (1993) 14.

³⁹¹ American with Disabilities Act of 1990 s 101(10)(A).

³⁹² American with Disabilities Act of 1990 s 101(10)(B)(i).

³⁹³ American with Disabilities Act of 1990 s 101(1)(B)(ii).

³⁹⁴ American with Disabilities Act of 1990 s 101(1)(B)(iii).

³⁹⁵ American with Disabilities Act of 1990 s 101(1)(B)(iv).

³⁹⁶ Barry K ‘Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights’ (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 206.

³⁹⁷ Barry K ‘Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights’ (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 207.

³⁹⁸ Barry K ‘Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights’ (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 213.

³⁹⁹ Barry K ‘Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights’ (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 213.

from the “norm” or are “abnormal” from the majority of society.⁴⁰⁰ The minority group approach mimics the medical model approach to disability which largely focuses on the individual’s disability preventing him or her from actively participating in society.⁴⁰¹ Before an individual can be protected under the minority group approach, the impairment, be it physical or mental, has to have been around long enough for such an impairment to have gained a specific stigma.⁴⁰² If the impairment has not been subjected to some form of stigmatisation, the disabled individual will be unable to seek protection.⁴⁰³

The universal approach, while still forming part of the broader social model approach to disability, acknowledges that every person has some form of impairment, and further provides that everyone is at risk of being disabled.⁴⁰⁴ The universal approach does not limit impairments to those that have been historically stigmatised.⁴⁰⁵ The universal approach offers protection to any or all persons who have been denied an opportunity to actively participate in society, based on any form of impairment.⁴⁰⁶ Important to note that the universal approach does not offer protection to persons who have been discriminated against based on certain characteristics, such as height, weight or even eye colour, as an individual is protected against such discrimination in terms of the Civil Rights Act of 1964.⁴⁰⁷ The universal approach removes the focus away from disability that limits bodily functions, to any limitation that disability causes.⁴⁰⁸ This approach aligns itself with the true form to which the social model to disability was constructed around.⁴⁰⁹ However, the universal approach protects any person that finds themselves on the spectrum of abled-bodied to disabled.⁴¹⁰ This approach does not factor in stigmatised impairments. The

⁴⁰⁰ Barry K ‘Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights’ (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 213.

⁴⁰¹ Barry K ‘Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights’ (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 216.

⁴⁰² Barry K ‘Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights’ (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 216.

⁴⁰³ Barry K ‘Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights’ (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 216.

⁴⁰⁴ Barry K ‘Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights’ (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 217.

⁴⁰⁵ Barry K ‘Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights’ (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 218.

⁴⁰⁶ Barry K ‘Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights’ (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 218.

⁴⁰⁷ Barry K ‘Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights’ (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 218.

⁴⁰⁸ Barry K ‘Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights’ (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 219.

⁴⁰⁹ Barry K ‘Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights’ (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 219.

⁴¹⁰ Barry K ‘Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights’ (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 220.

universal approach acknowledges that a person with a disability is not discriminated against once, but rather that discrimination is recurring, having a large impact on the quality of their lives.⁴¹¹ The universal approach by including non- stigmatised impairments into the definition of disability, neglects to take into account the lived reality of many of the persons that continuously face discrimination based on stigmatised impairments.⁴¹²

The explanation of both the minority and universal approach sets the foundation as to where the courts in the USA have erred greatly when interpreting the definition of disability found in the ADA. While the ADA called for a broad interpretation of the definition of disability, in the application of the ADA's definition of disability, the ADA favoured the minority group approach⁴¹³ in order for the ADA to win political support.⁴¹⁴ While there was an influx of cases that came before the courts after the ADA was enacted, ninety-seven percent of these case brought against employer's who discriminated against an employee due to disability were unsuccessful as the courts found that the employee was not disabled in terms of the definition of disability within the ADA.⁴¹⁵ Many employees who suffer from depression were deemed not to be disabled in terms of the ADA.⁴¹⁶

As mentioned above, the definition of disability in the ADA is comprised of three parts.⁴¹⁷ The 'substantially limiting' element, namely the performance of major life activities, has been discussed above. However the Supreme Court's interpretation of the 'regarded as' requirement of the definition has resulted in the definition excluding many persons with disabilities from being protected under the ADA.⁴¹⁸ Given the literal meaning of the words 'regarded as' requirement will extend protection to an individual who has a stigmatised impairment which has

⁴¹¹ Barry K 'Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights' (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 220.

⁴¹² Barry K 'Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights' (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 220.

⁴¹³ Barry K 'Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights' (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 223.

⁴¹⁴ Barry K 'Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights' (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 207.

⁴¹⁵ Barry K 'Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights' (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 222.

⁴¹⁶ Barry K 'Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights' (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 222.

⁴¹⁷ Barry K 'Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights' (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 223.

⁴¹⁸ Barry K 'Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights' (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 223.

the effect of substantially limiting their ability to perform major life activities.⁴¹⁹ This interpretation finds itself supporting the minority approach.⁴²⁰

4.2.1.5 Case law pertaining to the definition of disability

In the case of *Sutton v United Airlines*⁴²¹ the applicants, twin sisters, had applied to become pilots for United Airlines.⁴²² Their applications were rejected based on the fact that their eyesight did not meet the standard requirements which were set by the airline.⁴²³ The sisters brought a claim of discrimination against United Airlines on the basis of disability.⁴²⁴ The United States Court of Appeals for the Tenth Circuit found that the sisters were not disabled in terms of the definition of disability as found within the ADA.⁴²⁵ The court's reasoning was that wearing glasses did not substantially limit their abilities to perform major life activities.⁴²⁶ The sisters then appealed this decision to the Supreme Court. The Supreme Court however concurred with the court a quo's finding.⁴²⁷ The Supreme Court held that where an individual with an impairment uses methods to mitigate the impairment, such a person does not fall within the scope of individuals that the ADA aims at protecting.⁴²⁸ The court further held that if they had to allow an individual who uses mitigating measures to correct an impairment to be protected under the definition of disability, this would result in a floodgate of cases, and an over-extension of the protection under the ADA.⁴²⁹ The court did however indicate that while someone might not fall under the "substantially limits" test, that person might perhaps be covered under the "regard as"

⁴¹⁹ Barry K 'Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights' (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 224.

⁴²⁰ Barry K 'Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights' (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 223.

⁴²¹ *Sutton v. United Airlines, Inc.* 119 S. Ct 2139 (1999).

⁴²² Duncan A 'Defining Disability in the ADA: *Sutton v. United Airlines, Inc.*' (1999-2000) 60 *Louisiana Law Review* 967 971.

⁴²³ Duncan A 'Defining Disability in the ADA: *Sutton v. United Airlines, Inc.*' (1999-2000) 60 *Louisiana Law Review* 967 971.

⁴²⁴ Duncan A 'Defining Disability in the ADA: *Sutton v. United Airlines, Inc.*' (1999-2000) 60 *Louisiana Law Review* 967 971.

⁴²⁵ Duncan A 'Defining Disability in the ADA: *Sutton v. United Airlines, Inc.*' (1999-2000) 60 *Louisiana Law Review* 967 971.

⁴²⁶ Duncan A 'Defining Disability in the ADA: *Sutton v. United Airlines, Inc.*' (1999-2000) 60 *Louisiana Law Review* 967 971.

⁴²⁷ Duncan A 'Defining Disability in the ADA: *Sutton v. United Airlines, Inc.*' (1999-2000) 60 *Louisiana Law Review* 967 971.

⁴²⁸ Duncan A 'Defining Disability in the ADA: *Sutton v. United Airlines, Inc.*' (1999-2000) 60 *Louisiana Law Review* 967 971.

⁴²⁹ Duncan A 'Defining Disability in the ADA: *Sutton v. United Airlines, Inc.*' (1999-2000) 60 *Louisiana Law Review* 967 972.

test of the definition of disability.⁴³⁰ The court mentioned that the sisters were not prevented from performing a major life activity, the activity being able to work, as they were only excluded from becoming pilots and not any other job within aviation.⁴³¹ The court considered the EEOC guidelines, however found that disability applied to a limited minority group, and not the large group of persons the EEOC had included.⁴³²

In the case of *Murphy v United Parcel Service*,⁴³³ United Parcel Service employed Mr Murphy as a mechanic which required him to drive commercial vehicles. In terms of the Department of Transportation's requirements, a person suffering from clinically diagnosed high blood pressure would not be able to drive a commercial vehicle. Despite Mr Murphy's high blood pressure, he was mistakenly granted the certificate to operate commercial vehicles. When United Parcel Service discovered the mistake they dismissed Mr Murphy. Mr Murphy instituted a claim of unfair dismissal based on Title I of the ADA. On appeal the court held that when making use of the 'regarded as' requirement of the definition, Mr Murphy's high blood pressure is not considered a disability. The court reasoned that Mr Murphy's high blood pressure did not substantially limit him from performing a major life activity. The Court of Appeals for the Tenth Circuit (hereinafter referred to as "Court of Appeal") held that although Mr Murphy was unable to drive, he was able to perform a number of functions required of a mechanic. The Court of Appeal further entrenched the reasoning of the *Sutton* case. The court held that where an individual used mitigating measures to correct his impairment, such an individual will not be 'regarded as' being disabled in terms of the definition of disability.⁴³⁴

The court in the *Albertson's, Inc v Kirkingburg*,⁴³⁵ held that where an employee does meet the minimum vision requirements set by the Department of Transport, an employee would not be considered disabled as the employee is not prevented from a class of jobs.⁴³⁶ The employee was only excluded from working in a certain position based on the fact that he did not meet the

⁴³⁰ Duncan A 'Defining Disability in the ADA: *Sutton v. United Airlines, Inc.*' (1999-2000) 60 *Louisiana Law Review* 967 972.

⁴³¹ Duncan A 'Defining Disability in the ADA: *Sutton v. United Airlines, Inc.*' (1999-2000) 60 *Louisiana Law Review* 967 973.

⁴³² Duncan A 'Defining Disability in the ADA: *Sutton v. United Airlines, Inc.*' (1999-2000) 60 *Louisiana Law Review* 967 973.

⁴³³ *Murphy v. United Parcel Service, Inc.* 119 S. Ct 2133 (1999).

⁴³⁴ Duncan A 'Defining Disability in the ADA: *Sutton v. United Airlines, Inc.*' (1999-2000) 60 *Louisiana Law Review* 967 974.

⁴³⁵ *Albertson's, Inc. v. Kirkingburg*, 119 S. Ct 2162 (1999).

⁴³⁶ Duncan A 'Defining Disability in the ADA: *Sutton v. United Airlines, Inc.*' (1999-2000) 60 *Louisiana Law Review* 967 974.

minimum requirements of the job.⁴³⁷ The court held that Title 1 of the ADA allows for an employer to use qualifying standards to exclude certain person, provided that the reasons provided are job related and consistent with business necessity.⁴³⁸

In *Toyota Motor Manufacturing, Kentucky, Inc v Williams*,⁴³⁹ (*Toyota*) the court's narrow interpretation of the definition of disability made it near to impossible for any claimant to succeed in their claim of disability related discrimination by an employer. In the case of *Toyota*, Ella Williams had worked for Toyota for many years. She subsequently developed various physical problems which negatively impacted on her ability to do her job.⁴⁴⁰ Ms Williams, upon her doctor's recommendations, was assigned to a new position which did not require much physical labour.⁴⁴¹ Toyota later required Ms Williams to wipe down the cars with highlighting oil, as a result of this new task Ms Williams' physical condition began to deteriorate.⁴⁴² Ms Williams requested to be reassigned to a position which did not require such intense physical labour.⁴⁴³ Toyota refused to reassign Ms Williams and ultimately Ms Williams' employment was terminated.⁴⁴⁴ Ms Williams filed a claim of discrimination against Toyota, based on the allegation that their failure to accommodate her was a violation of the ADA.⁴⁴⁵ The trial court held that the Ms Williams' condition did not fall within the ambit of disabled in terms of the ADA.

Ms Williams appealed against the decision of the trial court, and the Sixth Circuit Court found that the evidence Ms Williams presented met the requirements laid down in the *Sutton* case.⁴⁴⁶ The court held that working is considered a major life activity, however, working should be

⁴³⁷ Duncan A 'Defining Disability in the ADA: *Sutton v. United Airlines, Inc.*' (1999-2000) 60 *Louisiana Law Review* 967 974.

⁴³⁸ Duncan A 'Defining Disability in the ADA: *Sutton v. United Airlines, Inc.*' (1999-2000) 60 *Louisiana Law Review* 967 974.

⁴³⁹ *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 122 S.Ct. 681 (2002).

⁴⁴⁰ Bucholtz BK 'Employment Rights and Wrongs: ADA Issues in the 2001 – 2002 Supreme Court Term' (2002 – 2003) 38 *Tulsa Law Review* 363 368.

⁴⁴¹ Bucholtz BK 'Employment Rights and Wrongs: ADA Issues in the 2001 – 2002 Supreme Court Term' (2002 – 2003) 38 *Tulsa Law Review* 363 368.

⁴⁴² Bucholtz BK 'Employment Rights and Wrongs: ADA Issues in the 2001 – 2002 Supreme Court Term' (2002 – 2003) 38 *Tulsa Law Review* 363 368.

⁴⁴³ Bucholtz BK 'Employment Rights and Wrongs: ADA Issues in the 2001 – 2002 Supreme Court Term' (2002 – 2003) 38 *Tulsa Law Review* 363 368.

⁴⁴⁴ Bucholtz BK 'Employment Rights and Wrongs: ADA Issues in the 2001 – 2002 Supreme Court Term' (2002 – 2003) 38 *Tulsa Law Review* 363 368.

⁴⁴⁵ Bucholtz BK 'Employment Rights and Wrongs: ADA Issues in the 2001 – 2002 Supreme Court Term' (2002 – 2003) 38 *Tulsa Law Review* 363 368.

⁴⁴⁶ Bucholtz BK 'Employment Rights and Wrongs: ADA Issues in the 2001 – 2002 Supreme Court Term' (2002 – 2003) 38 *Tulsa Law Review* 363 369.

considered as a ‘residual life activity’.⁴⁴⁷ Thus, the court in *Toyota* held that working is at the very bottom of life activities. The court would then only consider work as a life activity, if Ms Williams was not substantially limited from performing any other major life activities.⁴⁴⁸ The court ruled that Ms Williams’ impairments did in fact render her disabled under the ADA.⁴⁴⁹

The Supreme Court, after having considered the EEOC guidelines, the history which led to the ADA’s enactment and the decision of *Sutton*, proceeded to reverse the decision of the Sixth Circuit Court.⁴⁵⁰ The Supreme Court ruled that the definition of disability in the ADA required a narrow interpretation as Congress only intended it to protect a small group of disabled persons.⁴⁵¹ The Supreme Court held that Ms Williams could perform major life activities such as brushing her teeth, bathing and doing laundry.⁴⁵² The Supreme Court’s ruling was approached from a pure business perspective, the court failed to use a holistic approach. On this basis the Supreme Court found that Ms Williams was not disabled in terms of the ADA.⁴⁵³

The various cases which followed from the *Sutton* and *Toyota* cases closed the door for many employees who had untraditional impairments and who sought protection under the ADA.⁴⁵⁴ Professor Nicole Porter, in her article, “*The New ADA Backlash*” tries to establish a reason as to how the courts got the interpretation of the disability so wrong.⁴⁵⁵ Professor Porter considered various reasons, and the explanation that seemed to gain the most support, was that the courts, employers and society as a whole believed that inserting the reasonable accommodation provision allowed for persons with disabilities to be treated favourably, but such favourable treatment should be limited to those who were truly in need.⁴⁵⁶ Professor Porter goes on to add that what exactly amounted to the employer making reasonable accommodation was confusing,

⁴⁴⁷ Bucholtz BK ‘Employment Rights and Wrongs: ADA Issues in the 2001 – 2002 Supreme Court Term’ (2002 – 2003) 38 *Tulsa Law Review* 363 369.

⁴⁴⁸ Bucholtz BK ‘Employment Rights and Wrongs: ADA Issues in the 2001 – 2002 Supreme Court Term’ (2002 – 2003) 38 *Tulsa Law Review* 363 369.

⁴⁴⁹ Bucholtz BK ‘Employment Rights and Wrongs: ADA Issues in the 2001 – 2002 Supreme Court Term’ (2002 – 2003) 38 *Tulsa Law Review* 363 370.

⁴⁵⁰ Bucholtz BK ‘Employment Rights and Wrongs: ADA Issues in the 2001 – 2002 Supreme Court Term’ (2002 – 2003) 38 *Tulsa Law Review* 363 370.

⁴⁵¹ Bucholtz BK ‘Employment Rights and Wrongs: ADA Issues in the 2001 – 2002 Supreme Court Term’ (2002 – 2003) 38 *Tulsa Law Review* 363 370.

⁴⁵² Bucholtz BK ‘Employment Rights and Wrongs: ADA Issues in the 2001 – 2002 Supreme Court Term’ (2002 – 2003) 38 *Tulsa Law Review* 363 371.

⁴⁵³ Bucholtz BK ‘Employment Rights and Wrongs: ADA Issues in the 2001 – 2002 Supreme Court Term’ (2002 – 2003) 38 *Tulsa Law Review* 363 371.

⁴⁵⁴ Bucholtz BK ‘Employment Rights and Wrongs: ADA Issues in the 2001 – 2002 Supreme Court Term’ (2002 – 2003) 38 *Tulsa Law Review* 363 371.

⁴⁵⁵ Porter NB ‘The New ADA Backlash’ (2014) 82 *Tennessee Law Review* 1 12.

⁴⁵⁶ Porter NB ‘The New ADA Backlash’ (2014) 82 *Tennessee Law Review* 1 13 – 14.

thus the courts preferred not to deal with the complexity of what reasonable accommodation meant and simply denied many claims under the ADA.⁴⁵⁷

4.2.2 Establishment of the Americans with Disabilities Amendment Act (ADAAA)

The National Council of Disability (NCD) was dissatisfied with the narrow interpretation given to the definition of disability by the Supreme Courts. Consequently, in their report “Righting the ADA”,⁴⁵⁸ the NCD put forth the idea of enacting the ADA Restoration Act.⁴⁵⁹ The ADA Restoration Act would aim to correct the interpretation given by the Supreme Court decisions.⁴⁶⁰ The NCD and disability rights advocates began working on a new legislative language for the ADA Restoration Act.⁴⁶¹ After several proposals were made for the amendments, former USA president, George W. Bush, signed the ADA Amendments Act (ADAAA) into law.⁴⁶²

The most prominent and important change effected by the ADAAA was revising of the definition of disability.⁴⁶³ While the definition remained the same as that founded in the ADA, the ADAAA included several rules within the purposes and findings of the ADAAA.⁴⁶⁴ These rules aimed to assist the courts in interpreting the definition, thus giving effect to the universal approach.⁴⁶⁵ Congress explicitly stated that the purpose behind the enactment of the ADAAA was to reject the findings of the *Sutton* case, where the court found that where an employee made use of mitigating measures to correct or manage the impairment, the use of such measures did not qualify the employee to find protection under the ADA.⁴⁶⁶

The ADAAA further proceeded to reject the finding of the *Toyota* case where the court set unattainably high standards to which a disabled applicant had to prove that an impairment

⁴⁵⁷ Porter NB ‘The New ADA Backlash’ (2014) 82 *Tennessee Law Review* 1 14.

⁴⁵⁸ Righting the American with Disabilities Act report by the National Council on Disability available at <https://ncd.gov/publications/2004/Dec12004> (accessed on 01 October 2017).

⁴⁵⁹ Barry K ‘Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights’ (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 251.

⁴⁶⁰ Barry K ‘Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights’ (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 251.

⁴⁶¹ Barry K ‘Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights’ (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 253.

⁴⁶² Porter NB ‘The New ADA Backlash’ (2014) 82 *Tennessee Law Review* 1 14.

⁴⁶³ Porter NB ‘The New ADA Backlash’ (2014) 82 *Tennessee Law Review* 1 14.

⁴⁶⁴ Porter NB ‘The New ADA Backlash’ (2014) 82 *Tennessee Law Review* 1 15.

⁴⁶⁵ Barry K ‘Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights’ (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 274.

⁴⁶⁶ American with Disabilities Amendment Act of 2008 s 12101(b)(2).

limited his/her activity.⁴⁶⁷ The ADAA further provided that an impairment which substantially limited the carrying out of a major life activity was now an activity which played a significant role in the daily lives of these individuals.⁴⁶⁸ The ADAAA added that it no longer needed to be major life activities, it could also be one activity which was substantially limiting.⁴⁶⁹

One of the major changes made by the ADAAA, which held specific benefits to individuals who suffered from depression, was that an impairment which substantially limited an individual when the impairment seemed active, was regarded as remaining substantially limiting when in remission or controlled.⁴⁷⁰ The ADAAA now only required claimants to prove that they suffered adverse treatment. This then shifted the onus of proof to the employer to motivate why the employer's actions were adverse towards the employee.⁴⁷¹ This significant shift in onus away from the claimant having to prove the seriousness of their impairment, removed the hurdle for employees to first having to prove that they were disabled, thus falling within the definition of disability.⁴⁷² This particular amendment allowed for an employee to be protected before having to prove disability.

While much of the literature on the ADAAA considers how the changes positively affect a person who has a physical impairment, there is also a small body of commentary on the positive impact the ADAAA has had on mental impairment situations. After the cases of *Sutton* and *Toyota*, it was near to impossible for those with mental impairments to succeed in their claims brought under the ADA.⁴⁷³ However, in many cases brought after the ADAAA was passed, the courts have ruled that depression is to be considered a disability, even in the absence of a doctor's formal diagnosis, or where the depression was episodic.⁴⁷⁴

Several cases have since been brought before the courts, and in majority of those cases the employee's depression was deemed to be a disability, as the effects of depression had substantially limited numerous of the individuals' capability to perform a major life activities.⁴⁷⁵ It was found that the most common major life activities which were affected by an employee's depression were the ability to concentrate at work, the ability to look after personal well-being,

⁴⁶⁷ American with Disabilities Amendment Act of 2008 s 12102(b)(5).

⁴⁶⁸ American with Disabilities Amendment Act of 2008 s 12102(b)(4).

⁴⁶⁹ Porter NB 'The New ADA Backlash' (2014) 82 *Tennessee Law Review* 1 16.

⁴⁷⁰ Porter NB 'The New ADA Backlash' (2014) 82 *Tennessee Law Review* 1 17.

⁴⁷¹ Porter NB 'The New ADA Backlash' (2014) 82 *Tennessee Law Review* 1 17.

⁴⁷² Porter NB 'The New ADA Backlash' (2014) 82 *Tennessee Law Review* 1 17.

⁴⁷³ Porter NB 'The New ADA Backlash' (2014) 82 *Tennessee Law Review* 1 34.

⁴⁷⁴ Porter NB 'The New ADA Backlash' (2014) 82 *Tennessee Law Review* 1 35.

⁴⁷⁵ Porter NB 'The New ADA Backlash' (2014) 82 *Tennessee Law Review* 1 35.

and the ability to take care of the well-being of dependants.⁴⁷⁶ The courts even afforded protection to an employee who had isolated instances of depression and who required inpatient treatment.⁴⁷⁷ In this sense the shift from the approach under the ADA to the ADAAA has been significant as employees who are now able to submit evidence that they suffer symptoms of depression are likely to be protected under the ADA.⁴⁷⁸ The ADAAA eases the burden on employees to first having to prove that he or she is disabled, which historically has been problematic as employees often do not make it past this initial step.

Professor Porter holds that while the ADAAA has made it easier for applicants to make it pass the initial step of first having to prove that he or she is disabled, she wonders how long it might be before courts will become reluctant to have the ADAAA realise its full transformational potential.⁴⁷⁹ Professor Porter holds that where employers are continuously requesting more from their employees in order to remain ahead of their competition, she doubts that both the courts and employers will so easily respond to the ADAAA requiring that an employer make significant changes in the functions of a disabled person's job description.⁴⁸⁰

The ADAAA restoring the 'regarded as' requirement of the definition of disability to its original broad interpretation,⁴⁸¹ has removed many of the boundaries which previously separated disabled from abled-body persons.⁴⁸² What now distinguishes persons under the ADAAA is that an individual who suffers negative treatment based on the stigma attached to certain impairments, is also afforded protection.⁴⁸³ While the ADAAA has been praised for removing the unattainable high standards by which one has to prove disability, the ADAAA has been critiqued for upholding the requirement of 'substantially limits', as this aligns itself with the medical model approach to disability.⁴⁸⁴ Furthermore this requirement follows the minority group approach, which approach the drafters of the ADAAA tried to avoid, as their aim was for

⁴⁷⁶ Porter NB 'The New ADA Backlash' (2014) 82 *Tennessee Law Review* 1 35 – 36.

⁴⁷⁷ Porter NB 'The New ADA Backlash' (2014) 82 *Tennessee Law Review* 1 37.

⁴⁷⁸ Porter NB 'The New ADA Backlash' (2014) 82 *Tennessee Law Review* 1 37.

⁴⁷⁹ Porter NB 'The New ADA Backlash' (2014) 82 *Tennessee Law Review* 1 82.

⁴⁸⁰ Porter NB 'The New ADA Backlash' (2014) 82 *Tennessee Law Review* 1 82.

⁴⁸¹ Barry K 'Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights' (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 279.

⁴⁸² Barry K 'Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights' (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 279.

⁴⁸³ Barry K 'Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights' (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 279.

⁴⁸⁴ Barry K 'Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights' (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 280.

the ADAAA to make use of the universal approach.⁴⁸⁵ The ADAAA in using the minority group approach still only offers protection to impairments that are stigmatised. It does not appreciate the view that stigma itself is often what disables an individual.⁴⁸⁶ Considering the effects of stigma would be in line with the broader universal approach.

While the ADAAA has made great strides in restoring the position to that of the ADA's predecessor, there is still much that the ADAAA has not done to protect persons with disabilities.⁴⁸⁷ The ADAAA has failed to provide incentives to encourage employers to employ people with impairments, as well as including instances where a prospective employee is denied employment due to their impairment.⁴⁸⁸ A prospective employee often finds it difficult to prove, that he or she was denied employment based on his or her physical or mental impairments.⁴⁸⁹ However despite these shortcomings the overall protection offered has been a substantial breakthrough for those who have been discriminated against due to impairments.⁴⁹⁰

4.3 THE UNITED KINGDOM

The United Kingdom (UK) is one of the leaders in attempting to prevent disability discrimination within the workplace. The UK has acknowledged that persons with disabilities require special attention and these individuals have been protected in the UK since 1944 under the Disabled Persons (Employment) Act.⁴⁹¹

⁴⁸⁵ Barry K 'Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights' (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 281.

⁴⁸⁶ Barry K 'Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights' (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 281.

⁴⁸⁷ Barry K 'Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights' (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 281.

⁴⁸⁸ Barry K 'Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights' (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 281.

⁴⁸⁹ Barry K 'Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights' (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 282.

⁴⁹⁰ Barry K 'Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights' (2010) 31 2 *Berkeley Journal of Employment and Labor Law* 203 282.

⁴⁹¹ Wheat K 'Mental Health and Stigma – How Best to Protect Workers from Discrimination' (2013) 34 *Windosr Rev. Legal & Soc.* 1 9.

4.3.1 The Enactment of the Disability Discrimination Act

The Disabled Persons (Employment) Act required that three percent of an employer's workforce would have to be registered disabled persons.⁴⁹² This Act therefore only extended protection to persons with disabilities in as far as reaching a certain quota was concerned.⁴⁹³ The Disabled Persons (Employment) Act was repealed and replaced with the Disability Discrimination Act (DDA) in 1995. The DDA aimed to remove the quota system approach in favour of a more inclusive rights-based approach.⁴⁹⁴

The DDA was enacted to address the issues around the employment prospective of persons with disabilities and removing prejudices that those that were employed suffer.⁴⁹⁵ The DDA gave persons with disabilities specific rights, which could be enforced in tribunals that were specifically created to deal with such matters.⁴⁹⁶ Persons with disabilities would however only be protected under the DDA if they satisfied the DDA's definition of disability.⁴⁹⁷

4.3.2 Definition of Disability in terms of the DDA

In terms of section 1 of the DDA, disability is defined as a 'person who has a physical and mental impairment which has a substantial and long-term adverse effect on his/her ability to carry out normal day-to-day activities'.⁴⁹⁸ While the definition contained in the DDA is flexible, the definition has proven to be rather complex and lend itself to litigation on the basis of who the definition applies to, as well as actually proving that an employee suffers from a disability.⁴⁹⁹

⁴⁹² Mansfield G & Bowers J 'Disabled Persons Under the Disability Discrimination Act 1995' (2002 – 2003) 24 *Comp. Lab. L. & Pol'y. J.* 631 631.

⁴⁹³ Wheat K 'Mental Health and Stigma – How Best to Protect Workers from Discrimination' (2013) 34 *Windosr Rev. Legal & Soc.* 1 9.

⁴⁹⁴ Mansfield G & Bowers J 'Disabled Persons Under the Disability Discrimination Act 1995' (2002 – 2003) 24 *Comp. Lab. L. & Pol'y. J.* 631 632.

⁴⁹⁵ Wheat K 'Mental Health and Stigma – How Best to Protect Workers from Discrimination' (2013) 34 *Windosr Rev. Legal & Soc.* 1 9.

⁴⁹⁶ Mansfield G & Bowers J 'Disabled Persons Under the Disability Discrimination Act 1995' (2002 – 2003) 24 *Comp. Lab. L. & Pol'y. J.* 631 631.

⁴⁹⁷ Mansfield G & Bowers J 'Disabled Persons Under the Disability Discrimination Act 1995' (2002 – 2003) 24 *Comp. Lab. L. & Pol'y. J.* 631 631.

⁴⁹⁸ Disability Discrimination Act 1995 s 1.

⁴⁹⁹ Mansfield G & Bowers J 'Disabled Persons Under the Disability Discrimination Act 1995' (2002 – 2003) 24 *Comp. Lab. L. & Pol'y. J.* 631 634.

The interpretation of the definition, specifically with regards to mental impairment, is that the mental impairment has to be clinically recognised.⁵⁰⁰ The DDA therefore requires that a ‘respected medical body’⁵⁰¹ recognises what type of mental impairment the employee suffers from.⁵⁰² The requirement that the mental impairment must be clinically recognised has proven difficult as many medical practitioners avoid diagnosing employees with mental illness largely due to the stigma attached.⁵⁰³ Thus there is tension created between the mechanisms of the DDA and the ability to make findings on medical conditions.⁵⁰⁴ The court in the matter of *Morgan v Staffordshire*⁵⁰⁵ held that determining whether an employee suffered from a mental impairment or not was dependent on an informed finding made by a qualified expert. Other courts in the UK have also pointed out that making a finding on whether a person has a mental impairment or not is a factual issue that many courts grapple with.⁵⁰⁶

4.3.3 The Incorporation of the Employment Equality Directive

In 2000, the European Union (EU) published the Employment Equality Directive (EED) which required that all member states incorporate the directive into their national laws.⁵⁰⁷ The focus of the Employment Equality Directive is to achieve equal treatment in employment, with special focus on religion or belief, age disability and sexual orientation.⁵⁰⁸ The main purpose behind the establishment of the Employment Equality Directive was to provide greater social inclusion of persons with disabilities within the labour market by eradicating every form of discrimination that persons with disabilities generally suffer.⁵⁰⁹ The EED places a duty on employers to provide reasonable accommodation to ensure that employees who suffer from disability are accommodated in such a manner that allows for their advancement in employment.⁵¹⁰ The EED

⁵⁰⁰ Mansfield G & Bowers J ‘Disabled Persons Under the Disability Discrimination Act 1995’ (2002 – 2003) 24 *Comp. Lab. L. & Pol’y. J.* 631 638.

⁵⁰¹ Mansfield G & Bowers J ‘Disabled Persons Under the Disability Discrimination Act 1995’ (2002 – 2003) 24 *Comp. Lab. L. & Pol’y. J.* 631 638.

⁵⁰² Mansfield G & Bowers J ‘Disabled Persons Under the Disability Discrimination Act 1995’ (2002 – 2003) 24 *Comp. Lab. L. & Pol’y. J.* 631 638.

⁵⁰³ Mansfield G & Bowers J ‘Disabled Persons Under the Disability Discrimination Act 1995’ (2002 – 2003) 24 *Comp. Lab. L. & Pol’y. J.* 631 639.

⁵⁰⁴ Mansfield G & Bowers J ‘Disabled Persons Under the Disability Discrimination Act 1995’ (2002 – 2003) 24 *Comp. Lab. L. & Pol’y. J.* 631 646.

⁵⁰⁵ *Morgan v Staffordshire* [2002] ICR 475.

⁵⁰⁶ Mansfield G & Bowers J ‘Disabled Persons Under the Disability Discrimination Act 1995’ (2002 – 2003) 24 *Comp. Lab. L. & Pol’y. J.* 631 646.

⁵⁰⁷ Wells K ‘The Impact of the Framework Employment Directive on UK Disability Discrimination Law’ 2.

⁵⁰⁸ European Employment Directive 2000/78/EC Article 1.

⁵⁰⁹ European Employment Directive 2000/78/EC Article 6 and Article 8.

⁵¹⁰ European Employment Directive 2000/78/EC Article 5.

acknowledges that while the employer has a duty to provide reasonable accommodation to employees who are disabled, the accommodation should not be financially burdensome on the employer.⁵¹¹ The EED approach has followed what many of the other European Union Members have already incorporated into their national laws, specifically with regards to the protection of persons with disabilities.⁵¹²

With the incorporation of the Employment Equality Directives into the United Kingdom's national legislation, the DDA's definition of disability fell short of offering protection to those persons that the DDA initially aimed at protecting.⁵¹³ The definition of disability within the DDA was phrased in such manner to make it readily understandable and easy to apply. The directive has heavily critiqued the definition in the DDA for having a 'highly medicalised approach to defining disability'.⁵¹⁴

Once the Employment Equality Directive was incorporated into the United Kingdom's national legislation the DDA removed the requirement that a mental impairment had to be clinically recognised.⁵¹⁵ The reasoning behind the removal of the words clinically recognised was that this required that an employee could only lay a claim of discrimination against the employer if the employee could prove that he or she is in fact disabled.⁵¹⁶ This initial step in proving that the employee is disabled shifted the question away from whether the employee has been discriminated against due to his or her disability to a question of whether or not the employee was 'disabled enough to qualify for protection'. This then excluded many employees from receiving protection under the DDA, as well leaving many of these employees without recourse, as the definition only protects a select few.⁵¹⁷

⁵¹¹ European Employment Directive 2000/78/EC Article 5.

⁵¹² Waddington L & Lawson *A Disability and Non-Discrimination Law in the European Union: An Analysis of Disability Law within and Beyond the Employment Field* 1 ed (2009) 16.

⁵¹³ Waddington L & Lawson *A Disability and Non-Discrimination Law in the European Union: An Analysis of Disability Law within and Beyond the Employment Field* 1 ed (2009) 23.

⁵¹⁴ Waddington L & Lawson *A Disability and Non-Discrimination Law in the European Union: An Analysis of Disability Law within and Beyond the Employment Field* 1 ed (2009) 23.

⁵¹⁵ Wheat K 'Mental Health and Stigma – How Best to Protect Workers from Discrimination' (2013) 34 *Windosr Rev. Legal & Soc.* 1 10.

⁵¹⁶ Waddington L & Lawson *A Disability and Non-Discrimination Law in the European Union: An Analysis of Disability Law within and Beyond the Employment Field* 1 ed (2009) 23.

⁵¹⁷ Wheat K 'Mental Health and Stigma – How Best to Protect Workers from Discrimination' (2013) 34 *Windosr Rev. Legal & Soc.* 1 10.

4.3.4 The Equality Act

The Equality Act (EA) took effect on 01 October 2010.⁵¹⁸ The Act was a consolidation of the three pieces of the UK's most prominent anti-discrimination legislation at the time that aimed to combat discrimination within the workplace.⁵¹⁹ These pre-existing pieces of legislation were the DDA, the Sex Discrimination Act 1975 and Race Relations Act 1976.⁵²⁰ While the EA has not strayed too far away from the initial provisions found within the DDA, the EA set out to align itself with the Convention on the Rights of Persons with Disabilities (CRPD) and the Employment Equality Directive.⁵²¹ The EA has adopted the social model approach in its application.⁵²² The social model approach adopted within the EA looks at disability rather than impairment. Impairment focuses on an individual's impaired abilities or capacities, thus the focus is on the individual's limitations.⁵²³ Whereas disability of the individual considers the societal barriers which lead to an individual being excluded and even disadvantaged.⁵²⁴

4.3.4.1 Definition of Disability in the EA

As mentioned above, the EA has maintained many of the DDA's content; therefore the definition of disability has remained the same.⁵²⁵ The definition of disability found within the EA provides that "a person who has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on the person's ability to carry out normal day-to-day activities".⁵²⁶

Many have critiqued the EA for having kept the definition the same as it was found in the DDA. It is felt that this has not improved the position of persons with disabilities, nor has it extended

⁵¹⁸ Lawson A 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 *ILJ* 359 359.

⁵¹⁹ Lawson A 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 *ILJ* 359 359.

⁵²⁰ Lawson A 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 *ILJ* 359 359.

⁵²¹ Lawson A 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 *ILJ* 359 360.

⁵²² Lawson A 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 *ILJ* 359 361.

⁵²³ Lawson A 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 *ILJ* 359 361.

⁵²⁴ Lawson A 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 *ILJ* 359 361.

⁵²⁵ Lawson A 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 *ILJ* 359 361.

⁵²⁶ Equality Act 2010 s 6(1).

protection to those that were excluded from protection under the DDA.⁵²⁷ The definition still requires that a person first prove a disability before the claim of discrimination can be considered.⁵²⁸ Having kept the definition the same as it was under the DDA indicates that persons with disabilities are left in a similar position that they were under the DDA.

Another critique of the EA is that the EA has kept the requirements that a person's disability must have a negative effect on his/her ability to carry out normal day-to-day activities, as well as the disability being substantial and long-term.⁵²⁹ The requirements of 'normal day-to-day activities and 'substantial and long term' have remained within the definition of disability. Had the EA removed these requirements it would have been considerably easier for an individual to bring a claim against his or her employer for less favourable treatment.⁵³⁰ In terms of the EA, less favourable treatment will only be considered unfair when such treatment is considered to be unjustified.⁵³¹

The United Kingdom government aimed to limit the number of justifications on which an employer could rely on to substantiate why less favourable treatment was reasonable.⁵³² The EA has replaced all the various justifications available within the DDA with one objective justification test. The test considers whether the employer's conduct is "proportionate in achieving a legitimate aim".⁵³³ This test further then considers whether an employer's conduct would be deemed to be fair where employers have considered both the conditions under which the employee requires accommodating and whether the accommodation is significantly burdensome on the employer.⁵³⁴

⁵²⁷ Lawson A 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 *ILJ* 359 361.

⁵²⁸ Lawson A 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 *ILJ* 359 361.

⁵²⁹ Lawson A 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 *ILJ* 359 363.

⁵³⁰ Lawson A 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 *ILJ* 359 363.

⁵³¹ Lawson A 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 *ILJ* 359 364.

⁵³² Keen S & Oulton R *Disability Discrimination in Employment* 1 ed (2009) 12.

⁵³³ Keen S & Oulton R *Disability Discrimination in Employment* 1 ed (2009) 13.

⁵³⁴ Keen S & Oulton R *Disability Discrimination in Employment* 1 ed (2009) 13.

4.3.4.2 Developments the EA made to the Definition of Disability

4.3.4.2.1 Removal of listed capacities

The EA has however made changes that have been welcomed by many of those who seek protection in terms of this EA.⁵³⁵ One of the most welcomed change made by the EA is the removal of list of the day-to day activities which a person with a disability needs to prove that they are unable of performing due his or her disability.⁵³⁶ This change has in particular had a positive impact on those who suffer from mental illness. Not only did the amendment remove an extra requirement which persons with disabilities had to meet, but also alleviated the burden of having to prove that the disability had the effect of diminishing one of the listed capacities.⁵³⁷

4.3.4.2.2 Removal of 'less favourable treatment'

The second welcomed change made by the EA, which initially presented a problem when the Equality Bill was before Parliament, was to determine the extent to which to determine whether an individual has been discriminated against based on his or her disabilities.⁵³⁸ The EA did away with the comparator test of 'less favourable treatment' as laid out in the House of Lords judgement of *London Borough of Lewisham v Malcolm*⁵³⁹

In the case of *Clark v Nova cold (Novacold)*, the court of appeal was faced with interpreting and applying the then DDA's definition of what constituted discrimination.⁵⁴⁰ The DDA defined discrimination as the employer treating the person with disability "less favourably" than they would treat an employee to whom the DDA did not apply.⁵⁴¹ While the applicant, Mr Clark, in the *Novacold* case based his claim on a physical impairment and not a mental impairment, the principle laid down within this case applied to all persons with disabilities.

Mr Clark, sustained an injury while on duty work. Mr Clark's doctors could not provide Novacold with an indication of when he would be able to return to work. The uncertainty of his return lead to Novalcold dismissing Mr Clark. Mr Clark brought a claim against Novacold in the Industrial Tribunal. The Industrial Tribunal had to determine whether Mr Clark was

⁵³⁵ Keen S & Oulton R Disability Discrimination in Employment 1 ed (2009) 13.

⁵³⁶ Keen S & Oulton R Disability Discrimination in Employment 1 ed (2009) 13.

⁵³⁷ Keen S & Oulton R Disability Discrimination in Employment 1 ed (2009) 13.

⁵³⁸ Keen S & Oulton R Disability Discrimination in Employment 1 ed (2009) 13.

⁵³⁹ *London Borough of Lewisham v Malcolm* [2008] UKHL 43.

⁵⁴⁰ *London Borough of Lewisham v Malcolm* [2008] UKHL 43 par 1.

⁵⁴¹ Disability Discrimination Act 1995 s 5(1)(a).

discriminated against due to his disability. The court applied section 5(1) of the DDA, and found that Novacold did not treat Mr Clark less favourably than Novacold would have treated any another abled bodied employee.

On appeal, the Employment Appeal Tribunal (EAT) held that the court a quo did not err in applying the comparator clause of less favourable treatment of Mr Clark, as he was unable to fulfil the requirements of his job. These requirements were not connected to Mr Clark's disability. Mr Clark then further appealed to the Supreme Court of Judicature. The court held that Novacold did in fact discriminate against Mr Clark based on disability and due to Novacold failing to provide alternative employment arrangements as required in section 6 of the DDA, Novacold's actions amounted to discrimination.

This case was considered a landmark judgement, as the courts clarified the ambiguity found within section 5(1) and 5(2) of the DDA.⁵⁴² The court held that a complainant would only have to prove that he or she has been treated less favourably to that of a non-disabled employee, to whom such treatment which would ordinarily not apply.⁵⁴³ The court went further to hold that the complainant does not have to prove the connection between the reason why the employer treated the employee less favourably and the employee's disability.⁵⁴⁴

The case of *London Borough of Lewisham v Malcolm (Malcolm)* overturned the judgement of *Novacold*. This judgement concerned itself with the manner in which a mentally impaired person may be discriminated against outside of the employment sphere. While the case of *Malcolm*, deals with matters outside of the scope of this thesis, the test laid down in *Malcolm* negatively affects all person who wish to claim protection under the DDA.

The case of *Malcolm* dealt with Mr Malcolm who signed a lease agreement with the respondent London Borough of Lewisham (Lewisham). The terms of the lease agreement was that Mr Malcolm could not sublet the property to any other person.⁵⁴⁵ The respondents discovered that Mr Malcolm had sublet the property to another; the respondent held that Mr Malcolm was in breach of the lease agreement.⁵⁴⁶ Lewisham terminated the lease agreement with Mr Malcolm.⁵⁴⁷

⁵⁴² Keen S & Oulton R *Disability Discrimination in Employment* 1 ed (2009) 161.

⁵⁴³ Lawson A 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 *ILJ* 359 364.

⁵⁴⁴ Keen S & Oulton R *Disability Discrimination in Employment* 1 ed (2009) 161.

⁵⁴⁵ *London Borough of Lewisham v Malcolm* [2008] UKHL 43 par 5.

⁵⁴⁶ *London Borough of Lewisham v Malcolm* [2008] UKHL 43 par 6.

⁵⁴⁷ *London Borough of Lewisham v Malcolm* [2008] UKHL 43 par 6.

Mr Malcolm brought a claim against Lewisham for “seeking possession” due to his disability.⁵⁴⁸ The court of first instance held that Mr Malcolm, suffered from schizophrenia, therefore was not considered disabled in terms of the DDA. The court reasoned that Mr Malcolm was not influenced by his mental impairment when he sublet his property.⁵⁴⁹ The court of appeal overturned the court a quo’s judgement and found that Mr Malcolm was in fact “disabled in terms of the DDA”,⁵⁵⁰ and was treated less favourably due to his disability.

When the matter appeared before the House of Lords, the court found that the decision reached in the *Novacold* case was incorrectly decided.⁵⁵¹ The court held that the court in *Novacold* interpreted less favourable treatment too broadly, and that the comparator test in section 5(1) of the DDA required a narrower interpretation.⁵⁵² The House of Lords found that where the courts consider whether the complainant was treated less favourably compared to such a person to whom such treatment would ordinarily not apply weakens the notion of disability related discrimination.⁵⁵³ The court then went on to emphasise that without the reason there would not ordinarily be a need to treat the complainant in such a manner.⁵⁵⁴

The case of *Malcolm* has been critiqued as this case only considers a situation where a disabled person has only been victim to direct discrimination; the decision did not consider that a person may be discriminated against indirectly.⁵⁵⁵

The case of *Malcolm* served as precedent until the EA did away with the comparator test.⁵⁵⁶ Section 15 of the EA did away with the term less favourable treatment and inserted unfavourable treatment.⁵⁵⁷ This allowed for claims of disability related discrimination to be claimed where there has been both or either direct and indirect discrimination. The change made by the EA favoured the approach in the *Novacold* case.⁵⁵⁸

⁵⁴⁸ Keen S & Oulton R *Disability Discrimination in Employment* 1 ed (2009) 162.

⁵⁴⁹ Keen S & Oulton R *Disability Discrimination in Employment* 1 ed (2009) 162.

⁵⁵⁰ Keen S & Oulton R *Disability Discrimination in Employment* 1 ed (2009) 163.

⁵⁵¹ Keen S & Oulton R *Disability Discrimination in Employment* 1 ed (2009) 163.

⁵⁵² Keen S & Oulton R *Disability Discrimination in Employment* 1 ed (2009) 163.

⁵⁵³ Keen S & Oulton R *Disability Discrimination in Employment* 1 ed (2009) 163.

⁵⁵⁴ Keen S & Oulton R *Disability Discrimination in Employment* 1 ed (2009) 163.

⁵⁵⁵ Keen S & Oulton R *Disability Discrimination in Employment* 1 ed (2009) 164.

⁵⁵⁶ Lawson A ‘Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated’ (2011) 40 *ILJ* 359 365.

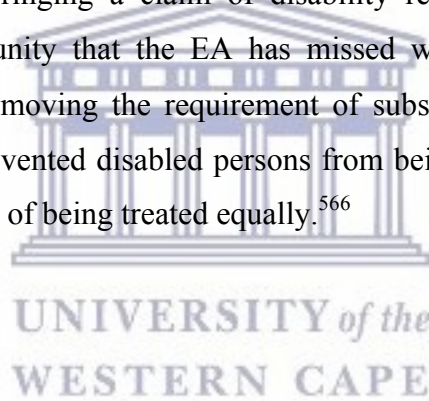
⁵⁵⁷ Lawson A ‘Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated’ (2011) 40 *ILJ* 359 365.

⁵⁵⁸ Lawson A ‘Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated’ (2011) 40 *ILJ* 359 365.

4.3.4.2.3 Extension of protection offered to persons associated with persons with disabilities

The third welcomed change made by the EA is found within section 13. The section provides that a person who is not disabled, but falls victim to direct discrimination based on a connection to a disabled person, may bring a claim of unfavourable treatment against the that person.⁵⁵⁹ However, the EA does not require that such a person's working conditions be adjusted in order for such an employee to care for the disabled person.⁵⁶⁰ Section 13 of the EA has extended the protection beyond the disabled person.⁵⁶¹ However, the practicality of conferring protection to persons who are connected to persons with disabilities has proved to be problematic, based on the construction of the definition of disability within the EA.⁵⁶²

The EA aimed at bringing about consistency in disability related claims, and making it simpler for victims of disability related discrimination to lay a claim.⁵⁶³ The minor changes made by the EA have been welcomed, however with the enactment the EA, Parliament missed an opportunity to reduce the difficulty in bringing a claim of disability related discrimination against the employer.⁵⁶⁴ Another opportunity that the EA has missed was to develop and improve the definition of disability, by removing the requirement of substantial and long term.⁵⁶⁵ These missed opportunities have prevented disabled persons from being able to actively participate in society, and enjoy the benefits of being treated equally.⁵⁶⁶



4.4 CONCLUSION

From the above discussion, both the USA and the UK have been the leaders in recognising the need for person with disabilities to be afforded greater protection from discriminatory practices within society, more importantly within the realm of employment.

⁵⁵⁹ Lawson A 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 *ILJ* 359 373.

⁵⁶⁰ Lawson A 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 *ILJ* 359 373.

⁵⁶¹ Lawson A 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 *ILJ* 359 373.

⁵⁶² Lawson A 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 *ILJ* 359 374.

⁵⁶³ Lawson A 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 *ILJ* 359 381.

⁵⁶⁴ Lawson A 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 *ILJ* 359 381.

⁵⁶⁵ Lawson A 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 *ILJ* 359 382.

⁵⁶⁶ Lawson A 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 *ILJ* 359 382.

The USA's initial aim when enacting the ADA was not simply to prevent discrimination but to empower persons with disabilities. The USA government acknowledged that having either a mental or physical impairment did not reduce individual's capabilities. Title 1 of the ADA specifically focuses on removing discriminatory practices in employer's policies, thus allowing for more equal employment opportunities to persons with disabilities.

Initially the ADA seemed to have addressed many of the issues that persons with disabilities had in actively contributing to society. The success of the ADA in addressing these issues was short lived, when the USA courts restricted the definition of disability. The effects of the narrow interpretation given to the definition of disability, allowed for only a few individuals who could prove that they are in fact disabled, to find protection under the ADA. The enactment of the ADAAA aimed to remove the barriers put into place by the USA courts. This allowed for many persons with disabilities to find protection under the ADAAA. The unique feature of the ADAAA is that persons who suffer negative treatment based on the stigma's attached to certain impairments would now be able to seek protection under the ADAAA. The ADAAA has however lacked in encouraging employers to employ persons with disabilities.

The UK, having recognised the need to protect persons with disabilities some thirty years before the USA, has not been as successful in their attempt. The UK has however moved away from the quota system in the employment of persons with disabilities, to a practice where legislation, such as the DDA has aimed to empower persons with disabilities. The definition of disability in the DDA was highly medicalised, resulting in many persons specifically with mental impairments, being prevented from seeking protection. The DDA required that an individual would first have to prove that his or her impairment was clinically recognised. The adoption of the Employment Equity Directive resulted in the term 'clinically recognised' being removed from the definition of disability. This did not resolve the difficulty persons with disabilities had in seeking protection under the DDA. This was largely due to the UK's courts limiting the application of the definition and giving a narrow interpretation to the definition of disability.

The enactment of the EA, aimed at removing the hurdles created in the DDA. The EA failed to do so, as they kept the definition of disability the same as in the DDA. The EA then inherited many of the problems that arose in the DDA. The EA however did limit the various defences an employer could raise in proving that the dismissal of an employee and denial of an employment opportunity to a potential employee, who is impaired, to one.

While both the USA and the UK have each seen the practical difficulties in the implementation of the definition. Both the USA and the UK have maintained the definition of disability as contained in the CRPD, South Africa being a member state of the CRPD has incorporated the definition of disability into its national laws. The definition of disability features in both the Employment Equity Act and within in the Code of Good Practice on the Employment of Persons with Disabilities.⁵⁶⁷ South Africa, therefore has a solid body of authority from both the USA and the UK, as to what to avoid when enacting possible legislation to better offer persons with disabilities protection.

Upon examining the disability laws of the USA and the UK, South Africa can benefit greatly from using the disability laws of the USA and the UK as a basis to ensure that persons with disabilities within South Africa are afforded better protection. The next chapter will consider the lessons learnt from the USA and the UK's disability laws and how South Africa can incorporate these lessons into national laws.



⁵⁶⁷ Good Practice on the Employment of Persons with Disabilities discussed in chapter 2 above on page 26-28.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 AN OVERVIEW

One of the biggest difficulties around addressing depression in the workplace is that as a mental impairment it is not as easily identifiable as physical impairments. Many employees or prospective employees wish not to disclose mental impairments to employers. Firstly, because of the stigma attached to such an impairment and, secondly, due to the fear that where such an impairment is disclosed, the employee may end up being isolated or even discriminated against.

Chapter two considered the South African position on protection afforded to persons, particularly employees in the workplace, suffering from depression. Since the adoption of the Constitution, 1996 the fundamental rights and freedoms of all South African citizens have been safeguarded. Of particular importance in this regard is section 9 of the Constitution, known as the equality clause, which prohibits unfair discrimination against any person on any one or more of the listed grounds. One such ground listed is that of disability. The Constitution also goes further to protect the employment and labour rights of individuals in section 23.

As a result of section 23 of the Constitution, three key statutes were enacted to ensure that employment and labour rights are effectively enforced. In this regard the most important piece of legislation protecting the rights of persons with disabilities is the Employment Equity Act (EEA). The EEA includes disability as one of the listed grounds against which an employee may not be unfairly discriminated against. Under the EEA, the Code of Good Practice Key Aspects on the Employment of People with Disabilities (hereinafter referred to as ‘the CGP on Disabilities’) was also issued. The CGP on Disabilities aims to create awareness around the employment of persons with disabilities and the protection to be offered to them. The CGP on Disabilities further aims at eliminating the social barriers that prevent employees from actively participating in society. The CGP on Disabilities does not however provide a clear framework for implementing employer workplace policies to break down these barriers. The CGP on Disabilities, expressly provides that workplace policies should be developed in such a manner to assert the rights of persons with disabilities,⁵⁶⁸ in compliance with objectives of the Employment

⁵⁶⁸ Code of Good Practice on the Employment of Persons with Disabilities clause 3.4.

Equity Act. The CGP on Disabilities provides that workplace policies be drafted in a manner that will align with the needs of the employer.⁵⁶⁹

South Africa's case law provides very little guidance on how to deal with depression as a disability. The court in *L S v Commission for Conciliation, Mediation and Arbitration* held that an employee suffering from depression cannot be dismissed on the ground of misconduct, but rather that depression should be viewed as incapacity. The court in *New Way Motors v Marsland* again held that depression is considered a disability. The court in *Independent Municipal & Allied Trade Unions v Witzenberg Municipality* however held that depression should be dealt with as incapacity due to ill health. Workplace policies have continued to make use of the medical model approach to disability with the result that many persons with disabilities are still being excluded from meaningful employment opportunities. The difficulty in not having a uniformed approach within South Africa's case law is that it does not create legal certainty within South Africa's legal system. The difficulty of not having legal certainty is that people are unsure whether they will be granted protection in terms of the law.

Chapter three provided a brief overview of the history around the enactment of the Convention on the Rights of Persons with Disabilities (CRPD). The CRPD's predecessors failed to allow for the full and equal enjoyment of the fundamental rights and freedoms of persons with disabilities. When the CRPD was enacted its primary aim was to ensure that persons with disabilities were empowered. The CRPD attempted to do so by shifting away from the restrictive medical model approach to disability to the more inclusive social model approach.⁵⁷⁰

Article 33 was another unique feature of the CRPD. Article 33 introduced monitoring provisions to ensure that member states incorporate the CRPD into their respective national laws so as to allow persons with disabilities a chance to actively participate in society. The CRPD was not without its shortfalls though, as indicated in chapter three. Article 12 of the CRPD which aims at restoring of persons who suffer from mental impairment's legal capacity, allows for persons with disabilities to enjoy legal independence. As discussed in Chapter 2 above, mental impairments result in persons losing an interest in many of the activities that they once found joy in. Allowing persons with mental impairments to have complete control over their decision making, could result in, decisions that would not always be in their best interest. Article 12, in its attempt to restore an individual's capacity, has left it up to member states to incorporate what they refer to

⁵⁶⁹ Code of Good Practice on the Employment of Persons with Disabilities clause 3.4.

⁵⁷⁰ The discussion on the medical and social model approach is discussed in Chapter 3 above on pages 44-45.

as the “guardianship model” of decision making into their national laws.⁵⁷¹ Article 17 prevents persons with mental impairments from being institutionalised without their consent. Article 17 and Article 12 are interrelated as the CRPD aims at restoring the legal capacity of individuals to make their own decision as to whether to be institutionalised. The CRPD has left this issue in the hands of member states to decide on and implement provisions into their national legislation.

Chapter four examined how the United States of America (USA) and the United Kingdom (UK) each deals with affording protection to persons suffering from depression. The USA enacted the American with Disabilities Act (ADA) which offers equal employment opportunities to persons with disabilities. The ADA is also aimed at preventing persons with disabilities from being discriminated against. The ADA does not promote preferential treatment however; it rather aims to eliminate discriminatory practices within society and more specifically the workplace.

The USA courts initially interpreted the definition of disability by using the universal approach, which aligned itself with the social model. The court in *Toyota Motor Manufacturing, Kentucky, Inc v Williams*⁵⁷² however restricted the interpretation of the definition, which again left many employees with disabilities without protection. The onus of proof shifted from the employer to the employee and the employee was required to prove that he or she was in fact disabled. The National Council of Disability was unsatisfied with this narrow interpretation given by the court in *Toyota* and the consequences thereof. Congress, in response to the National Council of Disability grievances, enacted the Americans with Disabilities Amendment Act (ADAAA) which restored the interpretation of the definition of disability to the previous⁵⁷³ broad interpretation. The broader interpretation removed many of the barriers that previously prevented persons with disabilities from being protected under the ADA.⁵⁷⁴ The broader definition included various guidelines which would be of assistance to the courts. This was a mechanism to ensure that the courts do not give the definition of disability a narrow interpretation.

The UK acknowledged that persons with disabilities need protection some thirty years before the USA did. The Disability Discrimination Act (DDA) was enacted to protect the right of persons with disabilities. The DDA aimed to remove the prejudices that persons with disabilities encountered when seeking employment. The UK, as a member state of the European Union,

⁵⁷¹ The discussion on the guardian model approach is discussed in Chapter 3 above on page 48.

⁵⁷² The case of *Toyota Motor Manufacturing, Kentucky, Inc v Williams* is discussed in Chapter 4 above on page 67 - 69.

⁵⁷³ The broad definition of disability, is found in the American with Disabilities Act. The discussion around broad interpretation of the definition discussed in Chapter 4 above on page 59.

⁵⁷⁴ The discussion around broad interpretation of the definition discussed in Chapter 4 above on page 59.

required that UK to incorporate the Employment Equity Directive (EED)⁵⁷⁵ into their laws. The EED in its construction of the definition of disability aimed at addressing the issues that resulted in many persons with disabilities still being excluded from employment opportunities. The EED's definition of disability was aimed at being more inclusive. As a result of this, the definition of disability in the DDA fell short of offering effective protection to persons with disabilities. The DDA's definition of disability required that a mental impairment be clinically recognised, which lead to the definition only applying to those who could prove that they suffered from a mental impairment.

The shortcomings of the DDA resulted in the enactment of the Equality Act. The Equality Act aimed at restoring the shortcomings of the DDA. The Equality Act brought about many welcomed changes. One of these was the limit placed on an employer's argument that providing reasonable accommodation would place an undue hardship on the employer. Despite this, overall it was felt that the Equality Act still failed to offer better protection to persons with disabilities. The Equality Act had not been as successful as it retained the definition of disability as was found in the DDA. This meant that many of the challenges that person with disabilities faced under the DDA continued under the Equality Act. The Equality Act was however praised for removing the comparator test which was laid down in the *London Borough of Lewisham v Malcolm*⁵⁷⁶. The Equality Act thus brought about consistency in addressing disability discrimination claims.



5.2 RECOMMENDATIONS

5.2.1 *Is depression a disability for purposes of employment law?*

South Africa's position on whether depression is considered a disability for purposes of employment law remains uncertain. This is evident through the majority of South African case law, some of which have been discussed in this research, which recognises depression as either a disability or incapacity for ill health reasons. The different findings raise inconsistency and as such uncertainty. While both disability and ill-health fall under the wider concept of incapacity as recognised in South African law, they remain distinct concepts which are subject to different employment processes.

⁵⁷⁵ The Employment Equity Directive is discussed in Chapter 4 above on page 74-75.

⁵⁷⁶ The case of *London Borough of Lewisham v Malcolm* is discussed in Chapter 4 above on page 79-80.

Bassuday and Rycroft⁵⁷⁷ argue that the ground on which an individual brings a claim (i.e. the manner in which an individual chooses to word a claim) will determine whether the claim falls under incapacity based on ill-health or disability reasons.⁵⁷⁸ What is however clear is that disability and incapacity are not interchangeable terms, though South African courts have treated them as such on various occasions. Majority of the case law discussed in chapter two above indicated that South African courts recognised depression as a disability. Therefore, before an employee can be dismissed, an employer is required to ensure that the four stages as laid out in *Standard Bank of SA v CCMA*⁵⁷⁹ was followed to ensure that such a dismissal is to be considered fair. The courts have however failed to consider that an disabled employee is capable of performing and is not suffering from an illness, and should thus be treated accordingly. This is of little assistance to the many South African employees who suffer from depression. It is problematic as it creates uncertainty within South Africa's legal system.

Both the United Kingdom and United States of America clearly consider depression to be a disability in terms of employment law. As such they afford protection to employees who are discriminated against because of the stigma attached to this particular mental impairment. The World Health Organisation has also requested that employees who suffer from depression be accommodated within the workplace, and acknowledged that depression is on the rise.⁵⁸⁰ The CRPD also acknowledges that depression falls under mental impairment. From all of this it should become apparent that while there may be varying degrees of depression, the effect of depression has the ability to prevent an employee from actively engaging in either their work environment or prospective work environment. It then calls for South Africa to develop, or at the very least clarify, its laws so that those suffering from depression are afforded protection under disability provisions specifically. The Code on Dismissal recognises that an employee suffering from depression can seek protection from an unfair dismissal under incapacity based on ill-health. This is however problematic as it creates the impression that the Code on Dismissal deals with depression and incapacity due to ill-health as one of the same. In line with the approach in the USA and UK, it should be clarified in South African legislation that depression should be dealt with as a form of disability under incapacity.

⁵⁷⁷ Bassuday K & Rycroft A 'Incapacity or Disability? The Implications for Jurisdiction *Ernstzen v Reliance Group Trading (Pty) Ltd (C717/13) [2015] ZALCCT 42*' (2015) 36 *ILJ* 2516.

⁵⁷⁸ Bassuday K & Rycroft A 'Incapacity or Disability? The Implications for Jurisdiction *Ernstzen v Reliance Group Trading (Pty) Ltd (C717/13) [2015] ZALCCT 42*' (2015) 36 *ILJ* 2516.

⁵⁷⁹ The case of *Standard Bank of SA v CCMA* is discussed in Chapter 2 above on page 29 - 30.

⁵⁸⁰ Depression Fact Sheet accessed at <http://www.who.int/mediacentre/factsheets/fs369/en/> (accessed on 06 November 2017).

As a member state to the CRPD, South Africa is obligated to incorporate the CRPD into its national laws. South Africa did this by including the definition of disability into the CGP on Disabilities. However the CGP on Disabilities only serves as a guideline and is not considered law. As a result, there is not a one set of specialised disability laws that assist employees in seeking protection from disability related discrimination. Protection for employees are scattered across various pieces of legislation, which makes it difficult for employees to know what their rights are and what protection they have.

Both the UK and the USA has provided South Africa with a solid foundation on which the legislature can begin to consider enacting legislation that will effectively offer protection to persons with disabilities, and in particular those that suffer from depression. The lessons learnt from both the UK and the USA are that disability legislation should be drafted broad enough to accommodate most disabilities, even those who suffer from temporary disabilities. As was however seen through the case law discussion of the USA and UK the courts, in interpreting and applying the definition of disability in a narrow sense often, albeit unintentionally so, excluded many individuals whom disability law initially aimed to protect from the scope of such laws. South Africa, in enacting specialised disability legislation, can learn from this by putting measures in place which would prevent courts from interpreting the definition of disability too narrowly.

South Africa has made great progress in affording previously marginalised groups of persons with fundamental rights and freedoms. South Africa specifically recognises that persons with disabilities is a marginalised group that require greater protection. South Africa as a fairly young democratic country could benefit greatly from the USA's approach of eliminating discriminatory practices, which included doing away with preferential treatment in the ADA. However, in order to achieve the objectives of the Constitution South Africa cannot, at this stage, entirely do away with preferential treatment.

The CGP on Disability, together with already existing provisions in labour legislation that protects employees with disabilities in the workplace, has given South Africa a solid foundation on which to develop a specialised set of employment disability laws. South Africa should furthermore use the lessons learnt and experiences gained from the jurisdictions of the USA and the UK to develop such specialised laws. In keeping with the approaches adopted in the USA and UK employees suffering from depression will then also be fully protected under disability legalisation. This would bring a welcome end to the current uncertainty around the issue of

whether disability is to be dealt with as an ill-health incapacity issue, or a disability incapacity issue.



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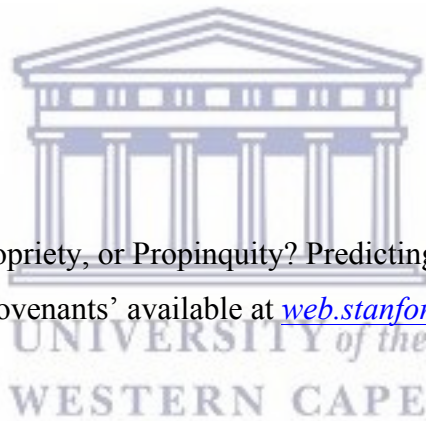
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