

MENTAL HEALTH AND THE WORLD OF WORK:

A COMPARATIVE ANALYSIS OF THE LEGAL

FRAMEWORKS GOVERNING CATEGORIES OF MENTAL

HEALTH CONDITIONS

DAMIAN JOHN VIVIERS

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HEALTH CONDITIONS

by

Damian John Viviers

LL.B (*cum laude*)

LL.M (*cum laude*)

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Promoter

Dr DM Smit
University of the Free State

Co-promoter

Prof Dr JL Pretorius
University of the Free State

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Ut Omnia in Gloriam Dei

DECLARATION

I, Damian John Viviers, declare that the doctoral thesis (thesis) that I herewith submit for the doctoral degree qualification *Doctor Legum*, LLD, at the University of the Free State is my independent work and that I have not previously submitted it for a qualification at another institution of higher education.

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LIST OF ABBREVIATIONS

ADA	<i>Americans with Disabilities Act</i>
CCMA	Commission for Conciliation, Mediation and Arbitration
COIDA	<i>Compensation for Occupational Injuries and Diseases Act</i>
DDA	<i>Disability Discrimination Act</i>
DSM	<i>Diagnostic and Statistical Manual of Mental Disorders</i>
ECJ	European Court of Justice
ECHR	<i>European Convention on Human Rights</i>
ECtHR	European Court of Human Rights
EEA	<i>Employment Equity Act</i>
EEOC	Equal Employment Opportunity Commission
EAT	Employment Appeal Tribunal
EU	European Union
FHSA	<i>Federal Occupational Health and Safety Act</i>
HSW	<i>Health and Safety at Work Act</i>
ICD	<i>International Classification of Diseases</i>
ILO	International Labour Organisation
LRA	<i>Labour Relations Act</i>
MDD	major depressive disorder
OHASA	<i>Occupational Health and Safety Act</i>

PEPUDA	<i>Promotion of Equality and Prevention of Unfair Discrimination Act</i>
PHA	<i>Protection from Harassment Act</i>
PTSD	post-traumatic stress disorder
UDHR	<i>Universal Declaration of Human Rights</i>
UK	United Kingdom
UN	United Nations
USA	United States of America
WHO	World Health Organisation

GLOSSARY OF TERMINOLOGY AND CONSTRUCTS

As certain concepts used in this thesis are not encountered in everyday legal discourse, this glossary is intended to clarify the meaning of the terminology and constructs as they apply to mental health conditions, as well as disability flowing from mental health conditions, in the employment context.

Classification instrument: A resource document used in the diagnosis and establishment of mental health conditions, such as depression, according to a set of criteria in the psychological, psychiatric and legal fields.¹

Depression:² Depression is a mood disorder that causes persistent feelings of sadness and loss of interest. It is also termed “major depressive disorder” or “clinical depression”. Depression affects how an individual feels, thinks and behaves, and can lead to a variety of emotional and physical problems. People with depression may have trouble performing normal day-to-day activities and may sometimes feel that life is not worth living. The disorder constitutes more than just a bout of the blues; it is not a personal weakness, and those suffering from it cannot simply “snap out of it”. It may require long-term treatment. Depression may also be present and diagnosable over an extended period of time, which is then termed persistent depressive disorder (formerly known as “dysthymia”).

Discrimination: It should be noted, at the outset, that while the South African legal framework requires unfair discrimination to have occurred, the US and UK legal frameworks merely make reference only to discrimination. At its core, however, this concept involves the use of inappropriate or arbitrary criteria to distinguish between individuals or groups, bringing about less favourable consequences for members of one group in relation to those of another.³ The specific personal prejudice of persons will influence the group against whom they are likely to discriminate, as their prejudice determines which stereotypes they consider to be an “out group”.⁴

¹ For a detailed discussion, see the exposition in chapter 2.

² Mayo Clinic 2015. <http://www.mayoclinic.org/diseases-conditions/depression/basics/definition/con-20032977>. Accessed on 30/09/2015.

³ Du Plessis and Fouche 2015:91.

⁴ Whitley and Kite 2010:376.

Employment-at-will doctrine: It is important to note that when the United States of America is discussed, its employment system adheres to the employment-at-will doctrine, in terms of which it is presumed that the employment relationship is for an indefinite period and may be terminated by either party at any time.⁵ This renders both the employee and employer free to consider other options if the current employment relationship does not suit either party's requirements: The employee may seek a more satisfactory employment position, and the employer may look for a better worker.⁶

Mental health:⁷ Although the various elements of mental health are easy to identify, the term itself is more challenging to define. Mental health is a state of successfully performing mental functions, resulting in productive activities, fulfilling relationships with others, and the ability to adapt to change and cope with adversity specific to the individual's culture.

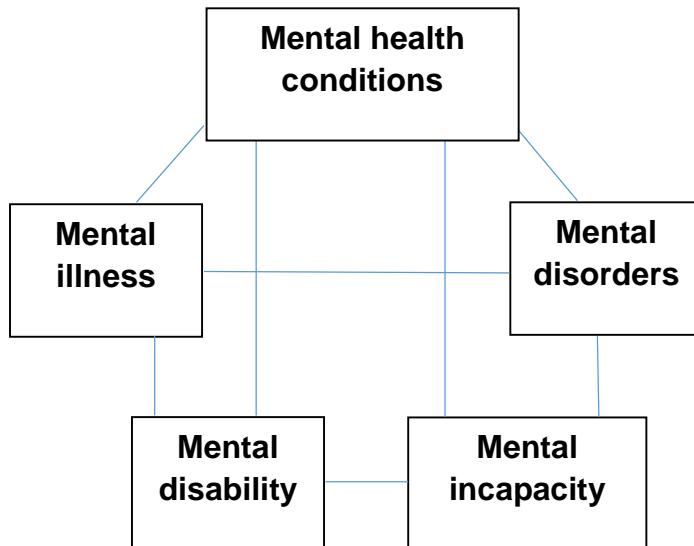
Mental health conditions: For the purposes of this thesis, the concept "mental health conditions" refers collectively to mental health problems, mental illness and mental disorders (the definitions of which are considered independently in the relevant sections of this thesis). If and where relevant, a different description may be used.

As a concept that falls outside the general legal discourse, the term "mental health conditions" can for the purposes of this study be diagrammatically represented as follows:

⁵ There has however been a move away from this doctrine over the last decade, with a growing emphasis on employees' rights. See Cornell University Law School 2014. <http://www.law.cornell.edu/wex/employment-at-willDoctrine>. Accessed on 10/09/2014.

⁶ Bonfield 2006:216.

⁷ Gabriel and Liimatainen 2000:10.



The diagram above illustrates that while all the various categories of mental health may be interlinked, they all fall under the umbrella concept of mental health conditions. Therefore, when used in this study, the term encapsulates all of these subcategories. Specific subcategories, such as mental disability, will be referred to where relevant and required by the context.

Mental illness:⁸ Mental illness refers collectively to all diagnosable mental health problems that become “clinical”, i.e. requiring a degree of professional intervention and treatment. Generally, the term refers to more serious problems instead of, for example, a mild episode of depression or anxiety requiring temporary help.

Prejudice: This may be viewed as an attitude;⁹ a subjective negative view of certain persons and situations. It deals with how individuals think and feel about other individuals and groups,¹⁰ and is based on a faulty and inflexible generalisation.¹¹ Closely linked to prejudice is stereotyping, which also involves negative beliefs and thoughts about people.¹² “Modern prejudice” is described as “any expression of prejudice that is subtle, easily justified, and hence, difficult to detect”.¹³

⁸ Gabriel and Liimatainen 2000:10.

⁹ Whitley and Kite 2010:370.

¹⁰ Whitley and Kite 2010:370.

¹¹ Brown 1995:6.

¹² Blaine 2012:66.

¹³ Blaine 2012:78.

Stigmatisation: This occurs when people rely on stereotypes to distinguish themselves from other groups. Stereotyped groups are isolated and vulnerable to stigmatisation and discrimination.¹⁴ These stereotypes are brought to the fore by repeated exposure to the subjective views of others in a majority group as well as by media such as newspapers, books and television, as well as social media.¹⁵

Workplace stress: Work-related stress is the response that people may have when presented with work demands and pressures that are non-aligned with or exceed their knowledge and/or capacity, and challenge their coping abilities. Stress occurs in a wide range of employment circumstances, but is often aggravated when employees feel they receive little support from supervisors and colleagues, and have little control over work processes. The term “work stress” is often mistakenly used to refer to mere work pressure or challenges, which are inextricably and inevitably part of any workplace, and is sometimes offered as an excuse for what is simply bad management practice.¹⁶

Vulnerability: Determining the parameters of and defining employment vulnerability is a complex issue, since specific criteria have not yet been established to determine which workers (currently falling outside the scope of the protection of labour laws) are vulnerable enough to receive protection.¹⁷ The International Labour Organisation has however given an indication of what constitutes employment vulnerability: “Vulnerable employment is often characterised by ... difficult conditions of work that undermine workers’ fundamental human rights.”¹⁸

¹⁴ Brown 1995:83.

¹⁵ Brown 1995:83.

¹⁶ WHO 2015a. http://www.who.int/occupational_health/topics/stressatwp/en/. Accessed on 10/11/2015.

¹⁷ Viviers and Smit 2014a:61.

¹⁸ Viviers and Smit 2014a:61.

“There are moments when one has to choose between living one’s own life, fully, entirely, completely – or dragging out some false, shallow, degrading existence that the world in its hypocrisy demands.”

— Oscar Wilde

PART 1

INTRODUCTION, EXPOSITION AND BACKGROUND

“Illusion is the first of all pleasures”
— Oscar Wilde

CHAPTER 1

INTRODUCTION AND GENERAL ORIENTATION¹

1.1 Introduction and background

Although particularly prevalent in recent years, mental health conditions are no new phenomenon in society or in employment, but can in fact be traced throughout history.² Individuals with mental health conditions are spread across society and workplaces both in South Africa and the rest of the world, which conditions are therefore likely to raise concerns in the employment realm.

Despite high rates of unemployment on a global scale, the discrimination and stigma experienced by persons with mental health conditions, especially depression, infringes their right of access to engage in employment and to participate in the world of work, as enshrined in the *Universal Declaration of Human Rights* (UDHR).³ Human rights violations perpetrated against people with mental health conditions, including exclusion from employment, are reported in most countries worldwide.⁴

The purpose of this thesis will be to evaluate the nature and scope of the legal frameworks governing certain categories of mental health conditions in the workplace, to identify the controversies, shortcomings and current *lacunae* in these frameworks, and to suggest recommendations and solutions to address these concerns in South Africa.

Although a magnitude of mental health categories exist, this thesis will specifically focus on the category of depression, as it appears to be most prevalent in employment, and therefore also most likely to raise legal concerns. It must be noted, however, that although depression will serve as primary example in this study, mental health

¹ This thesis reflects the legal position as on 30 April 2016.

² The WHO, for example, reported 15 years ago that mental health problems accounted for five of the ten leading causes of disability worldwide. See Harnois and Gabriel 2000:vi.

³ The UDHR states: “[E]veryone has the right to work.” See UDHR 1948: art 23(1). Also see Janda 2009:404.

⁴ WHO 2015b. http://www.who.int/features/factfiles/mental_health/mental_health_facts/en/index2.html. Accessed on 23/09/2015.

conditions will also be discussed in general, and reference will be made to other specific disorders, including post-traumatic stress disorder, bipolar disorder and schizophrenia, if and where relevant.⁵ Often, depression also goes hand in hand with these and other conditions.

Depression is a major occupational concern and leads to several negative effects, including absenteeism, occupational and social dysfunction, a decline in employee productivity, increased possibility of suicide and increased stigma and discrimination.⁶ An estimated 350 million people across the globe suffer from this disorder, and the number of individuals diagnosed with this condition worldwide increases by approximately 20% every year.⁷ It should also be noted that some 800 000 people commit suicide every year because of mental health conditions such as depression.⁸

Mental health conditions in South Africa are governed by the Constitution,⁹ various legislative provisions¹⁰ and the common law,¹¹ and consequently constitute a complex area of the South African legal system. This may be attributed to the fact that addressing mental health conditions in the legal sphere involves interplay between fundamental human rights and extends across various areas of employment law, including the law of disability, dismissal, unfair discrimination and reasonable accommodation. Mental health conditions also influence other areas of employment

⁵ This chosen structure links up with the title of this thesis, using mental health conditions in general as an umbrella concept for evaluation, while depression is used as a specific example in relation to the various legal tests, such as for disability and reasonable accommodation.

⁶ Hawkey 2014:32; Freeman and Joska 2012:203; Welthagen and Els 2012:5; Elinson *et al.* 2004:29. Those who do not understand depression generally view the disorder as a “moral weakness”, which serves only to perpetuate stigma and discrimination. See Seto 2012:7. A study in the USA also revealed that 43% of Americans consider depression to be a personal weakness. See Carvalheira 2011:28.

⁷ Healthline 2015. <http://www.healthline.com/health/depression/statistics-infographic>. Accessed on 23/09/2015. WHO 2012. <http://www.who.int/mediacentre/factsheets/fs369/en/>. Accessed on 23/09/2015.

⁸ WHO 2015b. http://www.who.int/features/factfiles/mental_health/mental_health_facts_en/index2.html. Accessed on 23/09/2015.

⁹ *Constitution of the Republic of South Africa*, 1996. The constitutional rights that orbit mental health in employment are the rights to dignity (section 10), equality (section 9), freedom and security of the person (section 12), privacy (section 14) and fair labour practices (section 23).

¹⁰ Pertinent statutes governing mental health in the workplace are the Employment Equity Act 55 of 1998, the Labour Relations Act 66 of 1995, the Basic Conditions of Employment Act 75 of 1997, the Occupational Health and Safety Act 85 of 1993, the Compensation for Occupational Injuries and Diseases Act 130 of 1993, the Prevention of Harassment Act 17 of 2011 and the Mental Health Care Act 17 of 2002.

¹¹ Various common law provisions impact mental health conditions in the workplace, including common law vicarious liability and the common law personality right to bodily integrity.

law, such as occupational health and safety, statutory compensation and employer liability. These areas, however, fall outside the scope of this thesis.

As alluded to above, certain constitutional rights impact on mental health conditions in the workplace. As will be demonstrated in this study, the rights to dignity equality, freedom and security of the person, privacy and fair labour practices of these persons are affected in employment.¹²

As further alluded to above, the common law personality right to bodily integrity of persons with mental health conditions may also be affected in the workplace. As will be demonstrated in the chapters that follow, the human psyche is part of the human body and may consequently be violated in the same manner.

Being prevalent in employment, which in South Africa is a heavily regulated field, mental health conditions such as depression attract several significant legal considerations. This research will indicate that individuals with mental health conditions are vulnerable in various areas of employment law due to certain *lacunae* and ambiguities in the existing South African legal framework.

Subsequent to a comparative and evaluative study on the position of mental health conditions, with specific reference to depression, in the workplace and the legal principles that govern them, this thesis will aim to draw lessons from the comparative jurisdictions of the United States of America and the United Kingdom¹³ in order to make suggestions to better address these concerns in South Africa.

1.2 Academic and practical reasons for the topic selection

The South African legal system lacks a uniform approach in dealing with mental health conditions in employment. The evaluations and analyses in this thesis are intended to provide new academic and practical insights into, as well as a new theoretical perspective on, the legal framework that governs mental health conditions in the South African workplace. The legal position on mental health conditions in South African law also constitutes an area that is currently under-researched and lags behind other

¹² See footnote 9 above.

¹³ These jurisdictions have been selected primarily as a result of the legal development in relation to mental health conditions under their respective legal frameworks. As will be illustrated in part 3, these jurisdictions also have well developed legislation, regulations, guidelines and judicial precedent governing these conditions in employment.

jurisdictions that have made noteworthy strides to address this issue, especially in recent years.

From a practical perspective, it is important to note that mental health concerns are among the most substantial contributors to disability and disease across the globe.¹⁴ Yet, as a cause of occupational disability, mental health conditions are under-recognised and undertreated worldwide.¹⁵ These concerns are equally relevant in low-income and high-income countries, and are not bound by factors such as age, gender or social strata.¹⁶ The World Health Organisation (WHO) also predicts a drastic increase in mental health problems in future.¹⁷ It is consequently imperative for the South African legal framework governing mental health conditions to function uniformly and with legal certainty.

This research is ultimately aimed at helping to solve the practical legal problems surrounding mental health conditions in the workplace. As the various chapters of this thesis will demonstrate, employees who suffer from mental health conditions constitute a vulnerable group in society, and particularly in the workplace. This thesis will evaluate the position on mental health conditions, specifically depression, in employment, as well as the legal measures that govern them, not only to clarify their current legal standing, but also to identify their legal limitations. The research also aims to provide clarity on the definitions and parameters applicable to mental health conditions, as well as the legislative provisions, legal rules and judicial precedents that may apply to a mental health concern in the workplace.

From both an academic and practical perspective, it is necessary to assess the position on mental health conditions in the South African legal framework, and its status, interpretation and application in the various areas of employment law, namely disability, unfair discrimination and reasonable accommodation. The parameters of mental health conditions will be extensively evaluated in order to address the legal shortcomings and suggest recommendations to remedy these concerns and contribute to a uniform approach in South African jurisprudence.

¹⁴ Harnois and Gabriel 2000:1.

¹⁵ Mokoka *et al.* 2012:34.

¹⁶ Harnois and Gabriel 2000:1.

¹⁷ WHO 2015. http://www.who.int/features/factfiles/mental_health/mental_health_facts/en/index2.html. Accessed on 23/09/2015. Also see Harnois and Gabriel 2000:1.

1.3 The legal research problem and objectives of the study

The problem explored in this study is that the current South African legal framework does not adequately address mental health conditions in the workplace. As will be illustrated below and in the following chapters, various areas of employment law lack legal certainty regarding these issues, which in turn leads to *lacunae* and ambiguities in the current legal framework.

The mental health conditions of employees and job applicants raise several legal concerns, including the following:

- Despite the prevalence of mental health conditions, especially depression, in South African society and the employment realm, there are limited legislative and judicial guidelines regarding the legal status of mental health conditions and the legal protection afforded to persons who suffer from them.
- Not all mental health conditions meet the requirements of a disability, and as such, cannot qualify for legal protection. Victims who suffer unfair discrimination and harassment based on their mental health will therefore be unable to rely on disability as a listed prohibited ground of unfair discrimination in terms of section 9(3) of the Constitution or section 6(1) of the *Employment Equity Act* (EEA) (as amended).¹⁸
- “Disability” in terms of the EEA does not explicitly cater for instances of “perceived disability” as a listed ground of unfair discrimination. Employees who are perceived to suffer from psychiatric disabilities, and are consequently treated as if they do, even if this is not the case, are therefore left without clear-cut protection under the South African legal system, exposing them to the severe stigma, prejudice and unfair discrimination associated with mental health problems.
- Although reasonable accommodation primarily constitutes a non-discrimination principle under the South African legal framework,¹⁹ employees whose mental health conditions do not meet the criteria of a disability in the legal sense will be excluded from the reasonable accommodation explicitly provided to individuals with disabilities (as a designated group for affirmative action

¹⁸ 55/1998, as amended by the *Employment Equity Amendment Act* 47/2013.

¹⁹ Pretorius *et al.* 2014:7-3.

measures). An employer will therefore be under no (automatic) obligation to assist these individuals in discharging the inherent requirements of their jobs.

- Although reasonable accommodation constitutes a flexible concept that requires an individualised assessment,²⁰ it is currently unclear under the South African legal framework which specific measures of reasonable accommodation could be implemented to cater for different mental health conditions, including depression.

For these reasons, an evaluative and comparative study is warranted in order to clarify the legal position on, and suggest recommendations for how to address, each specific mental health issue in both general and specific South African legal contexts.

It is necessary to investigate mental health conditions in the workplace more closely to establish in which sense employees may be vulnerable, what the employer's obligations and position are, and which areas of the law are relevant to mental health conditions, in order to provide appropriate recommendations for legal intervention and interpretation.

1.4 Research methodology

This study will be conducted through a comparative research methodology. It will also be evaluative and qualitative in nature. The sources of this dissertation will be extracted mainly from South Africa and the comparative jurisdictions of the United States of America and the United Kingdom.

It is important to note that although these comparative jurisdictions are doctrinally different from South African law in many respects, there are also definite similarities, as they all respect the fundamental human rights to equality, equal opportunity and dignity.

More specific reasons why these comparative jurisdictions have been selected include their disability-specific legislation that governs not only mental disabilities but also discrimination, reasonable accommodation and dismissals based on mental impairments. They are also considered important sources to draw on in order to make suggestions for the development and clarification of the South African legal position,

²⁰ Ngwena 2005b:556, referring to Sullivan 2001:116-117.

as International Labour Organisation (ILO) and WHO sources count them among the many foreign jurisdictions that have made significant strides to address the legal problem of mental health conditions in the workplace. In addition, these jurisdictions have a wealth of case law in relation to mental health conditions in the workplace, which together with their respective legislative frameworks, may offer South Africa some valuable lessons in clarifying its own legal position.

Various sources, including academic literature, legislation, case law, statistics and news articles, from both South Africa and the comparative jurisdictions will be cited, which will culminate in suggested solutions to address the current legal inadequacies in catering for mental health conditions in the South African labour context.

1.5 Key research questions

The study will aim to address the following key research questions:

- What is the nature, scope and prevalence of mental health conditions, particularly depression, in the workplace, and what are the legal frameworks governing this/these condition(s)?
- Does depression meet the criteria of a disability and should employees who are “perceived” to suffer from a disability based on their mental health condition(s) receive legal protection?
- What are the best avenues of approach to safeguard the right to equality and dignity of employees who experience mental health problems or develop mental health conditions, when exposed to unfair discrimination in employment?
- In cases involving incapacity dismissal based on mental ill health (such as depression), under which circumstances are employers obligated to consider measures of reasonable accommodation to assist the individual in discharging the inherent requirements of the job, and when may an employer rightfully dismiss an employee?
- What is the nature and scope of reasonable accommodation in the workplace for employees with mental health conditions, and which measures of reasonable accommodation would be appropriate to accommodate depression specifically?

1.6 A legal study

While this thesis constitutes a legal study, it is also necessary to investigate and evaluate certain social and psychological constructs that do not form part of the general legal discourse, but are required to provide background and clarity on the legal issues. For that reason, human behaviour, prejudice and statistics will be discussed to illustrate the prevalence and views of mental health problems at grassroots level. Various concepts from the psychological and psychiatric disciplines will also be evaluated to ensure optimal understanding of the nature of mental health conditions.

1.7 Structure of the thesis

The structure of this thesis may appear unusual, but has been purposefully designed to ensure that the information in the study is organised in the most logical and effective way. The thesis has been divided into four parts, clustering together chapters according to relevance and logical sequence. The structure may be outlined as follows:

- Part 1: Following this introductory chapter, chapter 2 will reflect on the nature, scope and background of mental health conditions in the legal and employment realms, as well as on the nature and scope of depression and its status in law.
- Part 2: Part 2 analyses the South African legal position in relation to mental health conditions and the world of work, with chapters 3, 4 and 5 containing the legal analysis in relation to the employment law areas of disability, discrimination and reasonable accommodation respectively.
- Part 3: Part 3 contains an analysis of the legal frameworks of the comparative jurisdictions of the United States (chapter 6) and the United Kingdom (chapter 7) in relation to mental health conditions and the world of work.
- Part 4: The final part reflects on the future handling of mental health conditions in the South African workplace. Chapter 8 provides the legal way forward drawing on the relevant lessons that South Africa stands to learn from the comparative jurisdictions. Chapter 9 contains the conclusions and practical recommendations for the South African legal framework.

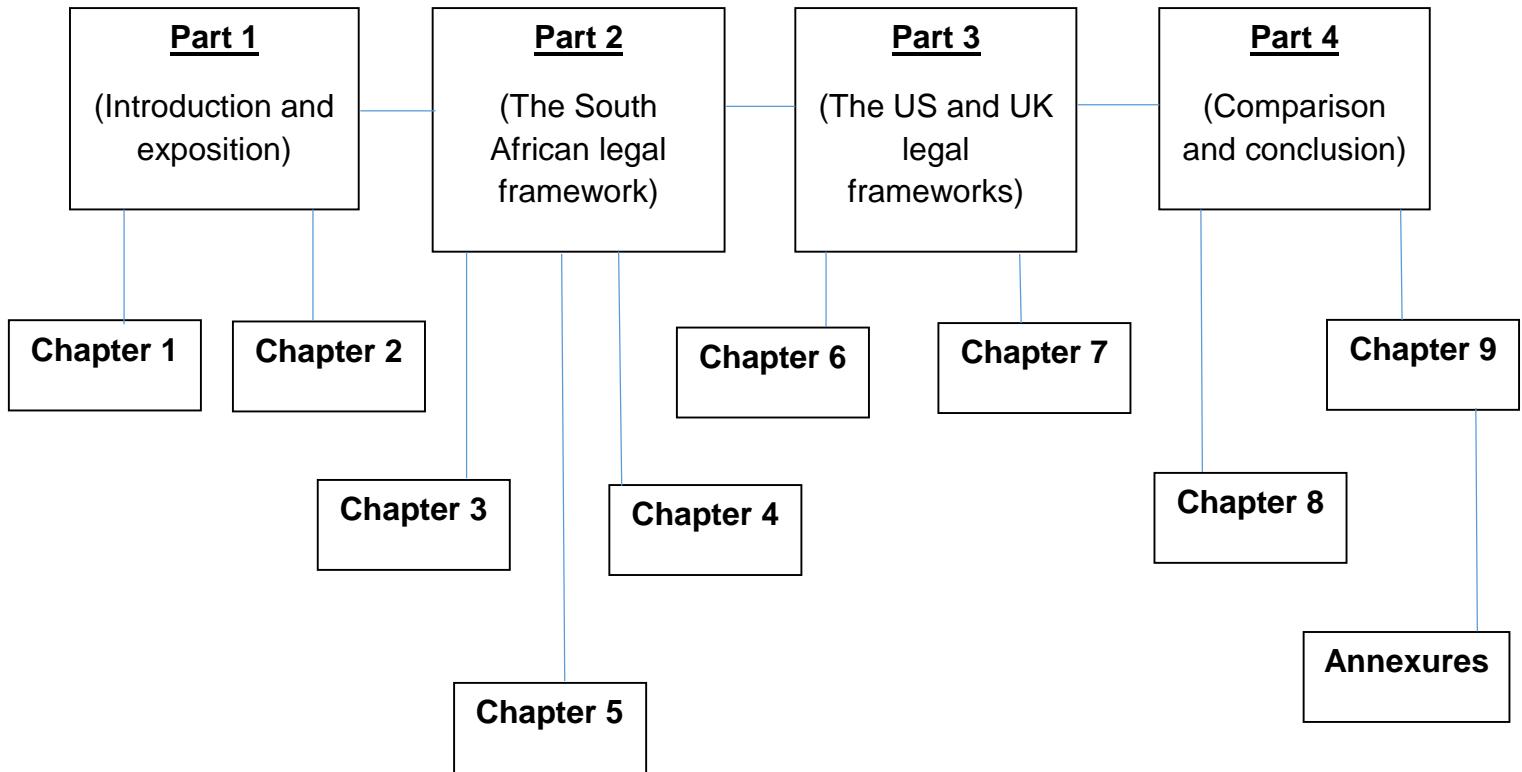
Part 4 also includes annexures, outlining practical suggestions to the recommendations. The annexures suggest a draft code of good practice, legislative and judicial guidelines and a workplace policy to address mental health conditions in the workplace.

A discussion of the South African legal position will precede a discussion of the position in the comparative jurisdictions. In this way, the South African legal framework and its shortcomings in relation to mental health conditions in the workplace will be investigated first, after which the legal position in terms of international and foreign law will be considered with these *lacunae* in mind. This will enable more convenient and effective comparison.

In addition, for each respective jurisdiction, mental disability is discussed first, followed by discrimination based on mental health and, finally, reasonable accommodation for mental health conditions in employment. This firstly enables an evaluation as to whether a particular mental health condition amounts to a legal disability and thus attracts protected legal status. This determination is followed by an assessment of whether discrimination based on an individual's mental health condition is treated as discrimination on the listed prohibited ground of disability or on the unlisted and arbitrary ground of mental health. In the final instance, a distinction can then be drawn between mental disabilities as a designated affirmative action group and explicit beneficiaries of reasonable accommodation, and mental health conditions that may rely on reasonable accommodation as a general non-discrimination principle.

As the evaluation of the relevant employment law under the South African legal framework is significantly more extensive than that for the comparative jurisdictions, the various areas of South African employment law are discussed in separate chapters in part 2 (namely chapter 3 on mental disability, chapter 4 on discrimination based on mental health, and chapter 5 on reasonable accommodation), while the corresponding areas under the comparative jurisdictions' legal frameworks are considered in single chapters in part 3 (chapters 6 and 7 respectively). This ensures clarity and conciseness, and makes for easier reading in general.

In practice, therefore, the thesis structure may be represented as follows:



1.8 Conclusion

In conclusion, this thesis will aim to achieve the following:

- To establish the legal position of persons with mental health conditions, particularly depression, in the workplace and evaluate the interconnectivity between mental health conditions and the various areas of employment law, namely –
 - disability;
 - discrimination; and
 - reasonable accommodation.
- To identify *lacunae*, ambiguities and shortcomings in the South African legal framework in relation to the legal areas mentioned above.
- To evaluate the legal position on mental health conditions in the comparative jurisdictions and extract lessons for the South African legal framework.

- To suggest solutions for the *lacunae*, ambiguities and shortcomings in the South African legal framework.

In pursuing substantive equality in terms of the South African Constitution, and striving for social justice along with the protection of human dignity, the current legal framework governing mental health conditions in employment needs to be investigated more closely so that any *lacunae*, ambiguities and controversies can be identified, and recommendations made for their correction.

To set the scene for such an investigation, the next chapter evaluates the nature, scope and prevalence of mental health conditions, especially depression, in the legal and employment realms.

CHAPTER 2

MENTAL HEALTH AND THE WORLD OF WORK¹

2.1 Introduction

This chapter will provide context on mental health conditions, particularly depression, and their manifestation in the employment sphere so that their nature and prevalence as well as the various concomitant social and occupational considerations can be understood. This will constitute the basis on which the study will examine the legal considerations applicable to mental health conditions, again with specific reference to depression, in the workplace in the South African and comparative foreign jurisdictions.

As a point of departure, the question may arise why depression should be singled out for investigation as opposed to all the other categories of mental health conditions.² Firstly, as the following sections will illustrate, depression is a severely debilitating illness with the highest prevalence in society and the workplace of all mental health conditions. Secondly, the disorder has an extensive history in law and is highly relevant in the modern workplace. Thirdly, despite its prevalence, negative effects and longstanding history in law, depression appears to be inadequately addressed by the existing South African legal framework.

The in-depth analysis of depression, its prevalence, social status and symptomology conducted in this chapter is highly relevant in eventually considering whether this mental health condition may meet the requirements of a legal disability, whether it can form the basis of unfair discrimination, and which measures of reasonable accommodation are considered most appropriate to deal with it in the workplace. This then points to an interesting intersection between mental health and the law, which is explored in the following section.

¹ It should be noted that this chapter is not jurisdiction-specific and provides a more global perspective on mental health conditions in employment. Specific reference will however be made to various jurisdictions if and where relevant.

² Other categories of mental health conditions include, but are not limited to, post-traumatic stress disorder, bipolar disorder, schizophrenia, alcohol and substance abuse, eating disorders and gender dysphoria. See DSM-5 2013.

2.2 The intersection between mental health and the law

2.2.1 Introduction

Over 2 000 years ago, the Roman philosopher Cicero remarked that “the diseases of the mind are more destructive than those of the body”.³ This observation is as true in the modern world as it was two millennia ago. Mental health conditions constitute one of the most critical social and occupational concerns worldwide and affect more human lives than any other disabling condition.⁴ Society appears to have a general misconception that mental illness is rare.⁵ On the contrary, however, the possibility that people may develop mental health conditions is considerable, given the alarming rates of violence, not only in South Africa but worldwide, as well as the stressors of daily life.⁶

The WHO has identified mental health conditions,⁷ and depression specifically, as the leading cause of disability worldwide.⁸ According to a WHO report in 2012, more than 500 million people across the globe were afflicted with serious mental health conditions, while the ILO has also recognised mental illness as affecting more human lives and resulting in a more significant waste of human resources than all other forms of disability.⁹ The WHO further indicates that 25% of people across the world will develop one or more mental or behavioural disorders in their lifetime.¹⁰

Mental health conditions in the workplace seem to have become more prevalent in recent years, which may be attributed to the shift from “brawn[-based] to brain-based” economies and industries.¹¹ Iacovides *et al* argue that modern employment environments have heightened levels of commitment and stress, which may contribute

³ Blair 1999:1351, referring to Pechman 1994:1.

⁴ Harnois and Gabriel 2000:1.

⁵ Blair 1999:1351. Mental disabilities and impairments must be distinguished from an individual’s mental capacity. The former is determined by a medical and psychiatric assessment, while the latter denotes an individual’s ability to make decisions. See Bartlett *et al.* 2007:4.

⁶ Bowman *et al.* 2007:32-33.

⁷ These include various conditions, such as post-traumatic stress disorder, schizophrenia and bipolar disorder.

⁸ Hawkey 2014:31; World Federation for Mental Health 2012:2, 6.

⁹ Harnois and Gabriel 2000:19. These authors compiled the research for, and wrote, the WHO report. As such, they will be referred to when this source is cited, even though the report remains an official WHO document.

¹⁰ Bell 2015:196, referring to the WHO’s World Health Report 2001:23.

¹¹ Bender and Farvolden 2008:73.

to an increase in mental health conditions in the workplace.¹² Particularly workplace stress is considered to be a prominent trigger for the onset of various mental disorders, especially depression.¹³ This is illustrated by the case of *Bennett and Modipak*,¹⁴ where an employee developed depression as a result of workplace stress. The Commission for Conciliation, Mediation and Arbitration (CCMA) held the following in this regard:

Modern work environments, due to the competitive nature of the markets, have experienced increased demands on employee's performance and concomitantly there has been a rise in general work stress levels. This is a commonly established phenomenon throughout industries and economic sectors. More so in those that face stiff competition and which are characterized by new modes of working and which involve an element of rapid change.¹⁵

But what makes the employment realm so significant in relation to people with mental health conditions? Work constitutes something more than simply earning a living in order to survive and is considered to be a vital component of social status and an important source of meaning in life.¹⁶ Employment constitutes an important link between an individual and the community, regulating people's everyday lives and providing a realistic means of satisfying some of their basic needs.¹⁷ The notion of being employed is directly linked with a sense of identity, self-esteem and self-worth, and in this regard, has extensive social and psychological significance.¹⁸ Unsurprisingly, therefore, the workplace is one of the key environments that affect mental health and mental well-being.¹⁹ Work is essential for increased enjoyment of life and an improved prognosis for people with psychiatric disabilities.²⁰ Moreover, people with mental health conditions want to be employed, and even individuals who have severe psychiatric impairments are capable of performing some sort of work.²¹

¹² Iacovides *et al.* 2003:210. Over the last 30 years in particular, changes in workplace structure have significantly contributed to increased stress and psychiatric morbidity in the employment realm. See Blackmore *et al.* 2007:2088.

¹³ Carvalheira 2011:21, referring to Weiten 2001.

¹⁴ 2004 25 ILJ 583 CCMA.

¹⁵ *Bennett and Modipak*: 590-591.

¹⁶ Iacovides *et al.* 2003:209.

¹⁷ Yur'yev *et al.* 2010:4. Also see Stefan 2002:5-6, who indicates that work offers structure to one's day and provides the opportunity for people to expand their social circle and contribute to society.

¹⁸ The South African judiciary also noted the social worth of work in *Standard Bank of South Africa v Commission for Conciliation Mediation and Arbitration* 2008 4 BLLR 356 LC: 65. See Ngwena 2010:56.

¹⁹ Harnois and Gabriel 2000:5.

²⁰ Jackson 2010:223; Baldwin and Marcus 2011, in Schultz and Rogers (eds) 2011:55.

²¹ Stefan 2002:7; Krupa 2011, in Schultz and Rogers (eds) 2011:93.

People with mental health conditions do not constitute a homogenous group. The experience and symptomology of people with depression, for example, will be distinctly different from those with schizophrenia. They do however potentially share certain characteristics, such as vulnerability and a need for legal protection, both in society and the workplace. This then points to the intersection between mental health and the law – a connection that can be traced back throughout history.

Psychiatry and psychology reportedly have their roots in ancient Greece, which cultures supported naturalistic explanations of mental disorders. Originally, the jurist, priest and physician existed as one person, and these various disciplines were bound together by magic, superstition and religion.²² Therefore, the study and understanding of “the history of madness” is also intertwined with the importance and relevance of the law and legal sources: After all, at the most basic level, the law provides the rights of the mentally ill individual.²³

Persons with mental health conditions have been disadvantaged, discriminated against, stigmatised and marginalised throughout history, and modern society is no exception.²⁴ The law serves as a vital tool to extend protection to these vulnerable individuals, and even though noteworthy strides have been made in recent years to address the rights of the mentally ill, a substantial amount of work still needs to be done in order to entrench their basic human rights, particularly in the workplace, as part of the status quo.²⁵

²² Swanepoel 2009b:6, 124-128. Johann Reil coined the term “psychiatry” in 1808 from the words *psyche* (mind) and *iatros* (doctor). See Burns 2010:35.

²³ Although the occurrence of mental disorders throughout history was predominantly associated with supernatural phenomena, new developments and views in the medical field eventually started incorporating it as a medical problem. Socrates and Hippocrates were among the first to suggest that the human body was not merely a series of parts, but included the health of the psyche. See Swanepoel 2009a:125, 129, 131, 139, 142-143.

²⁴ Swanepoel 2009b:3, 84. Examples of prejudice and disadvantage suffered by people with mental health conditions are evident across the globe. One such an example under the US legal framework is the case of *Buck v Bell* 274 US 200 1927, where the US Supreme Court upheld a statute in the state of Virginia sanctioning the compulsory sterilisation of people that had been diagnosed as “mentally retarded” for the protection and health of the state. See Ngwena 2006:633.

²⁵ Swanepoel 2009b:3.

2.2.2 Instruments used in the classification and diagnosis of mental health conditions

2.2.2.1 Defining mental health conditions

The term “mental health conditions” will be used throughout this study to refer collectively to mental health problems, mental illness and mental disorders.²⁶ The *ILO Executive Summary on Mental Health in the Workplace 2000* provides the following definitions for these terms:²⁷

Mental health: Though many elements of mental health may be identifiable, the term is difficult to define. Mental health is a state of successful performance of mental function, resulting in productive activities, fulfilling relationships with other people, and the ability to adapt to change and to cope with adversity specific to the individual’s culture.

Mental health problems: The vast majority of mental health problems are relatively mild, though distressing to the person at the time, and if recognised can be alleviated by support and perhaps some professional help.

Mental illness: Mental illness refers collectively to all diagnosable mental health problems that become “clinical”, that is where a degree of professional intervention and treatment is required. Generally, the term refers to more serious problems, rather than, for example, a mild episode of depression or anxiety requiring temporary help.

Mental disorders: Mental disorders are health conditions characterised by alterations in thinking, mood or behaviour (or some combination thereof) associated with distress and/or impaired functioning.

Swanepoel reports the following definition for mental illness, which is used collectively for all diagnosable mental disorders, including depression:²⁸

Mental illness is a disorder (or a disease) of the mind that is judged by experts to interfere substantially with a person’s ability to cope with the demands of life on a daily basis. It can profoundly disrupt a person’s thinking, feeling, moods and ability to relate to others. Mental illness is manifested in behaviour that deviates notably from normal conduct.²⁹

Section 1 of the *Mental Health Care Act*,³⁰ in turn, defines mental illness as follows:

[A] positive diagnosis of a mental health related illness in terms of accepted diagnostic criteria made by a mental health practitioner authorised to make such diagnosis.³¹

²⁶ For a practical illustration, please see the diagram under “Glossary of terminology and constructs”.

²⁷ Gabriel and Liimatainen 2000:10, underlining added.

²⁸ Diagnosable mental disorders are those mental health conditions that meet the minimum number of symptoms in order for the conditions to be classified as disorders in terms of internationally accepted criteria. These will be expanded on below.

²⁹ Swanepoel 2009b:98, referring to Bartol 2008:228-229. However, according to the American Psychiatric Association, there is no definition that can adequately capture the precise nature of mental illness, primarily because mental disorders are defined in terms of various concepts. See Swanepoel 2009b:99.

³⁰ 17/2002.

³¹ *Mental Health Care Act*: sec 1.

It is clear from both of these definitions that in order to establish the existence of a mental health condition, including depression, the diagnosis must be made by a mental health practitioner who is qualified to do so, in terms of official and accepted diagnostic criteria. Therefore, a consideration of the various classification systems and their use in the legal domain seems appropriate.

2.2.2.2 The *Diagnostic and Statistical Manual of Mental Disorders* and its use in the legal realm

The *Diagnostic and Statistical Manual of Mental Disorders* (DSM), first published in 1952 by the American Psychiatric Association,³² serves as the primary resource for establishing mental health conditions in the fields of psychology, psychiatry and law. The United States of America (USA), for example, has incorporated the use of the DSM into various areas of their law, including worker's compensation, determining healthcare benefits, and for the purpose of criminal and civil trials.³³ As will be illustrated below, however, the use of the DSM is not restricted to the USA, but extends to both the United Kingdom (UK) and South Africa as well.

The DSM is a detailed consensus document comprising the expert opinions, clinical trials and developments in the field, and was developed by a committee of experts to reflect particular diagnoses for various sets of symptoms.³⁴ As such, it constitutes a symptom-based classification system in terms of which an individual is diagnosed with a mental disorder in accordance with the symptoms that (s)he is experiencing.³⁵ A diagnosis will consequently be made if the individual exhibits a minimum number of symptoms under that particular diagnostic category.³⁶ Conversely, no diagnosis will be made if the person displays fewer than the minimum number of symptoms, irrespective of their severity.³⁷

³² The DSM was the first reference manual that could assist mental health-care practitioners and physicians in diagnosing mental illness. See Swanepoel 2009b:84.

³³ Bearden 2012:80; 98 and Hass 2013:685; 692.

³⁴ Hass 2013:685; 689; Allan 2005:52-53.

³⁵ An interesting point of criticism raised against this classification system is that afflicted individuals may exhibit only a few of the symptoms of an illness from which they are suffering, while potentially displaying several symptoms of an illness they do not have. See Bearden 2012:89; Smith 2002:451; Burns and Alonso-Betancourt 2013:151.

³⁶ Bearden 2012:89.

³⁷ In using depression as an example, Bearden states that in terms of this system, an individual who meets the minimum requirements may be diagnosed with depression, without ever having felt depressed. On the other hand, an individual who is suffering from a depressed mood may not be diagnosed as having

Psychiatric diagnoses play an important role in law, as they may often determine the outcome of a legal trial.³⁸ According to Mastroianni and Miaskoff, the most direct evidence of the existence of a mental impairment in the legal sense is a documented diagnosis from the current edition of the DSM, namely the DSM-5.³⁹ In addition, the DSM greatly assists the legal profession by stating that a mental disorder constitutes “a clinically significant behavioural or psychological syndrome that is attendant with present distress or disability”.⁴⁰ As such, the DSM classification system is used worldwide⁴¹ in the legal domain. Courts in the USA have called the system a “nationally recognized directory of mental illness, a reliable text and specialized literature with a rigorous process for including mental illness”.⁴² The Equal Employment Opportunity Commission’s (EEOC) *Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* specifically stresses the use of the DSM in cases brought under the *Americans with Disabilities Act*⁴³ (ADA) involving people with mental health conditions.⁴⁴ The legislative history of the ADA also shows that the intention was for the DSM to be used in judicial determinations.⁴⁵ Similarly, in the UK, research indicates that mental health diagnoses used in law largely stem from the DSM,⁴⁶ while South African case law⁴⁷ and the *Circular Instruction 172 Regarding Compensation for PTSD*⁴⁸ equally illustrate support for the legal use of the system. In terms of its future use, Bearden suggests that because of the difficulties experienced by the legal

depression if (s)he does not display the minimum number of symptoms. See Bearden 2012:89. Also see Hass 2013:691, where a similar explanation is given.

³⁸ Bearden 2012:93; Allan 2005:52.

³⁹ Mastroianni and Miaskoff 1997:727.

⁴⁰ The criterion also requires symptoms to result in “clinically significant distress or impairment in social, occupational, or other important areas of functioning”. DSM-IV-TR 1994:xxxii. Also see Hass 2013:689.

⁴¹ The use and applicability of the DSM in various jurisdictions, especially South Africa, the USA and the UK, will be illustrated in chapters 3, 6 and 7 respectively.

⁴² *Pandazidez v Va. Bd. of Education* 804 F. Supp. 794, 804 E.D. Va. 1992; *United States v Danser* 110 F. Supp. 2d 807, 829 S.D. Ind. 1999; *Discepolo v Gorgone* 399 F. Supp. 2d. 123, 127 D. Conn. 2005; Hass 2013:692. See also Smith 2002:455; Danforth 1999:674.

⁴³ Of 1990.

⁴⁴ Smith 2002:453.

⁴⁵ Blair 1999:1352.

⁴⁶ Burns 2010:37.

⁴⁷ See for example *Media 24 v Grobler* 2005 6 SA 328 SCA: 56-59; *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland* 2009 12 BLLR 1181 LAC: 24 and *Urquhart v The Compensation Commissioner* 2005 JDR 1008 E: 10.

⁴⁸ *Circular Instruction 172 Regarding Compensation for Post-Traumatic Stress Disorder (PTSD)* GN 936 Government Gazette 2003:27 Jun (25132): 2.

fraternity in understanding mental illness, the continued use of the DSM is reasonably foreseeable.⁴⁹

The latest edition, the DSM-5, was published in 2013 and reflects several minor alterations to the diagnostic categories in the DSM-IV.⁵⁰ Depending on the diagnosis, the diagnostic criteria tend to differ to varying degrees in successive editions of the manual.⁵¹ This may be attributed to the fact that the body of knowledge regarding the various mental disorders is constantly expanding.⁵² According to Zoellner *et al*, the changes contained in the DSM-5 diagnostic criteria are unlikely to have a significant impact on the conceptualisation of the diagnoses.⁵³ Therefore, in the discussion of depression below, the disorder will be considered in terms of the DSM-5 diagnostic criteria, although the relevant changes since the previous edition will be noted, primarily because most judicial precedents on mental health conditions still relied on diagnoses made under the DSM-IV.

2.2.2.3 The *International Classification of Diseases*

The DSM is however not the only source available for the classification and diagnosis of mental disorders. The other considerable source is the *International Classification of Diseases* (ICD-10), currently in its tenth edition, developed and published by the WHO and used by its 194 member states, including South Africa, the USA and the UK.⁵⁴

The ICD-10 provides prescriptive prototypes to guide the making of a diagnosis, as opposed to the checklists of criteria provided in the DSM.⁵⁵ Although there are textual differences between the DSM and the ICD, the treaties between the USA and the WHO ensure that the diagnostic code numbers are identical to maintain a uniform standard and some level of certainty.⁵⁶

⁴⁹ Bearden 2012:100.

⁵⁰ Zoellner *et al* 2013:277.

⁵¹ Allan 2005:53.

⁵² Allan 2005:53.

⁵³ Zoellner *et al* 2013:277.

⁵⁴ Burns and Alonso-Betancourt 2013:153. Also see WHO 2016. <http://www.who.int/countries/en/>. Accessed on 21/02/2016.

⁵⁵ Burns and Alonso-Betancourt 2013:153.

⁵⁶ Swanepoel 2009b:104.

Although the use of both the DSM and the ICD is supported in South Africa and the comparative jurisdictions, the DSM will be preferred throughout this thesis given the judiciaries, legislatures and mental health-care practitioners' apparent preference for it.

2.3 Mental health conditions in the workplace: A social deconstruction

2.3.1 The social attitude towards mental health

Mental health conditions are rather unique from other health concerns in that they are both prevalent and stigmatised in modern society.⁵⁷ The social understanding and the actual medical definition of mental health conditions are often at odds with each other, resulting in certain negative societal perceptions of the mentally ill.⁵⁸

Although discrimination based on mental health is rife, mental health conditions themselves do not discriminate, and constitute a universal phenomenon affecting all countries, cultures and people of all ages and socio-economic status.⁵⁹ However, despite the increased prevalence of mental health conditions across the globe, affecting a considerable percentage of the world's population, the stigma attached to mental health conditions is more significant today than it was 50 years ago.⁶⁰ According to Swanepoel, "people suffering from mental disorders are among the most stigmatised, discriminated against, marginalised, disadvantaged and vulnerable members of society".⁶¹ These individuals have been denied employment, housing and disability grants, merely because they are perceived to be "different" or "strange".⁶²

⁵⁷ Mastroianni and Miaskoff 1997:723.

⁵⁸ To the general public, mental illness is synonymous with insanity, and the concept of mental health conditions is associated with certain stereotypes and images, including straightjackets and electroshock therapy. See Mika and Wimbiscus 1997:174.

⁵⁹ Janda 2009:403.

⁶⁰ Janda 2009:412. Several reasons have been proposed for the increase in prevalence of mental health conditions, which are estimated to affect one in every four adults. These include the fact that the boundaries of normality appear to be shrinking; common misperceptions encourage everyone to identify colleagues, patients, friends and family members who may suffer from undiagnosed mental health conditions and need help; that prescriptions for psychiatric medications have drastically increased; that non-psychiatric mental health workers as well as lay and semi-lay counsellors attempt to diagnose mental health conditions and screen society for clients, and that the internet allows people to check symptoms and "diagnose" themselves and others using the information acquired online. See Ewart Smith 2012:75.

⁶¹ Swanepoel 2009b:3.

⁶² Perlin 1994:26-27.

Mental illness is regarded as the most stigmatised of all disabilities, and as a result, the rights of persons with mental illnesses are often at risk.⁶³ In a more advanced form, stigma leads to the exclusion of people with mental health conditions from several spheres of functioning and may have disastrous consequences when these individuals start believing that they deserve to be treated in such a manner.⁶⁴ Stigmatisation based on mental health can manifest itself in the denial of a person's competence, ability and potential, thereby directly affecting the individual.⁶⁵

Stigmatisation aggravates mental illness and can consequently serve as both a cause and a consequence thereof.⁶⁶ Being prejudiced towards and stigmatising persons with mental health conditions tend to trigger a chain reaction, as negative attitudes towards mental illness result in the construction and propagation of stereotypes, which in turn encourages discrimination.⁶⁷ Also relevant in the context of mental health conditions is the fact that stigma creates social hierarchies and constitutes a forum for the creation and perpetuation of structural inequality, which eventually leads to a pattern of disadvantage.⁶⁸ Moreover, in addition to the severe stigma attached to people with mental health conditions, these individuals are also often excluded from benefits associated with disability status once they have been diagnosed with a particular mental impairment.⁶⁹

Certain specific negative stereotypes about persons with mental health conditions include the perception that mentally ill individuals are unpredictable and dangerous,⁷⁰ childlike and incompetent; that they have a flawed or defective character, and that they are unmotivated and deceptive.⁷¹ Persons with mental health conditions are also

⁶³ Perlin 1994:26; Janda 2009:411; Baldwin and Marcus 2011, in Schultz and Rogers (eds) 2011:56.

⁶⁴ Harnois and Gabriel 2000:28.

⁶⁵ Harnois and Gabriel 2000:28.

⁶⁶ Discriminating against and stigmatising persons with mental health conditions are significant factors that influence whether or not an individual will seek treatment. By not seeking the appropriate treatment, mental illness will become worse over time and may result in homelessness, unemployment or even imprisonment. Continuous evolution in medical science is also directly linked to the manner in which society perceives, understands or misunderstands mental illness. See Janda 2009:408; 411.

⁶⁷ Janda 2009:413.

⁶⁸ Ngwena 2010:231-232.

⁶⁹ Stefan 2000:280.

⁷⁰ The assertion that persons with psychiatric disabilities are inherently violent continues to breathe life into this fear-inducing stereotype. See Laden and Schwartz 2000:247. See also Felts 2006:122 and World Federation for Mental Health 2012:25.

⁷¹ Janda 2009:413.

perceived to be violent and unable to make rational judgments.⁷² A further misconception in society that serves to disadvantage those suffering from mental health problems is the belief that mental health conditions can easily be identified by lay persons, whose “diagnoses” stem from the “common sense notion of crazy behaviour”.⁷³

Due to this ignorance in society about mental health conditions, people generally are reluctant to accept that these conditions may be attributed to a variety of genetic, biological, social and environmental factors, and that mental illness is “a real and disabling health condition, not a character flaw”.⁷⁴ Instead, social attitudes towards people with mental health conditions remain largely negative:

Social discrimination against people with mental illness is widespread. Treating people differently on the basis of mental illness does not provoke the same moral outrage as that inspired by differential treatment on the basis of race, sex or even physical disability ... Most people would still likely prefer not to have a coworker or employee with a mental illness.⁷⁵

Therefore, there is an urgent need for a paradigm shift in social attitudes regarding people with mental health conditions. Society in general must accept the prevalence of mental illness and contribute to removing the current barriers to equal opportunity for persons with mental health conditions, particularly in the workplace.

2.3.2 Interface between mental health conditions and the workplace

Persons with mental health conditions are in many instances both able and willing to work. In many instances also, unemployment is a major impediment to overcoming or coping with mental health conditions, which makes it essential to give effect to the right of persons with mental health conditions to work.⁷⁶

Yet, similar to the situation in broader society, persons with mental health conditions experience various forms of discrimination in the workplace also, including dismissal, the denial of employment, enduring exposure to demeaning and condescending attitudes from supervisors and co-workers,⁷⁷ as well as falling victim to harassment

⁷² Concannon 2012:92; Stefan 2000:278.

⁷³ Perlin 1998:786.

⁷⁴ Janda 2009:414.

⁷⁵ See Janda 2009:403-404, 406, referring to the report *The Numbers Count: Mental Disorders in America* by the National Institute of Mental Health, 2008.

⁷⁶ Janda 2009:420.

⁷⁷ Stefan 2002:4.

and workplace bullying.⁷⁸ As a result of stigma, many employers are unwilling to hire people with mental health conditions, and many employees are unwilling to have them as their colleagues.⁷⁹ These negative attitudes play no minor role in reinforcing the exclusion of persons with mental health conditions from the workplace, whether or not they are willing and able to work.⁸⁰

Individuals stigmatised due to mental health conditions are not only prime victims of harassment in the workplace, but are often on the receiving end of adverse employment action, such as the denial of a promotion.⁸¹ As these factors may serve to aggravate a mental condition, the workplace itself may become a cause of mental illness.⁸² A stressful work environment may also trigger mental health conditions, as stress is a powerful debilitator among employees and has been singled out as the factor most likely to negatively affect mental health.⁸³

The primary stereotype regarding people with mental health conditions in the workplace is that they are less capable of performing the duties of their positions, mainly because of a misunderstanding of the nature of their mental illness.⁸⁴ This stereotype causes employers to underestimate employees with mental health conditions and serves as a barrier to equal opportunity: Such employees are for example less likely to be promoted or rewarded.⁸⁵ Support for mental health conditions in the workplace is also often inadequate, making these employees hesitant to disclose their mental illness to the employer.⁸⁶

The stereotyping of individuals with mental health conditions is more severe than that experienced by people with physical health issues, primarily because of the invisible

⁷⁸ Employees with mental health conditions also reported having had their employment terminated while they were still adjusting to their medication(s). See Stefan 2002:4.

⁷⁹ One study revealed that “in comparison to persons with general medical disorders, mentally ill persons have the strongest stigma rankings, lowest employability rankings, and largest productivity adjusted wage differentials”. See Janda 2009:423, referring to Baldwin and Marcus 2006:388. See also Baldwin and Marcus 2011, in Schultz and Rogers (eds) 2011:56.

⁸⁰ Janda 2009:414.

⁸¹ Janda 2009:404.

⁸² Janda 2009:420.

⁸³ Stress-related disability is prevalent and can no longer be seen as a unique occurrence. See Janda 2009:421.

⁸⁴ Janda 2009:424.

⁸⁵ Janda 2009:424.

⁸⁶ A former chair of the Equality and Human Rights Commission noted that “it is probably still more difficult, in the 21st century, to come out as having mental health conditions than it was to reveal that you were gay or lesbian thirty years ago”. See Janda 2009:426.

nature of mental illnesses.⁸⁷ Amplifying the problem in relation to mental health conditions is the fact that they may develop from physical conditions, often also existing concurrently.⁸⁸ In the employment context, the hidden nature of mental health conditions perpetuates and aggravates the misunderstanding of these disorders by employers, who view them as “conditions of laziness, stupidity or bad temperament”.⁸⁹

Since employees with mental health conditions are also perceived to be violent and unpredictable, an employer’s fear of violence at work and a possible hostile work environment provides another significant barrier to employment for people with mental illness.⁹⁰ Employers who do not have experience in employing people with mental health conditions have in fact revealed that their primary concerns in employing these individuals are possible strange behaviour and the possibility of workplace violence.⁹¹

This discrimination experienced by these vulnerable workers infringes on one of their most fundamental human rights, namely the right to work, as enshrined in the *Universal Declaration of Human Rights* (UDHR).⁹² However, Janda reports that although the UDHR asserts this right, international legislation giving effect to it is scarce and unsatisfactory.⁹³ The WHO agrees, stating that “most existing national mental health legislation is outdated and actually takes away the rights of mentally ill persons, rather than providing protection”.⁹⁴ An analysis of international disability legislation also reveals unequal treatment of mental disabilities in relation to physical disabilities, as most of the statutes do not even specifically provide for the protection of people with mental health conditions.⁹⁵

⁸⁷ Danforth 1999:664. Cases involving mental illness are also considerably more complex than those involving physical illness. See Blair 1999:1351. Mental health conditions seldom have specific objective criteria, such as biological markers and pathology results, which can aid in the “visibility” of their presence. See Allan 2005:53.

⁸⁸ See for example *Pretorius v Compensation Commissioner* 2010 31 ILJ 1117 O.

⁸⁹ Danforth 1999:664, 666.

⁹⁰ Fear of workplace violence and resultant employer liability has been suggested as a reason why courts and legislatures in the USA, for example, seem reluctant to extend protection to persons with mental health conditions. See Danforth 1999:678, 684, 685.

⁹¹ Danforth 1999:678, 684, 685.

⁹² See UDHR 1948: art 23(1). Also see Janda 2009:404.

⁹³ Janda 2009:416.

⁹⁴ Janda 2009:416, referring to the WHO’s *Handbook on Mental Health, Human Rights and Legislation* 2005.

⁹⁵ However, accepting that mental health and physical health are of an equal status may prove challenging, as several mental illnesses are not as visible as physical illnesses. See Janda 2009:414, 416.

In light of the “unprecedented number of workers affected by mental illness and the resulting negative effects upon the economy”, along with the concomitant costs for employers as well as the stigma and discrimination suffered by these individuals,⁹⁶ a re-analysis of the legal framework governing mental health conditions is required.

As mentioned, this thesis will be exploring depression as primary example of a mental health condition prevalent in the modern-day workplace. The following section will therefore consider this disorder and its features that may create problems in the world of work.

2.4 Depression and the world of work: a social and occupational double helix

... I feel exhausted all the time and keep getting sick and taking time off. My boss is asking me what's wrong but I can't speak to him about feeling so overwhelmed and unable to cope – that's like admitting I can't handle the pace. I can't afford to lose my job. I get frustrated with feeling like this when everyone around me seems to cope and be happy all the time, it makes me angry and I sometimes feel like lashing out. The only thing that seems to help is a few drinks in the evening ...⁹⁷

2.4.1 Nature and prevalence of depression

Depression has been described as a “whole body illness” that displays symptoms of physical, cognitive and behavioural impairment, presents as feelings of extreme sadness, helplessness and hopelessness,⁹⁸ and is associated with high rates of distress.⁹⁹ It causes an individual to become increasingly more inefficient,¹⁰⁰ which may contribute to difficulties in employment, where the individual is expected to be productive.¹⁰¹ The disease is notorious for the fact that it presents differently in different people, its changeable nature and its high rate of reoccurrence, as symptoms never fully disappear, but merely vary in intensity over time.¹⁰²

⁹⁶ For example, it was estimated in 2007 that mental illness cost the United States economy approximately \$150 billion a year. Janda 2009:404-406.

⁹⁷ Hawkey 2014:31, referring to a report of the Depression and Anxiety Group's call centre in Johannesburg.

⁹⁸ Hawkey 2014:31.

⁹⁹ Freeman and Joska 2013:16; Elinson *et al.* 2004:29.

¹⁰⁰ Carvalheira 2011:23.

¹⁰¹ Depressed individuals experience low levels of energy and motivation, and struggle to engage in basic everyday tasks, even to the point where they cannot get out of bed. See Weiten 2014:606.

¹⁰² Sandoval 2014:701; World Federation for Mental Health 2012:14; Gotlib and Hammen 2002:21.

Depression may occur along with other illnesses or hide behind their symptomology (so-called “masked depression”).¹⁰³ People may develop depression outside the workplace, with the disorder affecting their employment, or may develop depression due to occupational factors.¹⁰⁴ Irrespective of the form it takes, however, it remains a serious mental health issue that prevents afflicted persons from leading a normal life, and cannot be considered a sign of personal weakness.¹⁰⁵ It affects their ability to obtain and retain employment as well as to perform other activities that form part of daily life.¹⁰⁶

Depression is in fact a deceptively mild term for an extremely debilitating illness.¹⁰⁷ However, although it can be managed and treated with primary care¹⁰⁸ and is generally regulated with the use of antidepressants¹⁰⁹ and psychotherapy,¹¹⁰ most people suffering from depression do not receive treatment, and fewer than 25% of afflicted individuals worldwide have access to these treatments.¹¹¹ According to the WHO, the average rate of untreated depression is 50% worldwide.¹¹²

Depression is episodic in nature, normally persisting throughout a person’s life. Its onset is however usually between the age of 20 and 30, which makes it a particularly relevant concern in the employment sphere, as people typically seeking employment or being employed and attempting to advance their careers fall into this age bracket.¹¹³

Apart from being the most common mental health problem in the Western world, it also affects all other societies, regardless of race, gender or social status.¹¹⁴ Indeed, depression has been described as one of the most widespread, debilitating and costly

¹⁰³ World Federation for Mental Health 2012:14.

¹⁰⁴ Bender and Farvolden 2008:74.

¹⁰⁵ World Federation for Mental Health 2012:20.

¹⁰⁶ Depression has also been identified as the most predominant and costly mental health issue among working-age individuals. See World Federation for Mental Health 2012:20. Also see Kessler and Bromet 2013:120.

¹⁰⁷ Blair 1999:1353.

¹⁰⁸ World Federation for Mental Health 2012:6.

¹⁰⁹ Antidepressants constitute a class of “psychotropic medications” that control the level of neurotransmitters in the human brain. See Blair 1999:1354.

¹¹⁰ World Federation for Mental Health 2012:7; Blair 1999:1354.

¹¹¹ World Federation for Mental Health 2012:9.

¹¹² World Federation for Mental Health 2012:9.

¹¹³ Freeman and Joska 2012:203; Freeman and Joska 2013:16.

¹¹⁴ Welthagen and Els 2012:1.

health problems in existence.¹¹⁵ In 2012, the WHO reported depression as the leading cause of disability in the world, affecting more than 350 million people worldwide.¹¹⁶

Also according to the WHO, depression is set to become the leading cause of disease in the world by 2030.¹¹⁷ A 2014 study in the USA revealed that between 6,9% and 16,2% of employees were clinically depressed.¹¹⁸ In South Africa, studies have revealed that at least one in ten South Africans will be diagnosed with depression at some point in their lives.¹¹⁹ The disease itself does not discriminate, and affects a wide variety of people in the employment sphere, ranging from “domestic workers to CEOs”.¹²⁰

As a major occupational concern, depression has several negative effects in the workplace, including absenteeism, occupational and social dysfunction, lower employee productivity, an increased possibility of suicide, and increased stigma and discrimination.¹²¹ Depression reportedly has a more significant impact on work performance than several other major health problems, including diabetes, back problems, arthritis and hypertension.¹²²

Depression also results in high costs for employees¹²³ and employers. In addition to the costs associated with presenteeism¹²⁴ and absenteeism,¹²⁵ depression also

¹¹⁵ World Federation for Mental Health 2012:7; Welthagen and Els 2012:1.

¹¹⁶ Hawkey 2014:31; World Federation for Mental Health 2012:2, 6.

¹¹⁷ World Federation for Mental Health 2012:2; Freeman and Joska 2012:203; Freeman and Joska 2013:16.

¹¹⁸ Hawkey 2014:31.

¹¹⁹ Freeman and Joska 2013:16.

¹²⁰ Kahn 2015. <http://www.bdlive.co.za/national/health/2015/02/04/depressed-workers-hide-condition-according-to-study>. Accessed on 04/02/2015.

¹²¹ Hawkey 2014:32; Freeman and Joska 2012:203; Welthagen and Els 2012:5; Elinson *et al.* 2004:29; Blackmore *et al.* 2007:2088; Seto 2012:7; Carvalheira 2011:28.

¹²² Welthagen and Els 2012:5.

¹²³ Depression tends to indirectly worsen an afflicted individual’s physical health because of the individual’s unwillingness to participate in rehabilitation, poor diet and general decline in self-care. See Welthagen and Els 2012:5.

¹²⁴ Where employees are on the job, but are not fully functional because of their medical conditions (in this case, their mental health conditions). See Bender and Farvolden 2008:74. Also see Dewa and Mcdaid 2011, in Schultz and Rogers (eds) 2011:42.

¹²⁵ In addition to the increased number of sick leave days taken by people with depression, these individuals have also been found to be unproductive for at least two hours per day. Thus, if an employee works a traditional eight-hour workday, 25% of that day will be wasted. See Felts 2006:132. Also see Dewa and Mcdaid 2011, in Schultz and Rogers (eds) 2011:42.

affects burnout levels,¹²⁶ stress-related ill health¹²⁷ symptoms and work engagement levels.¹²⁸ The direct costs as a result of the disorder account for 31% of the financial burden caused by depression and include costs associated with hospitalisation, medical treatments, medication, therapy and other medical expenses.¹²⁹ Indirect costs are more difficult to calculate, but account for 69% of the burden, including costs associated with absenteeism, disability, suicide and low wages.¹³⁰ Employees with depression are three to four times more likely to take sick leave than their healthy peers.¹³¹ A 2015 study confirms that depression adversely affects employee productivity, resulting in an average of 18 days' sick leave per episode.¹³² It has also recently been reported that depression costs employers in the USA approximately 200 million workdays each year.¹³³

The onset and prevalence of depression has been directly linked to the individual's social environment, as depression generally stems from problematic social circumstances.¹³⁴ In light of the fact that people spend the majority of their time at work, it naturally follows that the social environment in the workplace may be a primary contributor to the onset of depression. This is aggravated by the strong correlation between depression and life stress.¹³⁵ The workplace is inevitably a stressful environment and may thus contribute to the development of depression. Increased job strain and workplace stress places employees at a higher risk for 12-month depressive episodes.¹³⁶

¹²⁶ Burnout refers to a "negative work-related well-being state". Employees who suffer from burnout are exhausted, feel ineffective, are detached from the job, feel a lack of accomplishment and are cynical. Burnout is an extended response to "chronic and interpersonal stressors" encountered in the employment environment. It affects not only the employee, but also the employer, as it is accompanied by absenteeism, job withdrawal and intentions to resign. See Welthagen and Els 2012:2, 4; Iacovides *et al.* 2003:209.

¹²⁷ May be physical or psychological in nature and is generally associated with absenteeism, low energy levels and loss of concentration and attentiveness. See Welthagen and Els 2012:2.

¹²⁸ Welthagen and Els 2012:1. In the USA, for example, depression costs \$43,7 billion annually in losses due to absenteeism, presenteeism and treatment costs. See Sandoval 2014:688-689.

¹²⁹ Welthagen and Els 2012:1. Research has revealed that depressed employees cost their employers anywhere from 70% to 147% more in terms of medical costs. See Carvalheira 2011:30.

¹³⁰ Welthagen and Els 2012:1.

¹³¹ Sandoval 2014:703.

¹³² Kahn 2015. <http://www.bdlive.co.za/national/health/2015/02/04/depressed-workers-hide-condition-according-to-study>. Accessed on 04/02/2015.

¹³³ Sandoval 2014:703.

¹³⁴ Gotlib and Hammen 2002:314.

¹³⁵ Gotlib and Hammen 2002:317, 319.

¹³⁶ Blackmore *et al.* 2007:2088.

Suicide as a specific aspect of depression deserves independent consideration. Suicide is defined as “the act of taking one’s life voluntarily or intentionally”.¹³⁷ The WHO has estimated that approximately one million people commit suicide each year.¹³⁸ The link between employment and suicide has also been confirmed, as well as the impact of employment or employment status on the increased risk of suicide.¹³⁹ In addition, the prevalence of suicide reportedly varies across different occupational groups.¹⁴⁰

2.4.2 Origins and development of depression as a mental health condition

Depression is hardly a new phenomenon, as many prominent figures in history acknowledged experiencing symptoms of the disorder. The biblical account of King Saul and the character Ajax in Homer’s *Iliad* are examples.¹⁴¹ Another historical figure who experienced severe depression and suicidal tendencies was the Russian author Leo Tolstoy, particularly while he was completing his well-known work *Anna Karenina*, when his depression became severe and pushed him to the brink of suicide.¹⁴² About this period, Tolstoy wrote the following:

The thought of suicide came to me as naturally as thoughts about improving life had come to me formerly. The thought was so tempting that I had to use guile against myself so as not to bring it to fulfilment too hastily ... I ... used to hide rope lest I should hang myself on the cross beam of the bookshelves in the room where I undressed alone every evening, and gave up hunting with a gun lest I should be tempted by so easy a way of delivering myself from life.¹⁴³

Tolstoy’s symptoms are demonstrably characteristic of the modern diagnosis of depression, and are also not a rare or unusual occurrence. In fact, they are so widespread that almost all people have had some experience with it, either personally or through somebody they know.¹⁴⁴ Other historical figures who struggled with

¹³⁷ However, behaviour that is self-defeating or may lead to death, but lacks the intention of dying is not considered to be suicidal behaviour. See Winokur 1981:67.

¹³⁸ This results in an average of one suicide every 40 seconds. See Min *et al.* 2015:72. It has also been reported that suicide attempts outnumber completed suicides by a ratio of as many as ten to one. See Weiten 2014:609, referring to Sudak 2009.

¹³⁹ Yur'yev *et al.* 2010:62; Min *et al.* 2015:72.

¹⁴⁰ The risk appears to be higher among physicians, pharmacists, nurses, veterinarians, police officers and military personnel. Unemployed people or people in a precarious employment relationship are also more likely to commit suicide. See Min *et al.* 2015:72.

¹⁴¹ Carvalheira 2011:21.

¹⁴² Winokur 1981:1.

¹⁴³ Winokur 1981:1.

¹⁴⁴ Winokur 1981:1.

depression include Abraham Lincoln, Tchaikovsky, Edgar Allan Poe, Winston Churchill,¹⁴⁵ Marilyn Monroe, Vincent van Gogh and Ernest Hemingway.¹⁴⁶

In 1864, the French psychiatrist Flaret investigated and presented an illness that was categorised by recurring attacks of mania¹⁴⁷ and depression.¹⁴⁸ Around the same time, another French physician, Baillarger, came to the same conclusion.¹⁴⁹ These two were however not the first to notice the symptoms of depression and isolate it as a distinct form of illness. Although not labelled as such at the time, Hippocrates had already identified depression and mania, but regarded them independently without making any link between the illnesses.¹⁵⁰ In 1896, Kraepelin placed depression in its appropriate context and identified that this “manic-depressive disease” comprised episodes of illness that alternated with long periods of health.¹⁵¹ Depression remained an interesting research topic in the years that followed, until its inclusion in the ICD and DSM classification systems,¹⁵² where the diagnosis has consistently evolved.

Depression across all cultures has been a key area of research and investigation since the 1960s and 1970s.¹⁵³ These studies, however, encountered many obstacles. Although the symptomology of depression appears to be similar across cultures, the modern conception of what depression is has been influenced and developed by Western culture. This has caused difficulties in studies of cultures that do not share the Western emphasis on positive emotions and positive perceptions of the self as the norm.¹⁵⁴

¹⁴⁵ Carvalheira 2011:21, referring to Gilbert 1993.

¹⁴⁶ Weiten 2014:606.

¹⁴⁷ “Mania” may be defined as a “mental illness in which a person becomes very emotional or excited”. See Merriam-Webster Dictionary 2015a. <http://www.merriam-webster.com/dictionary/mania>. Accessed on 13/08/2015.

¹⁴⁸ Winokur 1981:27.

¹⁴⁹ Winokur 1981:27.

¹⁵⁰ Winokur 1981:27.

¹⁵¹ Winokur 1981:28.

¹⁵² Depression was included in the DSM’s third edition in 1980 and in the ICD in 1992.

¹⁵³ Gotlib and Hammen 2002:467. The first cross-national study of depression was conducted and published by Weissman *et al* in 1996, using the DSM-III criteria for major depression. See Kessler and Bromet 2013:120.

¹⁵⁴ Gotlib and Hammen 2002:467-468.

2.4.3 Depression under the *Diagnostic and Statistical Manual of Mental Disorders*

Depression, as it is commonly known, is referred to as major depressive disorder (MDD) in clinical terms. Although “depression” is used as a blanket term in this thesis, the most prevalent of the depressive disorders – and therefore also the ones most likely to be diagnosed in those in the workplace – are MDD and persistent depressive disorder (dysthymia).¹⁵⁵

Persistent depressive disorder is a new addition to the DSM-5 and combines the former diagnoses of dysthymia and chronic depression found in the DSM-IV.¹⁵⁶ The primary and consistent link between these diagnoses is that they require an individual to feel depressed for most of the day, almost every day, for at least two years. The link between these forms of depression is described as follows:

The common feature of all of these disorders is the presence of sad, empty, or irritable mood, accompanied by somatic and cognitive changes that significantly affect the individual’s capacity to function. What differs among them are issues of duration, timing, or presumed etiology.¹⁵⁷

MDD, in turn, is characterised by discrete episodes that last at least two weeks, even though most episodes tend to last longer, and involves identifiable changes in “affect, cognition, and neurovegetative functions and inter-episode remissions”.¹⁵⁸ Even though an individual may be diagnosed following a single episode, the disorder is primarily recurrent.¹⁵⁹ Persistent depressive disorder (dysthymia) constitutes a more chronic form of depression and will be diagnosed when the mood disturbance lasts for at least two years.¹⁶⁰ MDD may precede persistent depressive disorder (dysthymia) and MDD episodes may occur during the time when persistent depressive disorder (dysthymia) is present.¹⁶¹

There exists a clear overlap between MDD and persistent depressive disorder (dysthymia), while the pertinent and essential distinction between these two conditions

¹⁵⁵ Uher *et al.* 2014:465; Gotlib and LeMoult 2014:193, 197-198.

¹⁵⁶ “Dysthymia” refers to a persistent mild form of depression, while “chronic depression” constitutes a form of low-grade depression that remains present for several years. See DSM-IV 1994:317-318.

¹⁵⁷ DSM-5 2013:155.

¹⁵⁸ DSM-5 2013:155.

¹⁵⁹ DSM-5 2013:155.

¹⁶⁰ DSM-5 2013:155.

¹⁶¹ DSM-5 2013:169.

is that the latter condition presents with long term features, while the former presents with more recurrent features.

For the purposes of this study, it is necessary to consider the specific diagnostic criteria and features of depression.¹⁶² These will be particularly relevant when considering the requirements of a disability in the legal sense, and the assessment of whether depression may qualify as such. The DSM-5 indicates the diagnostic criteria for MDD as follows:¹⁶³

A. Five (or more) of the following symptoms have been present during the same 2-week period and represent a change from previous functioning: at least one of the symptoms is either (1) depressed mood or (2) loss of interest or pleasure.

Note: Do not include symptoms that are clearly attributable to another medical condition.

1. **Depressed mood most of the day, nearly every day**, as indicated by either subjective report (e.g., feels sad, empty, hopeless) or observation made by others (e.g., appears tearful).
2. **Markedly diminished interest or pleasure in all, or almost all, activities** most of the day, nearly every day (as indicated by either subjective account or observation).
3. Significant **weight loss** when not dieting **or weight gain** (e.g., a change of more than 5% of body weight in a month), or decrease or increase in appetite nearly every day.
4. **Insomnia or hypersomnia** nearly every day.
5. **Psychomotor agitation or retardation** nearly every day (observable by others, not merely subjective feelings of restlessness or being slowed down).
6. **Fatigue or loss of energy** nearly every day.
7. **Feelings of worthlessness or excessive or inappropriate guilt** (which may be delusional) nearly every day (not merely self-reproach or guilt about being sick).
8. **Diminished ability to think or concentrate, or indecisiveness**, nearly every day (either by subjective account or as observed by others).
9. **Recurrent thoughts of death** (not just fear of dying), recurrent suicidal ideation without a specific plan, or a suicide attempt or a specific plan for committing suicide.

B. The **symptoms cause clinically significant distress or impairment in social, occupational, or other important areas of functioning**.

C. The episode is not attributable to the physiological effects of a substance or to another medical condition.

The DSM-5 criteria for depression are met when an individual exhibits at least five of the nine psychiatric symptoms during the same two-week period, with at least one symptom being a depressed mood or loss of interest.¹⁶⁴

The diagnostic features of MDD are as follows:¹⁶⁵

¹⁶² These features and criteria are particularly relevant to the legal fraternity, as they do not form part of law training or general legal discourse.

¹⁶³ DSM-5 2013:160-161, own emphasis added.

¹⁶⁴ Fried *et al.* 2014:2067.

¹⁶⁵ DSM-5 2013:162-164, own emphasis added.

The criterion symptoms for major depressive disorder must be present nearly every day to be considered present, with the exception of weight change and suicidal ideation. Depressed mood must be present for most of the day, in addition to being present nearly every day. The essential feature of a major depressive episode is a period of at least 2 weeks during which there is either **depressed mood or the loss of interest or pleasure in nearly all activities**.

The mood in a major depressive episode is often described by the person as depressed, sad, hopeless, discouraged, or “down in the dumps”. In some individuals who complain of feeling “blah”, having no feelings, or feeling anxious, the presence of a depressed mood can be inferred from the person’s facial expression and demeanour.

Many individuals report or exhibit **increased irritability** (e.g., persistent anger, a tendency to respond to events with angry outbursts or blaming others, an exaggerated sense of frustration over minor matters). Loss of interest or pleasure is nearly always present, at least to some degree. Individuals may report feeling less interested in hobbies, “**not caring anymore**”, or not feeling any enjoyment in activities that were previously considered pleasurable.

Decreased energy, tiredness, and fatigue are common. A person may report sustained fatigue without physical exertion. **Even the smallest tasks seem to require substantial effort.** The efficiency with which tasks are accomplished may be reduced. Such individuals often misinterpret neutral or trivial day-to-day events as evidence of personal defects and have an exaggerated sense of responsibility for untoward events.

Many individuals report **impaired ability to think, concentrate, or make even minor decisions**. They may appear **easily distracted** or complain of **memory difficulties**. Those engaged in **cognitively demanding pursuits are often unable to function**. Thoughts of death, suicidal ideation, or suicide attempts are common.

The abovementioned descriptions all have an essential bearing on an individual’s ability to function in the workplace. Clearly, an individual suffering from depression poses a risk of increased absenteeism, loss of productivity and strained relationships in the employment environment.

2.4.4 Depression under the *International Classification of Diseases*

For the sake of completeness, it is necessary to consider depression under the ICD-10 also. This classification instrument describes a “depressive episode” as follows:

In typical mild, moderate, or severe depressive episodes, the patient suffers from **lowering of mood, reduction of energy, and decrease in activity. Capacity for enjoyment, interest, and concentration is reduced, and marked tiredness after even minimum effort is common. Sleep is usually disturbed and appetite diminished.** Self-esteem and self-confidence are almost always reduced and, even in the mild form, some ideas of guilt or worthlessness are often present. The **lowered mood varies little from day to day, is unresponsive to circumstances** and may be accompanied by so-called “somatic” symptoms, such as loss of interest and pleasurable feelings, waking in the morning several hours before the usual time, **depression worst in the morning, marked psychomotor retardation, agitation, loss of appetite, weight loss**, and loss of libido. Depending upon the number and severity of the symptoms, a depressive episode may be specified as mild, moderate or severe.¹⁶⁶

¹⁶⁶

ICD-10 2015: chapter V (F32), own emphasis added.

The ICD-10 also notes depression as being a recurrent mental health condition, with symptoms that fluctuate in severity from episode to episode.¹⁶⁷ Provision is also made for dysthymia, or chronic depression, which is described as a series of depressive episodes lasting for several years.¹⁶⁸ The ICD-10 includes a condition termed “recurrent depressive disorder, currently in remission”, where the individual has experienced two or more depressive episodes in the past, but has been free from depressive symptoms for several months.¹⁶⁹

2.4.5 Psychiatric co-morbidity

Most mental health conditions exist concurrently with, although usually independent of, one or more other mental health conditions.¹⁷⁰ This is known as psychiatric co-morbidity.

As exposure to physical and/or psychological trauma is an inherent risk in many vocations, employees may develop various mental health conditions independently or concurrently, with depression being the primary one.¹⁷¹ There may also be an overlap in the symptomology of the co-morbid conditions, which may be attributed to the fact that features of an existing mental disorder may amplify an individual’s vulnerability to develop subsequent disorders.¹⁷²

With depression often associated with a variety of medical and psychiatric co-morbidities, it is estimated that up to three quarters of individuals with depression also have some other form of mental health problem.¹⁷³ For example, anxiety disorders, which are often caused by stress, frequently precede the onset of depression.¹⁷⁴ Given the stressful nature of modern work environments, this is particularly relevant in the employment context.

¹⁶⁷ ICD-10 2015: chapter V (F33).

¹⁶⁸ ICD-10 2015: chapter V (F34.1).

¹⁶⁹ ICD-10 2015: chapter V (F33.4).

¹⁷⁰ Merriam-Webster Dictionary 2015b. <http://www.merriam-webster.com/dictionary/comorbid>. Accessed on 13/08/2015.

¹⁷¹ Bender and Farvolden 2008:74.

¹⁷² Lockwood and Forbes 2014:109.

¹⁷³ Freeman and Joska 2013:17.

¹⁷⁴ Freeman and Joska 2013:17.

The co-morbid mental health conditions most frequently encountered include (major) depression, other anxiety disorders and substance abuse.¹⁷⁵ Post-traumatic stress disorder (PTSD) and MDD are particularly co-morbid.¹⁷⁶ Given that PTSD is the primary response to trauma exposure, Lockwood and Forbes have suggested that MDD can develop as a consequence of PTSD.¹⁷⁷ Other studies have indicated that PTSD may develop as a result of depression, since depression may predispose a person to the suffering of trauma.¹⁷⁸

2.5 Conclusion

As this chapter has shown, mental health and the law have been intertwined from early times. This has continued in modern times, and the prevalence of mental health conditions, not only in society, but also in the workplace, appears to have increased.

The DSM constitutes the most significant classification instrument in the diagnosis of mental disorders and is used extensively in both the psychiatric and legal fields. The judiciary in South Africa and the comparative jurisdictions appear to support the use of this manual in legal issues involving an element of mental health.

Despite being highly prevalent, persons with mental health conditions continue to be stereotyped, stigmatised, discriminated against and subjected to prejudice in society and the workplace. Various misconceptions about mental illness perpetuate and exacerbate prejudice against these individuals, putting their basic human rights, particularly their rights to equality and dignity, at risk of violation.

Depression in the workplace undeniably results in significant costs to employers, employees and society in general, which makes it a serious concern in employment law. Therefore, the legal implications of mental health conditions and their place in the legal framework cannot be disregarded or dismissed. The legal framework governing mental health conditions need to be certain and clear.

Against this backdrop, part 2 will reflect on mental health conditions under the South African legal framework, with chapters 3, 4 and 5 respectively analysing mental

¹⁷⁵ Biehn *et al.* 2013:290.

¹⁷⁶ Frueh *et al.* 2010:261, 263.

¹⁷⁷ Lockwood and Forbes 2014:109.

¹⁷⁸ Lockwood and Forbes 2014:109.

disability, discrimination based on mental health and reasonable accommodation for those with mental health conditions.

PART 2

DOMESTIC MENTAL HEALTH JURISPRUDENCE: CONSIDERATIONS UNDER THE SOUTH AFRICAN LEGAL FRAMEWORK

“They've promised that dreams can come true - but forgot to mention that nightmares are dreams, too.”
— Oscar Wilde

PROLOGUE TO THE SOUTH AFRICAN LEGAL FRAMEWORK GOVERNING MENTAL HEALTH CONDITIONS IN EMPLOYMENT

Part 2 evaluates the South African legal framework governing the law of disability, discrimination and reasonable accommodation in relation to people with mental health conditions, especially depression. Each of the topics will be evaluated in separate chapters to enable a focused analysis of the approach to mental health conditions under each specific area of employment law. Part 2 will also endeavour to identify and clarify the current legal status of mental health conditions, using depression as a specific example, with the aim of identifying any controversies, ambiguities and *lacunae* in the existing legal framework.

A consistent undercurrent throughout this part of the thesis will be the various basic and internationally recognised human rights of persons with mental health conditions, especially equality and human dignity, against the backdrop of the prejudice, discrimination and disadvantage they suffer.

In exploring the approach to mental health conditions under the South African legal framework, the relevance and independence of the human psyche under South African law requires consideration.¹ Throughout history, the human *corpus* has been considered to consist of a physical as well as a psychological component, both of which require legal protection.² The concept of the mind and the physical body as separate legal constructs, and the notion of injury to the mind, can be traced back to

¹ All natural persons have legal subjectivity and are the bearers of the fundamental human rights embodied in the Constitution. In addition to the fundamental rights, natural persons are also the bearers of specific personality rights. See Slabbert 2008:72.

² The separation of the human mind and body can be seen in Aristotle's *De Anima* and Descartes's *Cogito ergo sum*, and has been a consistent concept in Western jurisprudence. See Slabbert 2008:74; Loubser *et al.* 2012:314. The human body as an independent personality interest has been recognised from early times, dating as far back as 450 BC to the *Twelve Tables* and *Digesta* in Roman law. It was carried over into Roman-Dutch law, and consequently became part of the South African common law, before being entrenched as a constitutional right in the South African Bill of Rights. The constitutional entrenchment of the personality right to *corpus* is reflected in the right to safety and security of the person in sec 12 of the Constitution, which includes the right to bodily and **psychological integrity** (own emphasis added). See Neethling *et al.* 2005:83. Also see Ackermann 2013:93, referring to *Minister of Justice v Hofmeyer* 1993 3 SA 131 A: 132C ff.

Roman law, which recognised that a person could experience distress of the mind without any accompanying physical injury.³

According to research, 16,5% of South Africans suffered from a common mental illness such as depression or anxiety in 2009.⁴ In 2013, the South African College of Applied Psychology reported that one in six South Africans suffered from depression, anxiety and substance abuse problems, while less than 16% of these individuals received treatment for their mental health concerns.⁵ A 2014 report indicated that 30,3% of South African adults would suffer from a mental health problem at some point in their lives.⁶ In research conducted by the South African Depression and Anxiety Group in 2015, it was found that one in four South Africans suffered from depression.⁷

In the employment realm, 54% of depressed individuals indicated that their productivity had decreased due to the disorder, while each depressive episode required approximately 18 days of sick leave.⁸ The number of sick leave days taken by an individual with depression, however, will vary according to the severity of the depressive episode, with some studies reporting up to 57 days of sick leave per incident.⁹ The stigma surrounding mental illness in South Africa is another significant concern, with sufferers fearing discrimination and even dismissal should they reveal their mental health conditions to their employers.¹⁰ Therefore, the empirical evidence

³ De Villiers 1899:79 describes this concept as follows: "With the elasticity characteristic of the Roman Law actions, the principle of the *Lex Cornelia* with regard to attacks upon the person was extended by analogy (*utilis actio*) to the case where there was no actual impact upon the body of the person assaulted, but distress of the mind, which has its seat in the body, is brought about in a somewhat similar manner as if an assaulted had actually been committed; so that it was considered an injury under the *Lex Cornelia* ..."; own emphasis added.

⁴ Mail & Guardian 2009. <http://mg.co.za/article/2009-04-20-almost-one-in-five-south-africans-suffer-mental-illness>. Accessed on 05/11/2014.

⁵ Sacap 2013. <http://www.sacap.edu.za/mental-health-south-africa-whose-problem-counselling/>. Accessed on 05/11/2014.

⁶ Chiumia and Van Wyk 2014. <http://africacheck.org/reports/do-a-third-of-south-africans-really-suffer-from-mental-illnesses/>. Accessed on 05/11/2014.

⁷ South African Depression and Anxiety Group 2015. http://www.sadag.org/index.php?option=com_content&view=article&id=2391:new-research-on-depression-in-the-workplace&catid=11:general&Itemid=101. Accessed on 28/09/2015.

⁸ South African Depression and Anxiety Group 2015. http://www.sadag.org/index.php?option=com_content&view=article&id=2391:new-research-on-depression-in-the-workplace&catid=11:general&Itemid=101. Accessed on 28/09/2015.

⁹ Korb 2015:1.

¹⁰ This is aggravated by the fact that persons with mental illnesses are still viewed as "crazy, dangerous or weak". See Sacap 2013. <http://www.sacap.edu.za/mental-health-south-africa-whose-problem-counselling/>. Accessed on 05/11/2014.

points to the problematic nature of mental health conditions in South African society and the country's workplaces.

CHAPTER 3

MENTAL DISABILITY UNDER THE SOUTH AFRICAN LEGAL FRAMEWORK

3.1 Introduction

This chapter analyses mental health conditions, and especially depression, as a possible mental disability under South African law. Following an analysis of the international instruments influencing South African law in relation to mental disabilities, and an investigation of the disability concept, the symptoms and diagnostic features of depression will be tested against the disability definition that currently applies under the country's legal system.

3.2 International instruments in the consideration of people with mental disabilities

In accordance with sections 39¹ and 233² of the Constitution, as well as the comparative nature of this thesis, the international law relevant to persons with mental disabilities first needs to be considered before the South African legal framework is analysed.

The *Declaration on the Rights of Disabled Persons*,³ which was proclaimed by the United Nations (UN) General Assembly in 1975, was the first international instrument that expressly recognised the inherent human dignity of people with disabilities.⁴ This declaration was preceded by the *Declaration on the Rights of Mentally Retarded Persons*.⁵ The following paragraphs provide an overview of other international instruments applicable to persons with mental disabilities.

¹ Section 39 of the Constitution states that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law and may consider foreign law.

² Section 233 of the Constitution states that “when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”.

³ GA Res 3447 XXX 9 Dec 1975.

⁴ Bhabha 2009:227.

⁵ GA Res 2856 XXVI 20 Dec 1971. This declaration recognised the rights of “mentally retarded persons” as equal to those of other persons and aimed to protect their well-being and interests.

3.2.1 United Nations Convention on the Rights of Persons with Disabilities⁶

The *UN Convention on the Rights of Persons with Disabilities* 2006 (or “the UN Disability Convention”) is of primary significance as an international instrument dealing with the employment of people with mental disabilities, especially as it does not view disability as a deviation or a pathological condition, but rather as part of human diversity.⁷

The Disability Convention addresses the social, cultural, economic and legal barriers that prevent persons with disabilities from fully participating in society and fulfilling their human rights.⁸ It embodies an international movement away from the medicalised model of disability and embraces an understanding of disability based on human rights.⁹ It endorses a substantive approach to equality, which seeks to target deep-rooted structural inequalities and disadvantage suffered by people with disabilities, including mental disabilities such as depression.¹⁰

The Disability Convention recognises that people with disabilities continue to face various barriers to participation as equal members of society, and that their inherent and basic human rights continue to be violated in all parts of the world.¹¹ In an attempt to promote international change for people with disabilities, it states as its purpose the promotion, protection and advancement of the full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities, as well as respect for their inherent human dignity.¹² It also provides the following definition for persons with disabilities:

Persons with disabilities include those who have **long-term** physical, **mental**, intellectual or sensory **impairments** which in **interaction with various barriers** may hinder their full and effective **participation in society on an equal basis** with others.¹³

This definition clearly promotes equality and equal opportunity for people with mental disabilities and acknowledges that various barriers may obstruct their equal

⁶ Signed by South Africa on 30 Mar 2007, and ratified on 30 Nov 2007. See Grobbelaar-Du Plessis and Nienaber 2014:366.

⁷ Grobbelaar-Du Plessis and Nienaber 2014:379.

⁸ Gibson 2011:12.

⁹ Gibson 2011:12.

¹⁰ Broderick 2015:109.

¹¹ UN Disability Convention 2006: preamble (k).

¹² UN Disability Convention 2006: art 1.

¹³ UN Disability Convention 2006: art 1, own emphasis added.

participation in society and the workplace. These barriers may include the attitudes, prejudice and stereotypes harboured by employers and co-workers in the workplace. The Disability Convention also recognises the right of persons with disabilities to access the labour market and to participate on an equal basis with others in employment.¹⁴

3.2.2 International Labour Organisation Vocational Rehabilitation and Employment (Disabled Persons) Convention¹⁵

The ILO has firmly established its position on the employment of people with disabilities with its *Vocational Rehabilitation and Employment (Disabled Persons) Convention No.159*, which promotes equality for and the equal treatment of disabled people in the workplace and applies to all categories of disabled persons.¹⁶ “Disabled person” in terms of this convention refers to “an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognised ... mental impairment”.¹⁷ This has formed the basis of the definition suggested by the UN and the European Union (EU), and is in itself equality-based.¹⁸

3.2.3 International Labour Organisation Code of Good Practice on the Managing of Disability in the Workplace

The *ILO Code of Good Practice on the Managing of Disability in the Workplace 2001* (or “the ILO Disability Code”) also promotes the protection of persons with mental disabilities. It recognises that persons with disabilities are not a homogeneous group; that their mental disabilities can be acquired at any point in their lives, and may either have a momentous or minimal impact on their ability to work and participate in

¹⁴ The right to work for persons with disabilities encompasses those persons who enter the workplace with a disability, as well as those who develop a disability in the course and scope of their employment. The right to work on an equal basis with others includes not only equal opportunities, but also equal remuneration for work of equal value, safe and healthy working conditions, and protection from harassment. See UN Disability Convention 2006: art 27(1), 27(1)(b).

¹⁵ Although a significant convention on the international stage, South Africa did not ratify or implement it or its principles domestically. See ILO 2015a. http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312304 Accessed on 28/09/2015.

¹⁶ *ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention No. 159* 1983: art 1(4), art 4.

¹⁷ *ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention*: art 1(1).

¹⁸ Carvalheira 2011:63.

society.¹⁹ The principles that inform the ILO Disability Code are those underlying the *ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention* mentioned above.²⁰ The ILO Disability Code has as its primary objective the promotion and protection of equal employment opportunities for people with disabilities, as well as promoting safe, healthy and accessible workplaces for these persons.²¹

3.2.4 International Labour Organisation Executive Summary on Mental Health in the Workplace²²

The *ILO Executive Summary on Mental Health in the Workplace* 2000 also flows from the *ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention* and provides support for the promotion and protection of the rights of persons with mental disabilities. The rights to freedom, equality, human dignity and security of these persons are stated as being paramount and worthy of protection.²³

3.2.5 Mental Health and Work: Impact, Issues and Good Practices

The ILO and WHO report *Mental Health and Work: Impact, Issues and Good Practices* 2000 indicates that accessing the right to decent and productive work in conditions of freedom, dignity, equality and security is particularly challenging for people with mental health conditions.²⁴ The report also states that as a result of the prevalence and pervasiveness of mental health problems, the WHO recognises mental health as a top priority.²⁵ It reveals that mental health conditions are among the most significant contributors to the burden of disease and disability worldwide, and predicts a further rise in mental health problems and mental disabilities in future.²⁶ The report confirms that mental health conditions have serious consequences for both individuals and their

¹⁹ ILO Disability Code: preface.

²⁰ ILO Disability Code: item 1.2.1.

²¹ ILO Disability Code: item 1.1.

²² Since this executive summary flows from the ILO convention discussed above, it has not been incorporated in South African law. See ILO 2015b. http://www.ilo.org/skills/pubs/WCMS_108221/lang--en/index.htm. Accessed on 28/09/2015.

²³ Gabriel and Liimatainen 2000:1.

²⁴ Harnois and Gabriel 2000:vi.

²⁵ Harnois and Gabriel 2000:vi.

²⁶ Mental health conditions are among the top three leading causes of disability across the globe. See Harnois and Gabriel 2000:1.

respective employers, since productivity and working capacity are considerably reduced.²⁷

All these international instruments appear to stress the rights to equality, equal opportunity and inherent human dignity of persons with mental disabilities in the workplace. As international law must be considered in terms of the South African Constitution, these rights will be of paramount importance in the South African legal framework governing disabilities also.

3.3 The disability concept: The nature and scope of mental disabilities under South African law

The terms “persons with disabilities”, “people with disabilities” and “disabled people/persons” are used interchangeably in this thesis in order to reflect their use not only in the South African legal framework, but also globally. This approach is in line with that of the ILO Disability Code.

South Africa is one of a few jurisdictions that constitutionally protect the rights of persons with disabilities.²⁸ Section 9(3) of the Constitution entrenches the right to substantive equality and equal opportunity for these persons.

The constitutional rights to dignity, equality and freedom are central to the protections and liberties of people with mental disabilities in employment.²⁹ Unlike the legal frameworks in the USA and the UK, however, the South African legal framework does not contain any disability-specific legislation. Although disability is listed as a protected ground of equality in the Constitution, it has received little judicial attention as such, with the courts still having to develop a theory of disability equality.³⁰ This is particularly true in the context of persons with mental disabilities and their pursuit of substantive equality.

The cluster of constitutional rights applicable to persons with mental disabilities – namely the rights to equality, dignity and social security – aim to protect and advance

²⁷ Harnois and Gabriel 2000:1.

²⁸ See also Christianson 2004, in Dupper *et al.* 2004:154.

²⁹ Christianson 2012, in Le Roux and Rycroft 2012:290.

³⁰ Bhabha 2009:230.

the rights of these persons and go beyond mere protection from discrimination.³¹ Flowing from the constitutional right to equality, the Employment Equity Act (EEA) also specifically protects these persons' rights in the workplace. The EEA serves the dual purpose of eliminating unfair discrimination against persons with disabilities, as well as redressing past disadvantages and promoting substantive equality for these individuals through affirmative action measures.³² The EEA and the *Code of Good Practice: Key Aspects on the Employment of People with Disabilities* 2002 (or "the Disability Code")³³ promote the fundamental rights of equality and human dignity in the workplace for disabled persons.³⁴

Disability is included in the list of prohibited grounds in both section 9(3) of the Constitution and section 6(1) of the EEA; yet, no single, accepted definition exists.³⁵ What constitutes a disability depends primarily on the circumstances.³⁶ The EEA defines people with disabilities as "people who have a long-term or recurring physical or mental impairment which substantially limits their entry into or advancement in employment".³⁷ The Disability Code 2002 was published under the EEA as a guiding document in order to assist persons in the employment and legal spheres in dealing with disability-related issues. Together with the *Technical Assistance Guidelines on the Employment of People with Disabilities*, it constitutes an important source of disability jurisprudence in employment. Apart from falling under chapter 2 of the EEA as a listed ground of unfair discrimination, disability is also one of the groups singled out as beneficiaries of affirmative action measures in terms of chapter 3.

Affirmative action measures as provided for in the EEA are consistent with both ILO Convention 111 and the South African Constitution.³⁸ These measures aim to ensure that suitably qualified persons from designated groups enjoy equal opportunities in employment and are equitably represented at all occupational levels in the

³¹ Disability equality stems from the transformative imperatives contained in the key legal instruments. See Bhabha 2009:219.

³² Sec 6(1) of the EEA provides that unfair discrimination on the basis of an individual's disability is prohibited. The same act singles out disability as one of the designated beneficiary groups of affirmative action. Also see Christianson 2004, in Dupper *et al.* 2004:159.

³³ Importantly, however, the Disability Code does not constitute delegated legislation, and instead constitutes a form of quasi-legal guideline. See Ngwena 2006:615.

³⁴ Christianson 2004, in Dupper *et al.* 2004:187.

³⁵ Pretorius *et al.* 2001:7-26(1).

³⁶ Pretorius *et al.* 2001:7-26(1).

³⁷ Sec 1.

³⁸ Van Niekerk *et al.* 2015:155.

workplace.³⁹ Designated groups are defined as “black people, women and **people with disabilities40**

It is important to distinguish between mental disability as a ground of unfair discrimination in terms of section 6(1) of the EEA, and people with disabilities as a designated group benefiting from affirmative action measures. Pretorius *et al* point out that while a narrower interpretation of disability is applied in the assessment of which individuals may qualify for affirmative action measures, the interpretation of disability as an anti-discrimination measure should be broader so as to protect these persons from discrimination.⁴¹

The fundamental policy behind the protection of persons with mental disabilities is to give effect to their human rights.⁴² The South African legal framework protects employees with disabilities as a vulnerable group, because they constitute a minority with traits and characteristics that are different from those of people in mainstream society.⁴³ Disability is a central concept in the social, legal and medical outcomes of cases involving psychological injury and illness.⁴⁴ It is also significant to note that mental health conditions, such as depression, are ranked as the leading cause of disability in South Africa.⁴⁵

In spite of the negative connotations attached to “mental disability”, this phenomenon remains under-theorised and under-researched, and has received little academic and even less judicial attention in South Africa.⁴⁶ Ngwena points out that the equality claims of people with disabilities remain unfulfilled, inadequately acknowledged and misunderstood.⁴⁷ From an equality perspective, Mégret and Msipa have also suggested that a formal approach to equality is inadequate in promoting the rights of persons with disabilities because of its inability to take into account individual needs.⁴⁸

³⁹ EEA: sec 15(1); Du Plessis and Fouche 2015:93. Grogan (2014a:139) explains that affirmative action constitutes a system in terms of which a measure of discrimination is permitted in favour of a particular group that has been disadvantaged by discrimination in the past.

⁴⁰ EEA: sec 1, own emphasis added.

⁴¹ Pretorius *et al.* 2014:7-29. Also see Ngwena 2007:150.

⁴² *Standard Bank of SA v CCMA*: 1253[60].

⁴³ *Standard Bank of SA v CCMA*: 1253[61].

⁴⁴ Schultz 2008:94.

⁴⁵ Ewart Smith 2012:75.

⁴⁶ Ngwena 2014:275.

⁴⁷ Ngwena 2014:275.

⁴⁸ Mégret and Msipa 2014:263.

The nature and scope of “mental disability” will depend on the particular circumstances of each case.⁴⁹ The *Technical Assistance Guidelines on the Employment of People with Disabilities* (or “the Disability Guidelines”) provide that a disability is a “**condition caused by an accident, trauma, genetics or a disease** which may limit a person’s mobility, hearing, vision, speech, **intellectual or emotional functioning**”.⁵⁰ As depression is a condition that limits both intellectual and emotional functioning, it would appear that it may satisfy the legal criteria to constitute a disability.⁵¹

Mental disability constitutes a broad concept encompassing traditional ideas relating to mental impairments as well as the social and economic barriers that stem from these impairments.⁵² From a conceptual perspective, mental disability may include a wide range of individuals who at some point in their lives experienced some form of mental impairment that deviates from the norm, or have had the experience of being treated as if they were so impaired.⁵³ Consequently, the label of disability may arise from self-identification or may be imposed on an individual by others.⁵⁴ From a psychological perspective, disability is regarded as a form of behaviour and is not viewed as an individual attribute, but rather as a complex set of “conditions, activities and relationships” that stem from an individual’s social environment, including the workplace.⁵⁵

Defining disability in the employment context shifts the focus from the diagnosis of the employee’s disability to its effect on his or her ability to work and to secure

⁴⁹ Pretorius et al. 2014:7-28; Ngwena and Pretorius 2003:1819; Christianson 2012, in Le Roux and Rycroft 2012:294. Unless the specific criteria for determining disability are supplied, it may become an amorphous concept without any clear identity or boundaries. See Ngwena 2010:216. The classic biomedical conceptualisation regards disability as “an observable deviation from the biomedical norms of structure or function directly produced by a medical condition”. See Schultz 2008:95.

⁵⁰ Disability Guidelines:1, own emphasis added. The *Integrated National Disability Strategy White Paper* 1997 endorses the ILO’s definition of disability, namely that “a person with a disability is an individual whose prospects of securing and retaining suitable employment are substantially reduced as a result of physical or mental impairment”.

⁵¹ A detailed evaluation follows in 3.5.2 below.

⁵² Christianson 2012, in Le Roux and Rycroft 2012:294.

⁵³ Ngwena 2010:216; 2006:617.

⁵⁴ Ngwena 2006:618.

⁵⁵ Schultz and Stewart 2008:107.

employment.⁵⁶ Therefore, the mental disability concept cannot be rigidly and irrefutably defined, as much of its consideration depends on the context.⁵⁷

3.4 The medical and social models of disability

The medical model of disability has been the traditional approach,⁵⁸ considering the disability label to be apolitical and morally neutral, as it may be verified and confirmed by scientific and clinical means.⁵⁹ The medical model regards impairment as an “abnormality that needs to be corrected, cured or overcome and sees the individual as alterable and the social environment as fixed and unalterable”.⁶⁰ It is therefore the individual and not the environment that needs to change.⁶¹

Many regard the medical model of mental disability as stigmatising, or at least amplifying the stigma attached to disability, since its focus on a medical diagnosis in effect legitimises the dichotomy between normality and abnormality.⁶² According to the medical model, psychological impairment is psychiatrically informed, and structured according to the provisions and classifications in the DSM.⁶³ The medical model offers the advantage of certainty, but holds the disadvantage of overlooking the fact that mental disability is socially constructed.⁶⁴

⁵⁶ *Standard Bank of SA v CCMA*: 1256[68].

⁵⁷ In essence, disability may be considered as being “less categorical and more relational”, taking on such a fluid form that it can encompass a wide range of persons. See Ngwena 2010:217.

⁵⁸ According to religious views predating the medical model, disability and mental disability were understood and viewed as a misfortune or the consequence of sin, guilt, bad luck or bad genetics. In this regard, the introduction of the medical model was seen as a significant move towards ensuring human rights for disabled individuals, as disability was now rooted in medical science and no longer in a belief system. For over 30 years, the medical model of disability was the primary consideration in the WHO’s actions, and as a result, disability-related language in the public policies of several international jurisdictions focuses on the rehabilitation and cure of mental impairments. See Diniz *et al.* 2009:64, 66. Ngwena 2010:219, referring to Pendo 2002:1198.

⁵⁹ Christianson 2012, in Le Roux and Rycroft 2012:294, referring to Natrass 2006:4. In terms of the medical model, disability is considered the result of a physical, cognitive or sensory deficit. See Ngwena 2005a:220.

⁶⁰ Christianson 2012, in Rycroft and Le Roux 2012:294, referring to Natrass 2006:4. The medical model considers disabilities as deficiencies that must be diagnosed, treated and cured. It reflects an “able-bodied” perspective as the norm and regards disability as the extent to which the individual suffering from impairment deviates from the norm. See Bhabha 2009:223.

⁶¹ Bhabha 2009:223; Ngwena 2006:626. In the medicalisation of disability, the divide between “normal” and “abnormal” is amplified, with no allowance for the consideration of diverse human abilities. This simply intensifies the stigma attached to disability. See Ngwena 2010:230.

⁶² Schultz 2008:94.

⁶³ Ngwena 2005a:225.

The social model of disability, in turn, identifies disability as a social and cultural construct instead of a mere medical one.⁶⁵ This approach centres on substantive equality as a transformative principle⁶⁶ and adheres to the notion that barriers erected by society and the environment in relation to disability are as disabling as the environment itself.⁶⁷ This stems from the fact that disability is not predominantly an impairment residing in the human body, but also a social phenomenon arising from the disobliging and adversarial way in which the social environment intersects with disability.⁶⁸

In terms of the social model, disability is understood as an experience of inequality shared by people with different types of impairments,⁶⁹ such as various mental health conditions, including depression. The social model has materialised as a “socio-political approach and a counterpoint to bio-medicalised understandings of disability or the medical model”.⁷⁰ This model pursues a society that accommodates diversity.⁷¹

Whilst the medical model of disability relies strongly on a medical diagnosis, the social model considers the effect of the impairment on the individual, which includes the removal of societal barriers such as physical and attitudinal constraints.⁷² The shift in emphasis in disability theory from the medical to the social model has gone a long way towards creating a more hospitable and accommodating climate for the inclusion of persons with disabilities in mainstream society and the workplace.⁷³

The UN Disability Convention illustrates support for the social model of disability.⁷⁴ The Disability Code states that the focus in the context of employment is on the effect

⁶⁵ The social model of disability is supported and defended from a philosophical perspective as well as by disability rights activists and the UN. See Ngwena and Pretorius 2003:1820. The social model shows the impact of disability activism. See Ngwena 2006:630.

⁶⁶ Ngwena and Pretorius 2003:1820.

⁶⁷ Ngwena and Pretorius 2003:1820. The social model promotes the view that limitations do not stem from an affected individual's ability to function in society, but instead from society's inability to function inclusive of all persons. See Bhabha 2009:223.

⁶⁸ Ngwena 2010:235.

⁶⁹ Diniz *et al.* 2009:65.

⁷⁰ Ngwena 2014:276, referring to Bickenbach 1993:61-92.

⁷¹ The social model promotes a societal obligation to take positive action in favour of equal participation. See Ngwena 2014:284.

⁷² Christianson 2012, in Le Roux and Rycroft 2012:294.

⁷³ Bhabha 2009:224.

⁷⁴ The convention states that “disability is an evolving concept and ... results from the **interaction between persons with impairments and attitudinal and environmental barriers** that hinders their full and effective participation in society on an equal basis with others”; own emphasis added. See UN Disability Convention: preamble (e).

of the disability on the individual in relation to the working environment, “and not on the diagnosis or impairment”.⁷⁵ Christianson points out that the disability definition in the EEA and the Disability Code emphasises that South African law follows the social model of disability.⁷⁶ However, the “clinically recognised” requirement for a mental impairment again leans towards the medical model of disability, despite the fact that the diagnosis should not be the focus in establishing disability under the EEA.⁷⁷ The disadvantage associated with this emphasis on the medical model is that persons who do not have an actual mental impairment, but are treated as if they do, are in no way accommodated.⁷⁸ As a result of prejudice, people may be treated as if they are disabled, even in the absence of a mental impairment.⁷⁹

Pretorius *et al* point out that “progressive conditions” under the Disability Code also emphasise support for the medical model of disability, because a restrictive interpretation does not extend protection to persons who are not actually disabled, but are treated as if they are (the category of so-called “perceived disabilities”).⁸⁰ At the same time, the Disability Guidelines indicate support for the social model of disability by stating that the central part of the struggle for persons with disabilities is the need to overcome barriers set by society and the environment, and that disability is a normal part of the human experience.⁸¹

Although the social model of disability is preferred in the pursuit of substantive equality for people with mental disabilities, the medical and social disability models are not mutually exclusive. These models are both necessary for addressing mental disability, with the medical model usually being the starting point in identifying mental impairments.⁸² The social model, on the other hand, serves to highlight the fact that discrimination is a social phenomenon, and offers a more nuanced approach for addressing discrimination based on mental disability.⁸³

⁷⁵ Disability Code: item 5.1.

⁷⁶ Christianson 2012, in Le Roux and Rycroft 2012:295; Christianson 2004, in Dupper *et al.* 2004:163.

⁷⁷ Christianson 2004, in Dupper *et al.* 2004:166; Christianson 2012, in Le Roux and Rycroft 2012:295.

⁷⁸ Ngwena and Pretorius 2003:1822.

⁷⁹ Ngwena and Pretorius 2003:1822.

⁸⁰ Pretorius *et al.* 2014:7-30(3).

⁸¹ Disability Guidelines 2005:3.

⁸² Ngwena 2004:174.

⁸³ Ngwena 2004:174.

3.5 Mental health conditions in the disability context under the South African legal framework, with special reference to depression as a disability in the workplace

3.5.1 Introductory remarks

To consider whether depression constitutes a disability under the South African legal framework, and thus attracts legal protection, it needs to be tested against the disability definition provided in the Disability Code, which flows from the definition in the EEA, as well as the legal considerations attaching to these.

3.5.2 The definition of people with disabilities: The Employment Equity Act, the Disability Code and the consideration of depression as a disability

The EEA provides that individuals with disabilities are “people who have a **long-term or recurring physical or mental impairment** which **substantially limits** their prospects of entry into or advancement in employment”.⁸⁴ Only individuals who satisfy all the criteria in the definition will be considered people with disabilities.

The *Revised Draft Code of Good Practice on the Employment of Persons with Disabilities* (or “the Revised Disability Code”)⁸⁵ defines persons with disabilities as inclusive of “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.⁸⁶

For the purposes of this section, it is important to reiterate that depression is an extremely debilitating illness that affects an individual’s ability to secure and retain employment as well as to perform everyday activities. It is said to have a more significant impact on work performance than several other major health concerns,

⁸⁴ EEA: sec 1, own emphasis added. See Bhabha 2009:229, who suggests that this definition is informed by a medical model of disability, which undervalues the actual potential and capabilities of the specific individual and fails to take into account perception and stereotyping, which is an integral part of the equality analysis.

⁸⁵ GN 581 *Government Gazette* 2015:12 Jun (38872).

⁸⁶ Revised Disability Code: par 5.2. This definition has been adopted from the UN Disability Convention. The Revised Disability Code does however also provide and endorse the definition of persons with disabilities provided by the EEA. See Revised Disability Code: par 5.3.

such as diabetes, arthritis and hypertension. It is also significant to restate that the WHO considers depression as the leading cause of disability worldwide.

The judiciary has not yet extensively and specifically considered depression as a possible disability in terms of the Constitution or the EEA. The closest to such an assessment was the case of *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland*. Although this case dealt with an employee's mental breakdown and consequent depression under the law of dismissal, it is still relevant in the disability context. The Labour Appeal Court in this case held that it was not strictly necessary to determine whether depression constituted a disability in terms of section 187(1)(f) of the Labour Relations Act (LRA).⁸⁷ Instead, the court held that even if this condition were not to be considered as a form of disability, the discrimination suffered by the employee as a result of his mental health problem had the potential to impair his fundamental human dignity as a human being, or to affect him in a comparably serious manner.⁸⁸ Thus, the court proceeded on the basis of this assessment, omitting to analyse whether depression could indeed constitute a disability in the legal sense.

Although the assessment of whether depression can be regarded as a disability was not strictly necessary in this case, it would have provided legal clarity. If the Labour Appeal Court had established depression as a legally recognised form of disability, individuals with this mental health condition would have been better placed to argue that they have suffered unfair discrimination based on the listed ground of disability, and also would have been in a stronger position to request reasonable accommodation from their employers.

In *Eskom and National Union of Mineworkers obo Fillisen*,⁸⁹ the lines between depression, incapacity and disability were blurred in the absence of an analysis of whether depression satisfied the legal requirements of a disability. Although this case dealt with a dismissal for incapacity where an employee suffered from depression, no clear distinction was drawn between incapacity and disability; the commissioner failed

⁸⁷ *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland*: 24.

⁸⁸ *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland*: 24.

⁸⁹ 2002 23 ILJ 1666 ARB.

to correct the view that the employee's depression was "one of permanent disability", and no disability analysis took place.⁹⁰

Similarly, in *IMATU obo Strydom v Witzenberg Municipality*,⁹¹ an employee suffering from depression was regarded as having a disability, without any form of disability analysis. In this case, the court held that "[a]ccommodating an employee with a disability is the primary way of avoiding a dismissal for incapacity".⁹² However, it was never determined whether depression amounted to a legal disability.

The aforesaid cases serve as prime examples of instances where an explicit and clear cut assessment could have been made by the judiciary on whether or not depression constitutes a disability in the legal sense and under which circumstances this would be the case.

3.5.2.1 Mental impairment

The existence of impairment may be considered the crux of disability, as the disability is in effect the consequence of impairment.⁹³ At their core, impairments may be described as "measurable deviations from biomedical norms".⁹⁴ In the context of people with mental health conditions, these deviations include anomalies, defects or loss of mental function.⁹⁵ The ILO Disability Code defines an impairment as "[a]ny loss or abnormality of a psychological ... function, including the systems of mental function".⁹⁶

According to the South African Disability Code, a mental impairment constitutes "a clinically recognised condition or illness that affects a person's thought processes, judgment or emotions".⁹⁷ This includes conditions such as intellectual, emotional and learning disabilities.⁹⁸ This definition is similar to the definition adopted by the WHO.⁹⁹ Christianson points out that it is generally accepted that the term "mental" should be

⁹⁰ *Eskom and National Union of Mineworkers obo Fillisen*: 1672.

⁹¹ 2008 29 ILJ 2947 LC.

⁹² *IMATU obo Strydom v Witzenberg Municipality & Others*: 2950.

⁹³ Ngwena and Pretorius 2003:1821.

⁹⁴ Ngwena 2005a:221.

⁹⁵ Ngwena 2005a:221.

⁹⁶ ILO Disability Code: item 1.4.

⁹⁷ Disability Code 2002: item 5.1.1(iii).

⁹⁸ Disability Guidelines 2005:8.

⁹⁹ Pretorius *et al.* 2014:7-30(3).

interpreted as widely as possible, covering all forms of impairment.¹⁰⁰ Although the definition requires the mental health condition to be “clinically recognised”, it does not clarify who should recognise it. Christianson suggests that a medical practitioner or psychologist’s opinion will have to be sought in this regard.¹⁰¹ However, it should be noted that in cases of mental health conditions such as depression, medical practitioners may have varying opinions, especially in the absence of a definitive biological test.¹⁰² Ngwena and Pretorius, in turn, state that the determination of a “clinically recognised condition or illness” is a question of fact that must be proved by means of expert evidence.¹⁰³

The cases of *Media 24 v Grobler*,¹⁰⁴ *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland*¹⁰⁵ and *Urquhart v The Compensation Commissioner*¹⁰⁶ illustrate the South African judiciary’s willingness to accept the use of the DSM in legal proceedings to establish the existence of mental illnesses and impairments. Burns and Alonso-Betancourt also point out that the DSM is “adhered to religiously” by the mental healthcare community in South Africa and is often referred to and cited by the country’s judicial forums.¹⁰⁷

Since the Disability Code requires a mental impairment to be a “clinically recognised condition or illness”, without identifying the person or institution that should recognise it, and given Christianson’s indication that it should be interpreted as widely as possible, it is suggested that Ngwena and Pretorius’s recommendation should be preferred. Thus, the determination should be a question of fact, which is to be proven by expert evidence. As Christianson has suggested, such an expert will be a medical practitioner qualified to make the relevant diagnosis.

Allan points out that the diagnosis of a mental health condition is considered to be generally accepted and clinically recognised if it is included in the DSM or ICD classification systems.¹⁰⁸ Depression is indeed included in both of these classification

¹⁰⁰ Christianson 2012, in Le Roux and Rycroft 2012:295-296.

¹⁰¹ Christianson 2004, in Dupper *et al.* 2004:165-166.

¹⁰² See Abbas 2014:13.

¹⁰³ Ngwena and Pretorius 2003:1822.

¹⁰⁴ 2005 6 SA 328 SCA: 56-59.

¹⁰⁵ 2009 12 BLLR 1181 LAC: 24.

¹⁰⁶ 2005 JDR 1008 E: 10.

¹⁰⁷ Burns and Alonso-Betancourt 2013:151.

¹⁰⁸ Allan 2005:52.

instruments, and as such, should be considered as generally accepted and clinically recognised in South Africa.

Therefore, since the majority of psychologists and psychiatrists prefer the use of the DSM in making their diagnoses, and depression is a recognised condition in terms of the DSM, it follows that depression will constitute a mental impairment in terms of the EEA, provided that all the requirements for such a diagnosis are met.

3.5.2.2 Long-term conditions

In terms of the Disability Code, “long-term” means that “the impairment has lasted or is likely to persist for at least 12 months”.¹⁰⁹ Therefore, the “long-term” requirement focuses on the duration instead of on the cause of the impairment.¹¹⁰ Ngwena and Pretorius suggest that the 12-month period should be considered as a useful starting point and not an inflexible period, as the medical diagnosis as well as the prediction of a prognosis is based more on probability than certainty.¹¹¹

As discussed in chapter 2, major depressive disorder (MDD) is diagnosed if all the relevant symptoms are present for at least the same two-week period. Although depression is episodic in nature, normally persisting throughout a person’s life, it is difficult to predict upon the first episode which form the disorder will take and whether it will be chronic, episodic or a discrete episode.¹¹²

MDD is characterised by inter-episode remissions, and a recurrent disorder may present multiple times in a 12-month period. Since it does not consistently last for 12 months or longer, however, one may argue that it will not meet the long-term requirement set by the Disability Code. On the other hand, in line with Ngwena and Pretorius’s recommendation,¹¹³ namely that the 12-month period should not be regarded as an inflexible period, but as a useful starting point, MDD may possibly

¹⁰⁹ Disability Code 2002: item 5.1.2(i).

¹¹⁰ Pretorius *et al.* 2014:7-32.

¹¹¹ Ngwena and Pretorius 2003:1824.

¹¹² Lake 2005:154-155, referring to Miller 1997:718.

¹¹³ Ngwena and Pretorius 2003:1824.

satisfy the long-term requirement, as it may be consistently, albeit episodically, present for at least 12 months.¹¹⁴

Persistent depressive disorder (dysthymia), however, is a more chronic and persistent form of depression that is only diagnosed after a two-year period. This form of depression will undoubtedly satisfy the long-term requirement, persisting for well over 12 months.

3.5.2.3 Recurring conditions

The Disability Code defines “recurring” as an impairment “that is likely to happen again and to be substantially limiting. It includes a constant chronic condition, even if its effects on a person fluctuate”.¹¹⁵ The condition may thus disappear or become dormant for a certain period of time and then return, but is never cured.¹¹⁶ However, the Disability Code is silent on how often the impairment should recur before it may be legally considered as a recurring impairment.¹¹⁷

As the DSM and ICD both describe MDD as being characterised by inter-episode remissions that, although symptoms may fluctuate, continuously reoccur, there can be little doubt that this disorder will satisfy the “recurring” requirement in terms of the EEA’s Disability Code. This is reinforced by the fact that depression persists for the duration of a person’s life, even though the symptoms may become dormant and resurface at various intervals.

The “recurrent depressive disorder, currently in remission” classified in the ICD may also satisfy the recurring criterion. However, the symptoms would have to be active at the time of the assessment.

3.5.2.4 Progressive conditions

The Disability Code defines progressive conditions as those conditions that “are likely to develop or change or recur. People with progressive conditions or illnesses are considered as people with disabilities once the impairment starts to be substantially

¹¹⁴ However, a possible concern in this regard may be the fact that the assessments made by qualified medical practitioners in making a diagnosis may differ from practitioner to practitioner, given the unpredictable occurrence of MDD symptomatology.

¹¹⁵ Disability Code 2002: item 5.1.2(ii).

¹¹⁶ Disability Guidelines 2005:8.

¹¹⁷ Pretorius *et al.* 2014:7-32.

limiting. Progressive or recurring conditions which have no overt symptoms or which do not substantially limit a person are not disabilities".¹¹⁸

Although a single episode of depression may be severe enough to justify a diagnosis in terms of the DSM, depression is by its very nature a disorder that progressively develops over time until the requisite number of symptoms are present to make a diagnosis. The symptoms of depression may therefore develop, change and recur over time.

In light of the considerable psychiatric co-morbidity associated with depression, it may constitute a progressive condition if, for example, workplace stress causes an employee to develop an anxiety disorder, which could eventually result in depression. It will however only amount to a progressive condition once the symptoms become substantially limiting.

As the symptoms of depression may have a significant impact on an individual's ability to function in society and the workplace, even in the absence of sufficient symptoms to make an official diagnosis, depression may in fact satisfy the "progressive conditions" requirement set by the Disability Code, provided that the symptoms are severe enough to substantially limit the individual's ability to function in the employment sphere.

3.5.2.5 Substantially limits

The purpose of the "substantially limits" requirement is to eliminate from consideration those disabilities that have a trivial or minor adverse effect.¹¹⁹ The focus of this requirement is on the impact of the mental disability in the employment environment, instead of on the disability itself.¹²⁰ The nature and duration of the mental disability should however be taken into account when considering its impact.¹²¹ The determination of whether a mental impairment is substantially limiting will thus consist of its effects, nature and duration in the workplace.¹²²

¹¹⁸ Disability Code 2002: item 5.1.2(iii).

¹¹⁹ Pretorius *et al.* 2014:7-34.

¹²⁰ Pretorius *et al.* 2014:7-34.

¹²¹ Pretorius *et al.* 2014:7-34.

¹²² Pretorius *et al.* 2014:7-34.

The Disability Code provides the following explanation for “substantially limiting”:¹²³

- (i) An impairment is substantially limiting if, **in its nature, duration or effects, it substantially limits the person’s ability to perform the essential functions of the job** for which they are being considered.
- (ii) Some impairments are so easily controlled, corrected or lessened, that they have no limiting effects. For example, a person who wears spectacles or contact lenses does not have a disability unless even with spectacles or contact lenses the person’s vision is substantially impaired.
- (iii) **An assessment to determine whether the effects of an impairment are substantially limiting, must consider if medical treatment or other devices would control or correct the impairment** so that its adverse effects are prevented or removed.

Pretorius *et al* suggest that serious long-term or recurring impairments will have an equally substantial and adverse impact on an individual’s entry into or advancement in employment where there is a link between the impairment and the person’s ability to discharge the inherent requirements of the job.¹²⁴

The Disability Guidelines provide that employers may enlist the assistance of “qualified experts” to determine whether a particular impairment is substantially limiting and to obtain relevant information and documentation in this regard.¹²⁵ In the context of people with mental health conditions, mental health-care practitioners, psychologists and psychiatrists may be approached to determine whether a particular mental health problem is substantially limiting.

Two categories of impairments are excluded from the “substantially limiting” category, the first being impairments that are “so easily controlled, corrected or lessened” that they have no limiting effects,¹²⁶ and the second, various conditions based on public policy.¹²⁷ Ngwena suggests the following inference flowing from the Disability Code:

[W]here an impairment can be controlled or substantially eradicated, the impairment ceases to have substantial adverse effects even if it remains present in a residual way. If the residual or subsisting effects are not substantially limiting, there is no impairment. Conversely, where the medical intervention does not have the effect of eradicating substantial adverse effects, the intervention should be ignored when determining when the impairment is substantially limiting.¹²⁸

¹²³ Disability Code 2002: item 5.1.3, own emphasis added.

¹²⁴ Pretorius *et al.* 2014:7-34.

¹²⁵ Disability Guidelines:8. Also see Ngwena and Pretorius 2003:1826.

¹²⁶ Disability Guidelines:8.

¹²⁷ Disability Guidelines:9.

¹²⁸ Ngwena 2005a:233.

A noteworthy ruling in this regard was that in *IMATU v City of Cape Town*,¹²⁹ where it was held that a disability may be treated with medication, and thus, even if it is a long-term impairment, it will not necessarily be substantially limiting once treated.¹³⁰

Lake suggests that the “mitigating measures” consideration raises a concern, namely that certain persons may not have access to or be able to afford medications and treatments for their mental health condition(s). Consequently, an employee who can afford or has access to these treatments may be regarded as being substantially limited and, thus, disabled in the legal sense, while a less fortunate person may not be afforded protection in a similar set of circumstances.¹³¹

The fact that impairment has been lessened, controlled or corrected does however not prevent individuals from being treated as if they still have the disability.¹³² An employer’s attitudes and prejudices towards mental health conditions are not regarded as “substantial limitations” under South African law. This may result in a situation where an employer’s perceptions of an employee’s mental health condition may substantially limit the employee’s entry into or advancement in employment, without the employee being able to prove this prong of the disability definition.

Lake points out a potential shortcoming of the “substantially limits” requirement, namely the creation of a catch-22 in the workplace in terms of which a person may be too impaired to perform his or her work effectively, but may not be substantially limited in discharging the inherent requirements of the job.¹³³ Consequently, a person with a mental impairment may be too impaired to execute his or her employment duties effectively, but not sufficiently disabled to receive protection under the EEA.¹³⁴

An assessment of whether depression is substantially limiting should take into account the symptoms and relevant diagnostic features of the disorder. According to the DSM (which overlaps significantly with the ICD, as discussed in chapter 2), depression is characterised by the following factors, which may make the disorder substantially limiting in employment:

¹²⁹ 2005 26 ILJ 1404 LC.

¹³⁰ *IMATU v City of Cape Town*: 1436[89].

¹³¹ Lake 2005:166.

¹³² Ngwena and Pretorius 2003:1826.

¹³³ Lake 2005:155.

¹³⁴ Lake 2005:155.

- depressed mood most of the day, nearly every day;
- markedly diminished interest or pleasure in all, or almost all, activities;
- decreased energy, tiredness and fatigue (A person may sustain fatigue without physical exertion. Even the smallest tasks seem to require substantial effort. The efficiency with which tasks are accomplished may be reduced.);
- impaired ability to think, concentrate or make even minor decisions (A person may appear easily distracted or complain of memory difficulties. Those engaged in cognitively demanding pursuits are often unable to function.);
- increased irritability, for example persistent anger, a tendency to respond to events with angry outbursts or blame, and an exaggerated sense of frustration over minor matters.

The DSM provides that these symptoms cause clinically significant distress or impairment in occupational functioning.

If an employee experiences a depressed mood for most of the day, nearly every day, and has a severe loss of interest in the activities that (s)he is required to perform, this may substantially limit the individual's ability to discharge the inherent requirements of the job. Likewise, if an employee experiences decreased levels of energy, tiredness and fatigue, this will substantially limit his or her ability to function properly in the workplace and perform his or her employment duties. Similarly, a diminished ability to think or concentrate will severely affect an individual's ability to effectively perform his or her work duties. Increased irritability and anger outbursts may strain or compromise an employee's ability to interact with co-workers and clients, and may therefore also substantially limit an individual's ability to discharge the inherent requirements of the job. In addition, clinically significant distress and impairment in occupational functioning may substantially limit an employee's ability to gain entry into or advance in employment.

The fact that depression causes several major occupational concerns, such as absenteeism, occupational and social dysfunction and decreased productivity, also supports the notion that the disorder may substantially limit a person's ability to discharge the inherent requirements of a particular employment position. Moreover, cognitive impairment, which has been noted in about two-thirds of depressed

individuals,¹³⁵ may considerably impair an employee's ability to perform his or her employment duties.

Another significant concern in the workplace is the fact that sleep disturbances, particularly insomnia, are present in up to 90% of depressed individuals.¹³⁶ Employees who attempt to work while tired from a lack of sleep will not be at their most productive when performing their duties. Sleep disturbances also create the risk of being prone to sleeping on the job, which may in turn give rise to disciplinary action against a depressed employee. Clearly, these symptoms also constitute a substantial limitation of the employee's ability to perform the inherent requirements of his or her job.

Depression may be regulated with the use of antidepressants and psychotherapy, which may manage the disorder. Therefore, depression will not meet the standard of being "substantially limiting" in line with the requirements of the Disability Code if the use of these medications and treatments removes the substantially limiting effects of the impairment. In these cases, depression will thus not amount to disability and will not be eligible for legal protection. However, if the use of the medications and treatments fails to remove the substantially limiting effects, depression will most likely meet the "substantially limiting" requirement set by the Disability Code, which along with the other requirements, will afford depression protection as a disability in terms of the EEA.

A further relevant consideration is that antidepressants may have negative side effects, which may be substantially limiting, affecting an individual's functional capacity in the workplace. Some common side effects of antidepressants include the following:¹³⁷

- Insomnia
- Sedation and dizziness
- Headaches
- Nervousness
- Agitation
- Excessive sweating

¹³⁵ Rock *et al.* 2013:2029.

¹³⁶ Soehner *et al.* 2014:93.

¹³⁷ Freeman and Joska 2013:18; Cascade *et al.* 2009:17.

- Weight gain
- Fatigue
- Tremors and shaky hands
- Nausea

Any of these, either independently or combined, may substantially limit an employee's ability to discharge the inherent requirements of an employment position – a significant observation considering that approximately 38% of people taking antidepressants experience one or more of these side effects.¹³⁸ All the side effects may significantly distract employees, impair their ability to think and concentrate, and ultimately affect their productivity.

Moreover, most guidelines recommend that antidepressants be used for six to nine months following the diagnosis of depression,¹³⁹ exposing the individual to the side effects of the medication over an extended period of time, which may substantially limit the person's entry into or advancement in employment. It follows, then, that if the use of medication does not remove the substantial limitations of depression, or if it gives rise to other substantially limiting factors, the employee or job applicant should still be considered as substantially limited in their entry into or advancement in employment.

Interestingly, it is still unclear as to what the legal position would be if medication such as antidepressants were prescribed to an employee with depression, but not taken. In these circumstances, the depressed employee would fall outside the realm of legal protection, as the medications, if taken, may have removed the substantially limiting effects of the impairment. On the other hand, if the medications would not have removed the limiting effects, the position is ambiguous. However, this cannot be established unless the employee actually uses the medication.

3.5.2.6 Perceived disabilities

In addition to the self-perception of disability, the social perceptions of disability, including those that arise in the workplace, as well as persons' attitudes towards the disabilities of others are important considerations in determining disability.¹⁴⁰ This is

¹³⁸ Cascade *et al.* 2009:16.

¹³⁹ Freeman and Joska 2013:20.

¹⁴⁰ Schultz and Stewart 2008:108.

especially true in relation to mental disabilities, which are typically associated with a high degree of stigmatisation, stereotyping and prejudice.¹⁴¹ Discrimination may thus also occur in circumstances where there is a perceived instead of an actual mental disability.¹⁴²

However, the EEA does not explicitly extend protection to persons with so-called “perceived disabilities”, as the definition under the South African legal framework does not include a “perceived disability” prong. It is unclear why the South African legal framework, which is so intensely committed to the protection of human dignity and equality, would have omitted perceived disabilities from the definition.¹⁴³ Consequently, individuals who are perceived to have a mental disability or impairment are left without explicit protection in the South African dispensation, despite the prevalence and severity of these conditions in the workplace. As will be shown in the discussion of the USA and UK legal frameworks in chapters 6 and 7, both the *Americans with Disabilities Act* and the UK’s *Equality Act* incorporate this consideration, thus extending additional protection to persons with mental health conditions.

Interestingly, the original *Draft Code of Good Practice on Disability in the Workplace* did make provision for instances of perceived disabilities.¹⁴⁴ This consideration was however not adopted and included in the final 2002 Disability Code, nor does the 2015 Revised Disability Code extend protection in this regard.

Extending protection to persons who face disadvantage due to attitudinal and social barriers, such as stigma and prejudice, as a result of their mental health condition(s),

¹⁴¹ Social stigma and perceptions relating to mental health conditions have been found to be more disabling than the disability itself. See Schultz and Stewart 2008:108.

¹⁴² Albertyn and Goldblatt 2014, in Woolman and Bishop (eds) 2014:35-70.

¹⁴³ See Christianson 2004, in Dupper *et al.* 2004:172, who suggests that this may have been done to prevent asymptomatic disorders or diseases from being included in the definition.

¹⁴⁴ The original Draft Disability Code (which preceded the published final code) stated the following: “Employers may not unfairly discriminate against employees or applicants for employment, because the employer **suspects or believes, whether the belief or suspicion is correct or not, that the applicant or employee has an impairment that amounts to a disability**, or that they *have* been disabled or they are, or have been, *associated* with other people who are, or have been, disabled. People in a relationship, or association with, or those who have responsibility for, a person with a disability, have, under the Act, Chapter II’s rights to protection against unfair discrimination but not Chapter III’s affirmative action protections.” See Draft Disability Code: 5; own emphasis added.

such as depression, would be in line with the social model of disability and the substantive approach to equality.

The fact that depression has been lessened, controlled or corrected and is no longer substantially limiting does not prevent the individual from being treated by his or her employer as if (s)he still has the disability.¹⁴⁵ Similarly, individuals who had a form of mild or less severe depression that could not be diagnosed, as well as persons who merely displayed symptoms of depression, may be treated by their employers as if they are disabled, even though their symptoms are not severe enough to satisfy the “substantially limiting” requirement. Added to that, the societal perception, stigmatisation and prejudice associated with this mental health condition may lead employers to make unfounded assessments of the capacity to work of persons who experienced depression in the past. This may expose these persons to disadvantage in employment, with little legal recourse, since South African law does not explicitly extend protection to cases of perceived disability.¹⁴⁶

This lack of protection is not in line with the social model of disability or the substantive approach to equality that the EEA endorses and aims to achieve.

3.5.3 Other mental health conditions as disabilities

Although it is beyond the scope of this thesis to test other specific mental health conditions against the definition of disability as was done with depression above, other clinically recognised conditions such as post-traumatic stress disorder, bipolar disorder and schizophrenia may also meet the requirements set by the Disability Code to be considered as legally recognised disabilities. Both from a general perspective and in terms of the DSM, their nature, duration and effects allow them to be recognised as mental impairments, to possibly be long-term, progressive and recurring, and to

¹⁴⁵ Ngwena and Pretorius 2003:1826.

¹⁴⁶ Although the concept of reasonable accommodation for mental disabilities is discussed in chapter 5, it is necessary to mention here that while perceived disabilities constitute a viable ground for unfair discrimination, individuals whose mental health conditions cannot satisfy the requirements to constitute a legal disability will not be eligible for reasonable accommodation, since accommodating someone who is not legally disabled will impose a disproportionate burden on the business of the employer.

potentially substantially limit an individual's functioning in a similar manner to depression.¹⁴⁷

3.5.4 Mental disabilities under the Labour Relations Act

As stated earlier, section 185 of the Labour Relations Act (LRA)¹⁴⁸ provides that every employee has the right not to be unfairly dismissed.¹⁴⁹ Employees may be dismissed, but not in an unfair manner.¹⁵⁰ Fair reasons for dismissal are set out in section 188 of the LRA, namely misconduct, incapacity or poor work performance, and the employer's operational requirements.¹⁵¹ Every dismissal must also be both procedurally and substantively fair.¹⁵² Dismissals that cannot be justified under section 188 are considered arbitrary and unfair.¹⁵³

The test to establish the fairness of the dismissal of an employee with disabilities is derived from the Constitution and involves interplay between various fundamental rights, including equality, dignity, choice of trade, occupation or profession, and fair labour practices.¹⁵⁴ However, this test cannot be limited to the Constitution, as other relevant legislation, case law and international instruments also need to be taken into account.

Section 187 of the LRA stipulates categories of dismissals that are automatically unfair. Section 187(f) lists disability as a discriminatory ground that is considered an automatically unfair reason for dismissal. As there is a remarkable overlap between section 187 of the LRA and section 6 of the EEA, dismissal on one of the grounds in section 187 may also be actionable under the EEA.¹⁵⁵

This means that an employee may not be dismissed solely based on a mental disability, such as depression. Dismissing an employee merely for having depression or any other mental disability will be automatically unfair. The employee may also have

¹⁴⁷ For an outline of the symptoms and diagnostic features of these mental health conditions, see DSM-5 2013:87-90, 123-139.

¹⁴⁸ 66/1995.

¹⁴⁹ See 4.4.3.6 above.

¹⁵⁰ Grogan 2014a:189.

¹⁵¹ LRA: sec 188. Also see Grogan 2014a:189.

¹⁵² LRA: sec 188.

¹⁵³ Grogan 2014a:189.

¹⁵⁴ *Standard Bank of SA v CCMA*: 1253[60].

¹⁵⁵ Van Niekerk *et al.* 2015:267.

a claim for unfair discrimination under the EEA, depending on the circumstances. In cases where employees with mental disabilities were dismissed for incapacity on the basis of such disabilities, the courts and the CCMA have incorporated the use of the Disability Code to offer guidance on disabilities and their related legal considerations, in line with the substantive and procedural fairness required to legally dismiss an employee.¹⁵⁶

3.5.5 Concluding remarks

It would appear, therefore, that as a clinically recognised impairment that is recurring in nature, depression may amount to a disability under the South African legal framework, provided that the symptomology is severe enough to substantially limit the individual's entry into or advancement in employment. Explicit judicial and legislative recognition to this effect is however still lacking.

3.6 Lacunae in the South African legal framework in relation to people with mental disabilities

The analysis and considerations in this chapter seem to indicate that the South African legal system does not explicitly recognise depression or other mental health conditions, including PTSD, bipolar disorder or schizophrenia, as disabilities. Thus, even though depression may satisfy the legal requirements of a disability, it is not being recognised as such by either the legislature or the judiciary.

Although the South African Constitution and the EEA extend protection to people with mental disabilities, this is insufficient, given the prevalence and negative consequences of mental health conditions in the workplace, and the vulnerability of those affected. The reasons for this statement follow below.

Preference for the medical disability model

The Disability Code appears to favour the medical model of disability, which creates concern for persons with mental health conditions, who are exposed to social barriers such as stigma and prejudice because of their disorders. These social barriers require

¹⁵⁶ See for example *Wylie and Standard Executors and Trustees* 2006 27 ILJ 2210 CCMA; *National Education Health & Allied Workers Union obo Lucas and Department of Health (Western Cape)* 2004 25 ILJ 2091 BCA; *Standard Bank of SA v CCMA* 2008 29 ILJ 1239 LC.

a substantive approach to equality and a shift towards the social model of disability, which would be more in line with the international legal position. Such an approach would contribute to the elimination of the prejudice, stigmatisation, discrimination and disadvantage suffered by these vulnerable individuals in the workplace.

The lack of interpretative guidelines

Interpretative guidelines specific to mental disabilities are also lacking under the South African legal framework. Although the Disability Code and Disability Guidelines do address mental impairments and mental disabilities, the guidelines and suggestions are insufficient given the nature and extent of the problem created by mental health conditions in the workplace. Guidelines on the categories of mental health conditions such as depression that may generally amount to legal disabilities, as well as details of various mental health conditions and their symptoms and consequences, will be of significant aid.

The absence of explicit protection for perceived disabilities

Arguably the most striking *lacuna* in the South African labour realm in relation to persons with mental disabilities is that these persons, who are vulnerable to severe stigmatisation, prejudice and adverse treatment based on perceptions of their mental health conditions, are not extended explicit protection in cases of “perceived disability”. Although the Revised Disability Code includes the definition of “persons with disabilities” as provided by the UN Disability Convention, which endorses the social model of disability and recognises perceived disabilities, perceived disabilities are not protected or incorporated in the rest of the code, nor do they form part of the EEA as an explicit ground of unfair discrimination.¹⁵⁷ This is not in line with the Constitution’s commitment to the realisation of substantive equality and transformative constitutionalism¹⁵⁸ in society and the workplace, nor does it comply with section 39(1) of the Constitution, which requires adherence to international law.

¹⁵⁷ It should be noted that the consideration relating to reasonable accommodation stated in footnote 141 above applies equally here.

¹⁵⁸ This concept denotes an approach that seeks to address systematic inequality and to “shift the power relations that maintain the *status quo*” in society and the workplace. See Albertyn 2007:256. This concept is discussed extensively in 4.4.2.1.3 below.

The absence of disability specific legislation

South Africa signed and ratified the UN Disability Convention, but the legislature did not pass enabling legislation to incorporate its principles into the South African legal framework. Although the various applicable provisions in the Constitution, EEA, LRA and the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)¹⁵⁹ are indeed aimed at protecting the rights of persons with disabilities, there is no disability-specific legislation in South Africa to truly protect or give effect to their rights. Therefore, persons with mental disabilities such as depression are forced to rely on the general non-discrimination provision contained in section 6(1) of the EEA and a non-binding code of good practice, instead of a detailed body of binding legislation that ensures legal certainty in relation to mental and other disabilities. Although it falls outside the scope of this study to consider the physical and other disabilities that could also form part of such disability-specific legislation, the lack of disability-specific legislation under the South African legal framework to give effect to the UN Disability Convention constitutes a lacuna in the South African legal system governing mental health conditions in employment.

3.7 Conclusion

The reflection in this chapter leads one to conclude that mental health conditions are under-researched and afforded inadequate consideration in the disability context.

The practical test of depression against the disability requirements under the EEA and Disability Code shows that this mental health condition may indeed satisfy the criteria to qualify as a legally recognised disability and be eligible for protection under the law. Thus, depression may constitute a disability, but it is not presently recognised as such in the Disability Code or Guidelines.

Despite the fact that mental disabilities are prevalent in society, the individuals suffering from these disabilities will be placed under a strenuous burden in alleging that their mental health condition amounts to a legally recognisable disability, in the absence of disability specific legislation, guidelines to this effect and scarce judicial precedent on the topic. This constitutes the status quo despite that fact that

¹⁵⁹ 4/2000.

depression, for example, may satisfy the requirements of the disability definition, as illustrated in this chapter.

Other individuals with depression are unable to obtain legal protection under the disability banner. This may happen in circumstances where the individual is depressed, but may not have the sufficient number of symptoms to be diagnosed and have their condition amount to a “clinically recognised impairment”. Furthermore, the person may obtain the aforesaid recognition and have enough symptoms to be impaired and have their ability to function in the workplace diminished, but these symptoms may not be severe enough to substantially limit the person’s entry into or advancement in employment. The effects and influence of the use of medication in treating and managing mental health conditions and its resultant impact on a person’s eligibility of satisfying the disability definition is presently under-researched in South Africa.

The current *lacunae* in the South African legal framework may make it difficult to convince a court of law that mental health conditions should be considered as disabilities in the South African world of work. Persons with mental disabilities, including individuals living with depression, constitute a vulnerable group in society and have suffered and continue to suffer systematic disadvantage, stigmatisation and marginalisation in employment. A substantive equality approach and more effective legal protection are thus required to achieve redress.

CHAPTER 4

UNFAIR DISCRIMINATION BASED ON MENTAL HEALTH UNDER THE SOUTH AFRICAN LEGAL FRAMEWORK¹

4.1 Introduction

This chapter will analyse mental health conditions, including depression, as a possible category of unfair discrimination under the South African legal framework. To this end, it will firstly explore the international instruments influencing South African law in relation to discrimination based on mental health, as well as the concept of discrimination, after which mental health will be considered as a listed, an unlisted analogous and an arbitrary ground of unfair discrimination.

Mental health conditions will also be investigated in relation to workplace harassment and workplace bullying, being a specific subcategory of harassment.

4.2 International instruments and discrimination on the basis of mental health

The international law relevant to discrimination against persons with mental disabilities and mental health problems must be considered in relation to mental health based discrimination²

The UN Disability Convention serves as the primary international instrument in the consideration of discrimination against the mentally disabled. It provides that “discrimination against any person on the basis of their disability is a violation of the inherent human dignity and worth of the human person”.³ It then goes on to define discrimination as follows:

Discrimination on the basis of disability means **any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights**

¹ The contribution in this chapter is original in the sense that it represents the author's own work. Nevertheless, it does draw on sections in the author's LLM dissertation "A comparative labour law perspective on categories of appearance-based prejudice in employment" as well as the author's published article "The phenomenon of weight-based discrimination in South African employment".

² This consideration flows from sections 39 and 233 of the Constitution, as set out in 3.2 on page 42 above.

³ UN Disability Convention: preamble (h).

and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including the denial of reasonable accommodation.⁴

The Disability Convention further requires all state parties to the convention to prohibit all discrimination on the basis of disability, and to guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.⁵ It also provides a commitment to the prevention and eradication of discrimination in employment, with article 27 stating the following:

[To p]rohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions.⁶

Similarly, the *ILO Vocational Rehabilitation and Employment (Disabled Persons) Recommendation No. 168 1983* provides a commitment to the achievement of equality and equal opportunities for persons with disabilities in employment.⁷

The ILO Disability Code also commits to the achievement of equal opportunities for persons with disabilities in the workplace and provides the following definition for discrimination:

Any distinction, exclusion or preference based on **certain grounds** which **nullifies or impairs equality of opportunity or treatment in employment** or occupation. General standards that establish distinctions based on prohibited grounds constitute discrimination in law.⁸

Thus, all these international law instruments illustrate a commitment to the achievement of equality and equal opportunity for persons with mental disabilities, the prohibition of discrimination based on their disabilities, and respect for their inherent human dignity. The ILO Disability Code even provides additional protection, namely against discrimination based on “certain grounds”, which may include mental health and depression, irrespective of whether the particular mental health condition amounts to a disability in the legal sense.

⁴ UN Disability Convention: art 2, own emphasis added.

⁵ UN Disability Convention: art 5(2).

⁶ UN Disability Convention: art 27(a).

⁷ *ILO Vocational Rehabilitation and Employment (Disabled Persons) Recommendation No. 168 1983*: art 7.

⁸ ILO Disability Code: item 1.4, own emphasis added.

4.3 The concept of discrimination under the South African law

The EEA (as amended by the *Employment Equity Amendment Act*)⁹ was enacted to give effect to the constitutional right to equality¹⁰ and to eradicate unfair discrimination in the South African workplace, thereby bringing about the new labour dispensation envisaged by the Constitution.¹¹ Thus, constitutional equality, as embodied in section 9 of the Constitution, forms the backdrop to the EEA and remains relevant in any context in which the EEA is considered.¹²

From the outset, it is important to note that the prohibition of unfair discrimination in employment essentially centres on the protection of inherent human dignity.¹³ In a discrimination case, it must *inter alia* be shown that the discrimination complained of negatively affected the individual's dignity as a member of a vulnerable group.¹⁴ Individuals alleging discrimination based on a mental health condition such as depression will consequently have to prove that said discrimination impaired their fundamental human dignity.

Du Toit indicates that although the number of unfair discrimination disputes referred to the CCMA is negligible, it would not be justified to infer that discrimination, as well as discriminatory practices and attitudes, has been eradicated from the employment realm.¹⁵ Empirical evidence suggests that discrimination in the workplace is indeed highly prevalent.¹⁶ Given the stigma, stereotypes and prejudice that attach to mental health conditions, it is safe to say that these conditions constitute a high-risk area for employment discrimination in South Africa, as is the case abroad.

Section 6(1) of the EEA lists the grounds of prohibited discrimination, including disability, and also provides for the possibility of alleging a ground not mentioned in the list, which could include a mental health condition such as depression, as an unlisted analogous ground or an arbitrary ground of unfair discrimination.

⁹ 47/2013.

¹⁰ Grogan 2005:87.

¹¹ Du Toit 2007:1.

¹² Du Plessis and Fouche 2015:87.

¹³ Human dignity is also the key factor in distinguishing between the listed and unlisted grounds of unfair discrimination. See McGregor and Germishuys 2014:96; Dupper *et al.* 2004:65.

¹⁴ McGregor and Germishuys 2014:94.

¹⁵ Du Toit 2014:2624.

¹⁶ Du Toit 2014:2624.

The legal requirements will have to be satisfied in each case in order to support an allegation of unfair discrimination, irrespective of the form it takes. Section 5 of the EEA places an obligation on employers to promote equal opportunity in the workplace by eradicating unfair discrimination, eliminating it from employment policies and practices.¹⁷ The EEA serves as the foundation of the prohibition on unfair discrimination in the South African employment realm.¹⁸ The prohibition is crystallised in section 6(1) of the act, which states the following:¹⁹

No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth or on any other arbitrary ground.

Importantly, however, section 6(1) does not prohibit discrimination as such, but only unfair discrimination.²⁰

Although not necessarily in situations where the EEA applies,²¹ the definition of discrimination as stated in the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), being part of the South African legal framework, is also relevant. PEPUDA defines discrimination as follows:

[D]iscrimination means any act or omission including a policy, law, rule, practice, condition or situation which directly or indirectly
(a) imposes burdens, obligations, or disadvantage on; or
(b) withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds.²²

It goes on to list the prohibited grounds as follows:

- (a) ... disability ...
- (b) Any other ground where discrimination based on that other ground
 - (i) Causes or perpetuates systematic disadvantage;
 - (ii) Undermines human dignity; or
 - (iii) Adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).²³

Disability is listed as a prohibited ground in terms of PEPUDA, and discrimination based on disability is consequently prohibited, as is discrimination based on a ground

¹⁷ EEA: sec 5.

¹⁸ Dupper *et al.* 2004:31.

¹⁹ *Employment Equity Amendment Act*: sec 6(1), own emphasis added.

²⁰ Dupper *et al.* 2004:31.

²¹ PEPUDA: sec 5(3).

²² PEPUDA: sec 1.

²³ PEPUDA: sec 1.

that is analogous to disability, or a ground that affects the individual's human dignity or causes systematic disadvantage. It is contended that discrimination based on an individual's mental health status may constitute such a ground.

4.4 Mental health conditions as a category of unfair discrimination, with special reference to depression

4.4.1 Introductory remarks

In order to explore whether mental health constitutes a ground of unfair discrimination, it is necessary to first consider mental health in relation to the rights of equality and dignity flowing from the Constitution. Thereafter, mental health conditions will be considered as a possible listed ground (namely mental disability), an unlisted analogous ground and an arbitrary ground of unfair discrimination, against the legal requirements applicable to each.

4.4.2 The role of mental health in relation to equality and dignity in the South African context

The rights to dignity and equality are cemented in the Constitution and form the cornerstones of the new constitutional society, resulting in their entrenchment in the labour realm also.²⁴ The constitutional commitment to the achievement of substantive equality and the eradication of systematic inequalities and unfair discrimination, along with the right to dignity, both as an independent right and a value that informs the interpretation of equality, is of paramount importance in considering mental health conditions in the workplace, as the following paragraphs will show.

4.4.2.1 The interface between mental health conditions and the rights to equality and dignity

4.4.2.1.1 Dignity, equality and mental health

The right to human dignity, as an international and universal human right, is treated and interpreted similarly in both South Africa and the comparative jurisdictions studied in this thesis.²⁵ South Africa, however, boasts one of the world's most developed

²⁴ The right to equality in sec 9 and the right to dignity in sec 10.

²⁵ Haysom 2014, in Cheadle *et al.* 2014:5-3.

bodies of jurisprudence on human dignity.²⁶ The Constitution states the following in section 10: “Everyone has inherent dignity and the right to have their dignity respected and protected.”²⁷

Dignity constitutes an umbrella concept, as so many facets of this right have come to be recognised, including that dignity highlights individual features of personal autonomy and psychological self-worth.²⁸ Dignity, in the broadest possible sense, means to be treated with respect and protected from conditions and treatment that offend one’s sense of self-worth in society.²⁹ Consequently, treatment that is abusive, degrading or demeaning may be considered as a violation of the right to dignity.³⁰

The right to dignity is regarded as an acknowledgement of the intrinsic worth of human beings,³¹ underlining that all persons are worthy of respect and concern, and should be treated as such.³² Inherent human dignity is also considered to be a universal human duty, and as such, all people have a responsibility to uphold it and to treat every other human being in a dignified and humane fashion.³³ In addition, dignity is inherent in every person, regardless of their bodily or mental capacity, and does not depend on particular characteristics, nor can it be lost through undignified behaviour.³⁴

The considerations above are fundamentally important in considering people with mental health conditions, who also have inherent human dignity and deserve to have this dignity respected, irrespective of their mental state. Persons with mental health conditions do not lose their right to dignity if they engage in undignified conduct as a result of their particular mental health problem. Equal concern and respect in relation to the right to dignity entails respect irrespective of differences, and an affirmation of

²⁶ Woolman 2014, in Woolman and Bishop (eds) 2014:36-1.

²⁷ A commitment to human dignity as enshrined in the Constitution, and to all that stems from this concept, is intimately bound to the humanity of the right bearer and cannot be considered as a privilege granted by the state. See Haysom 2014, in Cheadle *et al.* 2014:5-6.

²⁸ Albertyn 2010, in Dupper and Garbers (eds) 2010:90; Albertyn 2014, in Cheadle *et al.* 2014:4-11; Albertyn and Fredman 2015:435; Ackermann 2013:23.

²⁹ Ackermann 2013:23-24; Haysom 2014, in Cheadle *et al.* 2014:5-8.

³⁰ Haysom 2014, in Cheadle *et al.* 2014:5-8.

³¹ Ackermann 2013:182-183, referring to *S v Makwanyane* 1995 3 SA 391 CC: 328; Woolman 2014, in Woolman and Bishop (eds) 2014:36-1.

³² Albertyn and Fredman 2015:430; Haysom 2014, in Cheadle *et al.* 2014:5-8; Albertyn and Goldblatt 2014, in Woolman and Bishop (eds) 2014:35-9; Woolman 2014, in Woolman and Bishop (eds) 2014:36-10.

³³ See Goolam 2001:4, who notes that in a transforming society, every person’s right to human dignity and responsibility to uphold it is vital for the future of South Africa.

³⁴ Botha 2009:191; 197.

diversity.³⁵ People with mental health conditions, such as depression, should thus be treated with equal concern and respect, in spite of differing from the societal norm. The right to dignity is ever-present and may serve as a powerful tool in bringing about legal transformation for people with mental health conditions.³⁶

The concept of equality is central to the South African legal system, constituting a free-standing right as well as a foundational value under the Constitution.³⁷ South Africa takes a very stern view on the prohibition of unfair discrimination, particularly in light of its discriminatory past,³⁸ which is why every person's right to be equal before the law is enshrined in section 9 of the Constitution. De Waal argues that in interpreting the equality clause, the Constitutional Court found that it sought to promote two primary values, namely the "prevention of arbitrariness" and "the protection of human dignity".³⁹ Another central value of the equality clause is "the removal of systematic discrimination and deeply entrenched patterns of disadvantage and the development of opportunities and resources for meaningful participation in society".⁴⁰

The equality clause and the right to equal opportunity and protection from unfair discrimination are highly relevant in the context of people with mental health conditions, especially given the long history of stigmatisation, discrimination and prejudice they have suffered. This is also inextricably intertwined with the right to dignity, since the core notion of this right is to address the injuries of stigma, humiliation, stereotyping and prejudice.⁴¹

³⁵ Albertyn and Goldblatt 2014, in Woolman and Bishop (eds) 2014:35-11.

³⁶ The Constitutional Court's dignity-based approach has served as a powerful tool in the struggle of various social groups, including homosexuals, religious minorities and non-citizens. It may thus serve as a powerful weapon for people with mental health conditions also, being another vulnerable group. See Botha 2009:213.

³⁷ Jagwanth 2005:131; Albertyn and Goldblatt 2014, in Woolman and Bishop (eds) 2014:35-1.

³⁸ Inequalities in South Africa, such as those suffered by people with mental health conditions, are deep and pervasive, scarring every facet of society. See Albertyn and Goldblatt 2014, in Woolman and Bishop (eds) 2014:35-2.

³⁹ De Waal 2002:143.

⁴⁰ De Waal 2002:142, referring to Albertyn and Goldblatt 1998:254. The significant relationship between equality and the value of dignity has been recognised and emphasised by the Constitutional Court. The central role of dignity in the equality analysis, including its significance in relation to the right not to be unfairly discriminated against, was established in *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 CC and in *Harksen v Lane NO* 1997 11 BCLR 1489 CC. The value of dignity continues to play a primary role in relation to unfair discrimination. Its meaning, however, is broadened in certain circumstances to include issues of group disadvantage. See Albertyn 2014, in Cheadle *et al.* 2014:4-11, 4-12.

⁴¹ Albertyn and Fredman, 2015:431.

Applying this to the employment context, Vettori indicates that a contract of employment is more than just a commercial contract, but also contains aspects of dignity, identity and humanity.⁴² An employer is consequently obliged to act in a reasonable and fair manner towards its employees and to respect their constitutionally protected right to dignity.⁴³ Therefore, by virtue of the contract of employment and the employment relationship, an employer may also not unfairly discriminate against employees based on their mental health conditions, but are obligated to respect their dignity and right to equality in the workplace.

A further dignity-based consideration flowing from the employment relationship is the principle of “fair dealings”⁴⁴ between the employer and the employee. In the case of *Murray v Minister of Defence*,⁴⁵ the court held that the marginalisation and workplace bullying that resulted in the employee developing depression had violated the principle of fair dealings.⁴⁶ It was also held that the acts of workplace bullying, together with the depression suffered by the employee, were highly relevant to how the employer should have dealt with the employee had it followed the principle of fairness.⁴⁷ Therefore, if employees develop mental health conditions such as depression in the course and scope of their employment, the duty of fair dealings requires employers to take this condition into consideration in its treatment of the employee.

The right to dignity protects individuals from degrading, humiliating or abusive treatment that in effect diminishes a person’s self-worth.⁴⁸ Therefore, this right may act as a significant source of protection for individuals with mental health conditions and should provide them with protection and legal recourse from the discrimination,

⁴² Vettori 2012:103.

⁴³ It is further reaffirmed that the rights to dignity and equality, as well as the prevention of harassment, are fundamental cornerstones of the South African labour arena. See Vettori 2012:103.

⁴⁴ This principle entails that there is a reciprocal duty of fair dealings between an employer and an employee in the workplace, and that employers should deal with employees openly and honestly. This principle also requires the parties to respect each other’s dignity. See Smit 2014:269, referring to *Kotze and Agricultural Research Council of SA* 2007 28 ILJ 261 CCMA: 267; *Murray v Minister of Defence* 2008 29 ILJ 1369 SCA 1375.

⁴⁵ 2008 29 ILJ 1369 SCA.

⁴⁶ In light of this case, Viljoen argues that preventative and reactive measures implemented by an employer should not be restricted to instances of harassment and sexual harassment, but should be extended to other instances of abuse, bullying and other types of inexcusable employee behaviour as well. See *Murray v Minister of Defence*: 51, 59, 65, 66; Viljoen 2013:66; Smit 2014:269.

⁴⁷ *Murray v Minister of Defence*: 59.

⁴⁸ Haysom 2014, in Cheadle *et al.* 2014:5-12; Albertyn and Fredman 2015:435.

prejudice, stereotyping and unfair treatment that they have been subjected to in the past.

Former Justice Ackermann argues that self-esteem is also regarded as forming part of the dignity concept and is considered as another way of formulating the notion of self-awareness and a sense of self-worth.⁴⁹ In light of the social vulnerability of people with mental health conditions, their fear of stigmatisation, prejudice, discrimination and marginalisation because of their condition may negatively affect their self-esteem as well as their sense of self-awareness and self-worth, which may in turn impair their human dignity.

Dignity has often been described as the central value of equality in so far as it speaks to our basic humanity.⁵⁰ Human dignity is a feature of humankind, dictating that all human beings must be treated equally.⁵¹ Therefore, while these rights are protected as individual and independent rights, they also exist in unison.⁵² Fredman refers to Chaskalson in this regard, who states the following: "Inequality is established not simply through group-based differential treatment, but through differentiation which perpetuates disadvantage and leads to scarring of the sense of dignity and self-worth."⁵³ Therefore, unfavourably distinguishing individuals with mental health conditions from other employees perpetuates a pattern of disadvantage, creates vulnerability and marginalisation, and consequently also scars these individuals' dignity and self-worth.

The court in *Standard Bank of SA v CCMA* stated that for employees with disabilities, dignity is about being socially and economically independent in managing their normal day-to-day activities with minimum hardship for themselves and others, and about participating in and contributing to society.⁵⁴ The court went on to confirm that dignity

⁴⁹ Ackermann 2013:106.

⁵⁰ Currie and De Waal 2013:252. The Constitutional Court has also placed dignity at the centre of the equality right. See Albertyn and Fredman 2015:430. This consideration is supported by Ackermann 2013:186. Also see Albertyn and Goldblatt 2014, in Woolman and Bishop (eds) 2014:35-8; Woolman 2014, in Woolman and Bishop (eds) 2014:36-25. Nevertheless, the supremacy of dignity in the equality right has also been criticised. See for example Albertyn and Goldblatt 2014, in Woolman and Bishop (eds) 2014:35-14; Albertyn and Fredman 2015:430-455.

⁵¹ Ackermann 2013:182.

⁵² Fredman 2010, in Dupper and Garbers (eds) 2010:19.

⁵³ Fredman 2010, referring to Chaskalson 2002:140, in Dupper and Garbers (eds) 2010:19.

⁵⁴ *Standard Bank of SA v CCMA*: 1255[65].

is about self-respect and self-worth.⁵⁵ In the context of persons with mental health conditions such as depression, this is particularly relevant, as they have been excluded from participating effectively in society and have suffered various patterns of social and economic disadvantage. Consequently, these individuals' right to dignity should offer them an opportunity to participate in and contribute to society, to be employed, to be respected and to manage their day-to-day activities with minimum hardship.

It is thus proposed that a substantive approach to equality is required in relation to people with mental health conditions in the workplace. This suggestion stems primarily from the need for proper redress instead of the mere removal of past patterns of prejudice, discrimination and disadvantage experienced by this group. A formal approach to equality would in these circumstances not recognise these forms of structural and systematic inequality. Substantive equality also requires social change in addressing inequality and would effectively highlight the social arrangements behind the legal position of people with mental health conditions, and how to address them. The substantive approach to equality, as developed by the Constitutional Court,⁵⁶ requires that the right to equality be applied in its social context, including the recognition of past and present social disparities, and also incorporates the value of human dignity.⁵⁷ The right to equality for people with mental health conditions may thus be applied effectively when their right to human dignity as well as their past and present social disparities are taken into account.

The achievement of substantive equality involves a process of transformation in society, which is aimed at the eradication of disadvantage based on race, gender, class and other forms of inequality.⁵⁸ Discrimination based on an individual's mental health is believed to be one such form of inequality that should be remedied if society is to achieve equality and transformation. The transformative approach requires a paradigm shift and the eradication of systematic forms of inequality.

⁵⁵ *Standard Bank of SA v CCMA*: 1255[65].

⁵⁶ The equality standard developed by the Constitutional Court is “**based on a substantive approach to equality that is sensitive to past patterns of discrimination, systematic inequality and the role of harmful social stereotypes**”. See Botha 2004:724, own emphasis added.

⁵⁷ Jagwanth 2005:132.

⁵⁸ Albertyn 2010, in Dupper and Garbers (eds) 2010:77.

The transformative method may be a significant tool in eradicating systematic forms of prejudice and inequality suffered by persons with mental health cognitions. The transformative approach also includes the promotion of opportunities that “allow people to realise their full human potential within positive social relationships”.⁵⁹ For people with mental health conditions to realise their full human potential, the prejudice, stereotyping and discrimination they have suffered because of their mental health status need to be eradicated from the social norm.

In employment, the right to equality and the pursuit of fairness require a balancing act between the rights and interests of the employer and employee.⁶⁰ This differs slightly from the constitutional position, where the balance is tilted in favour of the vulnerable and marginalised,⁶¹ although issues such as vulnerability and marginalisation will always play a dominant role in assessing fairness and equality in the labour arena also. Consequently, a balance needs to be struck between the rights and interests of employees with mental health conditions and an employer’s economic interests. Given the stigmatisation, prejudice and marginalisation of people with mental health issues, as well as their vulnerable position in society and the workplace, an employer’s economic interests will infrequently outweigh these persons’ right to equality, provided of course that they are able to discharge the inherent requirements of their particular jobs.

If a claim alleging the infringement of the right to equality is brought before the South African judiciary, the Constitution compels the courts to approach such claims by assessing the “position of the claimants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real-life context, in order to determine its fairness or otherwise in light of the values of the Constitution”.⁶²

In *Harksen v Lane*, the Constitutional Court stated that fairness was assessed by determining whether there has been an infringement of a complainant’s fundamental human dignity, or an impairment of a comparably serious nature.⁶³ Therefore, as the

⁵⁹ Albertyn and Goldblatt, 1998:249.

⁶⁰ Albertyn 2010, in Dupper and Garbers (eds) 2010:79.

⁶¹ Albertyn 2010, in Dupper and Garbers (eds) 2010:79.

⁶² Albertyn 2010, in Dupper and Garbers (eds) 2010:80.

⁶³ *Harksen v Lane NO* 1998 1 SA 300 CC: 38; Albertyn 2010, in Dupper and Garbers (eds) 2010:80.

human mind is an integral part of the human body as well as a defining attribute of human individuality, judging and disadvantaging employees based on their mental health in circumstances where they are indeed able to discharge the inherent requirements of the job strikes at the very foundation of such an individual's dignity, resulting in unfairness.

Currie and De Waal argue that human dignity is the foundation in which an individual's innate right to physical integrity as well as a number of other rights are rooted.⁶⁴ Therefore, the right to dignity can have many meanings, can be used in many different ways to address a diversity of issues, and have many facets. One such facet is that dignity is believed to reflect characteristics such as psychological self-worth and personal autonomy.⁶⁵ It follows that when employees experience prejudice based on their mental health conditions, even though they can discharge the inherent requirements of the job – whether with or without reasonable accommodation – this offends both the employee's personal autonomy and psychological self-worth. Consequently, the employee's right to dignity is also impaired.

Albertyn highlights the fact that the judiciary has addressed only a small portion of the inequalities that characterise South African society.⁶⁶ This has led her to suggest that the list of additional prohibited grounds should be carefully considered, and the nature and values underpinning the right to equality be further articulated and applied.⁶⁷ In this manner, protection may also be extended to the victims of discrimination based on mental health conditions specifically, as such conditions are prevalent in the employment domain. "Mental health" could be established as an independent ground of unfair discrimination that should be prohibited. Albertyn's view may be supplemented by proposing that such an additional ground could also be developed as either an unlisted analogous ground or an arbitrary ground under the *Employment Equity Amendment Act*.⁶⁸

⁶⁴ Currie and De Waal 2013:251.

⁶⁵ Albertyn 2010, in Dupper and Garbers (eds) 2010:90.

⁶⁶ Albertyn 2010, in Dupper and Garbers (eds) 2010:96.

⁶⁷ Albertyn 2010, in Dupper and Garbers (eds) 2010:96.

⁶⁸ As indicated under par 4.4.3.3 below, the legislature and/or the judiciary will first need to clarify the nature and scope of the arbitrary grounds. Although unlikely and depending on the judicial interpretation thereof, it would be possible to tender the view that the unlisted grounds and arbitrary grounds are one in the same.

4.4.2.1.2. Formal and substantive equality for people with mental health conditions in the workplace

The right to equality, as enshrined in the Constitution, gives rise to two central notions, namely formal and substantive equality. In the context of people with mental health conditions, the distinction between these two is particularly significant.

At its core, formal equality (or *de iure* equality) entails that people who are similarly situated should be treated similarly,⁶⁹ based on the notion that inequality is irrational and arbitrary.⁷⁰ Thus, formal equality calls for neutrality and a symmetrical application of the law and is achieved if people are treated in “a mutual fashion”, without taking into account the specific histories and socio-economic disparities between various groups and individuals.⁷¹

Substantive equality, on the other hand, calls for disparate treatment of people, provided that the outcome achieves equality for all.⁷² At its core, the notion of substantive equality entails that people should be placed in a position to participate fully in society and to develop their full human potential.⁷³ The substantive approach to equality suggests that formal equality does not highlight and address the patterns of underlying socio-economic disadvantage among groups and individuals.⁷⁴ Therefore, substantive equality does take into account the socio-economic circumstances of various groups in order to determine whether the constitutional

⁶⁹ Currie and De Waal 2013:213; Pretorius *et al.* 2014:2-6. Also see Pretorius 2013:7, who states that in terms of the formal approach to equality, “people or groups of people should be treated identically, regardless of their particular circumstances. Formal equality simply requires that people should have the same rights and entitlements”. Also refer Albertyn 2014, in Cheadle *et al.* 2014:4-6, where formal equality is described as “the abstract prescription of equal treatment for all persons, regardless of their actual circumstances. It perceives inequalities as irrational aberrations in an otherwise just social order, which aberrations can be overcome by extending the same rights and entitlements to all, in accordance with the same neutral standard of measurement”.

⁷⁰ Albertyn and Goldblatt 2014, in Woolman and Bishop (eds) 2014:35-6.

⁷¹ Pretorius 2013:7; Currie and De Waal 2013:213; Albertyn 2014, in Cheadle *et al.* 2014:4-6.

⁷² Currie and De Waal 2013:213. Also see Albertyn 2007:254, where it is stated that “a constitutional commitment to substantive equality is thus also a commitment to the eradication of systematic inequalities. It establishes an aspirational ideal - the achievement of a society based on equality - and presumes that this is (at least partly) possible through law”.

⁷³ This understanding of substantive equality requires the removal of arbitrary and systematic barriers to participation in society for vulnerable groups, as well as the creation of conditions where human potential can be realised. See Albertyn 2014, in Cheadle *et al.* 2014:4-5.

⁷⁴ Albertyn and Goldblatt 2014, in Woolman and Bishop (eds) 2014:35-6; Pretorius 2013:7; Cooper 2004:817.

promise of equality is being effectively realised in society.⁷⁵ The substantive approach to equality, as developed by the Constitutional Court,⁷⁶ requires that the right to equality be applied against a social backdrop, which includes recognising past and present social disparities as well as the value of human dignity.⁷⁷ It furthermore emphasises the remedial and restitutive potential of the right to equality and ensures, with addressing past and present patterns of disadvantage as a primary function.⁷⁸

In certain circumstances, formal equality may therefore strengthen instead of remedy social disadvantage⁷⁹ and fail to recognise the existence of various forms of systematic or structural inequality.⁸⁰ In this way, formal equality may be unsuccessful in changing the patterns of the past, because those forms of inequality need to be redressed and not merely removed.⁸¹ Through an asymmetrical application of equality, on the other hand, different groups of individuals are treated non-identically in certain cases, precisely to address the differences between them.⁸² Under such a substantive equality approach, a claim of discrimination must be considered in terms of whether the discriminatory treatment reinforces pre-existing group disadvantage, stereotypes or prejudice.⁸³ The principles of substantive equality should thus form the “lens” through which the law is applied.⁸⁴

Albertyn and Fredman suggest a multidimensional framework of substantive equality, which includes the aims of addressing stigmatisation, stereotyping and prejudice, facilitating participation, and accommodating difference through structural change.⁸⁵

⁷⁵ Currie and De Waal 2013:213.

⁷⁶ Botha 2004:724.

⁷⁷ Jagwanth 2005:132.

⁷⁸ In this case, the emphasis of substantive equality is on the impact of the discrimination instead of on whether there is similar treatment between similarly situated individuals. See Jagwanth 2005:133, who refers to the judgment in *President of the RSA v Hugo*: 41 in order to illustrate this point. In that case, it was held that each set of circumstances will require a careful and thorough understanding of the impact of the discriminatory action on the people concerned in order to establish whether or not the impact furthers the constitutional goal of equality or not.

⁷⁹ Pretorius *et al.* 2014:2-6; Albertyn 2014, in Cheadle *et al.* 2014:4-6.

⁸⁰ Cooper 2004:817; Albertyn and Goldblatt 2014, in Woolman and Bishop (eds) 2014:35-6.

⁸¹ Cooper 2004:817, referring to Kentridge 1989:14-4. Also see *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 CC: 60.

⁸² Albertyn and Fredman 2015:434; Jagwanth 2005:133, referring to *Prinsloo v Van der Linde* 1997 6 BCLR 759 CC: 24.

⁸³ Jagwanth 2005:133.

⁸⁴ Jagwanth 2005:131.

⁸⁵ Albertyn and Fredman 2015:432, 439.

Fredman makes the following distinction between formal and substantive equality: "Whereas formal equality addresses discrimination based on status, substantive equality highlights the fact that it is not status per se which is problematic, but the disadvantage which attaches to status."⁸⁶ This notion is supported by Albertyn and Goldblatt, who postulate that it is not the particular group or individual's characteristics that are of primary relevance, but rather the social arrangements behind them.⁸⁷ In the context of people with mental health conditions, this consideration is arguably best stated by Albertyn and Fredman, who suggest that difference is a central feature of substantive equality, and that it is not the difference itself, but instead the disadvantage that flows from it that is problematic.⁸⁸ In light of the stigmatisation, stereotypes and discrimination attaching to people with mental health conditions, substantive equality may therefore be an important vehicle to facilitate change for this societal group.

Substantive equality entails both social and economic change that is capable of addressing various forms of inequality stemming from diverse social and economic causes.⁸⁹ It operates as both a value and a legally enforceable right in the pursuit of constitutional equality.⁹⁰ When establishing an appropriate approach to determine equality, the judicial forums will therefore have to analyse the particular social context of the group in question in order to determine whether differential treatment or identical treatment will result in (in)equality.⁹¹

The Constitutional Court has endorsed a substantive approach to equality,⁹² and that the notion is thus essential in the interpretation of the equality clause contained in

⁸⁶ Therefore, substantive equality aims to redress the disadvantage associated with a particular characteristic, such as mental health. See Fredman 2010, in Dupper and Garbers (eds) 2010:15.

⁸⁷ Albertyn and Goldblatt 1998:253.

⁸⁸ They suggest that difference is a valuable part of life, and that conformity should not be the price for equality. See Albertyn and Fredman 2015:437. Also see Albertyn and Goldblatt 2014, in Woolman and Bishop (eds) 2014:35-7.

⁸⁹ Albertyn and Fredman 2015:432; Albertyn 2007:253. Also see De Waal 2002:141, who argues that the Constitution requires an analysis of substance and a focus on the purpose and effect of rules and conduct, not merely on their form.

⁹⁰ Albertyn 2007:254.

⁹¹ Pretorius 2013:7; Albertyn 2007:259.

⁹² See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 2000 1 BCLR 39 CC; *President of the Republic of South Africa v Hugo*; *City Council of Pretoria v Walker* 1998 3 BCLR 257 CC; Pretorius 2013:7-9; Pretorius et al. 2014:2-6; Albertyn and Goldblatt 1998:250; Cooper 2004:816-817; Ackermann 2013:353.

section 9.⁹³ The Constitutional Court explained the need for substantive equality as follows in *National Coalition for Gay and Lesbian Equality v Minister of Justice*.⁹⁴

Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable discrimination in the past. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.⁹⁵

One such a category that has suffered considerable discrimination in the past is persons with mental health conditions such as depression.⁹⁶ This makes it necessary to take substantive measures to redress the inequality suffered by this group, both in society and the workplace.

The following statement by Albertyn in relation to substantive equality is particularly relevant to people with mental health conditions:

Different groups in society experience a different mix of political, social and economic inequalities, giving rise [to] different kinds of equality claims. **Social inequalities result in patterns of inclusion and exclusion in which the identity, culture, values and behaviours of a particular group are stigmatized, marginalised and/or denigrated, while another group is affirmed and privileged.** Such exclusion may reflect or result in increased vulnerability to physical and psychological violence and to political marginalization.⁹⁷

It is contended that people with mental health conditions would constitute the disadvantaged group in this scenario, while able-minded people would constitute the group that is “affirmed and privileged”.

South Africa has a past of discrimination, misunderstanding, marginalisation and the exclusion of certain societal groups, including people with mental health conditions. The Constitution aims to overcome this history of inequality by healing society. However, this may fail if an approach of formal equality is followed. People with mental health conditions require certain additional protective and remedial measures to safeguard and give effect to their constitutional right to equality, especially given the stigmatisation, discrimination and disadvantage they have suffered. Equality claims aimed at social inclusion are one way in which people with mental health conditions may have their right to equality recognised, but these claims do not address the

⁹³ Cooper 2004:818.

⁹⁴ 1999 1 SA 6 CC.

⁹⁵ *National Coalition for Gay and Lesbian Equality v Minister of Justice*: 61. Also see Ackermann 2013:354.

⁹⁶ This is evidenced more fully in chapter 2 above.

⁹⁷ Albertyn 2007:255, own emphasis added.

structures that create and preserve systematic inequalities.⁹⁸ A second, and perhaps more effective, vehicle for change is equality claims aimed at the actual transformation of society.

4.4.2.1.3 Transformative constitutionalism as a vehicle for change in relation to people with mental health conditions

As substantive equality is at the core of the development of South Africa's equality jurisprudence, this reflects the constitutional commitment to a transformative approach and the establishment of "indigenous jurisprudence of transformation".⁹⁹ Section 9(2) of the Constitution clearly reflects this transformative purpose and the notion that the achievement of equality is an ongoing remedial and restitutive process.¹⁰⁰ The Constitutional Court as well as other South African judicial forums view the Constitution as transformative; yet, no single accepted definition for this concept exists,¹⁰¹ nor does it appear in the text of the Constitution itself.¹⁰² Klare introduced the concept of "transformative constitutionalism" in 1998, defining it as follows:

[A] long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institutions and power relations in a democratic, participatory and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale change through non-violent political processes grounded in law.¹⁰³

Former Chief Justice Pius Langa argues that transformative constitutionalism in essence signifies a change in society.¹⁰⁴ Brickhill and Van Leeve agree, stating that transformative constitutionalism envisages a meaningful improvement in people's living conditions.¹⁰⁵ This has relevance in the context of people with mental health conditions given the need for meaningful improvement of their lives in society and the workplace.

⁹⁸ Vulnerable and disadvantaged societal groups usually experience various inequalities, including aspects of social and economic inequality. See Albertyn 2007:256.

⁹⁹ Albertyn and Goldblatt 1998:250; Currie and De Waal 2013:214; Albertyn and Goldblatt 2014, in Woolman and Bishop (eds) 2014:35-5.

¹⁰⁰ Albertyn and Goldblatt 2014, in Woolman and Bishop (eds) 2014:35-30.

¹⁰¹ Langa 2006:351; Ackermann 2013:15.

¹⁰² Brickhill and Van Leeve 2015:146.

¹⁰³ Klare 1998:150.

¹⁰⁴ According to the former chief justice, transformation presupposes a social and economic revolution. See Langa 2006:352.

¹⁰⁵ Brickhill and Van Leeve 2015:143.

The transformative approach seeks to address systematic inequality and to “shift the power relations that maintain the *status quo*”.¹⁰⁶ Although transformation is, quite unsurprisingly, a contested concept, achieving equality in society requires a paradigm shift and the eradication of systematic forms of inequality.¹⁰⁷ In terms of the transforming conditions of this approach, the law can produce outcomes in line with the constitutional value of equality when confronted with the real-life conditions of people whose vulnerability and disadvantage are reinforced by historical circumstances,¹⁰⁸ which would include people with mental health conditions such as depression.¹⁰⁹

The constitutional transformation project is aimed at the eradication of systematic forms of disadvantage based on “race, gender, class and other forms of inequality”.¹¹⁰ Systematic disadvantage, discrimination and stigmatisation experienced by people with mental health conditions constitute one such “other form of inequality”, which the transformative approach to equality may redress. The transformative approach also includes the promotion of opportunities that “allow people to realise their full human potential within positive social relationships”,¹¹¹ which given their current state of disadvantage, is something that people with mental health conditions urgently need.

Albertyn identifies at least four features of substantive equality that give it transformative potential:

[A]n emphasis on understanding inequality within its social and historic context; a primary concern with the impact of the alleged inequality on the complainant; a recognition of difference as a positive feature of society; and attention to the purpose of the right and its underlying values in a manner that evinces a direct or indirect concern with remedying systematic subordination or disadvantage.¹¹²

Persons with mental health conditions could use this transformative approach envisaged by substantive equality to achieve social change. Substantive equality in its transformative form also requires that social institutions that cause systematic

¹⁰⁶ Albertyn 2007:256.

¹⁰⁷ Equality is a prominent driving force behind social transformation and is significant as both a right and a value in the transformative approach. See Albertyn and Goldblatt 1998:249.

¹⁰⁸ Brickhill and Van Leeve 2015:148.

¹⁰⁹ See the full exposition of past vulnerability and discrimination suffered by these persons in chapter 2 above.

¹¹⁰ Albertyn and Goldblatt 1998:249.

¹¹¹ Albertyn and Goldblatt 1998:249.

¹¹² Albertyn 2007:258.

disadvantage undergo a paradigm shift and accommodate disadvantaged individuals and groups, as opposed to requiring the individual or group to conform to the societal norm.¹¹³ Albertyn notes that the judiciary addresses only a limited number of the inequalities that persist in society and can extend the reach of section 9 of the Constitution to redress these inequalities by applying the transformative approach.¹¹⁴

4.4.3 Mental health conditions and unfair discrimination¹¹⁵

Differentiation constitutes the foundation of unfair discrimination.¹¹⁶ Put simply, differentiation in the workplace means treating job applicants or employees differently, or having an employment policy that distinguishes between these persons.¹¹⁷ Differentiation becomes discrimination if a person is treated differently for an unacceptable reason.¹¹⁸ The prohibited grounds listed and the arbitrary grounds in section 6(1) of the EEA qualify as such unacceptable reasons, as does any unlisted ground that is analogous to these listed grounds.¹¹⁹ Discrimination becomes unfair discrimination if the employer cannot justify it.¹²⁰ The Constitution and the EEA both prohibit unfair discrimination, but neither defines it.¹²¹

¹¹³ Fredman 2010, in Dupper and Garbers (eds) 2010:18. Also see Bhabha 2009:237, where the following statement provides support for the argument that transformative constitutionalism is fuelled by a substantive approach to equality: “In normative terms, transformation is the remedial imperative born of the theory of substantive equality. Or, thinking more instrumentally, substantive equality helps provide doctrinal tools with which to carry out the project of transformation.”

¹¹⁴ The courts may thus be a powerful tool in transforming the legal and social status of people with mental health conditions in South Africa. See Albertyn 2010, in Dupper and Garbers (eds) 2010:94.

¹¹⁵ A full practical exposition of these legal provisions follows below.

¹¹⁶ Dupper *et al.* 2004:33.

¹¹⁷ Dupper *et al.* 2004:33.

¹¹⁸ Dupper *et al.* 2004:33-34.

¹¹⁹ Grogan 2014a:107; Dupper *et al.* 2004:34.

¹²⁰ Dupper *et al.* 2004:35.

¹²¹ Du Toit and Potgieter 2014:16. Also see Du Plessis and Fouche 2015:88, who suggest the following definition for unfair discrimination: “Unfair discrimination is **different treatment of people on an arbitrary ground or using inappropriate criteria to differentiate** between one person or group and another”, own emphasis added. The ILO Convention 111, with which the EEA, in terms of section 3(d), must comply, does however provide the following definition for discrimination: “1. For the purpose of this Convention the term ‘discrimination’ includes — (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers’ and workers’ organisations, where such exist, and with other appropriate bodies.” See ILO Convention 111/1958: art 1(1); Du Toit and Potgieter 2014:9.

In terms of the traditional South African approach to determining unfair discrimination, which is endorsed by the South African judicial forums and supported by section 11 of the amended EEA, a three-stage inquiry needs to be conducted to establish unfair discrimination:¹²²

- Stage 1: Has differentiation taken place?
- Stage 2: If so, does the differentiation amount to discrimination?
- Stage 3: If it does, is the discrimination unfair?

If all three questions are answered in the affirmative, unfair discrimination has occurred.

Employees are the victims of unfair discrimination if they are singled out and treated prejudicially on an unacceptable ground.¹²³ The discrimination need not be arbitrary and may include a deliberate or rational discriminatory action.¹²⁴ Discrimination in employment may also constitute the use of any distinguishing criterion not related to the employment relationship, provided that the use of the criterion adversely affects the complainant's human dignity.¹²⁵

The following sections will consider mental health as a ground of unfair discrimination. It should however be noted that employees may also develop a mental health condition such as depression as a result of being discriminated against on another ground (such as race, sex or sexual orientation), or that such discrimination may aggravate an existing mental health condition.¹²⁶

4.4.3.1 Mental disability as a listed ground of unfair discrimination

The grounds of discrimination may be divided into listed grounds, namely those specified in section 6(1) of the EEA, and unlisted grounds, namely those that are analogous to the listed ones. In addition, in terms of the *Employment Equity Amendment Act*, the new "arbitrary grounds" in section 6(1) are also relevant.

¹²² Grogan 2005:88; Pretorius 2013:9-21; Du Toit and Potgieter 2014:91.

¹²³ Grogan 2014a:107.

¹²⁴ Grogan 2005:90.

¹²⁵ Du Plessis and Fouche 2012:93.

¹²⁶ Moomal *et al.* 2009:383.

The listed grounds of unfair discrimination have been listed because of the disadvantage and prejudice that these particular groups have been subjected to in the past, and because if these groups are not protected, discrimination could be used to demean them, violating their inherent human dignity.¹²⁷ As the listed grounds are closely related to “the self” and form part of the individual’s human identity, they are often difficult to alter.¹²⁸ The specified grounds relate to (immutable) biological characteristics,¹²⁹ which would include mental health status.

If discrimination is alleged on one of the listed grounds, it is automatically presumed to be unfair, while an allegation of discrimination based on an unlisted ground will require the complainant to establish unfairness.¹³⁰

Disability is listed as a prohibited ground of unfair discrimination in both section 9(3) of the Constitution and section 6(1) of the EEA. The Revised Disability Code, like the Disability Code, provides that the purpose of the EEA and the code is to protect persons with disabilities against unfair discrimination in employment.¹³¹ The Revised Disability Code incorporates the definition for “discrimination on the basis of disability” provided in the UN Disability Convention, stating the following in this regard:

Discrimination on the basis of disability means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic social, cultural, civil or any other field. It includes all forms of discrimination, including the denial of reasonable accommodation.¹³²

Therefore, if an individual with a mental health condition such as depression meets the requirements to establish the existence of a disability in the legal sense, as set by the Disability Code, such an individual will automatically be in a favourable position when alleging unfair discrimination against an employer, as there would be a rebuttable presumption of unfair discrimination on a listed ground. It has also been stated that the listed grounds need to be interpreted broadly,¹³³ which may further

¹²⁷ *Harksen v Lane NO* 1998 1 SA 300 CC: 50. Also see Du Toit 2014:2625; Grogan 2014a:109-110; Albertyn and Goldblatt 2014, in Woolman and Bishop (eds) 2014:35-76.

¹²⁸ McGregor and Germishuys 2014:95, referring to *Mangena v Fila SA (Pty) Ltd* 2009 12 BLLR 1224 LC: 227I-J.

¹²⁹ McGregor and Germishuys 2014:95.

¹³⁰ Grogan 2014c:211. Also see Albertyn and Goldblatt 2014, in Woolman and Bishop (eds) 2014:35-16.

¹³¹ Revised Disability Code: item 2.1.

¹³² Revised Disability Code: item 5.1.

¹³³ Van Niekerk *et al.* 2015:128.

assist individuals who wish to allege their mental health condition as a mental disability under the existing legal framework.

The Revised Disability Code provides that “[d]iscrimination is a socially constructed action and can thus be avoided by ensuring better knowledge, understanding and awareness about disabilities and the challenges encountered by persons with disabilities”.¹³⁴ By identifying the social origin of discrimination and attempting to combat disability discrimination as such, the Revised Disability Code shows support for a substantive approach to equality because of the remedial measures it recommends to combat discrimination against these individuals.

Consequently, if depression can be established as a disability (as suggested in the previous section), it will qualify as a listed ground of unfair discrimination in terms of the EEA. This will hold the benefit that discrimination based on an employee's depression will be presumed to be unfair, obviating the need for the complainant to establish the unfairness (as would be the case if depression is alleged as an unlisted analogous ground of unfair discrimination).

4.4.3.2 Mental health (conditions) as a possible unlisted analogous ground of unfair discrimination

This section will first explore the relevant legal provisions applicable to mental health conditions in employment – other than those qualifying as a disability – and will then turn to a consideration of whether these conditions may, according to the provisions, constitute an unlisted analogous ground of unfair discrimination.

4.4.3.2.1 Applicable legal provisions

As a point of departure, it should be noted that the only difference between the listed grounds and unlisted analogous grounds of unfair discrimination is that the latter does not benefit from the presumption of unfairness.¹³⁵ Therefore, the key distinction between the two lies in the fact that if a listed ground of discrimination is alleged, the

¹³⁴ Revised Disability Code: item 1.

¹³⁵ Albertyn and Goldblatt 2014, in Woolman and Bishop (eds) 2014:35-49.

discrimination is presumed to be unfair; if an unlisted ground of discrimination is alleged, the unfairness thereof will have to be proven.¹³⁶

It is significant to consider section 3(d) of the EEA in establishing discrimination based on the unlisted grounds, which stipulates that the act must be interpreted in line with Convention 111 of the ILO. This Convention makes provision for unfair discrimination on the basis of grounds not listed in the Convention, provided that the ground or attribute in question has the effect of obstructing or preventing equal opportunity or treatment of employees in the workplace.¹³⁷

In terms of section 6(1) of the amended EEA, the use of the word “including” suggests that the list of prohibited grounds is not exhaustive, and that certain unlisted analogous grounds may be alleged and proven.¹³⁸ Section 6(1) should consequently be extended to include “any ground that is integral to an employee’s identity or dignity”.¹³⁹ The determination of what could constitute such unlisted analogous grounds has been left to the South African courts to decide based on the specific circumstances of each case before them.¹⁴⁰

It was pointed out in *President of the Republic of SA v Hugo* that any ground of discrimination should be outlawed if it amounts to a prejudicial form of stereotyping stemming from societal attitudes that regard certain categories of persons as inferior.¹⁴¹ Another crucial consideration in respect of the unlisted grounds of discrimination can be found in *Harmse v City of Cape Town*,¹⁴² where it was stated that “the right not to be unfairly discriminated against is a right enjoyed by all employees, whether or not they fall within any of the designated groups as identified by the Act [EEA]”.¹⁴³

¹³⁶ Dupper *et al* 2004:58.

¹³⁷ Du Toit 2007:6.

¹³⁸ Van Niekerk *et al*. 2015:127. Since the list of prohibited grounds is open-ended, discrimination on an unlisted analogous ground may also be unfair, and as discrimination is unfair when it is based on an aspect of an individual’s personality, and human personality is not currently contained in the grounds listed in section 6(1), the prohibition can be extended. See Du Toit and Potgieter 2014:24.

¹³⁹ Du Toit and Potgieter 2014:24.

¹⁴⁰ Du Toit and Potgieter 2014:24.

¹⁴¹ Du Toit 2014:2626, referring to *President of the Republic of SA v Hugo* 1997 4 SA 1 CC: 80.

¹⁴² 2003 24 ILJ 1130 LC.

¹⁴³ *Harmse v City of Cape Town*: 47; EEA: sec 6.

In *Harksen v Lane*, the Constitutional Court stated that in order for an employee to succeed with a claim of unfair discrimination based on an unlisted ground, the employee must establish the particular distinguishing factor and prove that it defines a group or class of persons.¹⁴⁴ Thereafter, the employee will also have to show that the factor is worthy of protection.¹⁴⁵

In terms of the traditional approach, the unlisted grounds impose a more strenuous burden of proof, since neither unfairness nor discrimination will be presumed.¹⁴⁶ The *Harksen* test will have to be applied, and complainants will have to show that the employment policy or practice complained of may impair their fundamental human dignity or affect them in a comparably serious manner.¹⁴⁷ The unlisted grounds of discrimination should be analogous to the listed grounds and should consequently have a similar relationship and impact.¹⁴⁸ Complainants must therefore demonstrate a link between the alleged discrimination and the analogous ground that impairs their dignity.¹⁴⁹

Mental health has successfully been brought before the judiciary as an unlisted ground of unfair discrimination. An example of this is the matter of *Marsland v New Way Motor and Diesel Engineering (Pty) Ltd*¹⁵⁰ and its appeal in *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland*.¹⁵¹

In this case, an employee suffered a mental breakdown while on holiday as a result of anxiety and depression following the collapse of his marriage.¹⁵² After his return to work, the employee detected a change in attitude towards him by the senior management staff, who excluded him from activities in which he had previously been included.¹⁵³ In addition, the employee suffered severe bullying, intimidation, violence,

¹⁴⁴ *Harksen v Lane* NO: 27.

¹⁴⁵ *Harksen v Lane* NO: 27.

¹⁴⁶ Dupper *et al.* 2004:60.

¹⁴⁷ *Harksen v Lane* NO: 1509E-G; Pretorius 2013:14. This test lies at the heart of the equality analysis. See Jagwanth 2005:134.

¹⁴⁸ Grogan 2005:91; Pretorius 2013:14.

¹⁴⁹ Van Niekerk *et al.* 2012:135.

¹⁵⁰ *Marsland v New Way Motor and Diesel Engineering (Pty) Ltd* 2009 30 ILJ 169 LC.

¹⁵¹ Although this case dealt with mental illness as an unlisted ground of discrimination in the law of dismissal under the LRA, which will be considered in a separate section below, it is still relevant as far as the analysis of mental health as an unlisted ground of unfair discrimination is concerned.

¹⁵² *Marsland v New Way Motor and Diesel Engineering (Pty) Ltd*: 175.

¹⁵³ *Marsland v New Way Motor and Diesel Engineering (Pty) Ltd*: 175.

demotion and marginalisation in the workplace because of his mental health condition.¹⁵⁴ The employee alleged that the employer had discriminated against him based on an arbitrary ground, namely his mental illness, and that this forced him to vacate his position.¹⁵⁵

In accordance with the test for unspecified grounds of unfair discrimination established in *Harksen v Lane*, the court held that discrimination based on an individual's mental health condition had the potential to impair the individual's fundamental human dignity, which may affect the person in a comparably serious manner.¹⁵⁶ Therefore, the court believed that mental health should be treated as a prohibited ground of unfair discrimination.¹⁵⁷ It was further held that the employer had discriminated against the employee on the basis of his mental illness, which amounted to unfair discrimination, and that this forced the employee to leave his job, which amounted to an automatically unfair dismissal.¹⁵⁸

The employer appealed to the Labour Appeal Court. In reaching its conclusion of whether the employee had been unfairly discriminated against on the basis of his mental health status, the Labour Appeal Court considered the following question:

[D]id the conduct of the appellant impair the dignity of the respondent; that is did the conduct of the appellant objectively analysed on the ground of the characteristics of the respondent, in this case depression, have the potential to impair the fundamental human dignity of the respondent?¹⁵⁹

The Labour Appeal Court held that the employee had returned to his employment position in a vulnerable state and had been subjected to a brutal regime of psychological assault and degrading treatment for a significant period of time.¹⁶⁰ This conduct of the employer the court found to have clearly constituted an "egregious attack" on the employee's fundamental human dignity, and consequently amounted to unfair discrimination.¹⁶¹

¹⁵⁴ *Marsland v New Way Motor and Diesel Engineering (Pty) Ltd*: 176, 177, 181-183.

¹⁵⁵ *Marsland v New Way Motor and Diesel Engineering (Pty) Ltd*: 174, 191.

¹⁵⁶ *Marsland v New Way Motor and Diesel Engineering (Pty) Ltd*: 193.

¹⁵⁷ *Marsland v New Way Motor and Diesel Engineering (Pty) Ltd*: 193.

¹⁵⁸ The court held that the employer's discriminatory conduct was directly related to the employee's mental illness. See *Marsland v New Way Motor and Diesel Engineering (Pty) Ltd*: 192-193.

¹⁵⁹ *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland*: 25.

¹⁶⁰ *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland*: 34.

¹⁶¹ *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland*: 26.

However, despite this ruling by the Labour Appeal Court, the legislature did not use the opportunity to include mental health as a listed ground of unfair discrimination in section 6(1) when the EEA was amended in 2014, subsequent to the ruling.

In the case of *Makau v Department of Education Limpopo Province*,¹⁶² an employee did not receive sufficient support from his employer, which included the refusal and ignoring of several of the employee's requests.¹⁶³ As a result, the employee suffered both psychologically and emotionally, and later developed depression.¹⁶⁴

The employee alleged that he had been discriminated against, harassed and victimised by the employer because of the issues he had initially raised and because he had become ill.¹⁶⁵ In his claim, the employee did not rely on any ground specified in section 6(1) of the EEA, but instead elected to rely on an unspecified ground, namely "incessant harassment and unfair treatment".¹⁶⁶

Following the approach established in *Harksen v Lane*, the court held that the employee would be required to prove that the "incessant harassment and unfair treatment" had the potential to impair his fundamental human dignity or to affect him in a comparably serious manner.¹⁶⁷

After examining the evidence, the court ruled that the employer had indeed discriminated against the employee based on the alleged ground, and that the employer's treatment of the employee (constantly ignoring his requests and complaints as well as ignoring his illness) had the potential to impair his fundamental human dignity.¹⁶⁸

4.4.3.2.2 Mental health (conditions) as a possible unlisted analogous ground of unfair discrimination: A legal application

In considering the possibility of mental health as a possible unlisted analogous ground of unfair discrimination, it is important to re-emphasise the link between mental health conditions and equality, dignity and substantive equality considered earlier in this

¹⁶² 2014 JDR 1458 LC.

¹⁶³ *Makau v Department of Education Limpopo Province*: 5.

¹⁶⁴ *Makau v Department of Education Limpopo Province*: 5, 11.

¹⁶⁵ *Makau v Department of Education Limpopo Province*: 21.

¹⁶⁶ *Makau v Department of Education Limpopo Province*: 23.

¹⁶⁷ *Makau v Department of Education Limpopo Province*: 24.

¹⁶⁸ *Makau v Department of Education Limpopo Province*: 44.

chapter. In *Harksen v Lane*, it was stated that when manipulated, the specified and analogous grounds indeed had the potential to impair fundamental human dignity:

In some cases they [the specified grounds and those analogous to them] relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features.¹⁶⁹

As an unlisted analogous ground, “mental health” will have to satisfy the three-stage test of unfair discrimination currently endorsed by the judiciary, formulated from the test in *Harksen v Lane*, and supported by section 11 of the EEA. In terms of this test, an inquiry into a claim of unfair discrimination will require the claimant to prove that differentiation based on a mental health condition has taken place, that it amounted to discrimination, and that the discrimination was unfair. This analysis is considered below.

Stage 1: Differentiation

Differentiation occurs when an employer treats certain job applicants or employees differently from others or uses an employment policy or practice to exclude certain groups.¹⁷⁰

If an employer, whether through its conduct or in any employment policy or practice, distinguishes between employees based on an employee’s mental health condition, this will amount to differentiation on the basis of mental health. The victims of differentiation are not treated in the same manner as other similarly situated employees or job applicants due to a certain characteristic, namely their mental health status.

Stage 2: Discrimination

Discrimination can be established by linking the differentiation in treatment or effect to an unlisted ground (a ground not mentioned in section 6(1) of the EEA).¹⁷¹ However, in order to be considered as an unlisted ground of discrimination, the differentiation must first comply with the *Harksen* test, according to which it will have to be shown that the “ground is based on attributes and characteristics which have the potential to

¹⁶⁹ *Harksen v Lane* NO: 50.

¹⁷⁰ Importantly, differentiation is not synonymous with discrimination. The former is a neutral term and may not be for a negative reason. See Viviers and Smit 2014b:111, referring to Dupper *et al.* 2004:33.

¹⁷¹ Dupper *et al.* 2004:36.

impair the fundamental human dignity of persons as human beings or to affect them in a comparably serious manner” as members of a vulnerable group.¹⁷² Albertyn and Goldblatt assert that the judiciary should adopt a substantive instead of a mechanical approach to determine whether there has been discrimination.¹⁷³

Mental health (not constituting a disability) is not specifically listed as a prohibited ground of unfair discrimination in section 6(1) of the EEA and will consequently have to be alleged as an unlisted analogous ground of unfair discrimination. In terms of the *Harksen* test, it will have to be proven that discrimination based on an employee’s mental health condition has the potential to impair the fundamental human dignity of the victims, or to affect them in a comparably serious manner. Therefore, employees or job applicants with depression will have to prove that discrimination based on their mental health condition impaired their human dignity or affected them in a comparably serious manner.

Dignity is described as affording an individual “his or her intrinsic worth and value”.¹⁷⁴ An individual’s mental health status forms an intrinsic part of his or her biological make-up, and consequently contributes to who the person is as an individual. Subjecting an employee to prejudicial treatment based on a condition that forms an indisputable part of that person’s human biology in effect offends the individual’s “intrinsic worth and value”, and consequently has significant potential to impair the person’s dignity.

This argument is further strengthened by the finding of the Labour Court and the Labour Appeal Court in the *Marsland* case (discussed above), where it was held that mental health constituted an unlisted ground of unfair discrimination, and that discriminating against an individual on the basis of mental health had the potential to impair the person’s fundamental dignity as a human being.

¹⁷² Viviers and Smit 2014b:111, referring to McGregor and Germishuys 2014:94,95; Dupper *et al.* 2004:36; Radebe 2013:73.

¹⁷³ Albertyn and Goldblatt 2014, in Woolman and Bishop (eds) 2014:35-46.

¹⁷⁴ McGregor and Germishuys 2014:96. The Labour Court in *IMATU v City of Cape Town* also stated the following in relation to an infringement of the right to dignity: “Arbitrary, irrational and unfair exclusions predicated upon anachronistic generalised assumptions impair their [persons with Type 1 diabetes] dignity and seriously affect them adversely by limiting the full enjoyment of the right, guaranteed by section 22 of the Constitution, to pursue a chosen trade, occupation or profession.” See *IMATU v City of Cape Town*: 90.

It is also worth noting that a suitable contextual inquiry at the discrimination stage of the test will allow for a substantive approach to equality.¹⁷⁵ Thus, the social context of people with mental health conditions such as depression, including their vulnerability as well as the stigmatisation and prejudice they have suffered, will have to be taken into account. This social context will have the benefit of highlighting possible patterns of disadvantage suffered by these individuals, which may then serve to supplement the argument of impairment to their fundamental human dignity.

Stage 3: Unfairness

Fairness is considered to be the means of distinguishing permissible from impermissible forms of discrimination.¹⁷⁶ Discrimination itself already has a negative connotation, encompassing some form of harm based on difference, such as mental health; unfair discrimination goes a step further by deepening or worsening existing disadvantage.¹⁷⁷

Harksen v Lane indicates that if discrimination is based on one of the prohibited grounds, unfairness will be presumed. If the differentiation is based on an unlisted ground, however, the complainant will have to prove unfairness.¹⁷⁸

The primary right and value on which unfairness hinges is dignity.¹⁷⁹ In light of the considerable link between mental health and persons' inherent human dignity, if their right to dignity is tarnished by discrimination based on their mental health condition, the discrimination is likely to be unfair.

Various factors, including stigmatisation, marginalisation, social exclusion, stereotyping and the failure to accord equal concern and respect, may all contribute to the vulnerability of a particular group,¹⁸⁰ such as employees and job applicants with depression. The factors mentioned above are all realities for people with mental health conditions such as depression, and consequently contribute to their vulnerability. The

¹⁷⁵ Albertyn and Goldblatt 2014, in Woolman and Bishop (eds) 2014:35-45, referring to Jagwanth 1999:205.

¹⁷⁶ Albertyn and Goldblatt 2014, in Woolman and Bishop (eds) 2014:35-43.

¹⁷⁷ Albertyn and Goldblatt 2014, in Woolman and Bishop (eds) 2014:35-43.

¹⁷⁸ *Harksen v Lane* NO: 325A.

¹⁷⁹ The words "of a comparably serious nature" indicate that the evaluation of the impact of unfair discrimination not only involves dignity, but other rights and values also. See Albertyn and Goldblatt 2014, in Woolman and Bishop (eds) 2014:35-76, 35-80.

¹⁸⁰ Albertyn and Goldblatt 2014, in Woolman and Bishop (eds) 2014:35-77.

more vulnerable the group that is adversely affected by the discrimination, the more likely the discrimination is to be unfair.¹⁸¹

The *Harksen* test dictates that unfairness is established by focusing on the impact of the discrimination on the complainant and others similarly situated.¹⁸²

The impact of the discrimination is regarded as the fundamental question in the fairness test and should be contextual.¹⁸³ The Constitutional Court stated the following in *Minister of Finance v Van Heerden*¹⁸⁴ in relation to the contextual approach:

The substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and their vulnerability ...¹⁸⁵

The stigmatisation, stereotyping and prejudice suffered by people with mental health conditions constitute one such form of “social differentiation and systematic under-privilege” that still persists in South African society and the workplace. In line with the Constitutional Court’s approach above, the vulnerability of people with mental health conditions, and the past patterns of discrimination and disadvantage they suffered, will be essential in establishing their position in society and the impact of the discrimination to which they have been exposed.

In order to assess whether the discriminatory provision has impacted on the complainant or others in a similar position, their position in society and the extent to which the discrimination has affected their rights or interests must be considered.¹⁸⁶ In this regard the courts will take into account various factors, including the worth and value of victims’ attributes, the exploitation suffered by them, as well as their vulnerability¹⁸⁷ and past patterns of disadvantage and prejudice suffered.¹⁸⁸ The unfairness test is intended to illustrate that discrimination may have different impacts

¹⁸¹ Albertyn and Goldblatt 2014, in Woolman and Bishop (eds) 2014:35-77.

¹⁸² *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 CC: 755E-F; Pretorius 2013:16.

¹⁸³ Albertyn and Goldblatt 2014, in Woolman and Bishop (eds) 2014:35-75.

¹⁸⁴ 2004 6 SA 121 CC.

¹⁸⁵ *Minister of Finance v Van Heerden*: 27. Also see Albertyn and Goldblatt 2014, in Woolman and Bishop (eds) 2014:35-75.

¹⁸⁶ Pretorius 2013:16.

¹⁸⁷ The more vulnerable the group adversely affected by the discrimination, the more likely it is that the discrimination will be held to be unfair. See *President of the Republic of South Africa v Hugo*: 755E-F.

¹⁸⁸ *Harksen v Lane NO*: 1510F; Pretorius 2013:16; Jagwanth 2005:133-134.

in different circumstances.¹⁸⁹ The “shifting patterns of harmful discrimination and stereotypical response in our evolving democratic society” require a flexible approach.¹⁹⁰

In light of the stereotypes, stigmatisation, marginalisation and prejudice suffered by persons with mental health conditions, as well as their vulnerable position in society (as revealed in chapter 2), the impact of discrimination based on mental health is severe. These individuals also continue to suffer exploitation and disadvantage, rendering them vulnerable in both society and the workplace. A historical overview also reveals that most of these individuals suffered past patterns of disadvantage.

In *Kadiaka v Amalgamated Beverage Industries*,¹⁹¹ the Labour Court held that certain factors should be taken into account in the determination of whether discrimination is unfair. These are whether the discrimination is “purposeless, or for a purpose of insufficient importance to outweigh the rights of the job-seeker or the employee, or if it was morally offensive”.¹⁹² Discriminating against persons with mental health conditions is indeed purposeless, provided that the individual can discharge the inherent requirements of his or her job. Discriminating against persons because of a biological aspect of their person (if it does not affect their ability to do the job) is also morally offensive.

Kruger indicates that the stereotyping of complainants, or the prejudice suffered by them, has been used to determine the impact of the discrimination on them.¹⁹³ Mental health conditions attract an array of negative and diverse stereotypes. In circumstances where stereotypes about mental health amount to a withholding of benefits or opportunities, or result in disadvantage that is comparable to the disadvantage suffered by other protected groups (race, sex or age), such stereotypes unfairly discriminate against the individual concerned.¹⁹⁴

The historical oppression experienced by persons with mental health conditions manifests itself in overlapping processes of stereotyping, stigmatisation, exclusion and

¹⁸⁹ Jagwanth 2005:134.

¹⁹⁰ Jagwanth 2005:134, referring to *Minster of Finance v Van Heerden*: 27.

¹⁹¹ 1999 20 ILJ 373 LC.

¹⁹² Grogan 2005:91.

¹⁹³ Kruger 2011:493.

¹⁹⁴ Viviers 2014:104, referring to Pieterse 2000:124.

marginalisation.¹⁹⁵ Discrimination and relegation of this societal group reinforces the perception of these persons as “outsiders” and perpetuates the cycle of disadvantage.¹⁹⁶

Disadvantaging and judging individuals because of their mental health status in effect marginalises this vulnerable social group in the employment realm and perpetuates a pattern of disadvantage for them. For all the reasons cited above, discrimination on the basis of mental health may be considered unfair.

4.4.3.3 Mental health (conditions) as a possible arbitrary ground of unfair discrimination

Again, the applicable legal provisions in relation to the arbitrary grounds will be considered first, followed by an analysis of whether mental health conditions may constitute an arbitrary ground of unfair discrimination.

4.4.3.3.1 Applicable legal considerations

The *Employment Equity Amendment Act* has introduced the words “or on any other arbitrary ground” in the wording of section 6(1). The meaning and scope of this concept is however still ambiguous.

Du Toit and Potgieter suggest that “arbitrary” clearly amounts to a category of “unspecified grounds”, but that it is arguable whether this should be allocated the same meaning as unlisted analogous grounds, since that would render the amendment meaningless.¹⁹⁷ They further propose that the amendment was possibly made in order to widen the net of possible discrimination on the basis of grounds that may not necessarily be analogous to the listed grounds, but are nonetheless arbitrary “in the sense of being random, subjective, capricious or haphazard”, and consequently infringe on the right to equality.¹⁹⁸

It has also been suggested that “arbitrary” introduces another dimension of unfairness, as it serves to describe all forms of listed and unlisted discrimination that violate an

¹⁹⁵ Sheldon 2011:175.

¹⁹⁶ Sheldon 2011:175.

¹⁹⁷ Du Toit and Potgieter 2014:24-25.

¹⁹⁸ Du Toit and Potgieter 2014:25.

employee's right to dignity.¹⁹⁹ Therefore, as with the listed and unlisted grounds, dignity again appears to come to the fore as a determining factor when considering whether or not an arbitrary ground unfairly discriminates against an individual.

Van Niekerk *et al* indicate that the consideration of what may constitute an arbitrary ground will most likely be controversial, especially as the courts draw such a close link between discrimination and dignity.²⁰⁰ Du Toit suggests that in the interpretation of "arbitrary grounds", the purpose of the EEA, namely the eradication of unfair discrimination, should be considered.²⁰¹ He further suggests that in order to avoid redundancy, "arbitrary" must contribute something to the concept of "unfair discrimination". In his view, this may be achieved if arbitrary is awarded the same meaning as indicated in *Kadiaka v Amalgamated Beverage Industries*, namely "capricious or for no good reason".²⁰² He suggests that this would broaden the scope of the prohibition on unfair discrimination to afford protection against grounds that may undermine inherent human dignity.²⁰³

According to Grogan, "arbitrary" can be defined as discrimination that is based on some irrelevant criterion.²⁰⁴ De Villiers believes that an arbitrary ground has its origin in an employer's personal preferences; in certain characteristics that are not of primary relevance to the employment relationship.²⁰⁵

Section 11 of the amended EEA stipulates the burden of proof where an allegation of unfair discrimination based on an arbitrary ground is concerned, and provides that a complainant must discharge the burden of proof in order to succeed with such a claim.

4.4.3.3.2 Mental health (conditions) as a possible arbitrary ground of unfair discrimination: A legal application

The inclusion of the words "or on any other arbitrary ground" in section 6(1) of the amended EEA strengthens a possible claim by employees who allege unfair

¹⁹⁹ Du Toit and Potgieter 2014:25.

²⁰⁰ Van Niekerk *et al.* 2015:127.

²⁰¹ Du Toit 2014:2627.

²⁰² Du Toit 2014:2627.

²⁰³ Du Toit 2014:2627.

²⁰⁴ Grogan 2007:280.

²⁰⁵ De Villiers 2014:182.

discrimination on the basis of their mental health in the workplace, even though the meaning and scope of the concept of an “arbitrary ground” is still uncertain.

In terms of section 11 of the amended EEA, the complainant bears the onus of proving on a balance of probabilities that the employer unfairly discriminated against him or her based on an arbitrary ground. Section 11(2) states the following in this regard:²⁰⁶

11(2) If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that –

- (a) the conduct complained of is not rational;
- (b) the conduct complained of amounts to discrimination; and
- (c) the discrimination is unfair.

Therefore, in terms of an unfair discrimination claim that alleges mental health discrimination as an arbitrary ground, it is foreseen that the aggrieved employee will have to prove that the employer’s differential treatment based on the employee’s mental health condition is not rational, that it amounts to discrimination, and that the discrimination is unfair.

It is uncertain how these elements stipulated in section 11 will be interpreted in the absence of legislative or judicial guidelines, however. “Rational” in this context is a speculative concept, and as the arbitrary grounds should be construed as something different from the unlisted analogous grounds, it is uncertain whether discrimination and unfairness may be determined based on the same *locus classicus* tests as formulated in *Harksen v Lane* (discussed above).

Thus, an extensive application of the legal principles attached to the arbitrary grounds is not possible in relation to mental health conditions without legislative guidelines or judicial precedent. It is speculated, though, that mental health conditions will likely also amount to an arbitrary ground in terms of section 6(1) of the EEA.²⁰⁷

4.4.3.4 Direct and indirect unfair discrimination on the basis of mental health

Direct and indirect discrimination are both prohibited by the EEA. Direct discrimination takes place when certain persons – because of a particular trait or characteristic that falls under the listed and unlisted analogous grounds of prohibited discrimination (or

²⁰⁶ Employment Equity Amendment Act: sec 11(2).

²⁰⁷ This speculation relies on the fact that discrimination based on mental health may amount to an unlisted analogous ground of unfair discrimination as discussed in the previous section, and as a listed ground if it constitutes a mental disability.

not) – are treated differently²⁰⁸ and usually unfavourably, typically being subjected to adverse treatment or being withheld a benefit because of their affiliation with the protected group. Indirect discrimination occurs when a seemingly neutral employment policy or practice (i.e. one that does not directly differentiate in terms of a listed, analogous or arbitrary ground) disproportionately affects members of a group protected in terms of a listed, analogous or arbitrary ground, and is not justifiable in the circumstances.²⁰⁹

Discrimination against employees based on their mental health may also take place directly or indirectly. The normal meaning of these concepts will apply to such a case of discrimination. Direct discrimination based on mental health will apply when an employee is discriminated against *because of* his or her mental health condition itself.²¹⁰ Indirect discrimination based on mental health takes place if an apparently neutral employment policy or practice of the employer in effect disproportionately disadvantages certain employees because of their mental health condition.²¹¹

4.4.3.5 Possible employer defences to a claim of unfair discrimination on the basis of mental health

An employer may raise the following three possible grounds of justification (defences) against an unfair discrimination claim:

- The action is not discriminatory, or the discriminatory action is not unfair.
- The action was taken in terms of affirmative action measures.²¹²

²⁰⁸ See Grogan 2014:108, where it is stated that direct discrimination may be based on the listed grounds in sec 6(1) or on “comparable attributes”. Also see Van Niekerk *et al.* 2015:125; Dupper *et al.* 2004:39.

²⁰⁹ Dupper *et al.* 2004:39, 46; Van Niekerk *et al.* 2015:125. Also see Albertyn and Goldblatt 2014, in Woolman and Bishop (eds) 2014:35-47, who argue that indirect discrimination applies when differentiation appears to be neutral, but in effect discriminates on a prohibited ground, whether listed or unlisted.

²¹⁰ For example, if an employer terminates the employment of or refuses to appoint an individual because he or she suffers from depression.

²¹¹ For example, if an employer requires all employees to undergo a “stress evaluation assessment” every month or every year, in order to assess whether individuals are coping at work and which practice may hold benefits for employees who are managing their stress well, such a policy may have the effect of disproportionately disadvantaging individuals with depression and other mental health conditions, since these persons will, due to the symptomology of the condition, not be in a position to cope well under stress, and will in fact serve as an environmental stressor which aggravates the condition.

²¹² EEA: sec 6(2)(a).

- The discriminatory action was taken because of the inherent requirements of the job.²¹³

These are the only crystallised defences on which an employer may rely to defeat a claim of unfair discrimination. Therefore, in an unfair discrimination dispute on the basis of an employee's mental health condition, the employer may defeat the employee's claim by successfully raising any of these defences, as follows:

- The employer may firstly prove that an employee's claim of discrimination based on mental health does not amount to discrimination. In order to achieve this, the employer will have to prove that it does not impair the employee's fundamental human dignity, according to the *Harksen* test. The employer may also prove that the discriminatory action is not unfair. This will be achieved if the employer can prove that the discrimination was not purposeless or was sufficiently important to outweigh the employee's right to equality, or that the impact on the employee was not severe or sufficiently prejudicial.
- The employer may also allege that the action was taken in order to advance affirmative action measures, and that these measures were sufficient in the circumstances to render the employer's discriminatory treatment fair.
- Arguably the most significant defence that an employer may raise against an employee's unfair discrimination claim is that the discrimination was justified because it related to an inherent requirement of the employee's job. "Inherent requirement of the job" means that the employee must possess the particular quality to effectively perform the duties attached to the position.²¹⁴ Consequently, if an employee's mental health condition will inhibit him or her from discharging the inherent requirements of the job, the employer will not be obligated to employ or retain that employee. Reasonable accommodation (discussed extensively in the next chapter) will also play a role in this assessment. If the individual with a mental health condition is a beneficiary of reasonable accommodation, either in terms of affirmative action measures or as a non-discrimination principle, the employee must be able to discharge the inherent requirements of the job with or without such reasonable

²¹³ EEA: sec 6(2)(b).

²¹⁴ Grogan 2005:108.

accommodation. If with reasonable accommodation the person is still unable to perform these essential functions, the employer will not be obligated to employ or retain the individual.²¹⁵

4.4.3.6 Discriminatory dismissals on the basis of mental disability

Section 185 of the LRA provides that every employee has the right not to be unfairly dismissed. Employees may be dismissed, but not unfairly.²¹⁶ Every dismissal must also be both procedurally and substantively fair.²¹⁷ Dismissals that cannot be justified under section 188 are considered arbitrary and unfair, as stated earlier.²¹⁸

Section 187 of the LRA also makes provision for categories of dismissals that are automatically unfair. Disability, including mental disability, is listed in section 187(f) as such an automatically unfair reason for dismissal. Since there is a significant overlap between section 187 of the LRA and section 6 of the EEA, a dismissal based on one of the grounds in section 187 may also be actionable under the EEA.²¹⁹

Thus, dismissing an employee merely because (s)he has a mental disability such as depression may be automatically unfair in terms of the LRA.

4.4.4 Concluding remarks

The analysis above has shown that mental health is intricately linked to the human dignity of each individual and is also interlinked with the right to equality and substantive equality under the South African legal framework. It is also suggested that mental health (conditions) may be considered as a listed ground of unfair discrimination if the condition amounts to a legally recognised disability; it may be considered as an unlisted analogous ground of unfair discrimination, and it may also

²¹⁵ The employer will, however, be obliged to comply with both substantive and procedural fairness in dismissing the employee, as set out in 4.4.3.6 below.

²¹⁶ Employees may be dismissed for a fair reason as set out in section 188 of the LRA, such as for misconduct, for incapacity or poor work performance, and based on the employer's operational requirements, after following a fair procedure as well. See LRA: sec 188; Grogan 2014a:189.

²¹⁷ LRA: sec 188.

²¹⁸ Grogan 2014a:189. It should be noted that while discriminatory dismissals is a relevant forum for discrimination based on mental health in employment, it is beyond the scope of this study to examine this employment law area extensively.

²¹⁹ Van Niekerk *et al.* 2015:267.

constitute an arbitrary ground depending on how the judicial forums interpret this ground in future.

4.5 Harassment (as a form of unfair discrimination) relating to mental health under the South African legal framework

4.5.1 Harassment, workplace bullying and mental health: A Gordian knot

Workplace harassment may ultimately be regarded as a violation of fundamental human rights, which causes victims to suffer physical, psychological and professional harm.²²⁰ As this section will indicate, there is an important causal link between workplace harassment, workplace bullying and the prevalence of mental health conditions in the employment domain.

Although harassment mostly conjures up images of sexual harassment, it is not limited to sexual harassment. Le Roux and colleagues note that although sexual harassment continues to be prevalent in employment, domestic and international jurisprudence indicates the emergence of other forms of harassment.²²¹ They further indicate that these other forms of harassment are far more discreet and seldom identified, and consequently are not recognised as being as prevalent as the more identifiable forms.²²² Harassment based on an employee's mental health condition(s) may be one such emerging form.²²³

Due to the significant link between harassment and mental health conditions, harassment is considered separately, albeit as part of the larger discrimination picture, as a form of unfair discrimination under the South African legal framework. The phenomenon of workplace bullying will also be briefly discussed.

It must be stressed from the outset that although harassment, and particularly sexual harassment, will be explored in this section, the concept itself is not the focus, but instead emphasis is placed on the circumstances where sexual harassment has

²²⁰ Viljoen 2013:66.

²²¹ Le Roux *et al.* 2010:1.

²²² Le Roux *et al.* 2010:1.

²²³ See for example *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland*, discussed below. Section 6(3) of the EEA provides that harassment may take place on any one or combination of grounds listed in section 6(1). Although mental health is not explicitly included in this list, as per the application in 4.4.3.2.3, it may very well constitute an unlisted ground of unfair discrimination analogous to the listed grounds.

caused an individual to develop a mental health condition. The same holds true for workplace bullying.

It should also be noted that employees may be harassed because of their mental health condition or their mental disability, or may develop a mental health condition as a result of harassment. Both these occurrences will be investigated below.

4.5.2 International instruments on harassment in the workplace

The UN Disability Convention states that the rights of persons with disabilities are to be protected on an equal basis with others, which includes protection from harassment and the redress of grievances.²²⁴

A 2006 ILO report revealed that harassment (along with its allied behaviours) could be just as damaging as actual physical violence.²²⁵ In 2003, the ILO described workplace violence as being both physical and psychological in nature and stated that it included offensive behaviour that manifested itself in various “vindictive, cruel, malicious or humiliating” manoeuvres to undermine an individual or individuals in the workplace.²²⁶

The UN Disability Convention makes it clear that individuals with mental disabilities should be protected from workplace harassment on the basis of their disabilities. By equating the consequences of harassment with those of physical violence, the ILO clearly illustrates the damaging effects of this behaviour, and its impact in the workplace.

4.5.3 The consideration of workplace bullying

4.5.3.1 Nature and scope of the concept

South Africa is by no means immune to the phenomenon of workplace bullying, and a study in this regard conducted in 2000 revealed that roughly 77,8% of South Africans had experienced some form of workplace bullying.²²⁷ However, this phenomenon is not explicitly covered by the South African legal framework, with no legislation and

²²⁴ UN Disability Convention: art 27(1)(b).

²²⁵ ILO 2006. http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_070505/lang--en/index.htm. Accessed on 07/08/2014.

²²⁶ Smit 2014:230.

²²⁷ Cunniff and Mostert 2012, referring to a study conducted by the Work Dignity Institute in 2000.

little judicial precedent available in this regard. Due to its profound connection with mental health conditions in the workplace, it warrants brief consideration.

Workplace bullying involves interplay between various deliberate, menacing and hurtful behaviours, as well as the harassment of the victim.²²⁸ It is difficult to define workplace bullying, which is probably also why no single definition exists.²²⁹ Identifying and defining workplace bullying has proven to be more effective by evaluating the elements, symptoms and consequences thereof. Oade suggests the following definition for workplace bullying by capturing its key elements:²³⁰

- A personalised, often sustained attack on one colleague by another colleague using behaviours which are emotionally and psychologically punishing.
- Introducing a dynamic into a workplace relationship which involves a purposed attempt by one colleague to injure another colleague's self-esteem, self-confidence and reputation or to undermine their competence to carry out their work duties effectively.
- The degree to which the person using bullying behaviour chooses to handle their relationship with a colleague in a way that involves removing power from that colleague and placing it with themselves.

In light of the generic aspects of harassment (namely that it constitutes persistent and unwelcome conduct that is seen as hostile or offensive to a reasonable person, includes fear of harm, and demeans, humiliates or creates a hostile work environment), it has been suggested that workplace bullying could be described as "any unfavourable or offensive conduct on the part of a person or persons which has the effect of creating a hostile work environment".²³¹

Bullying behaviour may manifest itself in various ways,²³² including verbal tactics,²³³ non-verbal tactics,²³⁴ practical tactics²³⁵ and performance-related tactics.²³⁶ Victims are constantly teased, badgered and insulted, and feel that they have little recourse to

²²⁸ Visagie *et al.* 2012:63, referring to Von Bergen *et al.* 2006:15.

²²⁹ Pietersen 2007:59; Visagie *et al.* 2012:63. This is also clearly illustrated by the multiple definitions captured and discussed by Smit 2014:30-32.

²³⁰ Oade 2009:2. Importantly, bullying also extends to group behaviour and is not limited to one-on-one conduct. Consequently, a group of employees may bully an individual in the workplace. See Smit 2014:31.

²³¹ Le Roux *et al.* 2010:53.

²³² Oade 2009:4-6; Einarsen *et al.* 2011:87-89.

²³³ Including name calling, discussing employees with others, abusive comments and remarks, as well as public shaming.

²³⁴ Including laughing, rolling of the eyes, staring, and adopting a threatening posture.

²³⁵ Including transmitting insulting and degrading messages electronically, for example via text message, e-mail or fax. Behaviour could also entail meddling with a victim's property or workspace.

²³⁶ Including unwarranted criticism, burdening the victim with an unreasonable workload, implying that the victim may suffer organisational detriment such as demotion or termination, purposely withholding information, and selecting onerous or petty work rules to apply to the victim.

retaliate.²³⁷ Einarsen *et al* also suggest that bullying may present itself in verbal and physical forms, and include other subtle behaviours such as excluding the victim from social intercourse or isolating the victim from his or her peer group.²³⁸ Although workplace bullying can take the form of physical violence, it more often appears in the form of psychological assault.²³⁹ This phenomenon has been described as psychological violence that is nearly invisible.²⁴⁰ According to Le Roux *et al*, workplace bullying is accompanied by feelings of incompetence, alienation from colleagues, job insecurity, feelings of inadequacy, and anxiety that there will be no recognition or promotion.²⁴¹

Workplaces where bullying behaviour is rife have consequently been described as “an organisational culture and climate filled with emotional toxicity”.²⁴² The destructive nature of bullying behaviour also causes high levels of anxiety in the organisation,²⁴³ as well as higher rates of absenteeism, loss of productivity and increased costs relating to intervention programmes.²⁴⁴ In addition, unethical conduct such as bullying has been shown to increase stress within an organisation.²⁴⁵

Furthermore, an ILO report in 2006 revealed that violence at work, which includes mobbing and bullying, was increasing on a global scale and had already reached epidemic proportions in certain jurisdictions.²⁴⁶

Rycroft²⁴⁷ and Smit²⁴⁸ interestingly and correctly point out that in the absence of legal clarity surrounding bullying in employment, the question arises as to whether it amounts to a form of harassment and unfair discrimination, or rather a dignity violation. The CCMA has classified workplace bullying as a form of harassment,²⁴⁹ while support for its status as a dignity violation may be found in the case of *Maharaj v CP de Leeuw*

²³⁷ Einarsen *et al.* 2011:76.

²³⁸ Einarsen *et al.* 2011:76.

²³⁹ Harthill 2008:255; Tehrani 2012:41.

²⁴⁰ Harthill 2008:255, referring to Namie and Namie 2004:325.

²⁴¹ Le Roux *et al.* 2010:51.

²⁴² Cilliers 2012:2, referring to Fox and Spector 2005.

²⁴³ Cilliers 2012:2, referring to Stapley 1996; 2006.

²⁴⁴ Smit 2014:77, referring to Branch *et al.* 2013:14.

²⁴⁵ Boddy 2011:45, referring to Giacalone and Promislo 2010.

²⁴⁶ ILO 2006. http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_070505/lang--en/index.htm. Accessed on 07/08/2014.

²⁴⁷ Rycroft 2009:1433.

²⁴⁸ Smit 2014:269.

²⁴⁹ Smit 2014:237.

(Pty) Ltd,²⁵⁰ where the court confirmed that bullying should be observed as a dignity violation instead of a form of unfair discrimination or harassment.²⁵¹ Le Roux *et al* point out that there are certain similarities between harassment and workplace bullying in terms of their consequences, which include low morale, poor productivity and increased potential for employer liability.²⁵²

Moreover, workplace bullying has been described as “non-status based psychological harassment”²⁵³ as well as “status neutral harassment”, because unlike harassment in its ordinary form, workplace bullying is not necessarily based on any protected status such as sex, gender or sexual orientation.²⁵⁴ Either way, because this phenomenon takes on characteristics of harassment and in effect violates an employee’s right to dignity, it warrants consideration in relation to people with mental health conditions.

4.5.3.2 Workplace bullying and mental health conditions

Workplace bullying affects different people in different ways, and it does not appear to elicit a typical reaction from victims.²⁵⁵ There are however certain consequences of workplace bullying that appear to be shared by its victims. These include various psychological consequences, including anxiety, feelings of isolation, lowered confidence and self-esteem, anger, mood swings, a lack of energy or motivation, and feeling depressed.²⁵⁶ Harthill indicates that employees who witness co-worker bullying also suffer adverse psychological consequences.²⁵⁷

Other consequences experienced by victims of workplace bullying include higher stress levels, increased absenteeism, disrupted sleep patterns and substance abuse problems.²⁵⁸ Victims’ stress levels also vary, with some experiencing only minor stress, while others develop depression or post-traumatic stress disorder (PTSD).²⁵⁹

²⁵⁰ 2005 26 ILJ 1088 LC 1104.

²⁵¹ *Maharaj v CP de Leeuw (Pty) Ltd*: 74; Smit 2014:271. Also see Tehrani 2012:198, who points out a link between an individual’s dignity and workplace bullying and harassment.

²⁵² Le Roux *et al.* 2010:52.

²⁵³ Harthill 2010:1250.

²⁵⁴ Duncan 2011:2333, 2334.

²⁵⁵ Oade 2009:149.

²⁵⁶ Oade 2009:151-154. Also see Harthill 2008:258; Squelch and Guthrie 2010:16; Harthill 2011:265-266; Cunniff and Mostert 2012:1.

²⁵⁷ Harthill 2010:1261.

²⁵⁸ Einarsen *et al.* 2011:109-110.

²⁵⁹ Einarsen *et al.* 2011:108. Various sources have linked workplace bullying to depression and PTSD. See for example the sources cited by Smit 2014:75, including Hoel *et al.* 2004:368; Leymann 1996:174;

Other sources have also identified workplace bullying as a risk factor in clinical depression and suicide attempts, heightened levels of anxiety, PTSD,²⁶⁰ nervous breakdowns, panic attacks, reduced concentration and burnout.²⁶¹ A 2010 study by the Workplace Bullying Institute revealed that more than 80% of victims reported psychological injuries, 39% reported clinical depression, and 30% of women and 21% of men reported PTSD.²⁶²

Depression resulting from bullying may be viewed as a particularly significant concern, since it is one of the most costly health problems in the world and places a severe economic burden on organisations.²⁶³ These increased costs stem from the fact that depression increases absenteeism and premature mortality as well as affects employees' work engagement levels, productivity, burnout levels²⁶⁴ and stress-related illnesses.²⁶⁵ Several studies have noted that in addition to workplace bullying being a considerable public health issue with concurrent symptoms of depression, bullying also results in poor health, challenges in adult personal relationships and the onset of depressive symptoms up to four years after the bullying behaviour has first occurred.²⁶⁶

Although the case of *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland* has already been discussed, it does present certain pertinent principles pertaining to workplace bullying in particular, which need to be elaborated on to illustrate its role in mental health conditions at work. As explained earlier, the case involved an employee with depression who, upon his return to work, was subjected to severe forms of workplace bullying, including marginalisation, being given menial tasks to do, exclusion from decision-making processes, ostracism, employment detriment in the

²⁶⁰ Yamada 2009:531; Vega and Comer 2005:106. Also see Duncan 2011:2335; Harthill 2008:258; Squelch and Guthrie 2010:16; Harthill 2011:265-266; Cunniff and Mostert 2012:1; Einarsen *et al.* 2011:116-117.

²⁶¹ One study revealed that one in every five people who are bullied at work develops symptoms of PTSD. See Duncan 2011:2336, referring to Heller 2006.

²⁶² Smit 2014:75, referring to Einarsen *et al.* 2011:25; Yildiz 2007:115. Also see Harthill 2011:253.

²⁶³ Harthill 2010:1262, referring to the Workplace Bullying Institute's *Report on Psychological-Emotional-Mental Injuries* 2010.

²⁶⁴ Welthagen and Els 2012:1, referring to McIntyre and O'Donovan 2004.

²⁶⁵ Burnout refers to "a negative work-related well-being state", and employees who suffer from it experience exhaustion, cynicism and feelings of ineffectiveness. See Welthagen and Els 2012:2.

²⁶⁶ Including loss of attentiveness, loss of concentration and low energy levels, which all have a negative impact on organisations, including factors such as increased health-care costs, reduced productivity and turnover, legal problems and increased substance abuse problems. See Welthagen and Els 2012:2, 5.

²⁶⁶ Ybarra 2004:248.

form of a demotion, disciplinary action without cause, and verbal abuse.²⁶⁷ The employee was also psychologically threatened by his supervisor, who brought a firearm to a meeting.²⁶⁸ As a result of this stress, the employee suffered a relapse and his depression became worse.²⁶⁹

The Labour Court held that the employer's ongoing adverse treatment of the employee had likely destroyed the employment relationship and contributed to an intolerable work environment.²⁷⁰ The Labour Appeal Court ruled that the employee had returned to his employment position in a vulnerable state and had been subjected to a brutal regime of psychological assault and degrading treatment for an extended period of time.²⁷¹ In its judgment, the Labour Appeal Court condemned cruel, inhumane and arbitrary treatment of employees, such as the employer and senior management's disgraceful behaviour in this case.²⁷² It was held that the employer's conduct clearly constituted an "egregious attack" on the fundamental human dignity of the employee, and consequently amounted to unfair discrimination.²⁷³

In *Murray v Minister of Defence* a member of the South African National Defence Force was subjected to various acts of "bullying",²⁷⁴ which included false accusations about the employee's management as well as allegations that he had engaged in acts of criminal activity.²⁷⁵ Although he was acquitted on the charges, the accusations and accompanying media coverage psychologically harmed the employee.²⁷⁶ Subsequent acts of workplace "bullying" ensued, which included employment detriment, being relieved of his command, and marginalisation and ostracism.²⁷⁷ As a result, the employee developed and was diagnosed with depression, placed on antidepressants and eventually hospitalised after his condition continued to deteriorate.²⁷⁸ The

²⁶⁷ *Marsland v New Way Motor and Diesel Engineering (Pty) Ltd*: 175-177.

²⁶⁸ *Marsland v New Way Motor and Diesel Engineering (Pty) Ltd*: 183.

²⁶⁹ *Marsland v New Way Motor and Diesel Engineering (Pty) Ltd*: 177.

²⁷⁰ *Marsland v New Way Motor and Diesel Engineering (Pty) Ltd*: 189.

²⁷¹ *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland*: 34.

²⁷² *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland*: 35.

²⁷³ *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland*: 26.

²⁷⁴ Although the acts constituted forms of workplace bullying, the term itself was not used specifically in this case.

²⁷⁵ *Murray v Minister of Defence*: 11[15]-14[21].

²⁷⁶ *Murray v Minister of Defence*: 14[21].

²⁷⁷ *Murray v Minister of Defence*: 16[26]-18[29], 29[51].

²⁷⁸ *Murray v Minister of Defence*: 18[30].

employee eventually claimed constructive dismissal, alleging that his career had been destroyed and that he had been robbed of any meaningful future at work.²⁷⁹

The Supreme Court of Appeal held that the employee had experienced severe strain and had been demoralised (also by the acts of workplace bullying).²⁸⁰ These factors, together with his depression, were highly relevant to how the Defence Force should have dealt with the employee had it followed the principle of fairness.²⁸¹ The court held that the employer had breached its duty of fair dealings towards the employee, leaving him no choice but to resign.²⁸²

According to Le Roux *et al*, this case illustrates many of the features of workplace bullying, including marginalisation, suspicion, demoralisation and depression.²⁸³

However, in another matter dealing with workplace bullying, namely *Visser and Amalgamated Roofing Technologies t/a Barloworld*,²⁸⁴ the CCMA regrettably took another view. The matter involved an employee who claimed to have been constructively dismissed from his employment position. He developed a depressed emotional condition as a result of the aggressive conduct towards him by his managers, as well as due to other factors in his work environment with which he struggled to cope.²⁸⁵ The managers' conduct towards the employee included sarcasm, "showing him up" in front of others, "losing control" and shouting at him, and carrying on in a fashion that he was unable to deal with.²⁸⁶ As a result of this behaviour, the employee was eventually hospitalised and received treatment for stress and depression.²⁸⁷

In relation to management's behaviour and its consequences on the employee, the CCMA commissioner held as follows:

In assessing management conduct in this context, reasonable allowances must be made for management fallibility arising from their human limitations. Employees and arbitrators alike should not set the standards of conduct expected from management at an unrealistic level. To do so would be unfair and unreasonable to the employer in my view, and not in accordance

²⁷⁹ *Murray v Minister of Defence*: 24[41].

²⁸⁰ *Murray v Minister of Defence*: 34[59].

²⁸¹ *Murray v Minister of Defence*: 34[59].

²⁸² *Murray v Minister of Defence*: 34[59], 36[64], 37[66], 38[67].

²⁸³ Le Roux *et al.* 2010:51.

²⁸⁴ 2006 27 ILJ 1567 CCMA.

²⁸⁵ *Visser and Amalgamated Roofing Technologies t/a Barloworld*: 1568.

²⁸⁶ *Visser and Amalgamated Roofing Technologies t/a Barloworld*: 1568.

²⁸⁷ *Visser and Amalgamated Roofing Technologies t/a Barloworld*: 1568.

with workplace realities or those of human nature operating within the robust competitive environment that is the modern workplace.²⁸⁸

I do not accept that their conduct as complained of by the applicant, measured realistically in the context of a highly pressurized and competitive work environment, can reasonably be branded as intolerable for purposes of a constructive dismissal. If, as I have accepted for purposes of this determination, such conduct negatively impacted on the applicant to the extent that he had to be treated for depression, this effect must be attributed to applicant's particular psychic and emotional make-up and high sensitivities to what he terms 'aggression' on the part of management, in other words, to his subjective individual characteristics.²⁸⁹

In light of this and the fact that the employee had resigned prematurely without giving the employer adequate opportunity to remedy the matter, the commissioner concluded that the employee had not been constructively dismissed.²⁹⁰

It is respectfully suggested that the CCMA commissioner in this case was materially misdirected in considering the workplace bullying incidents and the resultant mental health condition.²⁹¹ While the commissioner's references to the stressful modern work environment and the need to refrain from putting managers on a moral pedestal can be understood, this hardly balances out the disadvantage suffered by the employee and others like him who have developed mental health conditions due to unfavourable working conditions. The commissioner's comments also do not seem adequate when seen against these individuals' right to dignity, which protects their self-worth and entitles them to be treated with respect. Although, as the commissioner held, managers are also fallible and make mistakes, this does not entitle them to treat employees in a manner that infringes on their inherent human dignity.

Safeguarding the right to dignity and equality of people with mental health conditions, as well as their right to enjoy a work environment free from violence, whether physical or psychological, is of paramount importance for these persons. The aim of the new constitutional dispensation is precisely to protect vulnerable groups and individuals, which would include persons who are subjected to workplace bullying and develop mental health conditions as a result.

²⁸⁸ *Visser and Amalgamated Roofing Technologies t/a Barloworld*: 1569.

²⁸⁹ *Visser and Amalgamated Roofing Technologies t/a Barloworld*: 1570.

²⁹⁰ *Visser and Amalgamated Roofing Technologies t/a Barloworld*: 1571.

²⁹¹ This section does not aim to establish whether or not the employee was constructively dismissed and will therefore not venture into a discussion in this regard. The only focus here is the considerations in relation to the employee's mental health condition.

Some individuals may be more sensitive than others, which may predispose them to developing a mental health condition. However, the commissioner's contention that the consequences suffered "must be attributed to applicant's particular psychic and emotional make-up and high sensitivities" unfortunately only reinforces the existing unfounded stereotypes about persons with mental health conditions and serves as a barrier to the achievement of substantive equality for these persons.

4.5.3.3 Workplace bullying and concomitant mental health conditions: An occupational health and safety issue

As the above paragraphs have shown, workplace bullying may undoubtedly contribute to employees developing mental health conditions in the course and scope of their employment. Although an extensive analysis of statutory compensation and occupational health and safety legislation falls outside the scope of this study, it remains important to acknowledge the nexus between them in relation to people who develop mental health conditions as a result of workplace bullying.

In terms of the common law, employees enjoy a right to a safe working environment, which is statutorily codified in the *Occupational Health and Safety Act* (OHASA).²⁹² Employers are bound by this common law duty to, as part of their principal duties, assess the workplace and ensure that it is safe for their employees.²⁹³ OHASA is of particular significance in the mental health context, as circumstances of employment may lead to mental health conditions such as depression in employees. Employers' duty to provide a safe working environment also extends to employees' psychological well-being.²⁹⁴ Thus, employers are under an implied obligation to prevent acts of workplace bullying, which may give rise to the development of mental health conditions.

The *Compensation for Occupational Injuries and Diseases Act* (COIDA)²⁹⁵ provides a structure in terms of which employees who are injured, killed or contract diseases in the course and scope of their employment can claim compensation.²⁹⁶ COIDA also

²⁹² 85/1993. The common law duty of reasonable care is entrenched in OHASA. See Du Plessis and Fouche 2015:183. Also see Grogan 2014a:61-62; 2014c:335.

²⁹³ Van Niekerk *et al.* 2015:476.

²⁹⁴ Smit 2014:291. Also see *Media 24 v Grobler*: 38[65]-39[65].

²⁹⁵ 130/1993.

²⁹⁶ Du Plessis and Fouche 2015:161.

constitutes a noteworthy body of legislation for persons who develop mental health conditions in the course and scope of their employment, as they would probably want to claim compensation. Employees who develop mental health conditions such as depression and PTSD due to workplace bullying may thus have a claim in terms of COIDA. However, while this may be true, such a claim still constitutes only an *ex post facto* remedy, which means that it will only be available after the employee has already developed the mental health condition and is of no value in protecting the employee from it happening altogether.²⁹⁷

4.5.4 Harassment and mental health under South African law

Harassment has become a widespread problem in South African and global workplaces and has substantial destructive effects.²⁹⁸ Sexual harassment in particular can be severely devastating and have far-reaching negative consequences in employment,²⁹⁹ including the development and prevalence of mental health conditions. This section will aim to identify and evaluate the causal nexus between the presence of harassment and the prevalence of mental health conditions in the workplace in terms of the various areas governing South African labour law.

The Constitution

The Constitution extends protection to victims of harassment who develop mental health conditions. Other than the rights to equality, dignity and non-discrimination, as given effect in the EEA, the constitutional right to fair labour practices is also noteworthy in this regard.

In *Piliso v Old Mutual Life Assurance Co*³⁰⁰ an employee was sexually harassed by an unknown third party, which resulted in her suffering psychological trauma.³⁰¹ As it could not be established that the perpetrator was an employee of the employer, the complainant could not make out a case in terms of section 60 of the EEA nor in terms of the common law for vicarious liability.³⁰² The court considered the employee's

²⁹⁷ Compensation granted to those who have developed mental health conditions as a result of workplace bullying comes too late for many individuals who suffer abuse in the workplace. See Smit 2014:295.

²⁹⁸ Du Toit and Potgieter 2014:33.

²⁹⁹ Du Toit and Potgieter 2014:33.

³⁰⁰ 2007 28 ILJ 897 LC.

³⁰¹ *Piliso v Old Mutual Life Assurance Co*: 900[1], 900[2].

³⁰² *Piliso v Old Mutual Life Assurance Co*: 905[24], 906[29].

second alternative claim, namely that her constitutional right to fair labour practices (section 23) had been violated.

It was held that the employer's omission to address the sexual harassment, together with the sexual harassment itself, had caused the employee's mental trauma.³⁰³ The employee had to be placed under psychological supervision and care as a result of the shock and stress caused by the harassment.³⁰⁴ An expert psychologist confirmed that the employee was suffering from an adjustment disorder, generalised features of an anxiety disorder and/or PTSD.³⁰⁵

The Labour Court held that the employer should have taken immediate steps to provide the victim employee with the best possible support, including counselling, to establish the psychological impact of the incident on her.³⁰⁶ The court confirmed that employers were obligated to take all reasonable steps to ascertain what mental trauma their employees may have suffered, to assist such employees to cope with it, and to do everything reasonably possible to minimise or eliminate it.³⁰⁷ These measures constitute the minimum obligations that an employer is required to meet in terms of the right to fair labour practices where an employee has sustained mental trauma and psychological harm.³⁰⁸ The court ruled that the employer in this case had failed to meet its minimum requirements in terms of the right to fair labour practices, which entitled the employee to claim constitutional damages from the employer.³⁰⁹

This matter illustrated that a court might use its discretion to apply the relevant provisions of the Constitution directly in cases where there is neither certainty nor any other remedy in terms of statute or the common law.³¹⁰

³⁰³ The court held that even in circumstances where the identity of the perpetrator is unknown, the legal convictions of the community compelled an employer to undertake a process of investigation to identify the perpetrator. *Piliso v Old Mutual Life Assurance Co*: 909[37]-909[41], 910[42], 923[78].

³⁰⁴ *Piliso v Old Mutual Life Assurance Co*: 909[38].

³⁰⁵ *Piliso v Old Mutual Life Assurance Co*: 911[43].

³⁰⁶ *Piliso v Old Mutual Life Assurance Co*: 923[79].

³⁰⁷ *Piliso v Old Mutual Life Assurance Co*: 923[79].

³⁰⁸ *Piliso v Old Mutual Life Assurance Co*: 924[80], 924[81].

³⁰⁹ *Piliso v Old Mutual Life Assurance Co*: 927[89], 929[93].

³¹⁰ Interestingly, contrary to the Labour Court's decision, the High Court, Supreme Court of Appeal and Constitutional Court have held in a number of judgments that litigants may not rely directly on a constitutional right where that right is embodied in other legislation. See *SANDU v Minister of Defence* 2007 8 BCLR 863 C: 51. According to the Constitutional Court, where such legislation does not provide a remedy, the correct procedure would be to challenge the legislation as falling short of the

Employment Equity Act

Harassment is not defined in the EEA, but according to Van Niekerk *et al*, it generally involves “treating a person in a manner that has the effect of violating that person’s dignity or of creating a degrading environment”.³¹¹ Viljoen argues that workplace harassment is ultimately a violation of fundamental human rights, which causes victims to suffer physical, psychological and professional harm.³¹² To Du Toit and Potgieter, harassment constitutes a blatant attack on the dignity of the victim and, as such, forms part of the prohibition of unfair discrimination mentioned above, in order to safeguard the right to human dignity.³¹³

The Labour Appeal Court in *Gaga v Anglo Platinum Ltd*³¹⁴ held that employers are duty-bound to protect their employees from sexual harassment and recognised that it might result in humiliation, embarrassment, demoralisation and a decline in work performance.³¹⁵ In this case, the employee had not suffered any recognisable or diagnosable psychological trauma or mental health conditions, but the court nevertheless held that the deplorable and offensive nature of the sexual harassment constituted a violation of the victim employee’s dignity.³¹⁶

This case confirmed that even in the absence of a recognisable psychiatric injury, which is required to prove the damage element in sexual harassment cases,³¹⁷ mental

constitutional standard. A litigant may then only bypass that legislation if (s)he is able to show that it is unconstitutional or inadequate. See Calitz 2009:408.

³¹¹ Van Niekerk *et al*. 2015:122. The *Oxford Dictionary* defines harassment as “aggressive pressure or intimidation”. See Oxford University Press 2014a. <http://www.oxforddictionaries.com/definition/english/harassment>. Accessed on 06/08/2014. Moreover, the British Advisory, Conciliation and Arbitration Service defines it as “unwanted conduct affecting the dignity of men and women in the workplace ... related to sex, race, **disability**, religion, sexual orientation, nationality and **any other personal characteristic** ... and may be persistent or an isolated incident”. See Tehrani 2012:197-198, own emphasis added. Also see South African Prevention of Harassment Act 17/2011: sec 1, where harassment is defined as conduct of an electronic or personal nature that causes harm to or infringes on the rights of another.

³¹² Viljoen 2013:66.

³¹³ Du Toit and Potgieter 2014:33.

³¹⁴ 2012 33 ILJ 329 LAC.

³¹⁵ *Gaga v Anglo Platinum Ltd*: 334.

³¹⁶ *Gaga v Anglo Platinum Ltd*: 347.

³¹⁷ South African case law supports the proposition that the causing of mental suffering, which has a significant effect on the physical-mental well-being of an individual can found the *actio iniuriarum*. See Neethling *et al* 2005:91. Courts will award damages in cases where an individual has sustained a recognized psychiatric injury. In the case of Barnard v Santam Bpk 999 1 SA 202 SCA: 209A the Supreme Court of Appeal confirmed this, stating that the requirement was an “identifiable psychological harm”. The supporting expert evidence should therefore prove that harm of this nature

health conditions or psychological trauma sustained as a result of sexual harassment would be sufficient to prove a violation of the employee's right to dignity. It also illustrated the link between the development of a mental health problem and the right to dignity in the workplace.

In *Sahara Computers (Pty) Ltd v Mokone*³¹⁸ an employee who had been subjected to sexual harassment instituted an action against her employer for mental anguish, psychological trauma and impairment of her dignity.³¹⁹ Subsequent to repeated acts of sexual harassment, and complaints to management about the unwanted conduct, the employee was interviewed and assessed by a counselling psychologist. The psychologist's clinical impression was that the employee displayed symptoms of anxiety as well as "flattened emotions" and a lack of confidence.³²⁰ The mental health-care professional also stated that the sexual harassment had affected the employee's academic, social, occupational and interpersonal functioning, and that she came across as being "severely traumatised".³²¹ The employee was further described as experiencing severely high psychological distress levels and being "fairly depressed" as a result of the harassment.³²² It was however also stated that the employee did not suffer from PTSD.

The court held that in terms of the South African legal framework, a complainant was required to prove that (s)he had suffered a "recognised psychiatric injury" as a result of harassment.³²³ Based on the evidence above, the court believed that the employee satisfied this legal requirement and had indeed suffered mental anguish, psychological trauma and an impairment of her dignity.³²⁴ Therefore, the employee succeeded with a claim requiring a "recognised psychiatric injury", even though the injury did not have to be named specifically. The fact that the employee required treatment was sufficient to satisfy this legal requirement.

exists. See Loubser et al 2012:306, 307, referring to *Barnard v Santam Bpk*: 216F. PTSD, for example has been regarded as a recognized psychiatric injury in these cases. See *Media 24 v Grobler*: 15, 56.

³¹⁸ 2014 35 ILJ 2750 GP.

³¹⁹ *Sahara Computers (Pty) Ltd v Mokone*: 2751[1].

³²⁰ *Sahara Computers (Pty) Ltd v Mokone*: 2754[19].

³²¹ *Sahara Computers (Pty) Ltd v Mokone*: 2754[20].

³²² *Sahara Computers (Pty) Ltd v Mokone*: 2754[20], 2754[21].

³²³ *Sahara Computers (Pty) Ltd v Mokone*: 2755[25].

³²⁴ *Sahara Computers (Pty) Ltd v Mokone*: 2755[25], 2755[26].

This arguably bodes well for employees who develop mental health conditions as a result of harassment in employment, since, in terms of this judicial precedent, they will only have to prove that they suffered a recognised psychiatric injury, but a diagnosis of a specific mental health condition, such as PTSD will not be required.

As harassment is considered a form of unfair discrimination, as mentioned earlier, the EEA does protect employees from harassment on the basis of any one or a combination of the listed grounds in section 6(1). Grogan indicates that harassment may include “anything from taunting an employee **about some personal characteristic**, nagging, unpleasantness, or persecuting them with frivolous disciplinary action, provided that this is done on one or other of the grounds mentioned in the [EEA]”.³²⁵ An employee’s mental health amounts to such a “personal characteristic” and may also amount to a disability, which constitutes a listed ground in terms of section 6(1) of the EEA. Legally, this would have the effect of extending consideration to mental health as a prohibited ground of harassment. This consideration would also be in line with the suggestion that mental health constitutes a valid ground of unfair discrimination.

As stated earlier, the complainant in *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland* suffered a nervous breakdown as a result of anxiety and depression while on holiday and was subsequently subjected to various acts of workplace bullying, violence and employment detriment because of his mental health condition. The Labour Court held that the employee had been constructively dismissed, and that the bullying and verbal abuse suffered by the employee “**could only be described as a form of harassment**”, which contributed to the creation of an intolerable work environment.³²⁶ The Labour Appeal Court did not make a finding on whether the conduct suffered by the employee constituted a form of harassment, but the determination made by the Labour Court was not disputed either.

Harassment is regarded as unfair discrimination, as it acts as an arbitrary barrier to the full and equal enjoyment of an individual’s rights in the employment environment.³²⁷ Le Roux *et al* state that harassment negatively affects an individual’s

³²⁵ Grogan 2014c:284, own emphasis added.

³²⁶ *Marsland v New Way Motor and Diesel Engineering (Pty) Ltd*: 189-190, own emphasis added.

³²⁷ Mukheibir and Ristow 2006:246; Van Niekerk *et al*. 2015:122.

emotional and psychological well-being, and also allude to strong evidence supporting a link between sexual harassment and PTSD.³²⁸

The court in *J v M Ltd*³²⁹ stated that the psychological effect of sexual harassment on both male and female employees could be severe and could affect their emotional and psychological well-being.³³⁰ This judgment is significant for its recognition, from a legal perspective, of the causal nexus between sexual harassment and psychological detriment.

In the matter of *Ntsabo v Real Security CC*,³³¹ an employee was perpetually sexually harassed by her superior, which eventually led to an incident of sexual assault accompanied by death threats.³³² As a result, the employee started experiencing fear, distress and suicidal thoughts, which resulted in her being admitted to a psychiatric hospital.³³³ Despite having reported the incident to management, the employee's concerns were not addressed, which omission, the employee claimed, contributed to her psychological problems, since she felt that her dignity and privacy were not respected.³³⁴

A psychiatrist confirmed that the employee was suffering from depression and that she had been prescribed antidepressants for anxiety and PTSD.³³⁵ The psychiatrist also verified that the psychological symptoms experienced by the employee, namely those of depression and PTSD, were consistent with the events that had caused them.³³⁶ The notes of a second doctor stationed at the psychiatric hospital confirmed the employee's psychological symptoms.³³⁷ A report by a clinical psychologist indicated that the employee had suffered "substantial trauma and psychological damage" as a

³²⁸ Le Roux *et al.* 2010:18.

³²⁹ 1989 10 ILJ 755 IC. Decided in 1989, this matter is considered one of the pioneering cases on sexual harassment in South Africa in which the former Industrial Court recognised that employers were obligated to prevent sexual harassment in the workplace. The court further held that the victims of sexual harassment found it embarrassing and humiliating, and that it created an intimidating and hostile work environment. See *J v M Ltd*: 757, 758.

³³⁰ *J v M Ltd*: 758.

³³¹ 2003 24 ILJ 2341 LC.

³³² These acts included touching the employee's breasts, thighs, buttocks and genital area as well as a simulated sexual act where the superior ejaculated on the employee's dress. See *Ntsabo v Real Security CC*: 2343, 2344, 2346.

³³³ *Ntsabo v Real Security CC*: 2347.

³³⁴ *Ntsabo v Real Security CC*: 2347.

³³⁵ *Ntsabo v Real Security CC*: 2349.

³³⁶ *Ntsabo v Real Security CC*: 2349.

³³⁷ *Ntsabo v Real Security CC*: 2349.

result of the sexual harassment and resultant sexual assault, and further stated that the PTSD symptoms were very common in sexual harassment cases.³³⁸ The court accepted the evidence produced by the employee in support of her case as truthful and reliable.³³⁹ In accepting the evidence and confirming that the employee had suffered psychological harm as a result of the sexual harassment, the court stated the following:

The psychological consequences of an attack are often more serious than the physical consequences because the human body has, in most cases, an extremely high degree of ability to repair itself. This is not the case with psychological sequelae. By comparison, people with strong stoic characters are few and far between.³⁴⁰

The court found in favour of the harassed employee and held that the spirit of the EEA compelled all employers to protect their employees from offensive conduct, which in this case amounted not only to offensive conduct, but also a violation of the employee's constitutional rights.³⁴¹

*Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace*³⁴²

Although sexual harassment does not form the focus of this study, it is for the purposes of context significant to consider the nature of sexual harassment under the South African legal framework, given the noteworthy link between this phenomenon and the prevalence of mental health conditions in the workplace.

Although the foundation of the prohibition on sexual harassment in the workplace flows from the EEA, it is the *Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace* (hereinafter "the Sexual Harassment Code") that gives content to the prohibition, stating that sexual harassment is a form of unfair discrimination.³⁴³

³³⁸ The report also indicated that the employee's condition was so serious that without proper and careful treatment, she would continue to deteriorate. See *Ntsabo v Real Security CC*: 2350.

³³⁹ *Ntsabo v Real Security CC*: 2373.

³⁴⁰ *Ntsabo v Real Security CC*: 2383, own emphasis added.

³⁴¹ *Ntsabo v Real Security CC*: 2384.

³⁴² GN 1357 *Government Gazette* 2005:4 Aug (27865). Although this code, like the Disability Code, does not have the force of law, it serves as an important guideline in interpreting the law. Also see Du Toit and Potgieter 2014:36.

³⁴³ Thus, if sexual harassment, being a form of unfair discrimination, takes place in the workplace, it would be a violation of chapter 2 of the EEA. See Sexual Harassment Code: item 3.

The Sexual Harassment Code defines sexual harassment as “unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace”.³⁴⁴ This is qualified by certain factors that must be taken into account in assessing whether conduct constitutes sexual harassment. These factors are (i) whether the harassment is on the prohibited ground of sex,³⁴⁵ gender³⁴⁶ or sexual orientation³⁴⁷ (or a combination of such grounds), (ii) whether the sexual conduct was unwelcome, (iii) the nature and extent of the sexual conduct, and (iv) the impact of such conduct on the employee.³⁴⁸ It also provides that a single incident of unwelcome conduct may be sufficient to establish sexual harassment,³⁴⁹ and that the conduct should constitute an impairment of the employee’s dignity, taking into account the employee’s circumstances and the respective positions of the employee and the perpetrator in the workplace.³⁵⁰

Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)

Harassment is specifically prohibited by PEPUDA, which states that no person may subject any other individual to harassment.³⁵¹ Although PEPUDA does not apply to situations where the EEA is applicable,³⁵² it is a significant part of the South African legal framework, particularly in respect of its definition of harassment:

[U]nwanted conduct that is persistent and serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to

- (a) sex, gender or sexual orientation; or

³⁴⁴ Sexual Harassment Code: item 4.

³⁴⁵ The term “sex” refers to the biological element in terms of which individuals are defined as either male or female, depending on their reproductive organs. See Oxford University Press 2014b. <http://www.oxforddictionaries.com/definition/english/sex>. Accessed on 14/07/2014.

³⁴⁶ The term “gender” refers to the psychological, social and cultural element that can be described as the state of being female or male. See Oxford University Press 2014c. <http://www.oxforddictionaries.com/definition/english/gender>. Accessed on 14/07/2014.

³⁴⁷ “Sexual orientation” refers to a person’s sexual identity in relation to the gender to which the individual is attracted; the fact of being heterosexual, homosexual, or bisexual. See Oxford University Press 2014d. <http://www.oxforddictionaries.com/definition/english/sexual-orientation>. Accessed on 26/11/2015.

³⁴⁸ Sexual Harassment Code: item 4.

³⁴⁹ Sexual Harassment Code: item 5.3.3.

³⁵⁰ Sexual Harassment Code: item 5.4.

³⁵¹ PEPUDA: sec 11.

³⁵² PEPUDA: sec 5(3).

(b) a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such a group.³⁵³

Thus, if an employee develops a mental health condition such as depression because of harassment outside the work environment and the ambit of the EEA, the individual will have the option of seeking relief in terms of PEPUDA, provided that their mental health condition amounts to a characteristic associated with a protected group, such as disability.

Prevention of Harassment Act³⁵⁴

The South African Prevention of Harassment Act took effect on 27 April 2013. The statute and its directives aim to provide for the issuing of protection orders against harassment.³⁵⁵ The preamble of the act confirms all persons' constitutional right to dignity and the right to be free from all forms of violence.³⁵⁶ It also provides a definition for harassment, namely conduct of an electronic or personal nature that causes harm to or infringes on the rights of another.³⁵⁷

The Prevention of Harassment Act was adopted in order to protect individuals from harassment and resultant harm, which includes psychological harm, and also extends to employment.³⁵⁸ Employees may thus also rely on the act to seek relief if they develop mental health conditions such as depression due to harassment or, conversely, if they are harassed because of their mental health status.

The Common Law

Victims of harassment who develop mental health conditions as a result of sexual harassment in employment may also institute common law delictual claims against perpetrators and in applicable circumstances, against their employers either as a vicarious liability claim or a direct liability claim. Claimants will in these circumstances,

³⁵³ PEPUDA: sec 1, own emphasis added.

³⁵⁴ 17/2011.

³⁵⁵ Smit 2014:279.

³⁵⁶ *Prevention of Harassment Act*: 4. Also see Smit 2014:279.

³⁵⁷ *Prevention of Harassment Act*: sec 1.

³⁵⁸ *Prevention of Harassment Act*: sec 1; Smit 2014:279-280.

need to prove all the elements of a delict,³⁵⁹ including damage, which in these cases is proven by way of a recognised psychiatric injury.

The facts of *Media 24 v Grobler* centre on a common law delictual claim because of sexual harassment and the resultant psychological effects thereof in the workplace. This discussion will incorporate considerations from the decision of the court a quo in *Grobler v Naspers Bpk*³⁶⁰ as well as from the appeal case of *Media 24 v Grobler*. The matter involved an employee who had suffered an emotional breakdown as a result of continuous sexual harassment by one of her superiors.³⁶¹ The employee developed PTSD as a result.³⁶²

In *Grobler v Naspers Bpk*, a fundamental dispute between the parties was whether the plaintiff's condition could be classified as PTSD. The expert witnesses delivered contrary opinions in this regard: The male experts contended that in the absence of at least one significant traumatic event, there was no stressor present that could be viewed as severe enough to make a diagnosis of PTSD.³⁶³ The female experts, on the other hand, contended that a series of low-grade incidents could constitute such a severe assault on the personal and bodily integrity of an individual that the resultant stress could be diagnosed as PTSD.³⁶⁴ The court held that in circumstances where the consequences of sexual harassment were suffered by a female individual, female experts would be in a better position to judge this impact, and the court consequently supported the female experts' view, namely that the sexual harassment resulted in PTSD.³⁶⁵ It was also held that irrespective of whether it amounted to PTSD or not, the male superior, through his acts of sexual harassment, was responsible for the employee's psychological and emotional problems.³⁶⁶

In the appeal case of *Media 24 v Grobler*, the employee went on to contend that as a result of the sexual harassment, she suffered severe "shock, anger, anguish, fear and anxiety; was humiliated, degraded and disturbed in her mental tranquillity and

³⁵⁹ It is trirte that the elemens of a delict, under South African law are conduct, wrongfulness, fault, causation and damage.

³⁶⁰ 2004 4 SA 220 C.

³⁶¹ *Grobler v Naspers Bpk*: 223.

³⁶² *Grobler v Naspers Bpk*: 224.

³⁶³ *Grobler v Naspers Bpk*: 224.

³⁶⁴ *Grobler v Naspers Bpk*: 224.

³⁶⁵ *Grobler v Naspers Bpk*: 224.

³⁶⁶ *Grobler v Naspers Bpk*: 224.

emotional integrity, and suffered severe psychological and psychiatric trauma”, which resulted in PTSD.³⁶⁷ The employer disputed the fact that the employee suffered from PTSD as a result of the sexual harassment. Although the employer did not dispute that the employee had been exposed to psychological and psychiatric trauma, it merely argued that this trauma did not warrant a diagnosis of PTSD.³⁶⁸

The Supreme Court of Appeal held that the employee had been sexually harassed by her male superior.³⁶⁹ On the question of whether the employee’s condition amounted to a recognised psychiatric injury, namely PTSD, the court accepted the use of the diagnostic features of PTSD as set out in the DSM.³⁷⁰ The Supreme Court of Appeal held that the employee did indeed have PTSD, but that the extreme event or stressor that was required to make the diagnosis had occurred outside the course and scope of the employee’s employment while she was pursuing a private activity.³⁷¹ The employer could consequently not be held vicariously liable on this ground.

It was however held that employers had a legal duty to take reasonable care of the safety of their employees, which duty did not only extend to protection from physical harm, but protection from psychological harm also.³⁷² Based on the breach of this legal duty, the court held the employer directly liable for the sexual harassment and resultant psychological harm caused by its employee.³⁷³

4.5.5 Harassment, workplace bullying and mental health conditions: A causal nexus

The judicial precedents discussed above clearly indicate that harassment in the workplace and the mental health status of employees are interlinked: Some employees are harassed on the basis of their mental health, while others may develop a mental health condition as a result of harassment.

³⁶⁷ *Media 24 v Grobler*: 5[7].

³⁶⁸ *Media 24 v Grobler*: 7[10].

³⁶⁹ *Media 24 v Grobler*: 34[55].

³⁷⁰ The DSM-IV, which was in use at the time of the judgment. See *Media 24 v Grobler*: 35[56]-36[57].

³⁷¹ *Media 24 v Grobler*: 36[59], 37[60], 47[77]-48[77].

³⁷² *Media 24 v Grobler*: 38[65]-39[65].

³⁷³ *Media 24 v Grobler*: 42[71]-43[71]. Also see Grogan 2014c:290, who explains that the manager’s failure to deal with the matter when it was reported to him was culpable. The manager’s omission to take steps to prevent the harassment was negligent, which is why it did not matter that the incident that caused the employee’s PTSD occurred outside the scope of her employment, because if the manager had acted earlier, the incident might never have occurred.

The literature, empirical evidence and judicial precedent also point to the problematic nature of workplace bullying, and the link between this phenomenon and the occurrence of mental health conditions in the workplace. Similar to the cases dealing with harassment, the limited judicial precedent on workplace bullying shows that employees may be bullied because they have a mental health condition or may develop a condition as a result of bullying behaviour.

In respect of both harassment and workplace bullying, this causal nexus is evident and constitutes a significant concern in the employment domain.

4.6 *Lacunae* in the South African legal framework in relation to unfair discrimination based on mental health

The first *lacuna* that may be identified under the South African legal framework is that mental health is not specifically listed in either section 6(1) of the EEA or section 9(3) of the Constitution as a prohibited ground of unfair discrimination. Listing mental health status as a prohibited ground will hold the benefit of protecting all persons with mental health conditions from unfair discrimination in the employment realm, irrespective of their specific type of mental health issue. Listing mental health as a prohibited ground would also relieve claimants of overcoming the additional and more strenuous burden of proof applicable in cases where they would have to allege their mental health as an unlisted analogous or arbitrary ground. Since not all mental health issues may satisfy the criteria of a disability, listing mental health as a separate prohibited ground will extend the necessary protection to these individuals, who have historically been exposed to severe discrimination, prejudice and patterns of disadvantage. In line with the legal analysis above as well as the court's decision in *Marsland*, discrimination based on mental health is serious enough to violate the right to inherent human dignity in a similar manner as other listed grounds such as disability, race and sex. In addition, such an approach will bring legal certainty.

A second *lacuna* is the lack of judicial and legislative guidelines on how mental health conditions should be dealt with in the workplace as far as discrimination is concerned. It is suggested that a set of guidelines proceeding on a similar premise and incorporating the arguments as suggested in the legal analysis above will be a substantial source for the judiciary and all stakeholders in the employment arena to approach discrimination based on mental health in a uniform manner.

Thirdly, as an independent consideration and area of the legal framework, certain shortcomings can also be identified in relation to workplace harassment and bullying. In light of the demonstrated causal nexus between these phenomena and the prevalence of mental health conditions in the workplace, more adequate legal intervention is required to provide clarity and entrench protection for vulnerable individuals in the employment realm.

4.7 Conclusion

From the analysis in this chapter, it appears that people with mental health conditions such as depression may be protected from unfair discrimination on the basis of the listed grounds, provided that the mental health condition meets the requirements of a disability. Mental health status may also satisfy the criteria of an unlisted analogous ground of unfair discrimination in light of the potential of such discrimination to impair fundamental human dignity as well as the prejudicial differentiation and the past patterns of disadvantage suffered by these individuals. Moreover, mental health status may amount to an arbitrary ground of unfair discrimination under the amended section 6(1) of the EEA. This will however depend on how the judiciary approaches this concept in the future, and on the nature and scope they attach to this concept.

The remarkable link between an individual's mental health status and their rights to dignity, equality and equal opportunity under the South African legal framework has been illustrated. It has also been argued that the substantive approach to equality requires that these individuals be extended protection and that the past patterns of discrimination and disadvantage they have suffered be redressed.

However, there still are certain *lacunae* under the South African legal framework in relation to mental health conditions and unfair discrimination. Considerable gaps include the significant link between harassment, workplace bullying and the prevalence of mental health conditions; the fact that mental health is not listed as a prohibited ground of unfair discrimination, and the absence of clear guidelines on the handling of workplace discrimination based on mental health conditions. People with mental health conditions constitute a vulnerable group that has suffered systematic disadvantage, stigma and marginalisation in the past. A substantive approach to equality and more effective legal protection are consequently required to redress this disadvantage.

CHAPTER 5

MENTAL HEALTH CONDITIONS AND REASONABLE ACCOMMODATION UNDER THE SOUTH AFRICAN LEGAL FRAMEWORK

5.1 Introduction

This chapter analyses reasonable accommodation in the context of people with mental health conditions, particularly depression, under the South African legal framework. It starts off with an analysis of the international instruments influencing South African law in relation to mental health and reasonable accommodation, as well as of the concept of reasonable accommodation. Reasonable accommodation will be considered as both a non-discrimination principle and an affirmative action measure. Further considerations will include the process of selecting appropriate accommodation and the particular adjustment measures that may best serve to accommodate depression in the South African workplace.

As in the previous chapters, the characteristics of depression will serve as example and will be tested and applied to the considerations applicable to effective accommodation in the workplace.

5.2 International instruments applicable to reasonable accommodation for mental health conditions

Even before it was explicitly provided for in the UN Disability Convention, the concept of reasonable accommodation already made its way onto the international stage in relation to people with disabilities.¹ Several international human rights bodies and courts also decided cases involving reasonable accommodation before the UN Disability Convention took effect.²

¹ Mégret and Msipa 2014:255.

² These cases include *Hamilton v Jamaica* Communication 616/1995 UN doc CCPR/C/66/D/616/1995; *Price v UK* 2001 34 EHRR 1285; *Glor v Switzerland* Application 13444/04 30 April 2009. See Mégret and Msipa 2014:256.

5.2.1 United Nations Convention on the Rights of Persons with Disabilities

The UN Disability Convention regards failure to provide reasonable accommodation as a form of unfair discrimination.³ Article 2 of the convention defines reasonable accommodation as follows:

Reasonable accommodation means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

It places a duty on all state parties to ensure that reasonable accommodation is provided to persons with disabilities, including mental disabilities, in the workplace.⁴

In *HM v Sweden Communication*,⁵ the Committee on the Rights of Persons with Disabilities held that a formal equality interpretation of the law might have a discriminatory effect when people's specific circumstances are not considered.⁶ Grobbelaar-Du Plessis and Nienaber derive the following assessment from this judgment:

[T]he Committee found that a state's failure to treat a person with disabilities differently when the situation warrants it, amounts to discrimination as the definition of discrimination on the basis of disability in terms of the Convention includes "denial of reasonable accommodation".⁷

Consequently, international law recognises the concept of reasonable accommodation and incorporates it as an element of the principle of non-discrimination.

5.3 The concept of reasonable accommodation

The concept of reasonable accommodation is still developing under South African law, and its exact parameters, nature and scope have yet to be fully demarcated.⁸

Reasonable accommodation is primarily a non-discrimination principle and an accessory in the achievement of substantive equality.⁹ Accommodating diversity and

³ UN Disability Convention: art 2, 5(3).

⁴ UN Disability Convention: art 27(1)(i). Interestingly, although reasonable accommodation was eventually included as a form of discrimination in the convention, it accounted for the bulk of debate involving disability discrimination when the convention was still being drafted. See Mégret and Msipa 2014:257-258.

⁵ 3/2011, CRPD/C/7/D/3/2011 19 Apr 2012.

⁶ *HM v Sweden Communication*: 8.3. Also see Grobbelaar-Du Plessis and Nienaber 2014:369.

⁷ Grobbelaar-Du Plessis and Nienaber 2014:369.

⁸ Pretorius et al. 2014:7-3; Marumoagae 2012:351.

⁹ Pretorius et al. 2014:7-3.

disadvantage is a goal of the substantive equality approach, which makes the provision of reasonable accommodation vital in protecting and promoting equality for people with mental disabilities in the workplace.¹⁰ When employers effectively accommodate employees, they restore dignity to these individuals.¹¹

As disability is socially constructed and conditioned, and since a formal equality approach may in fact perpetuate disadvantage for these individuals, reasonable accommodation, as a concept that takes into account individual differences and needs, challenges this traditional conception of equality.¹² Reasonable accommodation flows from the substantive equality approach and aims to dismantle patterns of systematic discrimination.¹³ It also aims to affirm the dignity and worth of every person who is protected against unfair discrimination.¹⁴ In essence, accommodation means that the social environment must be adjusted and made accessible by eliminating both attitudinal and environmental barriers.¹⁵ In this context, the achievement of substantive equality stems from the fact that the physical and social environment must be altered to accommodate people with disabilities in order to ensure equality of outcomes.¹⁶

Pretorius *et al* describe the duty of reasonable accommodation as follows:

[R]easonable accommodation **comprises of positive measures** that ought to be taken to meet the special, or more accurately, **different needs** of those who, **by reason of a protected characteristic such as disability** ... cannot be adequately served by arrangements that are suitable for people who do not share such a characteristic.

In the workplace, reasonable accommodation essentially **requires the employer to take positive measures** and **adapt the job or working environment** so as to enable a job applicant or existing employee who has a protected characteristic that is adversely served by the employer's job requirements or the working environment, **to discharge the inherent requirements of the job.**¹⁷

Christianson suggests that reasonable accommodation is a way of ensuring that an individual who has the necessary ability and qualifications for a particular employment

¹⁰ Ngwena and Pretorius 2003:1831.

¹¹ *Standard Bank of SA v CCMA*: 1256[66].

¹² Mégret and Msipa 2014:262.

¹³ Pretorius *et al.* 2014:7-21. Substantive equality intersects with the duty to accommodate, and has been described as the most significant tool in the arsenal of people with disabilities. See Bhabha 2009:242.

¹⁴ Ngwena 2005b:560.

¹⁵ Grobbelaar-Du Plessis and Nienaber 2014:376.

¹⁶ Grobbelaar-Du Plessis and Nienaber 2014:376.

¹⁷ Pretorius *et al.* 2014:7-3, own emphasis added.

position is afforded accommodation that is reasonable, when necessary and if possible.¹⁸ She further indicates that reasonable accommodation should assist an individual to function productively in the employment environment and become self-supporting.¹⁹

In analysing the concept of reasonable accommodation, the meaning and scope of “reasonable” firstly needs to be considered. Although there is some ambiguity and contention as to what this concept means in some jurisdictions, its interpretation indicates that the term relates to the quality of the accommodation itself in the sense that it must be effective.²⁰ In this regard, it has been pointed out that effective accommodation is characterised by an adjustment or measure that is tailored to individual need.²¹

Reasonable accommodation is however not a fixed concept and requires a balancing act between the needs of the individual and the scope of the obligations imposed on the employer.²² Reasonable accommodation should not inflict a disproportionate burden on the employer.²³ Accommodation that imposes excessive costs or inconvenience is considered unreasonable and imposing an undue burden.²⁴

The Disability Guidelines indicate that the purpose of reasonable accommodation is to reduce the impact of impairment on the individual’s ability to discharge the inherent requirements of the job.²⁵ It is further provided that reasonable accommodation constitutes modifications or alterations to the way in which a job is normally performed, in order to make it possible for suitably qualified individuals with disabilities to perform in the same manner as other individuals.²⁶

Reasonable accommodation is about the interaction between the individual’s disability and the essential functions of the job.²⁷ As it places a burden on the employer, it cannot

¹⁸ Christianson 2004, in Dupper *et al.* 2004:174.

¹⁹ Christianson 2004, in Dupper *et al.* 2004:174.

²⁰ However, where reasonableness refers to the effectiveness of the accommodation, it is generally considered a legitimate defence to claim that the accommodation would have imposed an undue burden. See Mégret and Msipa 2014:266.

²¹ Mégret and Msipa 2014:265.

²² Mégret and Msipa 2014:267.

²³ Pretorius *et al.* 2014:7-7.

²⁴ Mégret and Msipa 2014:267.

²⁵ Disability Guidelines:13.

²⁶ Disability Guidelines:13.

²⁷ Ngwena 2005b:538.

be an open-ended duty with no clear legal limits.²⁸ The duty to provide reasonable accommodation will also mean different things in different circumstances. Since disabilities and impairments are diverse, the consequent needs are diverse and require varying types of modification or adjustment.²⁹ Mégret and Msipa suggest that this focus on individual needs is what makes reasonable accommodation effective in redressing the past inequalities and disadvantage suffered by people with disabilities,³⁰ allowing for a shift from formal equality to substantive equality.³¹

In establishing the criteria for reasonable accommodation, the Disability Guidelines state that the accommodation in question must remove the barriers to performing the job for an individual who is otherwise qualified, and should also mitigate the effects of the impairment so that the person can achieve his or her full potential in employment.³² Reasonable accommodation should also enable an individual with a disability to enjoy equal access to the opportunities and benefits of employment.³³ It follows that persons with depression and other mental health conditions who qualify in terms of the relevant legal requirements should also receive accommodating measures to ensure their equal access to the opportunities and benefits of employment and mitigate the effects of their impairment.

Critics of reasonable accommodation have described it as preferential treatment over other employees. However, this misconception stems from society's ignorance of the fact that employers already accommodate the needs of persons who are not disabled.³⁴ Ngwena argues that once society starts viewing people with disabilities as a variation of human diversity, it will become apparent that reasonable accommodation constitutes nothing more than an ordinary non-discrimination duty instead of a form of preferential treatment.³⁵ Reasonable accommodation seeks to overcome a

²⁸ Pretorius *et al.* 2014:7-7.

²⁹ Mégret and Msipa 2014:263.

³⁰ Reasonable accommodation is significant in the sense that it affects not only particular individuals, but also particular environments. See Mégret and Msipa 2014:263, 264.

³¹ Mégret and Msipa 2014:263.

³² Disability Guidelines:15.

³³ Disability Guidelines:15.

³⁴ Ngwena 2005b:536, referring to Crossley 2004:892-893.

³⁵ Ngwena 2005b:537.

disadvantage stemming from employment circumstances by levelling the playing field rather than conferring an advantage.³⁶

5.4 Reasonable accommodation for people with mental health conditions, with special reference to depression

5.4.1 Introductory remarks

In order to consider how mental health conditions, particularly depression, intersect with reasonable accommodation under the South African legal framework, one needs to first explore reasonable accommodation as a non-discrimination principle extending protection to these individuals, and then as an affirmative action measure aimed at providing specific accommodation measures to people with mental disabilities in the workplace. This will be done in the following sections.

5.4.2 Reasonable accommodation as a non-discrimination principle

5.4.2.1 Applicable legal considerations

Reasonable accommodation is primarily a principle for determining unfair discrimination. This was confirmed by the Labour Court in *SAMWU obo Solomons and the City of Cape Town*, where it was stated that under the new constitutional dispensation, employers were obligated to provide reasonable accommodation to employees with disabilities, and that not doing so would amount to unfair discrimination.³⁷

In this regard, Pretorius *et al* suggest that reasonable accommodation is a duty that should be implied into the *Harksen v Lane* test.³⁸ They further argue that reasonable accommodation cannot be limited to the Constitution, and even though the EEA does not explicitly address this concept as a non-discrimination principle, it should be implied into the determination of unfair discrimination under the act, since the EEA flows directly from the Constitution and strives to achieve constitutional equality in the

³⁶ Ngwena 2005b:538.

³⁷ *SAMWU obo Solomons and the City of Cape Town* 2009 18 SALGB 8.1.4, as highlighted by Ngwena 2014:291.

³⁸ Pretorius *et al.* 2014:7-3, referring to *IMATU obo Strydom v Witzenburg Municipality and Others* 2012 33 ILJ 1081 LAC. Also see Ngwena 2010:464-465.

workplace.³⁹ Ngwena supports this contention by suggesting that reasonable accommodation as a non-discrimination principle is central to the determination of direct and indirect discrimination.⁴⁰

Significantly, although the EEA does not expressly recognise reasonable accommodation as a non-discrimination principle, the Revised Disability Code incorporates the definition for “discrimination on the basis of disability” provided in the UN Disability Convention, which states that discrimination on this ground “includes all forms of discrimination, including the denial of reasonable accommodation”.⁴¹ The Disability Guidelines, on the other hand, explicitly state that reasonable accommodation is both a non-discrimination and an affirmative action requirement.⁴²

Reasonable accommodation as a non-discrimination principle as opposed to an affirmative action measure establishes an enforceable right in circumstances where unfair discrimination is alleged.⁴³ Thus, the concept goes beyond a mere statutory duty of which the scope extends to members of the designated groups only.⁴⁴ As a non-discrimination principle, reasonable accommodation does not advance the preferment of a particular group and does not aim to confer an advantage, but rather to overcome an occurrence of unfair discrimination.⁴⁵ In this regard, Ngwena views it as a shortcoming to recognise reasonable accommodation as an affirmative action duty only. He states that reasonable accommodation as a non-discrimination principle imposes a duty that can be enforced by any individual belonging to a protected group, while in circumstances where there is a failure to provide reasonable accommodation as an affirmative action duty, such a failure will not necessarily be sufficient grounds for an unfair discrimination claim.⁴⁶

The court in *Standard Bank of SA v CCMA*⁴⁷ assessed the nature and scope of reasonable accommodation in the South African context and found that

³⁹ Sec 6 of the EEA does not expressly mention reasonable accommodation, and it is therefore implied that it constitutes an affirmative action duty only. See Pretorius *et al.* 2014:7-3, 7-4.

⁴⁰ Ngwena 2005b:535; 2010:464.

⁴¹ Revised Disability Code: item 5.1.

⁴² Disability Guidelines:13.

⁴³ Pretorius *et al.* 2014:7-21.

⁴⁴ Pretorius *et al.* 2014:7-21.

⁴⁵ Pretorius *et al.* 2014:7-21, 7-22.

⁴⁶ Ngwena 2005b:540.

⁴⁷ 2008 29 ILJ 1239 LC.

“accommodating disability as difference operates to prevent adverse effect discrimination flowing from employment rules, procedures and standards”.⁴⁸ The court pointed out that dismissal based on a prohibited ground of discrimination was automatically unfair, and implicit in the employer’s obligation to reasonably accommodate was the duty to prevent discrimination.⁴⁹ Therefore, if an employer fails to provide reasonable accommodation to an employee with a disability, dismissing that employee would not only be unfair, but also automatically unfair.⁵⁰ The court further held that an employer who unreasonably refuses to provide accommodation where such a provision falls short of unjustifiable hardship acts irrationally.⁵¹

The Labour Court distinguished between reasonable accommodation as a non-discrimination principle and as an affirmative action measure. It held that because reasonable accommodation protected against an automatically unfair dismissal, it was more onerous than a general obligation to implement affirmative action.⁵² It was also held that affirmative action measures applied generally to all employees who form part of the group, while reasonable accommodation for people with disabilities required tailored and specific modifications and adjustments to address the employee’s specific disability.⁵³

In relation to this case, Ngwena regards it as a positive step for the disability method in South Africa that the notion of reasonable accommodation has been integrated with the concept of substantive equality and the equality jurisprudence of the legal framework as a right and not a mere privilege.⁵⁴ This case is significant in the context of people with mental health conditions, as the considerations of reasonable accommodation considered by the court will apply equally to these individuals under the South African legal framework.

⁴⁸ *Standard Bank of SA v CCMA*: 1258[77].

⁴⁹ *Standard Bank of SA v CCMA*: 1259[79].

⁵⁰ *Standard Bank of SA v CCMA*: 1259[80].

⁵¹ *Standard Bank of SA v CCMA*: 1259[80].

⁵² *Standard Bank of SA v CCMA*: 1260[84].

⁵³ *Standard Bank of SA v CCMA*: 1260[85].

⁵⁴ Ngwena 2010:471; 2014:292.

5.4.2.2 Reasonable accommodation and non-discrimination: An analysis specific to mental health conditions

To echo Ngwena's words above, reasonable accommodation as a non-discrimination principle imposes a duty that can be enforced by any individual belonging to a protected group, or a group analogous to a protected group. In light of this as well as the implication that unreasonably denying accommodation to an employee would amount to unfair discrimination, withholding reasonable accommodation from an employee with a mental health condition such as depression will under certain circumstances amount to unfair discrimination.

Therefore, if an employee with depression (or any other mental health condition) is denied reasonable accommodation by his or her employer, such an employee may allege having suffered unfair discrimination in the workplace. Where the employee's mental health condition amounts to a disability in the legal sense, the employee may allege having been denied reasonable accommodation and, thus, having been unfairly discriminated against based on the listed ground of disability. Where the mental health condition does not satisfy the legal criteria of a disability, the employee may allege having been denied reasonable accommodation and, thus, having been unfairly discriminated against based on the unlisted analogous or arbitrary ground of mental health.⁵⁵

As noted earlier, reasonable accommodation as a non-discrimination principle does not aim to confer an advantage, but merely seeks to protect individuals from being unfairly discriminated against. Therefore, persons with mental health conditions, such as depression, may invoke this form of non-discrimination in order to safeguard their rights to dignity and equality, and to ensure the promotion of their substantive equality.

5.4.3 Reasonable accommodation as an affirmative action measure for people with mental disabilities

Reasonable accommodation as an affirmative action measure aims to redress a history of disadvantage and marginalisation by endorsing group preferment.⁵⁶ If an

⁵⁵ In light of the legal analysis in the previous section and the contention that mental health conditions will pass the test of an unlisted analogous or an arbitrary ground of unfair discrimination.

⁵⁶ Pretorius *et al.* 2014:7-22. Also see Ngwena 2010:467.

individual belongs to a designated group, such a person will become eligible for preference by a designated employer.⁵⁷

The implication under the EEA is that in order to be eligible for reasonable accommodation, an individual with a disability must ultimately be able to discharge the inherent requirements of the job, with or without reasonable accommodation.⁵⁸ Thus, where employees or job applicants can establish their depression as a legally recognised disability, they will be entitled to request reasonable accommodation measures from the employer in order to assist them in discharging the inherent requirements of their jobs.

The EEA expressly recognises reasonable accommodation as an affirmative action measure for suitably qualified persons from designated groups, including people with disabilities. Section 15(2)(c) of the EEA provides the following in this regard:

[M]aking reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer.

Section 1 of the EEA defines reasonable accommodation as “[a]ny modification or adjustment to a job or to a working environment that will enable a person from a designated group to have access to or participate in employment”.⁵⁹ The Disability Code, in turn, provides the following definition:

Employers should reasonably accommodate the needs of people with disabilities. The aim of the accommodation is to reduce the impact of the impairment of the person’s capacity to fulfil the essential functions of a job.⁶⁰

Reasonable accommodation must be considered at all stages of employment, namely recruitment, selection, during the work process, in the work environment, during performance appraisal and promotion processes, and in the determination of employment benefits.⁶¹

Empirical research confirms that employers, managers and employees are seemingly unable to respond appropriately to the needs of individuals with depression.⁶² It should

⁵⁷ Pretorius *et al.* 2014:7-22.

⁵⁸ Pretorius *et al.* 2014:7-34.

⁵⁹ EEA: sec 1.

⁶⁰ Disability Code: item 6.1.

⁶¹ Christianson 2004, in Dupper *et al.* 2004:178.

⁶² Korb 2015:3.

be noted that not all mental health conditions are completely disabling, and those that only partially limit an employee's capabilities, including depression, should therefore be accommodated in the workplace.⁶³

Thus, an employee with a mental health condition will firstly have to prove that the impairment amounts to a disability in the legal sense in order to fall within the protected class. The person will then also have to prove that (s)he is capable of discharging the inherent requirements of the job, with or without reasonable accommodation.

In light of the EEA's definition of reasonable accommodation being "any modification or adjustment to a job or to a working environment that will enable a person from a designated group to have access to or participate in employment",⁶⁴ it follows that an employment position or working environment will have to be modified or adjusted in order to allow an individual with a mental disability to participate in employment and discharge the inherent requirements of the job.

5.4.3.1 “Suitably qualified” individuals as beneficiaries of reasonable accommodation

As mentioned earlier, both the EEA and the Disability Guidelines provide that "suitably qualified" persons may be beneficiaries of reasonable accommodation as a form of affirmative action. Individuals from the designated groups – in this instance, people with mental disabilities – may be suitably qualified for a particular employment position as a result of any one or a combination of their "formal qualifications, prior learning, relevant experience or capacity to acquire, within a reasonable time, the ability to do the job".⁶⁵ The employer will take these into account in order to determine whether the individual with a mental disability is suitably qualified and, thus, capable of performing the inherent requirements of the employment position.⁶⁶

If it is determined that the employee is not suitably qualified and, thus, unable to discharge the inherent requirements of the job, the employer may consider whether this could be remedied with reasonable accommodation.⁶⁷ However, an employer is

⁶³ Coetzer *et al.* 2002:68.

⁶⁴ EEA: sec 1.

⁶⁵ EEA: sec 20(3).

⁶⁶ Pretorius *et al.* 2014:7-34.

⁶⁷ Pretorius *et al.* 2014:7-34.

not obligated to make reasonable accommodation for an individual who is unable to discharge the inherent requirements of the job despite reasonable accommodation.⁶⁸

Therefore, in light of the aforesaid, it is clear that if persons with mental disabilities are unable to discharge the inherent requirements of a particular employment position even with reasonable accommodation, the employer will not be obliged to accommodate them.

5.4.3.2 Individualised assessments to determine appropriate measures of reasonable accommodation

Every individual's impairment will vary in its degree and nature, which implies that the requirements and choice of reasonable accommodation will also vary.⁶⁹ Other variables include the particular employment position, workplace and working environment.⁷⁰ Therefore, it is important that the reasonable accommodation is determined based on an individualised assessment of each person's specific circumstances.⁷¹

Pretorius *et al* point out that an employer may not rely on stereotypical assumptions about the ineptitude of persons with mental disabilities when formulating and implementing criteria for assessing the capability of such persons for potential employment.⁷² Instead, the employer must engage in an individualised or specific assessment, which takes into account the particular employment position, the specific disability as well as any consequent functional limitation of the individual.⁷³ Support for this can be found in the Disability Code, which states that the "particular accommodation will depend on the individual, the degree and nature of impairment and its effect on the person, as well as on the job and the working environment".⁷⁴ Likewise, the Disability Guidelines state that the type of reasonable accommodation

⁶⁸ Pretorius *et al.* 2014:7-34.

⁶⁹ Disability Guidelines:19.

⁷⁰ Disability Guidelines:19.

⁷¹ If an employer were to base its assessment and selection of reasonable accommodation on its general and assumed knowledge of a specific disability such as depression, rather than on information concerning the specific employee, the employer runs the risk of endorsing the same pattern of discrimination, stereotyping and unjustified paternalism that the law aims to prohibit. See Ngwena 2005b:556, referring to Sullivan 2001:116-117.

⁷² Pretorius *et al.* 2014:7-35.

⁷³ Pretorius *et al.* 2014:7-35.

⁷⁴ Disability Code: item 6.7.

required will depend on the employment position and its essential functions, the work environment and the individual's specific impairment.⁷⁵

Reasonable accommodation is designed to take into account the particular mental disability of the job applicant or employee, and to assist the individual specifically in the workplace. It is not intended to assist an individual with regard to functions that are purely personal and fall outside the nature and scope of employment.⁷⁶ According to Pretorius *et al*, however, the work environment should not be construed too narrowly and should extend to situations that are "work-related".⁷⁷ It is also noteworthy that the reasonable accommodation may be permanent or temporary, depending on the nature and extent of the specific mental disability.⁷⁸

In determining appropriate reasonable accommodation for people with mental disabilities, the employer must consider each individual's specific mental health condition. In the specific case of depression, the effects and symptoms of the disorder will vary in duration and severity. Consequently, two or more individuals in a workplace may suffer from depression, but may not necessarily be affected or impaired in the same manner. Likewise, both depression and PTSD may constitute mental disabilities, but their symptoms and effects cannot necessarily be accommodated in the same manner. Therefore, in determining appropriate reasonable accommodation, the employer will have to take into account the specific features and symptoms of each particular mental health condition, as well as the specific manner in which each individual is affected. The employment position and work circumstances in each case may also influence the employee's symptomology and functional capacity, which makes these considerations equally important in the individualised assessment of reasonable accommodation.

Pretorius *et al*'s argument cited above, namely that an employer should not rely on stereotypical assumptions about the ineptitude of individuals with mental disability, is particularly significant precisely because of the various misconceptions, stereotypes and prejudices associated with mental health conditions. Employers may, often

⁷⁵ Disability Guidelines:13.

⁷⁶ Pretorius *et al*. 2014:7-41.

⁷⁷ Pretorius *et al*. 2014:7-41.

⁷⁸ Disability Code: item 6.8.

inadvertently, factor these generalised assumptions into their assessment of appropriate reasonable accommodation, which may in effect not adequately accommodate each employee's specific circumstances.

The nature and extent of the mental disability should also be factored into the decision-making process. If, for example, the disability is temporary or the effects of the disorder vary, appropriate accommodation should be selected to address these effects. If, however, the disability is permanent, a more permanent accommodation would be required. In instances of depression, for example, the effects and symptoms of the disorder may fluctuate, but may be prevalent throughout the person's life. Consequently, an employer will have to determine, in the particular circumstances, whether permanent accommodation would be necessary (such as transferring the employee to another position) or whether accommodation may be put in place to deal with the effects of the disorder as and when they recur (such as additional leave and sick leave).

5.4.3.3 Disclosure and consultation in relation to mental health conditions

Reasonable accommodation for an employee's mental health condition can only be considered if the employer has been made aware of the disability or impairment.⁷⁹ Therefore, unless the disability is obvious to the employer, employees must disclose the nature of their mental impairments to the employer and request reasonable accommodation.⁸⁰ Ngwena describes the process of securing reasonable accommodation as a bilateral process, which entails mutual responsibilities by the employer and the employee, communicating in good faith to better understand each other's needs and limitations with the aim of determining the appropriate accommodation in the circumstances.⁸¹

The Disability Code states the following in this regard:

⁷⁹ Christianson 2004, in Dupper *et al.* 2004:178. Without an interactive process, the employer cannot easily identify the exact limitation of a disability and the appropriate form of reasonable accommodation. See Ngwena 2005b:556.

⁸⁰ Christianson 2004, in Dupper *et al.* 2004:178.

⁸¹ Ngwena 2005b:555, 556.

The **obligation to make reasonable accommodation may arise** when an applicant or employee **voluntarily discloses** a disability related accommodation need or when such a **need is reasonably self-evident** to the employer.⁸²

Therefore, the specific reasonable accommodation and its requirements should be identified and developed through a process that involves both the employee and the employer.⁸³ This places an obligation on the employer to consult with the employee regarding the reasonable accommodation. The Disability Code provides that “[t]he employer should consult the employee and, where reasonable and practical, technical experts to establish appropriate mechanisms to accommodate the employee”.⁸⁴

The court in *Standard Bank of SA v CCMA*⁸⁵ ruled that reasonable accommodation included adapting the way in which the performance standard of an employee is measured, and that the search for reasonable accommodation had to be a multi-party inquiry.⁸⁶ In this regard, it was pointed out that the process should be interactive, involve dialogue and include an investigation of alternatives conducted with a “give and take attitude”.⁸⁷ It was also highlighted that if an employer tendered a reasonable accommodation for an employee’s disability, such an employer would have fulfilled its obligation and may dismiss the employee on the ground of incapacity if (s)he rejected the offer unreasonably.⁸⁸

In the context of mental disabilities, the disclosure of the disability and the request for reasonable accommodation is however more complex than with physical disabilities. Psychiatric impairments are often not visible to others and are socially stigmatised. Employees may be reluctant to reveal the nature of their disabilities to the employer and request reasonable accommodation for fear of suffering prejudice, embarrassment or even aggravating the condition itself.⁸⁹ The stigma surrounding mental illness in South Africa is reportedly a significant concern, with sufferers fearing

⁸² Disability Code: item 6.4, own emphasis added.

⁸³ Disability Guidelines:19.

⁸⁴ Disability Code: item 6.6. The importance of disclosure in relation to mental health conditions is further emphasised in chapter 8 and 9 below.

⁸⁵ 2008 29 ILJ 1239 LC.

⁸⁶ *Standard Bank of SA v CCMA*: 1261[89], 1262[91].

⁸⁷ *Standard Bank of SA v CCMA*: 1262[91]-1263[91].

⁸⁸ *Standard Bank of SA v CCMA*: 1263[92].

⁸⁹ Ngwena 2005b:557.

discrimination and even dismissal from employment should they disclose their mental health conditions.⁹⁰

Turning to depression specifically, a 2015 study revealed that as many as 37% of employees with depression had not disclosed their condition to their employers for fear of being subjected to some form of employment detriment.⁹¹ Other empirical research indicates that non-disclosure of depression as the reason for employees' sick leave is predominantly due to stigma and work security issues.⁹²

Although the courts did not explicitly address the concept of reasonable accommodation in *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland*, Le Roux *et al* interestingly suggest that when considering the degree of sensitivity owed to an employee experiencing psychological problems, the degree of reasonable accommodation should be measured objectively, and that the provisions of the Disability Code should be followed.⁹³ They also argue that inherent in the notion of reasonable accommodation is the requirement that an employer must accommodate what has been referred to as the "thin skull employee".⁹⁴ Employees suffering from mental health conditions such as depression will inherently be more vulnerable and sensitive, and that in line with the abovementioned argument, an employer will have to take this into consideration when providing reasonable accommodation for such employees.

In *Visser and Amalgamated Roofing Technologies t/a Barloworld* (as discussed earlier), an employee developed depression as a result of bullying behaviours in the workplace, which prompted him to resign and claim that he had been constructively dismissed.⁹⁵ It was held that the employee had not made the employer properly aware of the situation, and consequently had not afforded the employer a fair opportunity to

⁹⁰ This concern is aggravated by the fact that persons with mental illnesses are still viewed as "crazy, dangerous or weak". See Sacap 2013. <http://www.sacap.edu.za/mental-health-south-africa-whose-problem-counselling/>. Accessed on 05/11/2014.

⁹¹ Kahn 2015. <http://www.bdlive.co.za/national/health/2015/02/04/depressed-workers-hide-condition-according-to-study>. Accessed on 04/02/2015.

⁹² Korb 2015:3.

⁹³ Le Roux *et al.* 2010:57-58. Also see Rycroft 2009:1439-1440.

⁹⁴ Le Roux *et al.* 2010:58. A "thin skull" employee in this context may be described as an individual who has a predisposition to developing mental health conditions for whatever reason, or has existing mental health conditions that may be aggravated by certain circumstances.

⁹⁵ *Visser and Amalgamated Roofing Technologies t/a Barloworld*: 1568.

address the situation and accommodate the employee.⁹⁶ It was consequently found that the employee had resigned prematurely, which contributed to the finding that he had not been constructively dismissed.⁹⁷

This case stresses that if an employee requires accommodation in the workplace, (s)he must disclose this to the employer and allow the employer a fair opportunity to consult with him or her and make the necessary adjustments and accommodation.

5.4.3.4 Mental health conditions as a health and safety risk

As stated previously, employees enjoy a common law right to a safe working environment, which has been codified in OHASA⁹⁸ and which binds employers.⁹⁹

Health and safety is an essential element of the inherent requirements of a job, and the mentally disabled employee must ultimately be able to perform the job safely.¹⁰⁰ Individuals with mental disabilities such as depression must be able to perform their jobs without posing a risk to themselves, co-workers or others associated with the business.¹⁰¹ However, the mere presence of a risk to health and safety does not in itself disqualify an employee or job applicant from consideration, and it is essential for the employer to rely on objective and reasonable medical evidence instead of generalised assumptions¹⁰² in considering whether the risk may be eliminated or lessened by making reasonable accommodation for the individual's mental disability.¹⁰³ If reasonable accommodation will eliminate the health and safety risk posed by the person's mental disability, the employer will be obligated to accommodate the employee.

⁹⁶ *Visser and Amalgamated Roofing Technologies t/a Barloworld*: 1570.

⁹⁷ *Visser and Amalgamated Roofing Technologies t/a Barloworld*: 1571.

⁹⁸ Du Plessis and Fouche 2015:183; Grogan 2014a:61-62; Grogan 2014c:335.

⁹⁹ Van Niekerk *et al.* 2015:476. Where employers fail to create a safe working environment for their employees, who then develop mental health conditions in the course and scope of their employment, employers may also open themselves up to vicarious liability claims in terms of the common law of delict.

¹⁰⁰ Pretorius *et al.* 2014:7-39.

¹⁰¹ A practical example of where an employee's mental health condition may pose a risk to others in employment, and where such a risk outweighs the possibility of reasonable accommodation, is illustrated by *Jordaan and Grey Security Services* discussed in 5.4.6 below. Also see Freeman and Joska 2013:17.

¹⁰² Pretorius *et al.* 2014:7-39.

¹⁰³ Pretorius *et al.* 2014:7-39.

5.4.3.5 Unjustifiable hardship: The disproportionate burden threshold

Unjustifiable hardship constitutes a defence to an employer's alleged failure to provide reasonable accommodation.¹⁰⁴ This defence flows from the EEA and section 36 of the Constitution, which implies that making a reasonable accommodation should not impose a disproportionate burden on the employer.¹⁰⁵

The Disability Code states the following in relation to unjustifiable hardship as a ground to absolve the employer from the obligation to provide reasonable accommodation to a suitably qualified individual with a mental disability:¹⁰⁶

The employer need not accommodate a qualified applicant or an employee with a disability if this would impose an unjustifiable hardship on the business of the employer.

"Unjustifiable hardship" is action that requires significant or considerable difficulty or expense. This involves considering, amongst other things, the effectiveness of the accommodation and **the extent to which it would seriously disrupt the operation of the business.**

An accommodation that imposes an unjustifiable hardship for one employer at a specific time may not be so for another or for the same employer at a different time.

According to the Disability Guidelines, the determination of whether reasonable accommodation will amount to unjustifiable hardship should involve an objective process.¹⁰⁷ This may involve identifying and determining the effectiveness of the accommodation, and whether the implementation of the accommodation will result in difficulty or expense that will seriously disrupt the operation of the employer's business.¹⁰⁸

Ngwena suggests that the use of the principle of proportionality would result in a more reliable test for determining the limits of reasonable accommodation. A balance should be struck between the interests of the employer to operate a profitable business free from a disproportionate burden, and the rights of employees not to be discriminated against and to have their dignity respected.¹⁰⁹ Pretorius *et al*/argue that the reasonable

¹⁰⁴ Ngwena and Pretorius 2003:1834.

¹⁰⁵ Ngwena and Pretorius 2003:1834.

¹⁰⁶ Disability Code: item 6.11-6.13, own emphasis added.

¹⁰⁷ Disability Guidelines:21.

¹⁰⁸ Disability Guidelines:21.

¹⁰⁹ Ngwena 2005b:560. Also see Ngwena 2014:310-311, where he points out an interesting shortcoming of the "unjustifiable hardship" defence, namely that it may in effect privatise equality in horizontal employment relationships. This stems from the fact that the accommodation of a person with a disability will depend on the individual employer's fortunes. Consequently, where the employer is well resourced, the possibility of providing reasonable accommodation as well as the variety of

accommodation must ultimately not be unduly financially onerous, pose a major risk to health and safety, or significantly disrupt business operations.¹¹⁰ Ngwena and Pretorius also caution that undue hardship is a relative term, meaning different things for different employers or for the same employer at different stages,¹¹¹ and thus also calls for an individualised assessment of the specific circumstances. Ultimately, if an employee or job applicant with a mental disability requires accommodation that would cause considerable difficulty or expense or would seriously disrupt the operation of business, the employer will not be obligated to accommodate the individual.

Ngwena's suggestion above regarding striking a balance between the employer's interests to operate a profitable business free from a disproportionate burden, and employees' rights not to be discriminated against and have their dignity respected warrants special consideration in the context of employees with mental health conditions. If this approach is adhered to, the rights of a mentally disabled individual not to be discriminated against and to inherent human dignity will have to be weighed up against the employer's interests to operate a profitable business without a disproportionate burden. The employer's interests will very seldom, if ever, be significant enough to outweigh an individual's basic human rights to dignity and equality. However, fairness demands that the burden not be disproportionate. Therefore, if accommodating the individual will inflict a disproportionate or unfair burden, the employer will ultimately be excused from providing reasonable accommodation for the mentally disabled employee.

In relation to the concept of unjustifiable hardship, the court in *Standard Bank of SA v CCMA*¹¹² held that no hard and fast rules could be established to define what constitutes unjustifiable hardship, and that every case had to be dealt with on its own merits.¹¹³ The court did however state that unjustifiable hardship meant "more than

accommodation is more significant. Therefore, employees with the same disabilities working for different employers will not necessarily be accommodated on an equal basis. In order to overcome this shortcoming, Ngewna suggests that the costs of providing reasonable accommodation should be borne by society.

¹¹⁰ Pretorius *et al.* 2014:7-43.

¹¹¹ Ngwena and Pretorius 2003:1835.

¹¹² 2008 29 ILJ 1239 LC.

¹¹³ *Standard Bank of SA v CCMA*: 1264[99].

mere negligible effort and that just as the concept of reasonable accommodation involves a proportionality test, so does that of unjustifiable hardship".¹¹⁴

5.4.3.6 Reasonable accommodation measures for mental disabilities

The Disability Code provides the following examples of reasonable accommodation measures that may assist an employee with a disability, although the list is not exhaustive:¹¹⁵

- (i) adapting existing facilities to make them accessible;
- (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 reassigned;
- (vi) adjusting working conditions, including working time and leave; and
- (vii) providing specialized supervision, training and support in the workplace.

Among others, the following reasonable accommodation measures in the Disability Guidelines are relevant in respect of employees with mental health conditions:¹¹⁶

- Assistance in making the workplace more accessible on the kind of person's limitations and needs.
- Workstation modifications.
- Adjustment to work schedules.
- Adjustment to the nature and duration of the duties of the employee at work, either on a temporary or permanent basis.
- The reallocation of non-essential job tasks and any other modifications to the way work is normally performed or has been performed in the past.

The judicial precedent discussed below¹¹⁷ illustrates that the most frequently applied forms of reasonable accommodation for people with mental health conditions are to transfer the employee to an alternative position, to grant additional leave and to limit the employee's job duties.

Writing from a psychiatric perspective, Coetzer *et al* suggest that the duty to provide reasonable accommodation under the EEA requires employers to consider various measures to accommodate employees with mental health conditions. These measures include changes in workplace policy, shaping the attitudes of co-workers, various guiding principles (including open dialogues regarding the mental health condition and a change in workplace culture), human assistance (including training

¹¹⁴ *Standard Bank of SA v CCMA*: 1264[98].

¹¹⁵ Disability Code: item 6.9.

¹¹⁶ Disability Guidelines:13.

¹¹⁷ See par 5.4.6 below.

programmes and the appointment of a job coach) and increased supervision (in order to increase monitoring of the employee and support in the workplace environment).¹¹⁸

Reorganising an employee's workstation to, for example, remove triggers and reminders of workplace stress may be a means to accommodate the employee. Restructuring jobs so that non-essential functions are reassigned, reallocating non-essential job tasks, and any other modifications to the way work is normally performed or has been performed in the past, may accommodate employees by removing excessive stress from their employment duties and allowing them additional time to recover from or manage their mental disability. Likewise, adjusting working conditions and work schedules, including working time and leave, may accommodate mentally disabled employees by allowing them additional time to seek treatment for and manage their mental health conditions. Depression, for instance, adversely affects employee productivity and results in an average of 18 days' sick leave per episode.¹¹⁹ As the symptoms of depression recur and fluctuate in intensity, an employer may have to adjust the person's work schedule and leave time in order to accommodate him or her.¹²⁰ Providing specialised supervision, training and support in the workplace may also be a form of reasonable accommodation and may aid an individual with a mental disability to discharge the inherent requirements of a job. Adjusting the nature and duration of the employee's duties at work, either temporarily or permanently, may also serve to accommodate a mentally disabled person. For employees with depression, for example, the duties of their employment positions may be temporarily adjusted when the effects and symptoms of the depression recur, or their positions may be permanently adjusted to accommodate the employees whenever they have a depressive episode.

¹¹⁸ Coetzer *et al.* 2002:70.

¹¹⁹ Kahn 2015. <http://www.bdlive.co.za/national/health/2015/02/04/depressed-workers-hide-condition-according-to-study>. Accessed on 04/02/2015.

¹²⁰ In terms of sec 22 of the *Basic Conditions of Employment Act* 75/1997, all employees have the right to 36 days' paid sick leave in a three-year cycle. Sick leave, however, is not a right and may only be utilised when employees are ill or incapacitated and unable to perform the duties of their employment. Employees may be dismissed for incapacity even in circumstances where their sick leave has not been depleted, but dismissal should be reserved for situations where employees abuse their sick leave, or where their illness is expected to exceed the relevant statutory or contractual leave period. Also see Van Niekerk *et al.* 2015:298-299; Grogan 2014b:401. Therefore, an average of 18 days' sick leave per episode will be a form of reasonable accommodation by the employer, since the employee is only entitled to 36 days in a three-year cycle.

The matter of *Director-General: Office of the Premier of the Western Cape v SA Medical Association obo Broens*¹²¹ involved an employee who, as a result of suffering from depression and anxiety, had requested a reassignment to another employment position on the recommendation of his psychiatrist.¹²² The employer contended that there were no alternative posts available and commenced proceedings to have the employee medically boarded on account of his depression.¹²³ The employer insisted that the employee consult with a second psychiatrist, who recommended that the employee be transferred to another employment position instead of being medically boarded.¹²⁴ The employer did not follow this recommendation and elected to terminate the employee's contract.¹²⁵

The employee referred an unfair dismissal dispute to the relevant bargaining council, where the arbitrator held that the dismissal had been unfair and ordered the employer to reinstate the employee in an alternative employment position.¹²⁶ This decision was reviewed by the Labour Court, which upheld the arbitrator's award to accommodate the employee's depression and reinstate him to an alternative post.¹²⁷

In *Hendricks v Mercantile and General Reinsurance Co of SA Ltd*¹²⁸ an employee's workplace stress caused him to develop depression and anxiety, which resulted in absenteeism and communication difficulties.¹²⁹ As the employee's psychological problems stemmed from his work circumstances, the employer attempted to accommodate the employee by providing him with a new position in another department, which would be less stressful.¹³⁰ However, the employee refused to accept this position.¹³¹ The employer expressed concern about the employee's

¹²¹ 2011 32 ILJ 1077 LC.

¹²² *Director-General: Office of the Premier of the Western Cape v SA Medical Association obo Broens*: 1080.

¹²³ *Director-General: Office of the Premier of the Western Cape v SA Medical Association obo Broens*: 1080.

¹²⁴ *Director-General: Office of the Premier of the Western Cape v SA Medical Association obo Broens*: 1080.

¹²⁵ *Director-General: Office of the Premier of the Western Cape v SA Medical Association obo Broens*: 1080.

¹²⁶ *Director-General: Office of the Premier of the Western Cape v SA Medical Association obo Broens*: 1078.

¹²⁷ *Director-General: Office of the Premier of the Western Cape v SA Medical Association obo Broens*: 1084.

¹²⁸ 1994 15 ILJ 304 LAC.

¹²⁹ *Hendricks v Mercantile and General Reinsurance Co of SA Ltd*: 306-308.

¹³⁰ *Hendricks v Mercantile and General Reinsurance Co of SA Ltd*: 309.

¹³¹ *Hendricks v Mercantile and General Reinsurance Co of SA Ltd*: 309.

continuous anxious and depressed state, and again offered to transfer him to another department, which the employee again refused.¹³² The employee was thereafter dismissed for incapacity. He challenged his dismissal, claiming that he had been unfairly dismissed.¹³³

The Labour Appeal Court acknowledged that the employee's depression and anxiety had stemmed from his working conditions, which he found stressful and made him unhappy.¹³⁴ The court further held that the employer had acted fairly when it explored options to assist the employee to overcome his health problems, *inter alia* by suggesting a transfer to another position.¹³⁵ With regard to the employee's difficulties in communicating with others, and the resultant strained employment relationships, the court stated that it would be unreasonable to expect the employer to restructure virtually the entire department to accommodate the employee.¹³⁶ The court also held that it was unreasonable for the employee to have refused the employer's efforts to accommodate him by offering alternative employment within the business.¹³⁷ Therefore, the court concluded that the employee had been fairly dismissed on the basis of his incapacity.¹³⁸

The case of *Insurance and Banking Staff Association obo Isaacs v Old Mutual Life Assurance Co*¹³⁹ involved an employee who had been publically insulted by her superior, which traumatised the employee and resulted in her developing severe depression.¹⁴⁰ This, in turn, caused the employee to be hospitalised and treated for anxiety and depression.¹⁴¹ Subsequent to her return to work, the employee was very emotional and distressed upon seeing her superior again.¹⁴² Another one of her superiors attempted to accommodate her by fashioning a new job description and insisting that she go home and return when she felt better.¹⁴³ After she returned to work, the employee was still unhappy with her employment circumstances and

¹³² *Hendricks v Mercantile and General Reinsurance Co of SA Ltd*: 310.

¹³³ *Hendricks v Mercantile and General Reinsurance Co of SA Ltd*: 311.

¹³⁴ *Hendricks v Mercantile and General Reinsurance Co of SA Ltd*: 312.

¹³⁵ *Hendricks v Mercantile and General Reinsurance Co of SA Ltd*: 314.

¹³⁶ *Hendricks v Mercantile and General Reinsurance Co of SA Ltd*: 315.

¹³⁷ *Hendricks v Mercantile and General Reinsurance Co of SA Ltd*: 315.

¹³⁸ *Hendricks v Mercantile and General Reinsurance Co of SA Ltd*: 316.

¹³⁹ 2000 5 LLD 584 CCMA.

¹⁴⁰ *Insurance and Banking Staff Association obo Isaacs v Old Mutual Life Assurance Co*: 585.

¹⁴¹ *Insurance and Banking Staff Association obo Isaacs v Old Mutual Life Assurance Co*: 585.

¹⁴² *Insurance and Banking Staff Association obo Isaacs v Old Mutual Life Assurance Co*: 585.

¹⁴³ *Insurance and Banking Staff Association obo Isaacs v Old Mutual Life Assurance Co*: 585.

requested to be transferred to another department.¹⁴⁴ The employee was advised that her request would be considered, but that it would not be possible for her to avoid altogether seeing the superior who had insulted her.¹⁴⁵ This caused the employee to leave her place of employment and not return, after which she was summarily dismissed for abscondment.¹⁴⁶

The commissioner held that the company's behaviour had been inappropriate.¹⁴⁷ The employer knew that the employee was depressed and had been hospitalised, and should have therefore more extensively considered alternatives to accommodate the employee.¹⁴⁸ It was held that the company was a very large organisation and that alternatives must have been available.¹⁴⁹ The commissioner further held that if the alternatives had not worked out, the correct procedure would have been to dismiss the employee based on incapacity. Consequently, the dismissal was held to have been unfair.¹⁵⁰

In the case of *Wylie and Standard Executors and Trustees*,¹⁵¹ an employee with multiple sclerosis could no longer adequately perform her employment duties on account of her illness. Various measures to accommodate the employee were considered, and it was eventually decided that three measures of accommodation would be considered for a period of three months.¹⁵² These measures were to attempt to accommodate the employee in her current position, to move the employee to another position, and to assist the employee in securing employment elsewhere.¹⁵³ If no appropriate accommodation could be found after the three months, the employee would be dismissed. No position became available, and the employee was ultimately dismissed on the ground of incapacity.¹⁵⁴

¹⁴⁴ *Insurance and Banking Staff Association obo Isaacs v Old Mutual Life Assurance Co*: 585.

¹⁴⁵ *Insurance and Banking Staff Association obo Isaacs v Old Mutual Life Assurance Co*: 585.

¹⁴⁶ *Insurance and Banking Staff Association obo Isaacs v Old Mutual Life Assurance Co*: 585.

¹⁴⁷ *Insurance and Banking Staff Association obo Isaacs v Old Mutual Life Assurance Co*: 585.

¹⁴⁸ *Insurance and Banking Staff Association obo Isaacs v Old Mutual Life Assurance Co*: 585.

¹⁴⁹ *Insurance and Banking Staff Association obo Isaacs v Old Mutual Life Assurance Co*: 585.

¹⁵⁰ *Insurance and Banking Staff Association obo Isaacs v Old Mutual Life Assurance Co*: 585.

¹⁵¹ 2006 27 ILJ 2210 CCMA.

¹⁵² *Wylie and Standard Executors and Trustees*: 2213.

¹⁵³ *Wylie and Standard Executors and Trustees*: 2213.

¹⁵⁴ *Wylie and Standard Executors and Trustees*: 2213.

In deciding whether the employee's dismissal had been fair, the commissioner noted that it was common cause that her illness amounted to a disability.¹⁵⁵ It was held that the employee had not been treated as a disabled person by management, but as a poor performer.¹⁵⁶ As a person with a disability, adequate consideration of reasonably accommodating the employee had therefore not taken place.¹⁵⁷

The commissioner further held that the employer had not attempted to accommodate the employee in line with the requirements set by the Disability Code. Appropriate accommodation would have been to restructure the employee's job so that non-essential functions were reassigned, and to adjust her working and leave time.¹⁵⁸ It was also held that an occupational therapist should have been consulted in the process of determining appropriate reasonable accommodation for the employee.¹⁵⁹

The commissioner concluded that the employee was capable of performing her job, but that she had not been reasonably accommodated, with which accommodation she would have been able to perform the essential functions of the position.¹⁶⁰ The consequence of the unfairness in this case was extremely serious, as an employee with a disability had not been reasonably accommodated.¹⁶¹ The dismissal was held to have been unfair and the employee was awarded maximum compensation.¹⁶²

This case illustrates the significance of accommodating employees with disabilities. Thus, in circumstances where employees with mental health conditions such as depression, which amount to legally recognised disabilities, are not accommodated in the workplace, this may invite negative consequences for the employer, such as the maximum compensation awarded in this matter.

In *Jordaan and Grey Security Services*,¹⁶³ an employee in the security industry was diagnosed with a mental disorder¹⁶⁴ and was hospitalised on multiple occasions as a

¹⁵⁵ *Wylie and Standard Executors and Trustees*: 2218.

¹⁵⁶ *Wylie and Standard Executors and Trustees*: 2221.

¹⁵⁷ *Wylie and Standard Executors and Trustees*: 2221.

¹⁵⁸ *Wylie and Standard Executors and Trustees*: 2221.

¹⁵⁹ *Wylie and Standard Executors and Trustees*: 2221.

¹⁶⁰ *Wylie and Standard Executors and Trustees*: 2221.

¹⁶¹ *Wylie and Standard Executors and Trustees*: 2221.

¹⁶² *Wylie and Standard Executors and Trustees*: 2222.

¹⁶³ 1999 11 BALR 1305 CCMA.

¹⁶⁴ Described and diagnosed as a schizo-affective disorder. See *Jordaan and Grey Security Services*: 1306.

result.¹⁶⁵ The employee alleged that the mental disorder had stemmed from work-related stress. The employer monitored the employee's condition and noted that it caused him to have severe mood swings.¹⁶⁶ Subsequent to various assessments, it was determined that the employee's condition was long-term and would require ongoing treatment.¹⁶⁷ The employer was concerned about the employee's condition as well as the potential risk that he posed to himself, the business and their clients.¹⁶⁸

The employee was dismissed from his employment position after the employer had engaged in various attempts to accommodate the employee, including transferring him to various positions, where he did not cope. Because of the nature of the security industry, the employer concluded that there were no suitable alternative jobs available for the employee with his unpredictable condition.¹⁶⁹ The CCMA commissioner held that due to the nature and extent of the employee's mental health condition, and also taking into account the nature of the industry, the employer was limited in its ability to accommodate the employee.¹⁷⁰ The commissioner was satisfied that the employer had gone to significant lengths to accommodate the employee, since it had considered alternative work and actually transferred the employee to various alternative positions.¹⁷¹ The commissioner consequently held that the employee's dismissal on the basis of incapacity had been fair.¹⁷²

5.4.4 Reasonable accommodation in the dismissal context: The interface between disability and incapacity

Reasonable accommodation intersects with the law of dismissal¹⁷³ in the case of the termination of an employee's employment based on incapacity. Incapacity also overlaps with the law of disability in certain circumstances. These considerations are explored below.

¹⁶⁵ *Jordaan and Grey Security Services*: 1305.

¹⁶⁶ *Jordaan and Grey Security Services*: 1306.

¹⁶⁷ *Jordaan and Grey Security Services*: 1306.

¹⁶⁸ *Jordaan and Grey Security Services*: 1306.

¹⁶⁹ *Jordaan and Grey Security Services*: 1307-1308.

¹⁷⁰ *Jordaan and Grey Security Services*: 1309.

¹⁷¹ *Jordaan and Grey Security Services*: 1309.

¹⁷² *Jordaan and Grey Security Services*: 1309.

¹⁷³ Dismissal occurs when a contract of employment is ended at the employer's behest, usually involving some conduct that denotes the termination of the contract. Dismissal is statutorily defined in sec 186(1) of the LRA and is said to have occurred if the employment relationship is terminated in any of the ways listed in the section. See Grogan 2014a:165; 2014b:15.

In instances of dismissal for incapacity, employees are not at fault, as the incapacity normally arises from circumstances for which the employee is not to blame.¹⁷⁴ Incapacity dismissal may be divided into two categories, namely incapacity relating to poor work performance, and incapacity relating to illness or injury. In the context of people with mental health conditions, the latter category of incapacity dismissals applies. This is particularly so since the labour courts have held that incapacity includes not only physical illnesses and injuries, but mental conditions also.¹⁷⁵ Consequently, employees may be incapacitated to discharge the inherent requirements of their employment positions because of depression.

The general guidelines on dismissal for ill health or injury are embodied in item 10 and 11 of the *Code of Good Practice: Dismissal* (or “the Dismissal Code”).¹⁷⁶ The code provides that the employee’s incapacity must stem from ill health or injury, which implies that any physical or mental incapacity will be relevant.¹⁷⁷

Grogan¹⁷⁸ and Christianson¹⁷⁹ correctly point out that a distinction should be drawn between disability and incapacity in this context,¹⁸⁰ as there is a more onerous duty on employers to accommodate employees with disabilities than those who are incapacitated by their ill health or injury. Incapacity suggests that employees cannot perform the duties of their employment position at an acceptable standard, while disability suggests that employees are indeed capable of performing their expected duties at an acceptable performance level with reasonable accommodation and assistance.¹⁸¹ Although it is possible to be both incapacitated and disabled, the fact that a person is disabled does not necessarily mean that the person is incapacitated

¹⁷⁴ Incapacity refers to the “inherent inability on the part of the employee to do the job for which he or she was hired”. See Grogan 2014b:375; Van Niekerk *et al.* 2015:294.

¹⁷⁵ Van Niekerk *et al.* 2015:294.

¹⁷⁶ Schedule 8 to the LRA.

¹⁷⁷ Grogan 2014b:395.

¹⁷⁸ Grogan 2014b:395. Also see Van Niekerk *et al.* 2015:294.

¹⁷⁹ Christianson 2004:889.

¹⁸⁰ Employees with disabilities are protected by the Constitution and the EEA, but for an individual with a mental health issue to be considered disabled, the condition must meet the requirements of a disability as contained in the Disability Code. Employees with mental health conditions may not meet these requirements in every set of circumstances and will therefore not qualify for the protection afforded to people with disabilities in incapacity dismissal cases.

¹⁸¹ Carvalheira 2011:73. Also see *Wylie and Standard Executors and Trustees*: 2220, where it was decided that incapacity implied that an employee is unable to perform the essential functions of the job, while an employee with a disability may be suitably qualified and capable of discharging the inherent requirements of the job, albeit with some form of reasonable accommodation. Also consult Christianson 2004:889.

to perform the duties of his or her employment.¹⁸² The employee's performance standard is of primary relevance in any case involving incapacity dismissal, which is not necessarily true for all cases involving disability.¹⁸³ If the employer cannot reasonably accommodate the employee without incurring unjustifiable hardship, the employee may be dismissed.¹⁸⁴

It is also significant to note that there is a more onerous burden on employers to accommodate an employee's incapacity where ill health or injury arose in the course and scope of employment.¹⁸⁵ Incapacity arising from circumstances outside the scope of employment is consequently less deserving of consideration.¹⁸⁶

An employer is required to determine the nature and extent of an employee's incapacity and has to prove that the employee is incapacitated.¹⁸⁷ As the employer must determine the employee's prognosis, the employer should engage in a consultation process with the employee.¹⁸⁸ Although employers cannot force employees to undergo medical examinations, an employee may consent to such an evaluation, and the employer must then make its decision based on the available evidence in this regard or, where an employee refuses to undergo a medical evaluation, in the absence of medical evidence.¹⁸⁹ Medical incapacity may also be established by evaluating whether the employee can perform the duties of his or her employment position.¹⁹⁰

Interestingly, the court in *Standard Bank of SA v CCMA* noted that many employers preferred to budget for a disability dismissal rather than to accommodate the employee.¹⁹¹ It was held that these attitudes could perpetuate innate prejudice towards and the stereotyping and stigmatisation of people with disabilities.¹⁹² The Dismissal

¹⁸² Marumoagae 2012:356, referring to Mouton 2008.

¹⁸³ If a disabled employee is suitably qualified and has the necessary skills and competencies to discharge the inherent requirements of the job, this may require the employer to provide reasonable accommodation. See Marumoagae 2012:356, referring to Christianson 2004, in Dupper *et al.* 2004:883.

¹⁸⁴ *Standard Bank of SA v CCMA*: 1256[67].

¹⁸⁵ Dismissal Code: item 10(4). Also see Christianson 2004:890.

¹⁸⁶ Grogan 2014b:396.

¹⁸⁷ Grogan 2014b:397.

¹⁸⁸ Van Niekerk *et al.* 2015:295; Grogan 2014b:398.

¹⁸⁹ Grogan 2014b:399; Van Niekerk *et al.* 2015:295.

¹⁹⁰ Grogan 2014b:399.

¹⁹¹ *Standard Bank of SA v CCMA*: 1254[61].

¹⁹² *Standard Bank of SA v CCMA*: 1254[61].

Code in fact requires employers to consider all alternatives short of dismissal.¹⁹³ These may therefore be seen as measures to accommodate an employee before considering dismissal. Possible alternatives/accommodation include adjusting employees' duties and responsibilities in order for them to perform their job despite their incapacity; providing employees with reasonable equipment and assistance to aid them in the performance of their duties, and finding alternative work for employees that they will be able to perform despite their incapacity.¹⁹⁴

Reasonable accommodation measures for employees with mental disabilities who are to be dismissed for incapacity will be predominantly the same as discussed above.

In *IMATU obo Strydom v Witzenberg Municipality*,¹⁹⁵ an employee with major depression failed in his application to be medically boarded and was consequently dismissed based on incapacity.¹⁹⁶

The Labour Court held that the onus of proving the fairness of a dismissal lay with the employer, and that an element of that onus was the employer's obligation to avoid the dismissal.¹⁹⁷ It was held that accommodating an employee was the primary way of avoiding a dismissal for incapacity.¹⁹⁸ In order to know how best to accommodate the employee, the employer needs to know what the employee is capable of doing, which involves an investigative process.¹⁹⁹ In this case, stressors present in the workplace were responsible for the employee's depression.²⁰⁰ The employee did not tender his services for any position whatsoever and did not request any form of accommodation from the employer.²⁰¹ The court held that the employer had accommodated the employee in the most reasonable way, namely by providing him with paid sick leave for about ten months.²⁰² The dismissal of the employee was therefore held not to have been unfair in the circumstances.²⁰³

¹⁹³ Dismissal Code: item 10(1).

¹⁹⁴ Grogan 2014b:401.

¹⁹⁵ 2012 33 ILJ 1081 LAC.

¹⁹⁶ *IMATU obo Strydom v Witzenberg Municipality*: 2949.

¹⁹⁷ *IMATU obo Strydom v Witzenberg Municipality*: 2950.

¹⁹⁸ *IMATU obo Strydom v Witzenberg Municipality*: 2950.

¹⁹⁹ *IMATU obo Strydom v Witzenberg Municipality*: 2950.

²⁰⁰ *IMATU obo Strydom v Witzenberg Municipality*: 2950-2951.

²⁰¹ *IMATU obo Strydom v Witzenberg Municipality*: 2951.

²⁰² *IMATU obo Strydom v Witzenberg Municipality*: 2951.

²⁰³ *IMATU obo Strydom v Witzenberg Municipality*: 2948.

On appeal, however, the Labour Appeal Court held that the employer's failure to consider all the medical evidence and to provide the employee with reasonable accommodation rendered the dismissal unfair.²⁰⁴ The court also recognised that reasonable accommodation was a constitutional non-discrimination principle and, as such, applied not only to the EEA, but also to the LRA.²⁰⁵ Consequently, the failure to consider reasonable accommodation will affect both the procedural and substantive fairness of a dismissal under the LRA.²⁰⁶

The Labour Appeal Court's approach in *IMATU obo Strydom v Witzenburg Municipality* may be considered to be the most appropriate view, namely that reasonable accommodation is a constitutional non-discrimination principle and is as such applied not only to the EEA, but also to the LRA.²⁰⁷ Consequently, the considerations in relation to reasonable accommodation under the EEA should apply *mutatis mutandis* to the law of dismissal under the LRA.

Although the case of *Standard Bank of SA v CCMA*²⁰⁸ centred on a physical disability and not a mental one, the Labour Court's consideration of the concept of reasonable accommodation in the South African context is equally applicable to people with mental health conditions. In this case, an employee was injured in a motor vehicle accident in the course and scope of her employment, which resulted in fibromyalgia and severe back pain.²⁰⁹ As a result of her disability, the employee was unable to perform the same job as before and was reassigned to a lesser employment position.²¹⁰ The bank eventually dismissed the employee on the ground of incapacity as a result of high absenteeism and low productivity.²¹¹ The court found that the employer had failed in its duty to provide the employee with certain adjustments and accommodation.²¹² According to the court, the employer had a duty to accommodate

²⁰⁴ *IMATU obo Strydom v Witzenburg Municipality* 2012 33 ILJ 1081 LAC: 8.

²⁰⁵ *IMATU obo Strydom v Witzenburg Municipality*: 8. Also see Ngwena 2014:291.

²⁰⁶ Ngwena 2014:291.

²⁰⁷ *IMATU obo Strydom v Witzenburg Municipality*: 8. Also see Ngwena 2014:291.

²⁰⁸ 2008 29 ILJ 1239 LC.

²⁰⁹ *Standard Bank of SA v CCMA*: 1244[2].

²¹⁰ *Standard Bank of SA v CCMA*: 1244[3]-[7].

²¹¹ *Standard Bank of SA v CCMA*: 1245[13].

²¹² Including not having supplied the employee with a headset to operate the telephones comfortably, not having provided her with a suitable chair, failure to make adjustments to her workstation, as well as having refused to grant her a half-day position. See *Standard Bank of SA v CCMA*: 1240.

the employee, which stemmed from its obligation not to discriminate.²¹³ Furthermore, because the bank had failed to accommodate the employee and did not prove that the accommodation would have imposed unjustifiable hardship, it had discriminated against the employee²¹⁴ and dismissed her in bad faith.²¹⁵

In the matter of *Bennett and Modipak*, an employee suffered a nervous breakdown as a result of workplace stress, as well as a second nervous breakdown after his return to work, which led to a diagnosis of anxiety and depression.²¹⁶ In the months that followed, the employee was unable to tender his services effectively due to his depression, which in turn resulted in his dismissal.²¹⁷ In relation to reasonable accommodation, it was held that the employee would have been capable of tendering his services effectively if the employer had been prepared to adapt the work circumstances to accommodate him.²¹⁸ It was further held that the law required an employer to attempt to accommodate an employee as a means of dealing with incapacity.²¹⁹ In this regard, it was held that the employer had a positive duty to fully investigate the circumstances that had given rise to the employee's work stress and explore whether it was capable of adapting these circumstances with the aim of eradicating the stressors.²²⁰ The employer had a duty to identify the stressors, address them, and reasonably create an environment within which the employee could perform.²²¹

In light of this, it was concluded that the employee had been unfairly dismissed,²²² and that the employer had failed in its duty to address the extraneous problems in the work environment and accommodate the employee.²²³ It was held that if the employer had

²¹³ *Standard Bank of SA v CCMA*: 1241.

²¹⁴ *Standard Bank of SA v CCMA*: 1273[140]. The employer's breach of the right to equality and non-discrimination through its failure to provide reasonable accommodation was contrary to section 6(1) of the EEA. See Ngwena 2014:292.

²¹⁵ *Standard Bank of SA v CCMA*: 1273[142].

²¹⁶ *Bennett and Modipak*: 585, 590, 593.

²¹⁷ *Bennett and Modipak*: 585.

²¹⁸ *Bennett and Modipak*: 595.

²¹⁹ *Bennett and Modipak*: 595.

²²⁰ *Bennett and Modipak*: 595.

²²¹ *Bennett and Modipak*: 595.

²²² *Bennett and Modipak*: 596.

²²³ *Bennett and Modipak*: 596.

fulfilled its duty and the employee was still unable to cope, this would have constituted solid ground on which to dismiss the employee based on incapacity.²²⁴

This case thus clearly illustrates that employers are under an obligation to investigate and eliminate the source of an employee's mental health condition, such as identifying stressors in the workplace that give rise to or aggravate these conditions. This positive duty on the employer is therefore in itself a form of reasonable accommodation.

In the case of *Eskom and NUM obo Fillisen* an employee who was suffering from severe depression was dismissed for incapacity, which subsequently led to a claim of unfair dismissal.²²⁵ It was held that in determining whether an employee is capable of performing his or her job, the employer had a duty to ascertain the severity and the nature of the employee's incapacity, as well as the employee's prognosis.²²⁶ The overriding consideration in these cases is reasonableness. Once the degree of the employee's incapacity has been diagnosed, the employer should take reasonable steps to adapt the employment position or offer any available alternative employment.²²⁷ The employee then has a duty to take reasonable steps to treat his illness and attempt to fulfil any alternative or adapted employment duties that the employer is able to provide.²²⁸ Therefore, an employer is obligated to provide the employee with every opportunity to secure his or her employment, while the employee is obligated to overcome his or her incapacity.²²⁹

It was held that the employer had not made sufficient attempts to accommodate the employee, nor had the employee been adequately informed of his rights.²³⁰ The arbitrator held that fairness and justice could only be served if an employer engages in the proper process to ascertain an employee's incapacity, including the consideration of providing the employee with appropriate accommodation(s).²³¹ Consequently, the dismissal was held to have been unfair.²³²

²²⁴ *Bennett and Modipak*: 596.

²²⁵ *Eskom and NUM obo Fillisen*: 1667.

²²⁶ *Eskom and NUM obo Fillisen*: 1668.

²²⁷ *Eskom and NUM obo Fillisen*: 1668.

²²⁸ *Eskom and NUM obo Fillisen*: 1668.

²²⁹ *Eskom and NUM obo Fillisen*: 1668.

²³⁰ *Eskom and NUM obo Fillisen*: 1673.

²³¹ *Eskom and NUM obo Fillisen*: 1673.

²³² *Eskom and NUM obo Fillisen*: 1673.

This case carries the practical consequence that employers are obligated to accommodate employees with diagnosed mental health conditions such as depression, and to allow them an opportunity to secure their employment, before dismissing them on the basis of incapacity.

In the case of *National Education Health & Allied Workers Union obo Lucas and Department of Health (Western Cape)*,²³³ an employee was injured on duty. She also suffered from an array of physical and psychological problems.²³⁴ As a result of her injury, she could no longer perform the job that she had been doing up until that point and was subsequently transferred to another department.²³⁵ This transfer, however, did not constitute a formal transfer, and employment relations were strained between the employee and her co-workers, primarily because of her absenteeism, which resulted in the other employees having to perform her employment duties.²³⁶ Due to the employee's continued poor health, she was dismissed.²³⁷ The arbitrator embarked on a detailed analysis to confirm that the employee was a person with a disability under the EEA, and also concluded that persons with disabilities were protected and the beneficiaries of reasonable accommodation under the LRA.²³⁸ The following was stated in this regard:

[D]isability status is not to be considered only as a sword to claim special treatment under the affirmative action provisions in chapter II of the EEA; it should also be considered as a shield to protect a person who has a disability from being dismissed from employment for a reason related to that disability.²³⁹

In relation to reasonable accommodation, it was held that the employer did not clearly set out its efforts to adapt the duties or work circumstances of the employee.²⁴⁰ It was unclear to the arbitrator whether the employer had made any accommodation for the

²³³ 2004 25 ILJ 2091 BCA.

²³⁴ *National Education Health & Allied Workers Union obo Lucas and Department of Health (Western Cape)*: 2094.

²³⁵ *National Education Health & Allied Workers Union obo Lucas and Department of Health (Western Cape)*: 2094.

²³⁶ *National Education Health & Allied Workers Union obo Lucas and Department of Health (Western Cape)*: 2094-2095.

²³⁷ *National Education Health & Allied Workers Union obo Lucas and Department of Health (Western Cape)*: 2097.

²³⁸ *National Education Health & Allied Workers Union obo Lucas and Department of Health (Western Cape)*: 2098-2101.

²³⁹ *National Education Health & Allied Workers Union obo Lucas and Department of Health (Western Cape)*: 2100.

²⁴⁰ *National Education Health & Allied Workers Union obo Lucas and Department of Health (Western Cape)*: 2101.

employee.²⁴¹ It was held that the parties should have consulted the EEA, the Disability Code and the Disability Guidelines in order to familiarise themselves with the correct steps in applying reasonable accommodation.²⁴² The arbitrator was of the opinion that the parties could have sought professional advice regarding suitable accommodation that would not necessarily have resulted in unjustifiable hardship for the employer.²⁴³ It was concluded that the employer had inadequately considered appropriate reasonable accommodation for the employee,²⁴⁴ and the employee was held to have been unfairly dismissed.²⁴⁵

Smit and Guthrie also confirm that this case illustrates how the general concept of fairness requires an employer to consider whether an employee can reasonably be accommodated (in terms of the Disability Code) instead of being dismissed.²⁴⁶

5.4.5 Reasonable accommodation and the Promotion of Equality and Prevention of Unfair Discrimination Act

Under PEPUDA, failure to accommodate the needs of persons with disabilities will amount to unfair discrimination. In this regard, section 9 states:

[N]o person may unfairly discriminate against any person on the basis of disability, including ... failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.²⁴⁷

It is significant to note the position of reasonable accommodation under PEPUDA, which forms part of the South African legal framework, in light of its strong link with the constitutional right to equality and its dedication to achieving substantive equality in society. Individuals with mental disabilities who are not granted reasonable

²⁴¹ *National Education Health & Allied Workers Union obo Lucas and Department of Health (Western Cape)*: 2101.

²⁴² *National Education Health & Allied Workers Union obo Lucas and Department of Health (Western Cape)*: 2102.

²⁴³ It was held that attempting to secure an employment position for the employee beyond the institution would be unduly burdensome, and that the determination of what could be considered reasonable would depend on the specific employee's circumstances. See *National Education Health & Allied Workers Union obo Lucas and Department of Health (Western Cape)*: 2102-2103.

²⁴⁴ *National Education Health & Allied Workers Union obo Lucas and Department of Health (Western Cape)*: 2105.

²⁴⁵ *National Education Health & Allied Workers Union obo Lucas and Department of Health (Western Cape)*: 2107.

²⁴⁶ Smit and Guthrie 2008:381.

²⁴⁷ PEPUDA: sec 9(c).

accommodation for their disability in circumstances where the EEA does not apply will be able to seek legal redress in terms of PEPUDA.

Equally significant is that, unlike the EEA, PEPUDA explicitly regards the denial of reasonable accommodation on the basis of disability as an act of impermissible discrimination. Thus, people with mental health conditions, including depression (if the condition constitutes a legal disability), will be able to claim the denial of reasonable accommodation as a form of discrimination under PEPUDA.

Although the case of *MEC for Education, Kwazulu-Natal v Pillay*²⁴⁸ dealt primarily with religious accommodation under PEPUDA, it is significant to contemplate the Constitutional Court's considerations in relation to the concept of reasonable accommodation.

The Constitutional Court noted that reasonable accommodation was not a new concept in South African law and held that at its core, this concept required an institution to take positive measures and possibly incur additional hardship in order to allow all people to enjoy their rights equally.²⁴⁹ It was also held that the principle of reasonable accommodation ensured that people are not relegated to the margins of society because they do not or cannot conform to certain social norms.²⁵⁰ The court acknowledged that people with disabilities felt the effects of exclusion and marginalisation most powerfully, but that the same exclusion was inflicted on all groups excluded by rules that fail to accommodate those that depart from the norm.²⁵¹

The Constitutional Court found that as South African society valued dignity, equality and freedom, it required people to act positively to accommodate diversity.²⁵² In considering the limits of reasonable accommodation, the court held that in line with the spirit of the constitutional project, which affirms diversity, more than a *de minimis* effort was required in order to satisfy the duty to accommodate.²⁵³ Consequently,

²⁴⁸ 2008 1 SA 474 CC.

²⁴⁹ *MEC for Education, Kwazulu-Natal v Pillay*: 499[72], 500[73].

²⁵⁰ *MEC for Education, Kwazulu-Natal v Pillay*: 500[73].

²⁵¹ *MEC for Education, Kwazulu-Natal, and Others v Pillay*: 501[75].

²⁵² *MEC for Education, Kwazulu-Natal, and Others v Pillay*: 501[75].

²⁵³ *MEC for Education, Kwazulu-Natal, and Others v Pillay*: 501[76].

reasonable accommodation is an exercise in proportionality, which will depend on the relevant set of circumstances.²⁵⁴

5.4.6 Concluding remarks

In light of the analysis above, it would appear that persons with mental health conditions may be entitled to legal protection if they are denied reasonable accommodation on the basis of their condition, as reasonable accommodation is first and foremost a non-discrimination principle. It also appears that persons whose mental health conditions amount to legally recognised disabilities may be entitled to reasonable accommodation as an affirmative action measure.

In these circumstances, mentally disabled employees need to be suitably qualified, disclose their mental impairment to the employer, embark on an individualised assessment to determine appropriate accommodation measures in the circumstances, and prove that their condition is not a health and safety risk and will not impose unjustifiable hardship on the employer. Employees with mental disabilities will also have to be accommodated before they can be dismissed from their employment position on the basis of incapacity.

5.5 *Lacunae* in the South African legal framework in relation to reasonable accommodation for mental health conditions

While reasonable accommodation as a constitutional non-discrimination principle may be implied in the EEA, the lack of explicit legislative provisions in this regard constitutes a *lacuna* in the South African legal framework. It is clear from the discussion in this chapter that reasonable accommodation is a non-discrimination principle in terms of international law and has been applied as such by the South African judiciary. It also flows from the contentions above that it is an essential component of discrimination law for people with mental health conditions, both as a listed ground (mental disabilities) and as an unlisted analogous ground.

Secondly, while the Disability Code and Disability Guidelines provide general examples of measures of reasonable accommodation that may be applied in the case of a mental health condition, there are no clear guidelines on which specific

²⁵⁴ *MEC for Education, KwaZulu-Natal, and Others v Pillay*: 501[76].

accommodation measures should be considered in these cases, let alone which measures should be considered for the various categories of (prevalent) mental health conditions, including depression. In addition, the South African legal framework does not provide clear guidelines in relation to the disclosure of mental health conditions and mental disabilities, with the result that employees still fear stigmatisation and discrimination as a result of their conditions. The legal framework also lacks guidelines in relation to “return to work” plans as a form of reasonable accommodation for mental health conditions. This lack of legal guidelines and educational instruments applicable to mental health conditions in the workplace constitutes a *lacuna* in the current legal system. Clear guidelines would assist the judiciary when having to deal with a case of reasonable accommodation, and will also assist employers to make informed decisions when considering appropriate accommodation measures for people with mental health conditions. Such educational guidelines will help combat stereotypical and generalised assumptions about mental health conditions and will make it easier for these individuals to disclose their conditions to their employer.

5.6 Conclusion

In summary, when applying reasonable accommodation under the South African legal framework, there seem to be three primary considerations:²⁵⁵

- **Whether the employee or job applicant is suitably qualified:** This entails that the individual must possess the required qualifications, experience, prior learning and/or the ability to become able to perform the particular job (within a reasonable time).
- **Choosing the appropriate reasonable accommodation:** There are several possible methods for an employer to achieve reasonable accommodation, including adapting facilities and equipment, reorganising the work environment, restructuring jobs, adjusting leave and working hours, and providing specialised support, training and supervision in the workplace.
- **Whether the reasonable accommodation will impose a disproportionate burden on the employer:** Any such accommodation should be assessed in light of an employer’s financial resources and the structure of the working environment

²⁵⁵ See Pretorius *et al.* 2001:7-34-7-44; Disability Code: item 6.

in order to determine whether the measures are reasonable and will not impose undue hardship on the employer.

The analysis conducted in this chapter has shown that mental health conditions may be subject to reasonable accommodation as a non-discrimination principle, in terms of which the denial of reasonable accommodation will amount to unfair discrimination (both if the mental health condition amounts to a mental disability as a listed ground or as an unlisted analogous ground). It also appears that if an individual's mental health condition meets the criteria of a mental disability, and the individual is suitably qualified, such a person may be the beneficiary of reasonable accommodation as an affirmative action measure.

However, certain *lacunae* still remain under the South African legal framework in relation to mental health conditions and reasonable accommodation. The absence of adequate legal guidelines to interpret mental health in relation to reasonable accommodation, and the fact that reasonable accommodation is not officially and explicitly recognised by the EEA as a non-discrimination principle, constitute two disquieting examples. These *lacunae* are not in accordance with international law and do not uphold a substantive approach to equality in South Africa for people with mental health conditions.

CONCLUSION TO THE SOUTH AFRICAN LEGAL FRAMEWORK GOVERNING MENTAL HEALTH CONDITIONS IN EMPLOYMENT

The study conducted in part 2 has revealed several significant insights in relation to mental health conditions, and particularly depression, under the South African legal framework.

Chapter 3 has shown that disability based on mental health is a significant concern in the South African employment realm. It also appears that depression may amount to a disability under the South African legal framework if a diagnosis is made and the symptoms are severe enough to substantially limit entry into or advancement in employment. The depression would also have to be long-term, such as in the case of persistent depressive disorder, or recur with substantially limiting symptoms. Certain *lacunae* in relation to mental disabilities under the South African legal framework have also been identified.

Chapter 4 has indicated that the rights to dignity and equality are inextricably linked with mental health status, and that a substantive approach to equality is necessary to redress past patterns of disadvantage suffered by people with mental health conditions. The study in this chapter has also revealed that mental health may constitute a listed ground of unfair discrimination (where it amounts to a legal disability) as well as an unlisted analogous and an arbitrary ground of unfair discrimination under the South African legal framework. Again, however, there still are *lacunae* in relation to discrimination based on mental health under the current legal framework.

Chapter 5 has shown that denying reasonable accommodation to people with mental health conditions may amount to unfair discrimination where reasonable accommodation is considered as a non-discrimination principle. As persons with a mental disability, individuals with depression may be the beneficiaries of reasonable accommodation as a form of affirmative action. But, as in the previous two chapters, the research has also pointed to certain *lacunae* under the South African legal framework in relation to reasonable accommodation for mental health conditions.

Part 4 will reflect on mental health conditions under the legal frameworks of the comparative jurisdictions, namely the USA and the UK. Unlike part 3, where the

various employment law areas of disability, discrimination and reasonable accommodation were evaluated in separate chapters, these areas will be considered together under the banner of the USA and UK legal frameworks respectively.

PART 3

COMPARATIVE MENTAL HEALTH JURISPRUDENCE: CONSIDERATIONS UNDER THE LEGAL FRAMEWORKS OF THE UNITED STATES OF AMERICA AND THE UNITED KINGDOM

“Behind every exquisite thing that existed, there was something tragic.”
— Oscar Wilde

PROLOGUE TO THE COMPARATIVE JURISDICTIONS AND MENTAL HEALTH CONDITIONS

This third part of the thesis will consider the status of mental health conditions, particularly depression, under the legal frameworks of the comparative jurisdictions, namely the USA and UK. The primary and fundamental value of utilising comparative law in the analysis of mental health jurisprudence is that principles of international law and the legal systems of foreign jurisdictions may provide insights and lessons for remedying the ambiguities and *lacunae* in the South African legal framework.

The acceptance of, and penchant for, the use of comparative law to solve South African legal problems is supported by the South African Constitution, which provides in section 39(1) that international law must be considered when interpreting the Bill of Rights, and that foreign law may be considered. It is further stated in section 233 that “when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”.

Importantly, although the comparative jurisdictions doctrinally differ from South African law in many respects, there are also definite similarities, as the rights to equality, equal opportunity and dignity are fundamental and universal human rights that are respected in all of them.¹ For this reason, these jurisdictions are considered significant sources to draw on in order to make suggestions for the development and clarification of the South African legal position.²

The various chapters in part 3 will analyse mental health conditions, with specific reference to depression, in relation to the USA and UK legal frameworks governing the employment law areas of disability, discrimination and reasonable accommodation. The analysis will focus on areas of the foreign legal frameworks that may provide lessons for the South African legal framework in order to recommend potential solutions for the identified *lacunae* under the latter framework.

¹ See for example the description of human dignity under the US legal framework in 6.2.1 below.

² See also the structure of the research methodology reflected in 1.4 in Chapter 1 above.

Finkin provides the following justification for the use of comparative law to remedy legal issues, such as the protection of people with mental health conditions, particularly in employment:

Labour law is a reflective discipline: it responds to the changing demands of a socially dynamic aspect of modern capitalism. New problems, economic or social, may crop up earlier in one system than in another. The constant process of even descriptive comparison may, like the proverbial canary in the miner's cage, function as an early warning system as old problems are settled, more or less, and new ones appear.³

Thus, the reflective nature of comparative labour law may be considered as a useful tool in providing lessons for the South African legal framework, as the comparative jurisdictions, it is suggested, have more developed legal frameworks to deal with the protection of people with mental health conditions.

Human dignity is not only intricately linked with mental health status, but is also a principle of morality and law in international law and the comparative jurisdictions utilised in this study.⁴ Inherently, human rights are said to derive from every person's inherent human dignity, and the fact that people, in terms of their dignity, have a right to be protected from degrading treatment such as discrimination and other outrages against their personal dignity.⁵ Dignity, as a universal human right, is also described as a status that comprises a given set of rights and, as such, informs the rights to equality, freedom and security.⁶ Consequently, the human dignity of people with mental health conditions informs their right to equality also.

Donnelly describes the universal right to work as having considerable intrinsic value as an element of the right to dignity.⁷ This equally applies in the context of persons with mental health conditions, who in terms of their inherent human dignity, should in every jurisdiction have the right to work and be protected from outrages against their dignity and from degrading treatment such as discrimination, harassment, workplace bullying and exclusion from protected status and legal protection.

³ Finkin 2006, in Reimann and Zimmerman (eds) 2006:1141.

⁴ Waldron *et al.* 2015:13.

⁵ Waldron *et al.* 2015:17; Cruft *et al.* 2015:126. Human rights, including the human rights of persons with mental health conditions, orbit the human dignity of each individual, as human rights aim to ensure a life of dignity for all persons. People with mental health conditions are also entitled to such a life of dignity. See Donnelly 2013:132.

⁶ Cruft *et al.* 2015:132-135.

⁷ Donnelly 2013:65.

On a global scale, dignity and equality are described as being “interdependent” concepts that exist in a state of symbiosis.⁸ Equality itself emphasises a commitment to the equal worth and dignity of every person, irrespective of their social utility.⁹ As a universal right, every human being’s right to equality entails the equal concern and respect of these persons.¹⁰ Equal concern and respect requires that governments and legislatures intervene to reduce certain social and economic inequalities.¹¹ In the context of people with mental health conditions, this intervention entails the enactment of legislation and legislative instruments that work towards the eradication of unjust discrimination against people with mental health conditions, the provision of protected status to persons with mental disabilities, and the requirement that reasonable accommodation be made to cater for mental health conditions in the workplace.

Thus, the comparative part of this study will be conducted against the backdrop of the inherent human dignity and right to equality of people with mental health conditions.

Chapter 6, the first chapter following this prologue, will reflect on the legal position in relation to mental disability, discrimination based on mental health as well as reasonable accommodation for mental health conditions under the USA legal framework, while chapter 7 will do the same with regard to the UK legal framework. An overall conclusion of part 3 will follow after chapter 7.

⁸ Waldron *et al.* 2015:55.

⁹ Donnelly 2013:63.

¹⁰ Donnelly 2013:62.

¹¹ Donnelly 2013:64.

CHAPTER 6

MENTAL DISABILITY, DISCRIMINATION BASED ON MENTAL HEALTH AS WELL AS REASONABLE ACCOMMODATION UNDER THE LEGAL FRAMEWORK OF THE UNITED STATES OF AMERICA

6.1 Introduction

This chapter aims to analyse mental health conditions, especially depression, as a possible mental disability, a ground of discrimination and a cause for reasonable accommodation under the USA legal framework.

Subsequent to an analysis of the USA legal system governing mental health conditions, the study will consider mental disabilities, including the nature and scope of the disability concept and relevant judicial precedent. Mental health will then be explored as a ground of discrimination in the USA, and the analysis will include the concept of discrimination and the various forms of discrimination in relation to mental health in this jurisdiction. The section will also include an evaluation of harassment and workplace bullying in relation to mental health conditions. The final segment of this chapter will consider the duty to make reasonable accommodation for mental health conditions in the USA and will include the concept of reasonable accommodation and its legal scope and impact in relation to mental health conditions.

It is hoped that the analysis conducted in this chapter will provide insight into how mental health conditions link up with the concept of disability, discrimination and reasonable accommodation under USA law. It will also consider whether depression may in fact constitute a disability and a valid ground for the provision of reasonable accommodation under the USA legal framework, as well as in which circumstances this may be the case, which may provide lessons for the South African legal framework in addressing these issues.

According to the US National Institute for Mental Health, approximately 26,2% of Americans aged 18 and older suffer from a diagnosable mental disorder in any given year.¹ The cost associated with mental illness in the USA is significant, with lost

¹ Vroman 2010:1.

productivity in the labour market costing the USA economy in excess of \$150 billion per annum.² Reportedly one in every ten Americans suffer from depression, although the prevalence is higher in some states than in others, with the number of patients diagnosed with depression increasing by 20% every year.³ Research also indicates that 80% of all individuals in the USA who suffer from symptoms of depression do not receive treatment for this condition.⁴ A significant observation is that depression has been ranked as the leading cause of disability in the USA by the US Centre for Disease Control.⁵ Depression is responsible for more than two-thirds of the 30 000 suicides that occur in the United States every year.⁶ Research indicates that for every two murders, there are three suicides in this jurisdiction.⁷

Fear of workplace violence and employer liability, together with stereotypical attitudes towards mental health conditions, influences American employer and court decisions pertaining to psychiatric disabilities.⁸ Employers of various sizes have indicated that depression often accounts for their highest mental health and disability costs.⁹ The direct link between mental health and productivity in American workplaces is becoming increasingly evident.¹⁰ Lost productivity as a result of workplace depression is estimated to cost between \$36,6 and \$51,5 billion annually.¹¹ Depression is estimated to result in 200 million lost workdays each year at a cost of between \$17 billion and \$44 billion to employers.¹² Furthermore, in a three-month period, employees with

² Janda 2009:404.

³ Healthline 2015. <http://www.healthline.com/health/depression/statistics-infographic>. Accessed on 28/09/2015. Studies indicate that rates of depression among Americans have risen significantly in the past 50 years. Research published in the *American Journal of Psychiatry* found that major depression rates for American adults increased from 3,33% to 7,06% from 1991 to 2002. See Everyday Health 2015. <http://www.everydayhealth.com/hs/major-depression/depression-statistics/>. Accessed on 28/09/2015.

⁴ Healthline 2015. <http://www.healthline.com/health/depression/statistics-infographic>. Accessed on 28/09/2015.

⁵ Everyday Health 2015. <http://www.everydayhealth.com/hs/major-depression/depression-statistics/>. Accessed on 28/09/2015.

⁶ Everyday Health 2015. <http://www.everydayhealth.com/hs/major-depression/depression-statistics/>. Accessed on 28/09/2015.

⁷ Everyday Health 2015. <http://www.everydayhealth.com/hs/major-depression/depression-statistics/>. Accessed on 28/09/2015.

⁸ Danforth 1999:678.

⁹ Carvalheira 2011:79.

¹⁰ Carvalheira 2011:79.

¹¹ Lerner *et al.* 2011, in Schultz and Rogers (eds) 2011:103.

¹² Centres for Disease Control and Prevention 2015. <http://www.cdc.gov/workplacehealthpromotion/implementation/topics/depression.html>. Accessed on 28/09/2015.

depression miss an average of 4,8 workdays and suffer 11,5 days of reduced productivity.¹³

Nations across the industrialised world have increasingly been relying on the *Americans with Disabilities Act* (ADA)¹⁴ as a model for disability employment laws.¹⁵ European legal commentators have described the ADA as having had “such an enormous impact on foreign legal development that one is tempted to say that the international impact of this law is larger than its domestic effect”.¹⁶

6.2 The United States legal framework governing mental health conditions

6.2.1 The structure of the United States legal system

As no two countries organise their systems of law and government in the same manner, there are unsurprisingly some unique differences between the legal systems of the USA and South Africa.¹⁷ A brief description of the structure of the USA legal system is therefore provided below.

The pinnacle of the USA legal system is the Constitution, together with the treaties and laws of the USA adopted for ratification and enactment, which together constitute the supreme law of the country.¹⁸ The USA Constitution stands as a collection of various higher law principles originally enshrined in the *American Declaration of Independence*, flowing from the principle that “[a]ll men are created equal ... with certain unalienable rights”.¹⁹ Since then, equality has been considered a fundamental principle of constitutionalism.²⁰ The notions of equal protection under the law and of non-discrimination are very closely related concepts.²¹

Dignity as a distinct concept entered American political and social policy discourse with the establishment of the UN, and more specifically with the advent of the UDHR.²²

¹³ Centres for Disease Control and Prevention 2015. http://www.cdc.gov/workplacehealth_promotion/implementation/topics/depression.html. Accessed on 28/09/2015.

¹⁴ Of 1990, as amended by the *Americans with Disabilities Amendment Act* of 2008.

¹⁵ Bagenstos 2003:655-656.

¹⁶ Bagenstos 2003:656, referring to Degener and Quinn 2002:3, 20.

¹⁷ Bonfield 2006:30.

¹⁸ Bonfield 2006:21.

¹⁹ Dorn 2014:494; Ackermann 2013:33; Tushnet *et al.* 2015:287.

²⁰ Tushnet *et al.* 2015:287.

²¹ Tushnet *et al.* 2015:288.

²² Yamada 2009:544.

In addition, various social movements in the USA challenging discrimination against people belonging to various groups, including people of colour, women, homosexual individuals and disabled persons, have illustrated how entire groups of individuals can be denied dignity based on an inherent characteristic, including mental disability.²³

Modern American employment law incorporates both the traditional and new conceptualisations of dignity. These vary from limited common law protections against wrongful discharge to a variety of statutory provisions covering wages, discrimination, retaliation, unemployment compensation and other concerns that the law of the workplace recognises, providing some tangible, affirmative benefits.²⁴

The USA Congress is regarded as the American legislature and, as such, may promulgate federal law.²⁵ The legal system of the USA is made up of both federal and state law. Federal law is regarded as supreme and may be limited only by the Constitution.²⁶ Federal law allows states to make laws that give effect to federal statutes.²⁷ States are also entitled to make their own laws where there is no applicable federal law, and the subject matter of such laws is not governed and predetermined by federal law.²⁸ Therefore, while state laws are not permitted to be in conflict with federal law, they may operate in the same areas and may accord other or even more extensive rights to their citizens than what federal law or the Constitution does.²⁹

The American judiciary has been described as the “guardian of the Constitution” and is separated into federal and state courts.³⁰ The USA Supreme Court is at the apex of the federal judiciary. It hears issues regarding constitutional matters and decides on cases where the circuit courts of appeal are split on a federal law issue.³¹

USA employment law is flexible in its approach to the regulation of the employment relationship, and in the absence of express contractual provisions, the employment

²³ Yamada 2009:546.

²⁴ Yamada 2009:555.

²⁵ Smit 2014:97; Bonfield 2006:31.

²⁶ Smit 2014:96.

²⁷ Bonfield 2006:21.

²⁸ Smit 2014:97.

²⁹ Bonfield 2006:39.

³⁰ The federal judiciary flows from article 3 of the Constitution and is subdivided into district courts, courts of appeal and the supreme Court. See Bonfield 2006:51, 53.

³¹ Bonfield 2006:55.

relationship is considered to follow the “at will” doctrine.³² This area of the American legal system has been described as a complex combination of federal, state and common law constructs.³³

6.2.2 Mental health and the *Civil Rights Act of 1964*

The United States *Civil Rights Act* has been described as the foremost “flagship” of employment discrimination law after the country’s constitution³⁴ and constitutes a federal law, which means that all states should adopt policies for the enactment of legislation to this effect. In addition, the act covers almost every aspect of the relationship between an employer and employee.³⁵

Title VII of the act has as its general purpose the elimination of discrimination in employment.³⁶ It outlaws discrimination on the grounds of race, colour, religion, national origin and sex.³⁷ Title VII also contains an anti-retaliation provision in order to protect employees who seek relief against unfair employment practices (via the Equal Employment Opportunity Commission).³⁸ Included in the scope of Title VII is the prohibition of discrimination in the hiring, terms and conditions of employment, dismissal or remuneration of an employee based on the prohibited grounds.³⁹

Although disability and mental health are not specific prohibited grounds listed in Title VII, it is important to take cognisance of this statute, because as the primary body of legislation governing employment discrimination, disability-specific legislation in the USA was modelled on this act.⁴⁰

³² “Employment at will” refers to the system whereby the employment relationship is for an indefinite period and may be terminated by either party at any time. This renders both the employee and employer free to consider other options if the current employment relationship does not suit either party’s requirements: The employee may seek a more satisfactory employment position, and the employer may look for a better worker. See Bonfield 2006:215, 216. Furthermore, in terms of status and bargaining power in the workplace, “at will” employees may generally only make requests and suggestions to employers. Generally, only workers with special skills or vocations that are in high demand (such as athletes and artists) will be in a better negotiating position with employers. See Yamada 2009:538.

³³ Bonfield 2006:217.

³⁴ Haggard 2001:3.

³⁵ Haggard 2001:3.

³⁶ Cavico *et al.* 2012:794.

³⁷ *Civil Rights Act of 1964*: Title VII: sec 2000e-2(a); Haggard 2001:4, 51.

³⁸ *Civil Rights Act of 1964*: Title VII: sec 2000e-2. See also Colalella 2013:231; Player 1999:24; Twomey 1998:3; Haggard 2001:4.

³⁹ *Civil Rights Act of 1964*: Title VII: sec 2000e-2; Twomey 1998:2.

⁴⁰ Barry 2010:221.

6.2.3 Rehabilitation Act of 1973

Preceding the enactment of the ADA, the *Rehabilitation Act* was the principal source of federal protection for persons with disabilities in the USA.⁴¹ The *Rehabilitation Act* was enacted in 1973, and section 504 of the act outlawed discrimination against people with disabilities who were the recipients of federal funds.⁴² Section 504 was modelled on civil rights laws such as Title VII of the *Civil Rights Act*.⁴³

The *Rehabilitation Act* made provision for the protection of persons with mental disabilities and read as follows:

The term “handicapped individual” means any individual who (A) has a physical or **mental** disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to titles I and III of this Act.⁴⁴

This definition in effect placed persons with mental impairments on an equal footing with those who have physical impairments, despite the fact that different stereotypes and stigmas attached to each of these categories.⁴⁵ The definition of disability under the ADA (discussed below) was borrowed from and modelled after this three-pronged definition of “handicapped individual” under the *Rehabilitation Act*.⁴⁶ It should be noted, however, that the *Rehabilitation Act* was passed not so much to regulate disability discrimination, but instead to provide access to rehabilitation programmes for disabled individuals.⁴⁷

6.2.4 Americans with Disabilities Act of 1990 (as amended)

The major driving force behind the implementation of the ADA was to increase the social and economic integration of people with disabilities into mainstream society and workplaces by providing civil rights protections tailored to eradicate discrimination based on disability.⁴⁸ The purpose of the ADA has been described as being nothing

⁴¹ Bales 1993:209.

⁴² Concannon 2012:90; Bales 1993:209.

⁴³ Concannon 2012:90.

⁴⁴ *Rehabilitation Act* of 1973: sec 7(6), own emphasis added.

⁴⁵ Concannon 2012:91.

⁴⁶ Befort 2010:996.

⁴⁷ Ngwena 2010:431.

⁴⁸ Kruse and Schur 2003:31.

less than a national mandate to end discrimination against people with disabilities, and to bring those persons into the economic and social mainstream of American life.⁴⁹

Subsequent to many years of exertion by disability rights advocates, the ADA, which has been described as a “civil rights bill”,⁵⁰ was signed into law in 1990 in line with the ILO’s recommendations.⁵¹ For the first time in the United States, the ADA brought into reality “the exclusion, segregation, and mistreatment of individuals with disabilities (including mental disability) as discrimination, rather than as an ineluctable consequence of the impairments the disabilities themselves had on those who possessed them”.⁵²

Part of the rationale behind the enactment of a separate body of legislation for people with disabilities was that discrimination based on this ground differs from discrimination based on other factors, such as race and gender. Race and gender generally do not construct rational differences between people regarding their ability to perform in various circumstances. There is therefore very little if any reason to treat these individuals differently.⁵³ On the other hand, individuals with disabilities may be restricted in their ability to perform certain functions and may as such be permissibly discriminated against in certain circumstances.⁵⁴

The ADA, with its central focus on the concept of reasonable accommodation, comprised a “second-generation anti-discrimination law”, which went beyond individualised equal-treatment legislation.⁵⁵

Significantly, during the extensive debates regarding the nature and scope of the ADA, mental illness was the only category that was the subject of attack on the floor of the United States Congress. The concerns voiced in relation to the inclusion of mental health conditions as disabilities were deeply rooted in common stereotypes and misconceptions, including the belief that people with mental health conditions are

⁴⁹ ADA: sec 12101(b); See also Perlin 1994:15.

⁵⁰ Mika and Wimbiscus 1997:173.

⁵¹ Bagenstos 2003:650; Concannon 2012:90; Carvalheira 2011:79, referring to *MacCoy v Pennsylvania Power and Light Co.* 933 F.Supp 438 M.D. Pa. 1996: 440.

⁵² Concannon 2012:90.

⁵³ Tucker and Milani 2004:2.

⁵⁴ Tucker and Milani 2004:2.

⁵⁵ Fletcher and O’Brien 2008:521.

inherently violent and that they lack the ability to make rational judgments.⁵⁶ However, despite the stigmatisation of mental health conditions by some members of Congress, the “mental impairment” concept from the *Rehabilitation Act* was retained and included in the ADA’s definition of a disability.⁵⁷

In addition to extending the protection of civil rights for persons with mental disabilities in employment, the ADA also lowered the discriminatory barriers to these persons’ entry into the employment sphere⁵⁸ and promoted their integration with the workplace.⁵⁹ However, in the past (and particularly under the pre-amended ADA), the USA judiciary has failed to protect persons with mental disabilities and has perpetuated stigma and stereotypes surrounding mental illness.⁶⁰

The protections contained in the ADA are similar to those contained in the *Civil Rights Act*⁶¹ and the *Rehabilitation Act*.⁶² The ADA adopts the coverage, enforcement and remedies of Title VII.⁶³ However, distinct from Title VII of the *Civil Rights Act*, the ADA does not merely require equal treatment of similarly situated individuals, but establishes a more nuanced brand of equality in employment.⁶⁴ Collins and Phillips indicate that this nuanced brand of equality stems from the fact that the ADA requires “both less and more”. It requires “more” in the sense that disabled employees are to be treated no worse than persons who are not disabled, and also requires that, in certain circumstances, disabled individuals be treated more favourably (afforded reasonable accommodation) in order to place them in an equal position with non-disabled persons.⁶⁵ It requires “less” in the sense that if the disabled individual cannot discharge the inherent requirements of the employment position, with or without reasonable assistance, the employer is not obligated to employ the individual.⁶⁶

⁵⁶ Concannon 2012:91, 92.

⁵⁷ Concannon 2012:92.

⁵⁸ Jackson 2010:223.

⁵⁹ Mika and Wimbiscus 1997:173.

⁶⁰ Jackson 2010:225.

⁶¹ Kruse and Schur 2003:33.

⁶² ADA.gov 2016. https://www.ada.gov/ada_intro.htm. Accessed on 05/06/2016; Player 1999:27.

⁶³ ADA.gov 2016. https://www.ada.gov/ada_intro.htm. Accessed on 05/06/2016; Player 1999:27.

⁶⁴ Collins and Phillips 2011:471. The ADA, unlike Title VII, extends protections only to persons who can establish the existence of a disability within the meaning of the act. See Kruse and Schur 2003:31-32.

⁶⁵ Kruse and Schur 2003:31; Collins and Phillips 2011:471.

⁶⁶ Collins and Phillips 2011:471.

In 1999 and 2002, the USA Supreme Court decided two cases that entrenched the restrictive interpretation of the ADA, and particularly the interpretation of “disability” under the act.⁶⁷ This restrictive interpretation resulted in the reality that most plaintiffs were unsuccessful in their claims, and eventually led to the amendment of the ADA in 2008.⁶⁸ The large umbrella of the newly amended ADA’s protected class includes persons with mental health conditions, especially depression and schizophrenia.⁶⁹

Due to the significant amendments brought about by the ADA Amendment Act in 2008, and the plight of persons with mental health conditions under the 1990 act, a minor distinction will be drawn between these bodies of legislation in order to illustrate the evolution of the law in extending more adequate protection to persons with mental health conditions.

6.2.5 The common law

It is theoretically and practically sound to allege common law actions for disability discrimination under the USA legal framework.⁷⁰ However, unlike misconduct based on race or sex, failure to employ or accommodate a person with a disability does not suggest tortious misconduct or a violation of contractual rights in itself.⁷¹

Common law claims that could provide a remedy for people who suffer discrimination on the basis of their mental disability include contract actions such as breach of promise to accommodate, and discharge in violation of the implied covenant of good faith and fair dealings. Tort actions include negligence, wrongful discharge in violation of public policy, tortious interference with contract, invasion of privacy and defamation, assault and battery, and intentional infliction of emotional distress.⁷² Even

⁶⁷ See *Sutton v United Airlines Inc.* 527 U.S. 471 1999; *Toyota Motor Mfg., Ky., Inc. v Williams* 534 U.S. 184 2002. Also see Concannon 2012:98; Vroman 2013:153. As a result of the restrictive interpretation of “disability” established by these judicial precedents, the primary object of the ADA Amendment Act is to ensure that in cases brought under the act, the determination should be whether parties covered under the ADA have complied with their obligations, and not to engage in an extensive analysis of whether the claimant is disabled in terms of the disability definition. See Vroman 2013:154; Collins and Phillips 2011:472.

⁶⁸ Collins and Phillips 2011:472; Concannon 2012:98-99. The ADA Amendment Act took effect on 1 Jan 2009 and does not have retroactive effect. See Vroman 2013:151, 153.

⁶⁹ Cox 2010:430-431.

⁷⁰ Weber 2012:430.

⁷¹ Weber 2012:430, 432.

⁷² See Weber 2012:430, 432.

blatant harassment based on an individual's disability has proven to be a "chancy" basis for common law relief.⁷³

Thus, while common law remedies for misconduct based on an individual's mental disability are possible, it would appear that this should not form a primary avenue of relief, particularly in light of the ADA and its specific application to disability discrimination and reasonable accommodation in employment.

6.3 Mental disability under the United States legal framework

6.3.1 Introductory remarks

This section will explore mental disabilities under the USA legal framework. This will include an analysis of the disability concept as well as a detailed exposition of the various legislative instruments governing mental disabilities such as depression in this jurisdiction.

6.3.2 The concept of disability

As is the case in other parts of the world, persons with disabilities in America are uniquely underprivileged and disadvantaged, being poorer, less educated, having less of a social life, fewer amenities and a lower level of self-satisfaction than other Americans.⁷⁴ Also similar to other parts of the world, employees⁷⁵ with disabilities in the USA are more likely to lose their jobs and less likely to secure new jobs, especially during a recession.⁷⁶ Mental health conditions in particular constitute the least protected and most misunderstood of all the disorders, diseases and disabilities covered by the USA legal framework.⁷⁷

American disability employment law experienced several significant changes during the 20th century. At the beginning of the century, USA disability law was essentially a scheme of social welfare that sought to provide for veterans injured during the Civil

⁷³ Weber 2012:430.

⁷⁴ Bales 1993:210. The population ratio of people with disabilities employed in the USA is less than half that of the non-disabled population. See US Department of Labor 2013. http://www.bls.gov/news.release/archives/disabl_06112014.htm. Accessed 04/06/2016.

⁷⁵ In terms of the ADA, an "employee" is an individual who is employed by an employer. This includes USA citizens who are employed in foreign countries. See Tucker and Milani 2004:79.

⁷⁶ Kruse and Schur 2003:32-33.

⁷⁷ Scheid 2005:671.

War and World War I.⁷⁸ In the years after World War I, the law started to incorporate the notion of rehabilitation into disability law, first for injured veterans and later for people with disabilities in general.⁷⁹ USA disability evolved to treat people with disabilities as full and equal citizens, who are entitled to participate in all areas of life, including, most crucially, the right to work.⁸⁰ Modern disability law in the USA is primarily a statutory field (governed predominantly by the ADA), and the primary relevance of constitutional law is to provide the foundation for congressional legislation.⁸¹

The American judiciary has recognised that federal disability statutes are intended to dispel myths about people with disabilities.⁸² However, despite this stated goal, people with mental health conditions continue to face a very real “justice disparity” compared to other disabled individuals.⁸³

There is no universally accepted definition of disability, but virtually all definitions imply some limitation on ability.⁸⁴ As is the case under the South African legal framework, the medical and social models of disability in America have predominantly moulded and informed USA disability jurisprudence.⁸⁵ The nature and scope of these models are generally the same as under the South African legal framework, with a standard approach of sorting social function (social model) from biological status (medical model) in order to determine real disadvantage.⁸⁶

The American legal framework acknowledges that inequality in relation to disability is partly a social conundrum, as well as that inequality stems from real biological disadvantages that can only be eradicated by means of affirmative accommodation of difference.⁸⁷

In considering USA disability law in relation to the medical and social models of disability, the American legal framework continues to define disability in terms of a

⁷⁸ Perju 2011:292; Bagenstos 2003:649.

⁷⁹ Bagenstos 2003:649.

⁸⁰ Bagenstos 2003:650.

⁸¹ Waterstone 2014:529.

⁸² See for example *School Board of Nassau County v Arline* 480 U.S. 273 1987: 284-285.

⁸³ Hsieh 2014:993.

⁸⁴ Barry 2010:210.

⁸⁵ Barry 2010:210.

⁸⁶ McCluskey 2010:109.

⁸⁷ McCluskey 2010:109-110.

predominantly medical model,⁸⁸ although the *Rehabilitation Act* and the ADA demonstrate an incomplete move towards the social model.⁸⁹ The EEOC guidelines emphasise a focus on the nature, duration and severity of impairment. This emphasis on the nature of the medical impairment and not the social effect thereof goes against the tenets of the social model.⁹⁰ However, the disability definition in the ADA extends protection to individuals who do not have substantially limiting impairments, but who once had or are perceived as having them.⁹¹ This provision incorporates major insights from, and a move towards, the social model of disability. In this regard, Bagenstos indicates that this approach towards the social model reflects a “recognition that society’s accumulated myths and fears about disability and disease are as handicapped as the limitations that flow from the actual impairment”.⁹²

While the original ADA may have placed more emphasis on the medical model of disability, the ADA Amendment Act and its move towards a more expansive definition and interpretation of “disability” is, generally speaking, more consistent with the social model of disability.⁹³ The notion that disability inheres in the interaction between impairment and the surrounding social world, instead of being an individual medical problem, illustrates support for the social model.⁹⁴

In resisting a medical impairment model of disability, the ADA Amendment Act suggests some opportunities for moving past the biological/social divide towards a more significant substantive vision of disability and equality.⁹⁵

6.3.3 Mental disability and the *Americans with Disabilities Act*

The ADA is regarded as the best-known legislation in the chronicles of disability law, primarily because of its pioneering attempt to place the legal definition of disability in

⁸⁸ Perju 2011:337-338.

⁸⁹ Bagenstos 2003:657.

⁹⁰ Perju 2011:337-338.

⁹¹ ADA: sec 12111(2).

⁹² Bagenstos 2003:658.

⁹³ Emens 2012a:214.

⁹⁴ Emens 2012a:214.

⁹⁵ McCluskey 2010:144.

a social context.⁹⁶ It has also been described as “the first comprehensive declaration of equality” for persons with disabilities.⁹⁷

The ADA consists of five titles.⁹⁸ Title I will form the focus of consideration for purposes of this study.

It is significant to keep in mind that the Equal Employment Opportunity Commission (EEOC) is charged with interpreting and enforcing the ADA.⁹⁹ To this end, the EEOC has published detailed regulations interpreting Title I of the ADA. These include *Regulations to Implement the Equal Employment Provisions of the ADA*¹⁰⁰ and *EEOC Enforcement Guidance: The ADA and Psychiatric Disabilities*.¹⁰¹ Given the significance of these sources, they will be referred to throughout the discussion and evaluation of the ADA. It should be noted that these sources are much like the South African codes of good practice in the sense that they are not legally binding, but do have significant persuasive force (especially since they flow from the EEOC, which is charged with enforcing the ADA).¹⁰²

Disability is defined as follows in the ADA:

The term “disability” means, with respect to an individual (A) a physical or **mental impairment** that **substantially limits** one or more of the **major life activities** of such individual; (B) a record of such an impairment; or (C) **being regarded as** having such impairment.¹⁰³

This definition has a “gatekeeping function” in disability law¹⁰⁴ and has been the subject of extensive debate and litigation. Although the existence of “impairment” was largely uncontested, the meaning of “substantially limits” and “major life activity” was fiercely debated.¹⁰⁵ Under the ADA Amendment Act, the three-pronged definition of disability was retained, but the USA Congress made it clear that the concept “disability”

⁹⁶ Ngwena 2007:128. The ADA is regarded as the first body of national legislation to position the disability definition within a social model of disability. See Ngwena 2010:430.

⁹⁷ Ara 2010:259.

⁹⁸ Title I deals with employment and employer discrimination, Title II concerns public services, Title III reflects public accommodations and services operated by private entities, Title IV deals with telecommunications, and Title V contains miscellaneous provisions.

⁹⁹ Stefan 2000:274. A comprehensive discussion of the EEOC will follow in 6.4.2.5 below.

¹⁰⁰ 29 C.F.R. 1630.

¹⁰¹ 8 FEP Manual BNA 1997.

¹⁰² *Soileau v Guilford of Me.* 105 F.3d 12 1st Cir 1997: 13. Also see Danforth 1999:665.

¹⁰³ ADA: sec 12111(2), own emphasis added.

¹⁰⁴ Bagenstos 2003:656.

¹⁰⁵ Concannon 2012:93-94.

was to be given a broad interpretation,¹⁰⁶ as the courts were applying too narrow an interpretation and were consequently excluding many individuals from the intended protection of the ADA.

Importantly, of all the prevalent mental health conditions, the USA judiciary has recognised depression most frequently as a disability under the ADA.¹⁰⁷ This is evidenced by the matter of *Keith v Ashland Inc.*,¹⁰⁸ where it was held that “depression is of course a recognised disability under the ADA”.¹⁰⁹

The meanings and interpretations of these elements in the 1990 act and the 2008 amendment act in the context of people with mental health conditions will be evaluated below. Each element of the USA disability definition will be considered independently.

6.3.3.1 Mental impairment

The ADA regulations, which reflect a social understanding of impairment,¹¹⁰ define mental impairment as “any **mental or psychological disorder**, such as mental retardation, organic brain syndrome, **emotional**¹¹¹ or **mental illness**, and specific learning disabilities”.¹¹²

The determination of whether an individual is impaired must be made on a case-by-case basis. This determination is particularly challenging in cases involving mental health conditions, as these conditions often do not display any outward physical symptoms, and the condition may consequently be dismissed as a personality flaw, laziness or a bad temperament.¹¹³ To define mental impairment, all mental traits that can be considered abnormal must be factored into this determination. These traits become impairments through the social identification of their difference from some

¹⁰⁶ ADA Amendment Act: sec 12102; Concannon 2012:102.

¹⁰⁷ Stefan 2000:280.

¹⁰⁸ No. 98-4539 2000 U.S. App. LEXIS 1940 6th Cir. 2000.

¹⁰⁹ *Keith v Ashland Inc.*: 10. Also see Stefan 2000:280.

¹¹⁰ Travis 2012:960.

¹¹¹ Emotional illness is defined as “a psychological disorder characterised by irrational and uncontrollable fears, persistent anxiety, or extreme hostility”. See Dictionary.com 2016. <http://www.dictionary.com/browse/emotional-illness>. Accessed 02/07/2016.

¹¹² *Regulations to Implement the Equal Employment Provisions of the ADA*: sec 1630(2)(h)(2), own emphasis added.

¹¹³ Danforth 1999:666.

established norm or ideal of human functioning and ability.¹¹⁴ The US Supreme Court in *City of Cleburne v Cleburne Living Center, Inc.*¹¹⁵ held that people with mental impairments have a reduced ability to cope with and function in the everyday world that they're not all cut from the same cloth and different, immutably so.¹¹⁶

The most forthright confirmation that an individual has a mental impairment under the ADA is evidence of a diagnosis in terms of the current edition of the DSM.¹¹⁷ The EEOC endorses the use of the DSM in establishing mental impairments in the legal field and lists both depression and PTSD as official examples of mental illness.¹¹⁸ Support for the use of the DSM can also be found in the research produced by the US National Institute of Mental Health.¹¹⁹ The US judiciary has also illustrated a readiness to accept and rely on the DSM in cases involving mental health conditions, and a diagnosis supported by the DSM has formed an integral part of the determination in relation to whether an individual has a mental disability.¹²⁰

However, although the DSM is widely used, a diagnosis in terms of this classification instrument is not the only way for an individual to establish the existence of a mental impairment.¹²¹ Persons attempting to prove to their employer that they suffer from a mental impairment may also provide a note or detailed report from a doctor or mental health-care professional, explaining the nature of their mental impairment.¹²² Although unlikely to be accepted in most cases, Mastroianni and Miaskoff suggest that in some instances, statements from friends, family and colleagues may also suffice in proving

¹¹⁴ It is important to note, however, that “normalcy” is a socially relative, contestable concept that changes over time. It is also significant to note that the translation of traits into impairments can be affected by various factors, including changes in medical fields, technological changes, financial interests and other social phenomena. See Travis 2012:972, 973.

¹¹⁵ 473 U.S. 432 1985.

¹¹⁶ *City of Cleburne v Cleburne Living Center, Inc.*: 442.

¹¹⁷ Jackson 2010:221-222; Mastroianni and Miaskoff 1997:727. The use and significance of the DSM in the legal arena was discussed in chapter 2.

¹¹⁸ Other mental health conditions listed as examples include bipolar disorder and schizophrenia. See the *EEOC Enforcement Guidance: The ADA and Psychiatric Disabilities*:7461, 7462. Also see Smith 2002:453-455; Vroman 2013:162. The EEOC did however indicate that not all conditions listed in the DSM would amount to disabilities under the ADA. These exclusions include sexual behavioural disorders, kleptomania, compulsive gambling, as well as drug and alcohol abuse.

¹¹⁹ See NIMH 2015. <http://www.nimh.nih.gov/health/statistics/prevalence/major-depression-among-adults.shtml>. Accessed on 28/09/2015.

¹²⁰ See *Boldini v Postmaster General* 928 F.Supp. 125 D.N.H. 1995: 130; *Osika v Board of Education* No. 98C5953 1999 U.S. Dist. LEXIS 17996 N.D. Ill. 1999: 11; Smith 2002:455; Tucker and Milani 2004:19.

¹²¹ Jackson 2010:222. It should be noted that for fear of stigma, many employees may choose not to disclose a diagnosis in terms of the DSM. See Mastroianni and Miaskoff 1997:727.

¹²² Mastroianni and Miaskoff 1997:728.

the existence of a mental impairment.¹²³ However, where an employee alleges mental impairment, it is preferable that employers not attempt to establish its existence themselves, but instead refer the employee to a mental health-care professional to make an official diagnosis.¹²⁴

The USA judiciary has also noted that mental health conditions, such as depression that have been medically diagnosed by a qualified medical practitioner, constitute impairments under the ADA.¹²⁵ Thus, if a qualified medical expert has recognised and diagnosed a condition as a mental impairment, the courts will generally regard that opinion in a serious light.¹²⁶ Significantly also, the American judiciary has on multiple occasions recognised depression as constituting a mental impairment.¹²⁷

Under the ADA Amendment Act, the USA Congress stipulated that an impairment that is episodic or in remission will constitute a disability if it would substantially limit a major life activity when it is active.¹²⁸ This clarifies the position that impairments should be assessed in their active state, even if they are inactive or in remission for certain periods of time. This arguably makes it easier for individuals with mental impairments to establish a disability under the ADA, since many mental health conditions are often episodic.¹²⁹ Depression in particular constitutes a recurring condition with periods of dormancy and activity. Thus, individuals with depression have a more significant chance of proving that they are mentally impaired under the ADA Amendment Act.

Travis makes an interesting observation, namely that the broad coverage and interpretation of disability offered by the ADA Amendment Act has in effect extricated “disability” from the broader concept of “impairment”.¹³⁰ Consequently, “impairment” has gained an elevated status as a specific protected class under federal anti-

¹²³ Mastroianni and Miaskoff 1997:728.

¹²⁴ Vroman 2013:161; 2010:3.

¹²⁵ See *Krocka v City of Chicago* 203 F.3d 507 7th Cir. 2000. Also see Tucker and Milani 2004:19.

¹²⁶ Tucker and Milani 2004:19.

¹²⁷ *Krocka v City of Chicago* 203 F.3d 507 7th Cir. 2000: 514; *Criado v IBM Corp* 145 F.3d 437 1st Cir. 1998: 442; *Pritchard v Southern Co. Servs.* 92 F.3d 1130 11th Cir. 1996: 1132; *Bombard c Fort Wayne Newspapers Inc.* 92 F.3d 560 7th Cir. 1996; *Ogborn v United Food and Commercial Workers Union Local No. 881.* 305 F.3d 763 7th Cir. 2002: 767; *Kotlowski v Eastman Kodak Co.* 922 F.Supp. 790 1996: 797; *Weiler v Household Finance Corp.* 101 F.3d 519 1996: 524; *Hatfield v Quantum Chemical Corp.* 920 F.Supp. 108 1996: 110.

¹²⁸ ADA Amendment Act: sec 12102(4)(D). See Concannon 2012:103-104.

¹²⁹ Depression and anxiety disorders are examples of episodic mental impairments that may now more easily be established as disabilities under the ADA. See Vroman 2013:159.

¹³⁰ Travis 2012:938.

discrimination law. This argument is in accordance with the social model of disability, in terms of which an individual's impairment is the description of the specific mental (or physical) condition, while "disability" refers to the exclusion or limitations that are socially imposed over and above their impairment.¹³¹ The ADA Amendment Act embraces difference by differentiating disability from impairment and using that distinction as the standard line between the affirmative right to reasonable accommodation and the negative right to be free from discrimination.¹³²

Originally, the EEOC clustered all cases involving discrimination based on psychiatric disability together under a single heading, without distinguishing between the various mental health conditions.¹³³ This position has changed, and the EEOC now classifies information regarding these cases under various categories, including depression and anxiety disorders (which included PTSD under the previous edition of the DSM).¹³⁴

6.3.3.2 Suitably qualified individual

A suitably qualified individual is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires".¹³⁵

The "essential functions" element of this definition was left open for broad interpretation, and although the EEOC's guidelines called for a distinction between functions that were essential and those that were merely marginal, the courts have continuously failed to do so.¹³⁶ The determination of what will constitute the "essential functions" of an employment position is a complex and factually specific analysis.¹³⁷ However, the court in *Benson v Northwest Airlines Inc.*¹³⁸ held that the burden of establishing the essential function of a job lay with the employer, as much of the

¹³¹ The social model shifts the causal responsibility away from the individual's specific impairment and onto the surrounding social, architectural and economic environment. See Travis 2012:944.

¹³² Travis 2012:940.

¹³³ Stefan 2000:277.

¹³⁴ Stefan 2000:277.

¹³⁵ ADA: sec 12111(8).

¹³⁶ Concannon 2012:97. The term "essential functions" has been taken to mean "job tasks that are fundamental and not merely marginal". It is also significant to note that essential functions refer only to the tasks to be performed and not the manner in which they are to be performed. See Tucker and Milani 2004:86, 87.

¹³⁷ Tucker and Milani 2004:89.

¹³⁸ 62 F.3d 1108 8th Cir. 1995.

information relating to the employment position and its duties and essential functions indeed lies with the employer.¹³⁹

The EEOC suggests that the determination of whether an individual is “suitably qualified” should consist of a two-stage analysis. In the first place, it should be determined whether the individual satisfies the basic requirements for the employment position in question, including the necessary educational background and employment experience.¹⁴⁰ In the second place, it must be determined whether the individual can perform the essential or inherent functions of the job, with or without reasonable accommodation.¹⁴¹

In *EEOC v Amego Inc.*,¹⁴² an employee was diagnosed as bulimic and clinically depressed. However, she failed to tell her employer about these conditions until after her first suicide attempt, which was more than a year after the diagnosis. She was prescribed antidepressants, although these only partially alleviated the depression.¹⁴³ The employee later attempted suicide again, stating the cause as personal problems, failure to receive a promotion at work, and work-related stress, and she was consequently hospitalised. The employee only told her supervisor that she had been hospitalised for bulimia and depression, failing to mention her attempted suicide. She asked her supervisor to modify her work schedule so that she could attend therapy twice or thrice weekly, to which the supervisor agreed.¹⁴⁴

After a third suicide attempt (overdosing on medication), and considering that the employee’s employment position required her to work with medication, the employer felt that the employee posed a risk in her current position and removed her.¹⁴⁵ It was later concluded that there was no alternative position that would suit the employee

¹³⁹ *Benson v Northwest Airlines Inc.*: 1113.

¹⁴⁰ Danforth 1999:667.

¹⁴¹ In determining the essential functions of an employment position, various considerations should be taken into account, including the amount of time spent performing the function, the consequences of the function not being performed, and the work experience of others performing similar jobs. See Danforth 1999:667.

¹⁴² 110 F.3d 135 1st Cir. 1997.

¹⁴³ *EEOC v Amego Inc.*: 138.

¹⁴⁴ *EEOC v Amego Inc.*: 138.

¹⁴⁵ *EEOC v Amego Inc.*: 140-141.

within the company, and that no position could be modified to accommodate her. The employee was subsequently dismissed.¹⁴⁶

The parties did not dispute that the employee was a disabled person within the meaning of the ADA. It was also undisputed that an essential function of her employment position was to administer and monitor medication. However, the employer disputed that the employee was “suitably qualified” to perform the essential functions of the job, since she could not reasonably be trusted to meet her responsibilities with regard to medication.¹⁴⁷

The court in this case held that it could discern no congressional intent to preclude the consideration of essential job functions that implicate the safety of others as part of the “qualifications” analysis, particularly where the essential functions of a job involve caring for others who are unable to care for themselves.¹⁴⁸ Based on this, it concluded that the employee did not successfully prove that she was a “qualified individual” in terms of the ADA,¹⁴⁹ and that given the nature of the employer’s business, the handling of medication, and the essential functions of the employment positions, there had been no reasonable accommodation that the employer could make without suffering undue hardship.¹⁵⁰

6.3.3.3 Substantial limitation

The most complex issue in relation to the “substantial limitation” requirement relates to the employment environment.¹⁵¹ An individual will be substantially limited in his or her ability to work when (s)he is significantly restricted to perform either a class of jobs or a broad range of jobs in various classes.¹⁵²

Impairment may be considered severe enough to qualify as a disability if it inhibits an individual from performing a major life activity. Impairment that is severe and is expected to last indefinitely or to have a long-term duration may be considered

¹⁴⁶ *EEOC v Amego Inc.*: 141.

¹⁴⁷ *EEOC v Amego Inc.*: 141.

¹⁴⁸ *EEOC v Amego Inc.*: 142.

¹⁴⁹ *EEOC v Amego Inc.*: 144.

¹⁵⁰ *EEOC v Amego Inc.*: 148.

¹⁵¹ Tucker and Milani 2004:29.

¹⁵² *Regulations to Implement the Equal Employment Provisions of the ADA*: sec 1630(2)(j)(3)(i). Also see Tucker and Milani 2004:29.

substantially limiting and will amount to a disability under the ADA.¹⁵³ Impairments that may not be substantially limiting when considered independently may in fact be substantially limiting enough to rise to the level of disability under the ADA when their effects are considered in combination.¹⁵⁴ In this regard, Kruse and Schur indicate that disability is a fluid concept, since mental impairments, environments and life circumstances may change in ways that alter whether or not the impairment substantially limits a major life activity.¹⁵⁵

According to the regulations implementing Title I of the ADA, the determination of whether an impairment “substantially limits” a major life activity can be assessed by considering the following factors, among others:¹⁵⁶

- (i) The nature and severity of the impairment;
- (ii) The duration or expected duration of the impairment;
- (iii) The permanent or long term impact resulting from the impairment.

An individual who is substantially limited would either be unable to perform the activity or would be “significantly restricted as to the condition, manner or duration” in which (s)he can perform the activity compared to the average person.¹⁵⁷ Substantial limitation is assessed in terms of both severity and duration.¹⁵⁸

In terms of the ADA Amendment Act, the term “substantially limits” is to be interpreted less strictly.¹⁵⁹ The EEOC’s regulations implementing the amendment act provides eight rules of construction that apply when considering whether an impairment substantially limits a major life activity. These are as follows:¹⁶⁰

- (i) The term “substantially limits” **shall be construed broadly in favour of expansive coverage**, to the maximum extent permitted by the terms of the ADA. “Substantially limits” is not meant to be a demanding standard.
- (ii) An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.

¹⁵³ Mastroianni and Miaskoff 1997:732.

¹⁵⁴ Mastroianni and Miaskoff 1997:733.

¹⁵⁵ Kruse and Schur 2003:34-35.

¹⁵⁶ Danforth 1999:665.

¹⁵⁷ Danforth 1999:665-666.

¹⁵⁸ Multiple impairments on their own may not be substantially limiting, but may in combination substantially limit a major life activity. See *Regulations to Implement the Equal Employment Provisions of the ADA*: sec 1630(2)(j); Mastroianni and Miaskoff 1997:732.

¹⁵⁹ Concannon 2012:102-103.

¹⁶⁰ *Regulations to Implement the Equal Employment Provisions of the ADA*: sec 1630(2)(j)(i)-(ix), own emphasis added.

- (iii) The **primary object** of attention in cases brought under the ADA should be whether covered entities have **complied with their obligations and whether discrimination has occurred**, not whether an individual's impairment substantially limits a major life activity.
- (iv) The determination of whether an impairment substantially limits a major life activity **requires an individualized assessment**.
- (v) The determination of whether an impairment substantially limits a major life activity shall be made **without regard to the ameliorative effects of mitigating measures**.
- (vi) An impairment that is **episodic or in remission** is a disability if it would **substantially limit a major life activity when active**.
- (vii) An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.
- (viii) The six-month "transitory" part of the "transitory and minor" exception to "regarded as" coverage in § 1630.15(f) does not apply to the definition of "disability" under paragraphs (g)(1)(i) (the "actual disability" prong) or (g)(1)(ii) (the "record of" prong) of this section. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.

In *Estate of Murray v UHS of Fairmount, Inc.*,¹⁶¹ an employee suffered from depression prior to her assumption of duties, although her symptoms subsided subsequent to the commencement of her employment. Later, the employee's depression returned and led to her taking leave of absence on two occasions. The doctor's note that the employee provided to the employer did however not specify that her mental illness was the reason for her absence. Upon her return, the employee confessed to a charge nurse that depression and anxiety were the cause of her absence. The employee's employment was later terminated, in response to which she filed a suit against her employer based on actual and perceived disability discrimination in violation of the ADA.

The employer argued that the employee's depression was a "transitory, temporary or minor impairment" that did not substantially limit her. The court held that while this argument may have been valid prior to the commencement of the ADA Amendment Act, it no longer was, as the "substantially limits" criterion was not intended to be a demanding standard, but should be construed broadly in favour of expansive coverage. The court held that under the dispensation prior to the ADA Amendment Act, the employee's evidence would almost certainly have failed to establish a substantial limitation. However, following the amendment act, it was a genuine issue

¹⁶¹ CIV.A. 10-2561 2011 WL 5449364 E.D. Pa. 2011.

of material fact as to whether the employee was regarded as disabled. The employee was consequently held to have been disabled under the “regarded as” prong of the disability definition, with her depression having substantially limited her ability to think, eat and sleep.

Under its section on predictable assessments, the EEOC lists both major depressive disorder (depression) and PTSD, along with bipolar disorder, obsessive compulsive disorder and schizophrenia as impairments that substantially limit brain function, which is considered to be a major life activity.¹⁶² In addition, under the ADA Amendment Act, “major depressive disorder should easily be concluded to substantially limit brain function”.¹⁶³

In terms of condition, manner and duration, the EEOC states the following:

Consideration of facts such as condition, manner, or duration may include, among other things, consideration of the **difficulty, effort, or time required to perform a major life activity**; pain experienced when performing a major life activity; the **length of time a major life activity can be performed**; and/or the **way an impairment affects the operation of a major bodily function**. In addition, the non-ameliorative effects of mitigating measures, such as **negative side effects of medication** or burdens associated with following a particular treatment regimen, **may be considered when determining whether an individual's impairment substantially limits a major life activity**.¹⁶⁴

Under the ADA prior to amendment, the use of mitigating measures, such as medication to treat the symptoms and effects of impairment, used to be a significant consideration in the assessment of whether impairment was substantially limiting. In both *Sutton v United Airlines Inc.* and *Toyota Motor Mfg., Ky., Inc. v Williams*, the courts emphasised that substantial limitation of a major life activity needed to be evaluated in their mitigated states.¹⁶⁵ Therefore, individuals with severe impairments who were partially aided by the use of medication fell short of establishing that they had a disability under the ADA.¹⁶⁶ Thus, in terms of the former position, an employee

¹⁶² *Regulations to Implement the Equal Employment Provisions of the ADA*: sec 1630(2)(j)(3)(iii).

¹⁶³ *Regulations to Implement the Equal Employment Provisions of the ADA*: sec 1630(2)(j)(l)(vii). Also see Vroman 2010:2.

¹⁶⁴ *Regulations to Implement the Equal Employment Provisions of the ADA*: sec 1630(2)(j)(4)(ii), own emphasis added.

¹⁶⁵ *Sutton v United Airlines Inc.*: 488-489; *Toyota Motor Mfg., Ky., Inc. v Williams*: 198. Also see Concannon 2012:100, 101; Stefan 2000:281; Vroman 2013:157.

¹⁶⁶ Concannon 2012:100, 101. However, it is important to bear in mind that simply because an individual has an impairment and uses medication to alleviate its negative effects, such individual may not necessarily have a disability under the ADA. The other elements of a disability must still be complied with. See Mastroianni and Miaskoff 1997:734.

taking antidepressants to mitigate the symptoms of their depression would fail to establish that they were disabled under the ADA.

The matter of *Osika v Board of Education*¹⁶⁷ involved an employee who had been diagnosed with clinical depression. Although the court accepted that the employee had a recognised mental impairment in terms of the DSM, that did not necessarily qualify the employee as disabled under the ADA.¹⁶⁸ The employee still had to satisfy the requirements of the disability definition. The court held that the employee was not legally disabled in terms of the ADA, because she was not substantially limited in a major life activity, namely the ability to work, as her depression could be controlled with medication, and her stress had stemmed from conflict with her superiors.¹⁶⁹

In *Krocka v Riegler*,¹⁷⁰ an employee with depression filed a disability discrimination lawsuit against the employer, *inter alia* alleging that the defendants had engaged in various employment practices that constituted discrimination based on a disability in violation of the ADA, including his classification as a “personnel concern” (and his placement in the personnel concerns programme), the employer’s alleged failure to provide him with a reasonable accommodation for his disability, and their retaliation against him for having requested accommodation and for pursuing his rights under the ADA.¹⁷¹

The court held that the employee’s depression did in fact constitute a disability under the ADA, because the employee would not have been able to execute the duties of his employment without medication and treatment.¹⁷² The court stated the following in this regard:

The entire thrust of the ADA is to prohibit discrimination against those individuals with disabilities who are qualified to perform the essential functions of their job with or without reasonable accommodation. The fact that Krocka alleges that he is able to perform his duties as a police officer as long as he takes Prozac does not imply that he does not suffer a substantial impairment of a major life activity; therefore, it does not mean that he is not “disabled” within the meaning of the ADA.¹⁷³

¹⁶⁷ No. 98C5953 1999 U.S. Dist. LEXIS 17996 N.D. Ill. 1999.

¹⁶⁸ *Osika v Board of Education*: 11.

¹⁶⁹ *Osika v Board of Education*: 12-13.

¹⁷⁰ 958 F.Supp. 1333 N.D. Ill. 1997.

¹⁷¹ *Krocka v Riegler*: 1338-1339.

¹⁷² *Krocka v Riegler*: 1340-1341.

¹⁷³ *Krocka v Riegler*: 1341.

The court further ruled that without determining whether there was particular accommodation required in this case, an unreasonable delay in implementing “reasonable accommodation” could constitute a discriminatory act, especially since the employer had initially refused outright to consider any accommodation for that particular disability.¹⁷⁴

The ADA Amendment Act expressly prohibits the consideration of mitigation measures in determining whether a person’s impairment substantially limits a major life activity.¹⁷⁵ This prohibition aims to correct the position entrenched by the courts in *Sutton* and *Toyota* regarding the consideration of the use of medication and other mitigating measures in assessing whether an impairment substantially limits a major life activity. Therefore, the current position is that the use of antidepressants and the consequent mitigation of the symptoms of depression will not be taken into account when determining whether an employee has a legally recognised disability under the ADA.

6.3.3.4 Major life activity

Major life activities constitute basic activities that an average individual in the general population can perform with little if any difficulty.¹⁷⁶ A non-exhaustive list of such activities include “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working”.¹⁷⁷ With special consideration for people with mental impairments, the EEOC extended this list and included “interacting with others” as another major life activity.¹⁷⁸

The ADA requires major life activities to be assessed and identified on a case-by-case basis, as these activities may be significantly affected by each individual’s specific mental impairment.¹⁷⁹ The major life activities that may be limited by a mental impairment vary, but may include thinking, concentrating, caring for oneself, speaking,

¹⁷⁴ *Krocka v Riegler*: 1342.

¹⁷⁵ ADA Amendment Act: sec 12102(4)(E)(i). The act provides a non-exhaustive list of mitigating measures, including medication and medical supplies. See Concannon 2012:104.

¹⁷⁶ Danforth 1999:665.

¹⁷⁷ Mastroianni and Miaskoff 1997:730; Danforth 1999:665.

¹⁷⁸ EEOC *Compliance Manual* 1995: sec 902.3(b). However, it is specified that individuals will not be substantially limited simply because they are irritable or have difficulty getting along with others. See *EEOC Enforcement Guidance: The ADA and Psychiatric Disabilities*:7463. Also see Danforth 1999:665.

¹⁷⁹ Mastroianni and Miaskoff 1997:730-731.

performing manual tasks, sleeping or working.¹⁸⁰ All of these activities influence an individual's ability to function in the employment environment, and that the restriction of any or a combination of these activities, for example by the symptoms of depression, may limit the employee's ability to perform these major life activities.

Under the ADA Amendment Act, Congress has set out the approach that is to be taken in determining whether a particular activity amounts to a major life activity.¹⁸¹ Congress rejected the approach formulated in *Toyota*, namely that major life activities should be activities that have a central bearing on most people's daily lives, and indicated that "major" should not be interpreted in a strict manner that creates a demanding standard for establishing disability.¹⁸²

In the case of *McClinton El v Potter*,¹⁸³ the USA judiciary found that an individual with depression might be substantially limited in the major life activities of caring for themselves, sleeping and eating.¹⁸⁴ *Krocka v Riegler*, in turn, involved an employee who had been diagnosed with depression and dysthymia. Without his medication, the depression made it nearly impossible for the employee to get out of bed for most of the day, which significantly restricted his ability to carry out his duties of employment, to the point of seriously limiting or eliminating his ability to work.¹⁸⁵ Finally, in *Holland v Shinseki*,¹⁸⁶ an employee alleged that the increased scrutiny she had received during her employment caused her to develop a number of medical ailments and disabilities. These included anxiety, loss of concentration, weight loss, insomnia, depression and severe headaches.¹⁸⁷ It was held that genuine issues of material fact existed as to whether the employee's depression, anxiety and acute stress substantially limited her in the major life activity of sleeping, since her impairments caused her to sleep only one hour per night on average.¹⁸⁸

¹⁸⁰ Danforth 1999:666.

¹⁸¹ ADA Amendment Act: sec 12102(4)(B). Also see Concannon 2012:102-103.

¹⁸² *Regulations to Implement the Equal Employment Provisions of the ADA*: sec 1630(2)(i)(2). Also see Concannon 2012:102-103.

¹⁸³ WL 5111182 N.D. Ill. 2008.

¹⁸⁴ *McClinton El v Potter* WL 5111182 N.D. Ill. 2008. Also see Carvalheira 2011:87.

¹⁸⁵ *Krocka v Riegler*: 1335.

¹⁸⁶ No. 3:10-CV-0908-B, 2012, WL 162333 N.D. Tex. 2012.

¹⁸⁷ *Holland v Shinseki*: I(A).

¹⁸⁸ *Holland v Shinseki*: III(A)(1).

6.3.3.5 Regarded as disabled

Certain conditions that do not interfere with an individual's ability to perform major life activities may become substantially limiting as result of other people's response to the condition(s).¹⁸⁹ Therefore, the "regarded as" prong of the disability definition has been included in order to "combat discrimination based on myths, fears and stereotypes about disabilities that may come into play even when a person does not actually have a disability".¹⁹⁰

The ADA aims to prevent adverse employment actions based on "stereotypes which are not truly indicative of the individual ability of such individuals to participate in, and contribute to, society".¹⁹¹ Consequently, individuals who fall victim to employment discrimination based on their impairment, even if the impairment is not substantially limiting, but is perceived by the employer to be substantially limiting, will also be protected under the ADA.¹⁹²

Individuals who have no impairment at all, but are considered by their employer to be impaired may also seek protection under the act.¹⁹³ This is particularly relevant in the context of people with mental health conditions, given their propensity to suffer discrimination and be subjected to unjust stigmatisation and stereotypes, especially in employment. For example, an employee's mild depression may not substantially limit the individual, but the employer may consider the employee to be substantially limited in his or her ability to think and concentrate, and thus, the ability to discharge the inherent requirements of the job. An employer may form such an assessment for various reasons: For example, the employee may provide the employer with ambiguous medical records and documentation regarding the impairment, or the employer may learn of the impairment from other persons, whether inside or outside the workplace.¹⁹⁴

As far as the "regarded as" prong of the definition is concerned, people with mental health conditions could bring themselves within the ambit of this aspect in one of two

¹⁸⁹ Bales 1993:221.

¹⁹⁰ Mastroianni and Miaskoff 1997:737.

¹⁹¹ Mikulik 2007:8.

¹⁹² Mastroianni and Miaskoff 1997:738.

¹⁹³ Mastroianni and Miaskoff 1997:739.

¹⁹⁴ Mastroianni and Miaskoff 1997:739.

possible ways. The first is by showing that the employer mistakenly believed that the individual had a mental impairment that substantially limits major life activities or, secondly, by proving that the employer mistakenly believed that an actual, non-limiting impairment substantially limits one or more of the individual's major life activities.¹⁹⁵ An employee would thus have to prove that the employer not only thought that (s)he had a mental impairment, but actually believed the impairment to be of such a nature that it substantially limited one or more of the employee's major life activities.¹⁹⁶

In amending the ADA, Congress has made significant changes to the "regarded as" prong of the disability definition. Under the "regarded as" disability prong, the ADA Amendment Act provides nearly universal protection¹⁹⁷ against simple discrimination.¹⁹⁸ In protecting almost everyone from discrimination on the basis of their impairments, the "regarded as" prong relieves individuals from proving that they are different because of the way in which their impairment limits them, and only requires them to prove that "others" limited them because of their impairments.¹⁹⁹

The negative treatment itself brings the individuals within the ambit of the ADA's protection, in the same way that negative treatment based on other characteristics such as race or gender brings plaintiffs within the ambit of other civil rights laws.²⁰⁰ Consequently, this prong of the disability definition protects against impairment-based discrimination, regardless of the real or perceived severity of the individual's condition.²⁰¹ Under the ADA Amendment Act, it need only be proved that an individual was discriminated against "because of" impairment, irrespective of how significant an impact the discriminator perceived the impairment to have on the individual's life.²⁰²

¹⁹⁵ Concannon 2012:95. This interpretation in effect insulated employers from discrimination claims if they were uncomfortable with mental illness, as long as they believed that the employee was not substantially limited in their ability to perform a major life activity. See Stefan 2000:276.

¹⁹⁶ Concannon 2012:95.

¹⁹⁷ Barry 2010:208.

¹⁹⁸ Travis 2012:953.

¹⁹⁹ Travis 2012:950-951; Barry 2010:208.

²⁰⁰ Barry 2010:208.

²⁰¹ This prong protects against impairment-based discrimination, whether the impairment results in widespread social exclusion or merely in a single employer's idiosyncratic response. See Travis 2012:951.

²⁰² ADA Amendment Act: sec 12102(3)(A). Also see Concannon 2012:105; Ara 2010:270.

Thus, an individual need not demonstrate any actual or perceived limitation on bodily functions.²⁰³

Importantly, “impairments which are transitory or minor” are excluded from the ambit of the “regarded as” prong of the definition.²⁰⁴ Therefore, impairments with an expected or actual duration of six months or less fall outside the scope of consideration where the “regarded as” prong is concerned.²⁰⁵ The reinvigorated “regarded as” prong highlights that social attitudes have a disabling effect.²⁰⁶ This expansion in coverage for disability stereotyping has taken a bold step towards universal non-discrimination protection.²⁰⁷

The ADA Amendment Act promotes the notion that non-discrimination based on disability should be universal, while entitlements to reasonable accommodation should require an individual to demonstrate some limitation of bodily functions.²⁰⁸ Therefore, the “regarded as” prong of the disability definition does not provide for reasonable accommodation. The EEOC regulations also indicate that individuals who are regarded as having a disability are not entitled to reasonable accommodation.²⁰⁹

The social barriers faced by the members of the ADA protected class vary considerably. In this regard, Cox suggests that while a missing limb may appear to be a more biologically severe disability than depression, an individual with depression may experience more significant social and vocational obstacles in the modern workplace.²¹⁰ One such example may be found in the matter of *Davidson v United Technologies Carrier*,²¹¹ where an employee’s co-workers referred to him as “crazy Willy” and “Prozac Willy” after he returned to work following hospitalisation and treatment for depression.²¹² Similarly, as discussed earlier, the employee in *Krocka v*

²⁰³ Barry 2010:272.

²⁰⁴ Ara 2010:270; Concannon 2012:105.

²⁰⁵ Concannon 2012:105.

²⁰⁶ Areheart 2011:379.

²⁰⁷ Areheart 2011:379.

²⁰⁸ Barry 2010:264.

²⁰⁹ *Regulations to Implement the Equal Employment Provisions of the ADA*: sec 1630(2)(o)(4).

²¹⁰ Cox 2010:431.

²¹¹ IP 98-1233-C M/S 2000 WL 33309724 S.D. Ind. 2000.

²¹² This case was however decided under the pre-amended ADA, and it was therefore held that despite the employee’s history of depression and hospitalisation, there was no evidence of past or present disability, nor any evidence that the employer regarded the employee as being substantially limited in his ability to perform his duties of employment. The court held that the employee’s medical

Riegler was treated as a “personnel concern” for taking depression medication and was also made the butt of Prozac jokes and writings on the bathroom wall. Because a personnel concern draws scrutiny from supervisors, other employees did not want to work with him for fear of intense observation. Co-workers also referred to the employee as “a nut case”.²¹³ The employee requested a transfer to another different department, but this was refused.²¹⁴

In *Kinney v Century Services Corp. II*,²¹⁵ an employee with depression and suicidal ideation requested leave of absence from her employment to receive treatment. Although the employer granted the request, the employee’s supervisor “thought it was ridiculous” and believed the employee was “overreacting”, as “people get sad all the time”, not understanding why the employee “need[ed] to go somewhere for it”.²¹⁶ A while after she returned to work, the employee again requested medical leave because of her depression, after which the employer raised serious concerns about the employee’s job performance, and the employee was informed that her disrespectful behaviour would not be tolerated.²¹⁷ The employee’s employment was subsequently terminated.²¹⁸

The employee instituted a claim against the employer for having discriminated against her based on her disability in violation of the ADA.²¹⁹ The employee argued that her depression constituted a disability under the ADA, but the employer contended that “isolated bouts” of depression did not satisfy the disability definition.²²⁰ The court in this case held that an employee’s depression, when active, substantially limited major life activities, including the right to work. It ruled as follows:

In this case, although there is no dispute that Ms. Kinney’s depression did not impact her work performance following her return to work, there is also no dispute that, before she was hospitalized, Ms. Kinney advised Ms. Ruckman that Ms. Kinney’s doctor recommended hospitalization because the depression was severe enough that Ms. Kinney was suicidal. **Regardless whether her depression impacted her work when inactive, there is no question that, by its very nature, inpatient treatment substantially impacts (in fact,**

record of depression and hospitalisation constituted insufficient evidence to establish a legal disability. See *Davidson v United Technologies Carrier*: 2, 6, 7.

²¹³ *Krocka v Riegler*: 1337.

²¹⁴ *Krocka v Riegler*: 1339.

²¹⁵ No. 1:10-cv-00787-JMS-DML, 2011, WL 3476567 S.D. Ind. 2011.

²¹⁶ *Kinney v Century Services Corp. II*: III(A).

²¹⁷ *Kinney v Century Services Corp. II*: III(C).

²¹⁸ *Kinney v Century Services Corp. II*: III(C).

²¹⁹ *Kinney v Century Services Corp. II*: IV(B).

²²⁰ *Kinney v Century Services Corp. II*: IV(B)(1).

precludes) work performance and limits major life activities. Given Ms. Kinney's debilitating symptoms when her depression was active, the Court finds that Ms. Kinney's depression at least raises a genuine issue of fact as to whether she is a qualified individual under the ADA.²²¹

In assuming that the employee's depression amounted to a disability under the ADA, the court held that the supervisor's comments about the depression as well as other incidents of adverse employment action, along with the termination of the employee's contract, constituted sufficient grounds of disability discrimination under the ADA to deny the employer's motion for summary judgment.²²²

6.3.3.6 Barriers faced by persons with mental disabilities under the *Americans with Disabilities Act*

In the final instance, it is important also to note the obstacles faced by persons with mental health conditions under the USA legal framework. Concannon identifies the following five primary barriers encountered by people with mental disabilities in alleging that they formed part of the protected class under the original ADA:²²³

- The first barrier was the fact that the courts were split on whether conditions of an episodic nature or in remission constituted disabilities under the ADA. This was of particular concern for individuals with mental disabilities, since psychiatric impairments tend to be episodic, with recurring symptoms. In *Brown v Northern Trust Bank*,²²⁴ a case that relied on a diagnosis in terms of the DSM, an employee was diagnosed as suffering from major depression.²²⁵ Her employment was terminated due to her frequent absence from work. The court held that the employee was not disabled in terms of the ADA, because depression was not of a requisite duration or impact to substantially limit the employee in any of her major life activities.²²⁶
- The second barrier stemmed from the restrictive approach taken by the Supreme Court in *Toyota* as to which activities constituted major life activities. This approach tended to obstruct the claims of mentally disabled individuals

²²¹ *Kinney v Century Services Corp. II*: IV(B)(1).

²²² *Kinney v Century Services Corp. II*: IV(C), V.

²²³ Concannon 2012:107-110.

²²⁴ 7 A.D. Cases BNA 548 N.D. Ill. 1997.

²²⁵ *Brown v Northern Trust Bank*: 552.

²²⁶ *Brown v Northern Trust Bank*: 552.

who alleged that “interacting with others”, “sleep” and “concentration” amounted to major life activities under the act.

- The third barrier related to the fact that employees with mental impairments often experienced problems in securing reasonable accommodation for their impairment. Persons with psychiatric impairments most frequently request a transfer, reduced working hours and additional leave. The American judiciary has shown a tendency to reject these accommodation measures as unreasonable.
- In the fourth instance, persons with mental impairments have often not been found to be suitably qualified for an employment position, as getting along and interacting with others is not regarded as an essential job function.
- The fifth barrier related to the “regarded as” prong of the disability definition. This came about because the courts insulated employers from discrimination claims in circumstances where they were uncomfortable with or simply hostile towards employees with mental health conditions, as long as they did not believe that the employee was limited in one or more major life activities.

6.3.4 Concluding remarks

The USA has made significant strides, especially under the ADA Amendment Act, to extend protection to people with mental disabilities. Although controversial under the original ADA, depression appears to be gaining favour with the USA judiciary as both a recognised impairment and a legal disability, provided that the requirements are met in each specific case. In addition, the fact that the EEOC tracks disability discrimination lawsuits based on mental health conditions, as well as lists depression as a recognised impairment and disability, indicates a significant move towards the protection of this socially vulnerable group.

The ADA’s move towards a social model of disability, and its protection against simple discrimination on the basis of the “regarded as” prong, afford people with mental health conditions, particularly depression, significant protection, especially given the stigmatised nature of these impairments.

6.4 Discrimination based on mental health

6.4.1 Introductory remarks

This section will explore discrimination based on mental health under the US legal framework. It starts off by analysing the discrimination concept and providing a detailed exposition of the various legislative instruments governing discrimination on the basis of mental health conditions such as depression in this jurisdiction.

This is followed by a detailed evaluation of the various forms of discrimination in relation to mental health conditions, with specific reference to depression. The analysis in this section is aimed at drawing possible lessons with a view to improving the South African legal framework in relation to mental disabilities in the employment realm.

6.4.2 The concept of equality and discrimination

Discrimination and equality are interlinked and are both embedded in the foundation of the law.²²⁷

Employment discrimination, segregation and harassment are regarded as significant risk factors in America.²²⁸ Discriminatory conduct against people with mental health conditions takes the form of bias, mistrust, stereotyping, fear, embarrassment, anger and avoidance.²²⁹ This impairs dignity and interferes with full participation in society and the workplace.²³⁰ Thus, the law of employment discrimination is regarded as a very vibrant area of American labour law.²³¹ While Title VII of the *Civil Rights Act* extends primary protection to employees in this regard, certain specific bodies of legislation, including the ADA, protects specific groups from discrimination in employment.

As is the case in jurisdictions across the world, however, the American society's attitudes towards disability lag behind the law.²³² Significant stigma has been attached

²²⁷ Rutherglen 2001:14. This may be attributed to the fact that discrimination (which satisfies the legal criteria) infringes the right to equality. The right to equality in turn serves to deter and combat unfair discrimination.

²²⁸ Center 2011, in Schultz and Rogers (eds) 2011:5.

²²⁹ Center 2011, in Schultz and Rogers (eds) 2011:5.

²³⁰ Center 2011, in Schultz and Rogers (eds) 2011:5.

²³¹ Bonfield 2006:220.

²³² Emens 2012b:1385.

to persons with disabilities, and these conditions are viewed as negative, undesirable characteristics that often lead to prejudice and discrimination against individuals displaying them.²³³ Social discrimination against people with mental health conditions is particularly widespread in American society, and treating these individuals differently does not provoke the same moral outrage as, for example, discrimination based on race, sex or even physical disability.²³⁴ Even the judiciary appears to share some of the stereotypes in relation to mental health conditions: For example, one judge dismissed several cases brought by persons with PTSD under the pre-amended ADA, calling this mental health condition “so-called PTSD” and denying that PTSD amounted to a legal disability, without having regard for the individual’s specific circumstances.²³⁵

Turning to the concept of equality in the USA, this has come to mean equal outcomes and equal opportunity in the sense of equal starting positions for all persons.²³⁶ American equality jurisprudence is historically anchored in a formalistic approach to equality.²³⁷ Equality is conceived as liberty and a duty of restraint on the part of the state, which has led to the exclusion of a substantive approach to equality in the USA.²³⁸ Despite the formal conception of equality taken in this jurisdiction as opposed to South Africa’s substantive equality approach, the protections offered in relation to employment discrimination (including workplace harassment) and the social-model style adopted in the ADA still render the USA worthy of consideration.

²³³ Tucker and Milani 2004:3. The USA Supreme Court has also noted that discrimination against people with disabilities is often the result of apathetic attitudes instead of affirmative prejudice. See *Alexander v Choate* 469 U.S. 287 S.Ct. 1985: 308. In one case, an employee returned to work after having been hospitalised for bipolar disorder and was taunted by his co-workers, who referred to him as “psycho”, “schitzo”, “wild man” and “freak”. See *Stewart v Bally Total Fitness*, No. 99-3555, 2000 U.S. Dist. LEXIS 10047E.D. Pa. 2000: 2. Also see Stefan 2000:303.

²³⁴ In addition, while overt discrimination based on race, sex and physical disability has arguably diminished in recent years, or at least become less obvious by morphing into less conscious forms of discriminatory animus, overt discrimination based on mental health is still widespread. See Emens 2006:401, 410.

²³⁵ See for example *Freeman v City of Inglewood* No. 96-55270 1997 U.S App. LEXIS 11789 9th Cir. 1997: 1; *Hoffman v City of Inglewood* No. 95-55508, 1997 U.S. App. LEXIS 11790 9th Cir. 1997: 1. Also see Stefan 2000:273.

²³⁶ Dorn 2014:492.

²³⁷ Ngwena 2010:402.

²³⁸ However, it has been said that American equality jurisprudence is a useful comparator, not because it yields analogous lessons, but precisely because it is different. It highlights equality paradigms that South Africa should avoid and embrace. See Ngwena 2010:399, referring to Fredman 2008:176.

In terms of the traditional legal anti-discrimination paradigm, inequality is classified as a formal problem of distinguishing sameness from difference.²³⁹ The classic equality doctrine emphasises the eradication of arbitrary or irrational correlations between formal biological difference and functional sameness.²⁴⁰ The concept of substantive equality has gained support as an independent approach highlighting the alleviation of the harmful disadvantages of real difference.²⁴¹ In terms of the conventional substantive equality model, legal protection increases with increased biological difference, including varying biological characteristics such as physical and mental impairments, which reverses the formal equality hierarchy. This results in disability being ranked as the most deserving of substantive protection in relation to other protected classes, such as race or gender.²⁴²

6.4.2.1 The challenges in relation to mental health conditions and employment discrimination

It has been said that one of the primary difficulties in eradicating employment discrimination against people with mental health conditions, as opposed to discrimination based on other grounds, is recognising what exactly constitutes a mental disability and requires appropriate reasonable accommodation.²⁴³ The following have been identified as further reasons for differentiating between employment discrimination claims against people with mental health conditions and other discrimination cases, making those with mental health problems more vulnerable:²⁴⁴

- Psychiatric impairments primarily present in behaviour, which makes them susceptible to facially neutral workplace rules or policies that have a disproportionate impact on people with mental disabilities.
- Some individuals have disclosed their condition to their employer, only to be held to higher behavioural standards than their fellow workers. Emotional

²³⁹ See *City of Cleburne v Cleburne Living Center Inc.* 473 U.S. 432 1985: 439; McCluskey 2010:113.

²⁴⁰ McCluskey 2010:113.

²⁴¹ The ADA's reasonable accommodation requirement (discussed under 6.5) is a paradigmatic example of the substantive equality approach. See McCluskey 2010:117.

²⁴² McCluskey 2010:118.

²⁴³ Mika and Wimbiscus 1997:175.

²⁴⁴ Hsieh 2014:1003-1004.

outbursts and reactions that would otherwise have been overlooked are regarded as signs of the individual “losing control”.

- Employers typically view the symptoms of mental health conditions as common personality traits, such as the inability to tolerate stress, difficulties in communicating and interacting with others, as well as periodic difficulties in focusing and concentration.
- As mental health conditions tend to be invisible, the stigma attaching to them has been difficult to dispel.
- Although advocacy groups have made significant strides with improving society’s understanding of mental health conditions, these efforts tend to operate at a conscious level and have not necessarily altered unconscious stereotypes.

In addition, discrimination based on mental health often operates via unsubstantiated assumptions, such as that an employee with depression or some other mental health condition cannot be relied on to perform certain employment duties.²⁴⁵ The majority of employees feel that disclosing their mental health condition at work would have detrimental consequences.²⁴⁶ Moreover, these employees feel that support at work is lacking or unavailable.²⁴⁷ Discrimination against individuals with mental health conditions in the USA is said to be so severe that even a “solid work history and impressive credentials” will not prevent discrimination, stigmatisation and employment detriment.²⁴⁸

6.4.2.2 The forms of discrimination

When considering the various forms of discrimination, it is important to distinguish between discrimination based on disability and discrimination on other grounds, such as race or gender. This is significant, as there rarely is a situation in which it may be warranted to treat persons differently on the latter grounds, while in circumstances where a disabled individual is unable to discharge the inherent requirements of a job, it may be permissible to treat such a person differently.²⁴⁹

²⁴⁵ Janda 2009:424.

²⁴⁶ Janda 2009:425.

²⁴⁷ Janda 2009:425-426.

²⁴⁸ Janda 2009:426.

²⁴⁹ Tucker and Milani 2004:2.

Both Title VII and the American Constitution prohibit discrimination based on grounds such as race, colour, religion, national origin and sex. These grounds strongly overlap with the listed grounds of unfair discrimination contained in section 6(1) of the South African EEA (as amended). Discrimination in the USA may take place directly or indirectly based on a prohibited ground,²⁵⁰ which is similar to the South African legal position.

The ADA goes further than other civil rights statutes by imposing on employers the affirmative duty to provide reasonable accommodation. Therefore, there are three possible causes of action in relation to a discrimination claim under the ADA, namely disparate treatment, disparate impact and the failure to reasonably accommodate a disability.²⁵¹

6.4.2.3 Specific forms of discrimination: Disparate treatment and disparate impact

Disparate treatment involves becoming aware of, and acting in accordance with, some differentiation.²⁵² The wording “*because of* such individual’s race, colour, religion, sex or national origin” used in Title VII is relevant to an employer’s decision-making process, implying that the reason for the employer’s decision is more significant than the outcome of the decision.²⁵³ This differs from the South African position, where the discriminatory impact is the most relevant, and not the employer’s intention to discriminate. In either circumstance, the unfair discrimination (for whatever reason) will have an adverse impact on the individual/group concerned. The intention element of discrimination, the so-called motive, is what separates intentional discrimination from disparate impact, creating two forms of employment discrimination under Title VII.²⁵⁴

Disparate impact occurs when an employer’s seemingly neutral employment policies or practices, although neutrally applied, have an adverse impact on the members of a protected group, and the policy or practice cannot be linked to job performance or

²⁵⁰ Haggard 2001:63, 67-71; Bonfield 2006:221.

²⁵¹ Hsieh 2014:998. Reasonable accommodation will be discussed in more detail under 6.5 below.

²⁵² Rutherglen 2001:31.

²⁵³ Rutherglen 2001:31.

²⁵⁴ Twomey 1998:6; Rutherglen 2001:32.

business necessity.²⁵⁵ In this instance, the relevant consideration is the impact of the discriminatory conduct, and not the intention to discriminate. A complainant alleging disparate impact need only prove that the employment policy or practice caused the impermissible effect, namely discrimination based on one of the listed grounds.²⁵⁶

6.4.2.4 Employer defences against an employment discrimination claim

The *Civil Rights Act* lists employers, labour organisations and employment agencies as being subject to its provisions, including the prohibition on discrimination. Should these categories of persons engage in discriminatory practices, they will therefore leave themselves open to a discrimination lawsuit and related adverse consequences.²⁵⁷

In the first instance, however, discriminatory conduct by an employer based on one of the prohibited grounds under Title VII will not be considered illegal if it is a so-called BFOQ defence, i.e. “*a bona fide* occupational qualification reasonably necessary to the normal operation of that particular business or enterprise”.²⁵⁸ The Supreme Court has recognised that this defence was meant to be narrowly interpreted, but has given way to a wider interpretation in certain instances.²⁵⁹ The business necessity defence allows an employer to escape liability if the discriminatory practice that serves to exclude certain groups can be shown to relate to job performance.²⁶⁰ These defences are similar to South African employer defences against an allegation of unfair discrimination, namely the defence of inherent requirements of the job as well as the defence of operational requirements. As a result, an employer will be entitled to justify discrimination against an employee because of the employee’s mental disability such as depression if it can be shown that it was related to job performance, or that it was necessary for the normal operation of the employer’s business or enterprise.

Secondly, an employer in the United States may use an affirmative action policy as a defence for discriminating against or excluding certain groups in its employment

²⁵⁵ Twomey 1998:6.

²⁵⁶ Haggard 2001:59.

²⁵⁷ Haggard 2001:51-55.

²⁵⁸ Bonfield 2006:221; Haggard 2001:76.

²⁵⁹ *Dothard v Rawlinson* 433 U.S. 321, 15 FEP 10 1997; Twomey 1998:56.

²⁶⁰ Haggard 2001:92.

policies and practices.²⁶¹ This mirrors the South African defence of affirmative action, with which employers are able to escape liability for employment discrimination.

6.4.2.5 Procedures, remedies and the Equal Employment Opportunity Commission

The EEOC, which has been established under the USA legal framework, warrants special consideration, as this agency is charged with enforcing the ADA as well as publishing guidelines and tracking mental disability claims in the employment realm.²⁶²

The EEOC was born from Title VII of the *Civil Rights Act*.²⁶³ It consists of a five-member commission responsible for making equal employment opportunity policy and approving all litigation in this regard.²⁶⁴ The general counsel of the EEOC bears the duty of organising and carrying out all EEOC enforcement litigation in court.²⁶⁵

Employees who wish to institute a claim under Title VII will first have to lodge their grievance with the EEOC (or the relevant state agency if the jurisdiction so demands), and only once this mandatory process is exhausted, the employee may proceed to court.²⁶⁶

Certain amendments made to the *Civil Rights Act* in 1991 now provide employees with a wide range of remedies for illegal employment discrimination, including compensatory damages, possible punitive damages, attorney's fees, back pay, and injunctive relief demanding that the employee be hired, reinstated, promoted or transferred (with an award of retrospective seniority).²⁶⁷

²⁶¹ Haggard 2001:81.

²⁶² As South Africa does not have any such commission or agency, the establishment of a body modelled on the EEOC it may prove a valuable recommendation for this jurisdiction. This will be expanded on in chapter 8.

²⁶³ Player 1999:38; Twomey 1998:3.

²⁶⁴ Twomey 1998:3.

²⁶⁵ Twomey 1998:3.

²⁶⁶ Employees may approach the court at their own behest, or the EEOC may approach the court on the employee's behalf. See Haggard 2001:4.

²⁶⁷ Haggard 2001:4.

6.4.3 Harassment and workplace bullying

6.4.3.1 Workplace harassment

Recent studies report that up to four million employees in the USA are likely to encounter some form of harassment in employment each year,²⁶⁸ with workplace bullying, discrimination, harassment and abuse of employees constituting extreme examples of poor workplace culture in that jurisdiction.

The harassment principles of anti-discrimination law in the USA apply to all protected classes, including people with disabilities.²⁶⁹ Two distinct forms of discriminatory harassment may be distinguished, namely actions denying tangible job benefits, and the creation or toleration of a hostile or abusive work environment because of the victim's protected status.²⁷⁰ The first instance, namely tangible employment action or the so-called "quid pro quo", constitutes any significant change to the employee's employment conditions and circumstances.²⁷¹ The second instance, namely a hostile work environment, requires the discrimination to create a work environment that is both subjectively and objectively offensive; one that the reasonable person would find abusive and offensive.²⁷² In a case of hostile work environment harassment, a claimant will have to prove that (s)he found the conduct offensive or unwelcome, as well as that (s)he was discriminated against because of his or her vulnerable status as a member of a protected group.²⁷³

Sexual harassment is regarded as the most pervasive and complex form of discriminatory harassment in the USA.²⁷⁴ Generally with sexual harassment, it takes the form of quid pro quo harassment or the creation of a hostile work environment.²⁷⁵ It is significant to note that an employee need not prove that (s)he suffered any economic or psychological harm in these cases.²⁷⁶

²⁶⁸ Viljoen 2013:65.

²⁶⁹ Player 1999:155.

²⁷⁰ Player 1999:155.

²⁷¹ For example hiring, dismissal, promotion, compensation and work assignments. See *Burlington Industries v Ellerth* S.Ct. 1998. Also see Player 1999:156.

²⁷² *Harris v Forklift Systems* S.Ct. 1993. Also see Player 1999:156.

²⁷³ Player 1999:157; 160.

²⁷⁴ Player 1999:155.

²⁷⁵ Smit 2014:142, referring to *Meritor Savings Bank, FSB v Vinson* 477 U.S. 57, 64 1993.

²⁷⁶ *Harris v Forklift Systems*: 126. This position differs slightly from the South African position, where victims who wish to hold their employers directly or vicariously liable in terms of the common law,

The ADA places an obligation on employers to provide a harassment-free work environment for people with disabilities, including mental disabilities such as depression.²⁷⁷ In these cases, employees will not have to prove that they are disabled in terms of the ADA, as would be the case if it were a disability discrimination claim. A reasonable, bona fide belief that the ADA has been violated and that an employee has been harassed because of their mental disability will suffice.²⁷⁸

Persons with mental health conditions are particularly likely to experience hostile work environments, often because co-workers and superiors do not believe that such persons are really disabled and resent any accommodation provided to them.²⁷⁹ In circumstances where an employee's diagnosis becomes known at work, (s)he may be subjected to forms of overt harassment, subtle harassment or belittling.²⁸⁰ In *Ralph v Lucent Technologies*,²⁸¹ for example, an employee had a mental breakdown subsequent to suffering workplace harassment by his superiors and co-workers.²⁸² He was diagnosed with major depression and PTSD.²⁸³ Upon the employee's return to work, the harassment continued, which caused his condition to worsen. Psychiatrists and medical practitioners recommended that the employee only work on a part-time basis.²⁸⁴ This was however not granted, which prompted the employee to institute an injunction, permitting him to return to work with "reasonable accommodation" for his disability.²⁸⁵ The employer argued that it had made attempts to accommodate the employee by providing him with leave, but the court held that the duty to provide reasonable accommodation was a continuing one, not exhausted by one effort.²⁸⁶ The court consequently upheld the employee's request for an injunction to provide him with reasonable accommodation, which was held to have been a reasonable request.²⁸⁷

must prove a recognised psychiatric injury. See for example *Media 24 v Grobler* (discussed in chapter 3).

²⁷⁷ ADA: sec 12203(b).

²⁷⁸ Tucker and Milani 2004:116.

²⁷⁹ Stefan 2000:292.

²⁸⁰ Stefan 2000:292.

²⁸¹ 135 F.3d 166 1st Cir. 1998.

²⁸² The employee suffered sexual harassment by his male co-workers and superiors, who regarded him as a homosexual individual and a child molester, even though neither of these labels was accurate. See *Ralph v Lucent Technologies*: 168.

²⁸³ *Ralph v Lucent Technologies*: 168.

²⁸⁴ *Ralph v Lucent Technologies*: 169.

²⁸⁵ *Ralph v Lucent Technologies*: 167.

²⁸⁶ *Ralph v Lucent Technologies*: 172.

²⁸⁷ *Ralph v Lucent Technologies*: 172.

6.4.3.2 Workplace bullying

Stressful work environments are a significant source of mental illness.²⁸⁸ One such source of stress is the phenomenon of workplace bullying.²⁸⁹ As in other jurisdictions, workplace bullying in the USA has been identified as a significant concern.²⁹⁰ A 2014 study by the Workplace Bullying Institute revealed that over a quarter of Americans (27%) had experienced some form of abusive conduct at work.²⁹¹ This translates into 37 million workers being subjected to this conduct and 65 million employees affected in total.²⁹²

In any of its numerous forms, workplace bullying inflicts damage upon employees and employers alike, resulting in depression and other mental health conditions, such as PTSD.²⁹³ According to Yamada, there is also ample evidence of the dignitary harm caused by workplace bullying.²⁹⁴

Although the phenomenon of workplace bullying and its harmful effects have been present in American workplaces for a long time, this concept entered the American vocabulary in the late 1990s only.²⁹⁵ Namie and Namie coined the term “workplace bullying” in the USA and established the foundation of the Workplace Bullying Institute.²⁹⁶ Bullying in the USA is considered to be “a form of interpersonal aggression or hostile, anti-social behaviour in the workplace”.²⁹⁷

A 2012 survey by the Workplace Bullying Institute revealed the following in relation to workplace bullying and mental health in the USA:²⁹⁸

- Anxiety is the most common psychological symptom of workplace bullying reported by 80% of bullied victims. Panic attacks afflict 52%.
- Half (49%) of targets reported being diagnosed with clinical depression.

²⁸⁸ Janda 2009:421.

²⁸⁹ Harthill 2011:254.

²⁹⁰ Harthill 2008:248, 256.

²⁹¹ Workplace Bullying Institute 2014. <http://www.workplacebullying.org/wbiresearch/wbi-2014-us-survey/>. Accessed on 28/09/2015.

²⁹² Workplace Bullying Institute 2014. <http://www.workplacebullying.org/wbiresearch/wbi-2014-us-survey/>. Accessed on 28/09/2015.

²⁹³ Yamada 2009:562.

²⁹⁴ Yamada 2009:562.

²⁹⁵ Smit 2014:94.

²⁹⁶ Smit 2014:102.

²⁹⁷ Smit 2014:102, referring to LaVan and Martin 2008:148.

²⁹⁸ Workplace Bullying Institute 2012. <http://www.workplacebullying.org/2012/08/09/2012-d>. Accessed on 01/09/2015.

- With respect to PTSD, 30% of respondents reported being diagnosed with it; 19% diagnosed with Acute Stress Disorder. Targets reported much higher rates of PTSD symptoms: forms of Hypervigilance (ranged from 83% to 59%), Intrusive thoughts (50%), but dissociation was only 14%.

These results indicate a significant correlation between workplace bullying and mental health problems in employment.

The USA legal framework does not provide any express legal protection from workplace bullying.²⁹⁹ A victim of workplace bullying who has suffered psychological harm may have a viable claim if the bullying amounts to cognisable harassment based on one of the protected characteristics listed in Title VII, or if the bullied employee can establish a common law tort claim for intentional infliction of emotional distress.³⁰⁰ However, as it is a form of “status-blind harassment”, this will not always be possible. Due to this lack of a specific legal remedy for victims of workplace bullying, bullied employees have only been successful in 15% of cases brought before the judiciary on this ground.³⁰¹

Where workplace bullying creates or exacerbates a disability, victims may be protected by the ADA.³⁰² Therefore, if an employee can establish that workplace bullying conduct caused him or her to develop a legally protected mental disability, or if the mental disability has been exacerbated by such conduct, the employee may claim protected status under the ADA.

There has been significant progress in the USA to enact legislation to govern workplace bullying. In this regard, Yamada has proposed the Healthy Workplace Bill, which has been introduced in many states, but has not yet managed to become law.³⁰³ The fact that the bill is still being considered in many states indicates how serious the phenomenon of workplace bullying really is.³⁰⁴ The enactment of the bill would have the effect of also extending protection to victims of workplace bullying who develop mental health conditions as a result.

²⁹⁹ Harthill 2008:260.

³⁰⁰ Harthill 2010:1263; Harthill 2008:260.

³⁰¹ Bible 2012:37.

³⁰² Bible 2012:41.

³⁰³ See the Healthy Workplace Bill website at <http://www.healthyworkplacebill.org/>. Accessed on 01/09/2015. Also see Harthill 2010:1263.

³⁰⁴ Smit 2014:96.

6.4.4 Discrimination under the *Americans with Disabilities Act*

A primary driving force behind the enactment of the ADA was the historical patterns of discrimination, exclusion and isolation suffered by persons with disabilities. At its core, Title I of the ADA is about protecting the disabled from discriminatory employment action based on stereotypes and fear.³⁰⁵ Discrimination against these individuals occurs in various forms, including outright intentional exclusion, the failure to make modifications to existing facilities and employment practices, exclusionary qualification criteria and standards, and relegation to lesser employment positions and benefits.³⁰⁶

Although the EEOC originally coded all discrimination claims by people with mental disabilities under a single heading, it now differentiates between these claims based on diagnoses.³⁰⁷ The prevalence of claims alleging discrimination based on mental disability under the ADA has been significant. The percentage prevalence of these discrimination claims is reflected in the table below based on specific mental health conditions:³⁰⁸

Impairment	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Anxiety disorders	2,4	2,0	2,1	3,2	4,1	4,4	4,5	5,1	5,5	5,8
Depression	5,4	6,6	5,5	6,1	6,5	6,3	6,6	6,8	6,3	6,4
Manic depressive disorder	2,7	2,8	3,1	3,4	4,1	3,9	3,4	3,3	3,4	2,7

³⁰⁵ EEOC v Amego Inc.: 142.

³⁰⁶ Tucker and Milani 2004:1.

³⁰⁷ Stefan 2000:277.

³⁰⁸ ADA Charge Data Impairments/Bases – Merit Factor Resolutions FY 1997 - FY 2014. EEOC 2014. <http://eeoc.gov/eeoc/statistics/enforcement/ada-merit.cfm>. Accessed on 20/08/2015.

PTSD	0,8	1,1	0,9	1,4	1,6	1,5	1,9	2,4	2,1	2,2
Schizophrenia	0,6	0,4	0,4	0,4	0,4	0,3	0,3	0,2	0,5	0,2
Other	1,0	1,3	1,1	1,4	1,6	1,1	1,4	1,4	1,3	1,4

These results indicate that the majority of claims based on mental health conditions brought under the ADA were on the basis of depression. The results also suggest that discrimination based on depression has consistently increased over the ten-year period indicated above. The statistics indicate that mental health conditions, especially depression, are a prevalent concern in employment, and the increasing trend of these claims points to a strong possibility of a continued intensification in these claims in future. This makes effective legal protection and legal certainty in respect of mental health conditions essential in the labour sphere.

The following constitutes actionable discrimination in terms of the ADA (as amended):³⁰⁹

(a) General rule: No covered entity shall **discriminate against a qualified individual on the basis of disability** in regard to **job application procedures, the hiring, advancement, or discharge** of employees, employee **compensation, job training, and other terms, conditions, and privileges of employment**.

(b) Construction: As used in subsection (a) of this section, the term "**discriminate against a qualified individual on the basis of disability**" includes

(1) **limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;**

(2) **participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited** by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

³⁰⁹ ADA: sec 12112, own emphasis added.

(3) **utilizing standards, criteria, or methods** of administration

(A) that **have the effect of discrimination on the basis of disability**;

(B) that **perpetuates the discrimination of others** who are subject to common administrative control;

(4) **excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association**;

(5)(A) **not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability** who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) **denying employment opportunities** to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) **using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability** or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

In terms of subsection (a) above, only discrimination against qualified individuals with mental disabilities will satisfy the legal requirement. Consequently, employees with mental health conditions must be able to perform the essential functions of the particular employment position in order to seek legal protection against disability discrimination based on their mental disability. Discrimination based on an individual's mental disability is prohibited at various stages of the employment process, including during application, appointment, promotion and dismissal.

In subsection (b), the ADA broadly lists various actions that may constitute disability discrimination. These actions appear to cover all employment policies and practices as well as the denial of equal employment opportunities. The denial of reasonable

accommodation for an employee's mental disability is also explicitly listed as a form of prohibited discrimination.³¹⁰

These protections against discrimination are phrased so as to prohibit irrational discrimination, and are relatively deferential to an employer's business needs.³¹¹ In essence, employers are prohibited from making selections that are not job-related and bear no relationship to business necessity.³¹²

6.4.5 Concluding remarks

It has been acknowledged that USA anti-discrimination law will not be effectively interpreted or implemented until attitudes towards disability and mental health conditions change.³¹³ Discrimination, stigmatisation and prejudice on the basis of mental health conditions, especially depression, are prevalent in the USA. The amendment of the ADA, however, has opened the door for victims of employment discrimination on the basis of their mental health conditions to seek protection and enforce their rights to equality and non-discrimination, subject to the caveat that they are able to satisfy the legal requirements discussed above.

6.5 Mental health and reasonable accommodation

6.5.1 Introductory remarks

In analysing reasonable accommodation relating to mental health under the US legal framework, this section will first investigate the concept of reasonable accommodation as well as the various legislative instruments governing such accommodation in relation to mental health in the USA, with specific reference to depression. In an attempt to identify lessons for the South African position in this regard, the accommodation principle in relation to depression in the United States, as well as the limitations on this duty, will then be studied.

³¹⁰ Reasonable accommodation on the basis of mental health under the USA legal framework is evaluated extensively in 6.5 below.

³¹¹ Stefan 2000:286.

³¹² Stefan 2000:286.

³¹³ Emens 2012b:1387.

6.5.2 The concept of reasonable accommodation in the United States of America

Although the consideration and trajectory of reasonable accommodation today spans the international stage, the United States is considered the birthplace of reasonable accommodation.³¹⁴ After it originated in the USA, it was gradually internationalised until its entrenchment in the UN Disability Convention, from where it has spread to many foreign jurisdictions by means of international diffusion.³¹⁵

The concept of reasonable accommodation was first developed in equality jurisprudence by the American and Canadian judiciaries.³¹⁶ The foundation of this concept in the USA emanates from judicial precedent interpreting Title VII.³¹⁷ Early American jurisprudence on reasonable accommodation was construed rather narrowly by the Supreme Court, which limited it to circumstances where the employer would not incur more than a “*de minimis*” cost in accommodating the employee.³¹⁸ However, today, in terms of American disability legislation, the failure to provide a suitably qualified and legally disabled individual with reasonable accommodation amounts to discrimination.³¹⁹ It constitutes an “active” rather than a “passive” form of non-discrimination that aims to ensure equal opportunity instead of creating a system of preference.³²⁰

Reasonable accommodation measures are workplace or job modifications that enable an employee with a mental disability to successfully perform the job in question, or to achieve equal employment opportunity.³²¹ In essence, the American interpretation of reasonable accommodation allows an employee with a mental disability to – either

³¹⁴ Mégret and Msipa 2014:254, 255.

³¹⁵ Mégret and Msipa 2014:254.

³¹⁶ Pretorius *et al.* 2014:7-9.

³¹⁷ Reasonable accommodation was originally developed to recognise religious diversity in the employment domain. It aimed to allow employees who could not work on normal working days because of religiously significant events to work on alternative days without facing dismissal. See Pretorius *et al.* 2014:7-9.

³¹⁸ Ngwena 2004:179-180.

³¹⁹ This position will be elaborated on below.

³²⁰ Accommodating individuals with disabilities provides them with the means to participate in society and the workplace. See Weisman 1996:1235, 1236. Also see *Pegues v Emerson Electronics* 913 F.Supp. 976 1996.

³²¹ Center 2011, in Schultz and Rogers (eds) 2011:6.

presently or in the immediate future – perform the essential functions of his or her employment position.³²²

Reasonable accommodation transcends a formal approach to equality, in terms of which all employees and job applicants would have been treated in the same manner, irrespective of their individual medical limitations.³²³ Instead, it points to a substantive approach to equality in American disability jurisprudence. In accordance with the substantive equality hierarchy, the ADA focuses primarily on reasonable accommodation as the foremost legal strategy for promoting equality in the disability context.³²⁴ However, the USA legal framework requires accommodation, as a form of substantive equality, not to be unlimited so as to advance equality for all as well as serve other public interests such as economic productivity. The rationale is that if accommodation is too costly to overall social well-being, these measures run the risk of exacerbating rather than redressing inequality.³²⁵

6.5.3 Reasonable accommodation under the *Americans with Disabilities Act*

The ADA goes further than most anti-discrimination employment statutes, since it requires the implementation of affirmative action measures in the form of reasonable accommodation for people with physical and mental disabilities.³²⁶ The duty to provide reasonable accommodation has become the defining characteristic of modern disability discrimination statutes such as the ADA and distinguishes these from other statutes dealing with discrimination based on, for example, sex and race.³²⁷

Employers in the USA have faced some difficulty in accommodating mental disabilities, primarily because mental health conditions may present as behaviours that are inappropriate for the workplace or violate workplace conduct rules.³²⁸ Significantly, however, the ADA does not require an employer to accommodate an employee with

³²² Befort 2002:459.

³²³ Ngwena 2007:128.

³²⁴ McCluskey 2010:118.

³²⁵ McCluskey 2010:121.

³²⁶ Bonfield 2006:222.

³²⁷ Weber 2010:1121-1122.

³²⁸ These behaviours may include yelling, cursing and hitting. See Vroman 2013:165.

a mental disability by accepting behaviour that would normally be punished if it were committed by a non-disabled employee.³²⁹

Employees with mental health conditions are said to face the following three primary hurdles in requesting reasonable accommodation:³³⁰

- In the first place, there may be no visible signs of illness. An employee with a mental health condition may be able to control his or her behaviour, especially during periods of remission. Ongoing treatment may also mask the symptoms of the condition.
- Secondly, it may be more difficult for employees with a mental health condition to approach their employer and disclose the condition. This may be because several psychiatric impairments limit a person's ability to interact with others. It may also be due to the stigma and stereotypes attached to mental illness.³³¹
- Thirdly, employees may not want to acknowledge to themselves that they are disabled and suffer from a mental health condition. Denial is a common feature of many mental health conditions.

The term “reasonable” suggests that the obligation to provide reasonable accommodation is not unlimited.³³² An accommodation is not regarded as reasonable if it imposes undue hardship on the employer. Employers have however been placed under a duty to accommodate employees with disabilities, which can range from adapting existing facilities to restructuring jobs.³³³ In the case of *U.S. Airways Inc. v Barnett*,³³⁴ the Supreme Court held that a “reasonable” accommodation was one that “seems reasonable on its face, i.e. ordinarily and in the run of cases”.³³⁵ Subsequent to this judgment, the EEOC altered its position, stating that an accommodation must be both “reasonable and effective”.³³⁶ In *Borkowski v Valley Cent School District*,³³⁷

³²⁹ *Breiland v Advance Circuits Inc.* 976 F. Supp. 858 D. Minn. 1997: 863; Vroman 2013:166.

³³⁰ Danforth 1999:678-679.

³³¹ Disclosure of a mental disability to an employer, which is required to invoke the protections of the ADA, may in some cases provoke the very discrimination that the ADA aims to prevent. See Mastroianni and Miaskoff 1997:723-724.

³³² Bonfield 2006:222.

³³³ Bonfield 2006:222.

³³⁴ 535 U.S. 391 2002.

³³⁵ *U.S. Airways Inc. v Barnett*: 401. Also see Collins and Phillips 2011:488.

³³⁶ Collins and Phillips 2011:489, referring to EEOC Notice 915.002:10.

³³⁷ 63 F.3d 131 2nd Cir. 1995.

the court held that “reasonable” was a relative term, assessing the desirability of a particular accommodation according to the consequences that it would produce.³³⁸

The employer may choose the accommodation to be provided, and may select the less expensive option or the option that is easier to provide, as long as it is effective.³³⁹ A disabled individual may refuse to accept an accommodation measure offered by the employer, although this may render the applicant or employee not suitably qualified for the relevant position.³⁴⁰ Yet, it should be noted that accommodation is not limited to those measures that are required to enable an employee to perform the essential functions of a job, but extends to all functions that are “job-related”.³⁴¹

The ADA defines reasonable accommodation as follows:

(A) [M]aking existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) **job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations** for individuals with disabilities.³⁴²

The EEOC defines the term “accommodation” as “any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities”.³⁴³ The concept of reasonable accommodation encompasses the following:³⁴⁴

(1) The term *reasonable accommodation* means:

- (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
- (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or
- (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

³³⁸ *Borkowski v Valley Cent School District*: 138.

³³⁹ Tucker and Milani 2004:98.

³⁴⁰ Tucker and Milani 2004:98.

³⁴¹ Collins and Phillips 2011:490.

³⁴² ADA: sec 12111(9), own emphasis added.

³⁴³ Danforth 1999:669.

³⁴⁴ *Regulations to Implement the Equal Employment Provisions of the ADA*: sec 1630(2)(o).

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

(4) A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under the “actual disability” prong (paragraph (g)(1)(i) of this section), or “record of” prong (paragraph (g)(1)(ii) of this section), but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the “regarded as” prong (paragraph (g)(1)(iii) of this section).

The list of possible reasonable accommodation measures is not exhaustive, and other adjustments and modifications may therefore be identified and implemented, given the specific circumstances. Importantly, also, the accommodation measures suggested in the list will not be reasonable in every single situation.³⁴⁵ What will constitute an appropriate accommodation measure in the given circumstances must be established by means of a factually based case-by-case approach, taking all the relevant considerations into account.³⁴⁶

Generally, individuals with mental health conditions have been noted to request accommodation measures that fall into three categories, namely transfers to other employment positions, a change in work hours, or additional leave.³⁴⁷ The accommodation most requested in these cases is for a transfer. The ADA and the EEOC recognise this as a legitimate accommodation measure, provided that an alternative position is available or will become available soon.³⁴⁸ Stefan notes that a transfer generally does not require any additional expenditure or funds on the part of the employer; yet, in the past, the courts have shown a tendency to reject this as an accommodation measure for people with mental health conditions, viewing it as unreasonable.³⁴⁹

Since many mental health conditions may be triggered or exacerbated by environmental stressors, it is important for employers to reduce stress in the workplace.³⁵⁰ Vroman indicates that the accommodation of an individual with a mental

³⁴⁵ Tucker and Milani 2004:94.

³⁴⁶ Tucker and Milani 2004:94.

³⁴⁷ Vroman 2013:166. The US judiciary has shown a tendency to reject these requests for reasonable accommodation, as they usually stem from difficulties in interacting with a superior in the business. See Stefan 2000:295. Also see Turner 2004:323.

³⁴⁸ *Regulations to Implement the Equal Employment Provisions of the ADA: sec 1630(2)(o)(2)(ii)*.

³⁴⁹ Stefan 2000:295-296, referring to *Pack v Kmart* 166 F.3d 1300 10th Cir. 1999: 1304[4].

³⁵⁰ Vroman 2013:167. Also see Yamada 2009:550.

health condition does not have to be onerous and may be accomplished in many cases by simply eliminating the false perceptions and stereotypes about these conditions that employers, supervisors and co-employees may harbour.³⁵¹

6.5.3.1 The interactive process in selecting appropriate measures of reasonable accommodation

The EEOC regulations envision that an employer should embark on an informal, interactive and flexible process with an employee to determine appropriate reasonable accommodation for the specific individual's mental disability.³⁵² During the interactive process, the employer should take a problem-solving approach to analyse the specific employment position, determine the essential functions, consult with the disabled individual regarding the limitations posed by his or her disability and possible accommodation that could overcome those limitations, and select the most appropriate accommodation measure.³⁵³

The failure to make reasonable accommodation for the *known* mental impairments of a suitably qualified individual with a disability amounts to discrimination under the ADA.³⁵⁴ Consequently, an employer must be aware of the individual's disability in order to provide the employee with reasonable accommodation.³⁵⁵ This, however, may be problematic for persons with mental health conditions, as disclosing³⁵⁶ their condition may in itself be traumatic, and they may fear discrimination once their

³⁵¹ Vroman 2013:167.

³⁵² Befort 2002:445.

³⁵³ Tucker and Milani 2004:97.

³⁵⁴ ADA: sec 12111(b)(5); Mikulik 2007:8, own emphasis added. Also see *Enica v Principi* 544 F.3d 328 1st Cir. 2008: 340, where the court held that if an employee did not communicate his or her disability and its limitations to the employer, the employer could not be held liable for failing to accommodate the employee.

³⁵⁵ See *Beck v University of Wisconsin Board of Regents* 75 F.3d 1130 7th Cir. 1996, where the court confirmed that the employee had a duty to inform the employer that (s)he needed reasonable accommodation, as well as the type of accommodation needed. Also see *Lousegod v Akzo Nobel Inc.* 178 F.3d 731 5th Cir. 1999: 736, which confirmed the responsibility to enter into an interactive, bilateral process, since each party has information that the other does not and cannot easily obtain.

³⁵⁶ Disclosure refers to revealing information and details about a diagnostic label, mental health condition or psychiatric disability to someone in the workplace. Disclosure of a mental health condition may take many forms, namely full disclosure, selective disclosure, strategically timed disclosure, targeted disclosure, non-disclosure, inadvertent disclosure and forced disclosure. See MacDonald-Wilson *et al.* 2011, in Schultz and Rogers (eds) 2011:192-195.

condition is known.³⁵⁷ In *Conneen v MBNA Bank, N.A.*,³⁵⁸ an employee was diagnosed with depression and placed on antidepressants, which caused morning drowsiness.³⁵⁹ In order to accommodate the employee, the employer temporarily adjusted the employee's starting time for work, which was changed back after a few months with the employee's agreement.³⁶⁰ Thereafter, the employee failed to report for duty on time on several occasions, which resulted in her dismissal.³⁶¹ The court in this case held that the employee had a duty to inform the employer of the need for further accommodation (an adjusted starting time), which she had failed to do. Consequently, the dismissal was affirmed and the employer's motion for summary judgment upheld.

Although the employee in this particular case was unsuccessful, it illustrates the importance of disclosing the need for reasonable accommodation so as to obligate the employer to consider accommodation measures. The employee will have to provide information specific enough for the employer to understand that the employee has a mental disability, as well as the nature of the condition.³⁶² Where an employee requests reasonable accommodation, the employer may request documented proof of an employee's disability if the disability is not obvious.³⁶³ In most cases involving mental health conditions, the employee's disability will not be obvious, and (s)he may thus be required to provide medical evidence of the diagnosis.

Requests for reasonable accommodation need not be made before the employee assumes duty, but can be made at any time.³⁶⁴ However, it is in the employee's best interest to make the request before performance of duties commences in order to avoid conduct and performance-related concerns.³⁶⁵

³⁵⁷ Hsieh 2014:1010. Empirical research revealed that up to 71% of employees avoided disclosing their mental health conditions to their employers for fear of discrimination and adverse employment action. See Center 2011, in Schultz and Rogers (eds) 2011:5; MacDonald-Wilson *et al.* 2011, in Schultz and Rogers (eds) 2011:192.

³⁵⁸ 334 F.3d 318 3d Cir. 2003.

³⁵⁹ *Conneen v MBNA Bank, N.A.*: 321.

³⁶⁰ *Conneen v MBNA Bank, N.A.*: 322-324.

³⁶¹ *Conneen v MBNA Bank, N.A.*: 322-324.

³⁶² Center 2011, in Schultz and Rogers (eds) 2011:10.

³⁶³ Tucker and Milani 2004:94.

³⁶⁴ Center 2011, in Schultz and Rogers (eds) 2011:10.

³⁶⁵ Center 2011, in Schultz and Rogers (eds) 2011:10.

The employer has an affirmative duty to make a “reasonable effort” to determine through an interactive process the accommodation required by a disabled individual.³⁶⁶ The USA judiciary has also confirmed the importance of the interactive process in determining appropriate reasonable accommodation: In *Zivkovic v S. Cal. Edison Co.*,³⁶⁷ the ninth-circuit court confirmed that the interactive process was mandatory, requiring direct communication between the employer and the employee to explore in good faith possible accommodation, consider the employee’s request, and offer accommodation that is reasonable and effective.³⁶⁸

It needs to be highlighted that the ADA provides a right to reasonable accommodation, which may not necessarily be the employee’s preferred accommodation. Where a few potentially effective options exist, the employer should give primary consideration to the employee’s preferred accommodation measure.³⁶⁹ The employer, however, retains the discretion to choose between effective accommodation measures and may select the option that is less financially burdensome or inconvenient to provide.³⁷⁰ As discussed earlier, *Holland v Shinseki* involved an employee who alleged that the increased scrutiny she had received during her employment caused her to develop a number of medical ailments and disabilities, including anxiety, loss of concentration, weight loss, insomnia, depression and severe headaches.³⁷¹ The employee submitted a formal request for reasonable accommodation in the form of one day off per week as sick leave or leave without pay in order to recover from the sleep deprivation she suffered due to insomnia, depression, panic disorder, anxiety, and acute stress disorder. The employer refused this request,³⁷² and the employee instituted a claim against the employer, alleging discrimination on the basis of her disability and the failure to provide reasonable accommodation.³⁷³ It was held that genuine issues of material fact existed as to whether the employee’s depression, anxiety and acute stress substantially limited her in the major life activity of sleeping, as she was only

³⁶⁶ *Regulations to Implement the Equal Employment Provisions of the ADA*: sec 1630(2)(o)(3).

³⁶⁷ 302 F.3d 1080 9th Cir. 2002.

³⁶⁸ *Zivkovic v S. Cal. Edison Co.*: 1089. Also see Center 2011, in Schultz and Rogers (eds) 2011:13; *Barnett v U.S. Airways* 228 F.3d 1105 9th Cir. 2000: 1114-1115; *Bultemeyer v Fort Wayne Community School* 100 F.3d 1281 7th Cir. 1996: 1285.

³⁶⁹ Collins and Phillips 2011:486; Center 2011, in Schultz and Rogers (eds) 2011:9.

³⁷⁰ Collins and Phillips 2011:486.

³⁷¹ *Holland v Shinseki*: I(A).

³⁷² *Holland v Shinseki*: I(C).

³⁷³ *Holland v Shinseki*: I.

able to sleep one hour per night on average.³⁷⁴ However, it was also stated that the employer had indeed made certain attempts to accommodate the employee and was not obligated to grant her her preferred accommodation measure.³⁷⁵ The employee's claim was consequently dismissed.³⁷⁶

This case highlights that an employer is obligated to provide an accommodation measure that is reasonable, but is under no duty to provide the employee with his or her preferred accommodation. The employer retains the discretion to elect the most effective accommodation, as long as it is reasonable. However, granting the employee's preferred accommodation does not necessarily mean that the employer has discharged its burden to provide reasonable accommodation. This was confirmed in *Feliberty v Kemper Corp.*,³⁷⁷ where it was found that the fact that the employer's proposed accommodation adhered to the employee's request did not make it reasonable, and that the employer had some responsibility to identify an appropriate and effective accommodation measure.³⁷⁸

The employer should essentially consider the following four informal steps in the interactive process to identify and provide reasonable accommodation:³⁷⁹

- *Identify barriers to equal opportunity.* This step includes identifying and distinguishing between essential and non-essential job functions and aspects of the work environment of the relevant position. Cooperating with the disabled employee, the employer must identify the abilities and limitations of the individual as well as the tasks or aspects of the work environment that limit the employee's ability to function effectively.
- *Identify possible accommodation.* The search for possible accommodation measures must begin with consulting the disabled individual.
- *Assess the reasonableness of each accommodation in terms of effectiveness and equal opportunity.* The possible accommodation should be "reasonable" in

³⁷⁴ *Holland v Shinseki*: III(A)(1).

³⁷⁵ *Holland v Shinseki*: III(A)(4).

³⁷⁶ *Holland v Shinseki*: III(A)(4).

³⁷⁷ 98 F.3d 274 7th Cir. 1996.

³⁷⁸ *Feliberty v Kemper Corp.*: 280.

³⁷⁹ Collins and Phillips 2011:482-483.

the sense that it does not impose undue hardship on the operation of the employer's business.

- *Implement the accommodation measure(s).* The most appropriate accommodation, which does not impose undue hardship on the employer, should be implemented to accommodate the disabled individual.

If the consultation process with the disabled individual does not reveal possible appropriate accommodation measures, the employer should seek guidance from the EEOC or other appropriate institutions.³⁸⁰ Medical evidence and the recommendations of mental health-care professionals concerning suggested accommodation measures for mental health conditions will be particularly helpful in evaluating an employee's request for reasonable accommodation.³⁸¹

A final important observation is that while employers carry the burden of having to accommodate an employee with a mental disability, an employee who fails to participate in the interactive process, or who unreasonably rejects reasonable accommodation by the employer, may lose his or her rights under the ADA.³⁸²

6.5.3.2 Employer defences to avoid the duty of reasonable accommodation

The undue hardship defence

While employers are obligated to make reasonable accommodation for people with disabilities, they are exempted from doing so where the accommodation would be "unreasonable" or would impose "undue hardship" on the employer's business.³⁸³ In the reasonable accommodation context, the term "undue" generally means disproportionate, improper, inordinate, excessive or oppressive, and is in some way significant.³⁸⁴ In accommodating an employee with a mental disability, some form of

³⁸⁰ Tucker and Milani 2004:97.

³⁸¹ Turner 2004:323; Center 2011, in Schultz and Rogers (eds) 2011:13; *Prilliman v United Airlines Inc.* 53 Cal. App. 4th Cir. 935 1997: 950.

³⁸² Center 2011, in Schultz and Rogers (eds) 2011:13. Also see *Stewart v Happy Herman's Cheshire Bridge Inc.* 117 F.3d 1278 11th Cir. 1197: 1286-1287.

³⁸³ ADA: sec 12111(10). Also see Danforth 1999:671; Tucker and Milani 2004:99; Concannon 2012:96.

³⁸⁴ Abbas 2014:7.

hardship is expected, but only “undue hardship” can remove the duty of accommodation.³⁸⁵

The pre-amended ADA required that the determination be made in terms of all the relevant factors, including the cost of the accommodation, the size of the entity and the entity’s financial resources.³⁸⁶ The ADA defined undue hardship as follows:³⁸⁷

- (A) In general the term “undue hardship” means **an action requiring significant difficulty or expense**, when considered in light of the factors set forth in subparagraph (B).
- (B) Factors to be considered[:] In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include
 - (i) the nature and cost of the accommodation needed under this chapter;
 - (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
 - (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
 - (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

The “undue hardship” analysis is a factually based inquiry that focuses on the effects of the accommodation on the employer.³⁸⁸ Although the “undue hardship” analysis focuses on the financial burden suffered by the employer, consideration is not limited to financial factors.³⁸⁹ However, the so-called cost analysis will be highly relevant in establishing whether an accommodation imposes undue hardship on the employer.³⁹⁰ The cost for the employer must be more than a *de minimis* burden before the undue hardship defence will be satisfied.³⁹¹ Each case should however be considered individually and on its own merit.

In relation to the impact of the accommodation on other employees, the undue hardship test will not be satisfied if the disturbance to them results from prejudice

³⁸⁵ Abbas 2014:7.

³⁸⁶ Concannon 2012:96.

³⁸⁷ ADA: sec 12111(10). Also see Danforth 1999:671; Tucker and Milani 2004:99; Concannon 2012:96.

³⁸⁸ Danforth 1999:671.

³⁸⁹ Danforth 1999:671.

³⁹⁰ Mégret and Msipa 2014:269, referring to *Vande Zande v Wisconsin Department of Administration* 44 F.3d 538 7th Cir. 1995.

³⁹¹ Tucker and Milani 2004:100.

towards or fear of the individual's disability instead of the provision of the accommodation itself.³⁹² The accommodation will also not constitute undue hardship if it affects other employees' morale without influencing their ability to perform their employment duties.³⁹³

The establishment of undue hardship or a disproportionate burden is thus a delicate balancing process, and the considerations that will be relevant in making this determination will vary from case to case.³⁹⁴

The direct threat defence

According to the ADA, an employer may defend against a discrimination claim by stating that the employee in question poses a risk to the health and safety of other individuals in the workplace.³⁹⁵ "Direct threat" is defined as "a significant risk to the health and safety of others that cannot be eliminated by reasonable accommodation".³⁹⁶

The determination of whether an individual poses a direct threat is based on an objective "individualised assessment" of the employee's ability to perform the essential functions of the employment position in a safe manner, based on "reasonable medical judgement" and the most recent medical knowledge and objective evidence regarding the individual's impairment.³⁹⁷

Importantly, although this defence was originally drafted to exclude employees with contagious diseases, it was amended shortly before the enactment of the ADA to focus specifically on psychiatric disabilities.³⁹⁸ The defence is applicable in cases involving mental health conditions, as some of the symptoms may pose a health and safety risk to others in the business. Employers are consequently not expected to employ or retain employees whose mental health conditions pose a health and safety risk to others where the risk cannot be eliminated by reasonable accommodation. In the case

³⁹² Tucker and Milani 2004:100.

³⁹³ *Regulations to Implement the Equal Employment Provisions of the ADA*: sec 1630(15). Also see Tucker and Milani 2004:100.

³⁹⁴ Mégret and Msipa 2014:269.

³⁹⁵ ADA: sec 12113(b).

³⁹⁶ ADA: sec 12111(3).

³⁹⁷ Hsieh 2014:997; Danforth 1999:672.

³⁹⁸ Stefan 2000:296.

of *Palmer v Circuit Court of Cook County*,³⁹⁹ for example, an employee was diagnosed with major depression and delusional paranoid disorder.⁴⁰⁰ Her employment was terminated after she had made various telephone calls to the business, accusing her supervisor of harassment and making a series of violent threats against her.⁴⁰¹ The court in this case held that there was no evidence that the employee's employment had been terminated because of her mental illness, but rather because of the violent threats that she had made against her supervisor.⁴⁰² Clearly, therefore, if an employer dismisses an employee for engaging in unacceptable behaviour, the fact that the behaviour may have been caused by a mental health condition does not present an issue under the ADA. This is because the ADA does not require an employer to retain a potentially violent employee.⁴⁰³

Also worth noting is that employers are obligated in terms of the *Federal Occupational Health and Safety Act* of 1970 (FOSA) to ensure safe and healthy working conditions for working men and women.⁴⁰⁴ In terms of this statutory requirement, employers will have to ensure the safety of others in the workplace, including protecting others from people with mental health conditions that pose a threat to health and safety at work.

6.5.3.3 Components of effective reasonable accommodation for mental health conditions

The following components may be critical in creating effective reasonable accommodation for employees with mental health conditions such as depression:⁴⁰⁵

- Identifying the need for accommodation before performance problems arise;
- Classifying what an employee needs in order to perform a job's essential functions;
- Looking for solutions that incorporate ideas from the employee, the supervisor, and other resources inside and outside the company;
- Selecting or designing accommodations best suited to the needs of both the employee and the employer;
- Using an even-handed process for developing accommodations, such as establishing a review panel to assure consistent and fair decisions;
- Being flexible and willing to try alternatives;
- Using a conflict resolution mechanism to handle difficulties that may arise regarding accommodations;
- Maintaining records about accommodations that have been implemented; and

³⁹⁹ 117 F.3d 351 7th Cir. 1997.

⁴⁰⁰ *Palmer v Circuit Court of Cook County*: 352.

⁴⁰¹ *Palmer v Circuit Court of Cook County*: 352.

⁴⁰² *Palmer v Circuit Court of Cook County*: 352.

⁴⁰³ *Palmer v Circuit Court of Cook County*: 352.

⁴⁰⁴ FOSA: preamble.

⁴⁰⁵ Zuckerman 1993:311.

- Stressing on-going communication, including periodic review and assessment of an accommodation.

Zuckerman notes that if the abovementioned components are implemented, employers will find that accommodating employees with mental difficulties will be a much less complex and less expensive process than anticipated. Many accommodation measures for these individuals simply require observation, flexibility and good management skills.⁴⁰⁶

6.5.3.4 Measures of reasonable accommodation for mental health conditions

There is no finite or exhaustive list regarding the types of workplace adjustment that may constitute reasonable accommodation, as the nature of an accommodation is limited only by the creativity of the employer and the employee.⁴⁰⁷ The EEOC guidelines do however stipulate certain specific reasonable accommodation measures, as quoted in 6.5.3 above.⁴⁰⁸

Possible accommodation measures for employees with mental health conditions in the USA include altering the work environment, flexible scheduling, job restructuring, job training, developing work plans, feedback, and on-the-job support.⁴⁰⁹ These measures are supported and expanded on as follows by Center:⁴¹⁰

- *Leave of absence.* Persons with mental disabilities frequently request this form of accommodation. As is the case with other accommodation measures, there must be a reasonable belief that the leave will be effective in accommodating the employee. However, once the employee's leave starts to impose undue hardship, the employer may end the leave and replace the employee. In *Santandreu v Miami Dade County*,⁴¹¹ for example, an employee with diagnosed depression requested medical leave of absence from work.⁴¹² However, he exhausted his sick leave and was informed that his employment would be terminated if he did not return to work, which then happened.⁴¹³ The employee

⁴⁰⁶ Zuckerman 1993:311.

⁴⁰⁷ Center 2011, in Schultz and Rogers (eds) 2011:14.

⁴⁰⁸ *Regulations to Implement the Equal Employment Provisions of the ADA*: sec 1630(2)(o).

⁴⁰⁹ Zuckerman 1993:315-317.

⁴¹⁰ Center 2011, in Schultz and Rogers (eds) 2011:14-23.

⁴¹¹ No. 11-15951 U.S. App. 11th Cir. 2013.

⁴¹² *Santandreu v Miami Dade County*: I.

⁴¹³ *Santandreu v Miami Dade County*: I.

filed a disability discrimination lawsuit against the employer on the basis that it had failed to accommodate him.⁴¹⁴ The court held that the employee failed to prove that additional leave would have enabled him to return to work within a reasonably definite period of time.⁴¹⁵ It was further held that while additional leave may constitute a measure of reasonable accommodation, the ADA did not require an employer to provide leave indefinitely because the employee was uncertain about the duration of his condition.⁴¹⁶ The employee in this case could not demonstrate that he would be able to return to work within a reasonable time.⁴¹⁷ The court concluded that because the employee was unable to show that he would be able to perform the essential functions of the job at some stage in the reasonably foreseeable future, his request for additional leave did not constitute a request for reasonable accommodation.⁴¹⁸ The USA courts have in other circumstances also recognised that leave of absence may enable a mentally disabled employee to, through rest and rehabilitation, return to productive work.⁴¹⁹

- *Modified or part-time work schedules.* Modification of a normal work schedule may be considered a form of reasonable accommodation, provided that it does not impose undue hardship on the employer. Modifications of this nature may include flexible work hours or possibly part-time work.⁴²⁰
- *Modifying workplace policies.* Modifying workplace rules and practices may be regarded as a form of reasonable accommodation, barring undue hardship. However, an employer does not have to excuse misconduct by employees with mental disabilities as a form of reasonable accommodation.
- *Job restructuring.* This includes reallocating and redistributing marginal job functions that an employee is unable to perform because of his or her mental disability. The employer is however not obligated to reallocate the essential functions of the job in order to accommodate the employee. Job restructuring

⁴¹⁴ *Santandreu v Miami Dade County*: I.

⁴¹⁵ *Santandreu v Miami Dade County*: III.

⁴¹⁶ *Santandreu v Miami Dade County*: III.

⁴¹⁷ *Santandreu v Miami Dade County*: III.

⁴¹⁸ *Santandreu v Miami Dade County*: III.

⁴¹⁹ Befort 2002:445.

⁴²⁰ Certain antidepressants and psychiatric medications may cause fatigue and grogginess in the morning, and an adjusted work schedule that allows an employee to commence work later in the day may therefore serve as accommodation. See Center 2011, in Schultz and Rogers (eds) 2011:16.

also extends to altering how and when a job function is performed and includes modifying work schedules.⁴²¹

- *Adjusting supervisory methods.* Adjusting supervisory methods in the workplace may accommodate employees with mental health conditions, since day-to-day guidance and regular feedback may add structure to their job performance.
- *Modified or more training.* This may even include providing a temporary job coach to assist in training a qualified individual with a mental disability as a form of reasonable accommodation, provided that it does not impose undue hardship.
- *Working from home.* Working from home may amount to reasonable accommodation if the essential job functions can indeed be performed from home, and if a work-at-home arrangement would not impose undue hardship on the employer. Relevant factors to consider will include the employer's ability to successfully supervise the employee, and the employee's need to work with certain tools and equipment that cannot be replicated at home.
- *Environmental changes.* People with mental health conditions may be uniquely sensitive to external stimuli. Consequently, physical changes to the work environment, such as installing room dividers, partitions as well as other soundproofing or visual barriers, may constitute effective accommodation for these individuals.
- *Reassignment or transfer to a vacant position.* This may be considered a measure of reasonable accommodation when adjustments to an employee's present position are not possible or would impose undue hardship. However, an employer is not required to create a new position as a form of reasonable accommodation. Under the USA legal framework, reassignment has often been referred to as "the reasonable accommodation of last resort", as the employer is not obligated to reassign an employee unless (s)he is suitably qualified, nor is the employer obligated to create a vacant position for the mentally disabled employee.⁴²²

⁴²¹ Befort 2002:444.

⁴²² Befort 2002:450-451.

6.5.4 Concluding remarks

The legal framework in the United States provides certain valuable lessons in relation to reasonable accommodation. The ADA, EEOC and the resultant judicial precedent provide significant insight into the nature of reasonable accommodation for mental health conditions, including the limitations, requirements and specific accommodation measures that are appropriate, both in general and in specific circumstances.

6.6 Conclusion

The USA legal framework contains disability-specific legislation that governs disability, discrimination and reasonable accommodation in the employment realm. The ADA contains a detailed disability definition, which is in accordance with a social model of disability. The EEOC has also published extensive guidelines on how mental health conditions such as depression should be dealt with in the disability, discrimination and reasonable accommodation contexts.

Relevant judicial precedent in this regard is also available, especially in relation to depression. These legal considerations, along with the judicial precedent cited in this chapter, offer valuable lessons for South African lawmakers to address these concerns in local labour law.

CHAPTER 7

MENTAL DISABILITY, DISCRIMINATION BASED ON MENTAL HEALTH AS WELL AS REASONABLE ACCOMMODATION UNDER THE LEGAL FRAMEWORK OF THE UNITED KINGDOM

7.1 Introduction

In studying mental health conditions, with special reference to depression, as a possible mental disability, a ground of discrimination and a cause for reasonable accommodation under the UK legal framework, this chapter will follow a similar approach to that followed in chapter 6 in respect of the position in the USA.

Subsequent to an analysis of the UK legal system governing mental health conditions, the study will consider mental disabilities, including the disability concept, the disability definition and relevant judicial precedent under the UK legal framework. Mental health will then be explored as a ground of discrimination in the UK, including the concept of discrimination and the various forms of discrimination in relation to mental health in this jurisdiction. Reference will also be made to harassment and workplace bullying in relation to mental health conditions. Finally, the chapter will consider the meaning, scope and impact of the duty to make reasonable adjustments for employees with mental health conditions in the UK.

As with the analysis of the position under USA law, this analysis of the UK legal framework in connection with employees with mental health conditions is aimed at revealing the link between mental health issues in the workplace and the concepts of disability, discrimination and reasonable accommodation under UK law. Depression will again serve as an example. In this way, it is hoped that the lessons already drawn from the USA in the previous chapter can be supplemented with lessons from the United Kingdom also.

Mental illness has been described as one of the “final taboos” facing employers in 21st-century workplaces, having created specific obstacles for policymakers and the judiciary in the UK.¹ The legal framework, it is said, should extend adequate protection

¹ James 2004:536.

from unfair dismissal, prejudice and discrimination based on mental health conditions. Brundtland states the following in this regard: "Mental illness is not a personal failure. If there is a failure, it is the way in which we have responded to people with mental and neurological disorders."²

In the UK, as is the case in other jurisdictions, employment plays a central role in society and the lives of most individuals. For people with mental health conditions, the employment environment has been recognised as a forum for changing societal views and stereotypes about these conditions and the people who suffer from them.³ Yet, only 12% of people with diagnosed mental health conditions in the UK are actively participating in the open labour market, and 73% of those with serious mental illness remain unemployed.⁴

Mental health conditions are rife within the borders of the UK. In this regard, the UK Mental Health Foundation reports that about a quarter of the population will experience some kind of mental health problem in the course of any given year, with mixed anxiety and depression the most common mental disorder in Britain.⁵ Depression in particular is reportedly increasing at an alarming rate, with one in five UK citizens being affected,⁶ and statistics such as the following being recorded:⁷

- People of all ages, backgrounds, lifestyles, and nationalities suffer from major depression, with a few exceptions;
- Up to 20% of people experience symptoms of depression;
- 10 times more people suffer from major depression now than in 1945;
- The average age of first onset of major depression is 25-29.

The consequences of mental health problems in the workplace are serious, not only for the individuals whose lives are affected either directly or indirectly, but also for enterprise productivity.⁸ The cost to the UK economy has been estimated at between

² James 2004:536, citing Brundtland 2001:64.

³ Adamou *et al.* 2011:453.

⁴ Lockwood *et al.* 2014:169.

⁵ Mental Health Foundation 2015. <http://www.mentalhealth.org.uk/help-information/mental-health-statistics/>. Accessed on 14/09/2015. Also see The Mind 2015. <http://www.mind.org.uk/information-support/types-of-mental-health-problems/statistics-and-facts-about-mental-health/how-common-are-mental-health-problems/>. Accessed on 14/09/2015. Other empirical research indicates that 17-20% of employees in the UK are affected by mental illness in a 12-month period. See Bell 2015:197.

⁶ Mental Health Foundation 2015. <http://www.mentalhealth.org.uk/help-information/mental-health-statistics/>. Accessed on 14/09/2015. Also see Bell 2015:197.

⁷ Clinical-depression.co.uk 2015. <http://www.clinical-depression.co.uk/dlp/depression-information/major-depression-facts/>. Accessed on 14/09/2015.

⁸ Liimatainen and Gabriel 2000:1.

£30 billion and £40 billion every year in terms of lost productivity and welfare benefits stemming from mental ill health.⁹ The Sainsbury Centre for Mental Health has also calculated that increased support for mental health conditions in the workplace would save up to £8 billion per annum.¹⁰ In addition, mental ill health has been identified as the most common condition for which people are awarded employment support allowances and remains a significant cause of absenteeism in workplaces across the UK.¹¹

Depression and stress-related illness accounts for over 40% of work-related illnesses in the United Kingdom.¹² On average, individuals suffering from depression, anxiety and stress take about 24 days off from work per year. This, in turn, translates into 10,4 million lost work days per annum.¹³ Since 2009, the number of lost workdays due to stress, depression and anxiety has increased by 24%.¹⁴

Clearly, therefore, depression and stress in UK workplaces are costly concerns that have a negatively effect on businesses financially as well as in terms of employee relations and work performance.¹⁵ UK employers have a non-delegable common law duty to take reasonable care of the health and safety of their employees, which makes their responsibilities in relation to employees' mental health a complex area of concern.¹⁶

Mental health conditions have been stigmatised in the UK employment realm, with the result that many employees have elected to suffer in secret and cover up the true reason for their absence from work and their poor performance.¹⁷ This is however shifting, and the growing social awareness and available assistance in relation to mental health conditions has illustrated to society that these conditions can affect any

⁹ Adamou *et al.* 2011:453.

¹⁰ Adamou *et al.* 2011:453.

¹¹ Bell 2015:195; Adamou *et al.* 2011:453.

¹² Boguslawska 2014:10.

¹³ Walden 2013:84; Boguslawska 2014:10.

¹⁴ Bell 2015:197.

¹⁵ Boguslawska 2014:10.

¹⁶ Walden 2013:84.

¹⁷ Boguslawska 2014:11. In the UK, 26% of employees (more than a quarter) experience a mental health problem while in employment. Despite this, too few employers take positive steps to manage this. Altogether 25% of participants in one study reported that their employer encouraged dialogue in relation to mental health conditions, while only 37% reported that their employer was supportive of their mental health condition. See Lockwood *et al.* 2014:176.

individual at any stage of their lives.¹⁸ Therefore, employees have become more likely to disclose their mental health conditions to their employers, and to institute claims against them to protect their rights.¹⁹

The rights of people with mental disabilities were reinforced by the development of human rights in the UK.²⁰ The notion of equality for these individuals was furthered under the banner of not only equal treatment and equal opportunity, but also equal participation.²¹ Disability rights are aimed at a paradigm of anti-discrimination law that functions within a framework of positive social rights, furthering substantive equality.²²

7.2 The United Kingdom legal framework governing mental health conditions

7.2.1 The structure of the United Kingdom legal system

The UK comprises England, Wales, Scotland and Northern Ireland.²³ The four primary sources of UK law are legislation, common law, EU law and the *European Convention on Human Rights* (ECHR).²⁴ However, there is no single series of documents that contain UK law in its entirety.²⁵

It is important to note at the outset that the USA legal system is based on the English common law system, which means that the two systems have significant similarities.²⁶ Similarly, English law shares a history with South Africa, which stems from the colonial era, and various principles of English law have therefore been embedded in the South African common law.

The English legal system is over 1 000 years old and has evolved over time.²⁷ Since the UK joined the then European Economic Community (today known as the EU), the

¹⁸ Boguslawska 2014:11.

¹⁹ Boguslawska 2014:11.

²⁰ Fletcher and O'Brien 2008:525.

²¹ Fletcher and O'Brien 2008:526, 534.

²² Fletcher and O'Brien 2008:527.

²³ CILEX 2015. http://www.cilex.org.uk/about_cilex_lawyers/the_uk_legal_system.aspx. Accessed on 24/11/2015.

²⁴ CILEX 2015. http://www.cilex.org.uk/about_cilex_lawyers/the_uk_legal_system.aspx. Accessed on 24/11/2015.

²⁵ CILEX 2015. http://www.cilex.org.uk/about_cilex_lawyers/the_uk_legal_system.aspx. Accessed on 24/11/2015.

²⁶ Harthill 2008:268.

²⁷ Slapper and Kelly 2012:xi.

laws and institutions of the EU have been sovereign within the UK²⁸ and have been a major source of its law.²⁹

The UK does not have a written constitution like South Africa or the USA, but adheres to certain constitutional principles and arrangements.³⁰ The most significant constitutional principles are not found in written documents, but in unwritten practice known as “constitutional conventions”.³¹ English “constitutionalism” is established by the separation of powers, the rule of law and the sovereignty of parliament.³² The power to make law within the boundaries of the UK lies with parliament, which has the power to enact, revoke or alter any law it deems fit.³³ After parliament as the predominant role player in the law-making process, central government, European institutions and the courts can also contribute to the development of UK law.³⁴

Although the UK does not have a constitution, it does have a *Human Rights Act*.³⁵ This act incorporates into domestic law the principles of the ECHR.³⁶ The state and its laws must comply with the *Human Rights Act*, but where a law cannot be reconciled with a right in the ECHR, the courts do not have the power to nullify or amend it.³⁷ However, where legislation does not cover certain problem areas and gaps exist in the law, these may be filled by the ECHR. Although the ECHR and the European Court of Human Rights are separate from European community law, the European Court of Justice (ECJ) still respects the ECHR and its principles, which is why these principles may filter into the UK system via community law and the judicial precedent of the ECJ.³⁸

²⁸ Slapper and Kelly 2012:79. Therefore, if a British act of parliament is in conflict with EU law, the law in question is regarded as having no effect. See Partington 2006:36.

²⁹ Smit 2014:166, referring to Harthill 2008:269. The legal system in Europe is made up of EU law and the ECHR.

³⁰ Partington 2006:15, 32.

³¹ These constitutional conventions are the constitutional monarchy, prerogative powers, cabinet, government, collective responsibility and individual ministerial responsibility. See Partington 2006:32, 33.

³² Partington 2006:33.

³³ Slapper and Kelly 2012:79. Parliament may enact primary, secondary and tertiary legislation as well as soft law and quasi-legislation, such as guidelines and codes of good practice. See Partington 2006:39.

³⁴ Partington 2006:38.

³⁵ *Human Rights Act* 1998.

³⁶ Connolly 2006:17.

³⁷ Connolly 2006:18.

³⁸ Connolly 2006:18.

The doctrine of binding judicial precedent is fundamental to the UK legal system.³⁹ At the pinnacle of the UK judiciary is the Supreme Court, whose decisions are binding on all other courts in the legal system. Current practice allows the Supreme Court to alter English law to meet changing social conditions, and to pay attention to decisions made by other superior courts in the Commonwealth.⁴⁰ Judges in the UK have considerable opportunity to determine the meaning and effect of law through statutory interpretation and their “marshalling” of the rules of judicial precedent.⁴¹

7.2.2 Mental health in Europe: A general overview

As already mentioned, the UK is a member state of the EU, which implies that EU law takes precedence over UK law.⁴² In addition, as a member state of the Council of Europe, the UK is a signatory to the ECHR. The UK *Human Rights Act*, which came into effect in October 2000, enables all UK courts to protect the rights identified in the ECHR.⁴³

After the Amsterdam Treaty of 1997, the EU disability policy has had two motivating agendas, namely human rights and the economy.⁴⁴ Consequently, people with mental disabilities are recognised not only in terms of their basic human rights such as equality and dignity, but also as valuable contributors to the economy.⁴⁵

Human dignity is a central feature of EU law.⁴⁶ The UK ratified the UN Disability Convention on 8 June 2009, and the EU followed suit on 23 December 2010.⁴⁷ Importantly, the UK declared the convention a community treaty of the EU, which implies that the provisions of the convention must be given effect to and enforced

³⁹ Slapper and Kelly 2012:116.

⁴⁰ The Supreme Court also brings the practice of the court in line with the ECJ and the ECtHR. See Slapper and Kelly 2012:120, 121.

⁴¹ Slapper and Kelly 2012:397.

⁴² CILEX 2015. http://www.cilex.org.uk/about_cilex_lawyers/the_uk_legal_system.aspx. Accessed on 24/11/2015.

⁴³ CILEX 2015. http://www.cilex.org.uk/about_cilex_lawyers/the_uk_legal_system.aspx. Accessed on 24/11/2015.

⁴⁴ Lane and Videbaek Munkholm 2015:94.

⁴⁵ Lane and Videbaek Munkholm 2015:94.

⁴⁶ Tushnet *et al.* 2015:194.

⁴⁷ UN 2016. https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4&lang=en. Accessed 31/05/2016.

accordingly.⁴⁸ The convention adds valuable depth and breadth to the landscape of UK and EU disability law.⁴⁹

The European Court of Human Rights (ECtHR) has referred to and ratified the use of the UN Disability Convention on multiple occasions. In *Glor v Switzerland*,⁵⁰ for example, the convention was recognised as a “worldwide consensus” on the need to provide protection from disability discrimination.⁵¹ In the matter of *Alajos Kiss v Hungary*,⁵² the ECtHR found that the UN Disability Convention’s approach to the concept of disability was in line with the ECHR.⁵³ The court also held that the curtailment of the rights of persons with mental disabilities should be subject to strict scrutiny.⁵⁴

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (hereinafter “the Employment Equality Directive”) constitutes the key EU legal source on the protection of people with disabilities, as well as the first rights-conferring instrument for this group.⁵⁵ This directive sets the minimum requirements in respect of disability protection in EU member states,⁵⁶ but fails to define the concept.⁵⁷ EU “soft law” disability initiatives reflect a substantive approach to equality as well as support for the social model of disability.⁵⁸ The Employment Equality Directive, which governs disability in community law, incorporates a formal “equal opportunities” conception of equality.⁵⁹ In this regard, Butlin suggests that since the UN Disability Convention has been ratified by both the EU and the UK and has been endorsed by the ECtHR, the Employment Equality Directive and the *Equality Act* (discussed below) should be interpreted in line with this

⁴⁸ Butlin 2011:428, 429.

⁴⁹ Lawson 2011:360.

⁵⁰ Application no. 13444/04, 30 April 2009.

⁵¹ *Glor v Switzerland*: 11[53]. Also see Broderick 2015:110.

⁵² 2010 ECHR 692 Application No. 38832/06.

⁵³ *Alajos Kiss v Hungary*: 42, 44.

⁵⁴ *Alajos Kiss v Hungary*: 44.

⁵⁵ Perju 2011:302.

⁵⁶ The directive aims, first and foremost, to put into effect the principle of equal treatment. See Liisberg 2011:89.

⁵⁷ Perju 2011:303. The directive intentionally leaves the concept of disability to be developed by the EU member states and the ECJ. See Lane and Videbaek Munkholm 2015:94.

⁵⁸ Hosking 2006:670.

⁵⁹ Hosking 2006:670.

convention, representing a social model approach to the consideration of disability in employment.⁶⁰

7.2.3 Human Rights Act of 1998

The *Human Rights Act* introduces the ECHR into UK domestic law.⁶¹ It places all courts and tribunals in the UK under an obligation to as far as possible interpret all legislation in a manner that is compatible with the rights laid down in the ECHR.⁶² The essence of the *Human Rights Act*, flowing from the ECHR and confirmed in *Pretty v United Kingdom*,⁶³ is the protection of human dignity.⁶⁴ Since its enactment, there has been a significant increase in UK judgments that refer to the concept of human dignity across various areas of the legal framework.⁶⁵

Therefore, as part of the UK legal framework, the *Human Rights Act* is relevant in the context of people with mental health conditions, as disability-specific and anti-discrimination legislation, together with the rights to equality and dignity, must be interpreted in terms of EU community law flowing from the ECHR.

7.2.4 Disability Discrimination Act of 1995 (as amended)

Prior to 2 December 1996, there was no specific legislation in the UK that governed employment discrimination against persons with disabilities.⁶⁶ The *Disability Discrimination Act of 1995* (DDA) was in fact the first law in the EU to specifically recognise that people with disabilities suffer discrimination in the employment environment.⁶⁷

The DDA resulted from a government initiative in response to a campaign both inside and outside parliament, which was in turn spurred on by the enactment of the ADA in the USA,⁶⁸ calling for equality and more significant protection for people with

⁶⁰ Butlin 2011:434.

⁶¹ Alessandria and Rosendahl 2010:67.

⁶² *Human Rights Act*: sec 3(1).

⁶³ 2002 35 EHRR 1.

⁶⁴ See *Pretty v United Kingdom*: 65; Hale 2007:18; Hale 2005:296.

⁶⁵ Bates 2005:165.

⁶⁶ Baker & McKenzie and Blackstone Chambers 2008:145.

⁶⁷ Wenbourne 1999:149.

⁶⁸ James 2004:517.

disabilities.⁶⁹ The act prohibited two forms of discrimination, namely less-favourable treatment and the failure to make reasonable accommodation.⁷⁰

In order for an individual to fall within the scope of protection offered by the DDA, a person had to satisfy the requirements of the disability definition.⁷¹ It was not sufficient for a person to be unwell or disabled in a general sense; the condition had to meet the requirements of disability according to the act.⁷² The scope of disability under the DDA covered both present and past disabilities.⁷³

The DDA was amended in 2005 in order to bring the original act in line with the EU Employment Equality Directive.⁷⁴ This entailed certain significant amendments, including amending the definition of disability.

Christie points out that the history of judicial precedent indicates that it was extremely difficult for individuals with mental health conditions to establish that they had a disability in terms of the DDA.⁷⁵ Historically, one of the most problematic aspects of the DDA related to its application of mental impairments.⁷⁶ Under the act, a mental impairment included “an impairment resulting from or consisting of a mental illness only if the illness is a clinically well-recognised illness”.⁷⁷ The guidance that applied at the time stated the following in this regard:

A clinically well-recognised illness is a mental illness which is recognised by a respected body of medical opinion. It is very likely that this will include those specifically mentioned in publications such as the World Health Organisation’s International Classification of Diseases.⁷⁸

Because of this requirement, claims involving mental illness focused on whether the individual’s mental health condition was clinically well-recognised and not on whether the condition had a negative impact on the person mentally.⁷⁹ This requirement was

⁶⁹ Baker & McKenzie and Blackstone Chambers 2008:145.

⁷⁰ Baker & McKenzie and Blackstone Chambers 2008:148.

⁷¹ The DDA of 1995 defined disability as “a physical or mental impairment which has a substantial and long term adverse effect on his ability to carry out day-to-day activities”. See DDA of 1995: sec 1.

⁷² Baker & McKenzie and Blackstone Chambers 2008:150.

⁷³ In the case of a past disability, it had to have had a substantial adverse effect for at least 12 months. See Baker & McKenzie and Blackstone Chambers 2008:150.

⁷⁴ Wheat 2007:195.

⁷⁵ Christie 2006:155.

⁷⁶ Phillips 2012:4; Baker & McKenzie and Blackstone Chambers 2008:155.

⁷⁷ DDA of 1995: sch 1, par 1(1); Baker & McKenzie and Blackstone Chambers 2008:155.

⁷⁸ *Department for Education and Employment Guidance on the Disability Discrimination Act 1995* of 1996. Since respected bodies of medical opinion widely use the DSM as a classification instrument, as discussed in chapter 2, it is more than likely that its use will find application here also.

⁷⁹ Baker & McKenzie and Blackstone Chambers 2008:156.

severely criticised on the ground that it imposed an additional hurdle for people with mental health conditions in establishing a legal disability, which was unfair, as a similar requirement did not apply to individuals with physical disabilities.⁸⁰ The requirement was removed in 2005 when the DDA was amended,⁸¹ which subsequently enabled more employees with mental impairments to satisfy the requirements of disability under the act.⁸²

The DDA made provision for the fact that disability under the act may stem from a wide variety of impairments, including “mental health conditions and mental illnesses, such as depression and schizophrenia”.⁸³ However, it did not cater for instances of “perceived disabilities”, nor extend protection to those individuals with mental disabilities who were regarded as disabled.⁸⁴

Various mental health conditions, including depression, continuously failed to meet the “long-term” requirement under the DDA, because their symptoms fluctuate in severity and occur in episodes.⁸⁵ This was regarded as unfair and perpetuating disadvantage, as even relatively short periods of mental illness may still result in serious long-term stigma and discrimination.⁸⁶

Significantly, the DDA did stipulate the employer’s duty to make reasonable adjustments to accommodate the needs of persons with disabilities, including mental disabilities, and provided that the failure to make said adjustments would amount to discrimination under the act.⁸⁷ The USA concept of “reasonable accommodation” was given pride of place in the DDA, translating into “reasonable adjustments” under the UK legal framework.⁸⁸ In terms of this duty, employers were bound not only to

⁸⁰ McArdle Galashan 2005:62.

⁸¹ DDA of 2005: sec 18(2).

⁸² The new requirement under the 2005 act was that impairment should be established in accordance with medical evidence, which in turn must establish the effect of a condition on a person. This change resulted in mental impairments being equated with physical impairments. See Christie 2006:156. Also see Baker & McKenzie and Blackstone Chambers 2008:156.

⁸³ *Disability Discrimination Act: Guidance on matters to be taken into account in determining questions relating to the definition of a disability* 2006: par A6.

⁸⁴ Wenbourne 1999:172.

⁸⁵ Christie 2006:161.

⁸⁶ Christie 2006:161.

⁸⁷ DDA of 1995: sec 6. Also see James 2004:52.

⁸⁸ Fletcher and O’Brien 2008:525.

deliberately take part in accommodating employees with mental disabilities, but also to actively adjust employment practices to ensure their participation.⁸⁹

The two primary categories of individuals that fell outside the protection of the DDA were those whose mental health conditions did not satisfy the disability definition, and those who had no disabling mental health condition at the time, but have had problems in the past and were discriminated against based on it.⁹⁰

7.2.5 *Equality Act* of 2010

The *Equality Act* took effect on 1 October 2010 with the aim of strengthening the law in relation to equality and discrimination law.⁹¹ The act consolidates several pieces of legislation, including disability discrimination law previously contained in the DDA, into a single statute.⁹² The *Equality Act* extends protection to persons who are defined by certain characteristics collectively referred to as “protected characteristics”, including disability.⁹³ The definitions of these characteristics are generally consistent with those set out in previous legislation, with a few minor changes.⁹⁴ The act covers both employees and job applicants.⁹⁵

The *Equality Act* has altered the landscape of equality law in the UK. In relation to disability, it has introduced much-needed changes that, although fairly minor, inject a greater degree of consistency and simplicity into the UK legal framework.⁹⁶ It represents an attempt to improve the legal protection of people with disabilities, and particularly those with mental health conditions.⁹⁷

⁸⁹ Fletcher and O'Brien 2008:525.

⁹⁰ Wheat 2007:201.

⁹¹ Alessandria and Rosendahl 2010:64; Talbot and Brownsell 2011:104; Lane and Videbaek Munkholm 2015:99.

⁹² Taylor and Emir 2012:233; Talbot and Brownsell 2011:104.

⁹³ Talbot and Brownsell 2011:104.

⁹⁴ Talbot and Brownsell 2011:104.

⁹⁵ Taylor and Emir 2012:233.

⁹⁶ Lawson 2011:381.

⁹⁷ Lockwood *et al.* 2012:182.

7.3 Mental disability under the United Kingdom legal framework

7.3.1 Introductory remarks

The following paragraphs will be devoted to an analysis of mental disabilities under the UK legal framework, looking at what disability means in this jurisdiction, as well as the legislative instruments governing mental disabilities in the UK, primarily the *Equality Act*.

7.3.2 Mental disability and the disability concept in the United Kingdom: General considerations

7.3.2.1 Europe and mental disability

Formal equality was the primary equality model in Europe from the end of World War II until the late 1960s.⁹⁸ The formal approach to equality was viewed as beneficial in the sense that it was relatively simple and, therefore, potentially easy to implement. It had the disadvantage, however, of not addressing structural disadvantage.⁹⁹

From the 1970s to the 1990s, the first steps were taken towards a substantive equality approach for people with disabilities. The substantive equality model calls for asymmetrical treatment in order to achieve equality in society, recognising both direct and indirect discrimination, as well as discrimination due to a lack of reasonable accommodation.¹⁰⁰ The formal equality approach, on the other hand, ignores differences between individuals and recognises only direct discrimination.¹⁰¹

The concept of disability in Europe was based on the medical model, in terms of which medically diagnosable deviance was seen as the cause of disadvantage, and medical treatment and rehabilitation were viewed as the primary solutions to this disadvantage.¹⁰² With the introduction of the substantive equality approach from the 1970s to the 1990s, however, there was a move away from the medical model of disability towards the social model.¹⁰³ The social model states that the limitations faced by disabled individuals are not the result of their medical diagnoses, but of the social

⁹⁸ Liisberg 2011:23.

⁹⁹ Liisberg 2011:23.

¹⁰⁰ Broderick 2015:102.

¹⁰¹ Liisberg 2011:28.

¹⁰² Wells 2003:260; Liisberg 2011:23-24.

¹⁰³ Perju 2011:305; Wells 2003:260; Liisberg 2011:29.

attitudes of neglect and stereotypical perceptions of disability.¹⁰⁴ In *I.B. v Greece*,¹⁰⁵ the ECtHR showed support for the social understanding of disability and incorporated it into its legal reasoning.¹⁰⁶

The 1980s also saw a shift in judicial decision-making and an increasing proclivity to interpret the ECHR in accordance with a substantive equality approach as opposed to the standard formal equality model.¹⁰⁷ The ECtHR has also endorsed a substantive approach to equality, particularly in light of its use of the notion of group vulnerability, including persons with mental disabilities such as depression.¹⁰⁸

The Employment Equality Directive replaced two decades' worth of "soft law" measures aimed at the improvement of the social and economic circumstances of disabled people.¹⁰⁹ It is worth noting that these "soft law" measures committed the EU to the social model of disability, which in turn increased pressure to promote the equality interests of people with disabilities.¹¹⁰ The directive does not define disability, but the ECJ provided the following interpretation of the concept in the EU:

Directive 2000/79 aims to combat certain types of discrimination as regards employment and occupation. In that context, the concept of "**disability**" must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person in professional life.¹¹¹

This definition reflects a medical model of disability, as it emphasises the limitation that results from impairment and the disabled individual instead of the barriers to equality created by society.¹¹²

Interestingly, in the classification and recognition of mental health conditions as mental impairments, the EU has demonstrated a tendency towards using the ICD-10.¹¹³

¹⁰⁴ Liisberg 2011:29-30.

¹⁰⁵ Application No. 552/10, 3 October 2013.

¹⁰⁶ *I.B. v Greece*: 3.

¹⁰⁷ Liisberg 2011:36.

¹⁰⁸ Broderick 2015:102.

¹⁰⁹ Hosking 2006:667.

¹¹⁰ Hosking 2006:668.

¹¹¹ *Sonia Chacon Navas v Eurest Colectividades SA* Case C-13/05 11 July 2006: 43.

¹¹² Butlin 2011:433.

¹¹³ Bartlett *et al.* 2007:3.

7.3.2.2 The UK and mental disability

People with disabilities in Europe and the UK have long been relegated to the margins of society, entrenching their status as a “particularly vulnerable and disadvantaged group”.¹¹⁴ Although all individuals with disabilities in the UK face significant obstacles in seeking and keeping employment, those with mental disabilities have been noted as being particularly disadvantaged.¹¹⁵ According to Baroness Hale of Richmond, people with mental health conditions are most vulnerable in having their basic human rights, namely respect for equal human dignity and humanity, ignored, irrespective of how severe the individual’s mental disorder or disability may be.¹¹⁶

The very first piece of legislation to address the needs of disabled individuals in the UK employment realm was the *Disabled Persons (Employment) Act* of 1944. This statute took more of a social welfare perspective and aimed to address the needs of post-war veterans who returned from World War II with various disabilities.¹¹⁷ It was only half a century later that the DDA replaced this act with the aim of enhancing and promoting the protection of people with disabilities, including mental disabilities.¹¹⁸

Primarily due to the emergence of various psychiatric and educational labels for a range of disabilities,¹¹⁹ it is no longer accurate to describe disability as affecting only a few in the margins of society, culture, economics and politics.¹²⁰ Instead, it is a growing phenomenon; “a problem and an almighty one at that”, affecting all members of society, transcending race, gender and socio-economic status.¹²¹ While society grows increasingly sceptical of medicine and science, disability is strongly associated with “men in white coats” and the grey institutional walls of hospitals, clinics and asylums.¹²² Disability hints at the fact that something is amiss, either physically or

¹¹⁴ Broderick 2015:102.

¹¹⁵ James 2004:516.

¹¹⁶ Hale 2005:296. Historically, psychiatric disability received very little attention in the UK, with disability law, policy and practice aiming more towards the protection of physical impairments than mental ones. See Christie 2006:155.

¹¹⁷ Wheat 2007:194-195.

¹¹⁸ Wheat 2007:195.

¹¹⁹ Goodley 2011:1.

¹²⁰ Goodley 2011:1.

¹²¹ Goodley 2014:3; 2011:1.

¹²² Goodley 2014:3.

mentally. Society is predisposed to understand disability as some form of personal tragedy that has inflicted an injury upon a person's mind and body.¹²³

The norm in the UK was to view disability jurisprudence through the lens of medicalisation and the medical model of disability.¹²⁴ The social model of disability was "written in concert" with British activists as an alternative and corrective to this.¹²⁵ Up until the 1990s, the medical disability model reigned supreme in relation to UK disability law, until the emphasis shifted to the social model, which has led disability studies to date.¹²⁶ The social model provides a new disability lexicon, in terms of which the problem with mental disabilities does not lie with the specific condition or impairment, but with a disabling society that threatens the very existence of these individuals and places unnecessary restraints upon their inclusion.¹²⁷ The social model created a paradigm shift in UK disability jurisprudence, moving from "disability-as-impairment" to "disability-as-oppression".¹²⁸

Mental health conditions in particular emphasise the divide between the medical and social models of disability: Mental health is more difficult to define than physical health; mental health conditions require a medical diagnosis to be recognised, and are often stereotyped as dangerous by the public.¹²⁹

In the UK, social and scientific beliefs that mental health conditions may in fact constitute disabilities have been criticised and scrutinised. Individuals so impaired have instead been labelled as intrinsically incompetent, deficient and lacking.¹³⁰ These views clearly perpetuate the stigmatisation, misconceptions and prejudice in relation to mental health conditions and act as barriers to their legal protection.

¹²³ Goodley 2011:5.

¹²⁴ Wells 2003:260; Goodley 2014:4.

¹²⁵ Goodley 2014:6.

¹²⁶ Wheat 2007:200; Goodley 2011:11.

¹²⁷ Wheat 2007:200; Goodley 2014:7.

¹²⁸ Goodley 2014:7. Under the UK legal framework, "disablism" is viewed as a form of social oppression involving the social restriction of the activities of people with impairments. This flows from the fact that "disability" is viewed as a cultural, political and socio-economic phenomenon. See Goodley 2011:9.

¹²⁹ Wheat 2007:203.

¹³⁰ Goodley 2011:110.

7.3.3 Disability under the *Equality Act*

The *Equality Act* is divided into various parts. Part 5 applies to all employers and is of primary importance for the purposes of this thesis. Case law pertaining to mental health conditions decided under the auspices of the *Equality Act* is sparse.¹³¹ However, the number of court applications in this regard is gradually increasing, making it one of the most significant categories of litigation in UK equality law.¹³²

The *Equality Act* preserves the DDA approach to the role and content of the disability definition. This definition acts as “gatekeeper” in that it only extends legal protection to those individuals who satisfy the criteria of the disability definition.¹³³ A more limited form of protection is also afforded to those individuals who are treated less favourably or harassed because they are perceived to be disabled, or because they are associated with a disabled person.¹³⁴ The *Equality Act* provides the following definition of disability:¹³⁵

6 Disability

- (1) A person (P) has a disability if-
 - (a) P has a physical or **mental impairment**, and
 - (b) The impairment has a **substantial and long-term adverse effect** on P's ability to carry out **normal day-to-day activities**.

This definition deviates from the definition under the DDA in that impairment is no longer required to affect one or more of a specified list of capacities.¹³⁶ The disability must be present at the time of the alleged discrimination.¹³⁷ Considering all the medical and other evidence, a judicial forum will have to decide whether the individual is indeed impaired.¹³⁸

In the past, job applicants with mental health conditions in the UK often failed in their applications, because employers would often require potential employees to complete

¹³¹ Lockwood *et al.* 2014:170.

¹³² Lockwood *et al.* 2014:171.

¹³³ Lawson 2011:361.

¹³⁴ Lawson 2011:361. An individual will be considered an “associated person” if he or she, for example, is related to or is employed to care for a person with a mental disability. See Government Equalities Office 2010. <https://www.citizensadvice.org.uk/Documents/Advice%20factsheets/Unclassified/equality-act-2010-carer.pdf>. Accessed on 02/07/2016.

¹³⁵ *Equality Act*: sec 6, own emphasis added.

¹³⁶ E.g. mobility, manual dexterity and speech. See Talbot and Brownsell 2011:105.

¹³⁷ Taylor and Emir 2012:267.

¹³⁸ Taylor and Emir 2012:267.

medical questionnaires during the recruitment process.¹³⁹ Frequently, it was the employer's stigmatisation, stereotyping and prejudice towards mental health conditions that prevented these applicants from securing employment.¹⁴⁰ For example, in *Cheltenham Borough Council v Laird*,¹⁴¹ an employee was sued by her employer for damages arising from health-related costs that it had incurred after the employee failed to disclose her history of depression in a medical questionnaire.¹⁴² The court held that the employee had not been misleading or false in completing the questionnaire, since her depression was not active at the time.¹⁴³ Similarly, in the matter of *J v DLA Piper*,¹⁴⁴ an offer of employment failed to materialise after the employee disclosed a history of depression in a medical questionnaire. The Employment Appeal Tribunal remitted the case to an employment tribunal, finding that the individual made out a significant case of perceived discrimination against the employer.¹⁴⁵

Under the *Equality Act*, employers are no longer permitted to question job applicants about mental disabilities and mental health conditions in the recruitment process before a job offer is made.¹⁴⁶ However, there are certain exceptions to this rule. The employer is allowed to ask the applicant specific health-related questions in order to establish whether (s)he will be able to perform duties intrinsic to the position and may also ask the applicant whether a reasonable adjustment is required in order to undergo an assessment during the recruitment process.¹⁴⁷

The following mental health conditions have been listed as probable disabilities under the *Equality Act*.¹⁴⁸

- dementia
- depression
- bipolar disorder
- obsessive compulsive disorder
- schizophrenia

¹³⁹ Alessandria and Rosendahl 2010:66.

¹⁴⁰ Alessandria and Rosendahl 2010:66.

¹⁴¹ 2009 EWHC 1253 QB.

¹⁴² *Cheltenham Borough Council v Laird*: 6, 7, 13-14, 30-32.

¹⁴³ *Cheltenham Borough Council v Laird*: 627.

¹⁴⁴ UK LLP 2010 IRLR 936 EAT.

¹⁴⁵ *J v DLA Piper*: 56, 62.

¹⁴⁶ *Equality Act*: sec 60.

¹⁴⁷ *Equality Act*: sec 60(6)(a), (b).

¹⁴⁸ Gov.UK 2015a. <https://www.gov.uk/when-mental-health-condition-becomes-disability>. Accessed on 15/09/2015.

- self-harm

The UK judicial forums and tribunals have had no difficulty in accepting that depression constitutes a disability under the *Equality Act*.¹⁴⁹

7.3.3.1 Mental impairment

At its core, impairment may be defined as “an embodied difference in terms of the functioning of the body or brain”.¹⁵⁰ Under the UK legal framework, mental impairments will generally encompass all recognised mental health conditions.¹⁵¹

In establishing the existence of impairment, various factors should be taken into account, including when and where the impairment was first discovered, the perception and visibility of the impairment, the severity of the impairment, the standard against which that severity is judged, and the relative stability and fluidity of the impairment.¹⁵²

While, under the DDA, individuals alleging a mental impairment had to satisfy the “clinically well-recognised” requirement as mentioned above, this is no longer necessary under the *Equality Act*.¹⁵³ The term “mental impairment” should be given its ordinary meaning.¹⁵⁴ It is also not necessary for the cause of the impairment to be established, or for the impairment to be the result of an illness.¹⁵⁵ The *Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability* lists the following as examples of mental impairments that may give rise to a disability:

[M]ental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, or unshared perceptions; eating disorders; bipolar affective disorders; obsessive compulsive disorders; personality disorders; **post-traumatic stress disorder**, and some self-harming behaviour; mental illnesses, such as **depression** and schizophrenia.¹⁵⁶

¹⁴⁹ See for example *Jennings v Barts and the London NHS Trust* 2013 Eq. L.R. 326; Lane and Videbaek Munkholm 2015:109.

¹⁵⁰ Goodley 2014:7.

¹⁵¹ Goodley 2011:5.

¹⁵² Goodley 2011:29.

¹⁵³ Every case will have to be decided on its own merit. See Taylor and Emir 2012:267.

¹⁵⁴ *Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability*: par A3.

¹⁵⁵ *Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability*: par A3.

¹⁵⁶ *Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability*: par A5, own emphasis added.

Although the *Equality Act* excludes certain conditions¹⁵⁷ such as alcoholism from consideration as impairments, the Employment Appeal Tribunal held in the case of *Power v Panasonic UK Ltd*¹⁵⁸ that where alcohol abuse resulted in depression, the depression would amount to a legal disability.¹⁵⁹

In order to establish the existence of a mental impairment, a diagnosis by an expert medical practitioner will be of significant value.¹⁶⁰ This notion was supported in the matter of *Morgan v Staffordshire University*,¹⁶¹ where it was stated that “the existence or not of a mental impairment is very much a matter for qualified and informed medical opinion”.¹⁶²

In establishing the existence of a mental impairment under the DDA, the *Department for Education and Employment Guidance on the Disability Discrimination Act 1995* of 1996, provided the following:

A clinically well-recognised illness is a mental illness which is recognised by a respected body of medical opinion. It is very likely that this would include those specifically mentioned in publications such as the World Health Organisation's International Classification of Diseases.

Although the “clinically well-recognised” requirement has been scrapped under the *Equality Act*, this section remains relevant, as it illustrates the UK legal system’s understanding of how a mental impairment should be classified. It would appear from this section that the use of the ICD is preferred. Callaghan and Kent also indicate that the use of a diagnosis in terms of the ICD is significant in considering whether a mental health condition constitutes a mental impairment for the purposes of the *Equality Act*’s disability definition.¹⁶³ However, other classification instruments such as the DSM are not excluded and may be relied on. UK judiciaries have by implication accepted the use of the DSM in diagnosing mental impairments, as. This is evidenced in the case of *Marinello v City of Edinburgh Council*,¹⁶⁴ where an employee’s depression was

¹⁵⁷ Other excluded conditions are dependence on nicotine and other non-prescribed substances, pyromania, kleptomania, a tendency to physically or sexually abuse others, exhibitionism, voyeurism and hay fever. See Lockwood *et al.* 2012:182.

¹⁵⁸ 2002 UKEAT 747_01_1709 17 September 2002.

¹⁵⁹ *Power v Panasonic UK Ltd*: 13, 18-20.

¹⁶⁰ Wells 2003:256.

¹⁶¹ 2002 IRLR 190.

¹⁶² *Morgan v Staffordshire University*: 20.

¹⁶³ Callaghan and Kent 2011:670.

¹⁶⁴ 2011 IRLR 669.

recognised as a condition diagnosed in terms of the DSM, and stemmed from various incidents of workplace bullying and harassment.¹⁶⁵

Although the above-mentioned case was decided more recently under the EA, the Employment Appeal Tribunal (EAT) has shown a preference for the use of the ICD over the DSM in determining the existence of mental impairments. In the case of *Morgan v Staffordshire University*¹⁶⁶ the EAT held that a similar publication may be used, but that the ICD is the preferred source in establishing the existence of a mental impairment.¹⁶⁷ In the case of *Blackledge v London General Transport Services Ltd*¹⁶⁸ the Employment Tribunal (ET) relied on the use of the DSM in establishing the existence of a mental impairment. The EAT, however, held that the ET decision to use the DSM over the ICD was “fatally flawed”, and the matter was remitted to a different tribunal to establish whether the employee in that case was suffering from a mental impairment in accordance with the diagnostic criteria of the ICD.¹⁶⁹

A different approach was taken in *J v DLA Piper*,¹⁷⁰ where the EAT clarified, for the purposes of employment law, that cases involving mental impairments and depression specifically, should be assessed in terms of the effect of the condition, rather than on the basis of an exclusively medical diagnosis. The court held the following in this regard:

[I]dentifying the impairment will generally be uncontroversial and any issue is likely to relate to the nature and extent of the adverse effect. But in other cases – and specifically in some cases of mental impairment – addressing the impairment question first carries the risk of the tribunal getting bogged down in difficult medical, or indeed metaphysical, questions where clear answers may simply be unavailable: precise diagnosis and/or aetiology are notoriously difficult in cases of mental ill-health or incapacity. Provided there is an impairment, recognised in a common-sense way by the effects which it has produced, such questions simply do not need to be answered.¹⁷¹

This approach would indeed have the effect of shifting the emphasis in establishing mental impairments from a diagnosis in terms of a classification instrument such as the ICD or DSM. In light of the above-mentioned quote, however, it would appear that if a reliable diagnosis is available in terms of the DSM or ICD by a mental health care

¹⁶⁵ *Marinello v City of Edinburgh Council*: 1.

¹⁶⁶ 2002 IRLR 190 EAT.

¹⁶⁷ *Morgan v Staffordshire University*: 9, 14.

¹⁶⁸ 2001 WL 825497.

¹⁶⁹ *Blackledge v London General Transport Services Ltd*: 18.

¹⁷⁰ UK LLP 2010 IRLR 936 EAT.

¹⁷¹ *J v DLA Piper*: 36.

practitioner, that this will receive preference in establishing the existence of a mental impairment.

7.3.4.2 Substantial and long-term adverse effect

“Substantial” has been described as “more than trivial”.¹⁷² The EA Guidance states the following in this regard:

The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect.¹⁷³

The effect of an impairment determines coverage under the EA. Thus, for example, an individual with a minor form of depression which has minor effects on their daily life may not be covered, whereas someone with major depression with substantial adverse effects on their daily life is likely to be considered as legally disabled.¹⁷⁴

“Long term” may be described as a condition that has lasted, or is expected to last, at least 12 months or for the rest of the affected individual’s life.¹⁷⁵ It is significant to note that this long term requirement was strongly challenged during the debates on the EA, particularly in relation to its applicability in cases of severe depression and nervous breakdowns.¹⁷⁶ Conditions with effects that fluctuate may still be considered impairments under the meaning of “long term”. A condition will be seen as likely to recur if this “could well happen” rather than the higher threshold of “more probably than not”.¹⁷⁷

Depression has been drawn into question as a condition that may not be able to satisfy the “long-term” requirement, because of its fluctuating effects. In the case of *J v DLA Piper*¹⁷⁸ it was held that determining whether a condition, such as depression, can meet the long term requirement in the Act is strongly influenced by the “looseness”

¹⁷² Equality Act: sec 212(1); Taylor and Emir 2012:268.

¹⁷³ Equality Act 2010 Guidance: *Guidance on matters to be taken into account in determining questions relating to the definition of disability*: par B1.

¹⁷⁴ Lockwood *et al.* 2012:182.

¹⁷⁵ This includes previous disabilities. Therefore, if a person’s impairment no longer has a substantial adverse effect on his or her ability to perform day-to-day activities, but is likely to recur, it may be considered to be continuous. See Taylor and Emir 2012:268.

¹⁷⁶ Butlin 2011:433.

¹⁷⁷ Lockwood *et al* 2012:182.

¹⁷⁸ UK LLP 2010 IRLR 936 EAT.

with which some medical professionals and most lay persons view concepts such as “depression”, “anxiety” and “stress”.¹⁷⁹ In *J v DLA Piper*, a job offer made to an individual was withdrawn subsequent to her disclosure of a history of depression. Prior to the determination of whether this constituted unlawful discrimination, it had to be determined whether her depression met the requirements of a legal disability. In light of its recurring nature and fluctuating symptomology, it was questioned whether depression was sufficiently “long-term” in order to qualify as such. As a result, the employment tribunal found that the employee was not suffering from a mental impairment within the scope of the *Equality Act*, nor was it sufficiently long-term.¹⁸⁰ This decision was overturned by the EAT and the case was remitted back to a different ET.¹⁸¹ The EAT held that the ET had misapplied itself by not considering whether the employee was legally disabled at the relevant point in time, namely when the offer of employment was withdrawn, and consequently whether her depression satisfied the elements of the disability definition.¹⁸²

Considered on its own, a person’s impairment may not have a substantial adverse effect on his or her ability to perform a day-to-day activity, but if it affects more than one activity, it could amount to a substantial limitation.¹⁸³ The *Equality Act* guidance provides that the cumulative effect of related impairments should be taken into account to determine whether a long-term substantial effect exists:

The substantial adverse effect of an impairment which has developed from, or is likely to develop from, another impairment should be taken into account when determining whether the effect has lasted, or is likely to last at least twelve months, or for the rest of the life of the person affected.¹⁸⁴

“Progressive conditions”, described as conditions that increase in severity over time, are also included in the scope of the definition.¹⁸⁵ In this regard, the *Equality Act* guidance states the following:

¹⁷⁹ *J v DLA Piper*: 56. Therefore, in light of the fluctuating symptoms associated with mental health conditions, such as depression, the perception and diagnosis thereof by some medical professionals will impact whether or not the condition may meet the long term requirement or not.

¹⁸⁰ *J v DLA Piper*: 56.

¹⁸¹ *J v DLA Piper*: 56.

¹⁸² *J v DLA Piper*: 43.

¹⁸³ Taylor and Emir 2012:268.

¹⁸⁴ *Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability*: par C2.

¹⁸⁵ *Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability*: par B18.

A person who has a progressive condition, will be treated as having an impairment which has a substantial adverse effect from the moment any impairment resulting from that condition first has some adverse effect on his or her ability to carry out normal day-to-day activities, provided that in the future the adverse effect is likely to become substantial.¹⁸⁶

The amount of time it takes a person with a mental impairment to carry out a normal day-to-day activity should be taken into account when determining whether the effect of that impairment is substantial. It should be compared with the time it might take a non-impaired person to complete the same activity.¹⁸⁷ A second factor to be considered in assessing whether the effect of impairment is substantial is the manner in which a person so impaired carries out a normal day-to-day activity. Again, it should be compared with the way in which a non-impaired person carries out the activity.¹⁸⁸ An individual may also be impaired in more than one way, which independently would not have a substantial effect. However, considered together, the impairments may have a substantial overall effect on the person's ability to carry out normal day-to-day activities.¹⁸⁹

Mitigating measures, such as the use of medication or medical treatment, should be ignored in determining whether impairment is substantially limiting.¹⁹⁰ Again turning to the *Equality Act* guidance, it says:

The Act provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, "likely" should be interpreted as meaning "could well happen". The practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question.¹⁹¹

The *Equality Act* guidance recognises that the specific work environment may exacerbate the effects of impairment and contribute to it having a substantial effect. Therefore, when determining whether the adverse effects of impairment are

¹⁸⁶ *Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability*: par B19.

¹⁸⁷ *Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability*: par B2.

¹⁸⁸ *Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability*: par B3.

¹⁸⁹ *Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability*: par B6.

¹⁹⁰ Taylor and Emir 2012:268.

¹⁹¹ *Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability*: par B12.

substantial, the extent to which such environmental factors, either individually or cumulatively, are likely to have an impact on the effects should also be considered.¹⁹²

7.3.3.3 Normal day-to-day activities

Under the *Equality Act*, the determination of whether something affects a day-to-day activity is a matter for the tribunal to decide, “using its common sense, looking at what the claimant cannot do, or can only do with difficulty”.¹⁹³ Consequently, where an element of the job in question cannot be performed because of some medical condition, but such task is not within the scope of normal day-to-day activities, a claim relating to discrimination on that ground will fail.¹⁹⁴

Thus, where employees have a mental health condition such as depression, they will have to prove that the condition and its symptoms hindered their ability to perform normal day-to-day activities, such as working, thinking, sleeping and concentrating.

7.3.3.4 Deemed to be disabled

Not only people with current or active mental health conditions suffer discrimination and difficulties in employment, but those who have had these conditions in the past may continue to face prejudice and discrimination.¹⁹⁵

The *Equality Act* provides for certain individuals who are deemed to meet the definition of disability without having to show that they have an impairment that has (or is likely to have) a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.¹⁹⁶ Section 13 of the *Equality Act* makes provision for claims by individuals who have been discriminated against on the basis of perception. These individuals may not actually be disabled, but they are treated less favourably because an employer mistakenly perceives them to be disabled.¹⁹⁷ In *J v DLA Piper*, the EAT held the following in relation to depression and perceived disability:

¹⁹² *Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability*: par B11.

¹⁹³ Taylor and Emir 2012:268.

¹⁹⁴ Taylor and Emir 2012:268.

¹⁹⁵ Wheat 2007:202.

¹⁹⁶ *Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability*: par A10.

¹⁹⁷ Lawson 2011:373.

The concept of “perceived disability” presents issues different from those presented by the question whether a person (either a claimant or a person with whom he or she is “associated”) is in fact disabled. What the putative discriminator perceives will not always be clearly identifiable as “disability”. But many physical or mental conditions which may attract adverse treatment do not necessarily amount to disabilities, either because they are not necessarily sufficiently serious or because they are not necessarily long-term. If a manager discriminates against an employee because he believes her to have a broken leg, or because he believes her to be “depressed”, the question whether the effects of the perceived injury, or of the perceived depression, are likely to last more or less than twelve months may never enter his thinking, consciously or unconsciously (nor indeed, in the case of perceived “depression”, may it be clear what he understands by the term).¹⁹⁸

In this matter, the EAT appears to have relaxed the requirement that an employee should satisfy the disability definition in the strict sense, as perceived discrimination on the basis of mental impairment such as depression is more complex. It also appears to support a social model approach to disability, recognising that disadvantage may stem from others’ prejudice and stigmatisation, and not necessarily from the disability only.

7.3.3.5 Disability vs incapacity

As is the case under the South African legal framework, the UK system also distinguishes between incapacity and disability as related yet independent concepts.

Disablement is distinguished from incapacity in the sense that disabled individuals may be able to perform work of various natures despite their disability.¹⁹⁹ This is particularly true in the case of people with mental impairments such as depression, since although the disability is long-term, their symptoms may be intermittent.²⁰⁰ Incapacity, on the other hand, is when an individual is incapable of working by reason of their mental (or physical) impairment.²⁰¹

7.3.4 Concluding remarks

The UK legal framework has the benefit of having been strengthened by general EU community law, its entrenchment of the social disability model, as well as its protection of the rights to equality and dignity of people with mental disabilities.

It has come a long way in addressing the rights of, and providing protection to, persons with mental disabilities in employment. The social model approach taken by the

¹⁹⁸ *J v DLA Piper*: 62.

¹⁹⁹ Tindley 2012:75.

²⁰⁰ Tindley 2012:75.

²⁰¹ Tindley 2012:74.

Equality Act, especially in providing protection to those who are perceived to be disabled, is a significant step forward for disability jurisprudence in this jurisdiction.

Although ambiguous under the original DDA, particularly because of the “clinically well-recognised” requirement, UK judicial forums now appear to be more open to viewing depression as both a recognised mental impairment and a legal disability where the requirements are met.

7.4 Discrimination based on mental health

7.4.1 Introductory remarks

In the following paragraphs, the position on discrimination based on mental health in the UK will be studied. Apart from exploring the concept of discrimination, the provisions on mental health discrimination in the *Equality Act*, and the way this matter has been previously dealt with by the UK courts and tribunals, the phenomena of workplace harassment and workplace bullying will also be referred to.

7.4.2 Discrimination

7.4.2.1 Discrimination in Europe: A brief overview

This overview aims to, briefly, highlight the significance of equality and non discrimination in Europe. These considerations are relevant in light of the fact that these concepts trickle down into UK law from the broader European framework.

There are several sources of anti-discrimination law in Europe. As the EU constitutes a community (a federation), which is in turn made up of member states, each member state will retain its own domestic laws, which may be considered individually. The community as a whole, however, also has its own law that applies to all its member states.²⁰² The member states are required to implement and enforce the directives and laws of the EU through detailed and specific legislation in their own domestic law.²⁰³ One such directive is the prohibition against discrimination. The ECJ is the most important enforcement mechanism of EU equality law. It is also an important forum for the development of equality and anti-discrimination law in the EU and has the discretion and power to develop EU law, define the nature of the law and give effect

²⁰² Ellis 2005:11.

²⁰³ Bell 2004:147.

to its provisions and articulations.²⁰⁴ The ECJ is not bound by the doctrine of precedent and may alter its own decisions if it believes it to be just in the circumstances.²⁰⁵

Anti-discrimination provisions in the EU are aimed at general non-discrimination, the pursuit of equality, fair participation and equal opportunity.²⁰⁶ In terms of EU community law and the Employment Equality Directive, equal treatment is equated with the absence of discrimination.²⁰⁷

The concept of equality is not stagnant, and its meaning and scope is subject to constant change and redefinition.²⁰⁸ At its core, though, equality requires that people should be treated alike.²⁰⁹ However, it has been argued that since every person is unique, it is rather difficult to find “like people”.²¹⁰ As such, says Barnard, equality shall be achieved when there is no unjust discrimination either directly or indirectly against any person.²¹¹ The primary focus and flagship of the EU’s policy is the achievement of equality²¹² and, consequently, the eradication of unjust discrimination in all spheres of life, particularly employment. Equality has been recognised as a general principle of law in the EU.²¹³

The *European Convention for the Protection of Human Rights and Fundamental Freedoms* is an international treaty to promote and protect human rights and fundamental freedoms in Europe. It is enforced by the Council of Europe and the ECtHR. The prohibited grounds of discrimination include disability.²¹⁴

The Employment Equality Directive aims to implement and promote the principle of equality in the European community, and not to deviate from it.²¹⁵ The concept of

²⁰⁴ Ellis 2005:19,37.

²⁰⁵ Ellis 2005:19.

²⁰⁶ Ellis 2005:87.

²⁰⁷ This approach has been criticised on the ground that protection from disability discrimination requires a more substantive approach to equality, since disability often makes a difference, justifiably or not, in various contexts due to a range of factors, from functional limitations imposed by the impairment to stereotyping and prejudice. See Hosking 2006:670.

²⁰⁸ Ellis 2005:4.

²⁰⁹ Barnard 2006:313-314.

²¹⁰ Barnard 2006:314.

²¹¹ Barnard 2006:314.

²¹² Barnard 2006:297.

²¹³ *Marshall v Southampton and South West Hampshire Area Health Authority No.1* 1986 ECR 723: 36; Barnard 2006:314.

²¹⁴ *Constitutional Treaty of the European Union* 2004: art II-81(1); Barnard 2006:313.

²¹⁵ Whittle 2002:22.

disability under the directive is to be defined comprehensively to ensure that the primary question is whether or not an individual has been discriminated against on the basis of mental disability, instead of whether the person's past, present, future or perceived impairment constitutes a disability in the legal sense.²¹⁶

7.4.2.2 The United Kingdom and discrimination: A general overview

Under the UK legal framework, every individual has the right not to be discriminated against even though their "differences", attributable to mental disability, are well known to the employer.²¹⁷ The law aims to combat social exclusion by imposing specific duties upon, and requiring positive action from, employers via non-discriminatory selection procedures, training programmes, and policies aimed at preventing stigmatising behaviour.²¹⁸

Studies indicate that in 2010, 87% of employees reported one or more experiences of discrimination on the basis of mental health, while 18,6% reported discrimination in securing employment and 16,6% reported discrimination in keeping their job.²¹⁹

A particular concern in relation to mental health conditions under the UK legal framework is the fact that not all of these conditions may satisfy the criteria of a legal disability and attract legal protection.²²⁰ The individuals who cannot meet the requirements of the disability definition will therefore remain exposed to and unprotected from discrimination on the basis of their mental health, since they will fall outside the boundaries of legal protection extended to people with disabilities.

Discrimination is considered to be the behavioural enactment of prejudice, with harassment being recognised as a significant element thereof.²²¹ Wheat suggests that in light of the significant discrimination and disadvantage suffered by persons with mental health conditions in the workplace, the pattern of disadvantage is comparable with that suffered by persons of other protected groups in the past, such as race,

²¹⁶ Whittle 2002:22.

²¹⁷ Alessandria and Rosendahl 2010:65.

²¹⁸ Alessandria and Rosendahl 2010:65.

²¹⁹ Bell 2015:198.

²²⁰ Wheat 2007:194.

²²¹ Discrimination against persons with mental health conditions in UK workplaces is reportedly highly prevalent. Up to 50% of respondents in one study reported discrimination and harassment in employment on the basis of their mental health. See Clement *et al.* 2011:219.

gender and sexual orientation.²²² According to Lockwood *et al*, the most significant mental health conditions that form the basis of discrimination claims are depression and anxiety caused by stress.²²³

The above discussion serves to illustrate that the problem in respect of discrimination on the basis of mental health is not confined to South Africa and is prevalent in the UK as well. It further aims to outline the relevant general principles in relation to discrimination in the UK, before specific legislation is considered.

7.4.3 Discrimination under the *Equality Act*

7.4.3.1 Disability discrimination

The *Equality Act* is premised on the notion that non-discrimination is a guarantee of equality, and not a special service reserved for a select few.²²⁴ The act protects persons with disabilities from discrimination, victimisation and harassment.²²⁵ The failure to make reasonable adjustments constitutes a form of discrimination under the act.²²⁶

A primary objective of the *Equality Act* is to promote transparency in order to tackle discrimination in employment. This is to be achieved by promoting effective disclosure of mental health conditions and the sharing of information about these conditions, since knowledge may assist in preventing discriminatory behaviours.²²⁷

Section 15 of the act makes provision for discrimination on the basis of disability, stating the following:

15 Discrimination arising from disability

- (1) A person (A) discriminates against a disabled person (B) if—
 - (a) A treats B unfavourably because of something arising in consequence of B's disability, and
 - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

²²² Wheat 2007:204.

²²³ Lockwood *et al.* 2014:174.

²²⁴ Lawson 2011:363.

²²⁵ *Equality Act*: sec 13-27.

²²⁶ Phillips 2012:4.

²²⁷ This argument is based on the premise that discrimination often stems from ignorance and a lack of information. See Alessandria and Rosendahl 2010:68.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

This definition clearly provides that the discrimination must stem from an individual's mental disability, and that the employer may raise the justification that the differential treatment was a proportionate means of achieving a legitimate aim.

In relation to mental health conditions, such as depression, various symptoms and behavioural patterns may arise from these conditions. These include possible suicidal tendencies, unpredictable moods and diminished work performance, among others.²²⁸ Thus if an employee's mental health condition amounts to a legally recognisable disability and an employer treats the employee unfavourably because of the depression or something stemming therefrom, such as its symptomology or diagnostic features then the employer will have discriminated against the employee if it cannot show that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

Alessandria and Rosendahl provide an interesting suggestion, namely that in aiming to overcome stigma in relation to mental health conditions, disclosure of the condition may serve to dispel and disprove various stereotypical assumptions, and to denounce discriminatory conduct.²²⁹ Although this is highly relevant, disclosure may also have the opposite effect, namely subjecting the employee with a mental health condition to the subconscious prejudice and misconceptions of employers, as has been evidenced in the other comparative jurisdictions.

In theory, employees with mental health conditions who disclose the condition to the employer and are subsequently unsuccessful in their applications can bring a disability discrimination claim against the employer. The aggrieved individual will however have to prove that their mental health condition satisfies the criteria of a legal disability under the *Equality Act*, while the employer will have to prove that the reason for the refusal of employment was unrelated to the disclosure and condition.²³⁰ It should also be

²²⁸ See chapter 2 for a comprehensive discussion around the symptoms and diagnostic features of depression.

²²⁹ The authors substantiate this view by stating that the disclosure of mental health conditions will have the benefit of raising awareness in society and the workplace about these conditions, and may thus have an educational effect. See Alessandria and Rosendahl 2010:65.

²³⁰ Alessandria and Rosendahl 2010:67.

noted that under the *Equality Act*, an employer may also raise the defence of “meeting operational requirements” to combat a claim of discrimination based on disability.²³¹

7.4.3.1.1 Direct and indirect discrimination

Direct discrimination was introduced into the DDA in 2004 as a result of the Employment Equality Directive.²³² This concept is governed by section 13 of the *Equality Act*, which states.²³³

13 Direct discrimination

- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Direct discrimination is centered around distinctions in treatment of people, based on protected characteristics. An allegation of direct discrimination must be substantiated by illustrating that a comparator (an individual or group in similar circumstances) was treated less favourably than the complainant.²³⁴ Less favourable treatment constitutes any form of disadvantageous treatment.²³⁵

Direct discrimination entails treating a person less favourably than others “because of” his or her disability. In these circumstances the discrimination is directly linked with a particular characteristic, such as mental disability. Talbot and Brownsell state the following in this regard:

This is broad enough to cover treating a person less favourably: (a) because they are associated with someone who possesses a protected characteristic; or (b) **because of a mistaken belief that they possess one of the protected characteristics.**²³⁶

As mentioned before, similar to the “regarded as” prong of the ADA definition of disability in the USA, section 13 of the *Equality Act* now also makes provision for discrimination based on perception, extending additional protection to people with psychiatric disabilities. This position did not exist under the DDA. These individuals

²³¹ *Equality Act*: sch 9, par 1.

²³² Lawson 2011:371.

²³³ It has been suggested that sec 13 also provides a clear basis for individuals who are not themselves disabled, but who are subjected to less favourable treatment because they are associated with someone who is. However, someone who is not personally disabled will not be entitled to reasonable accommodation under the *Equality Act*. See Lawson 2011:373.

²³⁴ Wadham *et al* 2010:43.

²³⁵ Wadham *et al* 2010:43.

²³⁶ Talbot and Brownsell 2011:105.

may not actually be disabled, but they are treated less favourably because an employer mistakenly perceives them to be disabled.²³⁷

Indirect discrimination, in turn, is governed by section 19 of the act, which for the first time in the UK introduces this concept into the realm of disability law:²³⁸

19 Indirect discrimination

- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
 - (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
 - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
 - (c) it puts, or would put, B at that disadvantage, and
 - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Indirect discrimination is at hand when certain employment policies, practices and criteria have a discriminatory impact on certain groups of individuals. These policies, practices and criteria may apply to a broad range, if not all individuals in employment, but disproportionately impact one group more than another without a legitimate reason.

Indirect discrimination applies to circumstances where a particular employment policy, practice or criterion has not yet been applied to an individual, but would be considered discriminatory if it were to be applied.²³⁹ The prohibition against indirect discrimination consequently applies to job applicants as well. It may be pointed out that actual comparative disadvantage is not required in order to establish indirect discrimination, since the *Equality Act* makes provision for hypothetical comparisons.²⁴⁰

²³⁷ Lawson 2011:373.

²³⁸ Lawson 2011:375.

²³⁹ Wadham *et al* 2010:44.

²⁴⁰ Both disadvantaged and advantaged groups can be hypothetical. Therefore, even in circumstances where the policy, criterion or practice has not disadvantaged any other employee's with the claimants particular characteristic, such as mental health, an indirect discrimination claim could be made out if the criterion, policy or practice would disadvantage those with the characteristic under ordinary circumstances. See Wadham *et al* 2010:44

Thus, indirect discrimination applies in circumstances where a provision, criterion or practice in effect disadvantages a mentally disabled person where this cannot be justified as being a proportionate means of achieving a legitimate aim.²⁴¹ Discrimination arising from disability occurs where an employer treats an individual with a mental disability less favourably because of something connected with his or her disability.²⁴²

Interestingly, it has been reported that 41% of all discrimination claims in the UK are based on direct discrimination and 25% on indirect discrimination in relation to disability in the workplace.²⁴³

7.4.3.2 Harassment and workplace bullying

7.4.3.2.1 Workplace harassment

Workplace harassment, workplace bullying, poor management styles and weak handling of cases are particularly significant in the context of people with mental health conditions, as these conditions both affect and are affected by social interaction.²⁴⁴ Some 7% of all discrimination claims in the UK are brought on the basis of workplace harassment.²⁴⁵

Harassment has been labelled as one of the “harshest aggressive manifestations” that may occur in the workplace, resulting in a significant health and safety risk for employees.²⁴⁶ In the UK, employees have the right to labour security and health, which encompasses both physical and mental health and security.²⁴⁷ This imposes a duty on the employer to arrange the workplace so that employees’ dignity is not injured.²⁴⁸

²⁴¹ Phillips 2012:4.

²⁴² This may be demonstrated with the following example: If an employer dismisses an employee with depression because (s)he took three months' sick leave due to her condition, but the employer was aware of the employee's depression, the dismissal cannot be because of the depression itself. However, the employee was treated less favourably because of something connected with and arising from his or her disability, namely the need to take disability-related sick leave. See Lockwood *et al.* 2012:182.

²⁴³ Lockwood *et al.* 2014:171.

²⁴⁴ Bell 2015:207, referring to Schied 2005:676. Also see the cases of *Carphone Warehouse Ltd v Martin* 2013 Eq LR 481 EAT and *Tameside Hospital NHS Foundation Trust v Mylott* 2011 Appeal No. UKEAT/0352/09/DM, UKEAT/0399/10/DM, which reflect how social interactions in the workplace can negatively affect mental health. Also consult Bell 2015:206-207.

²⁴⁵ Lockwood *et al.* 2014:171.

²⁴⁶ Ezer and Ezer 2012:299.

²⁴⁷ Ezer and Ezer 2012:299.

²⁴⁸ Ezer and Ezer 2012:300.

The *Equality Act* includes three types of harassment, namely sexual harassment, harassment resulting from treating someone less favourably because they submitted to or rejected sexual harassment, and subjecting an individual to unwanted conduct relating to a protected characteristic where such conduct creates an intimidating, hostile, degrading or offensive work environment or violates such person's human dignity.²⁴⁹ The act states the following in this regard:²⁵⁰

26 Harassment

- (1) A person (A) harasses another (B) if—
 - (a) A engages in **unwanted conduct related to a relevant protected characteristic**, and
 - (b) the **conduct has the purpose or effect of**—
 - (i) **violating B's dignity**, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
 - (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.

Workplace harassment has also been described as conduct, words or attitudes that repeatedly or systematically prejudice a person's mental dignity and integrity, jeopardise their work or degrade the work climate.²⁵¹ Given the close link between an individual's mental health status and inherent human dignity, harassment based on a mental health condition such as depression will be sufficient to violate the abovementioned section. UK judiciaries have in fact recognised the causal nexus between harassment in the workplace and the existence of mental health conditions. In *Marinello v City of Edinburgh Council*, for example, the court recognised that an employee's depression had been caused by incidents of workplace harassment.²⁵²

However, the UK legal framework does offer another piece of legislation other than the *Equality Act* that employees who have developed mental health conditions such as depression may turn to for redress. This is the *Protection from Harassment Act* of 1997 (PHA). The PHA, which was originally aimed at combating stalking, provides

²⁴⁹ Talbot and Brownsell 2011:105.

²⁵⁰ *Equality Act*: sec 26.

²⁵¹ Ezer and Ezer 2012:300.

²⁵² *Marinello v City of Edinburgh Council*: 11.

various criminal and civil penalties for harassment in a number of different contexts, including the workplace.²⁵³ In *Majrowski v Guy's and St Thomas's NHS Trust*,²⁵⁴ the court held that the doctrine of vicarious liability applied to cases of workplace harassment under the PHA.²⁵⁵ Consequently, individuals who suffer psychological harm or develop mental health conditions in the employment realm because of workplace harassment may hold their employers vicariously liable for damages.

7.4.3.2.2 Workplace bullying

Workplace bullying and abuse have been identified as the factors most frequently resulting in stress and depression in the UK.²⁵⁶ The phenomenon has been labelled “psychological violence”²⁵⁷ and was confirmed by the judiciary as a form of “psychological abuse”.²⁵⁸ The UK does not have any legislation in place to govern this issue specifically either,²⁵⁹ but in contrast to South Africa and the USA, it has been at the forefront of identifying and addressing workplace bullying since 1997 at the grassroots, political, organisational and legislative levels.²⁶⁰ Bullying is strongly linked with workplace harassment in the UK and is often dealt with in conjunction with it.²⁶¹

The cost of workplace bullying to individuals in the UK has been identified as primarily psychological. Depression, high stress levels, decreased performance and lowered work satisfaction have been noted as common consequences of this phenomenon.²⁶² In severe cases, heightened stress levels as a result of workplace bullying have also led to PTSD.²⁶³

UK employees exposed to abusive behaviour and workplace bullying have often brought claims for harassment under the PHA,²⁶⁴ being a well-developed anti-bullying

²⁵³ Harthill 2011:293-294.

²⁵⁴ 2006 UKHL 34.

²⁵⁵ *Majrowski v Guy's and St Thomas's NHS Trust*: 23-25.

²⁵⁶ Boguslawska 2014:11.

²⁵⁷ Smit 2014:171, referring to Harthill 2008:255.

²⁵⁸ *Price v Surrey County Council* UKEAT/0450/10/SM: 12.

²⁵⁹ Smit 2014:171.

²⁶⁰ Harthill 2008:251.

²⁶¹ Ezer and Ezer 2012:300.

²⁶² Harthill 2008:258, referring to Chappel and Di Martino 2006:136.

²⁶³ Harthill 2008:258.

²⁶⁴ Boguslawska 2014:10.

law in circumstances where employees' dignity-based rights are not recognised.²⁶⁵ Although this statute was developed and enacted with the intention of combatting harassment and personal stalking, and not workplace bullying, the courts recognised the psychological harm caused by harassment and applied it to bullying in a similar fashion.²⁶⁶ This flexibility by the judiciary stems primarily from the fact that the PHA does not define harassment and merely contains a general prohibition of this behaviour, which involves a course of conduct which amounts to harassment of another and which (the perpetrator) knows, or ought to have known amounts to the harassment of another.²⁶⁷

The judiciary may thus, depending on the circumstances, interpret certain acts of workplace bullying as a violation of the PHA. In *Majrowski*, the court confirmed that the PHA applied to cases of workplace bullying and that an employer might be held vicariously liable for acts of harassment committed by its employees in this regard.²⁶⁸

In the case of *Green v DB Group Services UK Ltd.*,²⁶⁹ an employee was subjected to a campaign of severe workplace bullying and harassment by four co-workers in her department. This campaign included marginalising and ostracising the employee, as well as taunting her, distracting her and hiding her post and documentation.²⁷⁰ The employee reported the behaviour to the employer, but nothing was done to assist her. As a consequence, the employee developed and was diagnosed with severe depression and was placed on suicide watch.²⁷¹ Upon her return to work several months later, she discovered an e-mail indicating that she would be dismissed, and she consequently suffered an immediate relapse.²⁷² The court in this case held that the employer was both directly and vicariously liable for the employee's serious

²⁶⁵ Smit 2014:171, referring to Harthill 2008:251. This is possible because the PHA very broadly defines harassment as follows: "(1) A person must not pursue a course of conduct - (a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other. (2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other." See PHA: sec 1.

²⁶⁶ Smit 2014:185.

²⁶⁷ Smit 2014:186-188.

²⁶⁸ *Majrowski v Guy's and St Thomas's NHS Trust*: 23-25.

²⁶⁹ 2006 IRLR 764.

²⁷⁰ *Green v DB Group Services UK Ltd*: 30-32, 35.

²⁷¹ *Green v DB Group Services UK Ltd*: 41, 53.

²⁷² *Green v DB Group Services UK Ltd*: 40, 43.

psychiatric injury and awarded her damages of just over £850 000.²⁷³ In *Lyon v Ministry of Defence*,²⁷⁴ in turn, an employee was subjected to workplace bullying over a period of several months, which resulted in him developing major depression.²⁷⁵ He was awarded damages for pain and suffering as well as aggravated damages by the court.²⁷⁶

These cases clearly illustrate that employees in the UK who are subjected to workplace bullying and abuse, and develop mental health conditions such as depression as a result, may be awarded damages. This stands as a firm warning to employers to protect their employees from these types of workplace hazards, which is why employers in the UK have made significant attempts to curb workplace bullying by introducing anti-bullying workplace policies.²⁷⁷ Harthill suggests that while at first glance, it appears that employers are at the forefront of the battle against workplace bullying, their concern merely stems from fear of direct and vicarious liability under the PHA.²⁷⁸ Whatever the reason, however, these policies appear to have made a significant contribution at grassroots level.

7.4.3.3 Dismissal

If an employee is dismissed because of a mental health condition, the dismissal will constitute unlawful discrimination in the UK, unless the employer can justify it.²⁷⁹ One such justification would be that the employee's condition renders him or her incapable of discharging the essential functions of the employment position. The employer will however be obligated to consider whether the individual can perform the job with reasonable adjustments, and if not, the dismissal will be justified.²⁸⁰

7.4.4 Concluding remarks

Discrimination amplifies the disability of people with mental health conditions. In this regard, Lockwood *et al* have described the *Equality Act* as a welcome firming up of

²⁷³ *Green v DB Group Services UK Ltd*: 172-191.

²⁷⁴ 2011 WL 2748481 unreported.

²⁷⁵ *Lyon v Ministry of Defence*: 5.

²⁷⁶ *Lyon v Ministry of Defence*: 5.

²⁷⁷ Harthill 2008:252.

²⁷⁸ Harthill 2008:292.

²⁷⁹ Lockwood *et al.* 2012:183.

²⁸⁰ Lockwood *et al.* 2012:183.

disability protections as well as a clarification for those vulnerable individuals who are seeking protection and wishing to disclose their condition to their employer.²⁸¹

Although, as in South Africa and the USA, discrimination, stigma and prejudice based on mental health conditions, especially depression, are common in the UK, the *Equality Act* does enable victims in employment to obtain redress and demand that their rights to equality, non-discrimination and dignity be respected, if they satisfy the legal requirements.

7.5 Mental health and reasonable accommodation

7.5.1 Introductory remarks

In order to supplement the lessons taken from the USA in this regard, the following paragraphs will explore reasonable accommodation relating to mental health under the UK legal framework. It starts off with a broad overview of reasonable accommodation in Europe, and then zooms in on the UK and its legislative instruments governing reasonable accommodation, or “reasonable adjustments” as it is termed in that jurisdiction, relating to mental health conditions such as depression.

7.5.2 Reasonable accommodation in Europe: A brief overview

The Employment Equality Directive states the following in article 16: “The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability.”²⁸² Reasonable accommodation can therefore be seen as a positive duty on employers, requiring some action to avoid less favourable treatment as opposed to requiring more favourable treatment or positive discrimination.²⁸³ In addition, the Employment Equality Directive is based on the assumption that other measures apart from the prohibition against discrimination may be needed in order to achieve equality.²⁸⁴ The directive may therefore be said to be in line with the substantive approach to equality. Wells also calls it “forward-looking and innovative” in its focus on reasonable

²⁸¹ Lockwood *et al.* 2012:183.

²⁸² Employment Equality Directive: art 16.

²⁸³ Wells 2003:265.

²⁸⁴ Liisberg 2011:90.

accommodation as the “lynchpin” of equal treatment for mentally disabled individuals.²⁸⁵

A failure to accommodate an individual with a disability under the directive will in itself constitute discrimination. In this regard, in deciding whether an individual is qualified for the employment position, an employer must assess the suitability of the person in light of any accommodation that can reasonably be made.²⁸⁶

The directive clearly provides for disabled people to seek reasonable accommodation, and it would thus appear that people who cannot establish a legal disability will be excluded from the provision of such accommodation. The disabled person seeking an accommodation measure will also have to be able to perform the essential functions of the job.²⁸⁷ Moreover, the directive restricts the duty to accommodate to the extent that the employer is not required to suffer a “disproportionate burden” in accommodating the employee.²⁸⁸ Generally, if a required accommodation measure imposes significant difficulty or expense, it is unlikely to be considered reasonable.²⁸⁹

The duty to accommodate should be viewed, and legislatively implemented, in its entirety as an obligation or positive duty to prevent and remove barriers to equality,²⁹⁰ confirming its potential interpretation as promoting substantive equality. The purpose of reasonable accommodation is to mediate the legitimate demands for inclusion of people with disabilities and the resultant costs to an employer and society that this could imply.²⁹¹

7.5.3 The notion of reasonable accommodation

From a UK perspective, Bell notes that although there is an extensive body of literature on the duty to accommodate, there has been less focus on its application in the mental health context.²⁹² Nevertheless, research indicates that this context is the most

²⁸⁵ Wells 2003:266.

²⁸⁶ Whittle 2002:10-11.

²⁸⁷ Employment Equality Directive: art 17.

²⁸⁸ To determine whether the measures in question give rise to a disproportionate burden, particularly the associated financial and other costs, the scale and financial resources of the organisation or undertaking, and the possibility of obtaining public funding or any other assistance should be taken into account. See Employment Equality Directive: art 21.

²⁸⁹ Whittle 2002:12.

²⁹⁰ Whittle 2002:14; Hosking 2006:677.

²⁹¹ Hosking 2006:677.

²⁹² Bell 2015:195.

contested terrain in respect of reasonable adjustments, with most disability cases concentrating on the interpretation of this obligation.²⁹³ Of all discrimination claims brought before the UK courts and tribunals, the failure to make reasonable adjustments is the most prevalent, with 53% of discrimination claims being based on this ground.²⁹⁴

The making of reasonable accommodation is not a novel social concept. It aims not to achieve identical results for people with disabilities compared to non-disabled individuals, but simply to ensure that disabled persons are afforded equal opportunities in society and the workplace.²⁹⁵ Bell argues that the duty to accommodate holds the promise of reconciling individual needs with business requirements in terms of job design.²⁹⁶ According to Whittle, the duty to accommodate requires nothing more than the provision of accommodation to cater for the needs of people with disabilities and does not require anything beyond that which has already been provided to other members of society.²⁹⁷ In the past, reasonable adjustments have been viewed as a form of welfare benefit or handout, which stemmed primarily from the restrictive interpretation of the disability definition. However, it does not constitute a form of compensation or subsidy, but rather a tool that compels employers to remove disadvantages from the workplace that restrict the equal participation of people with disabilities.²⁹⁸

In addition, it is believed that reasonable accommodation has the potential to humanise the experience of work via its “decommodification”.²⁹⁹ Job design is no longer a matter purely of market forces, but can instead be reshaped to reflect the needs of the individual.³⁰⁰

²⁹³ Bell 2015:195-196, referring to Lockwood *et al.* 2014:168, 179.

²⁹⁴ Lockwood *et al.* 2014:171.

²⁹⁵ Whittle 2002:12.

²⁹⁶ Bell 2015:218.

²⁹⁷ Whittle 2002:12.

²⁹⁸ These disadvantages may stem from employers' provisions, criteria, practices and premises. See Lawson 2011:362.

²⁹⁹ Bell 2015:200.

³⁰⁰ Bell 2015:200, referring to Somek 2011:182. Fredman holds a similar view, namely that reasonable accommodation duties call into question the dominance of the merit principle, in terms of which it is assumed that the individual should fit the job rather than that the job should be adjusted to fit the worker. See Bell 2015:200, referring to Fredman 2005:199, 204.

In its current form under the *Equality Act*, reasonable accommodation³⁰¹ concentrates on whether an adjustment is reasonable or not and requires an employer to take all reasonable steps in all circumstances to prevent a person with a mental disability from being placed at a substantial disadvantage compared to those who are not disabled.³⁰²

The duty to make reasonable adjustments is considered to be a pivotal feature of UK law, which is to be decided objectively based on the facts of a particular case and can be wide in scope and application, placing a significant duty on the employer.³⁰³ Reasonable accommodation in employment may encompass anything from adapting the workplace and work arrangements to adjusting policies or practices to meet the needs of the disabled employee where it is reasonable to do so.³⁰⁴

7.5.4 Reasonable adjustments under the *Equality Act*

Disability is the only protected characteristic to which the duty to provide reasonable accommodation applies under the UK legal framework, which is in line with both EU community law and international law. The concept of reasonable adjustments aims to provide “preferential” treatment for disabled individuals, without the risk of equipping a non-disabled individual with a legitimate discrimination claim.³⁰⁵ The *Equality Act* has had the effect of “tidying up and harmonising” the previous duties to provide reasonable accommodation under UK law.³⁰⁶

UK judicial precedent indicates that in considering reasonable adjustment measures, employers in the past tended to rush to the conclusion that nothing could be done for the employee, without considering a range of possible alternatives such as increased rest breaks, part-time work, flexible work and job-sharing.³⁰⁷ In *Cumbria Probation Board v Collingwood*,³⁰⁸ for example, an employee who had been on sick leave because of his depression sought a meeting with his employer to discuss the situation,

³⁰¹ The duty to make reasonable accommodation for people with disabilities first appeared in UK law in the DDA (preceding the Employment Equality Directive and UN Disability Convention). See Lawson 2011:367.

³⁰² Lockwood *et al.* 2014:170.

³⁰³ Lockwood *et al.* 2014:176. Also see *Smith v Churchill Stairlifts* 2006 ICR 524; *Archibald v Fife Council* 2004 IRLR 651; *Cosgrove v Caesar and Howie* 2002 IRLR 653.

³⁰⁴ Whittle 2002:10.

³⁰⁵ Lawson 2011:361.

³⁰⁶ Lawson 2011:368.

³⁰⁷ Lockwood *et al.* 2014:176.

³⁰⁸ 2008 UKEAT 0079_08_2805.

but the employer refused on the basis that its business policy did not permit confidential discussions with employees about health issues.³⁰⁹ The EAT held that the refusal constituted failure to make a reasonable adjustment for the employee, as the employee had expressed a need to converse with the employer in confidence about his condition.³¹⁰ It was held that a reasonable employer would have agreed to such a discussion.³¹¹ In the case of *Hinsley v Chief Constable of West Mercia Constabulary*,³¹² it was held that reappointing an employee without her having to undergo the normal recruitment procedures after she had resigned while suffering from depression constituted a reasonable adjustment.³¹³

The *Equality Act* and the Employment Equality Directive define reasonable accommodation as a particular duty to respond to the disadvantage experienced by a particular person, and to take into account the specific circumstances of each specific case and the impairment of the specific individual.³¹⁴ This level of sensitivity to the particular individual and his or her circumstances is a vital tool to ensure that a countless range of barriers are removed, on a case-by-case basis, for different people with different impairments, backgrounds, skills and work methods.³¹⁵

As is the case in the other jurisdictions, the individual seeking reasonable accommodation measures will first have to prove that they meet the requirements set by the disability definition. The *Equality Act* sets out the reasonable accommodation duty in sections 20 to 22, which are supplemented by additional context-specific details in the schedules to the act. The relevant provisions are as follows:³¹⁶

20 Duty to make adjustments

...

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

³⁰⁹ *Cumbria Probation Board v Collingwood*: 23.

³¹⁰ *Cumbria Probation Board v Collingwood*: 45-47.

³¹¹ *Cumbria Probation Board v Collingwood*: 54.

³¹² 2010 Appeal No. UKEAT/0200/10/DM.

³¹³ *Hinsley v Chief Constable of West Mercia Constabulary*: 22.

³¹⁴ Lawson 2011:369.

³¹⁵ Lawson 2011:369.

³¹⁶ *Equality Act*: sec 20.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

...

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

- (a) removing the physical feature in question,
- (b) altering it, or
- (c) providing a reasonable means of avoiding it.

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

Clearly, then, failure to comply with the reasonable adjustment duty will amount to unlawful discrimination. It is a requirement to remove substantial disadvantage faced by an “interested disabled person”. “Substantial” is defined as “something more than minor or trivial”,³¹⁷ and consequently sets the level of required disadvantage relatively low.³¹⁸ This implies that employers may have to incur some direct or indirect costs, although research has indicated that these costs are often low.³¹⁹ On the matter of costs, the EAT in *Cordell v Foreign and Commonwealth Office*³²⁰ held that in determining reasonable accommodation, the disadvantage to the employee if the adjustment is not made had to be balanced with the cost to the employer of making the adjustment.³²¹ It was further held that in balancing these concepts, tribunals had to make a judgment based on what they consider to be right and just in their capacity as an “industrial jury”.³²²

The statutory duty contained in section 20(3) of the *Equality Act* has been subdivided into various stages, as established in the *locus classicus* case of *Environment Agency*

³¹⁷ *Equality Act*: sec 212(1).

³¹⁸ Lawson 2011:368.

³¹⁹ Bell 2015:201.

³²⁰ 2012 ICR 280 EAT.

³²¹ *Cordell v Foreign and Commonwealth Office*: 30.

³²² *Cordell v Foreign and Commonwealth Office*: 30.

v Rowan,³²³ with further development in *Royal Bank of Scotland (RBS) v Ashton*.³²⁴ These stages, with slight variations from one tribunal to the next, have been set out as follows for cases involving mental health conditions:³²⁵

1. What is the provision, criterion or practice (PCP)?
2. Is the disabled person placed at a substantial disadvantage due to the application of the PCP in comparison with persons who are not disabled?
3. Can reasonable steps be taken to prevent the PCP creating that disadvantage?

The duty to make reasonable adjustments is not without limitations, however, since it applies only to work-related matters. A reasonable adjustment involves taking steps to make it possible for an employee with a mental health condition to remain employed. For example, in the case of *Tameside v NHS Trust v Mylott*,³²⁶ the EAT held that allowing a disabled employee who is incapacitated in his ability to work, to leave the employer's service on favourable terms did not constitute a reasonable adjustment.³²⁷

7.5.4.1 The interactive process in selecting appropriate measures of reasonable adjustment

Significantly, the duty to accommodate does not arise unless the employer is aware, or ought to have been aware, that the particular individual is disabled and exposed to the relevant substantial disadvantage.³²⁸ The employer may be made aware of the mental disability through disclosure by the individual or from sufficient evidence in this regard. A period of extended sick leave or absenteeism, for example, may be sufficient to alert an employer to the fact that an employee has a disability.³²⁹ An employee is however not obligated to disclose his or her mental disability to the employer, except if the disability could present a health and safety risk to others.³³⁰

As an employer must be aware of the mental health condition in order to make reasonable adjustments, employees with these issues find themselves in the position of having to either disclose the condition or make do without accommodation. However, academic literature has extensively documented the high levels of

³²³ 2008 ICR 218 EAT.

³²⁴ 2011 ICR 632 EAT.

³²⁵ *Royal Bank of Scotland (RBS) v Ashton*: 13-15. Also see Bell 2015:204.

³²⁶ 2011 Appeal No. UKEAT/0352/09/DM.

³²⁷ *Tameside v NHS Trust v Mylott*: 53.

³²⁸ *Equality Act*: schedule 8, sec 20. Also see Callaghan and Kent 2011:673.

³²⁹ Bell 2015:204, referring to *British Midland Airways Ltd v Hamed* 2010 Appeal No. UKEAT/0292/10/RN.

³³⁰ Lockwood *et al.* 2012:183.

stigmatisation associated with mental health conditions, and the barriers this creates to disclosure. Discrimination and social exclusion as well as the anticipation of it may lead many individuals to conceal their mental health conditions from their employers in order to avoid falling victim to such conduct.³³¹

Nevertheless, reasonable accommodation does require a process of dialogue between the employer and the individual, which should provide for mutual understanding and tailoring of the accommodation measure to suit the specific circumstances.³³² While employees are better able to suggest how their mental disabilities may be accommodated, the inherent onus is on both parties to be imaginative and flexible in their approach to reasonable accommodation.³³³ This helps displace ingrained assumptions about what an individual with a mental disability can achieve or about such a person's potential productivity.³³⁴

Brohan *et al* identify four possible elements in the disclosure of mental health conditions to an employer. These are the following:³³⁵

- *Voluntary or involuntary disclosure.* In circumstances where the symptoms and effects of the mental health condition are not visible or evident to an employer, the disclosure thereof would be voluntary. On the other hand, if the symptoms and effects, or even the side effects of the medication is evident to an employer, disclosure of the condition would more likely be involuntary.
- *Full or partial disclosure.* This entails whether the employee will disclose all aspects of the condition or only certain facets thereof.³³⁶
- *Selectiveness in disclosure.* This involves whether an employee will disclose their mental health condition to select persons within the work environment only, or whether disclosure will be made to a broader range of individuals.

³³¹ Bell 2015:197.

³³² Bell 2015:200, referring to Lawson 2008:69. If an employer is not aware of an employee's mental disability, it will be impossible for it to appreciate the need for reasonable adjustments. See Bell 2015:208.

³³³ Bell 2015:208.

³³⁴ These stereotypes often manifest themselves in a form of paternalism, e.g. assuming that an individual with depression should not be offered a stressful employment position. See Bell 2015:201.

³³⁵ Brohan *et al* 2012. <http://bmcpsychotherapy.biomedcentral.com/articles/10.1186/1471-244X-12-11>. Accessed 08/06/2016.

³³⁶ For example, certain symptoms of depression may be disclosed to an employer, such as impaired functioning and low energy levels, but not suicidal tendencies.

- *The timing of the disclosure.* This pertains to the point in the employment process when the disclosure is made, namely in the pre- or post appointment phase.

These elements will all impact when, how and to what extent an employee with a mental health condition engages in the interactive process with an employer.

Evidence indicates that UK tribunals and courts often consider late or no disclosure to the employer of a medical condition such as a mental disability as a lack of cooperation with the employer's attempts to ascertain the employee's condition and limitations, which negatively reflects on the employee's case.³³⁷

7.5.4.2 Health and safety at work

Although the *Equality Act* does not explicitly provide that employers may escape their duty to make reasonable adjustments for the mental disabilities of their employees if the particular mental health condition poses a threat to others in the workplace, the *Health and Safety at Work Act of 1974* (HSW)³³⁸ provides some insight in this regard.

The HSW aims to secure the health, safety and welfare of persons at work.³³⁹ UK employers are bound in terms of this statute to promote health and safety in the workplace and may consequently rely on this duty to justify excluding from employment those persons whose mental health conditions that pose a threat to occupational health and safety. The HSW is however silent on the duty to make reasonable accommodation to eliminate such threat.³⁴⁰

7.5.4.3 Return to work

In the context of people with mental health conditions, returning to work can pose significant challenges. For example, the reactions of supervisors, clients and co-workers may suggest that the person's judgment can no longer be trusted, or there may be embarrassment and social awkwardness over how or whether to discuss the

³³⁷ Lockwood et al. 2014:176.

³³⁸ The HSW is the primary statute in relation to occupational health and safety in the UK.

³³⁹ HSW: sec 1(a).

³⁴⁰ The importance of health and safety at work in relation to mental health conditions is elaborated in Chapter 8 below.

reason for the employee's absence.³⁴¹ Research indicates that many professional workers who take medical leave as a result of a mental health condition such as depression experience difficulties in maintaining a stigma-free relationship with their employers and co-workers upon their return to work.³⁴² It has been pointed out that as a result of the anxiety associated with the concept of returning to work, temporary adjustments are vital in this process.³⁴³ Bell is among those who suggest that the concept of providing reasonable adjustments may hold significant potential to address the barriers experienced by persons with mental health conditions upon their return to work.³⁴⁴

Support for this may be found in the matter of *Croft Vets v Butcher*,³⁴⁵ where an employee took a leave of absence as a result of depression and stress. Medical evidence indicated that the employee's return to work would be facilitated if the employer were to fund psychiatric sessions for the employee. However, the employer contended that this request was beyond the scope of the reasonable adjustments duty.³⁴⁶ The EAT sided with the employee and distinguished between the employer having to fund general medical treatment as opposed to treatment specifically designed to enable the employee to return to work.³⁴⁷

In certain other cases involving mental health, workplace disputes may constitute a key barrier to an employee's prospects of returning to work.³⁴⁸ This conundrum was illustrated in *Leeds Teaching Hospital NHS Trust v Foster*,³⁴⁹ where an employee's relationship with his manager broke down and led to stress-related ill health and absence from work.³⁵⁰ The employee requested to be relocated to a different department, but the employer denied the request.³⁵¹ The EAT in this case held that it

³⁴¹ Bell 2015:213.

³⁴² Lockwood *et al.* 2014:172.

³⁴³ Bell 2015:216, referring to Henderson and Madan 2014:161.

³⁴⁴ Bell 2015:213. *Mullen v Western Health Care Trust* 2010 UKEAT illustrates that where an employee returns to work following absence because of depression, there are several adjustments that an employer may consider to facilitate this process. These include a phased return to work, alternative work, and returning to work in a temporary capacity.

³⁴⁵ 2013 Eq LR 1170 EAT.

³⁴⁶ *Croft Vets v Butcher*: 40.

³⁴⁷ *Croft Vets v Butcher*: 40.

³⁴⁸ Bell 2015:214.

³⁴⁹ 2011 Appeal No. UKEAT/0552/10/JOJ.

³⁵⁰ *Leeds Teaching Hospital NHS Trust v Foster*: 1.

³⁵¹ *Leeds Teaching Hospital NHS Trust v Foster*: 3-4.

would have been a reasonable adjustment to relocate the employee to a different department,³⁵² since the resolution of the dispute was crucial in improving the employee's mental health and facilitating his return to work.³⁵³

7.5.4.4 Reasonable adjustments and dismissal

A significant consideration in relation to mental health conditions and reasonable accommodation is the overlap between extended absence due to sick leave and dismissal. Most employers in the UK have policies in place to govern illness that eventually culminates in dismissal where there is extended absence.³⁵⁴ In this regard, employers are not expected to disregard all disability-related sickness absences, but are obligated to disregard some or all of these absences by way of an adjustment if this is reasonable.³⁵⁵ Consequently, it would appear that employers should first attempt to reasonably accommodate employees with mental disabilities before dismissing them in cases where these individuals have been absent from work for an extended period.

In *Newham Sixth Form College v Sanders*,³⁵⁶ an employee was dismissed based on her poor timekeeping skills. She, however, suffered from depression, and medical evidence indicated that this affected her ability to get up in the mornings, which in turn affected her ability to perform day-to-day activities, including showing up for work on time.³⁵⁷ The ET held that the employer had failed in its duty to provide the employee with a reasonable adjustment for her depression, such as allowing her flexible working time or to work from home.³⁵⁸ In addition, the EAT and the appeal court found that the requirement that the employee had to be at work at 08:45 or had to inform the employer that she would be late placed her at a substantial disadvantage.³⁵⁹ However, although the employee had informed the employer in writing of her depression, the

³⁵² *Leeds Teaching Hospital NHS Trust v Foster*: 27.

³⁵³ Bell 2015:214.

³⁵⁴ Bell 2015:216.

³⁵⁵ *Equality Act 2010 Code of Practice: Employment* of 2011: 17.20.

³⁵⁶ 2014 EWCA Civ 734.

³⁵⁷ *Newham Sixth Form College v Sanders*: 4, 6.

³⁵⁸ *Newham Sixth Form College v Sanders*: 15-17.

³⁵⁹ *Newham Sixth Form College v Sanders*: 15.

court of appeal found that the employer was not given sufficient evidence of the severity of the depression and how it affected her ability to get to work on time.³⁶⁰

This case clearly illustrates that employees with depression or other mental health conditions should provide their employers with sufficient evidence of the disorder, as well as of how the symptoms of the condition may affect their ability to perform day-to-day activities, and which of these activities are likely to be affected.

7.5.5 Measures of reasonable adjustment

The employer is required to make reasonable adjustments so that an individual with a mental disability is not disadvantaged compared to a non-disabled individual. These measures of reasonable adjustment could include:³⁶¹

- a phased return to work – for example working flexible hours or part-time;
- time off for medical treatment or counselling; or
- assigning to another employee those tasks that a mentally disabled employee cannot easily perform.

Research indicates that typical adjustments for mental health conditions go to the heart of the organisation of modern workplaces and include measures such as providing greater flexibility in work schedules or restructuring open-plan workplaces to make them quieter.³⁶² Other accommodation measures afforded to employees with mental health conditions are a reduced workload, increased supervision, access to counselling and working from home.³⁶³

In certain circumstances, employees with mental health conditions such as depression may experience difficulties concentrating and remembering, either as part of their condition or as a side effect of medication. In these circumstances, appropriate reasonable adjustments may include providing room dividers (or other appropriate sound and visual barriers), reducing noise in the work environment (if possible) and

³⁶⁰ *Newham Sixth Form College v Sanders*: 18, 20.

³⁶¹ Gov.UK 2015b. <https://www.gov.uk/if-you-become-disabled/if-you're-in-employment-and-become-disabled>. Accessed on 15/09/2015.

³⁶² Bell 2015:200.

³⁶³ Bell 2015:210, referring to Henderson *et al* 2013:73.

giving written instructions that may serve to decrease anxiety and increase confidence.³⁶⁴

7.5.6 Concluding remarks

The influence of EU community law and its substantive approach to equality in the form of reasonable accommodation has had a significant impact on UK jurisprudence. The *Equality Act* and the resultant judicial precedent go a long way toward elucidating the nature of reasonable accommodation for employees with mental health conditions, and provide valuable lessons on the potential limitations, requirements and measures of accommodation, which South Africa would be well advised to incorporate in its legal framework.

7.6 Conclusion

This chapter has confirmed that South Africa undoubtedly stands to learn important lessons from the UK's approach to mental health conditions in the workplace. It has shed light on the disability-specific legislation governing disability discrimination and reasonable accommodation in the labour realm in that jurisdiction. The UK, together with the influential EU community law, has endorsed a social model approach to mental disability, along with an extensive disability definition. UK lawmakers have also published legal guidelines on how mental health conditions such as depression should be dealt with in the context of disability, discrimination and reasonable accommodation. In addition, the judicial precedent from this jurisdiction is very informative, especially in relation to depression in the workplace.

³⁶⁴ Liimatainen and Gabriel 2000:9.

CONCLUSION TO THE COMPARATIVE JURISDICTIONS AND MENTAL HEALTH CONDITIONS

Part 3 has brought to the fore several significant insights in relation to mental health conditions, particularly depression, under the USA and UK legal frameworks. It would appear that in many respects, these frameworks and their disability-specific legislation and provisions are useful benchmarks against which to formulate suggestions and recommendations to develop and improve the South African position.

The USA and UK legal frameworks have seen many legal developments in relation to mental disability, discrimination based on mental health as well as reasonable accommodation for mental health issues, which appear to be more advanced and effective than those currently in force in South Africa. The final part of this study is thus dedicated to a reflection on the lessons to be drawn from the legal developments and positions in the two comparative jurisdictions (chapter 8) and a detailed description of practical recommendations on how these lessons may be applied in the South African context (chapter 9).

PART 4

THE LEGAL WAY FORWARD:

COMPARISON, RECOMMENDATIONS AND CONCLUSION

"The aim of life is self-development. To realize one's nature perfectly – that is what each of us is here for."

— Oscar Wilde

CHAPTER 8

THE LEGAL WAY FORWARD IN SOUTH AFRICA:

LESSONS FROM THE COMPARATIVE JURISDICTIONS

8.1 Introduction

The aim with this chapter is to extract relevant principles in relation to mental health conditions in the employment law areas of disability, discrimination and reasonable accommodation from the legal frameworks of the comparative jurisdictions and compare them to those of South Africa. The ultimate objective is to identify possible lessons for improving the South African legal framework in this regard.

This will be done by independently appraising each of the three employment law areas mentioned above. Within each of these sections the relevant considerations from the USA and UK will be highlighted, followed by how these considerations may assist the South African legal framework.¹

8.2 Mental disability

8.2.1 Lessons from the international instruments in the consideration of people with mental disabilities

As the leading international law instrument in relation to mental disability in the workplace, the UN Disability Convention is of primary significance in South Africa, particularly since the jurisdiction signed and ratified the convention.

The UN Disability Convention promotes a concept of disability that recognises that people with mental disabilities are exposed to oppression. The significance of the convention lies in the fact that it serves as a reference for the protection of the rights of people with disabilities, including mental disabilities such as depression, in all countries across the world. In all signatory countries, the convention forms the basis

¹ The reflections, suggestions and contentions used in this section flow primarily from the considerations and studies conducted in chapters 3, 6 and 7. As the research was comprehensively presented and referenced in those chapters, relevant considerations will be extracted for use in this section without repeating the references. It must be noted, however, that the original sources still apply to all considerations contained in this section.

on which to construct domestic legislation and social policies in relation to disability.² In South Africa, however, the convention has not been used as a basis for establishing disability-specific legislation in the employment realm. This omission constitutes a noteworthy flaw in the South African legal framework, and that the convention and its principles should be implemented to that end.

The convention redefines disability as both a biomedical and a social concept, entailing both bodily impairments and a human rights perspective.³ This reflects a realistic and integrated approach to mental disability in the workplace, as it takes all aspects of disability into account. The endorsement of such a social model approach to disability in the UN Disability Convention goes a long way towards counteracting discriminatory attitudes towards people with mental health conditions, which create barriers to their effective participation in society and the workplace. Therefore, the convention's move towards a social model of disability serves as a welcome acknowledgement that mental disability is more than just a medical condition, and that prejudice based on such a condition may be just as disabling as the condition itself. In terms of the convention, the disadvantage suffered is not inherent in the human body, but the result of attitudes, values and practices that discriminate against people with mental disabilities.⁴

It appears, then, that by adopting the UN Disability Convention, the issue of mental disability is acknowledged as a matter of justice, human rights and equality.⁵ It is precisely this human-rights-based approach that would serve to strengthen legal protection for people with mental health conditions in the South African employment realm. After all, an emphasis on human rights such as equality and dignity in the understanding of disability is in line with South Africa's well-documented commitment to protect and advance human rights under its Constitution. Confirming the link between human rights in international law and under the South African legal system, and placing these at the centre of South Africa's disability jurisprudence, will advance legal certainty and firmly entrench constitutional dignity and equality for people with mental health conditions in employment.

² Diniz *et al.* 2009:68.

³ Diniz *et al.* 2009:62.

⁴ Diniz *et al.* 2009:62.

⁵ Diniz *et al.* 2009:69.

In spite of the fact that South Africa puts a high premium on the achievement of equality, equal opportunity and the protection of human dignity in the workplace, the country's disability jurisprudence appears to orbit the medical model rather than the social model of disability. In light of South Africa's long history of ingrained prejudice on many grounds, including mental health status, the UN Disability Convention's move towards a social disability model should be adopted under the South African legal framework also. This will help eradicate social, economic, legal and cultural barriers that prevent employees with mental health conditions from fulfilling their human rights such as equality and dignity in the workplace.

The UN Disability Convention's substantive approach to equality is in line with the South African Constitution's commitment to achieving substantive equality in South African society and the workplace. This shared foundation and the need for substantive equality in the context of people with mental health conditions may facilitate the adoption of the convention's principles into disability jurisprudence under the South African legal framework.

However, the UN Disability Convention is not the only international law instrument that may provide lessons for the South African legal framework in relation to mental disability. The other instruments, namely the *ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention*, the ILO Disability Code, the *ILO Executive Summary on Mental Health in the Workplace* and the ILO and WHO report *Mental Health and Work: Impact, Issues and Good Practices*, all stress the importance of protecting the human rights of people with mental disabilities. All of these instruments emphasise the right to equality, equal opportunity and inherent human dignity of persons with mental disabilities, thus overlapping with commitment under the South African legal framework to advance and protect these rights for this group in the workplace. Therefore, adopting the principles of these international law instruments into South African law can only strengthen the position of employees with mental conditions by endorsing and entrenching a human-rights-based approach to mental disabilities in South Africa.

8.2.2 Lessons from the legal frameworks of the United States of America and the United Kingdom

8.2.2.1 The legal status of mental disability and the disability definition

Firstly, it is important to keep in mind that the detailed legal considerations in relation to mental disabilities under the South African legal framework are embodied in a non-binding code of good practice. The USA legal framework, on the other hand, includes a detailed body of federal disability legislation that governs mental disabilities in the employment realm. The ADA contains an expansive definition of disability, and statutorily attempts to place disability jurisprudence in line with the social disability model, providing binding legal protection to people with mental disabilities. Similarly, the UK legal framework also has a detailed body of disability legislation that governs mental disabilities in the workplace. Similar to the ADA, the *Equality Act* also attempts to align disability jurisprudence with the social disability model, and also affords binding legal protection to people with mental disabilities.⁶

Secondly, the South African legal framework does not have a specialised forum, committee or agency that is specifically charged with enforcing disability law, or that issues guidelines to support the legal interpretation of mental health conditions and mental disabilities. The USA, however, has established the EEOC, which is specifically tasked to enforce the ADA in relation to mental disabilities in employment, as well as to issue guidelines in this regard. As the South African legal system does not include a commission such as the EEOC, the prevalence of claims involving mental health conditions are not tracked effectively and made available for public consideration. The EEOC not only keeps track of these claims, but categorises information regarding claims under separate headings based on each specific mental health condition. Such monitoring of claims involving mental health conditions is beneficial in considering the problematic nature of these conditions in the workplace.

In the third instance, while the UK government lists several mental health conditions, including depression, as likely disabilities under the *Equality Act*, the South African government does not take a similar approach, and mental health conditions such as

⁶ Interestingly, Pretorius *et al* suggest that if the disability definition under the EEA is narrowly interpreted, it resembles the definition under the *Equality Act*. See Pretorius *et al*. 2014:7-30(3). This is significant, as it indicates an overlap between the South African and UK legal frameworks.

depression are not legally recognised as possible disabilities, despite their prevalence in the employment realm.⁷

One similarity deserves mentioning. The ADA's disability definition plays a "gatekeeping" function in disability law to ensure that only people whose mental health conditions satisfy the legal criteria are considered to be people with mental disabilities. This is similar to the South African legal position, where the disability definition under the EEA and Disability Code aims to achieve the same purpose, as well as to the definition under the *Equality Act* (as preserved from the DDA).

8.2.2.1.1 Mental impairment

Although the judiciary has adopted the use of the DSM in South African law, neither the South African Disability Code nor the Disability Guidelines endorse the use of any classification instrument to establish the existence of a "clinically recognised condition" as a mental impairment. Under the USA legal framework, on the other hand, the EEOC officially endorses the use of a diagnosis in terms of the DSM to establish mental impairment. The United States does however not restrict this analysis to a diagnosis in terms of the DSM, and other methods of establishing mental impairment may also be used.

Even though the use of both the DSM and ICD classification systems is recognised under South African law to establish mental impairment, the judiciary seems to prefer the DSM. This differs slightly from the position in the UK, which also recognises the use of both instruments, but prefers the use of the ICD to establish mental impairment in a legal setting. The South African legal framework would benefit from explicitly endorsing the use of one or both of these classification instruments, as the USA and UK have done, in order to promote legal certainty.

The South African legal framework requires that mental impairment be "clinically recognised". In the USA, mental impairment does not have to be clinically recognised, and any psychological or mental disorder or illness will qualify. This approach seems to lean more towards the social model of disability and alleviates the burden on individuals who wish to establish their mental health condition, such as depression, as

⁷ Mental health conditions, such as depression, are not listed as likely or predictive disabilities in any guidelines or codes of good practice under the South African legal framework, as is done in the UK.

a mental disability.⁸ The requirement that mental impairment should be “clinically recognised” in terms of the Disability Code’s definition overlaps with the previous position under the UK’s DDA, which required mental impairments to be “clinically well-recognised”. In terms of the *Equality Act*, however, this requirement has been scrapped, which has rendered the consideration of mental impairment in the UK similar to that in the USA. In terms of the *Equality Act*, mental impairments will generally encompass all recognised mental health conditions.

Neither the South African Disability Code nor the Disability Guidelines explicitly recognise depression as a mental impairment under the South African legal framework. The EEOC guidelines do however list depression as a recognised legal mental impairment, which has the benefit of creating legal certainty and largely bypassing the need for extensive debates by expert witnesses. Similar to the EEOC guidelines, the *Equality Act* guidance lists various mental health conditions, including depression, as examples of recognised mental impairments that may give rise to a disability. Again, listing these conditions in this manner has the benefit of creating more legal certainty and obviating the need for expert opinions and deliberations as to whether a certain mental health condition may be recognised as a mental impairment. This increased legal certainty may assist the South African legal framework, which fails to explicitly recognise various mental health conditions as recognised mental impairments.

Significantly, the South African position overlaps with the UK’s in that a diagnosis by an expert medical or mental health-care practitioner is of significant value in establishing impairment.

8.2.2.1.2 Long-term, recurring and progressive conditions

As discussed in chapter 3, the South African legal framework governing mental disability requires mental impairment to be long-term, recurring or progressive. The ADA does not explicitly refer to long-term or recurring, but instead refers to “a record of such impairment”, which implies that it has occurred previously or has been long-

⁸ Although it could be contended that this approach may open the floodgates of frivolous litigation since the burden of proof is lighter, the case law discussed in chapters 6 and 7 clearly indicates that this would not be so, as the other elements of the disability definition still serve an effective gatekeeping function.

term in nature.⁹ This implication would in effect mean that the South African legal position overlaps with the USA's. The South African definition also arguably intersects with the USA position in terms of recurring conditions. Under the Disability Code, mental impairment must be likely to reoccur and to be substantially limiting. Under the ADA, mental impairment that is episodic or in remission will constitute a disability if it is substantially limiting when it is active.

The South African position overlaps significantly with the UK legal framework's considerations of "long-term", "recurring" and "progressive" conditions. As is the case under the Disability Code, long-term conditions under the *Equality Act* should have lasted or be expected to last at least 12 months, or be prevalent for life. In terms of recurring conditions, the UK legal framework recognises conditions with fluctuating effects and inter-episode remissions as long-term conditions, provided that the recurring effects "could well happen". Finally, as far as progressive conditions are concerned, both jurisdictions view these as conditions that increase in severity over time, change or recur and will become substantially limiting.

8.2.2.1.3 Substantially limits

In the context of substantial limitation, it should be highlighted that in terms of the South African approach, this concept involves the "substantial limitation of entry into or advancement in employment", while the USA position involves the "substantial limitation of a major life activity". Although these concepts overlap in that they both boil down to an individual's substantial limitation to discharge the inherent requirements of his or her job because of mental impairment, the USA's approach appears to be broader than South Africa's.¹⁰

Substantial limitation under the UK legal framework involves the "substantial and long-term adverse effect to carry out normal day-to-day activities". Although this definition has a stronger overlap with the USA disability definition, it nevertheless intersects with

⁹ Christianson 2004, in Dupper *et al.* 2004:167-268.

¹⁰ The USA approach is considered to be broader, since the substantial limitation relates to a major life activity, as discussed in 6.3.3.4. Major life activities are personal to the individual concerned and will depend on the circumstances. In terms of the South African approach, on the other hand, the substantial limitation relates to an individual's ability to enter or advance in employment. Therefore, it only involves a limitation on an individual's ability to be hired or promoted in the workplace. This assessment is thus limited to the individual in the workplace, while the USA approach involves the individual's impairment in multiple areas of life.

the South African definition, as it highlights an individual's substantial limitation to discharge his or her inherent job functions due to mental impairment.

The purpose of the substantial limitation criterion under the South African legal framework is to eliminate from consideration all mental impairments that have trivial or minor adverse impacts. This approach overlaps with that in the UK, which requires a substantial limitation to be something "more than trivial". The effect or impact of mental impairment determines coverage under the *Equality Act*. This is similar to the position in South Africa, which emphasises the impact of the mental impairment in the employment environment instead of the disability itself.

The position under the South African legal framework overlaps with both the USA and UK legal positions in the sense that long-term and recurring (episodic) mental impairments of a serious nature, such as depression, may substantially limit an individual in discharging the inherent requirements of his or her employment position.

The Disability Code requires that "an assessment to determine whether the effects of an impairment are substantially limiting, must consider if medical treatment or other devices would control or correct the impairment so that its adverse effects are prevented or removed". Although this position was mirrored in the original ADA, the ADA Amendment Act removed this requirement. Consequently, the consideration of mitigation measures in determining whether impairment substantially limits a major life activity is prohibited in the United States.

The use of antidepressants is therefore not taken into account when establishing substantial limitation. The USA approach is preferable, as the effects of mental health conditions are always residually present and are never fully eradicated. Although the use of antidepressants may remove some of the symptoms and consequences of the employee's depression, the individual may to some extent still be impaired in performing his or her employment duties or functioning effectively in the workplace.

Thus, despite the mitigation, an employee may end up in a situation where (s)he is still too impaired to perform the job effectively, but not substantially limited in discharging the inherent requirements of the job.¹¹ This may preclude the employee from claiming

¹¹ For example, the use of antidepressant medications may cause an employee to become fatigued or experience a loss of focus, resulting in possible flaws in their work and the performance of their

disability status, which puts him or her at a disadvantage. This disadvantage may extend so far as the employee being dismissed on the basis of incapacity, which in the absence of disability status will significantly restrict the employee's opportunity of claiming or receiving reasonable accommodation measures.

Under the *Equality Act*, in turn, mitigating measures such as the use of medications and medical treatment are to be eliminated from consideration in assessing whether a mental impairment has a substantial and long-term adverse effect on an individual's ability to perform normal day-to-day activities. This approach is therefore similar to the USA legal position, but different from the South African position, where mitigating measures are indeed taken into account in assessing substantial limitation. For the same reasons cited above in respect of the position in the USA, therefore, the UK approach is equally preferable.

Categories of mental health conditions such as depression are not explicitly listed in the Disability Code or in the Disability Guidelines as possible predictive mental impairments that may substantially limit entry into or advancement in employment. In its section on predictable assessments, the USA's EEOC, on the other hand, lists major depressive disorder (depression) along with PTSD, bipolar disorder, obsessive compulsive disorder and schizophrenia as impairments that may substantially limit a major life activity. This has the benefit of creating the presumption that depression and other mental health conditions may substantially limit employees' ability to perform the inherent requirements of a job, which in turn alleviates their burden of proof in establishing substantial limitation.

In terms of the South African position, the negative side effects of medications such as antidepressants are not officially recognised as substantial limitations or considered as part of the analysis to determine substantial limitation. Considering the use of medication is only relevant in so far as it removes the substantial limitation. In the USA, however, the negative side effects of medication may be taken into account in determining whether an individual's impairment is substantially limiting. Consequently, if the use of antidepressants gives rise to any side effects that substantially limit a

employment duties. The employee may thus be suffering, but these mistakes may not be significant enough to constitute a substantial limitation of their ability to discharge the inherent requirements of their employment position.

depressed individual in performing the inherent requirements of his or her job, this will be taken into account in the assessment, even though these limitations do not stem directly from the impairment. This USA approach is preferable, since the negative side effects of medication may in many instances impair people with mental health conditions such as depression in effectively performing their employment duties and fulfilling their inherent job requirements.

The South African legal framework does not explicitly recognise that environmental factors in the workplace may contribute to an employee's mental impairment having a substantial adverse effect. The *Equality Act* guidance, on the other hand, acknowledges that the specific work environment may exacerbate the effects of impairment and contribute to it having a substantial effect. Therefore, in terms of the UK legal position, when determining whether the adverse effects of impairment are substantial, the extent to which environmental factors, whether individually or cumulatively, are likely to have an impact on the effects should also be considered. In light of the significant stress created and permeated by modern work environments, and the potential of stress and anxiety to cause or exacerbate depression, the UK approach does offer significant insight in this regard. Official recognition of the role played by environmental factors will promote legal certainty in assessing the extent to which mental impairments substantially limit individuals' entry into and advancement in employment.

Finally, an employer's attitudes and prejudices towards mental health conditions are not regarded as "substantial limitations" under the South African legal framework. The fact that impairment has been lessened, controlled or corrected through the use of medications such as antidepressants does however not prevent the individual from being treated as if (s)he still has the disability. In this regard, the USA legal framework caters for instances of perceived disability. This is considered in more detail in the following section.

8.2.2.1.4 Perceived disabilities

As discussed in chapter 3, under the South African legal framework, neither the EEA nor the Disability Code explicitly provides protection to employees or job applicants

who are perceived to be disabled, since the disability definition does not contain a “regarded as disabled” prong.¹²

The ADA in the United States, however, explicitly caters for instances of perceived disability and includes a “regarded as” prong as part of its disability definition. This prong of the definition aims to combat stigma, stereotypes and prejudice associated with particular mental health conditions. It extends protection to employees who experience discrimination based on their mental impairment, even if the impairment is not substantially limiting, but is perceived by the employer to be substantially limiting. It also protects people who have no impairment at all, but are perceived by the employer to be impaired. Consequently, an employee with a mild form of depression may not be substantially limited, but an employer may consider the employee to be substantially limited in his or her ability to think and concentrate. Similarly, an employee may display symptoms of depression without actually being depressed, but the employer may perceive the employee to suffer from depression.

Similar to the ADA, the UK’s *Equality Act* also caters for instances of perceived disability and extends legal protection to those who are “deemed to be disabled”. The position under the UK legal framework mirrors the approach in the USA, which entails that individuals with mental health conditions may be discriminated against on the basis of a subjective perception harboured by the discriminator in relation to such persons’ mental health status. Therefore, such an approach allows individuals who suffer discrimination of this nature to meet the definition of a disability, without having to prove the legal requirements. UK lawmakers argue that instances of perceived discrimination are complex, especially in relation to mental health conditions such as depression. An employer may treat an employee with depression as being disabled, even if the employee has sufficiently recovered from this condition or was in fact never diagnosed at all.

It is proposed that the inclusion of perceived disabilities in the South African framework also is essential for the protection of people with mental health conditions in South African workplaces, given the stigma, stereotypes and prejudice associated with these

¹² Although victims of perceived disability discrimination may seek protection under the auspices of the unlisted analogous grounds of unfair discrimination, this sentence aims to highlight the *lacuna* that protection is not explicitly provided in the EEA or in the Disability Code.

conditions. The “regarded as” prong in effect protects almost everyone from discrimination on the basis of mental impairment. It also serves to relieve these individuals from having to prove that they are different because of the way in which their mental impairment limits them, and only requires proof that they were limited by others’ perceptions of their impairment. This will be in line with South Africa’s constitutional commitment to achieving equality, substantive equality, the eradication of discrimination and the protection of human dignity in employment.

Individuals with perceived disabilities should, however, not qualify for reasonable accommodation measures unless their mental health condition can also satisfy the legal requirements to amount to a legal disability. Providing reasonable accommodation measures to individuals that cannot satisfy the aforesaid requirements (and who are consequently not legally disabled) would arguably impose an unjustifiable hardship on the business of the employer.

8.2.2.2 Concluding remarks

Clearly, the USA and UK legal frameworks may provide some important lessons for South Africa to consider in relation to mental disability. The South African disability definition already overlaps with the USA definition in some instances, but falls short of developments in other respects, which may be remedied by taking the above considerations into account.

The character of disability rights in both the USA and the UK, with their focus on the social model of disability, their willingness to view disability in a broader human rights framework, and their disability-specific legislation,¹³ provides useful examples for enhancing legal protection for people with mental disabilities under the South African legal framework.

8.2.3 Addressing the *lacunae* in the South African legal framework: Enhancing protection for people with mental disabilities

8.2.3.1 Medical model of disability

As explained earlier, the South African legal framework appears to favour the medical model of disability under the Disability Code. Although the medical model serves as a

¹³ Fletcher and O’Brien 2008:540.

useful starting point in establishing mental disability, a social model approach to disability is essential in the context of mental health conditions, given the stigmatisation, prejudice and discrimination suffered by these individuals because of their conditions.

South Africa's ratification of the UN Disability Convention, which promotes a social model of disability, is arguably a step in the right direction for the jurisdiction's legal framework. The incorporation of the Convention's principles into domestic law will in effect entrench the social model and human-rights-based approach to disability law in South Africa.

The USA legal framework, through the ADA, promotes a shift towards a social model of disability and a more substantive vision of disability and equality. The UK legal framework equally embraces the social model of disability and has caused a paradigm shift in disability jurisprudence in that jurisdiction.

Therefore, embracing the social model of disability can only enhance the protection available to persons with mental conditions under the South African legal framework and will present a step closer to eliminating the prejudice, stigmatisation, discrimination and disadvantage suffered by these vulnerable individuals in the employment realm.

8.2.3.2 Disability-specific legislation giving effect to the United Nations Disability Convention

Although the South African legal framework does extend protection to people with mental disabilities in the workplace under various statutes, it does not currently contain any disability-specific legislation that details, protects and advances the rights of this group. Although South Africa signed and ratified the UN Disability Convention, the legislature has thus far failed to pass enabling legislation to incorporate the principles of the convention into the South African legal framework.

Although the consideration of physical and other disabilities falls beyond the scope of this study, all persons with disabilities in South Africa would benefit from disability-specific legislation adopted in line with the principles of the UN Disability Convention. Disability-specific legislation similar to the ADA in the United States and the *Equality Act* in the UK would establish greater legal certainty and, importantly, would be legally

binding. It would also serve to enhance the protection afforded to people with mental disabilities in employment.

South African disability-specific legislation in line with the UN Disability Convention would establish a legal and explicit link between the rights to dignity, equality and equal opportunity and the concept of mental disability. By doing so, it would adopt a social disability model and promote substantive equality for employees with mental disabilities.

8.2.3.3 Perceived disabilities

As the South African legal framework does not explicitly include perceived disability in the disability definition, individuals who are discriminated against on this basis currently have little choice but to allege discrimination based on either an unlisted analogous or arbitrary ground of unfair discrimination.

The severe stigmatisation and stereotypes associated with mental health conditions, and the resultant perceptions and misconceptions these generate, arguably justify the inclusion of this concept in the disability definition. This approach is endorsed by the UN Disability Convention as well as both comparative jurisdictions. Moreover, the explicit inclusion of perceived disability in the South African definition would be in line with a substantive approach to equality as well as the social model of disability.

For these reasons, it is contended that perceived disability should indeed be incorporated into the South African legal framework. Individuals who are discriminated against on the basis of perceived disabilities should, however, not qualify for reasonable accommodation.

8.2.3.4 Interpretative guidelines

As mentioned before, South Africa currently lacks interpretative guidelines specific to mental disabilities. Guidelines such as those under the USA and UK legal frameworks will facilitate legal certainty in cases involving mental health conditions.

In the United States, the *Regulations to Implement the Equal Employment Provisions of the ADA* and the *EEOC Enforcement Guidance: The ADA and Psychiatric Disabilities* both offer substantial legal guidance relating to mental disabilities in the USA employment realm. Although not legally binding, these sources offer the benefit

of facilitating legal certainty and providing insight and consistency in cases involving mental disabilities. In the UK, the *Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability* promotes a similar sense of legal clarity and certainty.

Therefore, the introduction of similar guidelines in South Africa would be of significant value, detailing which mental health conditions, including depression, may generally amount to disabilities, as well as stipulating the details of various mental health conditions and their symptoms and consequences.

8.3 Discrimination based on mental health

8.3.1 Lessons from the international instruments in relation to discrimination on the basis of mental health in South Africa

In terms of the UN Disability Convention, discrimination against people with mental disabilities is a violation of their inherent human dignity and tarnishes the worth of the human person. Coverage under the convention is broad and encompasses equal and effective legal protection from discrimination on all grounds. The UN Disability Convention's emphasis on human dignity as being at the centre of discrimination on the basis of mental health is similar to the approach taken under the South African legal framework. This reassures us that the South African approach to equality and non-discrimination in relation to people with mental disabilities is in line with international law.

The *ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention* takes a similar view than the UN Disability Code in relation to discrimination based on mental disability, providing a commitment to the achievement of equality and equal opportunity for these persons in the employment realm, and thus also overlaps with the South African position.

As provided earlier, while committing to the achievement of equal opportunities in employment for people with mental disabilities, the ILO Disability Code also possibly affords additional protection, since it provides for discrimination on the basis of "certain" grounds, which arguably could encompass "mental health" generally as well as "mental disabilities" in particular. This is also in line with the South African approach,

which provides for additional grounds of unfair discrimination to be alleged and proven, as long as they are analogous to the listed grounds, or sufficiently arbitrary in nature.

In summary, therefore, all of the instruments above emphasise the right to equality, equal opportunity and inherent human dignity of persons with mental disabilities, and the consequent commitment to the protection from discrimination, thereby overlapping with the commitment under the South African legal framework to advance and protect human rights for these individuals in the workplace.

8.3.2 Lessons from the legal frameworks of the United States of America and the United Kingdom

8.3.2.1 Equality, dignity and mental health conditions

The South African legal framework is well known for the high premium it puts on the protection of human dignity, which forms the foundation for eradicating unfair discrimination. South African discrimination law is also founded on the substantive approach to equality and a project of transformative constitutionalism under the new dispensation.

The USA legal position intersects with South Africa's in the sense that discrimination is viewed as impairing an individual's human dignity and interfering with a person's participation in the workplace. Although equality, together with human dignity, forms the foundation of anti-discrimination law in both the USA and South Africa, the former jurisdiction adopts a more formal approach to equality, while the South African legal framework flows from a substantive equality approach. The ADA, however, does indicate a shift towards a substantive approach to equality, as it relies more on a social disability model and requires the implementation of measures of reasonable accommodation to redress the disadvantage suffered by people with mental disabilities. Equal opportunity for all persons in employment is also a goal shared by the legal frameworks of both these jurisdictions. The two major overlapping areas in the South African and USA legal frameworks, namely that discrimination centres on the impairment of human dignity, as well as the significance of equality and equal opportunity in anti-discrimination law, do provide reassurance that the South African approach in this regard is on a par with the approach followed by a significant foreign jurisdiction such as the United States.

Human rights considerations in the UK are informed by EU community law. A high premium is put on non-discrimination and the pursuit of equality and equal opportunity. Equality has also been recognised as a general principle of EU law, and the eradication of unjust discrimination is regarded as vitally important. The *Equality Act* itself is premised on the notion that non-discrimination is an equality guarantee instead of a special service reserved for a select few. This position overlaps with the approach in South Africa, and thus in the United States also, where the achievement of equality, the eradication of unfair discrimination and the advancement of equal opportunity are just as important.

8.3.2.2 Disability-specific legislation governing discrimination based on mental health

As stated previously, disability is a listed ground of unfair discrimination under the South African legal framework (section 9(3) of the Constitution and section 6(1) of the EEA) and has been listed as such in light of the past prejudice suffered by this societal group and the fact that discrimination based on mental disability constitutes an assault on their inherent human dignity. Despite this, however, South Africa has no legislation that specifically governs discrimination based on mental disability. The USA, on the other hand, has the ADA, and the UK has the *Equality Act*, both of which aim to govern disability-related discrimination, providing a significant amount of detail about what discrimination entails in the disability context, as well as the conduct that will amount to discrimination.

Another shortcoming in the South African legal framework is that the jurisdiction does not have a special-purpose agency or commission that publishes guidelines on mental disability and discrimination. The USA's EEOC is charged with enforcing the ADA, and it also tracks claims filed on the basis of various mental health conditions. Following the USA's example and keeping track of claims instituted in South Africa through an organisation similar to the EEOC, as well as differentiating between claims on the basis of psychiatric diagnosis, will eventually offer a better indication of the magnitude and prevalence of discrimination based on mental health conditions. Although the UK's *Equality Act* is not enforced by a specialised agency such as the USA's EEOC, that jurisdiction's government has made significant strides in making available

interpretative guidelines on mental disabilities and employment discrimination, which is another example from which the South African legal framework may benefit.

8.3.2.3 Discrimination based on mental health falling short of a mental disability

The South African legal framework allows claimants with mental health conditions to establish unfair discrimination on the basis of either an unlisted analogous ground or an arbitrary ground of unfair discrimination.

The USA does not list mental health as a specific prohibited ground, nor does it allow individuals with mental health conditions to allege their condition as an unlisted ground of discrimination. Thus, people with mental health conditions who cannot establish their condition as a mental disability under the ADA are left unprotected. In contrast, people with mental health conditions in South Africa who cannot establish their condition as a mental disability will still be able to seek legal protection, albeit with a higher burden of proof. This consideration places South Africa ahead of the USA in protecting people with mental health conditions in employment.

Similar to the position under the ADA, the *Equality Act* also requires that the claimant in a discrimination suit against the employer will have to prove that his or her mental health condition satisfies the criteria of a disability in the legal sense. Like the USA legal framework, UK law fails to provide for the possibility of alleging mental health conditions as unlisted analogous grounds of discrimination in the same manner that the South African legal framework does. Clearly, therefore, the South African legal framework offers more legal protection in this regard than the UK legal framework.

8.3.2.4 Workplace bullying and harassment

The South African, USA and UK legal positions correspond in respect of the causal nexus between workplace bullying, harassment and mental health conditions. The analysis of these jurisdictions revealed that employees may be bullied and harassed because of their mental health condition(s), or the workplace bullying and harassment may trigger or exacerbate an individual's mental health condition(s).

All three jurisdictions offer sufficient legal protection to individuals who are harassed because of their mental health condition, as harassment is considered an explicit form of discrimination. In the UK, in addition to this, the law also extends protection to such

individuals in terms of the PHA. However, more legal awareness is required in all jurisdictions of the link between harassment, especially sexual harassment, and the prevalence of mental health conditions.

The analysis regarding workplace bullying, on the other hand, indicates that neither legal framework sufficiently protects employees who either fall victim to workplace bullying because of their mental health condition, or develop mental health conditions as a consequence of bullying.

Even though there is no explicit legal protection for bullied individuals in the USA, however, they may institute tort claims or harassment claims if they meet the legal criteria. They may also bring a claim under the ADA if a mental disability is triggered or exacerbated by workplace bullying. While it has not yet been enacted, the Healthy Workplace Bill would provide significant protection to these individuals. The South African legal framework would certainly benefit from adopting measures similar to the Healthy Workplace Bill and disability-specific legislation similar to the ADA to enhance the protection of people with mental health conditions in the workplace.

The study in relation to workplace bullying in the UK revealed that although the phenomenon is not sufficiently addressed by the legal framework, UK law does provide more extensive legal protection than both South Africa and the USA. UK judicial precedent also acknowledges the causal nexus between workplace bullying and the prevalence of mental health conditions such as depression in employment. Workplace bullying victims who have developed mental health conditions have also extensively relied on the UK's PHA, which safeguards their right to inherent human dignity. In addition, the introduction of anti-bullying workplace policies has helped curb this phenomenon in employment and minimise the onset and prevalence of mental health conditions caused by it. Although South Africa also has a *Protection from Harassment Act*,¹⁴ it has not been used in the same way as the UK's PHA to combat workplace bullying and prevent the prevalence of resultant mental health conditions in employment.¹⁵

¹⁴ 17/2011.

¹⁵ Smit 2014:280-281.

The South African legal framework would therefore benefit from legislation similar to the PHA, or an amendment to its current *Protection from Harassment Act*, to enable individuals who are harassed or bullied on the basis of their mental health conditions, or who develop mental health conditions as a result of workplace harassment and workplace bullying, to protect their right to dignity in the workplace. Furthermore, the South African legal framework may benefit from more employers introducing anti-bullying workplace policies, as experience in the UK has shown that these contribute to the curbing of workplace bullying behaviours and, consequently, the prevalence of resultant mental health conditions in employment.

8.3.2.5 Concluding remarks

The study in this section points to potential benefits for the South African legal framework if it were to incorporate certain discrimination provisions relating to mental disability contained in the USA's ADA and the UK's *Equality Act*.

With its substantive approach to equality, its emphasis on the protection of inherent human dignity, and its extensive non-discrimination provisions, the South African framework provides significant and sufficient opportunity for employees to allege not only mental disability as a ground of unfair discrimination, but also their mental health status itself (via the unlisted and arbitrary grounds). Neither the USA nor the UK provides equally extensive protections, which puts South Africa ahead of the comparative jurisdictions in this respect.

However, in respect of other legal considerations, such as explicitly providing legal protection from workplace bullying, and raising awareness of the causal nexus between workplace bullying and harassment and mental health conditions, the South African position may be enhanced by drawing on the comparative jurisdictions' approach and statutes.

8.3.3 Addressing the *Iacunae* in the South African legal framework: Enhancing protection for people with mental health conditions against unfair employment discrimination

8.3.3.1 Mental health status as a listed ground

In order to enhance protection for employees with mental health conditions such as depression, and to safeguard their rights to inherent human dignity, equality and equal opportunity, mental health should be listed as a prohibited ground of unfair discrimination in section 6(1) of the EEA.

This is supported by the analysis conducted in chapter 4, which has shown that discrimination on the basis of an individual's mental health condition or mental health status is sufficiently severe to impair the person's fundamental human dignity. Mental health is consequently not only analogous to the listed grounds of prohibited discrimination under the EEA, but is equal enough in status to warrant its inclusion as a listed ground. As not all mental health conditions may be established as mental disabilities, listing mental health as a separate ground of prohibited discrimination would secure sufficient protection for these individuals from the stereotyping, stigmatisation and prejudice that arise from their conditions.

8.3.3.2 Mental health conditions as disabilities

As emphasised above, South Africa may benefit from disability-specific legislation similar to the ADA and *Equality Act*, both of which provide for discrimination on the basis of mental disability. Legally binding provisions of this nature may promote legal clarity and certainty in these cases in South African employment.

8.3.3.3 Legislative and judicial guidelines on discrimination based on mental health

In addition to disability-specific legislation that provides for discrimination on the basis of mental disability, the South African legal framework would benefit from interpretative guidelines similar to those published by the EEOC in the USA as well as by the UK government, stipulating the finer details surrounding discrimination on the basis of mental disability.

Guidelines of this nature would provide legal clarity not only where mental disabilities are concerned, but also where individuals are discriminated against based on their mental health in general. In addition, they would promote the protection of human dignity and advance substantive equality for these persons in employment.

8.4 Mental health and reasonable accommodation

8.4.1 Lessons from the international instruments in relation to reasonable accommodation for mental health conditions

In the above regard, the UN Disability Convention is of primary significance in both South Africa and abroad, as it explicitly recognises the failure to provide reasonable accommodation as a form of unfair discrimination. Since South Africa ratified this convention, one would expect the jurisdiction to adopt this approach under its domestic legal framework and explicitly list the failure to reasonably accommodate as a form of unfair discrimination.

8.4.2 Lessons from the legal frameworks of the United States of America and the United Kingdom

8.4.2.1 Reasonable accommodation as a non-discrimination principle

Even though reasonable accommodation is a constitutional non-discrimination principle that permeates the employment realm, the South African legal framework does not explicitly list its denial as a form of unfair discrimination in either section 9(3) of the Constitution or section 6(1) of the EEA.¹⁶

Over against that, the USA's ADA explicitly stipulates that the failure to provide reasonable accommodation to a suitably qualified individual with a mental disability amounts to discrimination.¹⁷ In contrast to the South African legal position, this

¹⁶ As a non-discrimination principle, reasonable accommodation constitutes a ground that can be raised by any individual who suffers discrimination because of its refusal in the workplace. Although employees may allege the denial of reasonable accommodation as a form of discrimination on the listed ground of disability or on the unlisted analogous and arbitrary ground of mental health, explicit inclusion of this concept under the South African legal framework is still absent.

¹⁷ Although the USA legal framework explicitly includes the denial of reasonable accommodation as a form of unfair discrimination for people with legally recognised disabilities, reasonable accommodation does not constitute a general non-discrimination principle in this jurisdiction. Reasonable accommodation in the USA is limited only to the categories of religion and disability. See Ngwena 2005b:544. This position differs from that in South Africa in that all members of the listed categories as well as members of

approach constitutes an active instead of a passive form of non-discrimination aimed at promoting equality and equal opportunity. This is also more in line with a substantive approach to equality. Similarly, the EU and UK legal frameworks also explicitly list the denial of reasonable accommodation as a form of prohibited discrimination. In terms of EU community law, the failure to accommodate an employee with a mental disability will in itself constitute discrimination, while under the *Equality Act*, failure to comply with the reasonable adjustment duty will amount to unlawful discrimination. As is the case in the USA, this constitutes an active form of non-discrimination that aims at promoting substantive equality and equal employment opportunities for people with mental disabilities.

The USA and UK approach should be incorporated into South African law by explicitly listing the denial of reasonable accommodation for mental disability as a form of unfair discrimination under the EEA.¹⁸ This approach would have the benefit of entrenching reasonable accommodation as a non-discrimination principle and bringing the South African legal position in line with that of international law.

8.4.2.2 Reasonable accommodation as a positive duty for people with mental disabilities

As an affirmative action measure under the South African legal framework, reasonable accommodation aims to assist suitably qualified individuals in discharging the inherent requirements of their respective employment positions. This corresponds with the USA¹⁹ and UK legal positions, where the former regards reasonable accommodation as a form of affirmative action, and the latter views it as a positive duty on employers to ensure that an employee with a mental disability is not placed at a substantial disadvantage in employment.²⁰

unlisted analogous categories will potentially be able to allege the denial of reasonable accommodation as a form of unfair discrimination.

¹⁸ This could be done by expanding section 6(1) of the EEA to explicitly include such a provision.

¹⁹ Christianson also explicitly points out that the provision for reasonable accommodation in the ADA is not significantly different from the provision in the EEA. See Christianson 2004, in Dupper *et al.* 2004:175; Christianson 2012, in Le Roux and Rycroft 2012:298. Ngwena and Pretorius also support this contention, indicating that the Disability Code follows the approach to reasonable accommodation adopted under the ADA. See Ngwena and Pretorius 2003:1831.

²⁰ This contention is supported by Christianson 2004, in Dupper *et al.* 2004:177, where it is stated that the Disability Code “mirrors and develops” the concept of reasonable accommodation found under the USA and UK legal frameworks.

8.4.2.2.1 Suitably qualified

Under the South African legal framework, only suitably qualified individuals with mental disabilities qualify to be considered for reasonable accommodation. The legal position in the USA mirrors this approach.²¹ Over against the approach in South Africa and the USA, however, the UK's *Equality Act* does not specify that an individual with a disability should be suitably qualified. It merely provides that a disabled person should not be placed at a substantial disadvantage compared to persons who are not disabled.

The South African and USA approach is preferred. These jurisdictions provide for an analysis of the duty to make reasonable accommodation, first determining whether the mentally disabled individual is capable of discharging the inherent requirements of the job, after which the analysis may continue with an individualised assessment, dialogue, the selection of specific accommodation measures, and the determination of whether the accommodation will impose unjustifiable hardship on the employer.

Therefore, the “suitably qualified” criterion serves as a necessary “gatekeeper” in that it limits the duty to provide reasonable accommodation to only those individuals who can perform the essential functions of the job in question.

8.4.2.2.2 Individualised assessments

The determination of appropriate reasonable accommodation measures for an employee or job applicant's mental disability under the South African legal framework flows from an individualised assessment of each particular person's specific circumstances. The individualised assessment will take into account the nature of the mental disability (including the specific features and symptoms of the condition), the particular job, the work environment and any functional limitations of the individual. The USA legal framework follows a similar approach, determining on a case-by-case basis what constitutes appropriate reasonable accommodation by taking all the relevant considerations into account. UK law also allows for individualised assessments to determine an appropriate accommodation measure for a mental disability. Under the *Equality Act*, reasonable accommodation is regarded as a

²¹ Interestingly, in the context of disability jurisprudence, the concept of “essential functions of the job” owes its origin to the USA legal framework and is analogous to South Africa's “inherent requirements of the job”. See Ngwena and Pretorius 2003:1832.

particular duty to respond to the disadvantage experienced by a particular individual, and to take into account the circumstances of each specific case as well as the individual's specific mental impairment.

Such an approach is vital in determining appropriate measures of reasonable accommodation for mental disabilities, precisely because mental health conditions present with different symptoms, which fluctuate in severity and duration depending on the circumstances. Thus, only an individualised assessment would enable the selection of a suitable accommodation measure.

8.4.2.2.3 Disclosure and consultation

In South African law, the determination of appropriate reasonable accommodation is a bilateral process involving both the employer and the employee. Unless the mental disability is obvious to the employer, the employee will have to disclose the condition in order to pursue reasonable accommodation. This approach is also followed in both the USA and the UK, where employers must be aware, or ought to have been aware, of the employee's mental health condition before reasonable accommodation can be considered. Like South Africa, both the USA and the UK also require dialogue between the employer and the employee in order to reach a point of mutual understanding between the parties so that the accommodation measure can be tailored to the specific circumstances.

South African law allows the employer to consult technical experts such as mental health-care practitioners in determining appropriate reasonable accommodation. This intersects with the position in the USA, where the employer may also consult the EEOC or other appropriate institutions as well as mental health-care professionals.

The disclosure of mental health conditions has been noted as problematic in the South African employment context due to the fear of stigmatisation, prejudice and discrimination that disclosure may cause. This concern has also emerged in the USA and UK, where it has been noted that the disclosure of mental health conditions in itself, as well as the fear of being discriminated against, makes for a potentially very traumatic experience.

The USA legal framework makes it clear that the ADA provides a right to *reasonable* accommodation, which may not necessarily be the employee's *preferred*

accommodation. However, in circumstances where more than one accommodation measure would be effective, the employer is obligated to give primary consideration to the employee's preferred accommodation, while retaining its discretion to select the most effective measure to be instituted. In fact, in the USA, the employer may use its discretion to select the less expensive or more convenient option. An employee who refuses to accept reasonable accommodation offered by the employer may lose his or her protection under the ADA. The South African legal framework may benefit from endorsing this approach, as it provides greater legal certainty and clarity in relation to the legal status of an employee's request for his or her *preferred* accommodation.

Finally, the four steps²² in the interactive process to identify and provide reasonable accommodation under the USA legal framework should be endorsed and implemented in South Africa. Explicitly incorporating these steps in the Disability Code would provide guidance to employers on how to go about selecting reasonable accommodation measures and may also be a useful yardstick for the courts in determining whether an employer made a significant and acceptable attempt to select appropriate reasonable accommodation.

8.4.2.2.4 Mental health conditions as a health and safety risk

In terms of the South African legal position, health and safety forms an integral part of an individual's ability to discharge the inherent requirements of a job. Therefore, an employee with a mental disability must ultimately be able to perform his or her employment duties safely. The employer has a duty to consider whether a risk to health and safety posed by an employee's mental health condition may be eliminated or lessened by means of reasonable accommodation.

Slightly different from this position, the USA's ADA allows an employer to raise a threat to health and safety as a defence to escape the duty to provide reasonable accommodation. Under the UK legal framework, in turn, an employee is not obligated to disclose his or her mental disability unless the disability could present a health and safety risk to others.

²² (1) Identifying barriers to equal opportunity (2) Identifying possible accommodation (3) Assessing the reasonableness of each accommodation in terms of effectiveness and equal opportunity (4) Implementing the appropriate accommodation measure

The South African legal framework may benefit from explicitly including a “direct threat” defence in the Disability Code. This will entrench the employer’s existing duty to consider the health and safety of others in the workplace in the disability context, specifically clarifying the nature and scope of the potential employer’s defence.

8.4.2.2.5 A disproportionate burden: Limiting the duty of reasonable accommodation

In both the South African and USA legal frameworks, the term “reasonable” suggests that the duty to accommodate a mentally disabled employee is not unlimited. In fact, the key feature of reasonable accommodation is that it must be reasonable.²³ In the UK, in turn, the employer may escape its duty to provide reasonable accommodation by alleging that a mentally disabled employee is not placed at a substantial disadvantage compared to persons who are not disabled. Also, article 5 of the EU Employment Equality Directive provides that reasonable accommodation in the workplace should not impose a “disproportionate burden” on the employer. It would therefore appear that in all three jurisdictions, a proportionality analysis is required to limit the duty to provide reasonable accommodation in the workplace.

South African law relieves an employer of its duty to reasonably accommodate an employee or job applicant’s mental disability where such accommodation would impose “*unjustifiable hardship*” on the business of the employer, which seems very similar to the “*undue hardship*” under USA law and may also be likened to the “disproportionate burden” in the UK. Importantly, however, there is a difference in proportionality between “*unjustifiable*” (South Africa) and “*undue*” (USA). According to the Disability Guidelines, “*unjustifiable*” sets a higher standard than “*undue*” and was specifically selected in South Africa because individuals with mental conditions have had little employment opportunity and reasonable accommodation in the past.²⁴ Therefore, the duty of reasonable accommodation under the South African legal framework encourages employers to make a more significant effort to reduce and eliminate discrimination, and to promote affirmative action.²⁵ While both South African and USA law requires a proportionality analysis, the bar is thus set higher for the

²³ “Reasonable” serves as modifier to the duty to provide accommodation. See Mégret and Msipa 2014:265.

²⁴ Disability Guidelines:21.

²⁵ Disability Guidelines:21.

employer in South Africa.²⁶ In weighing up the rights to dignity and equality of an employee with a mental disability against an employer's interests in operating a profitable business, the "unjustifiable hardship" proportionality analysis should be preferred, as it tips the scale in favour of the mentally disabled worker's rights. This approach seems appropriate in light of the discrimination and lack of accommodation suffered by these individuals in the past.

The South African approach to determining unjustifiable hardship involves an objective procedure, taking into account factors such as whether the accommodation will result in difficulty or expense that would seriously disrupt the operation of the employer's business. The approach in the USA corresponds with this, as the analysis to determine undue hardship involves a factually based inquiry focusing on the effects of the accommodation on the employer.

Although the USA's approach to determining undue hardship emphasises a cost analysis, the consideration goes beyond financial factors. In this regard also, the South African and USA legal frameworks overlap, since the determination to establish unjustifiable hardship under South African law is also not restricted to financial considerations. In terms of the cost analysis, however, USA law provides that the cost to the employer in providing reasonable accommodation must be more than a *de minimus* burden in order to amount to undue hardship. This *de minimus* burden in the cost analysis is a useful yardstick in determining when reasonable accommodation is financially burdensome. Officially incorporating this yardstick into the South African legal framework will advance legal certainty and serve as a guideline for the various players in employment. The *de minimus* yardstick has however been criticised as setting the bar too low. Weber, for example, suggests that the duty to accommodate constitutes a significant burden that may be expensive to satisfy.²⁷ He further comments that it is not a cost-benefit balance that should apply, but a cost-resources balance, which will vary depending on the capacity of the particular employer.²⁸ This seems to be supported by the fact that "hardship" refers to something onerous, which is substantially more than a mere level above a *de minimus* burden.²⁹ Incorporating

²⁶ See Ngwena 2005b:560, who points out that although unjustifiable hardship does require more than undue hardship, the Disability Code in defining unjustifiable hardship does not clearly state this.

²⁷ Weber 2010:1124.

²⁸ Weber 2010:1124.

²⁹ Weber 2010:1150.

this under the South African legal framework may also prove useful, as it places a more substantial burden on employers to provide reasonable accommodation to employees with mental disabilities, although it may also place a heavier burden on the employer's commercial interests.

Finally, the USA legal framework highlights an interesting consideration, namely that if an accommodation measure affects the morale of other employees in the business, it will not constitute undue hardship unless it affects those employees' ability to perform their respective duties. The South African legal system may benefit from adopting this approach, especially given the stereotypes and prejudice harboured in relation to mental health conditions. Co-workers of the person with a mental disability such as depression may be resentful of accommodation made for the employee, but this is often due to a lack of understanding of the nature and scope of the condition, and not necessarily because the accommodation itself affects them.

8.4.2.2.6 Measures of reasonable accommodation

As is the case under the South African legal framework, both the USA and UK legal systems offer a non-exhaustive list of possible measures of reasonable accommodation for people with mental disabilities, and other measures may be identified and implemented. Reasonable accommodation is limited only by the creativity of the employer and the employee. As mental health conditions present differently, with various symptoms, inter-episode remissions and varying severity, this approach is to be supported, since reasonable accommodation should be tailored to the specific individual following an individualised assessment of the person's specific circumstances. Those measures that are listed in the three jurisdictions with specific reference to mental disabilities in employment overlap to a great extent, including measures such as altering the work environment, flexible scheduling, job restructuring, additional leave and specialised supervision.

Clearly, then, these accommodation measures appear to be the most popular and effective in accommodating people with mental disabilities in the workplace. However, USA law also identifies some additional accommodation measures not included in the South African or UK framework, such as modifying workplace policies, providing modified or more training, allowing the employee to work from home, or reassigning or transferring the employee to a vacant position. The UK framework, in turn, also lists

some additional accommodation measures not contained in South African or USA law, such as providing access to counselling, implementing certain environmental changes such as installing room dividers, reducing noise, and decreasing anxiety and stress in the workplace. Since these additional measures have been identified as effective under the USA and UK legal frameworks in accommodating employees with mental disabilities, the South African legal framework may benefit from also officially listing these in the Disability Code.

Reasonable accommodation under the ADA extends to all job-related functions and is not limited to the essential functions of the job. As this approach in effect provides more extensive protection to the employee with a mental disability, it should be endorsed under the South African legal framework also.

Discussion of the legal position in the USA further revealed that since environmental stressors may trigger or exacerbate many mental health conditions, employers should be duty-bound, as a form of accommodation, to reduce stress in the workplace. Although the modern workplace is permeated with various stressors, officially including this as a possible form of reasonable accommodation under the South African legal framework would provide guidance to employers on how employees with mental disabilities may be accommodated.

In the final instance, it was also pointed out that accommodating an employee with a mental health condition in the USA does not have to be onerous and may in many cases be accomplished by simply educating co-workers about mental health conditions and dispelling rumours and stereotypes relating to these conditions. Adopting and explicitly recognising workplace education as a form of reasonable accommodation for employees with mental disabilities in SA law may provide employers with further guidance and ideas on how to accommodate these individuals.

8.4.2.3 Reasonable accommodation in the dismissal context

Under the South African legal framework, the law of dismissal intersects with reasonable accommodation in relation to incapacity dismissals. Reasonable accommodation should be considered for employees with legally recognised mental disabilities before such an employee is dismissed on the basis of incapacity. This position is shared under the UK framework, where employers are also obligated to first

consider reasonable accommodation for an employee who has been absent from work for an extended period because of a mental disability.

8.4.2.4 Concluding remarks

The comparison in this section indicates that the provisions on reasonable accommodation for employees with mental health conditions in both comparative jurisdictions offer certain significant lessons for consideration in the South African context. Although the South African position on reasonable accommodation shows some considerable overlaps with the USA and UK positions, it may be further strengthened by taking the considerations above into account.

8.4.3 Addressing the *lacunae* in the South African legal framework: Enhancing measures of reasonable accommodation for people with mental health conditions

8.4.3.1 Explicit inclusion of the failure to provide reasonable accommodation as a ground of unfair discrimination

The position in the UN Disability Convention and under the USA and UK legal frameworks, namely that reasonable accommodation explicitly constitutes a non-discrimination principle, would advance substantive equality in South Africa if it were to be adopted under the country's legal framework. International and foreign law clearly indicates that the failure to provide reasonable accommodation should be statutorily listed as a form of unfair discrimination to establish greater legal certainty and achieve substantive equality for people with mental health conditions.

Therefore, South Africa's current failure to explicitly list the denial of reasonable accommodation as a form of unfair discrimination in section 6(1) of the EEA hampers the pursuit of substantive equality in the jurisdiction's employment realm. Employees and job applicants with mental disabilities should be able to allege the failure to provide reasonable accommodation as a form of unfair discrimination, without being saddled with the more strenuous burden of proving it as an unlisted analogous or arbitrary ground of unfair discrimination.

8.4.3.2 Guidelines on measures of reasonable accommodation specific to mental health conditions

The South African Disability Code and Disability Guidelines provide general examples of measures that may reasonably accommodate employees with mental disabilities. Yet, no guidelines specific to mental health conditions have been compiled in accordance with practical experience and existing judicial precedent.

Expanding the section on possible accommodation measures under the code and guidelines to include measures of reasonable accommodation for specific mental health conditions in accordance with those measures extracted from the comparative jurisdictions would provide significant legal guidance and certainty to employers and employees on possible measures that could accommodate employees' mental disability.

8.4.3.3 Guidelines on the disclosure of mental health conditions in employment

In light of the fear, stigma and prejudice surrounding the disclosure of mental health conditions in seeking reasonable accommodation, the Disability Code could be expanded to provide specifically for procedures of disclosure, higher levels of confidentiality, and greater awareness of mental health conditions in the workplace. Combating this fear of disclosure is essential in safeguarding the rights to dignity and equality of people with mental health conditions in the workplace and ensuring that they receive equal opportunities in seeking reasonable accommodation.

8.4.3.4 Guidelines on return-to-work measures as a form of reasonable accommodation

The South African legal framework does not explicitly contain any measures on reasonable accommodation for people with mental health conditions while transitioning back to work. In this regard, the following considerations under the UK framework may provide lessons for South Africa.

UK research has revealed that returning to work may pose significant challenges for people with mental health conditions, depending on the circumstances. Reasonable accommodation may be necessary to overcome supervisors and co-workers' reactions as well as their perceptions about the mental health condition. It is believed

that the anxiety generally experienced by people with mental health conditions upon their return to work may be effectively controlled with reasonable accommodation. In addition, UK jurisprudence has shown that employers may fund psychiatric sessions for the employee as a form of temporary reasonable accommodation to facilitate the person's return to work. Where an employee's mental health difficulties originated from employment relations and workplace disputes, a measure of reasonable accommodation to facilitate an employee's return to work may be to relocate the employee to another position within the business.

The South African legal framework may therefore benefit from acknowledging the significance of providing reasonable accommodation measures where employees with mental health conditions are about to return to work. Expanding the Disability Code to include a "return to work" section under reasonable accommodation would be useful to both employers and employees to ensure that the employee with a mental health condition experiences the easiest possible return to the workplace.

8.5 Conclusion

The comparisons and analyses presented in this chapter have confirmed that the employment law areas of disability, discrimination and reasonable accommodation under the South African legal framework may benefit from developments in international law and the legal frameworks of the comparative jurisdictions.

The various intersections between the South African legal framework and those of the USA and the UK are a welcome sign that, in certain respects, the South African position is in line with other jurisdictions'. However, the legal considerations and lessons extracted from these jurisdictions may also assist lawmakers in South Africa to further strengthen the country's legal framework in all three employment law areas mentioned above, thereby advancing human dignity, equality and equal opportunity and promoting legal certainty in relation to employees with mental health conditions.

In the following and final chapter of this thesis, the lessons outlined in this chapter culminate in various recommendations on how this may be facilitated in practice.

CHAPTER 9

PRACTICAL RECOMMENDATIONS AND CONCLUSION

9.1 Introduction

This final chapter aims to provide practical recommendations on how to address the *lacunae*, ambiguities and shortcomings relating to the employment law areas of disability, unfair discrimination and reasonable accommodation in respect of mental health conditions in employment in South Africa. The recommendations will draw on the study conducted and conclusions reached throughout this thesis, but specifically also the lessons from the comparative jurisdictions outlined in chapter 8.

The annexures that follow this chapter respectively contain a draft code of good practice, draft interpretative guidelines and a draft workplace policy, all aimed at enhancing the way in which mental health conditions are dealt with in the South African workplace. The drafts are intended not only as potential practical solutions to afford increased legal recognition and protection to people with mental health conditions in employment, but also to provide greater clarity and certainty to the country's judicial forums, Department of Labour and employers.

9.2 Practical recommendations for the South African legal framework in relation to mental health conditions in employment

9.2.1 Disability-specific legislation

The primary option for statutorily governing mental health conditions in employment would be legislative reform. Including disability-specific legislation in the South African legal framework would be the most effective long-term solution to regulate this phenomenon in the workplace.

In line with the contention raised in the previous chapter, adopting a statute similar to the USA's ADA or the UK's *Equality Act*, which adheres to the principles of the UN Disability Convention (which South Africa signed and ratified, yet failed to follow up with legislation) and South Africa's own Bill of Rights, would be the primary avenue to afford binding legal protection to those with mental disabilities in the workplace.

It is therefore recommended that a statute called the “South African Disability Equality Act” be enacted, which would be in line with a social model of disability and a substantive approach to equality and would aim to protect the human dignity of, and advance equal employment opportunities for, people with (mental) disabilities in South Africa.

9.2.2 An enforcement agency

Although the CCMA and the Commission for Employment Equity are established enforcement agencies in South Africa, given the current *lacunae* in South African law pertaining to the protection of employment rights for people with mental health conditions, as well as the lack of clear statistics and to indicate the prevalence of the problem in this regard, it is further recommended that the South African legal framework would benefit from establishing a specialised agency similar to the USA’s EEOC to enforce South Africa’s EEA and the disability-specific legislation recommended above.

An agency such as a “South African Employment Equality Commission” may make significant strides in advancing the rights of persons with mental disabilities in the South African workplace.¹ Such an agency could be tasked with tracking the prevalence and nature of claims based on disability, discrimination and reasonable accommodation, and issuing guidelines to support the interpretation and handling of mental health conditions in the workplace.

9.2.3 A more expansive disability definition, also including “perceived disabilities”

Firstly, to establish greater legal clarity and certainty in determining whether an individual has a legally recognised mental impairment, the use of the DSM and ICD classification systems should be endorsed, as well as a diagnosis in terms of either or both of these by a qualified mental health-care practitioner.

¹ A commission such as this may be involved with a wide range of equality categories, but this consideration falls beyond the scope of this thesis and this discussion is restricted to mental disability.

Secondly, in determining whether a mental impairment substantially limits an individual's entry into or advancement in employment, it is argued that (i) the use of medications should not be taken into account, (ii) the negative side effects of medications should be recognised as possible sources of substantial limitation, and (iii) environmental stressors should also be acknowledged as possibly imposing a substantial limitation.

In the third instance, in order to position South African disability jurisprudence more strongly in favour of the social disability model, it is suggested that the definition of people with disabilities in section 1 of the EEA as well as in the Disability Code be amended as follows so as to include perceived disabilities:

People with disabilities are “people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into or advancement in employment, or are regarded as having such impairment.”

An amendment of this nature would be a substantial step towards advancing equality, non-discrimination, substantive equality and the protection of human dignity in South Africa’s disability jurisprudence.

Finally, it is recommended that an official category of predictive mental disabilities such as depression be made available in order to advance legal clarity and uniformity.

9.2.4 The adoption of a code of good practice to govern mental health conditions in employment

South African lawmakers may consider expanding the Disability Code to include considerations specific to mental health conditions so as to move more strongly towards the social model of disability. However, an arguably more preferred option would be to adopt a code of good practice to govern mental health conditions in the South African workplace. Such a code could be called the “Code of Good Practice on the Handling of Mental Health Conditions in the Workplace”.

A suggested draft code is included in annexure A to this study.

9.2.5 The adoption of interpretative guidelines

It is proposed that a set of guidelines, definitions and tests relating to the status of mental health conditions in South African labour law would be a significant resource

for the judiciary in dealing with such matters if and when disputes arise.² These will also assist the South African Department of Labour, employers and employees in understanding the nature and scope of mental health conditions in the workplace and could help establish greater legal clarity and certainty regarding this phenomenon.

As a practical contribution, a draft set of guidelines is proposed in annexure B.

9.2.6 The adoption of workplace policies

Employers should be encouraged to adopt workplace policies on mental health conditions in employment. This is encouraged in addition to the other recommendations in order to promote certainty in employment for all stakeholders, including employers, employees and their respective representatives.

Such workplace policies would play a significant role in informing employees of the requirements to establish a mental disability, curbing discriminatory employment practices based on mental health, and establishing the requirements and procedures to request reasonable accommodation for these conditions.

This recommendation stems from the fact that although most employment decisions are made by employers, decision-making powers may also fall to higher-level employees of especially larger organisations, such as managers and supervisors, who may or may not share the employer's view on mental health conditions and mental disabilities, particularly if no guidelines have been set. Therefore, a workplace policy will clarify the position pertaining to mental health conditions in an organisation and help ensure that managerial employees who have the authority to make organisational decisions, such as those relating to appointment, promotion, demotion and dismissal, make such decisions without prejudicing employees and job applicants on the basis of their mental health status.

A policy prohibiting workplace discrimination, bullying and harassment based on mental health will also have the benefit of discouraging employees from prejudicing and disadvantaging each other (either vertically or horizontally) based on mental

² Although interpretative guidelines will help the various parties in the South African employment realm understand and deal with mental health conditions in the workplace, it is difficult to formulate comprehensive guidelines to govern all circumstances, since the persons suffering from these conditions do not constitute a homogenous group such as racial groups and the different genders. See Ngwena and Pretorius 2003:1819.

health status. In fact, workplace policies on mental health conditions in employment may prove adequate in dealing with these issues at grassroots level, combat low productivity, low morale and discrimination, as well as save costs for employers.

A suggested workplace policy called “Workplace policy dealing with mental health conditions in employment” has been drafted and included as annexure C.

9.2.7 Preventative measures

By putting various preventative measures in place, an employer could curb many disputes relating to mental health in the workplace, especially in relation to unfair discrimination and the denial of reasonable accommodation. Preventative measures could curb practices that may infringe on the inherent human dignity and right to equality and equal opportunity of people with mental health conditions in the workplace.

The following preventative measures are recommended:

- The adoption of workplace policies (as suggested above)
- The establishment of confidential workplace forums and procedures for the disclosure of mental health conditions in order to combat the fear of discrimination and stigmatisation associated with such disclosures
- The promotion of education and awareness about mental health conditions in an employment environment in order to dispel myths and stereotypes associated with these conditions and establish them as a normal part of human diversity
- Tailoring workplace health and safety measures both to ensure that the mental health conditions of employees do not pose a risk to others in the business and that the health and safety of employees with these conditions is not at risk
- Professional assessments of the mental health status of employees in a workplace by a mental health-care practitioner (if this is affordable for the employer)
- Training managers and supervisors on how to deal with employees who have mental health conditions. Training of this nature should include instructions on how to go about determining reasonable accommodation for a mental disability,

and how to deal with an allegation of workplace discrimination, bullying or harassment based on mental health.

- Eradicating as far as is reasonably practical and possible environmental stressors that may trigger or exacerbate mental health conditions in the workplace.

9.2.8 Increased awareness and education

Advancing education and awareness on the issue of mental health conditions in the workplace would help dispel the myths and stereotypes associated with these conditions. This may in turn contribute to the curbing of workplace discrimination, bullying and harassment on the basis of mental health, as well as keeping the prevalence of these conditions to a minimum. Increased education and awareness may also make it easier to determine whether an employee or job applicant has a legally recognised mental disability, and if so, which forms of reasonable accommodation would best accommodate the disability.

As employed persons generally spend a large portion of their time in the workplace, this represents a significant and appropriate forum to educate employers and employees as well as raise awareness of the nature, scope and prevalence of mental health conditions.

South Africa has had various successful campaigns raising awareness of other issues in the employment realm, including HIV and Aids,³ and it is proposed that similar campaigns may succeed in raising awareness about mental health conditions also.

9.2.9 Inclusion of “mental health” as a listed ground of unfair discrimination

In line with the arguments offered in this thesis, and the strong possibility that discrimination based on mental health status may impair human dignity, infringe the right to equality and perpetuate disadvantage, it is suggested that section 6(1) of the EEA be amended as follows:

No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual

³ Carvalheira 2011:106.

orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth and **health status** or on any other arbitrary ground.

The inclusion of “health status” is preferable since this would have the benefit of including both physical and mental health. Although the consideration of physical health status falls beyond the scope of this thesis, a suggested legislative amendment restricted to mental health would read too one sided.

The proffered amendment above will confirm mental health status as a prohibited ground of unfair discrimination, placing it firmly within the ambit of the EEA, and will provide more legal certainty as to the applicability of various other provisions, such as the employer defences and the prohibition of workplace harassment.

9.2.10 Inclusion of a definition for “mental health”

In order to avoid ambiguity and confusion as well as to limit possible frivolous litigation, it is suggested that the prohibited ground of “mental health” be defined as follows in section 1 of the EEA:

“Mental health”, for the purposes of employment discrimination law and employment equity, is defined as collectively referring to all mental health conditions, mental health problems, mental illnesses and mental disorders that are diagnosed by a qualified mental health-care practitioner, in terms of a recognised classification instrument.

9.2.11 Legal emphasis on, and increased awareness of, the causal nexus between mental health conditions, bullying and harassment in the workplace

The South African Department of Labour (or a specialised enforcement agency as proposed above) should issue informative guidelines to all players in the labour arena regarding the causal nexus between the onset and prevalence of mental health conditions and workplace bullying and harassment, as well as the costs associated with these phenomena. Such guidelines would contribute to greater awareness of this issue and motivate employers and employees to take steps to combat this problem at grassroots level.

9.2.12 The inclusion of the failure to provide reasonable accommodation as an explicit prohibited ground of unfair discrimination

To provide for the above, it is suggested that section 6(1) of the EEA be further amended as follows:

No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth and *health status*, including the denial of reasonable accommodation, or on any other arbitrary ground.⁴

This amendment would explicitly include the denial of reasonable accommodation as a prohibited ground of unfair discrimination, which would be in line with international law and the approach in the comparative jurisdictions. It would also serve to advance substantive equality in South workplaces.⁴

9.2.13 Specific measures of reasonable accommodation for mental health conditions

Various measures of reasonable accommodation may serve to specifically accommodate mental health conditions in the workplace and enable a worker suffering from such a condition to discharge the inherent requirements of the job. These measures are essential in promoting substantive equality for people with mental disabilities and, as such, should be incorporated into workplace policies, interpretative guidelines and codes of good practice (such as the drafts proposed in annexures A, B and C).

Possible measures of reasonable accommodation specific to mental health conditions include the following:

- Extended or additional leave
- Modified or part-time work schedules
- Job restructuring
- Adjusting supervisory methods
- Modified or additional training
- Working from home
- Environmental alterations
- Reassignment or transfer to a vacant position
- Eradication or reduction of environmental stressors
- Increased education and awareness to combat stigmatisation and stereotypes

⁴ As a general non-discrimination principle, reasonable accommodation applies to all the prohibited grounds as well as grounds analogous thereto. The consideration of grounds other than mental disability and mental health, however, fall beyond the scope of the study conducted in this thesis.

- Providing access to counselling
- Funding treatment and medications
- Confidential forums and procedures for disclosing mental health conditions
- Rehabilitation measures to facilitate an employee's return to work

9.2.14 Recognition of depression as a legal disability

Having used depression as a “test subject” for mental health conditions in the workplace throughout this study, depression can and should be recognised as a category of predictive mental disability in both the Disability Code and Disability Guidelines. Such an official recognition would provide explicit protection to people with depression who suffer unfair discrimination in the workplace, enabling them to bring a claim on the basis of disability as a prohibited ground of unfair discrimination under section 6(1) of the EEA. Officially recognising depression as a disability in the Disability Code and Disability Guidelines would also place those suffering from it in the designated group of people with disabilities, enabling them to possibly seek reasonable accommodation as an affirmative action measure under the EEA.

It is further recommended that the official recognition of depression as a disability would promote awareness of this mental health condition along with its effects, symptoms and prevalence in the employment realm. Finally, it would also safeguard the right to dignity of these persons and further their right to equality and non-discrimination, breaking down barriers of stigma and disadvantage.

9.3 Conclusion

To some, ableism and disadvantage are rooted in the culture of normality, in terms of which discrimination, oppression and inequality is aimed at the *impairments* and not the person. However, when disability is viewed as the patterns of inequality imposed by social and occupational environments on a *human being* with impairments,⁵ such a person may find legal refuge in his or her fundamental human rights to equality and dignity. By refusing to reduce disability to mere impairment, therefore, the social model offers new tools for social transformation and the guarantee of human rights.⁶

⁵ Diniz *et al.* 2009:61.

⁶ Diniz *et al.* 2009:64.

Mental disability, in terms of the social model and a substantive approach to equality, constitutes an umbrella term that embraces a body with mental impairments, activity limitations or participation restrictions. Mental disability is not limited to mental impairment and reflects the negative outcome when mental impairments intersect with social environments that are insensitive to people's mental diversity.⁷

In line with South Africa's substantive approach to equality, a stronger shift towards the social model of disability is required, as well as a more expansive and definitive disability definition under the South African legal framework. In this regard, the approach to disability jurisprudence in international law as well as in the comparative jurisdictions serves as a significant example to South Africa. The novelty of disability jurisprudence in South Africa arguably places this jurisdiction at an advantage, as it has the opportunity to learn from the disability-specific legislation, judicial precedent and overall experience of the legal frameworks of the USA and UK, which have been dealing with this phenomenon for over two decades.⁸

In the past, the legislature and the judiciary recognised that the most effective way to defeat prejudice and discrimination in employment is to eliminate the possibility of employers indulging in it.⁹ Therefore, it is submitted that the current *lacunae* in South African labour law in respect of discrimination based on mental health may be effectively addressed by the recommendations provided in this study. If properly implemented, these recommendations should safeguard and promote the rights to dignity, equality and equal opportunity of every employee in the workplace, irrespective of their mental health status.

As both a general non-discrimination principle and an advent to the achievement of substantive equality via affirmative action, reasonable accommodation is a significant consideration in employing people with mental health conditions. A particular challenge in reasonably accommodating employees with mental health conditions is that such accommodation may require a change in attitude from an employer and co-workers, or the elimination of environmental stressors, which is often more difficult to enforce than, for example, the duty to build a ramp for wheelchair users.¹⁰ The general

⁷ Diniz *et al.* 2009:68.

⁸ Lake 2005:233.

⁹ Rhode 2010:107.

¹⁰ Also see Lake 2005:232.

“invisibility” of mental health conditions, together with the stigma, prejudice and fear associated with them, often causes these conditions to be confined to the shadows, being excluded from the equality and dignity benefits offered by reasonable accommodation. Insights from comparative jurisdictions and international law, however, offer lessons for developing the South African legal framework in relation to reasonable accommodation for mental health conditions.

In judgment in the matter of *National Coalition of Gay and Lesbian Equality v Minister of Justice*, the Constitutional Court stated the following:

The acknowledgment and acceptance of difference is particularly important in our country where group membership has been the basis of express advantage and disadvantage. What the Constitution requires is that the law and public institutions acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are. At the very least, what is statistically normal ceases to be the basis for establishing what is legally normative.¹¹

More broadly speaking, the scope of what is constitutionally normal is expanded to include the widest range of perspectives and to acknowledge, accommodate and accept the largest spread of difference. What becomes normal in an open society, then, is not an imposed and standardised form of behaviour that refuses to acknowledge difference, but the acceptance of the principle of difference itself, which accepts the variability of human behaviour.¹²

In line with this sentiment, it is submitted that variations in mental health status and the occurrence of mental health conditions constitute merely another form of human diversity, and that the acceptance of this form of diversity is important in the South African employment realm and society, where these persons have been subjected to severe disadvantage in the past.

The variability of human beings, in this case their mental health status, should be acknowledged, and equal respect and concern should be shown to these individuals, exactly as they are. In terms of the Constitutional Court’s view above, it is contended that varying mental health status falls under the banner of what is “constitutionally normal”, and that in terms of this approach, people with mental health conditions should also be accommodated and accepted as part of the acceptance of difference and variability of human behaviour.

An emphasis on human dignity provides a solid foundation for a viable and sustainable

¹¹ *National Coalition of Gay and Lesbian Equality v Minister of Justice*: 134.

¹² *National Coalition of Gay and Lesbian Equality v Minister of Justice*: 134.

framework within which to shape employment law.¹³ This approach helps develop rights as well as responsibilities that promote a healthy workplace, and puts safeguards in place to protect those vulnerable employees that are prone to mistreatment.¹⁴ One such vulnerable category that may benefit from such an emphasis on human dignity is people with mental health conditions.

These individuals are entitled to have their inherent human dignity, together with their intrinsic and psychological self-worth, respected. The substantive approach to equality developed by the South African Constitutional Court, which purports to be sensitive to past patterns of discrimination, systemic inequality and the role of harmful stereotypes, constitutes an ideal equality model for the protection of people with mental health conditions in employment, particularly in light of the disadvantage these individuals have suffered in the past. The universal and constitutional rights to dignity and equality may address and redress the injuries of stigmatisation, stereotyping and prejudice suffered by people with mental health conditions in the employment realm and form the cornerstones of their protection. Through the lens of substantive equality, people with mental health conditions are afforded the opportunity to participate fully in society and develop their full human potential, as well as eradicate and redress the disadvantage and discrimination that flows from their differential characteristics.

The South African legal framework, with its human-rights-based foundation entrenched in the Constitution, is well suited to advance and protect the rights of people with mental health conditions in the employment realm. Although the law can never fully eliminate all forms of discrimination and disadvantage in the workplace, it can certainly do more to address severe abuse.¹⁵ As recommended in this study, legal reform is the most effective way to address this, govern prejudice in workplace culture and contribute to a more tolerant and effective employment realm. The law has a role to play in guaranteeing fair and equal treatment for all persons with mental health conditions, and in preserving their human dignity and right to equality.

¹³ Yamada 2009:540.

¹⁴ Yamada 2009:540.

¹⁵ Rhode 2010:116.

ANNEXURE A

DRAFT

CODE OF GOOD PRACTICE ON THE HANDLING OF MENTAL HEALTH CONDITIONS IN THE WORKPLACE¹

1. INTRODUCTION, DEFINITIONS AND OBJECTIVES OF THE CODE

1.1 Introduction and exposition

The Employment Equity Act (EEA) 55 of 1998, as amended, constitutes one of the key legislative and policy interventions within the ethos of South Africa's Constitution to give effect to the provisions relating to the removal of policies and practices that result in inequalities in the country. Specific emphasis is placed on ensuring equity, i.e. the right to equal protection and benefit of the law, for, among others, people with mental health conditions.

Although many barriers, including widespread ignorance, fear and stereotypes, have caused people with mental health conditions to be unfairly discriminated against in society and in employment, South Africa can take pride in its efforts to formulate policies to protect the rights of these people.

Unfair discrimination against people with mental health conditions is perpetuated in many ways. These could include:

- unfounded assumptions about the abilities and performance of job applicants and employees with mental health conditions;
- advertising and interviewing arrangements that either exclude people with mental health conditions or limit their opportunities to prove themselves;
- selection tests that discriminate unfairly;
- inaccessible workplaces; and
- inappropriate, lesser or no training for people with mental health conditions.

Therefore, this code of good practice forms part of a broader equality agenda for people with mental health conditions to have their rights recognised in the labour market, where they experience high levels of unemployment and often remain in low-status jobs or earn lower-than-average remuneration.

¹ This draft code has been adapted from the "Code of Good Practice on the Handling of Appearance-Related Prejudice" drafted by Viviers 2014:206-212, as well as from the *Code of Good Practice on HIV and AIDS and the World of Work*, the *Amended Code of Good Practice on the Handling of Sexual Harassment in the Workplace*, the Disability Code and the Revised Disability Code.

This is particularly important, since disability is a natural part of the human experience, and in no way diminishes individuals' rights to belong and contribute to the labour market. If provided with opportunities and reasonable accommodation, people with mental health conditions can contribute valuable skills and abilities to every workplace and contribute to our economy.

Discrimination is a socially constructed action and can thus be avoided by ensuring better knowledge, understanding and awareness of disabilities and the challenges encountered by people with mental health conditions.

1.2 Aims and objectives of the code

1.2.1 The EEA protects people with mental health conditions, which include, though are not limited to depression, post-traumatic stress disorder, bipolar disorder and schizophrenia, against unfair discrimination in the workplace and directs employers to implement affirmative action measures to redress discrimination.

1.2.2 The code serves as a guide for employers and employees on how to promote equal opportunities and fair treatment for people with mental health conditions, as required by the EEA.

1.2.3 The code is intended to help employers and employees understand their rights and obligations so as to promote certainty, reduce disputes and ensure that people with mental health conditions enjoy and exercise their rights at work.

1.2.4 The code is intended to help create awareness of the contributions that people with mental health conditions can make, and to encourage employers to fully utilise such persons' skills.

1.3 Definitions

Depression

A mood disorder that causes persistent feelings of sadness and loss of interest. It is also termed major depressive disorder or clinical depression and affects how an individual feels, thinks and behaves, and can lead to various emotional and physical problems.²

Discrimination based on mental health

The use of inappropriate or arbitrary criteria to distinguish between individuals with mental health conditions and those without, bringing about less favourable consequences for members of the former group in relation to members of the latter, and impairing the former's fundamental human dignity.

Mental health conditions

Refers collectively to mental health problems, mental illness and mental disorders (defined separately below). If and when relevant, a different descriptive term may be used.

Mental disability

A long-term or recurring mental impairment that substantially limits a

² This definition is borrowed from the Mayo Clinic 2015. <http://www.mayoclinic.org/diseases-conditions/depression/basics/definition/con-20032977>. Accessed on 30/09/2015.

	person's prospects of entry into or advancement in employment.
Mental disorder	A health condition characterised by alterations in thinking, mood or behaviour (or some combination thereof), associated with distress and/or impaired functioning. ³
Mental illness	A positive diagnosis of an illness relating to mental health made in terms of accepted diagnostic criteria by a mental health practitioner authorised to do so. ⁴
Reasonable accommodation	Retains its ordinary meaning as defined in section 1 of the EEA: "Any modification or adjustment to a job or to a working environment that will enable a person from a designated group [an individual with a legally recognised mental disability] to have access to or participate in employment."
Workplace stress	The response that people may have when presented with work demands and pressures that are non-aligned with or exceed their knowledge and abilities, thereby challenging their ability to cope. Workplace stress occurs in a wide range of circumstances, but is often exacerbated when employees feel that they receive little support from supervisors and colleagues, and have little control over work processes. Work stress is often confused with normal work pressure or challenges, and is sometimes used as an excuse for bad management practices. ⁵

2. APPLICATION OF THE CODE

2.1 This code applies to the workplace and, as such, serves as a guide for the following persons:

2.1.1 Employers

2.1.2 Employees and those in an employment relationship

2.1.3 Job applicants

³ This definition is borrowed from the *ILO Executive Summary on Mental Health in the Workplace*:10.

⁴ This definition is borrowed from the *Mental Health Care Act*: sec 1.

⁵ This definition is borrowed from WHO 2015a. http://www.who.int/occupational_health/topics/stressatwp/en/. Accessed on 10/11/2015.

2.1.4 Managers

2.1.5 Supervisors

2.1.6 Clients and customers

2.1.7 Contractors and sub-contractors of the business

2.2 Where “employee” is used in this code, it will be deemed to include job applicants also.

2.3 This code does not invest employers with the authority to take disciplinary action against non-employees.

3. NATURE AND SCOPE OF MENTAL HEALTH CONDITIONS IN THE WORKPLACE

3.1 Mental disability

3.1.1 The definition of people with mental disabilities

The scope of protection for persons with mental disabilities in employment focuses on the effect of a disability on the person in relation to the working environment, and not on the diagnosis or the impairment itself.

Individuals are considered people with mental disabilities if they satisfy all the criteria contained in the definition, namely if they:

- (i) have a mental impairment;
- (ii) which is long-term or recurring; and
- (iii) which substantially limits their prospects of entry into or advancement in employment; or
- (iv) are regarded as having such a mental impairment.

3.1.1.1 Mental impairment

- (a) Mental impairment means a condition or illness that affects a person’s thought processes, judgment or emotions.
- (b) The term “mental” is to be interpreted as broadly as possible and should widely encompass all forms of impairment.
- (c) In order to establish mental impairment, a diagnosis by a qualified mental health-care practitioner in terms of the current edition of either the *Diagnostic and Statistical Manual of Mental Disorders* or the *International Classification of Diseases* will suffice.
- (d) Possible predictive mental impairments that may impose a substantial limitation include depression (major depressive disorder and persistent depressive disorder), post-traumatic stress disorder, bipolar disorder and schizophrenia.

3.1.1.2 Long-term or recurring

- (a) “Long-term” means that the mental impairment has lasted or is likely to persist for at least 12 months.
- (b) A recurring impairment is one that is likely to happen again and to be substantially limiting (see below), including a constant chronic condition, even if its effects on a person fluctuate.
- (c) Progressive conditions are those that are likely to develop, change or recur. Persons living with progressive conditions or illnesses are considered people with mental disabilities once their impairment starts to be substantially limiting. Progressive or recurring conditions that have no overt symptoms or do not substantially limit a person are not considered disabilities.

3.1.1.3 Substantially limiting

- (a) A mental impairment is substantially limiting if its nature, duration or effects substantially limit the person’s ability to perform the essential functions of the job for which they are being considered.
- (b) The negative side effects of medications may pose a substantial limitation to an individual’s entry into and advancement in employment and, as such, should be taken into account during this assessment.
- (c) An assessment may be done by a suitably qualified person, such as a qualified mental health-care practitioner, if there is uncertainty as to whether a mental impairment is [or may be] substantially limiting.
- (d) Environmental factors and stressors in the workplace may exacerbate mental impairment and should consequently be taken into account during this assessment.

3.1.1.4 Regarded as disabled

- (a) Certain mental health conditions that do not interfere with individuals ability to perform their employment duties may become substantially limiting as a result of other people’s reactions to the condition(s). Therefore, the “regarded as” prong of the definition is included in order to combat discrimination based on myths, fears and stereotypes about mental disabilities that may apply, even when a person is not actually mentally impaired or is so impaired, but not substantially limited by it.
- (b) Individuals who are not impaired at all, but are considered by the employer to have a mental impairment may also seek protection under this prong of the definition.
- (c) Individuals who have a mental impairment, but are not substantially limited may also seek protection under this prong if an employer perceives the worker to be substantially limited in his or her ability to discharge the inherent requirements of the job.
- (d) In essence, the “regarded as” prong relieves workers from proving that they are different because of the way in which their impairment limits them, and only requires proof that “others” imposed limitations on them because of their impairments.

3.1.2 Categories of possible mental disabilities

- (a) Depression (major depressive disorder and persistent depressive disorder)
- (b) Post-traumatic stress disorder
- (c) Bipolar disorder
- (d) Schizophrenia

3.2 Discrimination based on mental health

3.2.1 Mental health status as a basis for discrimination

(a) Discrimination based on mental health perpetrated against an employee in accordance with any employment policy or practice, as well as bullying or harassment of employees on the basis of their mental health status, amounts to unfair discrimination and a violation of such person's dignity and equality.

3.2.2 Mental disability as a listed ground of unfair discrimination

(a) Workers who experience discrimination on the basis of their legally recognised disability in line with paragraph 3.1 above may bring an unfair discrimination claim under the auspices of section 6(1) of the EEA on the prohibited ground of disability.

3.2.3 Mental health as an unlisted analogous ground of unfair discrimination

(a) Workers who experience discrimination on the basis of a mental health condition that does not amount to a legally recognised disability may bring an unfair discrimination claim under the auspices of section 6(1) of the EEA on account of the unlisted analogous ground of mental health status.

3.2.4 Mental health as an arbitrary ground of unfair discrimination

(a) Workers who experience discrimination on the basis of a mental health condition that does not amount to a legally recognised disability may bring an unfair discrimination claim under the auspices of section 6(1) of the EEA on account of the arbitrary ground of mental health status.

3.3 Reasonable accommodation

3.3.1 Section 15(2)(c) of the EEA requires employers to provide reasonable accommodation to all workers from the designated groups, including people with mental disabilities, in order for them to access and enjoy equal employment opportunities. The aim of the accommodation is to reduce the impact of the impairment on the person's capacity to fulfil the essential functions of a job.

3.3.2 The obligation to make reasonable accommodation may arise when workers voluntarily disclose their mental disability to the employer, or when such a need is reasonably self-evident to the employer.

3.3.3 Employers must also accommodate workers when the job or the work environment changes, or if the mental impairment varies in duration and impact, affecting the worker's ability to discharge the inherent requirements of the job.

3.3.4 Employers should adopt the most cost-effective means so as to effectively remove the barriers to the performance of the job and the enjoyment of equal access to the benefits and opportunities of employment.

3.3.5 The reasonable accommodation requirement applies to applicants and employees with disabilities who are suitably qualified for the job. In terms of section 20(3) of the EEA, individuals from the designated groups, in this case people with mental disabilities, may be suitably qualified for a particular position as a result of any one or a combination of formal qualifications, prior learning, relevant experience and/or the capacity to acquire the ability to do the job within a reasonable time.

3.3.6 The employer should consult the employee and, where reasonable and practical, technical experts to establish appropriate mechanisms to accommodate the employee.

3.3.7 An individualised assessment will be required to establish the appropriate accommodation measure, and the particular accommodation will depend on the individual, the degree and nature of impairment, and its effect on the person as well as on the job and the working environment.

3.3.8 Reasonable accommodation may be temporary or permanent, depending on the nature and extent of the disability.

3.3.9 Reasonable accommodation measures for mental disabilities include, but are not limited to:

- extended or additional leave;
- modified or part-time work schedules;
- job restructuring;
- adjusting supervisory methods;
- modified or additional training;
- working from home;
- environmental alterations;
- reassignment or transfer to a vacant position;
- eradication or reduction of environmental stressors;
- increased education and awareness to combat stigmatisation and stereotypes;
- providing access to counselling;
- funding treatment and medications;
- confidential forums and procedures for disclosing mental health conditions; and
- rehabilitation measures to facilitate an employee's return to work.

3.3.10 The employer need not accommodate a suitably qualified applicant or employee with a mental disability if this would impose unjustifiable hardship on the business of the employer.

3.3.11 Unjustifiable hardship refers to an action that requires significant or considerable difficulty or expense. This involves, among other things, the consideration of the effectiveness of accommodation and the extent to which it would seriously disrupt business operations.

3.3.12 Accommodation that imposes unjustifiable hardship on one employer at a specific time may not do so for another or for the same employer at a different time.

4. TRAINING AND CAREER ADVANCEMENT

4.1 Employees with mental health conditions should be consulted in order to ensure input specific to their career advancement.

4.2 Facilities and materials for training, work organisation and recreation should be accessible to employees with mental health conditions.

4.3 Systems and practices to evaluate work performance should clearly identify and fairly measure and reward performance of the essential functions of the job. Work that falls outside the essential functions of the job should not be evaluated.

5. RETAINING EMPLOYEES WITH MENTAL HEALTH CONDITIONS

5.1 Employees who develop mental health conditions during employment should be reintegrated with the workplace where this is reasonable. Employers should seek to minimise the impact of the condition on employees.

5.2 If an employee develops a mental disability, the employer should consult the employee to assess whether the disability can be reasonably accommodated.

5.3 If an employee develops a mental health condition, the employer should maintain contact with the employee and encourage an early return to work where this is reasonable. This may require vocational rehabilitation, transitional work programmes and, where appropriate, flexible working time on a temporary or permanent basis.

5.4 If an employee is frequently absent from work for reasons of illness or injury, the employer should consult the employee to assess whether the reason for the absence is a mental disability that requires reasonable accommodation.

5.5 If reasonable, employers should explore the possibility of offering alternative work, reduced work or flexible work placement so that employees are not compelled or encouraged to terminate their employment.

6. TERMINATION OF EMPLOYMENT

6.1 If the employer is unable to retain the employee in terms of paragraph 5 above, the employer may terminate the employment relationship.

6.2 When employees with mental health conditions are dismissed for operational reasons, the employer should ensure that no selection criteria used either directly or indirectly unfairly discriminate against people with mental health conditions.

6.3 Employers who provide disability benefits must ensure that employees are appropriately advised before they apply for the benefits on offer and resign from employment because of a mental health condition.

7. PROCEDURES

Employers should develop and implement clear procedures to deal with cases of workplace discrimination, bullying and harassment based on mental health. These procedures should enable complaints to be resolved in a sensitive, efficient and effective manner.

7.1 Reporting workplace discrimination, bullying and harassment based on mental health

7.1.1 Incidents of workplace discrimination based on mental health must be brought to the employer's attention as soon as is reasonably possible.

7.1.2 Incidents of workplace discrimination based on mental health may be brought to the employer's attention by the complainant or any other employee who is aware of or witnessed the discrimination.

7.2 Obligations of the employer

When an incident of workplace discrimination based on mental health has been brought to the employer's attention, the employer should do the following:

7.2.1 Consult with all the relevant parties.

7.2.2 Take all reasonable and necessary steps to address the complaint (in accordance with this code and the employer's policy).

7.2.3 Take all reasonable and necessary steps to eradicate the discrimination.

7.3 The steps to be taken by the employer when a complaint is lodged should include, but will not be limited to:

7.3.1 advising the complainant of the formal and informal procedures available in terms of this code;

7.3.2 where appropriate, offering the complainant advice, counselling and assistance in terms of 7.4 below, or appointing a suitable external party to do so; and

7.3.3 following the procedures required by this code in a manner that is procedurally and substantively fair.

7.4 Advice and assistance

7.4.1 A complainant alleging workplace discrimination based on mental health is entitled to receive advice and assistance in terms of this code, either from the employer or a suitably qualified external party, depending on existing internal policies.

7.4.2 As far as is reasonably feasible, an employer should designate an employee outside the line of management or a suitably qualified external party to offer advice and assistance to complainants of workplace discrimination based on mental health.

7.5 Informal procedures

7.5.1 The complainant of workplace discrimination based on mental health and another appropriate person may approach the perpetrator employee or the employer to inform such person that the conduct, practice or policy in question is discriminatory based on mental health and violates the victim's rights to dignity and equality.

7.5.2 A suitably qualified external party or co-worker may approach the perpetrator employee or employer to inform such person that certain conduct, practices or policies are discriminatory on the basis of mental health and may violate employees' rights to dignity and equality.

7.6 Formal procedures

7.6.1 A complainant is entitled to follow a formal procedure with or without first having followed an informal procedure. This should be done in line with the company's internal policies and procedures (if these exist).

7.6.2 Where a formal procedure was not followed, an employer is still obligated to investigate the possibility and prevalence of workplace discrimination based on mental health in order to protect others from it.

7.6.3 An employer's policy to prevent workplace discrimination based on mental health should contain the following information in respect of the formal procedure to be followed:

 7.6.3.1 The individual with whom the complainant should lodge a grievance

 7.6.3.2 The internal grievance procedures to be followed

 7.6.3.3 Appropriate timeframes that will allow for swift resolution of the grievance

 7.6.3.4 That should the formal measures fail to satisfactorily resolve the matter, the complainant may refer the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).

 7.6.3.5 That it will constitute a disciplinary offence to victimise or retaliate against any employee who acts in good faith in lodging a complaint of workplace discrimination based on mental health.

8. CONFIDENTIALITY

8.1 Confidentiality

8.1.1 Subject to sections 7 and 18 of the EEA, employers, including health and medical services personnel, may only gather private information relating to employees if it is necessary to achieve a legitimate purpose and with such employees' written consent.

8.1.2 Employers must protect the confidentiality of the information that has been disclosed and must take care to keep private information relating to applicants and employees' mental health conditions confidential, keeping it separately from general personnel records.

8.1.3 When an employer no longer requires this information, it must be destroyed.

8.1.4 Subject to paragraph 8.2.7, employers may not disclose any information relating to a person's mental health condition without such person's written consent, unless legally required.

8.1.5 Employers and employees should endeavour to investigate and deal with allegations of workplace discrimination based on mental health in a manner that ensures that the identities of the parties and the nature of the complaint are kept confidential.

8.1.6 Employers are obligated to furnish the relevant parties with information that is reasonably necessary to enable their preparation for any proceedings in terms of this code.

8.2 Disclosure

8.2.1 People with mental health conditions are entitled to keep their mental health status confidential, unless the inherent requirements of the particular employment position or a risk to the health and safety of others in the workplace warrant a disclosure of the condition in question. However, if the employer is not aware of the condition or the need to be accommodated, the employer is not obligated to provide accommodation. Nevertheless, this does not absolve an employer from the responsibility not to discriminate unfairly, directly or indirectly against employees with mental health conditions.

8.2.2 Persons with mental health conditions may disclose their condition at any time, even if there is no immediate need for reasonable accommodation.

8.2.3 If the mental disability is not self-evident, the employer may require the employee to disclose sufficient information to confirm the disability or the accommodation needs.

8.2.4 If the employer does not reasonably believe that the employee is mentally disabled or requires accommodation, the employer is entitled to request the employee to be tested to determine his or her ability or disability, at the employer's expense.

8.2.5 As information about mental health conditions may be technical, employers should ensure that a competent person, such as a mental health-care practitioner, interprets the information.

8.2.6 If an employer requires further information, this must be relevant to a specific job and its essential functions.

8.2.7 An employer may not reveal the fact of an employee's mental health condition, unless this is required for the health or safety of the person with the disability or other persons.

8.2.8 After consulting the person with the mental disability, the employer may advise relevant staff that the employee requires accommodation.

9. EDUCATION AND AWARENESS

9.1 The Department of Labour should attempt to ensure that this code is accessible and available in all the official languages, where this is feasible.

9.2 The Department of Labour should ensure that copies of this code are available and accessible, particularly to persons with mental health conditions and organisations offering support to such persons and their families.

9.3 Employers and employer organisations should include the code in their employee orientation, education and training programmes.

9.4 Trade unions should include the code in their shop steward and employee education and training programmes.

9.5 CCMA commissioners should receive specialised training to adequately address issues relating to mental disability, discrimination based on mental health, including bullying and harassment, and reasonable accommodation for mental health conditions in the workplace.

ANNEXURE B

DRAFT

INTERPRETATIVE GUIDELINES FOR SOUTH AFRICAN JUDICIAL FORUMS, THE DEPARTMENT OF LABOUR, EMPLOYERS AND EMPLOYEES ON THE LEGAL POSITION REGARDING MENTAL HEALTH CONDITIONS IN THE WORLD OF WORK¹

1. INTRODUCTION

In the absence of legal clarity surrounding the phenomenon of mental health conditions in the employment realm, the following definitions, tests and suggestions aim to serve as a guideline for the Commission for Conciliation, Mediation and Arbitration (CCMA), the South African labour courts, the Department of Labour, employers and employees as well as their respective representatives to interpret and deal with mental health conditions in the workplace.

2. DEFINITIONS

2.1 Depression

A mood disorder that causes persistent feelings of sadness and loss of interest. It is also termed major depressive disorder or clinical depression and affects how an individual feels, thinks and behaves, and can lead to various emotional and physical problems.²

2.2 Discrimination based on mental health

The use of inappropriate or arbitrary criteria to distinguish between individuals with mental health conditions and those without, bringing about less favourable consequences for members of the former group in relation to members of the latter, and impairing the former's fundamental human dignity.

2.3 Mental disability

A long-term or recurring mental impairment that substantially limits a person's prospects of entry into or advancement in employment.

¹ These guidelines have been constructed from arguments and concepts used throughout this thesis and have also drawn on similar resources available in the comparative jurisdictions.

² This definition is borrowed from the Mayo Clinic 2015. <http://www.mayoclinic.org/diseases-conditions/depression/basics/definition/con-20032977>. Accessed on 30/09/2015.

2.4 Mental disorder

Health conditions characterised by alterations in thinking, mood or behaviour (or some combination thereof) associated with distress and/or impaired functioning.³

2.5 Mental health conditions

Refers collectively to mental health problems, mental illness and mental disorders (defined separately below). If and when relevant, a different descriptive term may be used.

2.6 Mental illness

A positive diagnosis of an illness relating to mental health made in terms of accepted diagnostic criteria by a mental health practitioner authorised to do so.⁴

2.7 Reasonable accommodation

Retains its ordinary meaning, as defined in section 1 of the Employment Equity Act (EEA): “Any modification or adjustment to a job or to a working environment that will enable a person from a designated group [an individual with a legally recognised mental disability] to have access to or participate in employment.”

2.8 Workplace stress

The response that people may have when presented with work demands and pressures that are non-aligned with or exceed their knowledge and abilities, challenging their ability to cope. Workplace stress occurs in a wide range of circumstances, but is often exacerbated when employees feel that they receive little support from supervisors and colleagues and have little control over work processes. Work stress is often confused with normal work pressure or challenges, and is sometimes used as an excuse for bad management practices.⁵

3. MENTAL DISABILITY

3.1 The legal elements of a mental disability

Individuals are considered people with mental disabilities if they satisfy all the criteria contained in the definition, namely if they have a mental impairment that is long-term or recurring and substantially limits their prospects of entry into or advancement in employment, or are regarded as having such a mental impairment.

3.1.1 Mental impairment

Mental impairment means a condition or illness that affects a person’s thought processes, judgment or emotions.

The term “mental” is to be interpreted as broadly as possible and should widely encompass all forms of impairment.

³ This definition is borrowed from the *ILO Executive Summary on Mental Health in the Workplace*:10.

⁴ This definition is borrowed from the *Mental Health Care Act*: sec 1.

⁵ This definition is borrowed from the WHO 2015a. http://www.who.int/occupational_health/topics/stressatwp/en/. Accessed on 10/11/2015.

In order to establish mental impairment, a diagnosis by a qualified mental health-care practitioner in terms of the current edition of either the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) or the *International Classification of Diseases* (ICD) will suffice.

Possible predictive mental impairments that may impose a substantial limitation include depression (major depressive disorder and persistent depressive disorder), post-traumatic stress disorder, bipolar disorder and schizophrenia.

Depression as an example

Depression is officially classified in both the DSM and ICD, and therefore, a diagnosis in terms of these will establish depression as a mental impairment for the purposes of disability law.

3.1.2 Long-term, recurring or progressive conditions

3.1.2.1 Long-term conditions

“Long-term” means that the mental impairment has lasted or is likely to persist for at least 12 months.

Depression as an example

Major depressive disorder is diagnosed if all the relevant symptoms are present for the same two-week period, although it may last longer. Although depression is episodic, it persists throughout a person’s life. It is however difficult to predict during the first episode what form the disorder will take and whether it will be chronic, episodic or discrete. The disorder is characterised by inter-episode remissions and is recurrent, which implies that it may present multiple times in a 12-month period. However, since it does not consistently last for 12 months or longer, it will probably not meet the “long-term” requirement set by the Disability Code.

Persistent depressive disorder (dysthymia), on the other hand, is a more chronic and persistent form of depression that is diagnosed only after a two-year period. This form of depression will undoubtedly satisfy the “long-term” requirement, since it persists for well over 12 months.

3.1.2.2 Recurring conditions

A recurring impairment is likely to happen again and to be substantially limiting (see below), including a constant chronic condition, even if its effects on a person fluctuate.

Depression as an example

According to the DSM and the ICD, major depressive disorder is characterised by inter-episode remissions, and although its symptoms fluctuate, it continuously reoccurs. There can be little doubt that this disorder will satisfy the “recurring” requirement in terms of the Disability Code. This is reinforced by the fact that depression prevails throughout a person’s life, although the symptoms may become dormant and resurface at various intervals.

The “recurrent depressive disorder, currently in remission” classified in the ICD may also satisfy the “recurring” criterion. However, the symptoms would have to be active at the time of assessing the condition.

3.1.2.3 Progressive conditions

Progressive conditions are those that are likely to develop, change or recur. Persons living with progressive conditions or illnesses are considered people with mental disabilities once their impairment starts to be substantially limiting. Progressive or recurring conditions that have no overt symptoms or do not substantially limit a person are not considered disabilities.

Depression as an example

Although a single episode of depression may be severe enough to justify a diagnosis in terms of the DSM, depression is by its very nature a disorder that progressively develops over time until the requisite number of symptoms are present to make a diagnosis. The symptoms of depression may therefore develop, change and recur over time.

In light of the significant psychiatric co-morbidity associated with depression, it may constitute a progressive condition if, for example, workplace stress causes an employee to develop an anxiety disorder, which eventually results in depression. It will however only amount to a progressive condition once the symptoms become substantially limiting.

As the symptoms of depression may have a significant impact on an individual's ability to function in society and the workplace, even if there are not enough symptoms present to make an official diagnosis, depression may in fact satisfy the "progressive conditions" requirement set by the code, provided that the symptoms are severe enough to substantially limit an individual's ability to function in the employment sphere.

3.1.3 Substantial limitation of entry into or advancement in employment

A mental impairment is substantially limiting if its nature, duration or effects substantially limit the person's ability to perform the essential functions of the job for which they are being considered.

The negative side effects of medications may pose a substantial limitation to an individual's entry into and advancement in employment and, as such, should be taken into account during this assessment.

An assessment may be done by a suitably qualified person, such as a qualified mental health-care practitioner, if there is uncertainty as to whether a mental impairment is [or may be] substantially limiting.

Environmental factors and stressors in the workplace may exacerbate mental impairment and should consequently be taken into account during this assessment.

Depression as an example

An assessment of whether depression is substantially limiting should take into account the symptoms and relevant diagnostic features of the disorder. According to the DSM (which overlaps significantly with the ICD), depression is characterised by the following factors, which may make it substantially limiting in the employment realm:

- Depressed mood most of the day, nearly every day
- Markedly diminished interest or pleasure in all, or almost all, activities;
- Decreased energy, tiredness and fatigue. A person may sustain fatigue without physical exertion. Even the smallest tasks seem to require substantial effort. The efficiency with which tasks are accomplished may be reduced.
- Impaired ability to think, concentrate or make even minor decisions. A person may appear easily distracted or complain of memory difficulties. Those engaged in cognitively demanding pursuits are often unable to function.
- Increased irritability, for example persistent anger, a tendency to respond to events with angry outbursts or blame, and an exaggerated sense of frustration over minor matters.

The DSM provides that these symptoms cause clinically significant distress or impairment in occupational functioning.

If an employee experiences a depressed mood for most of the day, nearly every day, and has a severe loss of interest in the activities that (s)he is required to perform, this may substantially limit the individual's ability to discharge the inherent requirements of the job. If an employee experiences decreased levels of energy, tiredness and fatigue, this will substantially limit his or her ability to function properly in the workplace and perform his or her duties. Similarly, a diminished ability to think or concentrate will severely affect an individual's ability to effectively perform in the workplace. In addition, increased irritability and angry outbursts may strain or compromise an employee's ability to interact with

co-workers and clients, and therefore this too may substantially limit an individual's ability to discharge the inherent requirements of the job. Furthermore, clinically significant distress and impairment in occupational functioning may also substantially limit an employee's ability to gain entry into or advance in employment.

As depression leads to several major occupational concerns, such as absenteeism, occupational and social dysfunction as well as decreased productivity, this supports the notion that it may substantially limit a person's ability to discharge the inherent requirements of his or her job. Cognitive impairment has also been noted in about two-thirds of depressed individuals, which may also significantly impair employees' ability to perform their employment duties.

Another significant concern in the workplace is that sleep disturbances, particularly insomnia, are present in up to 90% of depressed individuals. Employees who attempt to work when they are tired from a lack of sleep will not be at their most productive when performing their employment duties. Sleep disturbances also create the risk that the employee may be prone to sleeping on the job. Clearly, these symptoms also constitute a substantial limitation of the employee's performance of the inherent requirements of his or her job.

Depression may be regulated with the use of antidepressants and psychotherapy. However, even though these medications and treatments may manage the disorder, depression is present throughout a person's life and may recur in the future.

A further relevant consideration is that antidepressants may have negative side effects that may be substantially limiting. Antidepressants have the following common side effects that may affect an individual's functional capacity in the workplace:

- Insomnia
- Sedation and dizziness
- Headaches
- Nervousness
- Agitation
- Excessive sweating
- Weight gain
- Fatigue
- Tremors and shaky hands
- Nausea

These factors, either independently or in combination, may substantially limit employees' ability to discharge the inherent requirements of their employment positions, particularly as approximately 38% of people taking antidepressants do experience one or more of these side effects. All of these side effects may significantly distract employees, impair their ability to think and concentrate, and ultimately affect their productivity.

Moreover, most guidelines recommend that antidepressants be used for six to nine months after depression has been diagnosed, exposing the individual to these side effects over an extended period of time, which may substantially limit the person's entry into or advancement in employment. If the use of medication does not remove the substantial limitations of depression or gives rise to other substantially limiting factors, the employee or job applicant should still be considered as substantially limited in their entry into or advancement in employment.

3.1.4 Perceived disabilities

Certain mental health conditions that do not interfere with individuals ability to perform their employment duties may become substantially limiting as a result of other people's reactions to the condition(s). Therefore, the "regarded as" prong of the definition is included in order to combat discrimination based on myths, fears and stereotypes about mental disabilities that may apply, even when a person is not actually mentally impaired or is so impaired, but not substantially limited by it.

Individuals who are not impaired at all, but are considered by the employer to have a mental impairment may also seek protection under this prong of the definition.

Individuals who have a mental impairment, but are not substantially limited may also seek protection under this prong if an employer perceives the worker to be substantially limited in his or her ability to discharge the inherent requirements of the job.

In essence, the “regarded as” prong relieves workers from proving that they are different because of the way in which their impairment limits them, and only requires proof that “others” imposed limitations on them because of their impairments.

Depression as an example

The fact that depression has been lessened, controlled or corrected and is no longer substantially limiting does not prevent the individual from being treated by his or her employer as if (s)he still has the disability. Similarly, individuals who had a form of mild or less severe depression that could not be diagnosed, as well as persons who merely displayed symptoms of depression, may be treated by their employers as if they are disabled. Added to that, the societal perception, stigmatisation and prejudice associated with this mental health condition may lead employers to make unfounded assessments of the capacity to work of persons who experienced depression in the past.

4. DISCRIMINATION BASED ON MENTAL HEALTH

4.1 Examples of workplace discrimination, bullying and harassment based on mental health

4.1.1 Employment policies and practices

Section 6(1) of the EEA prohibits unfair discrimination, either directly or indirectly, against any employee in any employment policy or practice. Therefore, the primary forum where discrimination based on mental health could manifest itself is an employer's employment policy or practices.

4.1.2 Bullying and harassment

The following behaviours, among others, are examples of bullying and harassment on the basis of an employee's mental health condition:

- Name-calling (on the basis of mental health status)
- Laughing and/or staring at employees because of their mental health condition
- Transmitting insulting and degrading messages about an employee's mental health status
- Public shaming of employees because of their mental health condition(s)
- Abusive comments and remarks about an employee's mental health condition
- Public shaming of employees because of their mental health status
- Unwarranted criticism in relation to an employee's mental health condition
- Implying or stating that employees may suffer organisational detriment (such as demotion or dismissal) because of their mental health status
- Selecting onerous or petty rules and work tasks for employees because of their mental health condition(s)
- Purposefully excluding or ostracising employees because of their mental health status

4.2 Test to determine discrimination based on mental health

4.2.1 Mental health as a disability

Disability is listed as a prohibited ground of unfair discrimination in both section 9(3) of the Constitution and section 6(1) of the EEA. The Revised Disability Code, similar to the Disability Code, provides that the purpose of the EEA and the code is to protect persons with disabilities against unfair discrimination in employment.

Therefore, if an individual with a mental health condition such as depression can meet the requirements to establish a disability in the legal sense, as discussed above, such an individual will automatically be in a favourable position when alleging unfair discrimination against an employer, as there will be a rebuttable presumption of unfair discrimination on a listed ground.

4.2.2 Mental health as an unlisted ground

Workers who experience discrimination based on a mental health condition that does not amount to a legally recognised disability may bring an unfair discrimination claim under section 6(1) of the EEA on the basis of the unlisted analogous ground of mental health status.

As an unlisted analogous ground, mental health will have to satisfy the three-stage test of unfair discrimination currently endorsed by the judiciary, as formulated from the test in *Harksen v Lane* 1997 11 BLRD 1489 CC and supported by section 11 of the EEA. In terms of this test, an inquiry into a claim of unfair discrimination will require claimants to prove that differentiation on the basis of their mental health condition has taken place, that it amounted to discrimination, and that the discrimination was unfair. This analysis is considered below.

4.2.2.1 Has differentiation based on mental health status taken place?

Differentiation occurs when an employer treats certain job applicants or employees differently from others or uses an employment policy or practice to exclude certain groups. If an employer distinguishes between employees, either through its conduct or in any employment policy or practice, on the basis of employees' mental health condition(s), this will amount to differentiation based on mental health. These victims of differentiation are not treated in the same manner as other, similarly situated employees or job applicants due to a certain characteristic, namely their mental health status.

4.2.2.2 Does the differentiation constitute discrimination?

Discrimination can be established by linking the differentiation in treatment or effect to an unlisted ground (a ground not mentioned in section 6(1) of the EEA). However, in order to be considered as an unlisted ground of discrimination, the differentiation must first comply with the test laid down in *Harksen v Lane NO*, according to which it will have to be shown that the "ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them in a comparably serious manner" as members of a vulnerable group.

Mental health is not specifically listed as a prohibited ground of unfair discrimination in section 6(1) of the EEA and will consequently have to be alleged as an unlisted analogous ground of unfair discrimination. In terms of the *Harksen* test, it will have to be proven that discrimination based on an employee's mental health condition may impair the person's fundamental human dignity or affect him or her in a comparably serious manner.

Dignity is described as affording an individual "his or her intrinsic worth and value". An individual's mental health status forms an intrinsic part of his or her biological make-up, and consequently contributes to who the person is as an individual. Subjecting an employee to prejudicial treatment based on a condition that forms an indisputable part of that person's human biology in effect offends the individual's "intrinsic worth and value", and consequently has significant potential to impair the person's dignity. Therefore, judging and disadvantaging people because of medical and biological conditions that

form part of who they are strikes at the foundation of their dignity as human beings, and thus results in unfairness.

This argument is further strengthened by the finding of the Labour Court and the Labour Appeal Court in *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland* 2009 12 BLLR 1181 LAC, where it was held that mental health constituted an unlisted ground of unfair discrimination, and that discriminating against individuals based on their mental health might impair their fundamental dignity as human beings.

Discriminating against persons afflicted with mental health conditions impairs their fundamental human dignity and affects them in a manner similar to that of discrimination based on not only disability, but also other characteristics that are linked to human biology, such as race or gender.

Moreover, a suitable contextual inquiry at the discrimination stage of the test will allow for a substantive approach to equality. Consequently, the social context of people with mental health conditions such as depression, including their vulnerability as well as the stigmatisation and prejudice suffered by them, will have to be taken into account.

4.2.2.3 Is the discrimination unfair?

Fairness is considered to be the means of distinguishing permissible from impermissible forms of discrimination. Discrimination itself already has a negative connotation, encompassing some form of harm based on difference, such as mental health; unfair discrimination goes a step further by deepening or worsening existing disadvantage.

Harksen v Lane indicates that if discrimination is based on one of the prohibited grounds, unfairness will be presumed. If the differentiation is based on an unlisted ground, however, the complainant will have to prove unfairness. As mental health is not a listed ground of unfair discrimination, the unfairness of the discrimination will have to be proven.

The primary right and value on which unfairness hinges is dignity. In light of the considerable link between mental health and persons' inherent human dignity, if their right to dignity is tarnished by discrimination based on their mental health condition, the discrimination is likely to be unfair.

Various factors, including stigmatisation, marginalisation, social exclusion, stereotyping and the failure to accord equal concern and respect, may all contribute to the vulnerability of a particular group. These factors are all realities for people with mental health conditions such as depression, and consequently contribute to their vulnerability. The more vulnerable the group that is adversely affected by the discrimination, the more likely the discrimination is to be unfair.

The *Harksen* test dictates that unfairness is established by focusing on the impact of the discrimination on the complainant and others similarly situated. Stereotyping and prejudice suffered by people with mental health conditions constitute one form of social differentiation and systematic underprivilege that still persists in South African society and the employment realm. The vulnerability of people with mental health conditions, and the past patterns of discrimination and disadvantage they suffered, will be essential in establishing their position in society and the impact of the discrimination to which they have been exposed.

In relation to the impact of the discrimination on the complainant and others similarly situated, the courts will consider a number of factors, including the worth and value of victims' attributes, the exploitation suffered by them, as well as their vulnerability and past patterns of disadvantage and prejudice suffered. The unfairness test is intended to illustrate that discrimination may have different impacts in different circumstances. The shifting patterns of harmful discrimination and stereotypical response in our evolving democratic society require a flexible approach.

In light of the stereotypes, stigmatisation, marginalisation and prejudice suffered by persons with mental health conditions, as well as their vulnerable position in society, the impact of discrimination based on mental health is severe. These individuals also continue to suffer exploitation and disadvantage, rendering them vulnerable in both society and the workplace. A historical overview also reveals that most of these individuals suffered past patterns of disadvantage.

Discriminating against persons with mental health conditions is arbitrary and purposeless, provided that the individual can discharge the inherent requirements of his or her job. Discriminating against persons because of a biological aspect of their person (if it does not affect their ability to do the job) is also morally offensive.

Stereotyping of complainants, or the prejudice suffered by them, has been used to determine the impact of the discrimination on them. Mental health conditions attract an array of negative and diverse stereotypes. In circumstances where stereotypes about mental health amount to a withholding of benefits or opportunities, or result in disadvantage that is comparable to the disadvantage suffered by other protected groups (race, sex or age) because of stereotyping, such stereotypes unfairly discriminate against the individual concerned.

The historical oppression experienced by persons with mental health conditions manifests itself in overlapping processes of stereotyping, stigmatisation, exclusion and marginalisation. Discrimination and relegation of this societal group reinforces the perception of these persons as “outsiders” and perpetuates the cycle of disadvantage.

Disadvantaging and judging individuals because of their mental health status marginalises this vulnerable social group in the employment realm and perpetuates a pattern of disadvantage for them. For all the reasons cited above, discrimination on the basis of mental health is unfair.

4.2.2.4 Does discrimination based on mental health constitute an arbitrary ground in terms of section 6(1) of the EEA?

Workers who experience discrimination based on a mental health condition that does not amount to a legally recognised disability may bring an unfair discrimination claim under section 6(1) of the EEA on account of the arbitrary ground of mental health status.

The inclusion of the words “or on any other arbitrary ground” in section 6(1) of the amended EEA strengthens a possible claim by employees who allege unfair discrimination on the basis of their mental health in the workplace, even though the meaning and scope of the concept of an “arbitrary ground” is still uncertain.

In terms of section 11 of the amended EEA, the complainant bears the onus of proving on a balance of probabilities that the employer unfairly discriminated against him or her based on an arbitrary ground. The employee will thus have to prove that the differential treatment on the basis of mental health was not rational, that it amounted to discrimination, and that the discrimination was unfair.

4.3 Status of bullying and harassment based on mental health

Bullying and harassment based on mental health are not expressly recognised as forms of harassment or a legitimate dignity violation in terms of South African labour law. Workers may however be protected if their mental health condition constitutes a legally recognised disability under the EEA.

Employees who are bullied or harassed because of a mental health condition will therefore have to institute an action for delictual damages against the employer, or an action for constitutional damages based on a violation of section 23(1) of the Constitution (if the employer failed to maintain a safe working environment and violated the employee’s right to fair labour practices), or an action against the employer for vicarious liability in terms of section 60 of the EEA.

The South African judicial forums and the legislature are however encouraged to extend the South African labour law to prohibit bullying and harassment on the basis of an employee’s mental health status.

5. REASONABLE ACCOMMODATION FOR MENTAL HEALTH CONDITIONS

5.1 Reasonable accommodation as a non-discrimination principle

As a non-discrimination principle, reasonable accommodation imposes a duty that can be enforced by any individual belonging to a protected group (or a group analogous thereto). Since reasonable accommodation constitutes a non-discrimination principle, and because unreasonably denying accommodation to an employee would amount to unfair discrimination, denying reasonable accommodation to an employee with a mental health condition such as depression will equally amount to unfair discrimination.

5.2 Reasonable accommodation as an affirmative action measure

Section 15(2)(c) of the EEA requires employers to provide reasonable accommodation to all workers from the designated groups, including people with mental disabilities, in order for them to access and enjoy equal employment opportunities. The aim of the accommodation is to reduce the impact of the impairment on the person's capacity to fulfil the essential functions of a job.

The conjecture under the EEA is that in order for an individual with a disability to be suitable for reasonable accommodation, (s)he must ultimately be able to discharge the inherent requirements of the job, either with or without reasonable accommodation. If employees or job applicants can establish their mental health condition such as depression as a legally recognised disability, they will be able to request reasonable accommodation measures from the employer in order to assist them in discharging the inherent requirements of the job.

5.2.1 Suitably qualified individuals

The reasonable accommodation requirement applies to applicants and employees with disabilities who are suitably qualified for the job. In terms of section 20(3) of the EEA, individuals from the designated groups, in this case people with mental disabilities, may be suitably qualified for a particular employment position as a result of any one or a combination of formal qualifications, prior learning, relevant experience, or the capacity to acquire the ability to do the job within a reasonable time. It follows, then, that if an individual with a mental disability has the requisite formal qualifications, prior learning, relevant experience and/or the capacity to acquire the ability to do the job within a reasonable time, (s)he will be suitably qualified for the employment position. The employer will take these into account in order to determine whether the individual with a mental disability is suitably qualified and, thus, capable of performing the inherent requirements of the job.

If it is determined that the employee is not suitably qualified and, thus, does not have the ability to perform the inherent duties of the position, the employer will consider whether reasonable accommodation would remedy this. Consequently, an employer is in no way obligated to make reasonable accommodation for an individual who is not capable of discharging the inherent requirements of the job despite reasonable accommodation.

5.2.2 Individualised assessments

An individualised assessment will be required to establish the appropriate accommodation measure, and the particular accommodation will depend on the individual, the degree and nature of impairment, and its effect on the person as well as on the job and the working environment.

In determining appropriate reasonable accommodation for people with mental disabilities, the employer must have regard for each individual's specific mental health condition. This means that the employer will have to consider the specific features and symptoms of each particular mental health condition, as well as the specific manner in which each individual is affected, when determining appropriate reasonable accommodation. Moreover, as the particular job and work circumstances may also influence

the employee's symptomology and functional capacity, these should also be taken into account in the individualised assessment of reasonable accommodation.

5.2.3 Disclosure and consultation

The obligation to make reasonable accommodation may arise when a worker voluntarily discloses his or her mental disability to the employer, or when such a need is reasonably self-evident to the employer.

People with mental health conditions are entitled to keep their mental health status confidential. However, if the employer is not aware of the condition or the need to be accommodated, the employer is not obligated to provide accommodation. Nevertheless, this does not absolve an employer from the responsibility not to discriminate unfairly, directly or indirectly against employees and job applicants.

A person with a mental health condition may disclose his or her condition at any time, even if there is no immediate need for reasonable accommodation. If the mental disability is not self-evident, the employer may require the employee to disclose sufficient information to confirm the disability or the accommodation needs.

Employers have a duty to consult with their employees regarding reasonable accommodation, and to enlist technical experts to establish appropriate mechanisms where this is reasonable and practical.

5.2.4 Mental health conditions as a health and safety risk

Health and safety is an essential element of the inherent requirements of a job, and the mentally disabled employee must ultimately be able to perform the job safely. However, the mere presence of a risk to health and safety does not in itself disqualify an employee or job applicant from consideration, and it is essential for the employer to rely on objective and reasonable medical evidence instead of generalised assumptions. The employer has a duty to consider whether the risk may be eliminated or lessened by providing reasonable accommodation for the individual's mental disability.

5.2.5 The employer's "unjustifiable hardship" defence

The employer need not accommodate a qualified applicant or employee with a mental disability if this would impose unjustifiable hardship on the business of the employer. Unjustifiable hardship refers to an action that requires significant or considerable difficulty or expense. Determining unjustifiable hardship involves considering, among other things, the effectiveness of the accommodation and the extent to which it would seriously disrupt business operations.

Unjustifiable hardship also calls for an individualised assessment of the specific circumstances, since what may constitute unjustifiable hardship for one employer may not be so for another employer or for the same employer at a different time.

5.2.6 Measures of reasonable accommodation specific to mental health conditions

Measures of reasonable accommodation for mental disabilities include, but are not limited to:

- extended or additional leave;
- modified or part-time work schedules;
- job restructuring;
- adjusting supervisory methods;
- modified or additional training;
- working from home;
- environmental alterations;
- reassignment or transfer to a vacant position;
- eradication or reduction of environmental stressors;

- increased education and awareness to combat stigmatisation and stereotypes;
- providing access to counselling;
- funding treatment and medications;
- confidential forums and procedures for disclosing mental health conditions; and
- rehabilitation measures to facilitate an employee's return to work.

5.3 Reasonable accommodation in the dismissal context

Reasonable accommodation is a constitutional non-discrimination principle and, as such, is applied not only to the EEA, but also the LRA. Consequently, the considerations in relation to reasonable accommodation under the EEA apply equally to the law of dismissal under the LRA.

6. CONCLUSION

The guidelines, tests, definitions and suggestions above may serve to support the decision-making processes of the judiciary where a dispute in respect of discrimination based on mental health, mental disability status and the need for reasonable accommodation on this ground should make its way to the CCMA or labour courts. They may also serve as a reference for the Department of Labour to recognise and address these issues, while at the same time helping employers and employees to obtain legal clarity on the status of mental health conditions in employment.

The content of these guidelines is ultimately aimed at establishing a position of fairness and legal certainty for all employees in the South African labour arena who are vulnerable to unfair discrimination, the denial of reasonable accommodation as well as violations of their rights to dignity and equality on the basis of their mental disabilities or mental health conditions.

ANNEXURE C

DRAFT

WORKPLACE POLICY DEALING WITH MENTAL HEALTH CONDITIONS IN EMPLOYMENT¹

(Name of organisation/legal entity) recognises that all employees should work in an environment that is free from discrimination, bullying and harassment based on mental health status.

(Name of organisation/legal entity) further acknowledges that all employees should work in an environment that accommodates their mental disabilities and mental health conditions, barring unjustifiable hardship.

In this policy:

mental disability means a long-term or recurring mental impairment that substantially limits the prospects of entry into or advancement in employment;

discrimination based on mental health means the use of inappropriate or arbitrary criteria to distinguish between individuals who have mental health conditions and those who do not, bringing about less favourable consequences for members of the former group in relation to members of the latter, and impairing the former's fundamental human dignity;

bullying and harassment based on mental health means unwanted, unreasonable and unacceptable conduct (including verbal, non-verbal, practical and unfair performance-related behaviour) that affects the dignity of employees in the workplace, and that is based on their mental health status, which conduct may be persistent or an isolated event, or occur via electronic means; and

reasonable accommodation in the mental health context means any modification or adjustment to a job or to a working environment that will enable an individual with a legally recognised mental disability to have access to or participate in employment.

¹ This draft policy has been adapted from the "Draft workplace policy dealing with appearance-based discrimination, bullying and harassment in employment" constructed by Viviers 2014:213-216 and the "Draft policy to prevent and deal with workplace bullying" constructed by Smit 2014:382-384.

Mental disabilities

In accordance with the Employment Equity Act (EEA) 55 of 1998, as amended, and the Code of Good Practice: Key Aspects on the Employment of People with Disabilities 2002 (the Disability Code), people with mental health conditions have to satisfy the following legal requirements to qualify as an individual with a mental disability:

- Have a mental impairment [A mental impairment means a clinically recognised condition or illness that affects a person's thought processes, judgment or emotions. Employees may provide evidence of a medical diagnosis made by a qualified mental health-care practitioner in order to establish mental impairment.]
- ... that is long-term or recurring ["Long-term" means that the impairment has lasted or is likely to persist for at least 12 months. A recurring impairment is one that is likely to happen again and to be substantially limiting (see below), including a constant chronic condition, even if its effects on a person fluctuate. Progressive conditions are those that are likely to develop, change or recur. Persons living with progressive conditions or illnesses are considered people with mental disabilities once the impairment starts to be substantially limiting. Progressive or recurring conditions that have no overt symptoms or do not substantially limit a person are not considered disabilities. Employees may provide evidence of the nature, severity as well as the specific symptoms of their particular mental impairment in order to satisfy these requirements.]
- ... and that substantially limits entry into or advancement in employment. [An impairment is substantially limiting if its nature, duration or effects substantially limit the person's ability to perform the essential functions of the job for which they are being considered. Some impairments are so easily controlled, corrected or lessened that they have no limiting effects. An assessment to determine whether the effects of impairment are substantially limiting must consider whether medical treatment or other devices would control or correct the impairment to such an extent that it prevents or removes its adverse effects. An assessment may be done by a suitably qualified person if there is uncertainty as to whether impairment is [or may be] substantially limiting.]

Categories of possible mental disabilities

- (a) Depression (major depressive disorder and persistent depressive disorder)
- (b) Post-traumatic stress disorder
- (c) Bipolar disorder
- (d) Schizophrenia

Discrimination, bullying and harassment based on mental health

Discrimination, bullying and harassment based on mental health can occur vertically and/or horizontally within an organisation, and consequently, employers or employees may be responsible.

Examples of conduct that may amount to unfair discrimination, bullying or harassment on the basis of mental include, but are not limited to, the following:

Employment practices

- Promotion, demotion or appointment of individuals based on an aspect of their appearance that does not relate to the inherent requirements of the job in question
- Differences in remuneration of employees who perform substantially the same work or are employed in substantially similar employment positions, with the only difference between the employees being their mental health status
- Differences in working conditions and/or employment benefits that are attributable solely to the mental health status of employees

Behaviours

- Name-calling (on the basis of mental health status)
- Laughing and/or staring at employees because of their mental health condition
- Transmitting insulting and degrading messages about an employee's mental health status
- Public shaming of employees because of their mental health condition(s)
- Abusive comments and remarks about an employee's mental health condition
- Public shaming of employees because of their mental health status
- Unwarranted criticism in relation to an employee's mental health condition
- Implying or stating that employees may suffer organisational detriment (such as demotion or dismissal) because of their mental health status
- Selecting onerous or petty rules and work tasks for employees because of their mental health condition(s)
- Purposefully excluding or ostracising employees because of their mental health status

If the employer makes organisational decisions (such as appointment, promotion, demotion or allocation of employment benefits) based on the mental health status of an employee, and such decisions are in accordance with section 6(2) of the EEA (based on the inherent requirements of the job or in accordance with affirmative action measures), the employer has not committed an unjustifiable act of unfair discrimination and will not be held liable.

If the employer has taken all reasonable and necessary steps to prevent workplace bullying and harassment based on mental health, to deal with complaints of such bullying or harassment, and to eradicate such conduct, the employer will not be held liable for such incidents.

Isolated and single occurrences of discrimination, bullying and harassment based on mental health as well as patterns of repetitive behaviour are equally unacceptable and will not be tolerated.

(Name of organisation/legal entity) and all of its employees have an obligation to prevent and eradicate workplace discrimination, bullying and harassment based on mental health, and to promote the rights to dignity, equality and equal opportunity of all persons in the workplace.

(Name of organisation/legal entity) has procedures in place to deal with workplace discrimination, bullying and harassment based on mental health. All complaints will be afforded due consideration and will be dealt with in a swift and impartial manner, while maintaining confidentiality.

(Name of organisation/legal entity) encourages all its employees to help curb and manage workplace discrimination, bullying and harassment based on mental health, and to report any such incidents via the normal disciplinary and grievance procedures.

(Name of organisation/legal entity) will ensure that no employee who lodges a complaint or grievance, or any other person who may be involved, is victimised or subjected to retaliation.

Confidentiality will be respected and maintained by all persons involved in a complaint of discrimination, bullying or harassment based on mental health.

The relevant person to contact or approach regarding an allegation of workplace discrimination, bullying or harassment based on mental health is [insert name].

Reasonable accommodation on the basis of mental health

Section 15(2)(c) of the EEA requires employers to provide reasonable accommodation to all workers from the designated groups, including people with mental disabilities, in order for them to access and enjoy equal employment opportunities. The aim of the accommodation is to reduce the impact of the impairment on the person's capacity to fulfil the essential functions of a job.

The obligation to make reasonable accommodation may arise when workers voluntarily disclose their mental disability to (name of organisation/legal entity), or when such a need is reasonably self-evident.

(Name of organisation/legal entity) should adopt the most cost-effective means so as to effectively remove the barriers to the performance of the job and the enjoyment of equal access to the benefits and opportunities of employment.

(Name of organisation/legal entity) should consult the employee and, where reasonable and practical, technical experts to establish appropriate mechanisms to accommodate the employee.

An individualised assessment will be required to establish the appropriate accommodation measure, and the particular accommodation will depend on the individual, the degree and nature of impairment, and its effect on the person, the job and the working environment.

Measures of reasonable accommodation for mental disabilities

- Extended or additional leave
- Modified or part-time work schedules
- Job restructuring
- Adjusting supervisory methods
- Modified or additional training
- Working from home
- Environmental alterations
- Reassignment or transfer to a vacant position
- Eradication or reduction of environmental stressors
- Increased education and awareness to combat stigmatisation and stereotypes
- Providing access to counselling
- Funding treatment and medications
- Confidential forums and procedures for disclosing mental health conditions
- Rehabilitation measures to facilitate an employee's return to work

(Name of organisation/legal entity) need not accommodate a qualified applicant or employee with a mental disability if this would impose unjustifiable hardship on the business of the employer. Unjustifiable hardship refers to an action that requires significant or considerable difficulty or expense. Determining unjustifiable hardship will involve considering, among other things, the effectiveness of the accommodation and the extent to which it would seriously disrupt business operations.

Consequences of breaches

Individuals in the workplace who fail to adhere to this policy may be sanctioned with disciplinary action, including warnings, final written warnings, transfer, counselling or dismissal, depending on the circumstances.

Attendance of workshops and training regarding discrimination, bullying and harassment in the workplace will be compulsory if ordered.

Mediation is recommended in appropriate circumstances, and all internal disciplinary and grievance procedures must be exhausted before a dispute is referred to the Commission for Conciliation, Mediation and Arbitration.

This employment policy does not diminish or supersede any other legal recourse that is available to victims of workplace discrimination, bullying and harassment based on mental health.

Signed

Dated

BIBLIOGRAPHY

ABBAS M

2014. Employing Disability: Deconstructing Insufficient Protections for “Non-mainstream” Disabilities. *Western Journal of Legal Studies* 5(2):1-17.

ACKERMANN L

2013. *Human Dignity: Lodestar for equality in South Africa*. Cape Town:Juta & Co.

ADAMOU M, WADSWORTH A, TULLET M AND WILLIAMS N

2011. Hidden Impairments, the Equality Act and Occupational Physicians. *Occupational Medicine* 61(7):453-455.

ALLAN A

2005. Psychiatric Diagnosis in Legal Settings. *South African Journal of Psychiatry* 11(2):52-55.

ALBERTYN C

2007. Substantive Equality and Transformation in South Africa. *South African Journal on Human Rights* 23:253-276.

ALBERTYN C AND FREDMAN S

2015. Equality Beyond Dignity: Multi-dimensional equality and Justice Langa’s Judgements. *Acta Juridica*:430-455.

ALBERTYN C AND GOLDBLATT B

1998. Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality. *South African Journal on Human Rights* 14:248-276.

ALESSANDRIA F AND ROENDAHL C

2010. Privacy and Transparency in the Equality Act 2010. *Nottingham Law Journal* 19(2):64-71.

AMERICAN PSYCHIATRIC ASSOCIATION (APA)

1994. *Diagnostic and statistical manual of mental disorders* IV. 4th ed. Arlington:American Psychiatric Publishing.

2013. *Diagnostic and statistical manual of mental disorders* 5. 5th ed. Arlington:American Psychiatric Publishing.

ARA A

2010. The ADA Amendments Act of 2008: Do the Amendments Cure the Interpretation of Perceived Disabilities? *Santa Clara Law Review* 50:255-280.

AREHEART BA

2011. Disability Trouble. *Yale Law and Policy Review* 29:347-388.

BAGENSTOS SR

2003. Comparative Disability Employment Law from an American Perspective. *Comparative Labor Law and Policy Journal* 24:649-667.

BAKER & MCKENZIE AND BLACKSTONE CHAMBERS

2008. *Tolley's Discrimination in Employment Handbook*. London: Tolley Publishing.

BALES R

1993. Once is Enough: Evaluating when a Person is Substantially Limited in Her Ability to Work. *Hofstra Labor Law Journal* 11:203-246.

BARNARD C

2006. *EC Employment Law*. 3rd ed. New York:Oxford University Press.

BARRY K

2010. Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't do for Disability Rights. *Berkley Journal of Employment and Labor Law* 31(2):203-284.

BARTLETT P, LEWIS O AND THOROLD O

2007. *Mental Disability and the European Convention on Human Rights*. Leiden:Martinus Nijhoff Publishers.

BATES J

2005. Human Dignity – An Empty Phrase in Search of Meaning? *Judicial Review* 10:165-168.

BEARDEN C

2012. The Reality of the DSM in the Legal Arena: a Proposition for Curtailing Undesired Consequences of an Imperfect Tool. *Houston Journal of Health Law and Policy* 13:79-102.

BEFORT SF

2002. The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence. *Wake Forest Law Review* 37:439-472.

2010. Let's Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the "Regarded As" Prong of the Statutory Definition of Disability. *Utah Law Review* 4:993-1028.

BELL M

2015. Mental Health at Work and the Duty to Make Reasonable Adjustments. *Industrial Law Journal* 44(2):194-221.

BELL M

2004. *Anti-Discrimination Law and the European Union*. New York:Oxford University Press.

BENDER A AND FARVOLDEN P

2008. Depression and the Workplace: A Progress Report. *Suicide Risk* 10:73-79.

BHABHA F

2009. Disability Equality Rights in South Africa: Concepts, Interpretation and the Transformative Imperative. *South African Journal on Human Rights* 25(2):218-245.

BIBLE JD

2012. The Jerk at Work: Workplace Bullying and the Law's Inability to Combat It. *Employee Relations Journal* 38(1):32-51.

BIEHN TL, ELHAI JD, SELIGMAN LD, TAMBURRINO M, ARMOUR C AND FORBES D

2013. Underlying Dimensions of DSM-5 Posttraumatic Stress Disorder and major Depressive Disorder Symptoms. *Psychological Injury and the Law* 6:290-298.

BLACKMORE ER, STANSFIELD SA, WELLER I, MUNCE S, ZAGORSKI BM AND STEWART DE

2007. Major Depressive Episodes and Work Stress: Results from a national Population Survey. *American Journal of Public Health* 97(11):2088-2093.

BLAINE BE

2012. *Understanding the Psychology of Diversity*. 2nd ed. Sage Publications.

BLAIR DA

1999. Employees Suffering from Bipolar Disorder or Clinical Depression: Fighting an Uphill Battle for Protection under Title I of the Americans with Disabilities Act. *Seton Hall Law Review* 29:1347-1404.

BODDY CR

2011. *Corporate Psychopaths Organisational Destroyers*. 1st ed. United Kingdom:Palgrave MacMillan.

BOGUSLAWSKA K

2014. What Employers Need to Know About Stress at Work. *Management Services* 58(1):10-11.

BONFIELD L

2006. *American Law and the American Legal System*. St. Paul: Thompson/West.

BOTHA H

2004. Equality, Dignity and the Politics of Interpretation. *SA Publiekreg/Public Law* 19(3):724-751.

2009. Human Dignity in a Comparative Perspective. *Stellenbosch Law Review* 20(2):171-220.

BOWMAN B, SEEDAT M AND MATZOPOULOS R

2007. An Overview of the Economic Burden and Workforce Effects of Violence in South Africa. *African Journal of Safety Promotion* 5(2):32-41.

BRICKHILL J AND VAN LEEVE Y

2015. Transformative Constitutionalism – Guiding Light or Empty Slogan? *Acta Juridica*:141-171.

BRODERICK A

2015. A Reflection on Substantive Equality Jurisprudence: the Standard of Scrutiny at the ECtHR for Differential Treatment of Roma and Persons with Disabilities. *International Journal of Discrimination and the Law* 15(1-2):101-122.

BROHAN E, HENDERSON C, WHEAT K, MALCOLM E, CLEMENT S, BARLEY EA, SLADE M AND THORNICROFT G

2012. Systematic review of beliefs, behaviours and influencing factors associated with disclosure of a mental health problem in the workplace. *Journal of Negative Results in Biomedicine* 12(11).
<http://bmcpsycho.biomedcentral.com/articles/10.1186/1471-244X-12-11>. Accessed 08/06/2016.

BROWN R

1995. *Prejudice: Its Social Psychology*. 1st ed. Oxford:Blackwell Publishers Ltd.

BURNS T

2010. Mental Illness is Different and ignoring it Profits Nobody. *Journal of Mental Health Law* 34:34-39.

BURNS JK AND ALONSO-BETANCOURT O

2013. Are We Slaves to the DSM? A South African Perspective. *African Journal of Psychiatry* 16:151-155.

BUTLIN SF

2011. The UN Convention on the Rights of Persons with Disabilities: Does the Equality Act 2010 Measure Up to International Commitments? *Industrial Law Journal* 40(4):428-438.

CALITZ KB

2009. The Liability of Employers for the Harassment of Employees by Non-employees. *Stellenbosch Law Review* 20(3):407-425.

CALLAGHAN P AND KENT D

2011. *Labour Law: A Practical Guide*. London:Globe Law and Business Ltd.

CARVALHEIRA R

2011. *Depression, dismissals and disability*. Unpublished LLM dissertation.
University of Witwatersrand.

CASCADE E, AMIR H, KALATI MD, SIDNEY H AND KENNEDY MD

2009. Real-World Data on SSRI Antidepressant Side Effects. *Psychiatry* 6(2):16-18.

CAVICO FJ, MUFFLER SC AND MUJTABA BG

2012. Appearance Discrimination, “Lookism” and “Lookphobia” in the Workplace. *The Journal of Applied Business Research* 28(5):791-802.

CHEADLE MH, DAVIS DM AND HAYSON NRL

2014. *South African Constitutional Law: The Bill of Rights*. Butterworths LexisNexis.

CHIUMIA S AND VAN WYK A

2014. *Do a third of South Africans really suffer from mental illnesses?* <<http://africacheck.org/reports/do-a-third-of-south-africans-really-suffer-from-mental-illnesses/>> Accessed on 05/11/2014.

CHRISTIANSON M

2004. Incapacity and Disability: A Retrospective and Prospective Overview of the Past 25 Years. *Industrial Law Journal* 25(5):879-895.

CHRISTIE AL

2006. Is the Disability Discrimination Act Discriminatory? *Edinburgh Law Review* 10:155-163.

CILLIERS F

2012. A systems psychodynamic description of organizational bullying experiences. *South African Journal of Industrial Psychology* 38(2):1-11.

CLEMENT S, BROHAN E, SAYCE L, POOL J AND THORNICROFT G

2011. Disability Hate Crime and Targeted Violence Hostility: A Mental Health and Discrimination Perspective. *Journal of Mental Health* 20(3):219-225.

COETZER P, BOTHA A AND HUYSER D

2002. Psychiatric Impairment and Disability Assessment – Proposals to Improve Current Inadequacies. *South African Journal of Psychiatry* 8(3):66-70.

COLALELLA J

2013. An Unreasonable Application of a Reasonable Standard: Title VII and Sexual Orientation Retaliation. *Indiana Journal of Law and Social Equity* 1(1):225-259.

COLLINS GT AND PHILLIPS PJ

2011. Overview of Reasonable Accommodation and the Shifting Emphasis from Who is Disabled to Who Can Work. *Hamline Law Review* 34:469-502.

CONCANNON J

2012. Mind Matters: Mental Disability and the History and Future of the Americans with Disabilities Act. *Law and Psychology Review* 36:89-114.

CONNOLLY M

2006. *Discrimination Law*. 1st ed. United Kingdom:Sweet and Maxwell.

COOPER C

2004. The Boundaries of Equality in Labour Law. *Industrial Law Journal* 25(5):813-852.

COX J

2010. Disability Stigma and Interclass Discrimination. *Florida Law Review* 62:429-456.

CRUFT R, LIAO SM AND RENZO M

2015. *Philosophical Foundations of Human Rights*. Oxford:Oxford University Press.

CUNNIFF L AND MOSTERT K

2012. Prevalence of workplace bullying of South African employees. *South African Journal of Human Resource Management* 10(1):1-15.

CURRIE I AND DE WAAL J

2013. *The Bill of Rights Handbook*. 6th ed. Cape Town:Juta & Co.

DANFORTH KD

1999. Reading Reasonableness out of the ADA: Responding to Threats by Employees with Mental Illness Following *Palmer*. *Virginia Law Review* 85:661-695.

DE VILLIERS D

2014. Arbitrêre gronde vir onbillike diskriminasie en die bewyslas in arbeidsgeskille. *Litnet Akademies* 11(1):169-187.

DE VILLIERS M

1899. *The Roman and Roman-Dutch Law of Injuries*. Cape Town:Juta & Co.

DE WAAL J

2002. Equality and the Constitutional Court. *South African Mercantile Law Journal* 14(2):141-156.

DINIZ D, BARBOSA L AND DOS SANTOS WR

2009. Disability, Human Rights and Justice. *International Journal on Human Rights* 11:61-72.

DONNELLY J

2013. *Universal Human Rights in Theory and Practice*. New York:Cornell University Press.

DORN JA

2014. Equality, Justice and Freedom: A Constitutional Perspective. *Cato Journal* 34(3):491-517.

DUNCAN SH

2011. Workplace Bullying and the Role Restorative Practices Can Play in Preventing and Addressing the Problem. *Industrial Law Journal* 32(10):2331-2366.

DU PLESSIS JV AND FOUCHE MA

2012. *A Practical Guide to Labour Law*. 7th ed. Durban:Lexis Nexis.

2015. *A Practical Guide to Labour Law*. 8th ed. Durban:Lexis Nexis.

DUPPER O AND GARBERS C

2010. *Equality in the Workplace: Reflections from South Africa and Beyond*. 1st ed. Cape Town:Juta and Co Ltd.

DUPPER O, GARBERS C, LANDMAN A, CHRISTIANSON M AND BASSON A

2004. *Essential Employment Discrimination Law*. Cape Town:Juta Law.

DU TOIT D

2007. Protection Against Unfair Discrimination in the Workplace: Are the Courts Getting It Right? *Law, Democracy and Development* 11:1-15.

2014. Protection Against Unfair discrimination: Cleaning Up the Act? *Industrial Law Journal* 35(10):2623-2636.

DU TOIT D AND POTGIETER M

2014. *Unfair Discrimination in the Workplace*. Cape Town:Juta Law.

EINARSEN S, HOEL H, ZAPF D AND COOPER CL

2011. *Bullying and Harassment in the Workplace: Developments in theory, research and practice*. 2nd ed. Boca Raton:CRC Press Taylor and Francis Group.

ELINSON L, HOUCK P, MARCUS SC AND PINCUS HA

2004. Depression and the Ability to Work. *Psychiatric Services* 55(1):29-34.

ELLIS E

2005. *EU Anti-Discrimination Law*. New York:Oxford University Press.

EMENS EF

2006. The Sympathetic Discriminator: Mental Illness, Hedonic Costs and the ADA. *The Georgetown Law Journal* 94:399-487.

2012a. Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act. *The American Journal of Comparative Law* 60:205-234.

2012b. Framing Disability. *University of Illinois Law Review* 5:1383-1442.

EWART SMITH M

2012. Where Has All the Stigma Gone? *African Journal of Psychiatry* 15(2):75-77.

EZER M AND EZER OF

2012. Workplace Harassment; Mobbing Phenomenon. *Perspectives of Business Law Journal* 1(1):298-304.

FELTS C

2006. Dealing with a Depressed Workforce: Are American Employers Doing Enough to Support the Mental Health Challenges Affecting Today's Employee's? *The Scholar* 9:119-149.

FLETCHER A AND O'BRIEN N

2008. Disability Rights Commission: From Civil Rights to Social Rights. *Journal of Law and Society* 35(4):520-550.

FREEMAN CP AND JOSKA JA

2012. Dealing with Major Depression in Practice. *South African Family Practice Journal* 54(3):203-209.

2013. Dealing with Major Depression. *South African Pharmaceutical Journal* 80(6):16-21.

FRUEH BC, ELLHAI JD AND ACIERNO R

2010. The Future of Posttraumatic Stress Disorder in the DSM. *Psychological Injury and the Law* 3:260-270.

FRIED EI, NESSE RM, ZIVIN K, GUILLE C AND SEN S

2014. Depression is More than the Sum of Its Parts: Individual DSM Symptoms Have Different Risk Factors. *Psychological Medicine* 44:2067-2076.

GABRIEL P AND LIIMATAINEN MJ

2000. Mental Health in the Workplace: Introduction and Executive Summaries. International Labour Organisation. Geneva: ILO Publications.

GIBSON F

2011. The Convention on the Rights of Persons with Disabilities: The Response of the Clinic. *International Journal of Clinical Legal Education* 16:11-24.

GOODLEY D

2011. *Disability Studies: An Interdisciplinary Introduction*. 1st ed. London:SAGE Publications Ltd.

2014. *Disability Studies: Theorising disablism and ableism*. 1st ed. Abingdon:Routledge.

GOOLAM NMI

2001. Human Dignity – Our Supreme Constitutional Value. *Potchefstroom Electronic Law Journal*:1-12.

GOTLIB IH AND HAMMEN CL

2002. *Handbook of Depression*. New York: The Guilford Press.

GOTLIB IA AND LeMOULT J

2014. The “Ins” and “Outs” of the Depressive Disorders Section of the DSM-5. *Clinical Psychology: Research and Practice* 21(3):193-206.

GROBBELAAR-DU PLESSIS I AND NIENABER A

2014. Disability and Reasonable Accommodation: *HM v Sweden* Communication 3/2011 (Committee on the Rights of Persons with Disabilities). *South African Journal on Human Rights* 30(2):366-379.

GROGAN J

2005. *Dismissal Discrimination and Unfair Labour Practices*. 1st ed. Lansdowne:Juta & Co Ltd.

2007. *Workplace Law*. 9th ed. Cape Town:Juta & Co Ltd.

2014a. *Workplace Law*. 11th ed. Cape Town:Juta & Co.

2014b. *Dismissal*. 2nd ed. Cape Town:Juta & Co.

2014c. *Employment Rights*. 2nd ed. Cape Town:Juta & Co.

HAGGARD TR

2001. *Understanding Employment Discrimination*. San Francisco:Lexis Nexis.

HALE B

2005. What can the Human Rights Act 1998 do for mental health? *Child and Family Law Quarterly* 17(3):295-306.

2007. The Human Rights Act and Mental Health Law: Has it Helped? *Journal of Mental Health Law* 15:7-18.

HARNOIS G AND GABRIEL P

2000. Mental Health and Work: Impact, Issues and Good Practices. International Labour Organisation. Geneva: ILO Publications.

HARTHILL S

2008. Bullying in the Workplace: Lessons from the United Kingdom. *Minnesota Journal of International Law* 17:247-302.

2010. The need for a revitalized regulatory scheme to address workplace bullying in the United States: Harnessing the Federal Occupational Safety and Health Act. *University of Cincinnati Law Review* 78:1250-1306.

2011. Workplace bullying as an occupational safety and health matter: A comparative analysis. *Hastings International and Comparative Law Review* 34(2):253-302.

HASS DA

2013. Could the American Psychiatric Association Cause You Headaches? The Dangerous Interaction between the DSM-5 and Employment Law. *Loyola University Chicago Law Journal* 44:683-716.

HAWKEY R

2014. Does Depression in the Workplace Impact Productivity? A South African Perspective. *Mental Health Matters*:30-33.

HOSKING DL

2006. Great Expectations: Protection from Discrimination because of Disability in Community Law. *European Law Review* 31(5):667-689.

HSIEH A

2014. The Catch-22 of ADA Title I Remedies for Psychiatric Disabilities. *McGeorge Law Review* 44:989-1032.

IACOVIDES A, FOUNTOULAKIS KN, KAPRINIS ST AND KAPRINIS G

2003. The Relationship between Job Stress, Burnout and Clinical Depression. *Journal of Affective Disorders* 75:209-221.

JACKSON JM

2010. The Americans with Disabilities Act, Mental Illness and Medication: A Historical Perspective and Hope for the Future. *Marquette Elder's Advisor* 12:219-246.

JAGWANTH S

2005. Expanding Equality. *Acta Juridica*:131-148.

JAMES G

2004. An Unquiet Mind in the Workplace: Mental Illness and the Disability Discrimination Act 1995. *Legal Studies* 24:516-539.

JANDA AC

2009. Keeping a Productive Labor Market: crafting recognition and rights for Mentally Ill Workers. *Hamline Journal of Public Law and Policy* 30:403-446.

KAHN T

2015. Depressed workers hide condition, according to study. <<http://www.bdlive.co.za/national/health/2015/02/04/depressed-workers-hide-condition-according-to-study>> Accessed on 04/02/2015.

KESSLER RC AND BROMET EJ

2013. The Epidemiology of Depression across Cultures. *The Annual Review of Public Health* 34:119-138.

KLARE KE

1998. Legal Culture and Transformative Constitutionalism. *South African Journal on Human Rights* 14(1):146-188.

KORB F

2015. Depression in the Workplace. *Mental Health Matters*:1-3.

KRUGER R

2011. Equality and unfair discrimination: Refining the Harksen test. *The South African Law Journal* 128(3):479-512.

KRUSE D AND SCHUR L

2003. Employment of People with Disabilities Following the ADA. *Industrial Relations* 42(1):31-64.

LADEN VA AND SCHWARTZ G

2000. Psychiatric Disabilities, the Americans with Disabilities Act, and the New Workplace Violence Account. *Berkley Journal of Employment and Labor Law* 21:246-270.

LAKE R

2005. *Discrimination against people with mental health problems in the workplace: A comparative analysis*. Unpublished LLM dissertation. Rhodes University.

LANE J AND VIDEBAEK MUNKHOLM N

2015. Danish and British Protection from Disability Discrimination at Work – Past, Present and Future. *The International Journal of Comparative Labour Law and Industrial Relations* 31(1):91-112.

LANGA P

2006. Transformative Constitutionalism. *Stellenbosch Law Review* 17(3):351-360.

LAWSON A

2011. Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated. *Industrial Law Journal* 40(4):359-383.

LE ROUX R AND RYCROFT A

2012. *Reinventing Labour Law: Reflecting on the first 15 years of the Labour Relations Act and future challenges*. 1st ed. Claremont:Juta & Co Ltd.

LE ROUX R, RYCROFT A AND ORLEYN T

2010. *Harassment in the Workplace: Law Policies and Processes*. Durban:Lexis Nexis.

LIIMATAINEN MJ AND GABRIEL P

2000. Mental Health in the Workplace: Situation Analysis, United Kingdom. International Labour Organisation. Geneva: ILO Publications.

LIISBERG MV

2011. *Disability and Employment: A contemporary disability human rights approach applied to Danish, Swedish and EU law and policy*. Cambridge:Intersentia Ltd.

LOCKWOOD G, HENDERSON C AND THORNICROFT G

2012. The Equality Act 2010 and Mental Health. *The British Journal of Psychiatry* 200:182-183.

2014. Mental Health Disability Discrimination: Law, Policy and Practice. *International Journal of Discrimination and the Law* 14(3):168-182.

LOCKWOOD E AND FORBES D

2014. Posttraumatic Stress Disorder and Comorbidity: Untangling the Gordian Knot. *Psychological Injury and the Law* 7:108-1.

LOUBSER M, MIDGLEY R, MUKHEIBER A, NIESING L AND PERUMAL D

2012. *The Law of Delict in South Africa*. 2nd ed. Cape Town:Oxford University Press.

MARUMOAGE MC

2012. Disability Discrimination and the Right of Disabled Persons to Access the Labour Market. *Potchefstroom Electronic Law Journal* 15(1):345-365.

MASTROIANNI PR AND MIASKOFF CR

1997. Coverage of Psychiatric Disorders under the Americans with Disabilities Act. *Villanova Law Review* 42:723-740.

McARDLE D AND GALASHAN S

2005. A Consideration of “Substantial” and “Impairment” under the Disability Discrimination Laws of the UK and US. *Cambrian Law Review* 36:51-71.

McCLUSKEY MT

2010. How the Biological Divide Limits Disability and Equality. *Journal of Law and Policy* 33:109-160.

McGREGOR M AND GERMISHUYS W

2014. The taxonomy of an “unspecified” ground in discrimination law. *Obiter* 35(1):94-107.

MÉGRET F AND MSIPA D

2014. Global Reasonable Accommodation: How the Convention on the Rights of Persons with Disabilities Changes the Way We Think About Equality. *South African Journal on Human Rights* 30(2):252-274.

MIKA K AND WIMBISCUS D

1997. Responsibilities of Employers toward Mentally Disabled Persons under the Americans with Disabilities Act. *Journal of Law and Health* 173-193.

MIKULIK S

2007. "Regarded As" Plaintiffs and ADA Hostile Work Environment Claims. *Mental and Physical Disability Law Reports* 31:8-11.

MIN KB, PARK SG, HWANG SH AND MIN JY

2015. Precarious Employment and the Risk of Suicidal Ideation and Suicide Attempts. *Preventative Medicine* 71:72-76.

MOKOKA MT, RATAEMANE ST AND DOS SANTOS

2012. Disability Claims on Psychiatric Grounds in the South African Context: A Review. *South African Journal of Psychiatry* 18(2):34-41.

MOOMAL H, JACKSON PB, STEIN DJ, HERMAN A, MYER L, SEEDAT S, MADELA-MNTLA E AND WILLIAMS DR

2009. Perceived Discrimination and Mental Health Disorders: The South African Stress and Health Study. *South African Medical Journal* 99(5):383-389.

MUKHEIBIR A AND RISTOW L

2006. An Overview of Sexual Harassment: Liability of the Employer. *Obiter* 27(2):245-262.

NEETHLING J, POTGIETER JM AND VISSER PJ

2005. *Neethling's Law of Personality*. 2nd ed. Durban:Lexis Nexis.

NGWENA C

2004. Equality for People with Disabilities in the Workplace: An Overview of the Emergence of Disability as a Human Rights Issue. *Journal for Juridical Science* 29(2):167-197.

2005a. Interpreting aspects of the intersection between disability, discrimination and equality: Lessons for the Employment Equity Act from comparative law: Part 1 (Defining disability). *Stellenbosch Law Review* 16(2):210-243.

2005b. Interpreting aspects of the intersection between disability, discrimination and equality: Lessons for the Employment Equity Act from comparative law: Part 2 (Reasonable accommodation). *Stellenbosch Law Review* 16(3):534-561.

2006. Deconstructing the definition of disability under the Employment Equity Act: Social deconstruction. *South African Journal of Human Rights* 22(4):613-646.

2007. Deconstructing the definition of disability under the Employment Equity Act: Legal deconstruction. *South African Journal of Human Rights* 23(1):116-156.

2010. “*Disabled people*” and the search for equality in the workplace: An appraisal of equality models from a comparative perspective. Unpublished LLD thesis. University of the Free State.

2014. Developing Juridical Method for Overcoming Status Subordination in Disablism: The Place of Transformative Epistemologies. *South African Journal on Human Rights* 30(2):275-312.

NGWENA CG AND PRETORIUS JL

2003. Code of Good Practice on the Employment of People with Disabilities: An Appraisal. *Industrial Law Journal* 24(10):1816-1939.

OADE A

2009. *Managing Workplace Bullying: How to identify, respond to and manage bullying behaviour in the workplace*. London:Palgrave MacMillan.

PARTINGTON M

2006. *Introduction to the English legal system*. 3rd ed. Oxford:Oxford University Press.

PERJU V

2011. Impairment, Discrimination and the Legal Construction of Disability in the European Union and the United States. *Cornell International Law Journal* 44:279-348.

PERLIN ML

1994. The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone? *Journal of Law and Health* 8:15-45.

1998. "Where the Winds Hit Heavy on the Borderline": Mental Disability Law, Theory and Practice, "Us" and "Them". *Loyola of Los Angeles Law Review* 31:775-793.

PHILLIPS C

2012. The Equality Act 2010: Impact on Mental Health-Related Disability Claims. *Employment Law Bulletin* 109:2-4.

PIETERSEN C

2007. Interpersonal bullying behaviours in the workplace. *South African Journal of Industrial Psychology* 33(1):59-66.

PLAYER MA

1999. *Federal Law of Employment Discrimination*. 4th ed. West Group:St. Paul.

PRETORIUS JL

2013. *Public Law*. Bloemfontein:University of the Free State.

PRETORIUS JL, KLINCK ME, NGWENA CG

2001. *Employment Equity Law*. Butterworths LexisNexis.

2014. *Employment Equity Law*. Butterworths LexisNexis.

RADEBE S

2013. Unfair discrimination on unlisted grounds. *Without Prejudice* 13(7):72-75.

REIMANN M AND ZIMMERMAN R

2006. *The Oxford Handbook of Comparative Law*. New York:Oxford University Press.

RHODE DL

2010. *The Beauty Bias: The Injustice of Appearance in Life and Law*. New York:Oxford University Press.

ROCK PL, ROISER JP, RIEDAL WJ AND BLACKWELL AD

2013. Cognitive Impairment in Depression: A Systematic Review and Meta-analysis. *Psychological Medicine* 44:2029-2040.

RUTHERGLEN G

2001. *Employment Discrimination Law: Visions of Equality in Theory and Doctrine*. New York:Foundation Press.

RYCROFT A

2009. Workplace bullying: Unfair discrimination, dignity violation or unfair labour practice? *Industrial Law Journal* 30:1431-1450.

SANDOVAL NJ

2014. Disabled Yet Disqualified: Is it “Unreasonable” to Demand Accommodations for Employees with Depression under the Americans With Disabilities Act? *Chapman Law Review* 17:687-714.

SCHEID TL

2005. Stigma as a Barrier to Employment: Mental Disability and the Americans with Disabilities Act. *International Journal of Law and Psychiatry* 28:670-690.

SCHULTZ IZ

2008. Disentangling the Disability Quagmire in Psychological Injury: Part 1- Disability and Return to Work: Theories, Methods and Applications. *Psychological Injury and the Law* 1(2):94-102.

SCHULTZ IZ AND ROGERS ES

2011. *Work Accommodation and Retention in Mental Health.* New York:Springer.

SHULTZ IZ AND STEWART AM

2008. Disentangling the Disability Quagmire in Psychological Injury: Part 2 – Evolution of Disability Models: Conceptual, Methodological and Forensic Practice Issues. *Psychological Injury and the Law* 1(2):103-121.

SETO M

2012. Killing Ourselves: Depression as an Institutional, Workplace and Professionalism Problem. *Western Journal of Legal Studies* 2(2):1-22.

SHELDON CT

2011. It's Not Working: Barriers to the Inclusion of Workers with Mental Health Issues. *Windsor Yearbook of Access to Justice* 29:163-193.

SLABBERT MN

2008. Human Bodies in Law: Arbitrary Discursive Constructions? *Stellenbosch Law Review* 19(1):71-100.

SLAPPER G AND KELLY

2012. *The English legal system.* 13th ed. Oxon:Routledge.

SMIT DM

2014. *Bullying in the workplace: Towards a uniform approach in South African labour law.* Unpublished LLD thesis. University of the Free State.

SMIT N AND GUTHRIE R

2008. Job Security for Disabled Workers: A Comparative Study between South Africa and Australia. *Obiter* 29(3):373-394.

SMITH JL

2002. Understanding How to Apply the DSM-IV to a Case under the ADA. *The Labor Lawyer* 17:449-468.

SOEHNER AM, KAPLAN KA AND HARVEY AG

2014. Prevalence and Clinical Correlates of Co-occurring Insomnia and Hypersomnia Symptoms in Depression. *Journal of Affective Disorders* 167:93-97.

SQUELCH J AND GUTHRIE R

2010. The Australian Legal Framework for Workplace Bullying. *Comparative Labor Law & Policy Journal* 32:15-54.

STEFAN S

2000. Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act. *Alabama Law Review* 52(1):271-319.

2002. *Hollow Promises: Employment Discrimination Against People with Mental Disabilities*. Washington: The American Psychological Association.

SWANEPOEL M

2009a. The Development of the Interface between Law, Medicine and Psychiatry: Medico-Legal Perspectives in History. *Potchefstroom Electronic Law Journal* 12(4):124-170.

2009b. *Law, Psychiatry and Psychology: A selection of Constitutional, Medico-legal and Liability Issues*. Unpublished LLD thesis. University of South Africa.

TALBOT A AND BROWNSELL L

2011. The Equality Act 2010: Changes to Previous Law. *Private Client Business* 2:104-109.

TAYLOR S AND EMIR A

2012. *Employment Law: an introduction*. 3rd ed. Oxford:Oxford University Press.

TEHRANI N

2012. *Workplace Bullying: Symptoms and Solutions*. East Sussix:Routledge.

TINDLEY R

2012. The Concept of Incapacity for Work: Is it Really Measurable? *Journal of Social Security Law* 19(2):74-97.

TRAVIS MA

2012. Impairment as Protected Status: A New Universality for Disability Rights. *Georgia Law Review* 46:937-1002.

TUCKER BP AND MILANI AA

2004. *Federal Disability Law*. Thompson/West:St. Paul.

TURNER MW

2004. Psychiatric Disabilities in the Federal Workplace: Employment Law Considerations. *The Air Force Law Review* 55:313-334.

TUSHNET M, FLEINER T AND SAUNDERS C

2015. *Routledge Handbook of Constitutional Law*. Oxon:Routledge.

TWOMEY DP

1998. *Employment Discrimination Law: A Manager's Guide*. 4th ed. Cincinnati:West Educational Publishing Company.

UHER R, PAYNE JL, PAVLOVA B, PSY DC AND PERLIS RH

2014. Major Depressive Disorder in the DSM-5: Implications for Clinical Practice and Research of Changes from DSM-IV. *Depression and Anxiety* 31:459-471.

VAN NIEKERK A, SMIT N, CHRIIANSON MA, McGREGOR M AND VAN ECK BPS

2015. *Law@work*. 3rd ed. Durban:Lexis Nexis.

VAN WYK MW

2012. Conceptions of Equality and Social Justice: A Philosophical Overview with Reference to South Africa. *Southern African Business Review* 7(1):42-51.

VETTORI S

2012. The role of human dignity in the assessment of fair compensation for unfair dismissals. *Potchefstroom Electronic Journal* 15(5):102-123.

VILJOEN D

2013. Do you have a bully in the workplace? *Without Prejudice* 13(5):65-68.

VISAGIE JC, HAVENGA W, LINDE H AND BOTHA A

2012. The prevalence of workplace bullying in a South African mining company. *South African Journal of Labour Relations* 36(2):62-75.

VIVIERS DJ

2014. *A comparative labour law perspective on categories of appearance-based prejudice in employment*. Unpublished LLM dissertation. University of the Free State.

VIVIERS DJ AND SMIT DM

2014a. A Labour Law Perspective on the Protection of Persons in a Vulnerable Employment Relationship in South Africa. *International Journal of Business and Social Research* 4(5):59-71.

2014b. The Phenomenon of Weight-based Discrimination in South African Employment. *Journal for Juridical Science* 39(2):92-121.

VROMAN ME

2010. Hiring and Firing the Mentally and Psychiatrically Disabled: Advice for HR Professionals. *Cornell HR Review*:1-10.

2013. Mentally Disabled Employees and the ADAAA: What's an Employer to Do? *Quinnipiac Health Law* 16:149-179.

WADHAM J, ROBINSON A, RUEBAIN D AND UPPAL S

2010. *Blackstone's Guide to the Equality Act 2010*. Oxford: Oxford University Press.

WALDEN RM

2013. Employer Civil Liability for Work-Related Psychiatric Injury: Juggling Established Principles and "New" Risks. *Business Law Review* 34(3):84-94.

WALDRON J, DIMOCK WC, HERZOG D, ROSEN M AND DAN-COHEN M

2015. *Dignity, Rank and Rights*. New York:Oxford University Press.

WATERSTONE ME

2014. Disability Constitutional Law. *Emory Law Journal* 63:527-580.

WEBER MC

2010. Unreasonable Accommodation and Due Hardship. *Florida Law Review* 62(5):1119-1178.

2012. The Common Law of Disability Discrimination. *Utah Law Review*:429-474.

WEISMAN JJ

1996. Dignity and Non-Discrimination: The Requirement of Reasonable Accommodation in Disability Law. *Fordham Urban Law Journal* 23(4):1235-1244.

WEITEN W

2014. *Psychology: Themes and Variations*. South African ed. Andover: Cengage Learning.

WELLS K

2003. The Impact of the Framework Employment Directive on UK Disability Discrimination Law. *Industrial Law Journal* 32(4):253-273.

WELTHAGEN C AND ELS C

2012. Depressed, Not Depressed or Unsure: Prevalence and the Relation to Well-being across Sectors in South Africa. *South African Journal of Industrial Psychology* 38(1):1-12.

WENBOURNE N

1999. Disabled Meanings: A Comparison of the Definitions of “Disability” in the British Disability Discrimination Act of 1995 and the Americans with Disabilities Act of 1990. *Hastings International Comparative Law Review* 23:149-172.

WHEAT K

2007. Mental Health in the Workplace – Mental Discrimination in Employment. *Journal of Mental Health Law* 10:194-208.

WHITLEY BE AND KITE ME

2010. *The psychology of prejudice and discrimination*. 2nd ed. Belmont:Wadsworth Cengage Learning.

WHITTLE R

2002. The Framework Directive for Equal Treatment in Employment and Occupation: An Analysis from a Disability Rights Perspective. *European Law Review* 27(3):1-25.

WINOKUR G

1981. *Depression: The Facts*. London:Oxford University Press.

WOOLMAN S AND BISHOP M

2014. *Constitutional Law of South Africa*. 2nd ed. Cape Town:Juta & Co.

WORLD FEDERATION FOR MENTAL HEALTH

2012. Depression: A Global Crisis. *World Federation for Mental Health*:1-29.

WORLD HEALTH ORGANISATION (WHO)

2011. *The ICD-10 classification of mental and behavioural disorders: clinical descriptions and diagnostic guidelines*. Geneva:World Health Organisation.

YAMADA DC

2009. Human Dignity and American Employment Law. *University of Richmond Law Review* 43:523-569.

YBARRA ML

2004. Linkages between Depressive Symptomatology and Internet Harassment among Young Regular Internet Users. *Cyberpsychology and Behavior* 7(2): 247-257.

YUR'YEV A, VARNIK A, VARNIK P, SISASK M AND LEPPIK L

2010. Employment Status Influences Suicide Rate in Europe. *International Journal of Social Psychiatry* 58(1):62-68.

ZOELLNER LA, BEDARD-GILLIGAN MA, JUN JJ, MARKS LH AND GARCIA NM

2013. The Evolving Construct of Posttraumatic Stress Disorder (PTSD): DSM-5 Changes and Legal Implications. *Psychological Injury and the Law* 6:277-289.

ZUCKERMAN D

1993. Reasonable Accommodations for People with Mental Illness under the ADA. *Mental and Physical Law Reports* 17:311-320.

Institutional websites visited

CENTRES FOR DISEASE CONTROL AND PREVENTION

2015. <<http://www.cdc.gov/workplacehealthpromotion/implementation/topics/depression.html>>. Accessed on 28/09/2015.

CILEX

2015. <http://www.cilex.org.uk/about_cilex_lawyers/the_uk_legal_system.aspx>. Accessed on 24/11/2015.

CLINICAL-DEPRESSION.CO.UK

2015. <<http://www.clinical-depression.co.uk/dlp/depression-information/major-depression-facts/>>. Accessed on 14/09/2015.

CORNELL UNIVERSITY LAW SCHOOL

2014. <http://www.law.cornell.edu/wex/employment-at-will_doctrine>. Accessed on 10/09/2014.

DICTIONARY.COM

2016. <<http://www.dictionary.com/browse/emotional-ilness>>. Accessed 02/07/2016.

EVERYDAY HEALTH

2015. <<http://www.everydayhealth.com/hs/major-depression/depression-statistics/>>. Accessed on 28/09/2015.

GOVERNMENT EQUALITIES OFFICE

2010.<<https://www.citizensadvice.org.uk/Documents/Advice%20factsheets/Unclassified/equality-act-2010-carer.pdf>>. Accessed on 02/07/2016.

GOV.UK

2015a. <<https://www.gov.uk/when-mental-health-condition-becomes-disability>>. Accessed on 15/09/2015.

2015b. <<https://www.gov.uk/if-you-become-disabled/if-you're-in-employment-and-become-disabled>>. Accessed on 15/09/2015.

HEALTHLINE

2015. <<http://www.healthline.com/health/depression/statistics-infographic>>. Accessed on 23/09/2015.

HEALTHY WORKPLACE BILL

2015. <<http://www.healthyworkplacebill.org/>>. Accessed on 01/09/2015.

INTERNATIONAL LABOUR ORGANISATION (ILO)

2006. <http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_070505/lang--en/index.htm>. Accessed on 07/08/2014.

2015a. <http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312304>. Accessed on 28/09/2015.

2015b. <http://www.ilo.org/skills/pubs/WCMS_108221/lang--en/index.htm>. Accessed on 28/09/2015.

MAIL & GUARDIAN

2009. <<http://mg.co.za/article/2009-04-20-almost-one-in-five-south-africans-suffer-mental-illness>>. Accessed on 05/11/2014.

MAYO CLINIC

2015. <<http://www.mayoclinic.org/diseases-conditions/depression/basics/definition/con-20032977>>. Accessed on 30/09/2015.

MENTAL HEALTH FOUNDATION

2015. <<http://www.mentalhealth.org.uk/help-information/mental-health-statistics/>>. Accessed on 14/09/2015.

MERRIAM-WEBSTER DICTIONARY

2015a. <<http://www.merriam-webster.com/dictionary/mania>>. Accessed on 13/08/2015.

2015b. <<http://www.merriam-webster.com/dictionary/comorbid>>. Accessed on 13/08/2015.

NATIONAL INSTITUTE OF MENTAL HEALTH (NIMH)

2015. <<http://www.nimh.nih.gov/health/statistics/prevalence/major-depression-among-adults.shtml>>. Accessed on 28/09/2015.

OXFORD UNIVERSITY PRESS

2014a. <<http://www.oxforddictionaries.com/definition/english/harassment>>. Accessed on 06/08/2014.

2014b. <<http://www.oxforddictionaries.com/definition/english/sex>>. Accessed on 14/07/2014.

2014c. <<http://www.oxforddictionaries.com/definition/english/gender>>. Accessed on 14/07/2014.

2014d. <<http://www.oxforddictionaries.com/definition/english/sexual-orientation>>. Accessed on 26/11/2015.

SOUTH AFRICAN COLLEGE OF APPLIED PSYCHOLOGY (SACAP)

2013. <<http://www.sacap.edu.za/mental-health-south-africa-whose-problem-counselling/>>. Accessed on 05/11/2014.

SOUTH AFRICAN DEPRESSION AND ANXIETY GROUP

2015. <http://www.sadag.org/index.php?option=com_content&view=article&id=2391:new-research-on-depression-in-the-workplace&catid=11:general&Itemid=101>. Accessed on 28/09/2015.

THE MIND

2015. <<http://www.mind.org.uk/information-support/types-of-mental-health-problems/statistics-and-facts-about-mental-health/how-common-are-mental-health-problems/>>. Accessed on 14/09/2015.

UNITED NATIONS

2016.<https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4&lang=en>. Accessed 31/05/2016.

US DEPARTMENT OF LABOUR (PERSONS WITH A DISABILITY LABOR FORCE CHARACTERISTICS NEWS RELEASE)

2013. <http://www.bls.gov/news.release/archives/disabl_06112014.htm>. Accessed 04/06/2016.

US EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)

2014. <<http://eeoc.gov/eeoc/statistics/enforcement/ada-merit.cfm>>
Accessed on 20/08/2015.

WORKPLACE BULLYING INSTITUTE

2012. <<http://www.workplacebullying.org/2012/08/09/2012-d>>. Accessed on 01/09/2015.

2014. <<http://www.workplacebullying.org/wbiresearch/wbi-2014-us-survey/>>
Accessed on 28/09/2015.

WORLD HEALTH ORGANISATION (WHO)

2012. <<http://www.who.int/mediacentre/factsheets/fs369/en/>>. Accessed on 23/09/2015.

- 2015a. <http://www.who.int/occupational_health/topics/stressatwp/en/>. Accessed on 10/11/2015.
- 2015b. <http://www.who.int/features/factfiles/mental_health/mental_health_facts/en/index2.html>. Accessed on 23/09/2015.
- 2016.<<http://www.who.int/countries/en/>>. Accessed on 21/02/2016.

Case register

South Africa

Bennett and Modipak 2004 25ILJ 583 CCMA.

City Council of Pretoria v Walker 1998 3 BCLR 257 CC.

Director-General: Office of the Premier of the Western Cape v SA Medical Association obo Broens 2011 32 ILJ 1077 LC.

Eskom and National Union of Mineworkers obo Fillisen 2002 23 ILJ 1666 ARB.

Gaga v Anglo Platinum Ltd 2012 33 ILJ 329 LAC.

Grobler v Naspers Bpk 2004 4 SA 220 C.

Harksen v Lane NO 1997 11 BCLR 1489 CC; 1998 1 SA 300 CC.

Harmse v City of Cape Town 2003 24 ILJ 1130 LC.

Hendricks v Mercantile and General Reinsurance Co of SA Ltd 1994 15 ILJ 304 LAC.

IMATU obo Strydom v Witzenberg Municipality 2008 29 ILJ 2947 LC.

IMATU obo Strydom v Witzenburg Municipality 2012 33 ILJ 1081 LAC.

IMATU v City of Cape Town 2005 26 ILJ 1404 LC.

Insurance and Banking Staff Association obo Isaacs v Old Mutual Life Assurance Co 2000 5 LLD 584 CCMA.

J v M Ltd 1989 10 ILJ 755 IC.

Jordaan and Grey Security Services 1999 11 BALR 1305 CCMA.

Kadiaka v Amalgamated Beverage Industries 1999 20 ILJ 373 LC.

Maharaj v CP de Leeuw (Pty) Ltd 2005 26 ILJ 1088 LC 1104.

Makau v Department of Education Limpopo Province 2014 JDR 1458 LC.

Marsland v New Way Motor and Diesel Engineering (Pty) Ltd 2009 30 ILJ 169 LC.

MEC for Education, Kwazulu-Natal v Pillay 2008 1 SA 474 CC.

Media 24 v Grobler 2005 6 SA 328 SCA.

Minister of Finance v Van Heerden 2004 6 SA 121 CC.

Murray v Minister of Defence 2008 29 ILJ 1369 SCA.

National Coalition of Gay and Lesbian Equality v Minister of Justice 1999 1 SA 6 CC;
2000 1 BCLR 39 CC.

National Education Health & Allied Workers Union obo Lucas and Department of Health (Western Cape) 2004 25 ILJ 2091 BCA.

New Way Motor and Diesel Engineering (Pty) Ltd v Marsland 2009 12 BLLR 1181 LAC.

Ntsabo v Real Security CC 2003 24 ILJ 2341 LC.

Piliso v Old Mutual Life Assurance Co 2007 28 ILJ 897 LC.

President of the Republic of South Africa v Hugo 1997 6 BCLR 708 CC.

Pretorius v Compensation Commissioner 2010 31 ILJ 1117 O.

Prinsloo v Van der Linde 1997 3 SA 1012 CC, 1997 6 BCLR 759 CC.

Sahara Computers (Pty) Ltd v Mokone 2014 35 ILJ 2750 GP.

SANDU v Minister of Defence 2007 8 BCLR 863 C.

Standard Bank of South Africa v Commission for Conciliation Mediation and Arbitration 2008 4 BLLR 356 LC; 2008 29 ILJ 1239 LC.

Urquhart v The Compensation Commissioner 2005 JDR 1008 E.

Visser and Amalgamated Roofing Technologies t/a Barloworld 2006 27 ILJ 1567 CCMA.

Wylie and Standard Executors and Trustees 2006 27 ILJ 2210 CCMA.

United Kingdom and European Union

Alajos Kiss v Hungary 2010 ECHR 692 Application No. 38832/06.

Archibald v Fife Council 2004 IRLR 651.

Blackledge v London General Transport Services Ltd 2001 WL 825497.

Carphone Warehouse Ltd v Martin 2013 Eq LR 481 EAT.

Cheltenham Borough Council v Laird 2009 EWHC 1253 QB.

Cordell v Foreign and Commonwealth Office 2012 ICR 280 EAT.

Cosgrove v Caesar and Howie 2002 IRLR 653.

Croft Vets v Butcher 2013 Eq LR 1170 EAT.

Cumbria Probation Board v Collingwood 2008 UKEAT 0079_08_2805.

Environment Agency v Rowan 2008 ICR 218 EAT.

Green v DB Group Services UK Ltd. 2006 IRLR 764.

Hinsley v Chief Constable of West Mercia Constabulary 2010 Appeal No. UKEAT/0200/10/DM.

I.B. v Greece Application No. 552/10, 3 October 2013.

J v DLA Piper UK LLP 2010 IRLR 936 EAT.

Jennings v Barts and the London NHS Trust 2013 Eq. L.R. 326.

Leeds Teaching Hospital NHS Trust v Foster 2011 Appeal No. UKEAT/0552/10/JOJ.

Lyon v Ministry of Defence 2011 WL 2748481 (unreported).

Majrowski v Guy's and St Thomas's NHS Trust 2006 UKHL 34.

Marinello v City of Edinburgh Council 2011 IRLR 669.

Marshall v Southampton and South West Hampshire Area Health Authority No.1 1986 ECR 723.

Morgan v Staffordshire University 2002 IRLR 190.

Mullen v Western Health Care Trust 2010 UKEAT.

Newham Sixth Form College v Sanders 2014 EWCA Civ 734.

Power v Panasonic UK Ltd 2002 UKEAT 747_01_1709 17 September 2002.

Pretty v United Kingdom 2002 35 EHRR 1.

Price v Surrey County Council UKEAT/0450/10/SM.

Royal Bank of Scotland (RBS) v Ashton 2011 ICR 632 EAT.

Smith v Churchill Stairlifts 2006 ICR 524.

Sonia Chacon Navas v Eurest Colectividades SA Case C-13/05 11 July 2006.

Tameside Hospital NHS Foundation Trust v Mylott 2011 Appeal No. UKEAT/0352/09/DM, UKEAT/0399/10/DM.

United States of America

Alexander v Choate 469 U.S. 287 S.Ct. 1985.

Barnett v U.S. Airways 228 F.3d 1105 9th Cir. 2000.

Beck v University of Wisconsin Board of Regents 75 F.3d 1130 7th Cir. 1996.

Benson v Northwest Airlines Inc. 62 F.3d 1108 8th Cir. 1995.

Boldini v Postmaster General 928 F.Supp. 125 D.N.H. 1995.

Bombard c Fort Wayne Newspapers Inc. 92 F.3d 560 7th Cir. 1996.

Borkowski v Valley Cent School District 63 F.3d 131 2nd Cir. 1995.

Breiland v Advance Circuits Inc. 976 F. Supp. 858 D. Minn. 1997.

Brown v Northern Trust Bank 7 A.D. Cases BNA 548 N.D. III. 1997.

Buck v Bell 274 US 200 1927.

Bultemeyer v Fort Wayne Community School 100 F.3d 1281 7th Cir. 1996.

Burlington Industries v Ellerth S.Ct. 1998.

City of Cleburne v Cleburne Living Center, Inc. 473 U.S. 432 1985.

Conneen v MBNA Bank, N.A. 334 F.3d 318 3d Cir. 2003.

Criado v IBM Corp 145 F.3d 437 1st Cir. 1998.

Davidson v United Technologies Carrier IP 98-1233-C M/S 2000 WL 33309724 S.D. Ind. 2000.

Discepolo v Gorgone 399 F. Supp. 2d. 123, 127 D. Conn. 2005.

Dothard v Rawlinson 433 U.S. 321, 15 FEP 10 1997.

EEOC v Amego Inc. 110 F.3d 135 1st Cir. 1997.

Enica v Principi 544 F.3d 328 1st Cir. 2008.

Estate of Murray v UHS of Fairmount, Inc. CIV.A. 10-2561 2011 WL 5449364 E.D. Pa. 2011.

Feliberty v Kemper Corp. 98 F.3d 274 7th Cir. 1996.

Freeman v City of Inglewood No. 96-55270 1997 U.S App. LEXIS 11789 9th Cir. 1997.

Harris v Forklift Systems S.Ct. 1993.

Hatfield v Quantum Chemical Corp. 920 F.Supp. 108 1996.

Hoffman v City of Inglewood No. 95-55508, 1997 U.S. App. LEXIS 11790 9th Cir. 1997.

Holland v Shinseki No. 3:10-CV-0908-B, 2012, WL 162333 N.D. Tex. 2012.

Keith v Ashland Inc. No. 98-4539 2000 U.S. App. LEXIS 1940 6th Cir. 2000.

Kinney v Century Services Corp. II No. 1:10-cv-00787-JMS-DML, 2011, WL 3476567 S.D. Ind. 2011.

Kotlowski v Eastman Kodak Co. 922 F.Supp. 790 1996.

Krocka v City of Chicago 203 F.3d 507 7th Cir. 2000.

Krocka v Riegler 958 F.Supp. 1333 N.D. Ill. 1997.

Loulsegd v Akzo Nobel Inc. 178 F.3d 731 5th Cir. 1999.

McClinton El v Potter WL 5111182 N.D. Ill. 2008.

Ogborn v United Food and Commercial Workers Union Local No. 881. 305 F.3d 763 7th Cir. 2002.

Osika v Board of Education No. 98C5953 1999 U.S. Dist. LEXIS 17996 N.D. Ill. 1999.

Palmer v Circuit Court of Cook County 117 F.3d 351 7th Cir. 1997.

Pandazidez v Va. Bd. of Education 804 F. Supp. 794, 804 E.D. Va. 1992.

Pegues v Emerson Electronics 913 F.Supp. 976 1996.

Prilliman v United Airlines Inc. 53 Cal. App. 4th Cir. 935 1997.

Pritchard v Southern Co. Servs. 92 F.3d 1130 11th Cir. 1996.

Ralph v Lucent Technologies 135 F.3d 166 1st Cir. 1998.

Santandreu v Miami Dade County No. 11-15951 U.S. App. 11th Cir. 2013.

School Board of Nassau County v Arline 480 U.S. 273 1987.

Soileau v Guilford of Me. 105 F.3d 12 1st Cir 1997.

Stewart v Bally Total Fitness, No. 99-3555, 2000 U.S. Dist. LEXIS 10047E.D. Pa. 2000.

Stewart v Happy Herman's Cheshire Bridge Inc. 117 F.3d 1278 11th Cir. 1197.

Sutton v United Airlines Inc. 527 U.S. 471 1999.

Toyota Motor Mfg., Ky., Inc. v Williams 534 U.S. 184 2002.

United States v Danser 110 F. Supp. 2d 807, 829 S.D. Ind. 1999.

U.S. Airways Inc. v Barnett 535 U.S. 391 2002.

Weiler v Household Finance Corp. 101 F.3d 519 1996.

Zivkovic v S. Cal. Edison Co. 302 F.3d 1080 9th Cir. 2002.

Other international case law

Glor v Switzerland Application 13444/04 30 April 2009.

Hamilton v Jamaica Communication 616/1995 UN doc CCPR/C/66/D/616/1995.

Price v UK 2001 34 EHRR 1285.

HM v Sweden Communication 3/2011, CRPD/C/7/D/3/2011 19 April 2012.

Legislation and legislative instruments

South Africa

Basic Conditions of Employment Act 75 of 1997.

Circular Instruction 172 Regarding Compensation for PTSD, Government Gazette 27 June 2003, No. 25132.

Compensation for Occupational Injuries and Diseases Act 130 of 1993.

Constitution of the Republic of South Africa, 1996.

Employment Equity Act 55 of 1998 (as amended).

- *Code of Good Practice: Key Aspects on the Employment of People with Disabilities, Government Gazette 19 August 2002, No. 23702.*
- *Revised Draft Code of Good Practice on the Employment of Persons with Disabilities, Government Gazette 12 June 2015, No. 38872.*

Labour Relations Act 66 of 1995 (as amended)

- *Code of Good Practice: Dismissal, Schedule 8 to the Labour Relations Act.*

Mental Health Care Act 17 of 2002.

Occupational Health and Safety Act 85 of 1993.

Prevention of Harassment Act 17 of 2011.

Technical Assistance Guidelines on the Employment of People with Disabilities.

United Kingdom and European Union

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>>.

Accessed on 10/01/2016.

Disability Discrimination Act of 1995.

<<http://www.legislation.gov.uk/ukpga/1995/50/contents>>. Accessed on 10/01/2016.

- *Disability Discrimination Act: Guidance on matters to be taken into account in determining questions relating to the definition of a disability* 2006.
<https://www2.le.ac.uk/offices/equalities-unit/protected-characteristics/disability-1/guidance_on_matters_to_be_taken_into_account_in_determining_questions_relating_to_the_definition_of_disability.pdf>. Accessed on 31/05/2016.
- *Department for Education and Employment Guidance on the Disability Discrimination Act* 1995 of 1996.
<<https://www.thenbs.com/PublicationIndex/Documents/Details?Pub=DfEE&DocId=248472>>. Accessed on 31/05/2016.

Disabled Persons (Employment) Act of 1944.

<<http://www.legislation.gov.uk/ukpga/Geo6/7-8/10/contents>>. Accessed on 10/01/2016.

Equality Act of 2010. <<http://www.legislation.gov.uk/ukpga/2010/15/contents>>.

Accessed on 10/01/2016.

- *Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability.*
<http://www.equalityhumanrights.com/sites/default/files/documents/EqualityAct/odi_equality_act_guidance_may.pdf>. Accessed on 10/01/2016.
- *Equality Act 2010 Code of Practice: Employment* of 2011.
<<https://www.equalityhumanrights.com/sites/default/files/employercode.pdf>>. Accessed on 03/06/2016.

European Convention for the Protection of Human Rights and Fundamental Freedoms. <http://www.echr.coe.int/Documents/Convention_ENG.pdf>. Accessed on 31/05/2016.

Health and Safety at Work Act of 1974.

<<http://www.legislation.gov.uk/ukpga/1974/37>>. Accessed on 10/01/2016.

Human Rights Act of 1998. <<http://www.legislation.gov.uk/ukpga/1998/42/contents>>. Accessed on 10/01/2016.

Protection from Harassment Act of 1997. <<http://www.legislation.gov.uk/ukpga/1997/40/contents>>. Accessed on 10/01/2016.

United States of America

Americans with Disabilities Act of 1990. <<http://www.ada.gov/pubs/ada.htm>>. Accessed on 10/01/2016.

Americans with Disabilities Amendment Act of 2008. <<http://www.eeoc.gov/laws/statutes/adaaa.cfm>>. Accessed on 10/01/2016.

Civil Rights Act of 1964. <<http://www.eeoc.gov/laws/statutes/titlevii.cfm>>. Accessed on 10/01/2016.

EEOC Compliance Manual 1995. <<https://www.eeoc.gov/policy/docs/threshold.html>>. Accessed 30/05/2015.

EEOC Enforcement Guidance: The ADA and Psychiatric Disabilities 8 FEP Manual BNA 1997. <<http://www.eeoc.gov/policy/docs/psych.html>>. Accessed on 10/01/2016.

Federal Occupational Health and Safety Act of 1970. <https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=OSHACT&p_id=2743>. Accessed on 10/01/2016.

Regulations to Implement the Equal Employment Provisions of the ADA 29 C.F.R. 1630. <<https://www.law.cornell.edu/cfr/text/29/part-1630>>. Accessed on 10/01/2016.

Rehabilitation Act of 1973. <<http://www.usbr.gov/cro/pdfsplus/rehabact.pdf>>. Accessed on 10/01/2016.

ILO Discrimination (Employment and Occupation) Convention 111 of 1958. <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111>. Accessed 30/05/2016.

Universal Declaration of Human Rights of 1948. <<http://www.jus.uio.no/lm/un.universal.declaration.of.human.rights.1948/portrait.a4.pdf>>. Accessed 29/05/2016.

Other international legislative instruments

ILO Code of Good Practice on the Managing of Disability in the Workplace 2001.
<<http://www.ilo.org/public/english/standards/reilm/gb/docs/gb282/pdf/tmemdw-2.pdf>>. Accessed on 10/01/2016.

ILO Executive Summary on Mental Health in the Workplace 2000.
<http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_108221.pdf>. Accessed on 10/01/2016.

ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention No. 159 1983. <<http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1526&context=gladnetcollect>>. Accessed on 10/01/2016.

ILO Vocational Rehabilitation and Employment (Disabled Persons) Recommendation No. 168 *1983.*
<<http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1526&context=gladnetcollect>>. Accessed 30/05/2016.

ILO and WHO Report on Mental Health and Work: Impact, Issues and Good Practices 2000. <http://www.who.int/mental_health/media/en/712.pdf>. Accessed on 10/01/2016.

UN Convention on the Rights of Persons with Disabilities 2006.
<<http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>>. Accessed on 10/01/2016.

SUMMARY

Mental health conditions such as depression are common in the world of work. Despite having been a significant concern for centuries already, these conditions are becoming particularly prevalent in modern society and workplaces across the globe. Although they affect the legal realm in many different areas, mental health conditions are often misunderstood and inappropriately dealt with from a legal perspective. Inevitably, this will give rise to concerns in the employment environment.

Depression appears to be the most prevalent of all the categories of mental health conditions, with the most noteworthy impact on employment. Its symptoms are debilitating and impair sufferers' ability to fulfil the inherent requirements of their jobs. In addition, the medication used to treat and manage mental health conditions, such as antidepressants, also leads to various debilitating side effects, which may further affect the person's ability to function efficiently at work.

The United Nations (UN) Disability Convention has set the international benchmark for all jurisdictions in addressing mental disabilities, discrimination based on mental health as well as reasonable accommodation for these conditions. The convention displays support for the social model of disability and a substantive approach to equality. The International Labour Organisation (ILO) has in turn also played a significant role in offering guidance for domestic legal frameworks to address mental health concerns in the workplace. Against the backdrop of international instruments such as those of the UN and the ILO, this study takes an in-depth look at the approach to mental health conditions in employment in the jurisdictions of South Africa, the United States (USA) and the United Kingdom (UK). More specifically, the research analyses the various jurisdictions' take on mental health conditions as disabilities under the law, the disputability of workplace discrimination based on mental health, and the procedures and measures to provide reasonable accommodation for employees with mental health conditions.

Across the jurisdictions, depression in particular and mental health conditions in general may amount to legally recognisable disabilities if they can satisfy the elements

of the specific disability definition used. In South Africa, the USA and the UK, these definitions and elements differ. These three jurisdictions' legal frameworks do however acknowledge that in order for a mental health condition to attract disability status, the condition must be recognisable and must have a particular impact on the life or employment potential of the employee or job applicant within a particular timeline. Although the *Constitution of the Republic of South Africa*, 1996, requires a substantive approach to equality and, thus, the consideration that mental health conditions such as depression may amount to legally recognisable disabilities, South African disability law has been slow to give effect to this, lagging slightly behind the USA and UK in this regard. Consequently, the South African legal position on mental disabilities is underdeveloped and ambiguous.

Due to the significant stigma and prejudice associated with mental health conditions, they often form the basis for discrimination in both society and the workplace. Discrimination based on a person's mental health status impairs the individual's right to dignity, equality and non-discrimination, and may potentially even aggravate existing mental health conditions. In the USA, UK and South Africa, discrimination based on mental health may be challenged on the protected ground of disability, provided that the condition in question satisfies the legal requirements to constitute a mental disability. The UN Disability Convention along with disability-specific legislation in the USA and UK extensively governs this consideration. South Africa, on the other hand, does not have any legislation giving effect to the UN Disability Convention. Yet, the Constitution and the *Employment Equity Act* do enable victims to challenge discrimination based on mental health on either the protected ground of disability, or as an unlisted analogous or arbitrary ground of unfair discrimination. The latter does appear more viable in light of the disadvantage suffered by these persons because of their conditions.

Under the South African legal framework, reasonable accommodation for mental health conditions is based on two primary foundations: Firstly, reasonable accommodation is available to people with mental disabilities as an affirmative action measure; secondly, reasonable accommodation may possibly also be available to persons with mental health conditions in general, since it essentially constitutes a non-discrimination principle. Reasonable accommodation in the comparative jurisdictions of the USA and the UK, on the other hand, flows primarily from their respective

disability-specific legislation. To provide effective reasonable accommodation on the basis of mental health, several factors need to be considered in an interactive process between employer and employee. These include occupational health and safety, the intersection between reasonable accommodation and incapacity, the disproportionate-burden threshold, and the various forms of reasonable accommodation that may best suit the mental health condition in question, given its specific symptoms and diagnostic features.

This study emphasises the importance of adequate and effective consideration of mental health conditions under the legal frameworks of jurisdictions worldwide due to the global prevalence of these conditions, their devastating effects, and the disadvantage experienced by those who suffer from these conditions. Based on the comparison with the USA and the UK, it is concluded that the South African legal framework in relation to mental health conditions needs to be urgently developed in order to promote clarity and certainty regarding the official legal position on these conditions, as well as to safeguard the rights and interests of employees with mental health conditions in the workplace. As an added, more practical contribution, the study concludes with a proposed draft code of good practice on the handling of mental health conditions in the workplace, a draft set of interpretative guidelines for the South African judiciary, Department of Labour, employers and employees in dealing with these conditions in the world of work, as well as a draft workplace policy on mental health conditions for potential adoption by employers.

OPSOMMING

Geestesgesondheidstoestande soos depressie is algemeen in die arbeidswêreld. Al is dit reeds eeue lank 'n beduidende kwessie, kom hierdie toestande wêreldwyd al hoe meer in die moderne samelewing en werkplek voor. Hoewel dit die regsdomein op verskillende maniere raak, word geestesgesondheidstoestande dikwels uit 'n regsoogpunt verkeerd verstaan en onvanpas hanteer. Dit is daarom onafwendbaar dat dit tot uitdagings in die werksomgewing sal lei.

Depressie kom oënskynlik die meeste van alle kategorieë geestesgesondheidstoestande voor en het ook die merkbaarste impak op werk. Die simptome is uitmergelend en beïnvloed depressielyers se vermoë om aan die inherente vereistes van hulle poste te voldoen. Daarbenewens het die middels waarmee geestesgesondheidstoestande behandel en bestuur word, soos antidepressante, ook verskeie aftakelende newe-effekte, wat die persoon se vermoë om doeltreffend te werk verder kan verswak.

Die Verenigde Nasies (VN) se Gestremdhedskonvensie het die internasionale rigpunt geword vir hoe alle jurisdiksies geestesgestremdhede, diskriminasie op grond van geestesgesondheid, sowel as redelike voorsiening vir hierdie toestande behoort te hanteer. Die konvensie toon sydigheid vir die sosiale model van gestremdheid en 'n substantiewe benadering tot gelykheid. Op sy beurt het die Internasjonale Arbeidsorganisasie (IAO) ook 'n beduidende bydrae gelewer om leiding te bied oor binnelandse regsraamwerke om geestesgesondheidsprobleme in die werkplek te benader. Teen die agtergrond van internasjonale instrumente soos dié van die VN en die IAO, onderneem hierdie studie 'n diepte-ondersoek van die benadering tot geestesgesondheidstoestande in die werkplek in die jurisdiksies van Suid-Afrika, die Verenigde State (VSA) en die Verenigde Koninkryk (VK). Die navorsing ontleed in die besonder die verskillende jurisdiksies se benadering tot geestesgesondheidstoestande as gestremdhede volgens die reg, die aanvegbaarheid van werkplekdiskriminasie op grond van geestesgesondheid, en die procedures en maatreëls om redelike voorsiening te maak vir werknemers met geestesgesondheidstoestande.

In ál die jurisdiksies kan depressie in die besonder en geestesgesondheidstoestande in die algemeen op wettige gestremdhede neerkom indien dit aan die elemente van die heersende gestremdheidskrywing voldoen. Suid-Afrika, die VSA en die VK maak van verskillende omskrywings en elemente gebruik. Tog erken die regsraamwerke van ál drie jurisdiksies dat 'n geestesgesondheidstoestand gestremdheidstatus kan geniet indien die toestand herkenbaar is en binne 'n sekere tydperk 'n bepaalde impak op die lewe of indiensnemingspotensiaal van die werknemer of werksaansoeker het. Hoewel die *Grondwet van die Republiek van Suid-Afrika*, 1996, 'n substantiewe benadering tot gelykheid vereis, en dus ook die oorweging dat geestesgesondheidstoestande soos depressie op wettige gestremdhede kan neerkom, was Suid-Afrikaanse gestremdheidsreg tot dusver stadig om hieraan uitvoering te gee, en is die VSA en VK meer gevorderd in hierdie verband. Die Suid-Afrikaanse regstandpunt oor geestesgestremdhede is gevvolglik onderontwikkel en dubbelsinnig.

Weens die beduidende stigma en vooroordeel wat met geestesgesondheidstoestande verband hou, maak dit dikwels die grondslag vir diskriminasie in die samelewing sowel as die werkplek uit. Diskriminasie op grond van 'n persoon se geestesgesondheidstatus tas die individu se reg op menswaardigheid, gelykheid en nie-diskriminasie aan, en kan moontlik selfs bestaande geestesgesondheidstoestande vererger. Diskriminasie op grond van geestesgesondheid kan in die VSA, VK én Suid-Afrika op die beskermde grond van gestremdheid aangeveg word, mits die betrokke toestand aan die regsvereistes van 'n geestesgestremdheid voldoen. Die Gestremdheidskonvensie van die VN sowel as gestremdheidspesifieke wetgewing in die VSA en VK bied omvattende bepalings hieroor. Daarteenoor het Suid-Afrika geen wetgewing wat uitvoering gee aan die VN se Gestremdheidskonvensie nie. Tog stel die Grondwet en die *Wet op Diensbillikheid* slagoffers in staat om diskriminasie op grond van geestesgesondheid aan te veg op hetsy die beskermde grond van gestremdheid, of 'n ongelyste analoë of arbitrière grond van onbillike diskriminasie. Laasgenoemde is waarskynlik meer haalbaar in die lig van die benadeling wat hierdie persone weens hulle toestande ervaar.

Ingevolge die Suid-Afrikaanse regsraamwerk berus redelike voorsiening vir geestesgesondheidstoestande op twee hoofgronde: Eerstens het persone met geestesgestremdhede toegang tot redelike voorsiening as 'n maatreël van

regstellende aksie; tweedens kan diegene met geestesgesondheidstoestande in die algemeen ook op redelike voorsiening aanspraak maak aangesien dit in wese 'n nie-diskriminasiebeginsel is. Daarteenoor spruit redelike voorsiening in die vergelykende jurisdiksies van die VSA en die VK hoofsaaklik uit hulle onderskeie gestremdheidspesifieke wetgewing. Om doeltreffende redelike voorsiening vir geestesgesondheidstoestande te maak, moet verskeie faktore in 'n interaktiewe proses tussen werkewer en werknemer oorweeg word. Dit sluit in beroepsgesondheid en -veiligheid, die oorvleueling tussen redelike voorsiening en ongeskiktheid, die drempel van 'n oneweredige las op die werkewer, en die mees gesikte vorme van redelike voorsiening vir die betrokke geestesgesondheidstoestand, met inagneming van die spesifieke simptome en diagnostiese kenmerke.

Hierdie studie beklemtoon die belang van voldoende en doeltreffende oorweging van geestesgesondheidstoestande ingevolge die regsraamwerke van jurisdiksies wêreldwyd weens die hoë internasionale voorkoms van hierdie toestande, die verwoestende uitwerking daarvan, en die benadeling wat diegene met hierdie toestande ervaar. Op grond van die vergelyking met die VSA en die VK, is die gevolgtrekking dat die Suid-Afrikaanse regsraamwerk in verband met geestesgesondheidstoestande dringend ontwikkel moet word om sekerheid en duidelikheid oor die amptelike regstandpunt oor hierdie toestande te bevorder, en om die regte en belang van werknemers met geestesgesondheidstoestande in die werkplek te beskerm. As 'n bykomende, meer praktiese bydrae, sluit die studie af met 'n voorgestelde konsepkode van goeie praktyk vir die hantering van geestesgesondheidstoestande in die werkplek, 'n konsepstel vertolkende riglyne vir die Suid-Afrikaanse regbank, Departement van Arbeid, werkewers en werknemers oor die hantering van hierdie toestande in die arbeidswêreld, sowel as 'n konsepwerkplekbeleid oor geestesgesondheidstoestande vir moontlike ingebriukneming deur werkewers.

KEY TERMS

Depression

Dignity

Discrimination based on mental health

Equality

Harassment

Mental disability

Mental health

Reasonable accommodation

Substantive equality

Workplace bullying

TREFWOORDE

Bullebakery in die werkplek

Depressie

Diskriminasie op grond van geestesgesondheid

Geestesgesondheid

Gelykheid

Redelike voorsiening

Substantiewe gelykheid

Teistering in die werkplek

Verstandelike gestremdheid

Waardigheid