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DEPRESSION AND DISABILITY IN THE WORKPLACE

A thesis submitted in partial fulfilment of the

requirements for the degree of Master of Arts in Applied Ethics for Professionals

in

the Department of Philosophy of
University of the Witwatersrand

By

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ABSTRACT

South African law prohibits unfair discrimination against people with disabilities and the law recognizes mental illness as a form of disability. It follows that it is impermissible to discriminate against people on the basis of mental illness. In this essay, I unpack the philosophical and ethical underpinnings of this claim, specifically in regard to depression.

What complicates the question of discrimination on the basis of mental illness is the fact that not all discrimination is unfair, and one can justly remove people from jobs when they cannot perform these jobs to a required level. This seems to imply that it might be fair to discriminate against depressed employees when they cannot do their jobs on account of depression.

The duty not to discriminate against people on the basis of disability includes a positive duty to provide reasonable accommodations that will help them to do their jobs. Just as employers are obligated to help those who cannot walk to access their places of work, something similar is true of depression. But what does it mean to accommodate depression? In this research report, I go beyond the status quo and introduce positive suggestions for how reasonable accommodation can work for depressed employees. This will be to offer an account of how the workplace ought to be restructured in order for employers to fulfil their legal and moral duties not to discriminate against people with the disability of depression. In particular, I argue that a person who suffers with depression would be in a better position to fulfil his job role, on the same level as other employees, if employers drove a culture of inclusion and dismantled the stigma that surrounds mental illness.

DECLARATION

I declare that this is my own unaided work. It is submitted for the degree of Master of Arts in the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination in any other university.



Tracey-Lee Barnes

15 March 2024

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I dedicate this research report to everyone suffering with mental illness, facing it head on and excelling in the workplace despite all the challenges.

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Chapter 1 - Background to the Question: What South African Law Says About Disability

Introduction

The first step in my argument is to consider what South African law says about the treatment of employees who suffer from disabilities. As we will see, the law requires that the state and businesses not discriminate unfairly against people with disabilities. If you do treat a person differently, certain criteria must be met if you are not to act wrongly. Although the principles that I discuss in this chapter have a moral basis, as I will show later in chapter 4, for now I focus primarily on law.

I want to begin my discussion by considering how the hierarchy or binding power of law in South Africa works. I begin with the highest and most binding piece of law within South Africa which is the Constitution. Thereafter I will touch on present legislation, which is second of importance after the Constitution. The third type of law is case law—this is generally a reported case available to everyone setting out a dispute of facts between the parties before a judge; and lastly, we look at draft bills (the government of South Africa's proposed new law, it is not final therefore essentially a draft law), and international law. The format of this chapter will follow this hierarchy of law.

Section 1 – The Constitution of South Africa[1]

As I noted above, the founding law of the nation is the *Constitution of the Republic of South Africa* (1996, hereafter, the Constitution) and so it makes sense to begin there. I refer to Section 9, which reads as follows:

> (3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.[2]

The first point I want to note is that the Constitution prohibits discrimination by the state on the grounds of disability. The moral principle underlying this claim, namely that discrimination, or discrimination of a certain sort, is morally wrong, will be important for my argument. For the moment, I just want to note this. I return to the content of the principle later on.

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[1] The Constitution of the Republic of South Africa, 1996
[2] The Constitution of the Republic of South Africa, 1996, section 9

A second point to note is that, as we see here, the Constitution implicitly distinguishes between discrimination and unfair discrimination, only prohibiting the latter. The implication is then that in some instances, discrimination is fair.[3]

Since one of my goals in this dissertation is to answer the question of what constitutes unfair discrimination against depressed individuals in the workplace, I need to consider the question of what it means for discrimination to be fair in this context. We can start answering this question from a legal point of view by noting that there are three grounds for fair discrimination according to the Employment Equity Act 55 of 1998 (hereafter, the Employment Equity Act): inherent requirements of a job, productivity, and affirmative action. Let me consider each in turn.

First, businesses require people to do certain jobs in order to function as businesses. And many of these perform socially important functions. As an example, note that if the requirement of having a driver's license is inherent to the requirements of the job, such as, for example, a job as a truck driver, then a company may fairly exclude my application, if I do not have a driver's license, as I do not meet the requirements to fulfil the job. The exclusion of my application is deemed to be fair discrimination. Trucking is, of course, critical for the transportation of many necessary goods. Many jobs do not have arbitrary performance criteria but ones that relate to critical social functions.

I will unpack the idea of inherent job requirements in more detail below, but it is important to note for now that given the Employment Equity Act's[4] purpose, which is to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through eliminating unfair discrimination[5], the onus is on the employer to show that the differentiation is fair. To give another example, and one that I will return to a few times in later chapters, an airline can show that it is a requirement for its pilots is to have eyesight as one of the inherent and mandatory requirements of the job.[6] And this means that if a blind person is excluded from being considered as an applicant for a job as a pilot this would not be unfairly discriminatory.

The second instance of fair discrimination relates to productivity. According to the Employment Equity Act, the requirement relates to assessing performance or the different levels of remuneration that will need to be fair. An example of this kind of discrimination would be performance bonuses and increases. Each employee does not get the same bonus, in fact bonuses and increases are based on the work that you have

[3] Ibid, Section 9(5) (https://www.justice.gov.za/legislation/constitution/saconstitution-web-eng.pdf)
[4] Employment Equity Act 55 of 1998
[5] Employment Equity Act 55 of 1998, section 2(a)
[6] https://www.ccma.org.za/wp-content/uploads/2022/01/Skills-Development-Info-Sheet-2018-02.pdf

done within that financial year.[7] Treating people differently to recognize differences in productivity is considered fair discrimination.

When thinking about depression in the workplace, I will later have to consider whether it might count as fair discrimination if a depressed person is overlooked for a job or a promotion on account of low levels of motivation, say. In this regard, I will also take up the question of what would count as reasonable accommodation of the sort that would help those who are depressed to become eligible for promotion by performing at the same level of their colleagues who are not depressed. To anticipate this discussion briefly, the Federal Aviation Administration (FAA) in the United States strictly regulates a pilot's physical and mental status to protect the safety of the pilot and its passengers.[8] Depression if not picked up and treated could be a disqualifying criteria for being or operating as a pilot. On the other hand, if depression is properly controlled, then the pilot cannot be justly dismissed or prevented from flying.

The third type of fair discrimination is affirmative action. In this case, discrimination has an aim of achieving equality at work by allowing groups who had been previously disadvantaged, to gain access and equal opportunity to jobs.[9] The topic of affirmative action is a complex one and not something that I need to go into in this research report in detail. I do want to note, however, that there is a question of whether a policy of appointing disabled people who are relatively speaking less qualified for jobs than able bodied peers might be justified by considerations relating to affirmative action. For example, if affirmative action is justified on account of its ability to create positive role models and break down stereotypes, there might be reason to appoint disabled people to certain positions in order to counteract bias, prejudice and stigma associated with disability.

Section 2 - PEPUDA

Besides the Constitution and the Employment Equity Act, the rights of disabled persons appear in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (hereafter, PEPUDA). In particular, section 9 of PEPUDA is important as it states that:

> Subject to section 6, no person may unfairly discriminate against any person on the ground of disability, including –
>
> (a) Denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society;

[7] Ibid
[8] https://psychcentral.com/depression/faa-still-stigmatizes-depression-mental-illness
[9] Employment Equity Act 55 of 1998, section 2(b)

(b) Contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility;

(c) 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.[10]

Section 6 – Neither the State nor any other person may unfairly discriminate against any person.[11]

One point of significance here is that Section 25(1)(c)(iii) of PEPUDA indicates that, "*the state must develop codes of practice relating to"* reasonable accommodation for disability. (The Equality Court may also make an order compelling the implementation of reasonable accommodation.) This is significant because anti-discrimination law that relates to qualities such as race and gender do not include a "reasonable accommodation clause". This idea of reasonable accommodation will be important later on in my argument—I just want to flag it here for now.

Discrimination is often understood as a negative responsibility, something that one should not do. This is the concept of what is sometimes called "direct discrimination" being spoken about in section 6, as laid out above. One should not discriminate unfairly on the basis of race or gender—this much is clear. However, what is significant about section 9 is that it specifies a positive responsibility within the context of disability. It is not sufficient that the state or any other person actively refrain from discriminating against a person on the basis of disability—there are specific positive steps placed on government and/or an employer that must be taken in order to avoid unfair discrimination. In the philosophical literature, this is sometimes called "indirect discrimination".[12]

Let me explain the difference between direct and indirect discrimination a bit more, since this idea will be important for me later on. Direct discrimination when applied to disability is when a person with a disability is treated less favourably than a person without the disability in the same or similar circumstances. For example, it would be 'direct disability discrimination' if a nightclub or restaurant refused a person entry because they are blind and have a guide dog.

It is also disability discrimination when there is a rule or policy that is the same for everyone but has an unfair effect on people with a particular disability. For example, it may be indirect disability discrimination

[10] Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, section 9
[11] Ibid, section 6
[12] Altman, Andrew, "Discrimination", The Stanford Encyclopedia of Philosophy (Winter 2020 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/win2020/entries/discrimination/>.

if the only way to enter a public building is by a set of stairs because people with disabilities who use wheelchairs would be unable to enter the building."[13]

To explain the idea of indirect discrimination a bit further, I refer to the following quotation:

> [The] European Court of Human Rights (ECHR) has held that "[w]hen a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group" (Shanaghan v. U.K. 2001: para. 129).[14]

It seems clear that section 9(c) of PEPUDA refers to this type of indirect discrimination. It implies that, for example, a company's failure to provide access to people in wheelchairs might be a kind of unfair discrimination despite the fact that the company is not targeting people with disabilities specifically.

"Probably the most straightforward cases of indirect disability discrimination relate to overlooking reasonable adjustments in the workplace. When a workplace rule fails to accommodate for the needs of a disabled employee, it will leave them disadvantaged."[15] For example, imagine an employer hires women to restock shelves so that the employer need not buy a ladder. Even though the employer had no intention to discriminate but was only looking at a way to save costs, the employer might only hire tall women and consequentially exclude short women from job consideration. This would be a case of indirect discrimination.

In summary, then, we can see that avoiding indirect discrimination might require that employers develop and implement policies that protect and assist disabled employees. This will be to say that they make "reasonable accommodations". My research report is focused on depression, and I will have to take up the question of what a reasonable accommodation for depression might look like. I will explain this further in chapter 5.

PEPUDA is silent on the types of reasonable accommodation and how these are to be implemented. The state has developed one such code from PEPUDA: this is the Code of Good Practice on Key Aspects of Disability on the Workplace (hereafter, the Code). The Code states that the employers must reasonably

[13] https://humanrights.gov.au/our-work/disability-rights/know-your-rights-about-disability-discrimination-and-harassment
[14] Ibid
[15] https://croner.co.uk/resources/equality-discrimination/discrimination/indirect/

accommodate the needs of people with disabilities and, where possible, to reduce the impact of the impairment on the person's capacity to fulfil the essential functions of the job.

This requirement is subject to a limitation, though. Employers are not required to provide reasonable accommodation if it would place unjustifiable hardship on the business of the employer.[16] For example, a company does not need to provide reasonable accommodation for an employee if it cannot afford to do so. A fish and chip shop cannot be expected to provide free health care to its employee to take care of their mental health needs or expensive audio equipment for a deaf employee if their annual turnover is insufficient.

This idea of "unjustifiable hardship" is, of course, a difficult condition to interpret and apply. How much hardship is unjustifiable? In many cases, this will not be clear. As with some of the other ideas I introduce here, I will return to this question later in chapter 5.

Section 3 - White Paper – Draft Law

The South African government is looking at reviewing the law around people who have disabilities. On 9 March 2016, a White Paper on the Rights of Persons with Disabilities was published by the South African government.[17] In this piece of potential legislation (akin to a draft bill), the definition of disability is explored extensively. I will return to this discussion in depth in chapter 2.

Section 6.1.1.6 of the White Paper discusses reasonable accommodation measures. Reasonable accommodation ensures that disabled persons enjoy all human rights and fundamental freedoms on an equal basis with others. As we noted earlier, PEPUDA includes the "denial of reasonable accommodation" as a form of unfair discrimination . Reasonable accommodation tends to be individual and impairment specific and includes measures to:

1. Make the physical environment accessible;
2. Provide disabled persons with access to information and communication;
3. Redress stress factors in the environment;

[16] Yvette Basson, Towards Equality for Women with Disabilities in South Africa: The Implementation of Articles 5 and 6 of the Convention on the Rights of Persons with Disabilities, http://www.saflii.org/za/journals/ADRY/2021/2.pdf

[17] White Paper on the Rights of Persons with Disabilities | South African Government (https://www.gov.za/sites/default/files/gcis_document/201603/39792gon230.pdf)

4. Accommodate specific sensory requirements such as those relating to light, noise and spatial stimuli;

5. Improve independence and mobility of persons with disabilities;

6. Guarantee participation and supported decision making by persons with disabilities; and

7. Provide access and participation to quality education and work.

Besides the list above which details how disabled persons are to be assisted within a working environment, the White Paper of 2016 extends this list practically to show us what a disabled person may need whether this be flexible working arrangements or the necessities of health or safety. This was not detailed previously as it would be up to the employer to determine what it thought fit as reasonable accommodation.

Reasonable accommodation measures includes assistive devices, assistive technology, personal assistance, adaptations of the built environment, signage, captioning, text available in audio, loop systems, FM systems, alerting/alarm systems for evacuation procedures, dedicated sms lines to all emergency service call centres, adaptation of (for example) work arrangements and the implementation of flexibility within the workplace to accommodate persons with disabilities.

There is no consistent application of the term "reasonable accommodation" in this document and what each employee needs to perform his job adequately depends on the extend of the disability and his circumstances. The legislation provides us with a starting point and guide to assist people with disabilities within the workplace. The implementation of the reasonable accommodation for the disabled employee is however up to the employer.

Section 4 - Conclusion

What I have argued in this chapter is that it prohibited by law to discriminate against anyone because of their disability. There are however instances in which discrimination is fair and hence allowed such as the inherent requirements of the job. Moreover, employers are required to provided reasonable accommodation to disabled employees in the event that this disability is disclosed—unless, as noted, this violates the "unjustifiable hardship" clause. If the disability is not disclosed, however, then no reasonable accommodation for a disabled employee is necessary or required.

Chapter 2 - Disability

Introduction

In the preceding chapter, I introduced principles of non-discrimination and reasonable accommodation by considering South African law. I am interested in how these principles apply to disability and, in particular, depression. So, the next step in my argument is to consider these latter two ideas more carefully. I discuss disability in this chapter, and depression in the next one.

When we think about disability, the first thought that comes to mind for most of us is a person who cannot walk, talk, see or hear. These are, in short, physical disabilities that can be seen or made sense of through one's senses. But this is, as we will see in this chapter, an overly narrow view of disability.

Section 1 – Terminology

When one looks into the history of the idea of disability, we find that the term "disability" was first used in 1545 to describe the lack of ability to do something.[18] We also find related ideas expressed in the form of words such as "imbecility" or "dumbness". Of course, we now consider these terms derogatory and unacceptable.

The term "handicap" was widely used and accepted during the 19th century to refer to disability. This represented a change from earlier usage. During the seventeenth century the word[19] had meant the difference between the value of two items or, alternatively, the value you had to add to one to make it equal to the other.[20] For example, the difference between gold and silver or the weight of silver to equate it to the weight of gold.

By the twentieth century, the term "handicap" was no longer accepted because (or so it was thought) it implied too much of a distinction between the abled and the disabled; also, the expression could mean in

[18] Are We Handicapped, Disabled, or Something Else? (https://nfb.org/sites/default/files/images/nfb/publications/bm/bm19/bm1901/bm190111.htm)
[19] Ibid
[20] Ibid

the literal sense “to have a cap in your hand and to beg for public assistance”.[21] Subsequently, the term “disability” has come into general usage and is accepted throughout the general culture.[22]

Section 2 - The codification of the concept of disability in law

As we saw in chapter 1, the Code on the employment of persons with disabilities defines persons with disabilities as those “who have a long-term or recurring physical or mental impairment, which substantially limits their prospects of entry into, or advancement in employment.” Mental impairment is defined in terms of a clinically recognized illness that affects a person’s thought process, judgment and emotions.[23] From my reading of the Code it appears that there must be disclosure of the disability by the employee especially if the disability is not self-evident. If the employer is not aware of the disability, no accommodation is necessary from the employer. This will often be the case with an illness such as depression where the disability is not self-evident.[24]

The government is, however, currently reviewing the White Paper on the Rights of Persons with Disabilities: Official Publication and Gazetting of the White Paper on Rights of Persons with Disabilities 2016 (the White Paper).[25] The difficulties of trying to define disability is acknowledged in this document, which recommends taking the following into account:

1. that the current definitions of disability have evolved over time; [26]
2. there is no single definition of disability that has achieved international consensus;[27]
3. the common elements in a rights based definition are:
    a) the presence of an impairment;
    b) internal and external limitations or barriers which hinders full and equal participation;
    c) a focus on the abilities of the person with a disability; and
    d) loss or lack of access to opportunities due to environmental limitations or barriers or the negative perceptions and attitudes of society.[28]

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[21] Wasserman, David and Sean Aas, "Disability: Definitions and Models", The Stanford Encyclopedia of Philosophy (Fall 2023 Edition), Edward N. Zalta & Uri Nodelman (eds.), URL = <https://plato.stanford.edu/archives/fall2023/entries/disability/>
[22] Ibid
[23] Ibid
[24] Employment Equity Act 55 of 1998 Code of Good Practice on Employment of Persons with Disabilities, section 6.4 Employment Equity Act: Code of Good Practice on Employment of Persons with Disabilities (http://dpwrt.mpg.gov.za/Section%204%203%20-%20Code%20Of%20Good%20Practice%20Disability.pdf#:~:text=6.4%20The%20obligation%20to%20make%20reasonable%20accommodation%20may,a%20need%20is%20reasonably%20self-evident%20to%20the%20employer.)
[25] White Paper 2016, Ibid
[26] Ibid, section 1.1.1
[27] Ibid
[28] Ibid

4. The disability can be permanent, temporary or episodic.[29]

The law does not seem to have a clear definition of disability. By this I mean that it provides no single definitive account of the concept of disability. For this reason, I must depart from law and consider the question of disability more deeply from a philosophical point of view. As we will see later, the account that one adopts has implications for the principle of non-discrimination and the kinds of reasonable accommodations that employers are required to make for depressed employees.

Section 3 - Philosophical conceptions of disability—the medical and social model

Let us next turn to the concept of disability from a philosophical point of view. According to David Wasserman, the concept of disability is relatively new, being discussed in the nineteenth century for the first time. Earlier philosophers used to talk about disability in relation to other topics such as disease but only later on disability became a topic in its own right.[30] Since then, much work has been done on this topic. My goal in this chapter is not to give a comprehensive review of this work, but to sketch some of the central accounts of disability with a view to drawing distinctions that will be relevant to my argument later on.

To start off this discussion I think it is important to draw a basic distinction between what are called the medical and social models of disability[31]. Roughly speaking, the medical model understands disability as a matter of biology. Disability is a matter of one's body or mind working or not working in a certain way. As Wasserman explains:

> The medical model explains disability disadvantage in terms of pathological states of the body and mind themselves. It regards the limitations faced by people with disabilities as resulting primarily from their bodily differences[32].

Whether a person is disabled is then a matter of individual functioning. It would be natural to think of blindness in this way. A blind person is somebody whose eyes do not function properly—they do not enable sight. And this seems to be a fact about them, not about the environment or how they are treated by other people.

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[29] Ibid
[30] W, Ibid, section 2.1
[31] Ibid
[32] W Ibid section 1.1

By contrast, the social model thinks of disability primarily in relation to a social environment. For example, being left-handed might be a disability or a disadvantage in one social context but not in another.[33] This means that what counts as a disability is not to be understood in terms of biological function—the structure of social matters is the key determinant. A defender of the social model would say that what makes blindness a disability is not that a person cannot see, but that the environment is structured so as to make things difficult for non-seeing people. Wasserman puts the point clearly as follows:

> In our view, it is society which disables physically impaired people. Disability is something imposed on top of our impairments by the way we are unnecessarily isolated and excluded from full participation in society. Disabled people are therefore an oppressed group in society. Disability [is] the disadvantage or restriction of activity caused by a contemporary social organization which takes no or little account of people who have physical impairments and thus excludes them from participation in the mainstream of social activities.[34]

We can see in this quotation the emphasise on social organisation rather than biological function. The writers do not deny the existence of physical impairments but claim that these do not count as disabilities unless they imply a kind of exclusion—and whether or not they do, is not determined by the prevailing forms of social organisation.

I have presented these two accounts in its extreme forms. A more moderate position would claim that both biology and society are relevant to judgments of disability. And this seems to be the commonsense view. Blindness is much easier to live with in a society that accommodates people who can't see by providing auditory signals for crossing roads, auditory cues for directions, and so on. And yet even with all of these accommodations, or changes in the construction of the physical environment, it seems right to say that blindness remains a disability on account of the physical inability of the blind person to see.

Section 4 - the affirmative model[35]

The last model that I want to look at, briefly, is the affirmative model of disability. The affirmative model challenges the traditional medical and social models by proposing that disability is not primarily a problem or injustice, but rather a different way of experiencing the world with its own mix of advantages and

[33] Ibid
[34] Ibid
[35] Ibid, section 1.2

disadvantages. So, on one side of the coin, the blind person cannot see (disadvantage) but on the other side of the coin, the blind person has enhanced remaining senses (advantage).[36]

The affirmative model is logically compatible with both the medical and social models.[37] Disability can result from both biological and social factors and it would seem that how one responds to a disability is independent of how it is caused. So, even if blindness is a disability on account of disease or biological causes (medical model) it is possible to view one's blindness as a gift.[38] Much more could be said here but this will be sufficient for current purposes.

Section 5 - Philosophical accounts of disability

With this general classification in place, I now provide a more detailed account of the main accounts of disability. In this, I will again be drawing on Wasserman, who provides a useful overview of four different philosophical definitions of disability. As we will see, these accounts can be made to fit within the distinction between medical and social models. As I noted above, my goal is not to go into every detail but to provide a road map that I will use later.

The Normal Function View:

The first philosophical account of disability is the normal function view developed by Christopher Boorse.[39] According to Boorse, disability consists of a "pathological condition severe enough to have morally and legal important effects"[40]. Boorse gives a more formal account of disability as follows: For any person, S, S is disabled if and only if "S has a pathology – that is, some part of their body performs its normal function at statistically subtypical levels", and "that pathology causes effects in the context that make a difference to how S ought legally or morally to be treated."[41]

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[36] Ibid
[37] Ibid
[38] Ibid
[39] Boorse, Christopher, 2010, "Disability and Medical Theory", in *Philosophical Reflections on Disability*, D. Christopher Ralston and Justin Hubert Ho (eds.), (Philosophy and Medicine, 104), Dordrecht: Springer Netherlands, pp. 55–88.
[40] Ibid, page 60-61
[41] Ibid

This phrasing is quite technical, but we can express the basic idea in simple terms by considering the example of someone who was born with one limb being significantly shorter than the other. In this case, this person's inability to walk properly is a pathology in the sense that he is born with the congenital condition (limb-length discrepancy) that makes parts of his body function less well than a person born with limbs of equal and thus, "normal", length.

The second part of Boorse's account relates to moral and legal treatment.[42] Boorse's sets out this difference by asking readers to consider two scenarios. The first is one in which a sports player is disabled. He tells us that in this scenario the athlete cannot play, due to safety and comfortability and not because he cannot play the game at all.[43] In the second scenario, he refers to work disabilities protected by law and the cover afforded to workers, such as disability insurance to protect their income.[44] Boorse draws two conclusions:

> x is disabled by impairment I really means something like Because x has impairment I, which significantly limits x in activities of type A in environments of type E, where x deserves the consequence C.[45]
>
> My second conclusion is that, even given A, E, and C, the judgment whether x is disabled is not always purely medical.[46]

Boorse draws some important moral and legal points from his account. One of these is that whenever someone is called disabled, the question we need to ask is disabled from what or in what respect? Context is important as it determines an activity, a range of activities from which a person is disabled: a sport, a job, all jobs, major life activity or something else. Secondly, every conscious person has the ability to do something and therefore cannot be called disabled without referring to a range of activities.

A critique of Boorse's work is presented by the philosopher Ron Amundson, who writes:

> *Like the concept of race, the concept of normality is a biological error…. [T]he doctrine of biological normality is itself one aspect of a social prejudice against certain functional*

[42] Ibid, page 67
[43] Ibid
[44] Ibid
[45] Ibid, page 68
[46] Ibid, page 69

> *modes or styles. The disadvantages experiences by people who are assessed as 'abnormal' derive not from biology, but from implicit social judgments about the acceptability of certain kinds of biological variation.*[47]

Amundson's critique expresses one of the central ideas of the social model of disability. What Amundson I believe is trying to say is that taking into account the science or medical aspects of what makes a person different or in this context disabled is only one side of the coin. Consideration must also be had as to how society views and places judgment on disabilities.

Although Boorse's account seems to fit the medical model of disability, the facts are more complicated. As Wasserman and Aas explain:

> [T]hough this view mentions the medical concept of pathology, as a *definition* of disability it does not entail a medical model…. The medical/social debate will turn on the extent to which it is pathology *itself* that makes a moral difference, rather than pathology in combination with social factors. [48]

In other words, the existence of a pathology does not by itself imply that the disadvantages produced by disability are to be explained by the pathology. Since Boorse can appeal to social elements, his view is logically independent of the medical model.

The Welfarist View:

The second philosophical account of disability is a welfarist view, proposed by Kahane and Savulescu. On this account, disability refers to any stable physical or psychological property of a person that leads to a significant reduction in that person's wellbeing in certain circumstances.[49] Or, putting the point slightly more formally, "disability" refers to any stable physical or psychological property of subject S that leads to

[47] Ibid, page 77
[48] W Ibid section 2.2
[49] Kahane, Guy and Julian Savulescu, 2009, "The Welfarist Account of Disability", in *Disability and Disadvantage*, Kimberley Brownlee and Adam Cureton (eds.), New York: Oxford University Press, pp. 14–53.

a significant reduction of S's level of wellbeing in circumstances C, excluding the effect that this condition has on wellbeing that is due to prejudice against S by members of S's society."[50]

This formula may be elaborated upon in four stages. Firstly it does not refer to impairment but any intrinsic property of the agent, let's call him Jack.[51] Secondly, it has an intrinsic normative dimension-if something leads to a reduction in Jack's well-being (intrinsic normative concept), then that thing is bad for Jack.[52] Thirdly, disability is relative to person and context in that what makes leading a good life harder in one context may make it easier in another.[53] Fourthly, disability is ubiquitous in that genetics, biology, psychology will identify many internal features of people as impediments to wellbeing.[54]

There is one objection of the welfarist account of disability that I want to discuss, namely that the account is far too inclusive. This means that it categorizes too many conditions as disabilities, including those conditions that reduce well-being without impairing function in any way. The response by the welfarists to this criticism is its view is more resistant to stigmatization and gives recognition to effects on wellbeing of inner conditions (ubiquitous disabilities).[55]

I have touched on this point a little bit above but the stigma that surrounds disabled people is difficult. It is a two headed dragon. On the one hand, you have society that judges the disabled person on what they physically see and the biases based on an uninformed point of view. On the other hand, you have the hardship that the disabled person deals with himself. Abled bodied people take it for granted that you can go to the restroom unassisted whilst many disabled people do not have that privilege. The mental hardship and the sheer fight and will to keep going I believe is a daily struggle especially for disabled people as they have to face their disability every moment of every day.

Social Constructionism:

The third view of disability is that of "social constructionism" developed by Elizabeth Barnes. This position challenges the social model's failure to distinguish disability from other identity categories and focusses on the manner in which disabled people judge themselves, rather than the perspective of society. Barnes' formulation of disability from the view aforementioned is that "A is physically disabled only if A is in a

[50] W Ibid, Section 2.2.2
[51] Kahane, Guy and Julian Savulescu, Ibid, page 16
[52] Ibid, page 26
[53] Ibid, page 27
[54] Ibid, page 28
[55] Ibid

bodily state X such that the rules for making judgments about solidarity utilized by the disability rights movement classifying X in context Y as amongst the physical conditions that they are seeking justice for."[56]

One criticism of this view is that it makes disability too much a function of how people think of themselves. You may find yourself in the scenario where people who do not require protection and assistance are unduly benefiting from the disability rights movement.[57] The idea that people are disabled because they think that they are, seems also to conflict with common sense. This is a problem with social constructionism in general.

The Inability View:

The fourth and final view is called the "inability view" as proposed by Buchanan et al.[58] On this account, disability is defined as follows:

> To have a disability is to be unable to perform some significant range of tasks or functions that individuals in someone's reference group (e.g., adults) are ordinarily able to do, at least under favorable conditions, where the inability is not due to simple and easily corrigible ignorance or to lack of tools or means ordinarily available to performing such tasks or functions.[59]

For example, a disabled person, due to a spinal cord injury from the neck down, is not able to bathe himself not because of the lack of resources, in this case a specially equipped bath and bathing devices, but that he cannot physically complete the task of washing himself due to his disability. If we take the welfarist view which if you recall is a reduction in the wellbeing of an individual due to the disability and contrast it to the inability view, I will argue that the views are similar in the sense that both highlight the impairment of the disability on the individual and his life. The viewpoints only differ in that, the welfarist focuses on the disabled person's quality of life and wellbeing because of the disability, whist the inability view focuses on the disability and how it hampers the disabled person from conducting an ordinary life.

My opinion on the difference between the normal function view and the inability view, is that the former focuses on the pathology of the disabled person and how the disability affects that person's life. Whilst the

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[56] Ibid
[57] Ibid
[58] Buchanan, Allen, Dan W. Brock, Norman Daniels, and Daniel Wikler, 2000, From Chance to Choice: Genetics and Justice, Cambridge: Cambridge University Press. doi:10.1017/CBO9780511806940
[59] Ibid

inability view is more concerned with comparing the disability person's ability to perform a task in comparison to an abled bodied person.

Section 6: Implications

In this research report, I am interested in how employers should treat employees with the specific disability of clinical depression. The distinction between medical and social models of disability is relevant to this question. For example, if disability is entirely a social matter, then it should in principle be possible to accommodate all disabilities by changing the environment. And thus, if employers are morally obliged to accommodate disability, then they should be able to do so. Of course, this principle is more of principle than practice since social reorganisation would be a costly affair. As Putnam et al. remark:

> How much should a society modify these requirements or restructure these activities to include people with various intellectual, psychiatric, and complex physical disabilities? A total relaxation of such requirements would impose large, even "unduly burdensome" costs.[60]

On the other hand, if disability is partly a function of biology, then reasonable accommodations might not always be possible. For example, there simply might not be any way of accommodating an employee to fulfil a job role where the disability is of such a nature that he cannot perform his duties. For example, there might be some jobs that cannot be done without sight, for example, a pilot or an eye surgeon. If so, then no reconstruction of the environment or reasonable accommodations will help a blind person do this job.

Of course, this might well be a limiting instance. In most cases, disability is a function of both world and body. There is almost always a lot that can be done to accommodate disabilities even when these are rooted in "normal" biological functioning or relate to certain abilities that are deemed to be socially useful.

[60] Putnam, Daniel, David Wasserman, Jeffrey Blustein, and Adrienne Asch, "Disability and Justice", The Stanford Encyclopedia of Philosophy (Fall 2019 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/fall2019/entries/disability-justice/>

Chapter 3 - Mental illness and Depression

Introduction

In the first chapter, I showed that from a legal perspective disabled people have a right to non-discrimination and equal treatment. I used this discussion to lay down some moral principles that will be central to my positive argument later. In chapter 2, I delved into the philosophical meaning and views of the concept of disability. The next claims that I must establish for my argument are that mental illness is a form of disability and depression is a form of mental illness. From this, it will follow that South African companies should refrain from discriminating against depressed employees and also provide reasonable and positive support to them. As we have seen, section 9 of PEPUDA classifies "the failure to accommodate disability as a form of discrimination". These claims are embedded in the law, but the demands that they place on employers are moral demands.

In this chapter, I briefly discuss the idea of mental illness in general before focusing more specifically on depression. By getting clearer on the nature of depression, I will be better positioned to explain what kind of accommodations employers are obligated to provide. For obviously what is required to treat a blind person equally will be different from what is required to accommodate someone with major depressive disorder. A further point that will be of significance for my argument is that the difficulties experienced by depressed people in the workplace are, I claim, in large part due to the structure of the environment. This "social" aspect of depression is central to understanding how it can be reasonably accommodated.

Although it might seem that I am rejecting the medical model, this is not the case. My point is that there is a social dimension to depression that must be recognized by employers in order to treat depressed individuals ethically. Even if depression is biologically based, the way the depressed person is perceived in the workplace is a key element in determining the significance or valence of an employee's depression. In other words, social perception can make a large difference when it comes to the difference between a depressed person who is productive at work and someone who is not.

Section 1 - Mental illness explained

Defining the concept of mental illness is not straightforward. We can say, to begin, that a mental illness or mental disorder is a deviation from normal thought, reasoning, feelings, attitudes and actions. Schizophrenia, depression, obsessive-compulsive disorder, substance abuse and mania are all clear

examples.[61] What it means for thought, reasoning and so on, to be normal is of course a difficult question. We have encountered some of these difficulties in our discussion of the "normal function" views of disability.

The International Classification of Diseases 11th Revision (**ICD-11**) describes a mental disorder as a "significant disturbance in an individual's cognition, emotional regulation or behaviour… Mental disorders may also be referred to as mental health conditions". This term is broad enough to cover psychosocial disabilities and other mental states associated with distress, impairment in functioning and risk of self-harm.[62]

According to Doctor Awais Aftab, a professor in psychiatry and psychiatrist, there is no definition that adequately specifies the boundaries for the concept of a mental disorder—the concept cannot be operationalized to cover all situations.[63] There is a commonality in trying to define the concept of a mental disorder and the concept of disability in that both it seems are difficult to put into exact terms. What can be said, however, is that mental disorders are associated with distress or disability in social, occupational or other important activities.[64] Since there are many different forms of mental disability, and these differ from one another in the way and extent to which they can be handled, I want to narrow my focus by only looking at depression.

Section 2 - Depression

Depression is endemic in South Africa. There are various reasons for this, for example, traumatic childhood experiences, poor socio-economic status, being a third world country, and minimal education levels.[65] Arguably, it was only after and on account of the Covid-19 pandemic that mental illness is acknowledged, and mental health promoted worldwide. In other words, it took isolation due to a virus that killed thousands of people in order for society to be more accepting of help and seeking professional assistance to undo years of trauma and bad habits.[66]

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[61] Radden, Jennifer, "Mental Disorder (Illness)", The Stanford Encyclopedia of Philosophy (Winter 2019 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/win2019/entries/mental-disorder/>
[62] https://www.who.int/news-room/fact-sheets/detail/mental-disorders
[63] https://www.researchgate.net/publication/262535171_Mental_Illness_vs_Brain_Disorders_From_Szasz_to_DSM-5
[64] Diagnostic and classificatory manual of the American Psychiatric Association (DSM-5 [APA 2013])
[65] Ibid, https://www.wits.ac.za/news/latest-news/research-news/2022/2022-11/mental-health-in-sa-is-at shocking-levels-but-people-are-not-seeking-help-.html
[66] https://www.verywellhealth.com/pandemic-mental-health-awareness-5213655

I want to present next a brief taxonomy of the major types of depression. These differences will be relevant to my discussion later on, when I take up the question of how employers can accommodate people with different types of depression.

Three of the most common types of depressive disorders are major depression, dysthymia, and bipolar disorder.[67] My report will focus on major depressive disorder. Depression in this sense is clearly a condition that many people struggle with. A study conducted by the University of Witwatersrand indicated that 25.7% of the South African population are depressed.[68] It is interesting as this article was published in 2022 which shows a vast increase in cases of mental illness from 9.7% of the population (4.5 million) in 2017.[69]

Depression is a type of mental disorder (*genus*)[70]. It is distinguished from many other types of mental disorders in that it is not a disorder of thought (such as schizophrenia), primarily but a disorder of mood. Other types of mood disorder include anxiety, psychotic disorder, eating disorder, personality disorder, post-traumatic stress disorder, impulse control and addiction disorders, factitious disorder, obsessive compulsive disorder, sexual and gender disorder.[71]

As a textbook on abnormal psychological states, individuals experiencing episodes of major depression exhibit a variety of cognitive and physical symptoms.[72] Typically, these symptoms include anhedonia (an inability to experience pleasure), feelings of worthlessness or guilt, disturbances in sleep (insomnia or hypersomnia), disturbances in appetite, poor concentration or indecision, and recurring thoughts of death or suicide.[73]

As just noted, depression can be expressed in different symptoms. From a medical perspective, medical practitioners use an ICD-10 criteria for depression. The World Health Organization and doctors developed it using the criteria for diagnosis against a set of symptoms and signs that indicate the presence of the disorder.[74] Some elements of the criteria or checklist are as follows:

1. Unhappy or negative mood most of the day, nearly every day
2. Marked loss of interest or pleasure in all, or almost all, activities most of the day, nearly every day

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[67] Ibid
[68] https://www.wits.ac.za/news/latest-news/research-news/2022/2022-11/mental-health-in-sa-is-at-shocking-levels-but-people-are-not-seeking-help-.html
[69] https://businesstech.co.za/news/business/203648/feeling-depressed-at-work-this-is-what-the-law-in-south-africa-says/
[70] https://plato.stanford.edu/archives/spr2024/entries/aristotle-categories/; Section 2.1
[71] https://www.medicinenet.com/what_are_the_10_types_of_mental_disorders/article.htm
[72] Barlow, D., Durand, V., Du Plessis, L., Visser, C. (2017). Abnormal Psychology. Hampshire: Cengage Learning.
[73] Ibid
[74] https://www.verywellmind.com/icd-10-criteria-for-depression-5308497

3. Significant weight loss when not dieting or weight gain or decrease or increase in appetite nearly every day
4. Insomnia or hypersomnia nearly every day
5. Psycho motor agitation or retardation nearly every day
6. Fatigue or loss of energy nearly every day
7. Feelings of worthlessness or excessive or inappropriate guilt nearly every day
8. Diminished ability to think or concentrate, or indecisiveness, nearly every day
9. Recurrent thought of death, recurrent suicidal ideation without a specific plan, a suicide attempt, or a specific plan of committing suicide[75]

Major depressive disorder (**MDD**) is the more severe form of depression and requires a person to have at least five of the above symptoms listed for two or more weeks. At least one of the symptoms must be a loss of interest or pleasure.[76] MDD is an illness of the entire body, mood and thoughts. It affects the manner in which you eat, sleep, feel about yourself and the way you think about things.

Depression is not anything like feeling blue nor is it a sign of weakness or a condition that can willed or wished away. Depressed persons cannot pull themselves together and get better without treatment. Without treatment symptoms may last from weeks to years.[77] The rate of relapse and reoccurrence of the illness of MDD is quite high[78] and living with depression can be described as "*waiting for a change in the weather*" or "*weathering a constant storm*".[79] Like the weather, MDD can only be predicted to a certain extent, sometimes you will need an umbrella for the rainy days (bad days with medication and therapy for example) and some days the umbrella is unnecessary because the weather prediction was wrong (good days with medication and therapy for example). Remember that a person can experience more than one type of weather condition on a given day, the same is applicable for MDD and the emotions that happen within the depressed person.

[75] Ibid
[76] Verywellmind, Ibid
[77] https://www.sadag.org/images/brochures/Depression%20Brochure.pdf
[78] Ibid, page 257
[79] Ibid, page 252

Section 3 - Depression as a Disability

Given the accounts of disability that I discussed in the preceding chapter, and the nature of depression, as I have explained it here, it is clear that depression should be classified as a disability.

In terms of the Code on the employment of persons with disabilities and in terms of the Employment Equity Act, persons with disabilities are defined as "persons who have a long-term or recurring physical or mental impairment, which substantially limits their prospects of entry into, or advancement in employment." Mental impairment is defined in terms of a clinically recognized illness that affects a person's thought process, judgment and emotions.[80] Depression and therefore major depressive disorder fits into this account of persons with disabilities under mental impairment in terms of the Code.

Let me now run through some more general arguments for considering depression as a disability in the workplace.

Major depressive disorder is strongly correlated with impaired concentration. This means that a person who is working in a job that requires high levels of concentration is likely to experience difficulties with memory—a result of a failure to store, consolidate and retrieve memories. One can also experience difficulties with learning and regulating emotions due to changes in certain parts of the brain.[81] In sum, impaired concentration and related difficulties associated with MDD can significantly hinder performance in jobs requiring sustained focus, leading to reduced productivity.

Sleep deprivation is another correlation with MDD in that during REM (Rapid Eye Movement) sleeping problems are experienced due to the brain's inability to move short-term memory to long-term memory.[82] Sleeping problems may manifest itself in insomnia (a lack of sleep) or sleeping too much.[83]

The last correlation I want to look at in respect of major depressive disorder is fatigue.[84] Depression can cause fatigue directly and indirectly by affecting one's sleep, eating habits, workout routines, addition to general life stress and not engaging in pleasurably activities can increase fatigue and lower motivation.[85] All of these conditions can directly impair one's performance in the workplace. For these reasons, we can see that depression is reasonably regarded as a disability from a commonsense point of view.

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[80] Ibid
[81] Does Depression Cause Memory Loss? (https://www.everydayhealth.com/hs/major-depression/depression-memory-loss-and-concentration/)
[82] Ibid
[83] https://www.mayoclinic.org/diseases-conditions/depression/symptoms-causes/syc-20356007
[84] https://psychcentral.com/depression/depression-and-fatigue
[85] Ibid

Section 4 - Applying the philosophical accounts to depression

Although depression is not widely recognized as a disability in the way that blindness and deafness are (and there are, of course, some differences here, which I return to in chapter 5), we can apply the main accounts of disability to depression. The way in which depression is conceptualized will differ according to each account and sometimes with implications for how to accommodate it in the workplace.

The first account of disability that we discussed in the preceding chapter was the normal function view. When applied to depression, the view says, obviously enough, that depression is a disability because some part of the depressed person's body or brain does not function at the "normal" level. For example, it might be that parts of the brain correlated with motivation, do not work in the normal way. As a result, the depressed person might not be as efficient and productive as the "normal" employee.

On the second account of disability, the welfarist view supports my argument in that depression is a disability as a depressed employee's wellbeing is significantly impacted both in general and in a working environment.

Social constructionism, which was the third view of disability, made disability dependent on some social group. As I noted in the previous chapter, this account emphasises the role of the disability rights movement's judgment in determining who is considered disabled.[86] Whether depression counts as a disability would thus seem to depend on the existence of such activist movements, and what they happen to think about the different kinds of depression. This is a concern and seems to reinforce the criticism that the approach is too reliant on the current disability rights movement's perspectives.

It is not uncommon for many to suffer in silence for fear of being branded incompetent, crazy or even victimized at work. The point I need to note here as I would be naïve to not bring in the short comings of my research is the downfall of this view being too wide. By this I mean, and it is seen in many instances today that people use mental illness especially depression as a way to shield themselves from responsibilities and trouble. Take for example an employee who is a poor performer, he may allege that he is suffering from MDD and admit himself into a mental health facility to avoid the consequences of being placed on poor performance management at work. This is the one big danger that this view poses in that it may protect people who are actually not depressed which itself creates a whole new stigma.

Lastly, according to the inability view discussed in chapter 2, depression would be an inability in the sense that the depressed employee cannot perform tasks that can be performed by non-depressed employees, where conditions such as lacking adequate tools are discounted. What are these tasks? The answer would

[86] Kahane, Guy and Julian Savulescu, Ibid, page 28

seem to be quite general: a severely depressed person cannot work at all. I shall consider the implication of this general type of disability when thinking about reasonable accommodations in chapter 5.

Section 5 – Conclusion

Major Depressive Disorder and Depression may appear at first glance to only be treatable medically through medication and therapy. However, accommodating a depressed employee by an employer requires different considerations altogether, as different jobs have different needs. The topic of reasonable accommodation will be discussed in more detail in the next chapters. What I will be arguing is that there is much that employers can do to mitigate the effects of depression in the workplace. My argument will proceed simply by explaining what a suitable sensitive workplace would be like.

Chapter 4 - Current provision

Introduction

I have now argued that South African law requires employers to actively support people with disabilities and that mental illness, specifically major depressive disorder, is a disability. In this chapter I am going to take up the question of discrimination in a more philosophical way, and to try give an account of when discrimination against depressed people would be fair. This will also involve working towards a theoretical account of reasonable accommodation, a concept that is pivotal for my argument in the next chapter.

Section 1 - Revisiting the ideas of unfair discrimination and reasonable accommodation

As I explained in chapter 1, the law expresses certain moral principles relating to the unfairness of certain sorts of discrimination. It is obvious that one should not discriminate against people on the basis of race or gender unless race or gender is relevant to the situation.[87] This can be the case, of course. For example, one might employ a female nurse instead of a male nurse to caretake a group of women who are survivors of rape. And there could be good reasons for this.

We can see then that discrimination is unjust when a person is excluded from a job for reasons that have nothing to do with the job. By "exclusion" I mean to refer to the processing of hiring when, for example, where selection should be made on the basis of skills and experience to perform the job, but also cases of dismissal. I also want to include here matters of promotion and bonusses for performance. The term exclusion can also apply in this context when, for example, people are overlooked for promotions on account of disability.

The question of exclusion and discrimination is not straightforward when it comes to disability. Can one discriminate against blind people by removing them from consideration for a particular job? As I noted in chapter 1, this can be permissible if the disability implies that the individual cannot do the job to a required level. One can, for example, fairly discriminate against someone for being blind if sight is required for the job. To this extent, not all discrimination is unjust or unfair.

Why is it fair to discriminate in this way? The answer to this question must derive from the idea of community as one in which people are benefited by working together. For example, an institution such as a hospital is designed to bring about a social good, namely promoting health and treating illness. From this point of view, staff must be able to do their jobs well if hospitals are to fulfil the important purpose that they are intended to fulfil. A similar point applies, albeit less conspicuously, to many businesses and

[87] The Constitution of the Republic of South Africa, 1996, section 9

corporations. In short, society has an interest in sustaining key social institutions and work fitness is required for this.

As we have seen in the preceding chapters, one of the protections afforded by the law to disabled people is the requirement that "*an employer make reasonable accommodations"* for an employee suffering with depression. This is evident in section 9 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000. Reasonable accommodation is defined as the "*necessary and appropriate modification and adjustments, as well as assistive devices and technology, … where needed in a particular case, to ensure persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.*"[88]

"While any plausible criterion of social justice will accept the moral imperative to eliminate discrimination, it will also accepted that sometimes it must alleviate disadvantages faced by those whose physical and mental traits are ill-suited to their environment."[89] For example, let us take into account Employment Equity legislation. In Apartheid South Africa, people were hired on the basis of their skin colour. This we can conclude was clearly discriminatory, however in Democratic South Africa, legislation was introduced to assist previously disadvantaged individuals due to the exclusion based on race. Even though this piece of law has at its heart the elimination of unjust treatment of people, skills development and fair job opportunities, there may be instances where this legislation cannot be applied. For instance, in a job requiring highly technical skills, it is in order to hire one candidate over the other regardless of race.

On one view, the goal of reasonable accommodations is to counteract the disability to enable employees to do their jobs to a sufficient degree. So, although a person might not be able to do a job well without the accommodation, he might be able to work to a sufficient degree with it in place. The accommodation does not remove the disability but enables people to work around it. And if disabled employees are able to do their jobs, discriminating against them would be unjust. In this regard, I agree with Pogge and Anderson that the criteria for distributive justice and the needs of the disabled is eliminating discrimination and not compensating for natural impairment.[90] This condition will, however, create some complications when it comes to depression, as I explain below.

Another reason why reasonable accommodation might be required is that social environments can create disabilities. This corresponds with the social theory of disability which states that physical and mental impairments and the resultant disadvantages are caused by the social, institutional and cultural conditions

[88] White Paper 2016, Ibid, Glossary of terms, page 12
[89] Barclay, Linda, 2010, "Disability, Respect and Justice", Journal of Applied Philosophy, 27(2): 154–171. doi:10.1111/j.1468-5930.2010.00489, page 169
[90] Ibid, page 155

and not the impairments itself.[91] As Barclay writes: *"…an individual's natural traits are only disadvantageous in a particular social environment, that social environment is therefore and for that reason discriminatory*."[92]

The point that Barclay is making can be formulated as follows:

> Wheeling rather than walking is only a disadvantage because of the thoughtless design of the built environment; unemployment is caused by false assumptions about what blind people can do, not by visual impairment; social invisibility is due to the biased design of public transport and social hostility, not because one is too weak or incompetent for social participation.[93]

On this view, it would seem that employers have a duty to accommodate disabled people because they have actually created the disability by constructing the work environment in a certain way. The moral principle here seems to be one of rectification: if one has wronged somebody, then one has a duty to correct this. Once more, reasonable accommodation is not a matter of compensating for disabilities but rectifying the conditions that bring them into existence. Whether and to what extent this is true of depression is something that I consider in more detail below and in the next chapter.

There is one problem that I should mention here. There is no way to design all social institutions and practices so that everyone experiences equal access and success. As Barclay argues, it not feasible to shape the environment so that no one, whatever their physical or mental traits may be is not disadvantaged.[94] Even if we weakened this claim and spoke of a maximally inclusive society there would be difficulties. The cost of a "maximally inclusive society"[95] may be far greater than the cost of a reasonable one. And I want to note here that the Americans with Disabilities Act which follows the social model, only requires accommodation for the disabled up to a specific point.[96]

Section 2 - The Court's consideration of reasonable accommodation

[91] Ibid
[92] Ibid
[93] Ibid
[94] Ibid, page 162
[95] Ibid
[96] Ibid

We can further explore the question of discrimination and reasonable accommodation by considering a recent judgment, handed down on 30 March 2022 from the Constitutional Court. This judgment, Adam Damons versus the City of Cape Town, dealt with this issue of unfair discrimination and disability. In particular the court had to decide whether the inherent requirement of a job is a justifiable defence against the duty to reasonably accommodate people with disabilities.

In 2010, Mr Damons a firefighter was injured during routine drills on the job. The injuries suffered by Mr Damons was so severe he suffered permanent disability (Mr Damons could not do any strenuous activity and could not carry anything over 10 kilograms). Physical fitness is an inherent requirement of the job of being a firefighter and as a result of his disability he could not successfully complete a physical assessment.[97]

During 2010, Mr Damons applied for a promotion, however he did not get the position due to his disability (his application was turned down or excluded on account of his physical disability). On 22 May 2012, the City of Cape Town put Mr Damons through an incapacity hearing to assess his injury and the extent of his disability. Following negotiations through this process, an agreement was reached between the parties and on 23 January 2013, Mr Damons was moved to a more suitable position to do administrative and educational work.[98]

Mr Damons' salary and job title did not change even though his job role changed as part of the agreement. Later he tried for the second time to apply for another promotion as senior firefighter; however, this application was also declined due to the inherent requirement of the job, physical fitness, not being fulfilled. In 2014, Mr Damons was not happy with the outcome and referred the matter to the Commission, Mediation and Arbitration (CCMA) for conciliation. The CCMA recognized that Mr Damons had been in the same position and that this impacted his dignity, however it found in favour of the City of Cape Town due to the defence of the inherent requirements of the job.[99]

Mr Damons was not satisfied with the outcome and referred the matter to the Labour Court based on two issues: the first was whether physical fitness is an inherent requirement for being a firefighter, since this was the reason why he was prevented from advancing into a better position. The second was whether the City of Cape Town's Policy is justifiable and fair as it makes a distinction between people on the basis of an inherent requirement of a job. The Labour Court found that applying the Policy to Mr Damons amounted to unfair discrimination because it prohibited him from advancing in his career due to his disability. The

[97] *Damons v City of Cape Town* [2022] ZACC 13 (https://www.saflii.org/za/cases/ZACC/2022/13.html), paragraph 3
[98] Ibid, paragraph 4
[99] Ibid, paragraph 7

Labour Court based its decision upon the fact that the City of Cape Town was the cause of Mr Damons permanent disability. The Labour Court acknowledged the defence of inherent requirements of the job by the City of Cape Town but what Mr Damons was arguing went further than an allegation of unfair discrimination. The Labour Court found that the application of the Policy towards Mr Damons was flawed in that it did not respect his right to dignity nor enable progression in remuneration and status by moving up in rank.[100]

The matter then went to the Labour Appeal Court who overturned the judgment by the Labour Court on the basis that there is difference between Mr Damons and other active firefighters. When a promotion is considered, the rational requirements in the Policy and the inherent requirements for the position of a senior firefighter are considered. The Labour Appeal Court found that Mr Damons could not perform the essential tasks of an active firefighter and it would not be in the public interest if he attempted to do so. Mr Damons, dissatisfied with the Labour Appeal Court's decision, appealed to the Constitutional Court to reconsider the two issues raised above and to assess the defence of the inherent job requirement raised by the City of Cape Town.[101]

The Constitutional Court cautions us by stating that the Code is not an authoritative summary of the law, nor does it create additional rights and obligations. It is instead a guide for employers and employees on promoting equal opportunities and fair treatment of persons with disabilities.[102] It is interesting to note that the minority judgment of acting judge Pillay found that there is a positive duty on the employer to eliminate discrimination and looked at the burden of proof in terms of section 5 of the EEA which places same on the employer to prove that the discrimination is not unfair and unjustifiable. The minority judgment further found that physical fitness is an inherent requirement of the job of operational firefighters.[103] Further, it also found that accommodating persons with disabilities is not unfair or granting preference but is reasonable and the Policy therefore placed a positive duty on the City of Cape Town to explore ways of accommodating Mr Damons beyond his current position.[104] In other words, Mr Damons did not meet the inherent requirements of the job to be a firefighter but his employer, City of Cape Town must make the necessary accommodation so that Mr Damons can fulfil a senior position tailored to his specific circumstances and his specific disability.

The majority judgment disagreed with the minority judgment and stated that the only question to be decided on is whether the Policy unfairly discriminates against Mr Damons. The majority judgment also disagreed

[100] Ibid, paragraph 8
[101] Ibid, paragraph 19
[102] Ibid, paragraph 62
[103] Ibid, paragraph 68
[104] Ibid, paragraph 71

with reasonable accommodation as it leads to a misunderstanding between reasonable accommodation in a position and the inherent requirements of that position.[105] What this means is that a reasonable accommodation is only required if Mr Damons met all the requirements of a firefighter. Any accommodating beyond this point would not be reasonable and would require an employer to employ someone who cannot possibly perform the inherent requirements of the job.[106]

Based on the arguments made by both parties, the Court found against Mr Damons as the inherent requirement of physical fitness for the job of senior firefighter was not met, no accommodations were possible that would enable the employee to fulfil the requirements of that job.[107] It reached the judgment that the City of Cape Town had a satisfactory defence against the allegation of unfair discrimination.

Section 3 - The Philosophical Significance of Damons v City of Cape Town

I have presented this specific court case for my research report because it illuminates some of the central questions for my account of the employer-employee relationship in the realm of disability. Even though this specific case is focused on physical disability, I believe we can extend its application to mental illness and in particular to depression. In particular, the case helps us to better understand the idea of reasonable accommodation.

I want us to take a moment to imagine a scenario where we have an employee who suffers with major depressive disorder and is for this reason unable to do his job to a required level. However, he is taking positive action in his mental health journey by which I mean that he takes his medication every day, sees his treating doctors on a regular basis and has disclosed his condition to his employer.

Drawing on the principle that avoiding discrimination against disability requires positive steps and reasonable accommodations, we must ask whether the employer can do anything to accommodate the depressed employee. If the employer does not make the necessary accommodations such as allowing the employee to see his doctors or to place the employee in a more suitable role, this may place the employee in a precarious position and at risk of relapsing. The point is that employers have duties to accommodate their employees, the duty does not end merely by the exchange of labour for remuneration. Further steps and reasonable accommodations are required as I have elaborated above.

[105] Ibid, paragraph 140
[106] Ibid, paragraph 141
[107] Ibid, paragraph 147

The caveat of course to my argument is that depressed employees must be able to meet the inherent requirements of the job. As the Damons case makes clear, there would be no unfair discrimination if the depressed employee were boarded, say, because he was unable to do the job even after reasonable accommodations were put in place.

I believe that if depression is a disability, then the there is an inability to perform a work function. On the other hand, I am interested in exploring the extent to which depression can be accommodated, and what this means is the question of whether it is a disability when the workplace is suitably reorganised. I look at this in the same fashion as providing special equipment to a blind employee. Without the accommodation an employee does not have the ability to work but with it, he does. The depressed employee's difference is internal whilst the blind employee's difference is external however both are equally worthy of help.

This does not mean that depression is a disability in exactly the same sense that blindness or other physical disabilities might be. One obvious point of difference is that blindness cannot be cured in most cases, whereas there is always the possibility of a depressed person recovering wellness.

I must reiterate that disability especially depression has the following options available for the depressed employee –

1. The depressed employee gets treated and is no longer disabled.
2. The environment gets reconstructed so that what was a disability without the reconstruction is no longer a significant disability within the context of that job.
3. People's attitudes change so that what was a disability is significant reduced by the change in attitude. For example, the depressed person becomes less depressed and thus less disabled on account of the supportive environment.

Section 4 – Conclusion

As discussed, Mr Damons was injured whilst in the employ of his employer, and so he could no longer physically do the job of a firefighter (inherent requirements of the job). In this instance overlooking him for promotion is not unfair discrimination as you must be able to do the job in the first place or, at least, do the job with reasonable accommodations in place. However, in this situation, the employer could also do nothing to accommodate Mr Damons in the position of firefighter due to his disability. So he was moved to another role.

So, what does Mr Damons case mean for depressed employees? We could approach the judgment in two ways. We can empathize with the employer and apply pure logic in that if your depression totally prevents you from doing your job, it is fair for the employer to exclude your application from consideration for roles

that requires you to not be depressed. But this is, as we have seen, unethical and illegal. The employer must provide reasonable accommodations to assist the depressed employee. In the event the employer is unable to accommodate the employee due to resources or risk to life, the employer must find another suitable role for the depressed employee if this is possible. As a last resort, the employer should have the necessary insurance and provisions in place in the event that no accommodations can be made.

To discriminate on the basis of disability is not always unfair. Therefore, to discriminate on the basis of depression is not always unfair. However, there is not only a negative responsibility here, which is not to discriminate if the depressed employee can do the job, but a positive responsibility to help this individual to be able to perform at the required level. I will discuss the nature of this positive responsibility further in the next chapter.

Chapter 5 - Accommodating depression in the workplace

Introduction

In the previous chapter I discussed the question of discrimination and reasonable accommodation from an ethical point of view. In this chapter, I want to complete my account by taking up and answering the following questions: what accommodations are businesses required to put in place in order to avoid discriminating against depressed employees? How would a workplace that was sensitive to depression be organized? To what extent could changes in the environment help those with depression to contribute meaningfully to the success of the business?

Section 1 - Current considerations of depressed employees

To accommodate a disability, one needs to know what it is that the disabled person cannot do, or cannot do comfortably and to the required level, and then try to adjust the environment to ensure a better fit for him. So, to refer to the example I gave above, it is obvious that the blind person will need to receive information in a work context using routes that don't rely on sight. It follows from this that in order to accommodate a depressed staff-members, one needs to know what it is that they cannot do, or do comfortably, and to the level required by the job. And accommodations are not always possible, as is clear from the Damons case that I discussed above.

So my question is this: what is it that depressed people cannot do or cannot do well enough? In what way are they disabled, given the argument that I presented above? I will address these questions somewhat indirectly. Let me begin with the question of whether depressed employees can be viewed in the same way as people with physical impairments.

For some physical disabilities, it is relatively easy to specify the nature of the disability and what an employer would need to do to avoid a charge of indirect discrimination. I mentioned blindness above, but we can also consider another example: a paralyzed person in a wheelchair who cannot walk. Accommodating disabilities such as this one and those relating to mobility more generally requires augmenting access to buildings—for example, building ramps to enable wheelchair-bound employees to gain access to their work premises. Alternatively, employers could ensure that physically disabled and wheelchair bound staff members are placed on the ground floor for ease of access to and from the building. This same accommodation should be made in terms of parking and in business continuity plans to safeguard disabled employees who are considered vulnerable.

Progress has been made in accommodating physical disabilities in the workplace. For example, blind employees are allowed guide dogs at their place of work, there are even in some work contexts specific areas for refreshments for the service animals throughout the working day. Blind employees are also sometimes afforded special equipment to assist in their job role that is audible and that does not highlight the physical disability but enables them to feel and work like any other able-bodied person. I believe the aforesaid practices for blind employees is quite thorough. The reason I say this is because an employer will be required to do so by law, and to govern the way it is implemented, policy is drawn up and carried out. In South Africa, the Employment Equity Act requires employers to protect and caretake the rights of the disabled therefore they are incentivized (inclusive of a better rating resulting in greater promotion of business) to look after all the needs of employees with physical disabilities.

However, there are some difficulties that are worth mentioning that seem to distinguish physical disabilities from mental forms of disability. It seems that many physical disabilities are easier to accommodate than mental disabilities "such as fibromyalgia, multiple chemical sensitivity, and other conditions that radically and unpredictably affect energy, stamina, and functioning."[108] I will now mention several points that seem to make it more difficult *to know how to* accommodate mental disability in general before focusing on depression.

To say that depression is a disability means, as I have argued, that there is something that one cannot do on account of depression that is relevant to a job. This is not to say, of course, that the environment cannot be restructured to eliminate or reduce the extent of the disability. However, I have not committed myself to the social thesis—I do not claim that all disabilities implied by depression can be eliminated entirely by changing the environment.

As I argued above, it is sometimes just to discriminate on the basis of disability, that is, when the person cannot do the relevant job even with reasonable accommodations. My question is whether there are jobs in which it would be just to discriminate against an employee based upon depression. What complicates this discussion is that it seems clear that no accommodations will help a blind person to be able to do a job as a pilot, but is the same true of depression? Isn't it perhaps always possible to accommodate the depressed person, so that he can do the job well enough?

Accommodations for a physically disabled person are in many cases overt and easily characterized whereas the accommodations for a mentally ill person are not.[109] For example, as noted above, blindness impairs

[108] Putnam, Daniel, David Wasserman, Jeffrey Blustein, and Adrienne Asch, "Disability and Justice", The Stanford Encyclopedia of Philosophy (Fall 2019 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/fall2019/entries/disability-justice/>.
[109] Ibid

performance in relation to sight, and thus, although it might not be easy to actually accommodate blindness, it is relatively easy to specify what would need to be done—find some way of bypassing sight for the purposes of enabling communication and productive work in a certain context. By contrast, when you think of accommodating a person suffering with depression, the matter seems more difficult. How do you accommodate a mentally ill person when they are expressing wanting to self-harm or the constant negative thoughts? What about those who have insomnia and find it difficult to concentrate?

One point that seems to distinguish depression from blindness is that in the former case, the person's performance is affected across every domain relevant to work. The blind person can work just fine in anything that does not have to do with sight, whereas the depressed person, arguably, has impaired performance across every job and task. For example, if you cannot concentrate at all, you will not be able to work (perhaps exceptions can be made here for jobs that require only that one be present in a certain place—but this is an exception that proves the rule and, in any case, absenteeism would likely be a problem in the cases.)

A second point is that depression is individualized, and no set of supporting structures that will help for everyone. So, for example, a guide dog will help every blind person to navigate better, but it might be that an illuminated office will help some depressed people to concentrate but not others. In this regard, mental illness is much more complicated than physical illness and disability. It is not clear that specific interventions will help everyone in the same way.

What should then be done? Is the answer to simply lock depressed people in facilities or induce them with medication? Or perhaps even to terminate employment on the grounds of inability to do the job?[110] These are some of the questions that I will discuss below.

Section 2 - Revisiting depression

To make progress, I must return to the account of depression that I gave in the preceding chapter. To know how to accommodate depression, one needs to know what it is. But in approaching this material, I also want to draw a distinction between the negative effects of depression itself as opposed to negative effects that arise from being seen and treated as if one has a form of mental illness. I will refer to the later type of effects as stigmatization. I also want to restrict my discussion somewhat to make it more manageable. As we have seen depression is a complex phenomenon, and it manifests in many different ways. I will be

[110] https://www.labourwise.co.za/labour-articles/dismissing-an-employee-due-to-disability

focusing on what I take to be the most important elements of depression insofar as they impact on performance in the workplace.

As I explained in chapter 3, major depressive disorder can present itself in the form of an inability to concentrate, impaired decision making, difficulties with time management, inability to complete physical tasks, avoidance of social interactions, and even a lack of motivation to work or engage. As depression is a disability of the mind, we cannot see the ailments of a depressed colleague, though, of course we can see the effects just described. The battle is happening internally, from struggling to perform simple tasks, like getting up in the morning (perhaps leading to absenteeism from work) and caring for yourself to wanting a better life by striving towards personal goals.[111]

From an employer perspective, mental health and specifically depression has severe effects on all businesses. Depression can lead to absenteeism which may result in at least 26 additional days off from work. Mental illnesses account for an estimated 7% of the global payroll which surpasses the compensation for any other disorder. Presenteeism also known as impaired work performance and loss of productivity is another effect. It is estimated that the cost to an employer for presenteeism is 3 to 4 times greater than the cost of absenteeism. Healthcare costs is also another major effect and is twice as high for employees suffering with mental illness in comparison to employees without this condition.[112]

With this account of depression as disability outlined, I can now take up the question of accommodations that ought to be provided by employers. I will organize my discussion of accommodations into three categories: first, accommodations that treat depression as an internal condition of the individual person, in this case, the employee; secondly, those that seek to reconfigure the working environment in a broadly physical sense; and thirdly, attempts to alter the attitudes of other employees and to change the institutional culture more generally.

Section 3 - Accommodations: Depression as internal condition

As background to this part the discussion, I will assume that depressed employees receive help from qualified doctors and therapists outside of the workplace. Medication prescribed by the depressed individual's doctor will also assist in the treatment of depression. It is important to note that antidepressants take at least one to two weeks before an improvement of symptoms are noticed. An additional four to six

[111] https://workplacementalhealth.org/mental-health-topics/depression#:~:text=It%20contributes%20to%20presenteeism%2C%20or,%2C%20social%20interactions%2C%20and%20communication%20.
[112] Ibid

weeks is required for the full effect of the medication to take place to bring the depressed individual back to a sense of normalcy.[113]

It is clear that employers can help employees receive qualified help outside of the workplace. Many employers make it a mandatory requirement for its employees to have medical health cover. I would like to suggest that employers be more deliberate in assisting a mentally ill employees as most medical aids provide the necessary cover for mental illness, specifically depression. In addition, I suggest that employers make recommendations for their depressed employee to consult with a mental healthcare professional such as a psychiatrist or psychologist in certain circumstances.

There is of course the instance whereby the depressed employee, even though diagnosed, may choose not disclose his condition to the employer. In this instance, the employee prefers to manage his condition privately. Disclosure, we must remember, is a choice of each employee. However I must stress that if you self-manage depression and do not disclose, no accommodations will be required of the employer. This is explicitly stated in the relevant laws and also makes sense ethically: one cannot be obligated to help people when one does not know that they need help especially if, as is the case here, this lack of knowledge is not negligent or culpable.

Moving now to accommodations within the workplace, in my view, depressed employees have a right to talk about their mental illness to their manager. How this can potentially be accomplished is if management is approachable, approaches the topic with empathy and provides support. (I will return to this question down below in the context of my discussion of institutional culture.) The support after this difficult conversation can be in the form of regular checks up with an employee, encouragement in terms of the importance of taking a mental health day (akin to a doctor's checkup for physical health) and flexibility for an employee to see their necessary health professionals on a continuous basis.

One further question is whether employers should provide professional mental health assistance for the employee on site, as it were. The accommodation could be in the form of an employed mental health professional or the creation of a dedicated department with skilled staff to care take all employees' mental health needs. The main obstacle to this is, of course, that it can be awfully expensive for an employer and may just not be financially possible for all businesses. In some cases, accommodations of this sort will impose unjustifiable hardship on the employer.

One additional kind of accommodation for depressed employees is provided by programs like ICAS (Independent Counselling and Advisory Services).[114] ICAS is a Health and Wellness Programme which is

[113] Lundbeck SA (Pty) Ltd, Depression: Did you Know? – http://www.mysupport.co.za:8080/booklet/
[114] https://www.icas.co.za/services

offered to employers that has clinical psychologists, counselling psychologists and social workers answering calls 24/7 all year round and providing telephonic support to the employer's employees. The positives about ICAS is that is it usually free to all employees and their immediate family members and the counselling is available in all 11 official South African languages. ICAS differs from 24 hour hotlines in that it is provided by the employer whereas crisis, suicide and helplines in South Africa are available to the entire population. The 24 hour hotlines may consist of a mix of volunteers and mental health professionals.[115]

The goal of these programs is, of course, to treat depression and to ameliorate its effects by means of a therapeutic conversation. In this case, the goal would be to help the depressed person to improve motivation. These programs are in principle continuous with private therapy undertaken by the employee and the licensed medical professional.

One limitation of this program is that sessions are only for a short period of time. From my experience, the duration of session range from 30 minutes to 1 hour and I was only afforded 3 to 4 sessions in total. This is not enough time to assist a person suffering from depression to cope within the work environment.

The other accommodation is that of a wellness centre within major corporates. My opinion is that the impression is for employees to visit the centre only when they are physically unwell. The only time mental illness in general is highlighted is on the one day of the year when awareness is drawn to the importance of mental health and resilience. Wellness centres are important and should remain; however, encouragement should be made to make use of the services for mental illness by regular physical campaigning, electronic communication and forming part of the fundamental principles and values of all employers policies as well as its culture. I emphasise that an employer can implement policies to protect and support depressed employees. I no longer think it is appropriate for an employer to sit on the sideline and not take a stand and have a voice when it comes to mental health. The best way an employer can show it is serious about a movement, or topic is to implement a mandatory policy that has to be accepted by all employees as part of their employment contract when joining an organization. I think of how Standard Bank supports the HeForShe movement and has implemented gender neutral bathrooms in its offices.

Section 4 - Accommodations: Work life / The working environment

I now move on from depression considered from the point of view of an individual, and especially therapeutic interventions, to the question of the working environment. How can this environment be

[115] https://www.therapyroute.com/article/suicide-hotlines-and-crisis-lines-in-south-africa

restructured in order to help depressed employees to do their jobs? These sorts of changes would relate to the nature of the employment contract, working conditions and the working environment more generally.

At a general level, it seems to me that mental health days should be encouraged as well as regular leave to ensure that all employees especially depressed employees maintain a work life balance. All employers should if possible be given the option of hybrid working environments—intuitively, depressed employees may feel isolated if the working style is completely remote, which may lead to a relapse in treatment. And this might create more difficulties than full time in the office employment. A further possibility would be to extend mental illness leave to employees diagnosed with chronic depression similar to the initiative being driven by Unilever whereby women are given the option of a day off a month for their menstrual cycle.

Some of these changes are quite significant. Of course, there may be jobs in which regular leave is not possible and similarly for flexible working arrangements. So, for example, a fire fighter cannot do his job remotely and someone who misses too many days of work will not be good at his job. Some employees may take advantage of a leave policy introduced due to mental health which has the effect of disadvantaging employees who really need it.

An objection to mental health days is that you can just group this day into a normal leave day. As mental health is an individual duty many people would argue that it is up to the employee to manage their overall wellbeing. Calling it a mental health day does not raise awareness but could lead to some employees taking advantage and working the system which leads to the next objection that extending further leave even sick leave to people diagnosed with depression is subject to abuse. In a three-year cycle, employees are generally given 30 days sick leave therefore extending the sick leave days could be unaffordable to employers and be used as an abusive mechanism by certain employees. Working the system could be as a result of avoiding the consequences of bad performance at work or not adequately seeking the correct help to deal with stress.

Let me now consider specific workplace accommodations relating to the first type of inability related to depression, namely, low motivation for work. What kind of accommodations in the structure of the workplace (as opposed to personal-therapeutic interventions) could be put in place here?

This seems to depend on the way in which this low motivation manifests itself. For example, if it manifests in absenteeism, the employer through its representative will need to find out from the employee what is going on. The reason a discussion needs to take place is because help can only be given upon disclosure. On the other hand, if it manifests in low productivity, then this will ultimately affect the employee's performance ratings which can result in unhappiness in the job role or even loss of employment.

The employer may do various things to accommodate low motivation. For instance, the employer can ensure that the work environment is healthy. This could be in the form of rewarding employees for good performance, recognising employees publicly who excel in their roles and make it a requirement of management to ensure a happy staff (this may be established through an anonymous suggestion box or yearly surveys by staff of their direct line managers). I am saying there are certain nuances when dealing with a depressed employee. For example, if a depressed employee approaches you and asks for a reasonable accommodation to make his work environment better, tone is everything such as knowing the difference between a "person with depression" and a "depressed person". In other words, an employee actively working on their mental health and diagnosed compared to an employee who is undiagnosed and not working on their mental health. All of this might sound very commonsensical and ordinary. But in a way, that is my point. To accommodate depression one must create an environment that motivates people. And yet this is something that every workplace should attempt to do.

The second inability connected with depression is the inability to concentrate. What I mean by this is not being able to pay attention to a specific task because your mind is occupied with painful thoughts, of the past, for example, and the feelings connected therewith as well as the trauma experienced. In this way, depression can sometimes create cognitive disabilities, at least temporarily. What I mean by this is that depression can prevent one from doing the thinking that is required for a job.

One practical way of dealing with this might be to create specific spaces for decompression throughout the day for stress management and to incorporate in these spaces the benefits of natural light, as vitamin D is known to be the first aid for "feel good" hormones.[116] Again, this is part of creating a healthy work environment from which everyone can benefit.

One counterargument might be that it is up to the employee to handle their inability to concentrate. If he requires natural light, perhaps the employee should ensure that before and after work he exposes himself to natural light by taking a walk. Vitamin D supplements are also available, it can be purchased in cash by the employee or if there is medical aid available, through the benefits afforded from it. Sole responsibility for an employee's mental health, employers can argue, is not entirely on the employer. Depressed employees also have a part to play as help can only be given if it is wanted and effort placed by both parties. This is a reasonable view and not one that I wish to contest.

[116] https://www.yourhormones.info/hormones/vitamin-d/

Section 5 - Depression: the inabilities related to the performance of the work

The third type of inability associated with depression includes impaired decision making, time management, and the inability to complete physical tasks.

One way in which a line manager in charge of a depressed employee could help depressed employees here would be by ensuring that work instructions are clear, simple, and direct. Interactions between a line manager and depressed employee, say, should preferably not only occur via email or Teams. In-person communication, in a board room away from other staff members where tasks can be visually presented on a white board will sometimes be useful in visualization of tasks and goal setting.[117] Again, these might seem to be small things, but they can make a big difference. This reflects the nature of the disability of depression—it is not blindness or inherent cognitive incapacity but a disorder of mood.

Something else that might be useful is a tailor-made score card or key performance indicator should be done by the employer together with the line manager and human resources that ensures depressed employees are not unfairly discriminated against. A further useful accommodation would be to involve a mental health professional in the work environment to assist distressed employees and to create a plan in aid of performance of the job. This plan can also form part of the Professional Development Plan (PDP).

More fundamentally, I believe, it is up to the employee to communicate as to what would be his preferred style of communication when it comes to receiving instructions and work from his manager. The relationship between the manager and employer is reciprocal. An effort should be made to ensure communication occurs from both sides. Of course, this might not be so straightforward since depression is associated with difficulties in communication. I take up this point in the next section.

One objection to the account that I have given in this section is that the kind of specialised attention that I claim must be given to depressed employees is a kind of discrimination against those who are not depressed. For example, having a tailor-made scorecard for a depressed employee could be seen as discriminatory or showing favouritism. A short rebuttal here is that treating people fairly does not mean treating them in exactly the same way. The person-specific scorecard is justifiable by law and in terms of a reasonable accommodation for disability.

[117] https://www.highspeedtraining.co.uk/hub/managing-adhd-in-the-classroom/#:~:text=Make%20Tasks%20Interactive,important%20role%20in%20the%20classroom.

Section 6 - The inability to engage and communicate with others

The fourth inability correlated with depression relates to social interactions, communication, and engagement. For example, depressed people often withdraw from others, and they might be irritable. Naturally, this can put a strain on relationships. So it is necessary for me to say something about how a depressed employee can be accommodated when it comes to interactions with colleagues or clients of the employer. Of course, job descriptions vary considerably, and so my discussion is focussed on some commonplace examples.

How an employer can accommodate a depressed employee is for all staff especially the line manager to be upskilled by being educated on mental illness. Education may look like scheduling training or talks with staff on a regular basis about what is mental health and what is mental illness. Employers can send out communication in a summarized format with helpful contact numbers or help lines that assist when employees are distressed. An information e-booklet of the As to Zs on mental health could also be created that is essential a survival guide for all employees when it comes to looking after themselves. The booklet could also be updated regularly to stay up to date on current affairs and to break myths when it comes to depression and medication.

The reason for this is so that the line manager is adequately aware of how to deal with a depressed employee. This same reasoning is applicable to any staff member, the capacity in which you assist your colleague who suffers with depression will just be from an informed place and a collegial basis. In my view, all management should be upskilled so that their leadership style equips them with the ability to handle and create a safe space for employees suffering with depression. This point is specifically for employers who are able to send their management staff on the appropriate training courses. It is up to each employer to choose which is the appropriate course, service provider and the cost. However, I do believe, the following should be the goal: equipping the line managers with the confidence to have healthy conversations in supporting all their employees; increasing the awareness around mental health and to identify the signs and symptoms of depression; providing a good strategy or policy around supporting employee mental health especially depressed employees; and ensuring line managers have a level of responsibility in adequately supporting depressed employees.[118]

One objection here would be that it is the responsibility of the employee to work on his inability to communicate and interact at work. I personally do no think that it is the case. The responsibility is on both the employer and the employee. However, as I see things, the onus is mainly on the employee. Especially

[118] https://everymindatwork.com/mental-health-training-for-managers/

from a South African context the aforesaid context is against Ubuntu, having humanity for one another, "I am because you are."[119]

Another objection is that the demands placed on line managers might become excessive. If one is in charge of busy department, it might be difficult for the manager to take substantial responsibility for the mental health of employees. There is also the concern that managers are not usually trained psychologists, and so they might not have the ability to related to depressed employees in the right way. What makes this especially difficult is that depression can manifest in so many different ways. A triggering event for one person will not be the same as for another.

A response to this objection is that if the employee has disclosed his condition, the employer is obliged to make the necessary accommodations for the depressed employee. Another response might be to appeal to the reasonable cost test—reasonable accommodations are not required if this incurs excessive expenses. But setting this aside, it seems to me that if a line manager is overburdened with responsibilities, it is the employer's responsibility to assist him with the necessary capacity and support. The responsibility for accommodating depression does not have to fall upon one person alone.

Section 7 - The stigma that surrounds depression and the possible accommodations

I have now discussed depression from the perspective of the individual person, treatment, and therapy, and also discussed it from the perspective of changing the working environment. Next, I want to discuss the problem that is the stigmatization that surrounds mental illness. Although this is a problem for physical disabilities too, as when, for example, people feel ashamed of wearing hearing aids, it is especially acute for depression. For inasmuch as depression is stigmatised, a depressed person will actually become more depressed on account of the stigmatisation. The stigma of depression and the illness of depression feed into one another creating a vicious cycle, making it virtually impossible for a depressed employee to perform at maximum capacity. So we can I believe accommodate depression by changing people's attitudes and improving the institutional culture more generally.

Before I delve into this topic further. I think it is important to briefly understand the origin of the stigma that surrounds mental illness generally. It is a global issue that derives from ignorance or prejudice and is prevalent in low to middle income countries where there are large mental healthcare treatment gaps as well as linguistic and cultural barriers.[120]

[119] https://www.afnconference.org.au/ubuntu-i-am-because-you-are/
[120] https://waves-for-change.org/stigma-around-mental-health-in-black-communities/

Let me give an analogy. During apartheid, South Africa, black people were considered unintelligent, dirty and uncivilised by white people. This opinion was uninformed and the stigma towards black people is still felt today. This stigmatisation was at the time informed by ignorance and in my opinion greed so that the government at the time could obtain any land they wished.

In my view, re-education is needed to break the myth that being depressed means that you are weak, crazy or "abnormal" in any ethical sense (I have argued that depression is a disability, and on the normal function view, especially, this means that depression does imply a lack of statistical 'normality'). Given the requirement of non-discrimination interpreted positively, employers must make it their mission to create a culture of inclusion as an employee spends the majority of their time at work (at least 8 hours a day which equals to 40 – 45 hours a week[121]). In the event that an employee becomes depressed, it is the responsibility of the employer to create an environment that cares about its people. What I mean by caring includes normalizing the topic of depression by talking about it and educating all staff (by having virtual or face to face training with medical specialists or internal employees with the necessary skill). If you attend a workshop for mental health, you get discounted therapy for example) which through time breaks the stigmatization associated with all mental illness.

Let me unpack some of these suggestions further. The first is the requirement to create a culture of care. Even though an employee has a right to not disclose his depression it is important for an employer to do the work to ensure that there is room for open conversation and to understand that mental health is a priority. I have mentioned this point above, but it is important. The second is to incorporate policies focusing on mental health as well as embarking on education campaigns for all employees in respect of their right to mental health care hence decreasing barriers to adequate care.

From a personal perspective, dealing with depression every day is a struggle. I do not want my peers to treat me any differently, but the reality is that I am different. This is why there is a need for reasonable accommodation. If for example an instruction is given to me to do a given task, but it is not clear, it creates a triggering event for me. It is not that I desire to be perfect—however, I have been operating from a place of survival (and hence thinking that being perfect is possible) for so long that it takes me a bit longer to unlearn and relearn bad habits. So what may be a normal encounter of failure meant for learning and strengthening of an individual's character, is not in my case. I perceive it to be personal attack on my character and I blame myself. The correction of this chain of events from end to end takes time and practice. My time to self-regulate, that is process my emotions, is dependent on many factors. However outside the

[121] https://labourguide.co.za/employment-condition/working-hours-and-overtime#:~:text=The%20amount%20of%20normal%20time,hours%20per%20week%20normal%20time.

medical interventions available, empathy and understanding from the employer would make a big difference to me.

Section 8 - accommodating depression benefits everyone

One important argument for the kind of change in institutional culture that I recommend is the following one. Improving institutional culture for depression is good for every single employee and not just depressed employees. This is not the case for access ramps for the physically disabled or specific equipment designed to assist blind employees. A work environment in which managers were sensitive, who tried to help all employees with their levels of motivation and concentration, attempted to provide more clear instructions, and so on, would be beneficial for all employees. This links to the point that I made earlier: depression is holistic in that it affects every aspect of one's work performance. Conversely, improving work performance by creating a supportive environment that enables concentration, motivation, and so on, will benefit every staff member.

One may ask then what is the benefit to the employer? Well firstly, the employer has ability to now successfully and reasonable accommodate depression. And this is a matter of fulfilling legal and ethical duties. Secondly, improving the work environment to enhance motivation, concentration and communication benefit the employer in terms of skilled labour and larger profits.

Section 9 – Depression and disability: Pilots

In this section, I want to consider the requirement to accommodate depression through the lens of one specific example. This is the example of being a pilot. Doing so will help me to draw together the central parts of my argument and consider some difficult objections.

I have argued that depression is a disability. And if this is taken seriously, then a depressed person might not be able to do certain things relating to a job or do them to a sufficient level. In chapter 1 we considered this question in relation to an employee not being considered for the position of a pilot due to being blind. The employee's disability of blindness would place the flight crew and passengers in danger therefore not considering his application is fair and lawful. In this section, I want us to next consider whether an employee who suffers with depression but wants to be airline pilot can operate as a pilot. My discussion will be slanted to the United States for the simple reason that the controversy surrounding depressed pilots in this country is well known. However, similar points will apply also in South Africa.

To be eligible in the United States to become an airline pilot you need to be of good moral character, at least 23 years old, have a current commercial pilot license and instrument rating, pass the Federal Aviation Administration (FAA)medical exam and meet all the required training, flight hours and testing requirements.[122] For this research report, the only important requirement I want to delve into is the FAA medical exam. The goal of this medical examination is to ensure that the pilot and the passengers are safe. "There are many pilots that have health issues that are managed by a doctor. As long as you are staying on your medication and are completely upfront with what health issues you have, many of them can be accommodated."[123]

The FAA has listed some medical conditions that may result in a disqualification. Some of these relating to mental illness are bipolar disease, and personality disorder that is severe enough to have repeatedly manifested itself by overt acts and psychosis.[124] Depression and Major Depressive Disorder are not on this list. However, it must be noted that even if you suffer from a listed condition, you can still get a license as long as you can show that it is adequately controlled and to provide periodic reports to the FAA.[125] Of course, to say that it is adequately controlled would be to say that one is not currently suffering from this condition.

So we know that being a pilot comes with a lot a stress and some symptoms of depression can be concerning, such as the low levels of motivation and the inability to concentrate. I want to answer the aforementioned question about whether depressed pilots who are currently suffering from depression can be pilots in the affirmative.[126] I think all professions have stress, we just have to manage the good stress versus the bad stress. The FAA may however counter argue that preservation and protection of life is much more important than accommodating the pilot. And being a pilot is obviously more stressful in many other professions (people's lives are quite literally in one's hands). In this instance, one could argue for fair discrimination based on harm to human life being far greater than the needs of the depressed pilot. So, on this argument, it is fair in this instance to disqualify the pilot who is suffering from depression from flying due to his health condition (assuming this is not under control).

In response, it is important to note that the FAA still needs to provide support for the pilot's condition. This can be sourced in the FAA's policy and in particular through the FAA aviation medical examiner (AME). The AME does the medical assessment of the pilot to determine clinical stability for a minimum of 6 months. There are also only four types of medications that may be taken for depression: fluoxetine,

[122] https://everydayaviation.com/airline-pilot-requirements/
[123] Ibid
[124] Ibid
[125] Ibid
[126] https://psychcentral.com/depression/faa-still-stigmatizes-depression-mental-illness#looking-ahead

sertraline, citalopram and escitalopram. The assessment once done and passed by the pilot, he will be issued the specific medical certificate.[127] But what happens if the pilot does not manage to get his depression under control?

It is important to notice that all pilots will naturally suffer with issues of concentration, lack of sleep and fatigue. This would affect a pilot's ability to fly.[128] According to a 2016 study involving 65 pilots, suicide involving aircrafts was a rare event, and other factors affecting pilots besides mental illness were legal, financial, work and relationship problems. The FAA guidelines according to clinical psychologist Ernesto Lira de la Rosa believes that preventing a pilot from flying due to depression is not correct and that it is far more concerning for a pilot experiencing sleeping difficulties, lack of concentration and fatigue than to experience depression. De la Rosa is of the view that it is better to ground a pilot for the aforesaid than a pilot experiencing feelings of worthlessness and guilt.[129] Of course, this view is likely to be contested for several reasons, some of which I have mentioned already.

In summary, my opinion on whether it would be unfair discrimination to not allow a depressed pilot to fly (even though he is receiving treatment, medicated but still struggling with suicidal thoughts) is that in this instance the discrimination is fair. My opinion would be the same even if the pilot were not depressed but suffered with unacceptable levels of fatigue, sleep deprivation, and lack of concentration. In other words, the effects of depression compound the difficulties that non-depressed pilots suffer, and which make it difficult to do their jobs.

Of course, it might be objected that depression is a cause of poor concentration, poor motivation, and so on. And what this means is that depressed pilots would be in a particularly difficult position, since their condition exacerbates the normal difficulties experience by pilots. In 2010, an airline pilot crashed the aircraft while landing due to residual sleepiness and impaired judgment. 158 out of the 166 people on board died as result of the crash.[130] I think the onus on pilots is far greater than many other professions because of the potential harm to human life. Due to this, the standard by which we judge pilots is far greater than other professions where the impact on human life is minimal.

The further opposing argument to the above of course is that we can disregard statistics and highlight that the most important factor when dealing with depressed pilots is the passengers. Protecting the passengers

[127] https://psychcentral.com/depression/faa-still-stigmatizes-depression-mental-illness#mental-health-policies
[128] Ibid
[129] Ibid
[130] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8451537/

outweighs the need of a depressed pilot to fly. Even if there was only one plane crash due to a depressed pilot committing suicide is enough to prevent him from flying. It is not fair nor logical to accommodate a depressed pilot when the passengers are collateral damage. On other hand, these conclusions are quite compatible with saying that an airline needs to create a culture of care to tackle the stigma of depression so that more pilots seek professional help.

In summary, then, my argument that depression is a disability that must be accommodated within the workplace in order to fulfil the obligation not to discriminate unfairly is compatible with recognising certain limits (this is, of course, implied by the term “reasonable accommodation”). In some cases, such as being a pilot, the duty to preserve human life can justify keeping pilots grounded until they have their depression under control. If this does not happen, then pilots might have to be moved to different jobs in which error is not a matter of life of death. Accommodating disability is not always possible—therefore, the failure to do so is not always culpable.

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