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Depression, dismissals and disability: depression is increasing in the South African workplace. Do the Labour Relations Act's dismissal categories provide depressed employees with adequate protection from unfair dismissals? [...]

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Depression, Dismissals and Disability

Depression is increasing in the South African workplace. Do the Labour Relations Act's dismissal categories provide depressed employees with adequate protection from unfair dismissals? And does Depression fall within the ambit of the definition of Disability found within the Employment Equity Act?

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Chapter 1

INTRODUCTION

(a) Problem Statement

Depression is a growing worldwide health concern in the workplace. Both the United Nations and the International Labour Organisation have highlighted this mental disorder as one of the primary health problems in the international workplace. South Africa is no different as the local workplace is increasingly affected by depression.

However, what is depression? How is depression dealt with in terms of the Labour Relations Act (LRA) dismissal categories,[1] and is the protection offered against unfair dismissals adequate? And whether depression is a disability. To answer these questions, the LRA dismissal categories,[2] the definition of disability found within the Employment Equity Act (EEA),[3] The Code of Good Practice on Disabilities and Dismissals, and the Constitution are analysed. International conventions and guidelines as well as the American with Disabilities Act are included in the discussion.

(b) Significance Of This Research

Depression is a psychological disorder that is affecting, not only the South African workplace, but workplaces abroad as well. Depression has become so common that it has been referred to as the 'common cold' of mental illness and has become the world's number one public health problem.[4]

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[1] Act 66 of 1995.
[2] Section 188, namely incapacity of ill health or poor performance, misconduct and operational requirements.
[3] Act 55 of 1998. Section 1.
[4] Kimberly Bender & Rich Furman 'The Social Problem of Depression: A Multi-theoretical Analysis' (2003) 30 *Journal of Sociology and Social Welfare* 123 at 123.

Depression has become a costly illness among the South African workforce, as the employer, and eventually the country's economy, lose millions of Rands each year as a result of the loss of productivity and absenteeism.[5] To compound the problem further, the negative stigma attached to depression prevents the employees from disclosing their illness to their employers for fear of dismissal.

South African labour legislation does not provide a clear and concise method for addressing the issue of mental illness, namely depression, in the workplace. Abroad in countries such as the United States of America and the United Kingdom, legislation has been put in place to govern persons with mental illness in the workplace. This came about as a result of the International Labour Organisation's recommendations based on their findings that depression is a growing problem in the 1980's,[6] further highlighted by their most recent survey that found that one in five workers suffer from psychological disorders and only six percent seek treatment.[7]

The World Health Organisation (WHO) and the International Labour Organisation (ILO) have both recognised that mental health problems are among the most important contributing factors to disease and disability in the workplace worldwide.[8] Estimates in the United States of America (USA) show that 10 per cent of workers will develop an episode of depression serious enough to require time off from work.[9] 25 per cent of workers in the United Kingdom (UK) have psychological disorders of which the most common is depression.[10] In the European Union (EU), 20 per cent of the adult working population suffers from a psychological disorder, most common also being depression.[11]

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[5] Pieter Coetzer, Chief Medical Advisor for Sanlam, (2007), *Sanlam's Life Stats for 2007*, personal communication received on 8 July 2008; AIC Insurance (Algoa Insurance Company Limited) is a South African insurance company that underwrites absenteeism risk and provides short and long-term illness and temporary disability benefits, available at *http://aicinsurance.co.za/?page_id=4*, accessed on 3 August 2008.

[6] Gaston Harnois & Phyllis Gabriel 'Mental Health and Work: Impact, Issues and Good Practice', *Geneva: World Health Organisation*, (2000) at 32, available at *http://www.who.int/mental_health/media/en/712.pdf*, accessed on 1 July 2010.

[7] Elif Kaban 'Gloom and doom at work on the rise – survey', *Reuters Internet Supplement*, 10 October 2000. Available at *http://www.iol.co.za/index.php?set_id=1&click_id=31&art_id=qw971155381875M534*, accessed on 3 August 2008.

[8] Harnois & Gabriel op cit note 6.

[9] Yuiko Fujimori, Takashi Muto & Keiko Suzuki 'Characteristics of an external employee assistance program in Japan'(2004) 54 *Occupational Medicine Journal* 570.

[10] Ibid.

[11] Ibid.

This body of work will be investigating depression and why it is a problem in the South African workplace. This question will be addressed through reference to research conducted on depression in the workplace, both locally and abroad, as well as the use of statistical results concluded from various studies. The next step is then to evaluate if adequate protection against dismissal is afforded to the employees with depression during the period in which they are temporarily unable to perform to the required standard.

Due to a lack of funding in mental health in South Africa, there is a lack of resources.[12] Thus the first problem encountered is the distinct lack of valid data available on mental health, especially depression in the workplace.[13] The data that is available is provided largely by medical insurance companies and corporate absenteeism management companies which estimate the quantum of money lost due to various factors, including the effects of depression, absenteeism and low productivity, as well as the pay-outs for medical expenses to combat this illness.[14]

Thus, the main question addressed is whether South African labour law, namely the LRA EEA, the Basic Conditions of Employment Act,[15] the Constitution and common law principles provide a solution to this problem. More specifically, the forms of dismissal (dismissal categories) permitted in the LRA will be discussed, which include: incapacity, misconduct and operational requirements.[16] Automatically unfair dismissals[17] will also be discussed in light of an employee who is dismissed due to his or her mental disability, namely depression. A brief conclusion will then be drawn as to whether South African Labour Law has adequately provided a solution to the growing problem of depression in the workplace.

[12] South African Depression & Anxiety Group 'Improving Mental Health in Developing Countries: South Africa as a Case Study' available at http://www.sadag.co.za/index.php/Mental-Illness-SA/IMPROVING-MENTAL-HEALTH-IN-DEVELOPING-COUNTRIES.html, accesses on 23 August 2010.
[13] Ibid.
[14] Coetzer op cit note 5. AIC Insurance op cit note 5.
[15] No. 75 of 1997.
[16] S188 LRA.
[17] S187 LRA.

International law and foreign law, such as United Nations (UN) conventions and guidelines and ILO conventions and guidelines will be discussed, as well as an examination into the USAs Americans with Disability Act[18] (ADA) will be done with regard to Title 1,[19] disabilities in the workplace.[20] These bodies of legislation are to be taken into account when interpreting the various bodies of South African employment law, as this is required by the Constitution and LRA.[21] International and foreign trends will then be considered to determine their applicability in the South African context. Upon reaching a conclusion, recommendations will thus be made as well as a brief discussion on the insights that South Africa can gain from the ADA.

To accomplish this task, bodies of legislation, textbooks, case reports, journal articles as well as internet research will be used to gather the necessary current information. The research will thus be mainly based on a study of the literature which will then be critically analysed. The research methodology that will be employed will thus be interpretative. The applicability of the principles applied locally as well as internationally in the South African context will be determined. The research process that will be used will be qualitative as it is interpretive in nature.

In researching the dismissal categories found in the LRA, the conclusion was drawn that neither incapacity, nor misconduct nor operational adequately deal with an employee suffering from depression. The reason for the dismissal is either the lowered performance standards or the misconduct committed as a result of the manifestation of the symptoms of depression. Although these are all valid substantiations for dismissals, they do not address the growing issue of depression in the workplace. This is because there is no set guideline for dealing with dismissal and thus it is ignored.

However, the best solution available in South African labour law to address the growing problem of depression in the workplace is found in the EEA. The EEA provides a definition of

[18] Of 1990.
[19] Title 1 of the ADA is a subchapter of the statute that is applicable to employment.
[20] European Union Guidelines will be looked at briefly in Chapter 6 as it was influential in achieving a universal definition of disability.
[21] Section 39 of the Constitution and Section 3 of the LRA.

disability, in which depression meets all the requirements contained in the mental element of the definition. The result is that depression gains the protection that is afforded to disabilities.

The advantage of depression falling within the definition of disabilities in the EEA is that the employee is afforded more substantial protection from dismissal as the Code of Good Practice: Disabilities (Dismissal Code) applies. This Dismissal Code deals exclusively with disabilities thus addressing what responsibilities are imposed upon the employer, such as reasonable accommodation, but also under what circumstances may the employee be dismissed.

An employee suffering from depression will then gain guidance and protection, not only from the LRA, namely in terms of S187,[22] the EEA, the Code of Good Practice: Disabilities (Disability Code), but thus also, and most importantly, from the Constitution's antidiscrimination clause.[23] This approach will also be in line with international and foreign legislation. The protection given to the depressed employee if classified as a disability is far more comprehensive than under any other form of dismissal.

Both the South African Constitution and the LRA require that international law be taken into account when interpreting either body of legislation. The UN and ILO all produce international law guidelines for all member states.[24] The United States of America, who is a member of both bodies, legislated the ADA, which was based on the foundations these law making bodies provided. Thus, the ADA was chosen as a sample of foreign law from which to gain insight, as the USA has far more research available on disabled employees, namely depressed employees than South Africa and most other countries.

The ADA provides more protection to disabled employees than the current legislation in South Africa because the act deals exclusively with disabled employees and what must be expected by both the employer and the employee. This expectation requires a more active role by the parties, and as a result prevents arbitrary dismissals by the employer as well as abuse on

[22] S187 of the LRA addresses the issue of automatically unfair dismissals, of which disability is one of the listed grounds by which employers cannot dismiss an employee. Further discussed in Chapters 5 and 8.
[23] Section 9.
[24] South Africa is a member of both the United Nations and the International Labour Organisation.

the part of the employee. Thus, employers, employees and the courts refer to the ADA, an extensive body of legislation, for guidance upon dealing with the dismissal of a disabled employee.

Having an act in South Africa such as the ADA would provide the much needed guidance and clarity regarding the requirements that both parties must heed. The closest South Africa has to the ADA is the EEA and the Disability Code. However, the EEA only provides a definition for disability and the shortfall of the Disability Code is that it is merely a guideline, and not law.

The Constitution and LRA provide that no one may be discriminated against on the basis of their disability. However, the courts are unsure of how to address the issue of an employee suffering from depression as there is no clear category into which depression falls. This results in the dismissal of an employee with depression being dealt with as it is presented, as either an incapacity, or misconduct or operational requirement. However, there seems to be a growing trend in the courts to refer to depression as a disability.[25] But, they do not apply it as such.

The problem that has been posed is thus of vital importance to answer as it will provide, employers, employees and the courts with a guideline of which to follow and consistently apply when addressing the issue of dismissing an employee with depression. This also places the employee in a position to determine what is required of the employer as well as of themselves in order to gain the protection afforded in terms of labour legislation.

(c) Chapter Breakdown

Chapter 2: Research Methodology.
A review of the research methodology used in the research of this dissertation.

Chapter 3: Literature Review.
A review of the literature used in the research as well as a brief discussion of the main points offered by the various main authors.

[25] *Strydom v Witzenberg Municipality* (2008) No.C558/2006 ZALC 68. Discussed further in Chapter 6.

Chapter 4: What is Depression and what is its relevance within the South African workplace.

This chapter comprises of two parts. The first part addresses the question of what is depression by explaining the psychological effects of the mental illness on the individual and their daily life. The second part discusses the effects that depression is having on the South African workplace by taking into account the statistics collected from various companies of economic loss as a result.

Chapter 5: Depression and Dismissals.

This chapter critically discusses the LRA dismissal categories, namely incapacity for ill health or poor work performance, misconduct and operational requirements, in light of the employer who wishes to dismiss an employee who suffers from depression. The shortfalls of the categories are discussed and thus the categories are found to be inadequate.

Chapter 6: Depression as a Disability.

This chapter offers a solution to the problem of how to address employees with depression. It is suggested that depression be recognised as a disability as it falls within the definition of disability found within the EEA and as a result would be awarded further fuller protection against unfair dismissals.

Chapter 7: Americans with Disabilities Act.

The USAs ADA is discussed and insights drawn that are applicable to the South African context.

Chapter 8: Recommendations and Conclusions.

Recommendations are made as to how South Africa can further develop their disability legislation in a manner which is applicable to the workplace. A final conclusion is then made summing up this dissertations posed question and its findings, as well as the proposed solution and insights gained.

Chapter 2

RESEARCH METHODOLOGY

This body of work will answer the proposed questions, as to whether nor not adequate protection is afforded to employees suffering from depression in terms of LRAs dismissal categories, as well as if depressions falls within the definition of disability in the EEA. Should the dismissal categories do not provide adequate protection from unfair dismissals, a suggestion will then be made that is par with international developments, as well as what insights may be gained from American law, namely the ADA, in order to further develop the relevant labour law applicable to employees with depression. A conclusion is drawn and recommendations then made.

The foremost challenge is the lack of research as there has been very little reported research conducted dealing specifically with psychological disorders, such as depression, in the Labour Law context in South Africa. The data that is available is provided largely by medical insurance companies and corporate absenteeism management companies which indicate the quantum of money lost due to the effects of depression, absenteeism and low productivity, as well as the pay-outs for medical expenses to combat this illness.[26]

Depression, as other psychological disorders, has a negative stigma attached to it,[27] thus depressed persons are hesitant to disclose their disorder to their employers for fear of discrimination and dismissal. This causes data collection to be very difficult. Due to ignorance about the disorder, the lack of funding in mental health in South Africa, and therefore a lack of resources results in very few studies being conducted on this topic or related topics.[28]

In answering the proposed question, the first step will be to address what depression is by reference to research conducted on depression, both locally and abroad. Statistical results

[26] Coetzer op cit note 5; AIC Insurance op cit note 5.

[27] S Atkinson & S Brown 'Anxiety and depression in the workplace: Effects on the individual and organisations' (2005) 88 *Journal of Affective Disorders* 209; *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) JOL 24187 (LAC)

[28] South African Depression & Anxiety Group op cit note 12.

concluded from various studies will be used to contextualise the gravity of the problem posed by the question. An understanding of depression will be gained, as well as of its direct effects on the South African workplace.

The next stage is then to evaluate if adequate protection against dismissal is afforded by the LRA to the employees with depression during the period that they are temporarily unable to perform to the required standard. This step is accomplished by way of a critically discussion on the LRAs dismissal categories, namely incapacity, misconduct and operational requirements.[29] The conclusion found is that they do not adequately protect depressed employees from unfair dismissals and a solution is suggested to recognised depression as a disability.

The definitions of disability proposed by the ILO, UN and EEA are then discussed as well as what protection an employee with a disability is granted in terms of the LRA, Constitution and the Disability Code. Foreign law is then considered, namely the USAs ADA in order to determine whether the suggested solution may be further developed in order for the EEA and Disability Code to be in line with foreign developments.

The ADA was chosen as opposed to the other aforementioned countries as it is the most developed body of legislation dealing with disabled persons. Although it is one of the most recent acts addressing disabilities, it offers a comprehensive body of law, based on UN and ILO guidelines. The research available on the topic of employees with depression is also far more extensive than in any of the above mentioned countries as well as invaluable insight that may be gained in order to further develop South Africa's own workplace disability legislation.

A conclusion will be drawn and recommendations will then be made as to how South African labour law can improve its labour laws when addressing and dismissing employees with disabilities, such as depression.

[29] Section 188.

Research Methodology Used

For years, though quantitative research has held the position of being the dominant scientific method, it is not the only method of research. Qualitative methodology is not unscientific as there are specific guidelines which are rigorous and valid. The choice of the method used thus depends on the research question being asked. In this dissertation, the qualitative methodology will be applied as the context is mainly interpretive in nature.

The research will be mainly based on a study of the literature. Thus, the research methodology that will be employed will be interpretative. I intend to analyse South African case law, legislation, journal articles and textbooks. I will also research international law and foreign law principles to determine international trends and guidelines on dealing with employees with psychological disorders such as depression. I will endeavour to determine the applicability of the principles applied locally as well as internationally in the South African context. The research process thus that will be used will be qualitative as it is interpretive in nature.

I will start by researching the psychological illness of depression. This will be done through the use of textbooks, journal articles as well as communications with the South African Depression and Anxiety Group.[30] However, my primary focus will be on South African LRA, EEA and Code of Good practice. My aim is thus to explore primary sources of labour law such as the Constitution, various sections of labour law legislation as well as case law. Then I will explore other primary sources of law such as international principles and determine their applicability and relevance to South African workplace disability law. I will also use textbooks and journal articles in my research as they are a fundamental source of secondary law. International law and foreign law are also taken into account when interpreting the various bodies of employment law, as this is required by both the Constitution and LRA.[31] I will gather this information by using libraries and the internet to access legal resource websites, such as Lexis Nexis and Westlaw.

[30] Resources found at http://www.sadag.co.za.
[31] Section 39 of the Constitution and Section 3 of the LRA.

Once the interpretive approach has been applied to the case law, bodies of legislation and academic commentary, a logical conclusion will be drawn. The distinct lack of data available on this topic and the lack of national statistics in South Africa limit the findings of this dissertation. However, the manner in which the law is to be applied, justly and equitably, does not depend on the lack of data on depression in South Africa.

The conclusion that has been drawn from the data collected thus far is that the most comprehensive category in which an employee with depression falls within is that of a disability. This is in line with foreign developments. The other forms of dismissal, such as incapacity, operational requirements and misconduct, do not deal with the problem of depression adequately as they are applied as an attempt to remedy the symptoms, ignoring the cause, and resulting in an unfair dismissal. The existing procedures are incapable of dealing with an employee who is depressed. By categorising depression as a disability, the employee is afforded more protection from dismissal.

Chapter 3

LITERATURE REVIEW

Depression in the South African workplace has been found to be increasing at a startling rate in every sector.[32] Despite this, there has been very little reported research dealing specifically with psychological disorders, such as depression, in the workplace context in South Africa. Compared with the number of studies in First-World countries, there appears to be little interest in or literature on the topic of psychological disorders in South Africa within the legal context.[33]

Depression is a topic that has been extensively researched and published abroad. In South Africa, the South African Depression and Anxiety Group (SADAG) ensure that resources are available by way of their website[34] and call centre. SADAG provides information ranging from the characteristics of depression, to its causes and treatment available.[35]

Psychology textbook writers *Weiten*[36] and *Barlow*[37] both emphasise the debilitating effect that depression has on an individual. Various researchers and scholars' agree. In 1999, *Blair*[38] published his findings that depression is severely debilitating and the most common mental health disorder affecting society. *Bender* and *Furman*[39] came to the same conclusion in 2003. They concluded that depression was found to possibly be fatal, and had escalated to become the

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[32] Lesley Burns 'Incapacity Matters – Depression in the Workplace' available at http://www.b-h.co.za/downloads/depression_article.pdf accessed on 6 May 2008.

[33] H Van der Bijl & P Oosthuizen ' Anxiety, depression, health attitudes and coping strategies in doctors and teachers in a Cape Town setting' (2007) 13 *South African Journal of Psychology* 46.

[34] *http://www.sadag.co.za.*

[35] South African Depression & Anxiety Group op cit note 12. South African Depression & Anxiety Group 'Does Depression Threaten Your Job: Personal Stigma of Depression in Corporate Life' available at *http://www.sadag.co.za/index.php/Depression-in-work-place/Does-depression-threaten-your-job.html,* accessed on 23 August 2010; South African Depression & Anxiety Group 'Pride and Prejudice: The Stigma of Mental Illness' available at *http://www.sadag.co.za/index.php/Mental-Illness-SA/STIGMA.html,* accessed on 23 August 2010.

[36] Wayne Weiten *Psychology: Themes and Variations* 5 ed (2001) ch 14.

[37] David. H. Barlow and Mark V. Durand *Abnormal Psychology: An Integrative Approach* (2005) ch7.

[38] Douglas A Blair 'Employees Suffering from Bipolar Disorder or Clinical Depression: Fighting an Uphill Battle for Protection Under Title 1 of the Americans with Disabilities Act' (1999) 12 *Seton Hall Law Review* 1347.

[39] Bender & Furman op cite note 4.

world's number one public health problem. An American judge held that depression is a misleading term for an extremely debilitating illness.[40]

Kaban, a reporter for Reuters, a United Kingdom-based news service and former financial market data provider that provides news reports from around the world to news media, reports on a survey conducted by the ILO that depression is the second most debilitating illness for employees after heart disease.[41] The Royal *College of Psychiatrists*[42] has found that depression adversely affects ones ability to work productively. This is equally evident in South Africa from the data locally available.

There is an abundance of literature published abroad, namely journal articles,[43] on depression in the workplace, all emphasising the urgency to better address the growing problem of depression. Surveys conducted by international bodies such as the UN, ILO and WHO have all found that depression is the second most debilitating illness for workers after heart disease and it is increasing. These bodies all provided guidelines to address mental disorders such as depression in the workplace.

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[40] *Weiler v Household Finan. Corp.*, (1994) No. 93 C 6454 WL 262175 at p.3

[41] Kaban op cit note 7.

[42] The Royal College of Psychiatrists 'Effects of depression on work' available at *http://www.rcpsych.ac.uk/mentalhealthinformation/mentalhealthproblems/depression/depressionintheworkplace.aspx*, accessed on 28 August 2010.

[43] Atkinson & Brown op cit note 27; Blair op cit note 38; European Disability Forum, *Proposal for a Directive Implementing the Principle of Equal Treatment for Persons with Disabilities*, 12 March 2004, available at *http://www.edf-feph.org/Page_Generale.asp?DocID=12536, accessed* on 23 July 2010. Fujimori, Muto & Suzuki op cit 9. Phyllis Gabriel & Marjo-Riitta Liimatainen 'Mental health in the workplace: Introduction' *International Labour Office, Geneva* October 2000, available at *http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang--en/WCMS_007910/index.htm*, accessed on 1 July 2010; Karen A Guiduli 'Challenges for the Mentally Ill: The 'Threat to Safety' Defence Standard and the Use of Psychotropic Medication Under Title 1 of the Americans with Disabilities Act of 1990' (1996) 144 *U. Pa. Law Review* 1149; Ron Z Goetzel 'The Business Case for Quality Medical Health Services: Why Employers Should Care About Mental Health and Well-Being of their Employees' (2002) 44J *Occupational & Environmental Medicine* 320. Harnois & Gabriel op cit 6; M Kempe 'S.O.S. Stress at Work' (2000) 37 *World of Work: an ILO publication* 4; Karen Mika & Denise Wimbiscus 'Responsibilities of Employers Towards Mentally Disabled Persons Under the Americans with Disabilities Act' ((1996/1997) 11 *J.L. & Health* 173; Johan Mynhardt & Bongani Nhlapo 'The Psychology of Work'(1998) 25 *UNISA Psychologia* 46. L Pechman 'Mental Disabilities in the Workplace' (1994) March *New York Law Journal* 1. Ashfords 'Brief Note – Does Disability Discrimination Law Protect Workers with Mental Illness? (2007)' available at *http://www.ashfords.co.uk* accessed on 3 September 2009; Lyndsay Swinton 'Dealing with Depression in the Workplace' available from *www.mftrou.com*, accessed on 6 August 2008; Lyndsay Swinton, is an experienced people manager and team leader and is Uncommon Knowledge's personal development and coaching expert. She offers a variety of management solutions for problems commonly faced in the workplace by means of training and books.

The first problem encountered, as previously mentioned, is the distinct lack of data available on depression in South Africa, much less in the workplace. The data that is available is a study conducted in 2009 in the Western Cape on depression. It was found that depression in rural areas was as high as 27 per cent and in an urban setting, between 25.2 per cent and 34.7 per cent.[44] *Burns,*[45] who is in practice as a claims consultant, has also conducted some research that has been published on the topic of depression in the workplace and has found depression increasing in every sector. Her article emphasises the need for clarity on how to address depressed employees in terms of South African labour law. *Kaplan*[46] published his study in the *South African Medical Journal,* he found that work related stress to be the most common cited major contributing factor to depression.

The *Pharmaceutical research & Manufacturers of America* have found that depression is the leading cause in absenteeism.[47] This is a fundamental finding as absenteeism causes huge losses to companies each year. *Goetzel,* published research he conducted that has shown that depressed employees are far more expensive than non-depressed employees, forcing employers to take on anywhere from 70 per cent to 147 per cent higher medical costs.[48] *AIC Insurance* published statistics in 2005[49] on absenteeism in South Africa concluding that the country's economy is losing as much as R12 billion a year due to absenteeism. In 2007, *Corporate Absenteeism Management*[50] published the results of their study which showed that 'sick absenteeism' was costing the country about R19 billion a year.[51]

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[44] M Tomlinson, Anna T Grimsrud, Dan J Stein, David R Williams & Landon Myer 'The Epidemiology of Major Depression in South Africa: results from the South African Stress and Health Study' (2009) 99 *South African Medical Journal* 367.

[45] Burns Op cit note 32.

[46] R Kaplan 'Guidelines to the Management of Disability Claims on Psychiatric Grounds: Issued by the South African Society of Psychiatry' (1996) 86 *South African Medical Journal* 646.

[47] Pharmaceutical Research & Manufacturers of America. 'Productivity Impact Model' available at *http://www.depressioncalculator.com*, accessed on 3 August 2008.

[48] Goetzel op cit note 43.

[49] AIC Insurance op cit note 5.

[50] Corporate Absenteeism Management Solutions (Pty) Ltd (CAMS) came into existence in February 2006. The business was previously a division of Algoa Insurance Company Limited (AIC). CAMS owns the risk management software (called ABSOLV) and rents or sells this software to various corporate users. These users then provide the sick absenteeism management consulting service to their clients.

[51] These statistics were recorded in 60 South African companies with more than 7 000 employees, over the course of a year. South African Press Association (SAPA) 'Sick Absenteeism Costs SA R19m a Year', *CAMS in*

Cases and textbooks offer various solutions to dealing with an employee who is ill from a medical perspective. However, as will be discussed, there are no clear laws regarding employees with psychological disorders who can continue to work once treated and therefore should not be dismissed arbitrarily. No literature has addressed this in any manner or form. *Du Plessis*[52] in her article touches the topic of depression by acknowledges the prevalence of depression in the workplace. However her emphasis is on psychiatric illnesses, and how they should be incorporated into the workers compensation framework, and not on depression and dismissals. It seems that depression not only remains unnoticed in terms of our law, but also in terms of our literature.

Although there are various sources on dismissal categories (incapacity, operational requirements, misconduct and automatically unfair dismissals), none of them address this grave problem. *Grogan* in his books (*Dismissal;*[53] *Dismissal, Discrimination and Unfair Labour Practice;*[54] *Workplace Law*[55]) offers an evaluation of the various dismissal categories but not in the context of an employee suffering from depression. Christianson[56] reviews the capacity dismissal and its history from a number of international bodies of conventions.

The same gap exists in *Du Toit et al*.: *Labour Relations Law*,[57] *Van Niekerk*: *Dismissal for Incapacity*[58] and *Van Niekerk et al*.: *The South African Law of Unfair Dismissals,*[59] None of these authors address the issue of depression in the workplace. However, *Basson et al.*: in

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the Media 14 February 2007, available at *http://www.camsolutions.co.za/sick-absenteeism-costs-sa-r19m-year-a-17.html.* , accessed on 23 July 2010.

[52] Du Plessis, Meryl. (2009) 'Mental Stress Claims in South African Workers' Compensation', *Industrial Labour Journal,* vol. 30, pp.1476 - 1480

[53] John Grogan *Dismissal* 1 ed (2004) ch7.

[54] John Grogan *Dismissal, Discrimination and Unfair Labour Practices* (2005) ch 14.

[55] John Grogan *Workplace Law* 9 ed (2007) ch 11.

[56] Marylyn Christianson 'Incapacity and Disability: A Retrospective and Prospective Overview of the Past 25 Years'(2004) 25 *Industrial Law Journal* 879.

[57] D Du Toit, D Bosch, D Woolfrey, S Godfrey, J Rossouw, S Christie, C Cooper, G Giles and C Bosch *Labour Relations Law: A Comprehensive Guide* 5 ed (2006) pp376 -574.

[58] Andre Van Niekerk 'Dismissal for Incapacity' (1991) 5 *Contemporary Labour Law* 52 .

[59] A Van Niekerk & P. A. K Le Roux *The South African Law of Unfair Dismissal* (1994).

Essential Labour Law[60] stated that depression may effect the employee and become debilitating. Unfortunately, that was all that was said on the issue.

Swinton[61] recommends that employers become aware of the problem of depression and adapt accordingly. Although, this has not been the case, as there has been no reported case law nor research dealing specifically with the issue of a depressed employee and into which dismissal category depression can fall. Depression, in case law, is either dealt with as a misconduct for time related offences, or incapacity in which the employee is medically boarded. However the trend is to consider depression as a disability, even though it is not dealt with as such.

Internationally, diverse countries such as the USA, Japan, the UK and even the EU) have enacted laws and guidelines addressing persons with disability in the workplace. In these various countries, depression is considered to be a disability.

Fujimori et al[62] conducted a study and released statistics showing the rate of depression in the USA, UK, Japan and EU. *Gabriel* and *Liimatainen*[63] in their article on mental health in the workplace for the International Labour Organisation, published the estimated loss countries such as the USA and EU suffered due to mental health. As a result, a number of articles have been written abroad addressing exclusively the issue of disability and depression in the workplace.

Due to the growing problem of depression in the workplace as well as the economic loss as a result, various UN conventions, such as the S*tandard Rules on the Equalisation of Opportunities for Persons with Disabilities*, adopted at the 48th Session in 1993. The International Labour Organisation Conventions *Vocational Rehabilitation and Employment of Disabled Persons* No. 159 of 1983 also addressed persons with disabilities in the workplace. The EU also released through their European Disability Forum, a *Proposal for a Directive Implementing the Principle of Equal Treatment for Persons with Disabilities* in 2004 addressing the same issues. The World

[60] A C Basson, M A Christianson, C Garbers, P A K Le Roux, C Mischke, E M L Strydom *Essential Labour Law* 4 ed (2005) ch 7.
[61] Swinton op cit note 43.
[62] Fujimori, Muto & Suzuki op cit note 9.
[63] Gabriel & Liimatainen op cit note 43.

Health Organisation has also released a *Global Strategy on Occupational Health for All*,[64] as an attempt to aid in addressing the problem.

South Africa is a member state of both the UN and the ILO, and thus has legislated the Code of Good Practice: Disabilities in order to address the same issues. However, this code is not an act, and as a result, disability law in South Africa is not as clear and developed as it could be. The USA has a very developed act addressing the issue of disabilities in the workplace. It is the Americans with Disabilities Act.[65] This act provides an extensive in depth analysis of what a disability is, including examples, what is required from the employer in terms of reasonable accommodation and dismissing an employee with a disability such as depression, as well as what is required from an employee in proving that he has a disability and what he is entitled to from the employer.

Harnois and *Gabriel*[66] emphasised the right of persons with disabilities to the same opportunities as others and to an equal share in the improvements in living conditions resulting from economic and social development. *Betten*, in his book, reiterates that the ILO prioritised the fundamental objective of equality of opportunity and treatment.[67] *Schiek et al*[68] comments on the European Disability Forum, emphasising that the definitions contained therein cover direct discrimination and discrimination by association, dealing with the person rather than the disability itself. *Rubins*[69] commentary on the Vocational Rehabilitation and Employment of Disabled Persons states that the intention is to place all disabled persons on an equal footing regardless of the nature of their disability. The South African Constitution in Section 9, also too provides for antidiscrimination against persons with disabilities.

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[64] World Health Organisation 'Global Strategy on Occupational Health for All' available at *http://www.who.int/occupational_health/publications/globstrategy/en/index.html,* accessed on 23 July 2010.

[65] of 1990.

[66] Harnois & Gabriel op cit note 6.

[67] Lammy Betten *International Labour Law* 1 ed (1993) ch 5.

[68] Dagmar Schiek, Lisa Waddington & Mark Bell *Non-Discrimination Law* 1 ed (2007) ch 1.

[69] Neville Rubin *Code of International Labour Law: Law, Practice and Jurisprudence . Volume II, Book I.* 1 ed (2005) 415 – 433.

Mika and *Wimbiscus*,[70] *Anderson* and *Will*,[71] and *Blair*[72] all provide commentary on the ADA, focusing on the requirement of reasonable accommodation.

This research is thus original as no reported literature has attempted to analyse the situation of employees who are suffering from depression when it is obviously a problem in the South African workplace. Although depression in itself is a researched subject and so are the dismissal categories found in the LRA, the two are yet to be researched on the effects they have on one other. Thus, this original body of work is necessary to begin to deal with the pressing issues of depression being the second most debilitating disease in the workplace, and the quantum of loss it is causing the South African economy each year and thus needs to be adequately addressed.

[70] Mika & Wimbiscus op cit note 43.

[71] Steven R Anderson & Jennifer H Will 'EEOC Proposes Revised ADA Proposed Regulations', *The Law Firm of Faegre & Benson LLP* 1 October 2009, available at *http://www.faegre.com/showarticle.aspx?Show=10296*, accessed on 23 July 2010.

[72] Blair op cit note 38.

Chapter 4

WHAT IS DEPRESSION AND WHAT IS ITS RELEVANCE WITHIN THE SOUTH AFRICAN WORKPLACE

Depression is increasing at an alarming rate[73] as universally, people are being exposed to stressors both at work and at home. South Africa is no exception. One simply has to note the high rate of incidents such as road rage, family killings and suicides to understand that all people, no matter their background, are struggling to cope with stress.[74] Stress has become a problem, not only in itself but as an onset for mental disorders. Research has revealed that stress directly contributes to the onset of depression.[75]

Depression has affected society throughout history 'till the present day. The biblical account of King Saul, and Homer's suicidal character of Ajax depict examples of major depressive disorders. Depression is seen throughout history in literary and medical arenas.[76] Over two thousand years ago, the Greek physician Hippocrates labelled it melancholia. The Greeks believed depression arose from a disturbance of the human body humours, specifically black bile. Great men such as the composer Tchaikovsky, Abraham Lincoln, Winston Churchill and Edgar Allen Poe all suffered from depression.[77]

Depression, it would seem, has been with us for a very long time. It now has become so common that it has been referred to as the common cold of mental illness. However, it can be fatal, and has become the world's number one public health problem.[78]

This chapter will be analysing the nature and characteristics of major depression in an attempt to better understand the illness that plagues, not only the South African workplace, but society as

[73] Weiten op cit note 36.
[74] Burns op cit note 32.
[75] Also Bipolar disorder and schizophrenia. Weiten op cit note 36.
[76] Bender & Furman op cite note 4.
[77] Paul Gilbert *Counselling for Depression* 1 ed (1993) ch 1.
[78] Bender & Furman op cite note 4.

a whole. The effect depression is having on, not only the South African workplace, but also the country's economy will also be analysed in order to gain an understanding of the gravity of this disorder and its effects on all South Africans.

(a) What is Depression?

Major Depressive Disorder, or what is commonly referred to as Depression,[79] is a psychological disorder, or more specifically, a mood disorder.[80] Psychological disorders are defined as psychological dysfunctions associated with distress or impairment in functioning that is not a typical or culturally expected response. A psychological dysfunction refers to a breakdown in cognitive, emotional, or behavioural functioning.

Depression is considered to be severely debilitating and among the most common mental disorders affecting society.[81] As previously mentioned, an American court held that 'Depression is a misleadingly mild term for an extraordinarily debilitating illness'.[82]

There are a variety of symptoms that characterises depression. They can be briefly divided into four categories: Motivation, Emotional, Cognitive and Biological.[83] Motivation includes feelings of worthlessness or helplessness, hopelessness about the future, loss of energy and interest, wishes for death, exaggerated anger, apathy[84] and the inability to make even the smallest decisions.[85] Emotional includes variation in mood during the day,[86] persistent and intense sadness, social withdrawal, inappropriate guilt, recurrent thoughts of suicide, noticeable personality changes, and shame. Cognitive includes difficulty concentrating, restlessness,

[79] Also referred to as clinical depression.
[80] Barlow & Durand op cit note 37. Other examples of psychological disorders are Phobias, Bi-polar, Anxiety and Schizophrenia.
[81] Blair op cit note 38.
[82] *Weiler v Household Finan. Corp.*, (1994) No. 93 C 6454 WL 262175 at paragraph 3.
[83] Gilbert op cit note 77.
[84] Leonard L Heston *Mending Minds: A Guide to the New Psychiatry of Depression, Anxiety, and Other Serious Mental Disorders.* 1 ed (1992) ch 1. Gilbert op cit note 77.
[85] George W Brown & Tirril Harris *Social Origins of Depression* (1982) ch 2.
[86] Heston op cit note 84.

negative ideas about self, the world and the future. Biological includes sleeping problems (insomnia or excessive sleeping) and irregular eating habits.[87]

As the depression progresses, there is a noticeable loss of interest in their personal appearance and grooming. Their bodily movements begin to slow down. They very rarely smile and have a demeanour of misery. Spontaneous speech is reduced with nearly no attempt to initiate conversation or engage in discussions.[88]

The depressed individual also becomes increasingly more inefficient. Loss of interest, decreased energy, inability to finish tasks, difficulty in concentrating, lack of motivation and lack of ambition all combine and contribute to the resulting impaired inefficient functioning of that individual and thus becomes substantially limited in his daily life. In many individuals, the first sign of depression is their inability to cope with their workplace tasks and responsibilities.[89]

Often, persons suffering from depression cannot account for their sad and negative feelings as these feelings have very little or no basis in reality and show very little or no response to reassurance, argument or emotional appeal. It is common place that persons suffering from sever depression blame themselves for events that they had nothing or very little to do with. They blame themselves for problems others around them may be having.[90]

In short, persons suffering from this disorder simply cannot perform their daily functions as they used to. They emotionally stop functioning, they behave in a manner which is out of character, such as not wanting to get out of bed in the mornings nor wanting to work or eat, when they enjoyed those activities in the past. Their rationalisations begin to change, becoming at times, irrational and they are no longer able to stabilise their emotions.[91] They seem to lose the will to live.[92]

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[87] Barlow & Durand op cit note 37; Gilbert op cit note 77.
[88] Joseph Mendels *Concepts of Depression* (1970) ch 2.
[89] Ibid.
[90] Ibid.
[91] Barlow & Durand op cit note 37.
[92] Weiten op cit note 36. Depression is a mood disorder. Mood disorders are marked by emotional disturbances of varied kinds that may spill over to disrupt physical, perceptual, social and thought processes. There are two basic

The pattern of persons with depression is that they feel the most depressed in the morning. However, as the day progresses, they begin to feel better, their mood improves, and often by the evening, their evening may be pleasant. This leads to some difficulty with diagnosis. The most profoundly depressed mood may be lifted by brief periods of normal or even elevated affect.[93]

The guide used by medical health professionals, both in South Africa[94] and abroad, in diagnosing mental health illness is the *Diagnostic and Statistical Manual of Mental disorders (DSM)* which was published by the American Psychiatric Association. The purpose of this manual is to provide mental health professionals with a uniform system of diagnosis. According to the DSM-IV,[95] more than fifty per cent of individuals diagnosed with major depression will eventually experience another major depressive episode and between twenty and thirty-five percent will experience a chronic (reoccurring) course.[96]

Individuals with reoccurring depression usually have a family history of depression, as opposed to those who experience single episodes.[97] From the first onset, the tendency is to improve with time and then to have a relapse of depression. Thus, persons who have experienced an episode are therefore at a higher risk for subsequent episodes, which may manifest at fairly regular intervals.[98]

A depressive episode may occur at any point in ones life-span. It may be triggered by life events. It can have an acute onset (within days or weeks) or come on gradually (over months or years).[99] Depression may be chronic (lasting over two years) or short lived (recovery in weeks or

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types of mood disorders, uni-polar and bi-polar. People who suffer from uni-polar disorder experience only one emotional extreme at the end of the mood continuum, which is depression.

[93] Heston op cit note 84.

[94] Seen used in various studies and by most if not all mental health practitioners. The DSM-IV was used in Tomlinson et al op cit note 44.

[95] DSM-IV-TR: a specific test to detect an extreme depressed mood state that lasts at least two weeks and includes cognitive symptoms (such as feelings of worthlessness and indecisiveness) and disturbed physical functions (such as altered sleep patterns, significant changes in appetite and weight) to the point that the slightest activity or movement requires an overwhelming effort). Barlow & Durand op cit note 37.

[96] Blair op cit note 38.

[97] Barlow & Durand op cit note 37.

[98] Heston op cit note 84.

[99] Gilbert op cit note 77.

months),[100] and can occur up to four times in an average lifespan.[101] The average duration of the first episode may be between four and nine months if left untreated.[102]

The Average age of the onset of depression is 25 years of age, and the age seems to be decreasing. In 1905, only 1 per cent of Americans below the age of 75 had developed depression. Currently, 25 per cent of persons between the ages of 18 and 29 have already experienced major depression. This age group is the worst affected as they are still young and beginning their chosen carers in various workplaces. It is estimated that 12 to 18 per cent of the world population will experience depression at some point in their lives as onset may occur at any age. For persons who reach late middle age, the estimate reaches as high as 30 per cent. Depression affects women twice as much as men, a fact which is yet to be explained.[103]

Another factor is that depression is often a secondary effect of another illness. It appears to exaggerate other unrelated problems, and of itself, it may be mild or escalate to an excessive anxiety that becomes disabling.[104] Severe depression is associated with low noradrenaline levels in the brain.[105]

However, without treatment, the outcome of an episode of major depression, whether chronic or short lived, is months of intense suffering. Persons suffering from depression are at 30 per cent greater risk of death than members of the general population of the same age. The increased risk is due to suicide.[106]

Depression is treated in many different ways including medication, ECT (Electroconvulsive Therapy) and therapy. The most common is treatment with antidepressants, a class of psychotropic medication. These medications control the levels of neurotransmitters in the brain by means of a variety of inhibitors.[107] The most common side effects include drowsiness,

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[100] Ibid.
[101] Weiten op cit note 36.
[102] Barlow & Durand op cit note 37.
[103] Ibid.
[104] Heston op cit note 84.
[105] Wilhelm Jordaan & Jackie Jordaan *People in Context* 3 ed (2003) ch 11.
[106] Heston op cit note 84.
[107] Tricyclics, monoamine oxidase inhibitors and serotonin reuptake inhibitors.

dizziness, dry mouth, blurred vision, nausea and headaches.[108] In addition to medication, depression may also be treated through various modes of therapy such as cognitive therapy (focuses on the thought process), behavioural therapy (to establish habits) and psychosocial therapy (developing social and vocational skills).[109]

Thus, even though depression is a life altering mental disorder, it is not untreatable. The best method in treating depression is in fact to be able to identify it early enough before depression overpowers daily activities. Thousands of individuals live normal lives being able to control their depression through medication and therapy.[110]

(b) Depression in Workplaces Abroad

The WHO and the ILO have both recognised that mental health problems are among the most important contributing factors to disease and disability in the workplace worldwide.[111] According to the WHO, every citizen of the world has a right to healthy and safe work and to a work environment that enables them to live a socially and economically productive life.[112] Estimates in the USA, UK and EU have shown that depression is not only present but on the increase in the workplace.[113] It is evident that depression is not only a problem being experienced in South Africa, but globally as well.

The European Mental Health Agenda of the EU has recognised the prevalence and impact of mental health disorders in the workplace in EU countries.[114] It has been estimated that twenty per cent of the adult working population has some type of mental health problem at any given time.[115] In 2000, a study conducted by the ILO of mental health policies and programmes affecting the workforces of Finland, Germany, Poland, United Kingdom and United States shows that the incidence of mental health problems is increasing, with as many as one in ten

[108] Guiduli op cit note 43.
[109] Ibid.
[110] Weiten op cit note 36.
[111] Harnois & Gabriel op cit note 6.
[112] World Health Organisation op cit note 64 at 6.
[113] Fujimori, Muto & Suzuki op cit note 9.
[114] Harnois & Gabriel op cit note 6.
[115] Ibid.

workers suffering from depression, anxiety, stress or burnout, which lead, in some cases, to unemployment and hospitalisation.[116]

The ILO found further that in the USA, clinical depression has become one of the most common illnesses, affecting ten per cent of working age adults each year resulting in a loss of approximately 200 million working days each year. As a result, the national spending associated with the treatment of depression was between US$30 to US$44 billion. In many countries, early retirement due to mental health difficulties is increasing to such an extent that it is becoming the most common reason for allocating disability pensions.[117] The costs are felt in terms of low productivity, reduced profits, high rates of staff turnover and increased costs of recruiting and training replacement staff. For governments, the costs include health care costs and insurance payments as well as the loss of income at the national level.[118]

(c) Why Is It Relevant To The South African Workplace?

The roman philosopher, Cicero, commented more than two thousand years ago, that the diseases of the mind are more destructive than those of the body.[119] This still holds true as disability issues concerning workers who are mentally ill or impaired are far more complex than those with a physical impairment.[120]

[116] These countries were chosen due to their different workplace organisations and welfare systems. In Finland, it was found that over 50 per cent of the workforce experiences some kind of stress-related symptoms, such as depression. In Germany depressive disorders account for almost 7 per cent of premature retirements and depression-related work incapacity lasts about two and half times longer than incapacity due to other illnesses. In Germany the annual volume of production lost because of absenteeism related to mental health disorders is estimated at over 5 billion DM annually. In the UK, each year nearly three out of every ten employees experience mental health problems, the most common being clinical depression as at any point, one in every 20 working-aged Britons is experiencing clinical depression. And finally, in Poland, clinical depression is on the increase in the workplace. Gabriel & Liimatainen op cit note 43.

[117] Ibid.

[118] Ibid.

[119] Pechman op cit note 43.

[120] Ibid.

(i) Statistics, Surveys and Studies

Since November 1997, the European Commission has been sponsoring a research project into mental health issues in several sub-Saharan African countries, which includes South Africa.[121] This is due to the fact that mental health issues are increasing dramatically, especially depression. In many developing countries, such as South Africa, the first problem encountered is the distinct lack of valid available data. To date, there is no national representative data on the prevalence of major depression in South Africa.[122]

In March 1998, 8.5 per cent of the South African Gross Domestic Product (GDP) was spent on the health sector and only 2.5 per cent was allocated to mental health. Furthermore 95 per cent of the mental health allocation is spent on institutional care. This neglect by the government has thus resulted in limited resources being available for research as well as the fact that there are only fifteen NGOs active in the mental health sector in South Africa.[123]

Another problem that arises in the South African workplace which contributes to the lack of data is the fact the depression is stigmatised.[124] An opinion poll in the Unites States of America held by the National Mental Health Association found that 43 per cent of Americans view depression as a personal weakness. This opinion is no different among South Africans.[125] In a study conducted in South Africa, it was found that only 8.2 per cent of people with depression had reached out for help to a psychologist,[126] a very low statistic for a disorder that requires help as soon as possible.

However, a recent study conducted by medical practitioners in the South Africa, published in the 2009 *South African Medical Journal* was conducted on depression amongst South Africans

[121] Tomlinson et al op cit note 44.
[122] Ibid. This study was conducted in Cape Town.
[123] South African Depression & Anxiety Group op cit note 12.
[124] South African Depression & Anxiety Group *Does Depression Threaten Your Job: Personal Stigma of Depression in Corporate Life* op cit note 35.
[125] Ibid; *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* op cit note 27, this case illustrated how the negative stigma impacted upon the employee with depression which lead up to an automatically unfair dismissal in terms of Section 187 of the LRA. The judgement echoed the employees words, in paragraph 6, describing the prejudice he felt, he said "…it was as if I had a 'contagious disease'."
[126] Tomlinson et al op cit note 44.

in the Western Cape. The study found that the prevalence of depression in rural areas was as high as 27 per cent and in an urban setting, between 25.2 per cent and 34.7 per cent.[127] Although these were not national statistics, it provides a guideline with which to work. With the statistical results being that high, it is of no surprise that depression has found its way into the workplace.

Research has shown however, that in comparison with other countries, South Africa has lower rates of depression than the United States of America, but higher than other African countries such as Nigeria.[128]

A survey conducted by the ILO has found that after heart disease, depression in the workplace is the second most-disabling illness for workers.[129] Symptoms of depression appear to be related to job dissatisfaction, work overload and inadequate remuneration.[130] The United Nations Labour Agency found that unclear instructions, unrealistic deadlines, lack of decision making, isolated working conditions, workplace surveillance and inadequate childcare arrangements also contribute to triggering depression.[131]

The ILO released the statistic that twenty per cent of workers suffers from psychological disorders and only six percent seek treatment.[132] Most psychological disorders are treatable through either medication or therapy. The majority of people suffering from psychological disorders live 'normal' lives, and are able to work and keep relationships. But, accommodation does need to be made, as often living with a psychological disorder requires a lifestyle change.[133]

Companies or Organisations simply cannot exist without their employees, and ultimately the strength of the workforce thus determines the strength of the organisation or company. No matter how sophisticated the organisation's infrastructure is, if the employees are not producing, the organisation suffers.[134]

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[127] Ibid.
[128] Ibid.
[129] Kaban op cit note 7.
[130] Van der Bijl & Oosthuizen op cit note 33.
[131] Kaban op cit note 7.
[132] Ibid.
[133] Weiten op cit note 36.
[134] Mynhardt & Nhlapo op cit note 43.

(ii) Depression In The Workplace

Depression in the South African workplace has been found to be increasing at an alarming rate in every sector,[135] and are prevalent in the workplace.[136] Depression is a leading cause of absenteeism and low productivity in the workforce.[137] Research conducted has shown that depressed employees are far more expensive than non-depressed employees, forcing employers to take on anywhere from 70 per cent to 147 per cent higher medical costs.[138] Depressed workers suffer between 1.5 and 2.3 more short-term disability days per 30 day span than non-depressed workers, and when they do work, they lose approximately 20 per cent of their productivity due to their depression-caused symptoms.[139]

Research conducted by AIC Insurance published in 2005[140] on absenteeism in South Africa confirms that the country's economy is losing as much as R12 billion a year due to absenteeism. In 2007, Corporate Absenteeism Management[141] published the results of their study which showed that the sick absenteeism was costing the country about R19 billion a year.[142] The average company experiences 4.5 per cent absenteeism on any given day. In certain companies, the figure is as high as 18 per cent.[143] The wellness of employees is thus vital if a company is to improve their bottom line[144] as looking after sick employees and managing sick leave abusers correctly saves the company money and is good business practice.[145]

Statistics between January and November 2007, released by Sanlam show that of the approximately R 142 million that was paid out for disability claims, 19.85 per cent was for mental disorders and approximately 80 per cent of that was solely for depression.[146] Depression

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[135] Burns op cit note 32;
[136] Du Plessis op cit note 52.
[137] Pharmaceutical research & Manufacturers of America op cit note 47.
[138] Goetzel op cit note 43.
[139] Ibid.
[140] AIC Insurance op cit note 5.
[141] CAMS op cit note 50.
[142] SAPA op cit note 51.
[143] HR Future 'Absenteeism reaches new highest in South Africa' available at *www.hrfuture.net/display_web_article.php?article_id=144&category_id=5* , accessed on 3 August 2008.
[144] Ibid.
[145] SAPA op cit note 51.
[146] Coetzer op cit note 5.

is thus clearly becoming a large and costly problem for companies in South Africa as it not only affects the company's bottom line, but also ultimately the country's economy.

A 1998 study published by the American *Journal of Occupational and Environmental Medicine* found that the effective treatment of depressed employees resulted in increased productivity gains that offset the cost of treatment.[147] Employers are thus more concerned with a solution to alleviate the problem of depression so as to increase productivity. The effect of depression in the workforce has become more apparent in the last decade as there has been a shift from physical-based labour to knowledge and analytical based labour.[148]

Thus, it is important to be able to identify when an employee is suffering from a psychological disorder such as depression and, when to intervene to provide a remedy. The earlier the depression is identified, the earlier the treatment is started and the quicker the depression is dealt with thus the less negative effects the employee and employer suffers. However, due to the negative stigma and the fact that the employer has no clear legislative guideline on how to address the issue of a depressed employee, the employee is dismissed and the depression ignored.

As Kaban noted, this early detection approach is advisable. Research conducted by the ILO found that bad management costs companies in two ways. First, in the form of a loss of productivity attributed to the poor mental health and the associated despondent attitude of the workforce resulting in absenteeism. Secondly, through a higher staff turnover and the associated costs of recruitment and training of new staff.[149] It is thus economically advisable for a company to take an interest in the mental health of its employees so as to reduce the losses they suffer due to absenteeism as a result of depression and adapt the working environment accordingly.[150]

However, in spite of this, a survey conducted by the Depression and Anxiety Support Group found that the benefits for employees are far lower for mental illness than for other medical

[147] Goetzel op cit note 43.
[148] Ibid.
[149] Kaban op cit note 7.
[150] Swinton op cit note 43.

conditions, and are in most cases completely inadequate.[151] This results in inadequate treatment of disorders such as depression, especially since the stigma is one of weakness. In order to attempt to alleviate both the employee of depression, and the obvious economic strain placed upon the employer, the USA has legislated certain health benefits, or as it is termed, parity legislation.[152] This piece of legislation, for example, has given depressed employees the ability to receive proper care, as the treatment for depression is constantly becoming more effective, and thus has been shown to increase the employees' productivity and reduce their absenteeism.[153]

(d) Conclusion

Major Depression has been affecting humanity for thousands of years and has become common place.[154] It is a psychological disorder that may affect any individual irrespective of race, class and gender, and has a devastating negative effect on the individuals' daily life activities. Depression may render the individual virtually helpless as they seem to lose their will to live. They appear to be miserable and often, in fact, are.

The average age of an initial depressive episode has dropped to 25 years old, an age that will clearly affect the workplace. After the first episode, the chance of a reoccurrence increases. An episode may be relatively short term or may last years. Depression without treatment may re-occur an average of four times in a lifetime. Twelve to eighteen per cent of persons will experience a depressive episode. Treatment is thus necessary to ideally avoid or reduce the months of suffering the individual has or will endure, as well as to ensure his productivity and participation within the workplace.

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[151] South African Depression & Anxiety Group *Pride and Prejudice: The Stigma of Mental Illness* op cit note 35.

[152] Such as the Mental Health Parity Act of 1996 § 712, 29 U.S.C. § 1185a (2006). This Act requires insurance companies and employers offering mental health coverage to provide parity between mental health and physical health coverage, meaning that they must treat the two benefits similarly to each other. Budget Office scoring of mental health parity has shown a less than one per cent increase in cost to employers. American Academy of Child and Adolescent Psychiatry, *Legislative Action 110th Congress* 2006 available at *http://www.aacap.org/cs/legislative_action_110th_congress/mental_health_parity_legislation_approved_in_senate_committee* accessed on 16 July 2010.

[153] Goetzel op cit note 43.

[154] Bender & Furman op cite note 4.

The ILO and UN Labour Agency have stated that depression is the second largest disabling disease in the workplace. There is very little data available on depression in South Africa, and much less the workplace. However, the data that is available indicates that depression is, in fact, on the rise. Companies cannot perform without employees. But if the employee is ill with depression, productivity drops and absenteeism increases. This inturn costs the company, and ultimately the country's economy billions of rands each and every year.

Therefore the earlier the depression is identified, the earlier the treatment is started and the quicker the depression is dealt with thus the fewer negative effects the employee and employer suffer. However, the employer needs to be a part of the early detection remedy and be aware of mental disorders affecting their workforce such as depression. The end result being a more productive employee and less money lost, as a whole, due to absenteeism.

Chapter 5

DEPRESSION AND DISMISSALS

The LRA governs labour law in South Africa. It is supplemented by various bodies of legislation such as the Employment Equity Act, the Basic Conditions of Employment Act, the Constitution and the Code of Good Practice.

The LRA and Section 23 (1) of the Bill of Rights contained in the Constitution provides that everyone has the right to fair labour practices. On this fundamental right, persons suffering from depression are entitled to both a procedurally and substantially fair dismissal. This fundamental right was also upheld in Section 188 of the LRA.

One must note that currently, specific statutes exist[155] that protect labour practices and thus must be applied before the Bill of Rights may be invoked.[156] Section 188 of the LRA, as mentioned above, provides that a dismissal will only be fair if it is motivated by a 'fair reason' and 'was effected in accordance with a fair procedure'.[157] This section makes it clear that fair procedure and fair reason are two separate requirements. Substantive fairness, or fair reason, has two parts, first is to establish why the employee was dismissed, then the second is to establish the adequacy of that reason. If that reason falls with the scope of Section 187 – automatically unfair dismissals, the enquiry ends, unless the employer has a solid defence. If the reasons relate to the capacity or conduct of the employer, or reasons not in Section 187,[158] the adequacy of the reason must be assessed on a case by case basis.[159]

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[155] Such as the LRA, Basic Conditions of Employment Act 75 of 1997 and the Employment Equity Act 55 of 1998.

[156] Iain Currie & Johan De Waal *The New Constitutional and Administrative Law* 1 ed (2001) ch 8.

[157] Section 188 (2) of the LRA.

[158] The grounds listed are, but not limited to, race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

[159] Grogan Op cit note 53.

Section 188 (1)(a) of the LRA provides three reasons through which employees may be dismissed.[160] They relate to the conduct (or misconduct) and incapacity of the employee, and the operational requirements of the employer. This classification thus determines the forum in which the dismissal disputes are resolved, and determines the principles that must be applied when deciding if the dismissal was in fact fair.[161] In order for a dismissal to be fair, the concept of fairness requires a correlation between the seriousness of the employees conduct or incapacity (substantive requirement) and the employer's action (procedural requirement).[162]

Thus, this chapter will be discussing the various forms of dismissals found within the LRA, as mentioned above. These forms will then be critically analysed with regard to the extent of protection they in fact offer and their applicability to an employee who is suffering from depression. Case law will also be looked at as to determine the trend of the courts when addressing the problem of depressed employees.

(a) Incapacity

When an employee enters into a contract of employment, there is an implied agreement to work according to a reasonable standard set by the employer. If the employee fails to meet the standard, the employer is entitled to terminate the contract.[163] Terminations for this reason are known as dismissal for incapacity, and are said to be a 'no fault' dismissal,[164] as the incapacity arises from a lack of skill or physical or mental ability. This form of dismissal is essentially the employers legitimate loss of confidence in the ability of the employee to perform in accordance with the contract of employment as the employee cannot perform their work to the standard set

[160] Based on the guidelines in Article 4 of the ILO Convention 158 of 1982 it sets out three broad reasons for a fair dismissal: 'The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service'.

[161] Grogan op cit note 53.

[162] Ibid.

[163] *Friedlander v Hodes* 1944 CPD 169*; Nadamase v Fyfe-King* 1939 EDL 259; *Negro v Continental Spinning & Knitting Mills (Pty) Ltd* 1954 (2) SA 203 (W).

[164] Grogan op cit note 53.

by the employer.[165] Thus the duty to perform ones work may also be breached if the employee is physically present but mentally absent.[166]

Incapacity is divided into two categories, which are: poor work performance and ill health or injury. The LRA does not distinguish betweens the forms of incapacity; this distinction is drawn in Code of Good Practice: Dismissals (the Dismissal Code). Although these forms imply that the employee is unable to perform as required, they are two very different concepts. Poor work performance by the employee may be due to inadequate training, ability, skills, knowledge or simply unreliable or outdated machinery.[167] Ill health or injury refers to a temporary or permanent injury or accident (injury), or a physical or mental impairment (ill health). Poor work performance thus differs from ill health or injury as with the latter, the employee would be incapable of performing to the required standard as a result of their illness or injury, not because they merely did not measure up to the performance standard.[168] Both these forms require the dismissal to be substantively and procedurally fair.

(i) Poor Work Performance

Item 9 of the Dismissal Code addresses the issue of an employee who is not performing as required. This item encompasses a three stage enquiry. First, it provides that in order for an employer to dismiss an employee for incapacity, namely poor work performance, the employer must prove that a standard exists and that it is in fact reasonable, then proof is required that the employee did not meet that standard.[169] The crucial question to be answered in the enquiry is whether the said standard is objective and whether the employee was aware, or should have reasonably been aware of the standard.[170]

[165] Van Niekerk op cit note 58. *FAWU obo Meyer v Rainbow Chickens* (2003) 2 BALR 140 (CCMA).
[166] Grogan op cit note 53; Grogan op cit note 54.
[167] Basson et al op cit note 60.
[168] Item 11 of the code of Good Practice: Dismissals; Christianson op cit note 56.
[169] Grogan op cit note 53. Christianson op cit note 56.
[170] Basson et al op cit note 60.

Secondly, Item 9 requires that the employee be informed of their deficient performance as well as then being given a reasonable time to improve. The arbitrator in *A-B v SA Breweries*[171] held that although the employer is entitled to set standards, the courts will intervene when these standards are grossly unreasonable. Thus the performance standard is central to any dismissal for poor work performance.

Thirdly, Item 9 emphasises that a dismissal should only be a remedy of last resort. No employee may be dismissed without first being made aware of their poor work performance through consultation and given a reasonable period to improve.[172] First, the appropriate instruction, training, guidance and alternative work must be offered. Then, if this is unsuccessful, reasonable accommodation must be made. Once the employer has done all that is expected and to no avail, then dismissal may be the only appropriate sanction.

When applying the three stage enquiry discussed above to a situation where an employee has depression, one will find that the employee fails at each stage. In the first stage, the employee is aware of the performance standard when he begins his employment as there is an implied agreement to work to a reasonable standard. The second stage requires that the employee be made aware of his drop in performance. Upon the employer bringing to the attention of the employee his drop in performance level, as much as the employee expresses desire to improve, he cannot. The employee lacks all motivation, which will worsen as his condition progresses. The result is decreased productivity which results in the performance level dropping further as he loses all interest in activities which he once enjoyed.

The third stage requires the employer to provide training to the employee, alternative work or reasonable accommodation. If the drop in performance is due to the lack of training, or boredom in the same job or an accommodation due to a lifestyle change, then the performance level should increase. However, unfortunately, when dealing with an employee with depression, more than likely, none of the suggestions will produce the desired result as he is no longer motivated to work nor has interest in his work, and thus all attempts will be in vain.

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[171] (2001) 22 ILJ 495 (CCMA).

[172] Also upheld in *Unilong Freight Distributors (Pty) Ltd v Muller* (1998) 19 ILJ 229 (SCA)*; A-B v SA Breweries* (2001) 22 ILJ 495 (CCMA).

Therefore, one will find that the employee fails the enquiry and thus is dismissed as there is no other option left to the employer. The ultimate conclusion will be that depression falls through the cracks as it is not identified and dealt with effectively as there is a negative stigma attached to depression resulting in only a few, if any, employees disclosing their depression to their employers as they fear prejudice.[173] However, the employers are not equipped to identify depression.[174] Thus the same outcome will occur to the next employee with depression in the workplace as they are unable to perform up to the required reasonable standard.

Therefore, depression cannot be dealt with under incapacity for poor work performance as it will pass unnoticed and thus result in an injustice in the dismissing of an ill employee. This is because the cause of the poor work performance, which is the manifestation of the depression, is not addressed adequately. When the employee is made aware of his decreasing performance level, the employee lacks the mental ability to address this decrease in his productivity within the time period given.[175] This results in the employer having no other option than to dismiss the employee. In the end, an incapacity dismissal for poor work performance does not deal with the growing problem of depression in any manner or form, it merely addresses the symptoms of the depression, the poor work performance, and not its cause.

(ii) Ill Health or Injury

Ill health or injury is the second category of dismissal under the incapacity heading. Item 10 of the Dismissal Code deals with substantive and procedural fairness where the employee's incapacity is due to illness or injury. Item 11 sets out the guidelines that must be followed in order to dismiss the employee. The guidelines provided in the Dismissal Code will be looked at in the context of an employee who is suffering from depression, to determine if depression is better dealt with as incapacity due to ill health or injury.

[173] Swinton op cit note 43.

[174] "It is easier to understand the limitations imposed on a person who suffers the amputation of a limb than a person who suffers from depression as the former is so physically obvious and more easily of a measurable loss to the medical and psychological layman." Burns p. 2 op cit note 32.

[175] Mendels op cit note 88.

Item 11 of the Dismissal Code entails various factors which must be determined when considering a dismissal for ill health or injury. The factors include: ascertaining whether the employee is capable of performing the work for which he was employed; if the employee is unable to work, then the extent of his inability to perform his duties must be determined; whether the employee's duties can be adapted and the employee accommodated, when reasonable, to continue his duties; and finally if the employee cannot be placed in his former position, the employer must ascertain alternative work, even at a reduced salary, if available.[176]

Only once the above factors are considered, may the employer conclude that there is no other option but to dismiss the employee. It is fair to dismiss a disabled employee only when there is no prospect of their recuperation in time during which the employer can cope without suffering significant loss as a result of the employees' absence. Thus, dismissals for ill-health or injury are akin to dismissals for the employers' operational requirements.[177] Thus the onus rests on the employer to prove that the employee is in fact incapacitated and cannot work and thus that their dismissal would constitute a substantively fair dismissal.[178]

When applying these guidelines to an employee who is suffering from depression, the employee is afforded a little more protection then if he is dealt with under incapacity for poor work performance. Depression is not an injury but rather a state of ill health. Depression is a temporary psychological disease affecting ones mental health thus falling under the category of ill health as oppose to injury.[179]

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[176] Upheld in *Gostelow v Datakor Holdings (Pty) Ltd t/a Corporate Copolith* (1993) 14 ILJ 171 (IC) which provides that an alternative position need not be especially created; *Anthony v Telkom S.A* (2005) ARB Case no. ECPE959-04.

[177] Grogan op cit note 53.

[178] *Hoffman v SA Airways* (2000) 21 ILJ 2357 (CC).

[179] In both cases of *Naidoo v Old Mutual Healthcare (Pty) Ltd* (2004) ARB Case no. WE8760-03 and *Anthony v Telkom S.A.* (2005) ARB Case no. ECPE959-04 the courts dealt with depression as an incapacity through ill health. In the *Naidoo v Old Mutual Healthcare (Pty) Ltd* , the courts just placed depression under the heading for ill health then no longer addressed it, thus allowing it to slip through the proverbial crack as it was dealt with as if it were any other ill health matter. The cases of *X v Elvey International (Pty) Ltd* (1995) 16 ILJ 1210 (IC) and *Rikhotso v MEC for Education* (2005) 3 BLLR 278 (LC), held that not only is physical ill health or injury relevant, but also mental illness or stress that may result in an employee's incapacity for a period of time. The court also held that incapacity due to mental illness is temporary as when medicated correctly, the employee can in fact perform his duties. Although the court did not specifically which mental illnesses it was referring too, the characteristics are those of depression.

Upon applying the first requirements of Item 11, one can conclude that the employee is in fact not, at that point in time, capable of performing his work. This is as a result of the effects of depression on the individual. He loses the will to do the activities he once enjoyed or did at a reasonable standard, and no longer has any motivation or interest in performing his duties. Thus at that point, he is temporarily incapable of doing his work. This requirement merely assesses the extent of the capability of his work performance at that point in time and not the cause of the lessening performance.

The enquiry then moves on to the second part, which places an onus on the employer to attempt to aid the employee. The employer is required to determine the extent to which the employee can perform as well as adapt either his work environment or his duties, or to provide alternative work. This is termed as reasonable accommodation. Reasonable accommodation is defined as any modification or adjustment to a job or to a working environment that will enable a person from a designated group to have access to or participate or advance in employment.[180] Reasonable accommodation could well provide the depressed employee with a certain amount of protection, as the employer is required to determine the extent of the performance ability, provided one of two situations occur. First, the employee knows he is depressed and discloses it to his employer. The problem, however, is that the negative stigma attached to depression plays a role as to whether or not the employee wishes to disclose his illness to his employer.[181] Secondly, the employer recognises that either the employee is depressed or that the employee is not well and directs him towards professional help, which would ideally identify the problem of depression.[182]

If the depression is caused by the work itself, then the solution proposed in Item 11 of alternative work offered or accommodation would possibly solve the problem. However, if the cause of depression is something other than work, when the employee returns to full health, he finds himself in other circumstances regarding his work which he may or may not enjoy, which

[180] Section 1 of the Employment Equity Act.
[181] Atkinson & Brown op cit note 27.
[182] *Anthony v Telkom S.A.* (2005) ARB Case no. ECPE959-04 is an example of an employee with depression who after the employer followed all the steps required by Item 11 did not improve the employees performance as the problem was not being addressed, thus the employee was dismissed as the employer had no other option. Thus the depression went on unnoticed.

in turn may lead to another depressive episode. This, however, requires the depression being identified so that an appropriate solution may be found.

In theory, Item 11 would offer some protection to the employee, however, due to the two variables mentioned earlier - the negative stigma attached to depression and employers not being equipped to identify depression, there is a very real possibility that once again it would remain unnoticed as the dismissal system in place would not identify depression and the employee may be dismissed for his ill health. All that is required is to assess the extent of the incapability of performing his work for that particular time period. If the performance level does not rise, the employee is dismissed for incapacity and thus the cause of his ill health remains unidentified and thus unnoticed.

Item 10[183] of the Dismissal Code addresses the nature, degree and extent of the incapacity, as well as providing for reasonable accommodation, it elaborates on the second part of the enquiry found in item 11. Item 10 provides that when incapacity on the grounds of ill health or injury is temporary, the employer is obliged to ascertain the extent of the incapacity, and if the employee is likely to be absent. If the time period of absence is unreasonably long, the employer must investigate all other alternatives short of dismissal.

The concept of unreasonably long depends upon the individual circumstances of each scenario. When the alternatives are considered, the following are relevant factors:[184] First, the nature of the job. Is it the kind of job where one can easily substitute the employee with another

[183] Item 10 provides as follows: (1) Incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability. (2) In the process of the investigation referred to in subsection (1) the employee should be allowed the opportunity to state a case in response and to be assisted by a trade union representative or fellow employee. (3) The degree of incapacity is relevant to the fairness of any dismissal. The cause of incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counseling and rehabilitation may be appropriate steps for an employer to consider. (4) Particular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to accommodate the incapacity of the employee is more onerous in these circumstances.

[184] *Davies v Clean Deale CC* (1992) 13 ILJ 1230 (IC).

person, or is it highly specialised that a permanent replacement is the only option. Secondly, the period of absence. Should the period be relatively short, it is easier to delay the tasks required of the employee. Thirdly, the seriousness of the illness. Whether or not the employee can perform all or only selected functions of their job. If the employee can only perform a selected few functions, then delegation of the other functions to another employee temporarily may be a viable option. Finally, the possibility of securing a temporary replacement for the ill employee. This is dependant upon the nature of the job and skill required to perform the job.[185] The cause of the incapacity is also relevant as well as if counselling is appropriate.[186]

Where the assessment under Item 10 finds that the incapacity of the employee is in fact permanent, the following must be considered. 1. The possibility of alternative employment, 2. The adaptation of work duties or work circumstances to accommodate the employee if this is reasonably possible (examples: reduce working hours, reduce workload, job sharing, adapting the equipment the employee uses etc), and 3. The possibility of medically boarding (only if the employee is a member of a fund or scheme which provides for disability benefits).[187]

As discussed earlier, research has shown that the leading cause of absenteeism in the workforce is depression.[188] Dismissal is inappropriate if the absence is for a relatively short period, although habitual absenteeism may warrant a dismissal even for medical reasons.[189] Various factors are to be taken into account when evaluating the reasonableness of an employees absence, such as strategic importance of the employee's job, their length of service, how easily they may be temporarily replaced, the financial capacity of the employer to make arrangements to replace the ill employee, the prospect of the employee recovering as well as the effect of the employees absence on the other employees.[190]

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[185] Subsection 1.
[186] Subsection 3.
[187] Law department at the University of KwaZulu Natal, 'Employee Relations' available at *http://labourrelations.ukzn.ac.za/EmployeeRelations/IncapacityIHI.aspx* accessed on 23 July 2010.
[188] Pharmaceutical research & Manufacturers of America op cit note 47.
[189] *AECI Explosives Ltd (Zomerveld) v Mambalu* (1995) 16 ILJ 1505 (LAC).
[190] These factors were suggested in *Hendricks v Mercantile & General Reinsurance Co of SA Ltd* (1994) 15 ILJ 304 (LAC)*; Croucamp v Le Carbonne (SA) (PTY) Ltd* (1995) 16 ILJ 1223 (IC).

The provisions of the Basic Conditions of Employment Act[191] (BCEA) must be taken into account when deciding whether or not to dismiss an employee due to ill health or injury due to excessive absenteeism. An employer is entitled to dismiss an employee where it can be assumed that the employee's illness clearly exceeds their sick leave entitlement, even though at that point in time, the leave need not be exhausted. The BCEA gives every employee a particular amount of sick leave implying that when an employee is genuinely incapacitated, they should be protected against dismissals during that period only.[192]

Dismissing an employee with depression as incapacity for ill health requires an employer to satisfy various requirements, as previously discussed. However, an employer cannot be expected to continue employing an employee who is no longer productive. The nature and size of the employer's business must be considered as small businesses may not have the resources to cope with and support a non productive employee[193] nor be able to provide alternative work.[194] As a result, an employee suffering from depression in a larger company has greater job security than at a smaller company as the larger company can afford to spend more on accommodating the employee.

(iii) Medical Boarding

The other option to an incapacity dismissal of an employee suffering from depression is to book off the employee as medically unfit to work. This approach was looked at in a case adjudicated in the Pension Fund Tribunal. In the *Van Niekerk* case,[195] an employee had been diagnosed with major depression which was stress related as it was linked directly to his work environment. The employee had seen a psychiatrist who recommended that he be medically boarded. The employee then lodged an application for ill-health retirement in terms of the Pension Funds

[191] Act 75 of 1997. Section 22 (2) provides that an employee is entitled to six weeks sick leave in a single 36 month cycle.
[192] Grogan op cit note 55.
[193] Basson et al op cit note 60.
[194] *Gostelow v Datakor Holdings (Pty) Ltd t/a Corporate Copolith* (1993) 14 ILJ 171 (IC) which provides that an alternative position need not be especially created; *Anthony v Telkom S.A* (2005) ARB Case no. ECPE959-04.
[195] *Van Niekerk v Cape Municipal Pension Fund and others* (2004) No. 230404 (PFA).

Act.[196] The question the tribunal looked at was whether the employee was in fact entitled to the ill-health retirement benefit (medical boarding) or not.

The tribunal found that there was overwhelming medical opinion that the employee should be medically boarded. However, the court also found that the applicable rules were a 'motley mess'.[197] This was due to the fact that according to rule C8(2) of the Pension Fund Act, which requires that the employer first terminates the complainants employment on the ground of ill-health before any ill-health benefits are paid out. On the other hand, rule C8(3)(b) 'retiring benefits' are only triggered by termination of the complainants' employment by the employer. The problem is that the fund will not declare the member medically unfit to continue working, the employer will not terminate his employment and no ill-health benefits will follow. If the employer will not terminate the members employment for operational reasons, the fund will not pay the rule C8(3)(b) 'retiring benefits'.

This case illustrates the fact that although medically boarding is in fact available to depressed employees, it is in fact a 'catch twenty two' situation. This leaves very little aid and direction to the employee with depression from dismissals who in fact have pension funds.

In another case,[198] an employee had been previously booked off sick due to depression between February 2005 and March 2006 (180 days). During February 2005, he applied for ill-health retirement as he had depression with Post-Traumatic Stress Disorder (PTSD) as a result of his work in the South African Police Service (SAPS). As a result of his medical condition, it has rendered him disabled to continue performing his duties. The application was dismissed as depression with PTSD was not an 'illness arising from the performance of his duties'.[199] This decision was made contrary to the consultant who recommended temporary incapacity leave to enable the employee to recover.

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[196] Rule C8(2) of the Pension Funds Act No. 24 of 1956 provides for dismissal on the ground of ill-health if alternative employment is not possible. Rule C8(3)(b) addresses dismissals on operational causes if alternative employment is not possible.

[197] At paragraph 13.

[198] *Public Servants Association of SA obo De Bruyn v Minister of Safety and Security and Another* (2009) 30 ILJ 1631 (LC).

[199] At paragraph 13.

In this case, the employee argued that depression is to fall within the ambit of a disability, and thus disability leave is regulated by Resolution 5 of 2001 of the Public Service Coordinating Bargaining Council which regulates the process of applying for and the granting of incapacity and permanent disability leave. The Resolution regulates the process by which employees who have permanent disabilities are accommodated in the workplace and receive ill-health benefits.

The issue in this case was not one of a depressed employee but whether or not the refusal by the employer (respondent) to grant special incapacity leave and refusal to grant paid leave of 180 days constitutes administrative action in terms of Section 1 of the Promotion of Administrative Justice Act.[200] This case illustrates that depression is seen to fall not only within incapacity leave, but also within disability leave.

In *Strydom v Witzenberg Municipality,*[201] an employee applied to be medically boarded on the grounds that he suffered from clinical depression. Between May 2004 and April 2005, the employee was absent for about 315 days. In January 2005, the employee submitted his application. He had to satisfy the retirement fund board that he was incapable of working. His application was refused as he was found to be fit to work.

A similar dilemma presents itself in this case as it did in the *Van Niekerk* case. Employees who did not succeed in their application to be medically boarded were in a catch twenty-two situation. The employee has to prove that he is permanently unfit to work in order to succeed with his application. Upon the application refusal, he would have to assert that he can in fact perform some of his work duties in order to avoid an incapacity dismissal. Thus, the more persuasive the application for medical boarding, the weaker the prospects of accommodating him in a way that he would remain employed and earn a salary.[202]

The court reiterated the fact that the onus of proving a fair dismissal always rests on the employer and an element of that onus is the employers' duty to avoid dismissals. The court stated that accommodating an employee with a disability is the primary way of avoiding a

[200] No. 3 of 2000.
[201] (2008) No.C558/2006 ZALC 68.
[202] At paragraph 10.

dismissal for incapacity. Accommodation depends greatly upon what the employee is capable of doing. The problem in this case was that the cause of his stress and in turn his depression, was the stressors at work. Thus, the psychiatrist recommended that he be placed in a position of less responsibility as it would aid his recovery. Again in this case, the court looked at depression as a disability.

The above cases raise the question of whether or not a depressed employee can in fact continue to work. The previous chapter analysed the nature of major depression, and it has been found that with sick leave to recover and the correct medication, employees can return to their jobs relatively quickly. However, this is only effective if the depression is noticed before the employee grossly abuses his sick leave. Not all employees with depression should be medically boarded or dismissed (discussed further under misconduct below) as a disability is not necessarily an incapacity.

Although incapacity for Ill Health proves to afford a depressed employee with more protection than poor work performance, it is still not sufficient. As discussed above, only the symptoms are treated, i.e. adapting the work environment or finding alternative work for the employee, ignoring the cause. A depressed employee may respond to these changes at first, but they will not last as depression causes the employee to lose motivation and interest. Thus resulting in the outcome of a dismissal as the employer has in fact done all he is required to do and the depression will continue to pass unnoticed.

As a result, treating depression as an incapacity for poor work performance affords the employee no protection as the depression goes unnoticed thus allowing it to worsen. As a result, ultimately causing the dismissal of the depressed employee as regardless of the employer's accommodations and attempts at increasing the work performance, a depressed employee will only worsen as that is the nature of the psychological disease until it either passes or is treated.

Incapacity for Ill health affords little more protection. It requires the employer to only dismiss in the last instance and only recognise the said employee as having an incapacity for ill health. Although the employer is required to determine the extent of the capability of the performance, it

does not require an inquiry as to the cause of the lessening performance. Following the required steps in Item 11 may not improve the performance with any accommodation or alternative work. Thus, once again, resulting in the employees' dismissal and the cause being ignored.

(b) Misconduct

Misconduct is a listed ground for dismissal found in S188 (1)(a)[203] of the LRA and is the most common justification for dismissal in South Africa.[204] A misconduct is said to have occurred when an employee has intentionally ignored the rules of the workplace, which may be implied or expressly stated in the employment contract or provision of the employers disciplinary code. Misconduct may take various forms, although the essence is a breach by the employee of the terms of the employment contract.

Misconduct is essentially the legitimate loss of trust in the employee relating to one or more incidents demonstrating the lack of trustworthiness on the part of the employee.[205] Item 1 (3) of the Dismissal Code provides a key principle:

> 'Employers and employees should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of business. While employees should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their employees'. [206]

Dismissal should be imposed as a last measure in a series of penalties or in respect of serious misconduct, in accordance with the concept of progressive discipline.[207] S188(1) of the LRA provides three principles to be adhered to in order for a dismissal based on misconduct to be fair. First, that the dismissal must not amount to an unfair dismissal, secondly that the reason must be

[203] The others are capacity and operational requirements.
[204] Grogan op cit note 53. Grogan op cit note 54.
[205] Du Toit et al op cit note 57.
[206] Found in Schedule 8 of the LRA.
[207] The Code of Good Practice: Dismissals Item 3(2) requires that the employer should try to correct the employees' behavior through a system of gradual disciplinary measures such as counseling, warnings, demotions, transfer etc. Item 3(4) gives a list of serious misconducts that result in a disciplinary enquiry and possible dismissal. They are gross dishonesty, willful damage to company property, willful endangering of the safety or others, physical assault, gross insubordination.

substantively fair, and, finally, the procedure followed must be fair. S188(2) then requires the employer to take into account the relevant code of good practice.

Item 7 of the Dismissal Code[208] provides that various factors must be considered to establish substantive fairness when dismissing for misconduct. The factors to be considered are: whether the employee has contravened a rule or standard regulating conduct in, or relative to the workplace and if the rule or standard was contravened; whether or not the rule was a valid or reasonable rule or standard; the employee was aware of or could have reasonably been aware of the standard; the rule or standard has been consistently applied by the employer; and whether dismissal was an appropriate sanction for the contravention of the rule or standard.[209]

The first factor of this investigation requires that a rule or standard has been contravened. This requires proof that the rule or standard exists. This is indicated by looking at either the employment contract (implied or express terms) as well as any rules of conduct or disciplinary codes. Once it has been established that the rule or standard does exist, the employer must show that it has been contravened by the employee. In the context of a depressed employee, once the rule has been shown to exist, the employer can show that the depressed employee has broken it. The most common misconduct by a depressed employee is a time-offence,[210] i.e. either constant absenteeism or habitually arriving late.

The next factor of the enquiry requires the employer to prove that the rule or standard is reasonable and valid. This is a factual enquiry. The nature of the business is looked at as well as the circumstances in which the business operates.

The following factor requires that the employee must have been aware, or should have been reasonably aware of the rule they broke. Thus, in order to break the rule, intention is required. Intention is to know and to will an act or result[211] or as defined by *Neethling et al* ‘a person acts intentionally if his will is directed at a result which he causes while conscious of the

[208] The Code of Good Practice: Dismissals.
[209] Item 7 subsection (a) and (b).
[210] Pharmaceutical research & Manufacturers of America op cit note 47.
[211] C R Snyman *Criminal Law* 4 ed (2003) ch 5.

wrongfulness of his conduct'.[212] A test often used in criminal law is to look at the persons state of mind. A person is only blameworthy if they have sinned in their mind. *Snyman* refers to general incapacity defences[213] which encompass mental illness and emotional distress. This is a valid defence if the individual can prove their mental illness at the time the misconduct was committed and that it was a direct result thereof .[214]

Thus, if the employee is depressed, they are suffering from a mental illness and thus they breakdown cognitively, behaviourally and emotionally.[215] When suffering from depression, the employee lacks the intention required to commit a wrongful act.

The next factor requires that the rule be consistently applied. This is to determine if the employer has historically consistently applied the rule or has been inconsistent. If an employer has condoned the contravention in the past, he cannot decide that he will enforce the rule unexpectedly. The employees must be informed that the rule will be enforced from then on.[216]

The final factor requires that dismissal be the appropriate sanction. Further factors to be looked at are outlined in Item 3(5) and (6) of the Dismissal Code which include gravity of the misconduct, length of service by the employee, disciplinary record and personal circumstances.

S188(1)(b) of the LRA requires that the dismissal for misconduct be procedurally fair. Procedural fairness entails a fair disciplinary enquiry. The outline for this enquiry is found in Item 4 of the Dismissal Code as S188(2) requires the Code of Good Practice to be taken into account.

The elements of procedural fairness that are found in Item 4 are: that an investigation must be conducted to determine the grounds for dismissal; the employer must notify the employee of the charges against him; the employee must be given a reasonable time to prepare a response; the employee is entitled to state a case in response; the employee is entitled to the assistance of a

[212] J Neethling, J M Potgieter & P J Visser *Law Of Delict* 4 ed (2001) 123.
[213] As he feels it is a better name than non-pathological criminal incapacity.
[214] Snyman op cit notes 211.
[215] Weiten op cit note 36.
[216] Basson et al op cit note 60 at ch 6.

trade union representative or fellow employee; the decision must be communicated to the employee, preferably in writing and; the employee must be informed of the reason for the dismissal.

Although a depressed employee may be guilty of a number of misconducts, time-offences are the most likely.[217] As previously mentioned, depression is a leading cause of absenteeism and low productivity in the workforce.[218] The Dismissal Code does not expressly mention time-offences, such as absenteeism or unpunctuality.[219] However, the Labour Court recognises an employees' general duty to perform as agreed in terms of the employment contract, and a failure to do this is potentially a disciplinary offence.[220] To determine the fairness of a dismissal for absenteeism or unpunctuality, various factors must be assessed such as the reason for the employees' absenteeism, the employees' employment record as well as the employers' treatment of the behaviour in the past.

The employer may not dismiss at the first incident of absenteeism unless the period is unreasonably long. Employees must generally be given an opportunity to explain their absence. For a dismissal to be fair with regard to absenteeism, the courts require the time period of the absence to be unreasonably long.[221] If the time period was in fact unreasonably long, and it is perceived that the employee has abandoned their employment, if the employee returns, the courts require the employer to offer the employee an opportunity to explain his absence, as well as take personal circumstances into account. For short frequent periods of absence due to illness,

[217] This is because the employees have the duty, in terms of their employment contract, to be at their work station during working hours, unless they have an adequate reason to be absent. Under the common law, if the employee wilfully does not work during the agreed working hours, this constitutes breach of contract. Grogan op cit note 54. Grogan op cit note 53.

[218] Pharmaceutical research & Manufacturers of America op cit note 47.

[219] Grogan op cit note 53.

[220] Ibid..

[221] A distinction exists between absenteeism and abscondment. Absenteeism encompasses arriving late, absence from ones working station, and absence from the workplace itself for short periods. Abscondment is said to have taken place when the employee is absent from work for a time period that warrants the inference that the employee does not intend to return to work. The longer the period of absence, the more justified an employer will be in terminating the employment contract. Ibid; Grogan op cit note 54.

the courts have held that warnings are sufficient to dismiss the employee and a medical inquiry is unnecessary.[222]

The arbitrator in *Metal & Allied Workers Union and Horizon Engineering (Pty) Ltd*[223] held that the onus rests on the employee to justify his absence through a reasonable explanation such as illness. It is normally adequate if the employee can prove that it was beyond their control.[224] However, in *Johnson v The Department of Justice,*[225] the employee was absent from work for about four months due to depression and he had failed to contact his employer as to his whereabouts and thus was dismissed. The dismissal was upheld for misconduct. This case is in conflict with the above case. Depression and its effects are beyond the control of the employee. Depression in its nature causes the individual to lose all will to live and thus not to be in control of their behaviour as they lack motivation and the mental element of intention. This is another indication that the courts lack the guidelines necessary to make an informed and consistent ruling in cases which involve a depressed employee.

Employees on authorised sick leave are entitled to remain away from work for the duration of their sick leave, unless it has become clear that they are abusing their sick leave and thus are instructed to return. If the employee is absent due to a serious illness, they cannot be said to be at fault. Depression is considered a serious psychological illness at it can completely incapacitate an employee for a period of time.

An employee who has not been properly diagnosed and seems to be abusing their sick leave as they are either frequently on sick leave or are on long periods of leave, may be dismissed for misconduct due to time-related offences. An employee with depression is adversely affected and cannot work effectively or for a time period, they are mentally ill and thus lack the element of intention required to commit the misconduct. Although they are aware of the rule, they are incapable of abiding by it due to their temporary impairing illness (as discussed earlier). A depressed employee does not have the mental capacity to commit a misconduct.

[222] *AECI Explosives LTD (Zomerveld) v Mambalu* (1995) 16 ILC 1505 (LAC); Grogan op cit note 55; Grogan op cit note 53; Grogan op cit note 54.
[223] (1989) 10 ILJ 782 (ARB).
[224] Grogan op cit note 53; Grogan op cit note 54.
[225] (2003) 12 GPSBC.

In the case of *Adams v Impala Platinum Mine,*[226] the applicant had been absent for several days. He had been dismissed for committing a gross misconduct as well as for being absent from work without permission. Prior to his absence, he had been booked off as medically unfit to work for clinical depression. The employee had a history of alcoholism and depression which prompted the employer to investigate the employees' capacity to work. The issue in the case was whether dismissal was the appropriate sanction for the employee who was absent without permission. The arbitrator ultimately found that the dismissal had been substantially unfair as dismissal was not an appropriate sanction for the absence.

In this case, the arbitrator did not consider the employees depression. However, the court did find that the employee somewhat lacked the mental element required to intentionally commit the misconduct and that the dismissal was unfair. Once again, one notes the inconsistency in the courts approach to depressed employees in dismissal cases due to the lack of guidelines.

The procedural aspect contained in Item 4 of the Dismissal Code does not provide much more protection for the depressed employee. If he is aware of his depression and has the disposition to defend himself, he would need psychological proof that he is depressed. Although, he would be guilty of the, for example, time-offences but has a justification for it.[227] If the employee is guilty of the misconduct, regardless of his depression, he may still be dismissed for it. More protection is thus given in terms of Item 7 as to commit a misconduct, the mental element of intention is required, which the employee lacks when depressed.

Ill-health retirement appears to be an option for depressed employees who feel there is no solution. However, upon analysing the nature of depression, not all depressed employees wish to be ultimately dismissed, even though they appear to have lost all interest in their jobs, which is a symptom of the illness, they can in fact continue to work. If an employee does not apply to be medically boarded, or to be grant special incapacity leave, they are dismissed for having

[226] (2004) 12 BALR 1510 (CCMA). Similar facts and outcome in the *Mphoreng v Connex Travel* (2001) 10 CCMA.

[227] Item 4, however, does not contain express guidelines for witnesses or external professional evidence, as it is read in. The problem that arises here is if the employee cannot afford to pay for professional advice, then the enquiry would cease, resulting in the employee being prejudiced.

committed a misconduct. Often, however, the solution is simply time off as the employee needs to recover.

There appears to be no reported arbitration cases that deal exclusively with the issue of depression as grounds for an ill-health dismissal. The employers prefer to dismiss the employee for having committed a misconduct (absenteeism being the most common). The employers strategy is informed solely by the fact that the employees behaviour, his misconduct or poor performance, eclipses his ill-health[228] as the requirements for a dismissal are far less rigorous and thus rely on the 'other grounds' in order to successfully dismiss depressed employees. The problem of the negative stigma attached to depression is one of the reasons that appears to be some difficulty for the employer in addressing the issue directly and appropriately.

The main difference between misconduct and the other listed grounds is that employees who commit a misconduct can be held accountable for their conduct, where as poor work performance due to ill health, incapacity and operational requirements are no fault dismissals.[229] Where negligence or poor work performance results from circumstance beyond the employees control, such as a physical or mental incapacity, it should be treated as such. Thus, it is inappropriate to deal with depression as a misconduct as the mental element is lacking. However, it is very difficult to draw a clear distinction between the various forms of dismissal and misconduct as for example, negligence may arise from either misconduct or incapacity or both.

As discussed above, misconduct offers no more protection to employees with depression than incapacity as the employee is bound to commit a misconduct as they have no interest in their work. However, they do lack the mental element necessary to be found guilty of a misconduct. Therefore, this is not the appropriate method of dealing with depression as it does not address the problems, but merely disciplines the symptoms.

[228] *Shabani v Thales Geosolutions SA (PTY) Ltd* (2001) 10 CCMA.
[229] Grogan op cit note 55.

(c) Operational Requirements

A variety of scenarios exist that may result in an employer needing to dismiss one or more employees. Section 188 of the LRA, in line with international labour standards, recognises the employers needs and operational requirements, in certain circumstances, are valid reasons for dismissal.[230] Thus, operational requirements are accepted as another form of dismissal recognised in the LRA.

S213 of the LRA provides that dismissing an employee for operational requirements means that the dismissal was due to economic, technological, structural or similar needs[231] of the employer. Thus, this is a 'no-fault' dismissal on the part of the employee and is purely dependent on the employers' needs and requirements.

(i) Section 189

Section 189 deals with small scale dismissals, i.e. dismissals in companies that have fewer than 50 employees.[232] Before the S189A Amendment in 2002 (discussed below), there was no statutory definition provided for substantive fairness.[233] The courts therefore determined the question of substantive fairness as one of fact. Thus, the employer was expected to prove various facts.

First, the employer must prove, on a balance of probability, that the reason given for the dismissal is one based on the operational requirements of the business, i.e. that the reason falls within the given definition of operational requirements. Secondly, the employer must prove that

[230] Basson et al op cit note 60 at ch 8.

[231] 'Economic needs' may be a drop in the economy, pressures of a new competitor or simply bad management or unsound strategies in the company itself; 'Technological needs' may refer to new technology such as machinery or computerisation that has the results of an employee previously doing that job becoming redundant; 'Structural needs' refers to posts becoming redundant due to restructuring of the company. 'Similar needs' is determined on a case by case basis. Ibid.

[232] S189A deals with large-scale dismissals which are for companies with more than 50 employees.

[233] S189A(19) provides a definition for fair reason if the dismissal was: (a) to give effect to the employers economic, technological, structural or similar needs; (b) operationally justifiable on rational grounds; (c) a proper consideration of alternatives; and (d) selection criteria were fair and objective.

the operational reason exists and it is the real reason and not merely an easier way of dismissing employees by avoiding more stringent formalities.[234]

These requirements seem to provide some protection to the employees as the employer is required to prove that the principle reason for the dismissal does in fact fall within S189 and no other section. However, in various cases,[235] the courts have held that the LRA doesn't distinguish between operational requirements when the company is fighting for survival and when a profitable business just wanted to increase their profit margin. Further, the employers need not prove that actual costs were reduced.[236] Thus by merely showing that by dismissing the employee their profits will increase, is a sufficient reason to dismiss. The courts will not interfere with legitimate business decisions.[237]

However, protection against arbitrary dismissal fails at the second stage, where the employer must prove that operational requirement is the real reason. As discussed above, the justification of the employers' entitlement to make a profit affords the employer a rather easy method of getting around the real reason of the dismissal as the courts will not make business decisions. He must merely show that a profit can be made through this redundancy.

Employers are not expected to keep redundant workers, S189 of the LRA does, however, require the employer to try and avoid retrenchments. The Labour Appeal Court held that the employer must show that the dismissal could not have been avoided.[238] The courts require the employer to show that it was in fact necessary to dismiss the employee to effect saving[239] as well as it must be rational and justifiable.[240]

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[234] Du Toit et al op cit note 57.

[235] *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA & others* (2003) 24 ILJ 133 (LAC); *Hendry v Adcock Ingram* (1998) 19 ILJ 85 (LC).

[236] *Food & Allied Workers Union & others v Kellogg SA (Pty) Ltd (*1993) 14 ILJ 406 (IC); *Fry's Metals (Pty) Ltd v NUMSA & others* (2003) 3 BLLR 140 (LAC); *Food & Allied Workers Union & others v SA Breweries Ltd* (2004). 25 ILJ 1979 (LC); *Enterprise Foods (Pty) Ltd v Allen & others* (2004) 25 ILJ 1251 (LAC).

[237] *SACTWU & others v Discreto* (1998) 19 ILJ 1451 (LAC).

[238] *Country Fair Foods (Pty) Ltd v OCGAWU & another* (2003) 7 BLLR 647 (LAC).

[239] *Heigers v UPC Retail Services* (1998) 1 BLLR 45 (LC)*; NCBAWU & others v Natural Stone Processors (Pty) Ltd* (2000) 21 ILJ 1405 (LC).

[240] *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union & others* (1999) 20 ILJ 89 (LAC).

An employees' position becoming redundant due to a technological, structural or similar need or actual economic needs is truly a no-fault dismissal. However, the problem arises when the employer wishes to dismiss an employee for another reason, such as incapacity or misconduct, and opts to restructure the company as a manner of dismissing the employee with the least requirements possible, claiming economic reasons and dismisses the said employee. The factual proof required does protect the said employee to a point. The employer must show that the reason falls within operational requirements. This is not a problem as a company always needs to make a profit and thus economic reasons are easily proven.

In recent cases, both the Labour Court and Labour Appeal Court appear to be more prepared to investigate the employer's business decisions then they were in the past. The Labour Appeal Court in *BMD Knitting Mills (Pty) Ltd*[241] held that the fairness of the reason for dismissal must be fair to both parties. Thus the court may inquire into the reasonableness of the decision taken as well as the proposed procedure to be followed. This allows the courts to examine the substance of the reason given by the employer. This idea was further up-held in *Chemical Workers Industrial Union & Others.*[242] This trend in the courts, now requires the employer to show that the best possible option was made in the best possible business sense.[243]

There thus exists an overlap of reasons for dismissal on the basis of operational requirements as the employer always needs to effect savings and a situation where the employee is no longer able to fulfil their contractual obligations due to their illness. It is far less onerous on the employer to show that due to economic circumstances, the employee must be dismissed (as the company's bottom line is being affected), rather than having to prove that the employee is incapacitated and thus the dismissal was for a fair reason as proof is required that the employee did not meet the standard required by incapacities. There is a recognition in our courts of the ambiguous dividing line between dismissals for operational requirements and the other grounds for dismissals.[244]

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[241] *v SACTWU* (2001) 22 ILJ 2264 (LAC).
[242] *v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC).
[243] Basson et al op cit note 60 at ch 8.
[244] *Gouws v Mpumalanga Provincial Government & another* (2001) 22 ILJ 1822 (LC)*; Rikhotso v MEC for Education* (2005) 3 BLLR 278 (LC).

Thus the problem of depression continues unnoticed as it is either not identified or if identified, there are no guidelines or policies to address the situation. This allows the problem to continue resulting in the next depressed employee being made redundant as well. This form of dismissal thus suffers from the same problem that incapacity did, which is a lack of instruments being put in place to identify depression and deal with it effectively.

(ii) Section 189A

S189A of the LRA is an amendment put into effect in 2002 that addresses large scale dismissals. This section addresses both the size of the employer and the number of employees to be dismissed. Subsection 1 distinguishes the difference between a large employer which is one that employs more than 50 employees and a small employer which employs less than 50 employees.[245] S189A only applies to large employers as the minimum number of employees to be dismissed, for this section to apply, is at least 10. Normally, a single employee with depression is dismissed and thus does not fall within the ambit of S189A.

However, S189A goes further than S189, as it requires the Labour Court to evaluate the dismissal. The Labour Court was perceived as being ineffective in protecting employees against dismissals for operational requirements, thus the court is now obliged to scrutinise the employers rational.[246] S189A(19) requires the Labour Court to determine if the employees were fairly dismissed by determining the following: if the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs; If the dismissal was in fact based on operationally justifiable rational grounds; whether there was proper consideration of alternatives; and if the selection criteria was fair and objective. This affords the employees far more protection than is provided under the previous S189. The procedure for dismissal under S189 lacked the substantive fairness enquiry S189A has, thus allowing reasons such as profit increase, to justify a dismissal, as discussed above.

[245] This section addresses dismissals by employers with more than 50 employees. S189(1)(a) applies if the employer wishes to dismiss: (i) 10 employees and employs up to 200; (ii) 20 employees and employs between 200 and 300; (iii) 30 employees and employs between 300 and 400; (iv) 40 employees and employs between 400 and 500; (v) 50 employees and employs more than 500.

[246] Du Toit et al op cit notes 57.

Requiring the courts to apply S189A(19)[247] forces a much more in depth look at the substantive fairness of the dismissal. This section requires the court to not merely establish whether the reasons fall within the definition of operational requirements, but also that the reason is in fact the real reason, as is required under S189.

The procedures in S189A were designed to avoid dismissals, thus are far more extensive than under S189. The procedure in S189 is relatively straight forward and exists in both sections, such as the requirement of consultation, the parties to the consultation process, as well as the selection criteria. However, S189A goes further as it not only requires the courts to get involved and actively investigate the reason for the dismissals, but also introduces additional requirements. It affords either party the right to request the CCMA appoint a facilitator to assist the parties in consultation as well as a 60 day memorandum during which the employer cannot dismiss.

These small changes have made a big difference. They have given employees more protection against dismissals than before under S189. However, the problem still remains, an employee with depression is theoretically not protected by S189A. However, the question now is whether the Labour Court will use the guidelines given in S189A, namely S189A(19), the inquiry into substantive fairness, for small scale dismissals. It is hoped that the principle of substantive fairness in S189A will be consistently applied in small scale dismissals (S189), as the trend seems to be moving in that direction.

Although S189A would provide an employee with depression more protection than under S189 as the enquiry is more extensive, the same flaws apply. Currently the courts will not oppose a company claiming economic circumstances who can prove that an employees position has become redundant and thus a dismissal would increase the company's profits as the main

[247] S189A(19) provides as follows: 'In any dispute referred to the Labour Court in terms of section 191(5)(b)(ii) that concerns the dismissal of the number of employees specified in subsection (1), the Labour Court must find thst the employer was dismissed for a fair reason if – (a) the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs; (b) the dismissal was operationally justifiable on rational grounds; (c) there was a poor consideration of alternatives; and (d) selection criteria were fair and objective.'

reason for dismissal, as depressed employees are a liability as they cannot work thus, resulting in depression being undiagnosed and thus, once again, unnoticed.

A dismissal for operational requirements may be distinguished from a dismissal for incapacity or misconduct because a dismissal for the latter two originates in some way from the employee himself, where as operational requirements originate from the employers needs. A dismissal for incapacity as well as for the employers operational requirements are thus 'no-fault' dismissals. The line between dismissals for incapacity and operational requirements is often not clear.[248] This ambiguity thus creates an easier climate in which to dismiss an underperforming employee without all the requirements required under incapacity dismissals. One must thus be wary of the fine line between a dismissal for operational requirements and other dismissal grounds.[249]

The courts themselves are unsure as to the approach they should take,[250] whether the substantive fairness definition found in S189A(19) applies to S189 dismissals. They do not know where to place psychological illnesses such as depression. By not examining the true motive for the dismissal, nor wanting to interfere with the business, the courts have allowed various dismissals to be accepted as for operational requirements that were not. This has resulted in the employee being left in a very uncertain position, as when the employer wishes to dismiss them, they may relatively easily do so through operational requirements.

Therefore this ground offers even less protection to employees with depression then any of the others due to its uncertainty as well as due to the principles that the company is entitled to make a profit and that the courts do not enquire into the employers' business decisions. Thus, ultimately affecting the country's economy as the company's bottom line is affected. By placing depression under the category of operational requirements due to the employee becoming redundant, does not afford the employee the protection that is envisaged in the fair labour practice right in the Constitution as the problem is not being recognised and thus continues unnoticed and unaddressed.

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[248] Grogan op cit note 55.
[249] *Gouws v Mpumalanga Provincial Government & another* (2001) 22 ILJ 1822 (LC).
[250] Grogan op cit note 54.

(d) Conclusion

Categories of dismissals do overlap in certain circumstances, but their procedures are very different. Incapacity, misconduct and operational requirements were looked at as forms of dismissing an employee with depression. In determining whether a dismissal, through these various routes, is in fact fair, the justification is analysed, which depends upon the reason for the dismissal given by the employer. In the case of incapacity, the justification is that the employee did not reach the expected attainable performance standard and no other alternative existed. In operational requirements, the justification will be that the employee became redundant. In the case of a dismissal for misconduct, the justification is that the employee has broken a known reasonable rule in the workplace.[251]

As discussed, an employer has some form, or another, of justifying the dismissal of the employee with depression. Under operational requirements, the employer may dismiss a depressed employee by simply making his position redundant as he is under performing and thus a liability to the employer. The justification of a misconduct is simply that the depressed employee broke a reasonable rule.

Under an incapacity dismissal, poor work performance is a justification for dismissal as the employee does not perform as required. Ill health is another reason under incapacity as the employee is in fact ill. Ill health does provide more protection against dismissals, it does not address the problem of depression. Incapacity is the most comprehensive dismissal form to deal with depression, but it is not sufficient. A far more comprehensive solution in dealing with depressed employees needs to be implemented as the number of depressed employees is growing in the workplace.

In summation, none of the above discussed categories of dismissals found in the LRA adequately, or in any way, address the growing problem of depression in the workplace. Therefore, another manner of addressing the problem of depressed employees must be determined.

[251] Grogan op cit note 53.

Chapter 6

DEPRESSION AS A DISABILITY

Applications for disability claims have been increasing steadily over recent years in South Africa.[252] Following musculoskeletal claims (mainly back problems), the second largest group of claims are for psychiatric diagnosis, which includes depression, stress and anxiety, which are at the top of the DSM-IV diagnosis list.[253] Work related stress is the most commonly cited major contributing factor to these illnesses and thus a large number of psychiatrists are being put under pressure to declare this growing number of patients as disabled on psychiatric grounds.[254]

This chapter will be discussing the definition of disability as provided for by the EEA. Various relevant sections from the Code of Good Practice: Disabilities (Disability Code), the Constitution and the Labour Relations Act will de discussed in order to determine what constitutes a disability and what protection is afforded to disabled employees from dismissals.

As discussed in the previous chapter, the dismissal categories found within the LRA do not adequately address the issue of depression in the workplace. However, an alternative to addressing this growing problem is to recognise depression as a disability. Disability is a category that has direct protection given in terms of both the Labour Relations Act and the Constitution. Discriminating against anyone on grounds of disability is unconstitutional,[255] and dismissing them for having a disability is automatically unfair.[256]

Depression is a debilitating psychological illness that causes the employee to under perform from the standard the employee once was capable of. The question arising out of this problem in the workplace is whether depression is in fact a disability in terms of the definition offered in the

[252] South African Depression & Anxiety Group op cit note 12.
[253] List containing the most diagnosed psychiatric impairments.
[254] Kaplan op cit note 46.
[255] S9(3) of the 1996 Constitution.
[256] S187 (1)(f) of the LRA.

EEA. The first step in determining if depression is a form of disability is to critically evaluate the definition of a disability and its' applicability to depression in the workplace.

(a) Definitions of Disability

Section 39 of the Constitution as well as Section 3 of the LRA requires one to consider foreign law as well as international law. The Constitutional Court in the case of *NUMSA & Others v Bader Bop (Pty) Ltd & another*[257] held that the proper approach to interpreting the LRA was to interpret it in accordance with international law, foreign law and the Constitution. The United Nations, International Labour Organisation, as well as a universal definition of disability as constructed by the *International Classification of Functioning, Disability and Health (ICF)*[258] are briefly discussed in order to gain an understanding with regard to the development of the definitions of disability as well as their application to persons with disabilities in the workplace.

(b) A Brief Discussion on International and English Law

The ILO has set out its mandate on disability issues in the ILO Convention concerning Vocational Rehabilitation and Employment of Disabled Persons No. 159 (1983) (Convention 159). This Convention establishes the principle of equal treatment and employment for workers with disabilities. The intention is to place all disabled persons on an equal footing regardless of the nature of their disability.[259] The convention defines a disabled person as an individual whose prospects of securing, retaining, and advancing in suitable employment are substantially reduced as a result of a duly recognized physical or mental impairment.[260] The ILOs activities promote

[257] (2003) 2 BLLR 103 (CC).

[258] World Health Organisation 'Towards a Common Language for Functioning, Disability and Health', *ICF, WHO/IEP/GPE/CAS/01.3 2002* available at *http://www.who.int/classifications/icf/training/icfbeginnersguide.pdf,* accessed 23 July 2010.

[259] Rubin op cit note 69. Recommendation 168 of the Convention 159 is more explanatory. It restates that disability can arise as a result of a duly recognised physical or mental impairment. Although there is no further elaboration, both the Convention and its Recommendations apply equally to mental health disabilities such as depression. Section 2 on vocational rehabilitation and employment opportunities stresses the following: First, the disabled persons should enjoy equality of opportunity and treatment in respect of access to, retention of and advancement in employment which, whenever possible, corresponds to their own choice and takes account of their individual suitability for such employment. Lastly, measures for disabled persons should conform to employment and salary standards applicable to workers generally. Harnois & Gabriel op cit note 6. Betten op cit note 67.

[260] Art. 1 of Convention 159.

the inclusion of persons with physical, psychiatric and intellectual disabilities into mainstream training and employment structures.[261]

Since 1991, the UN has been actively involved in world action programs emphasising the rights of persons with disabilities in the workplace.[262] In 1994 the UN General Assembly released the publication *Standard Rules on the Equalization of Opportunities for Persons with Disabilities.*[263] Article 17 states that the term 'disability' summarises a great number of different functional limitations occurring in any population in any country in the world. People may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness. Such impairments, conditions or illnesses may be permanent or transitory in nature. Article 18 goes on to define 'handicap'.[264] These two definitions clarify the distinction between disability, which is medical in nature, and handicap, which refers to the social aspect of disability. Depression is seen to fall within the definition of the term 'disability' as depression is a mental illness that is transitory in nature as, although it is temporary, depression may re-occur several times in the individual's lifetime.[265]

The ILO definition of disability has been the foundation of the UNs offered definition as well as the EUs. It is a definition that is, in itself, equality based.

The EU is losing three to four per cent of their Gross Net Profit to disabilities and therefore is attempting to redress these losses by way of their Directives. Although the EU Directives are not as expansive or as detailed as they could be, they rely on and implement the ILOs recommendations.

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[261] Gabriel & Liimatainen op cit note 43.

[262] The UN proclaimed the International Year of Disabled Persons in 1991. In 1992 it adopted the World Program of Action concerning Disabled Persons which emphasised the right of persons with disabilities to the same opportunities as others and to an equal share in the improvements in living conditions resulting from economic and social development.

[263] A/RES/48/96, December 1993.

[264] The term 'handicap' means a loss or limitation of opportunity to take part in the life of the community on an equal basis with others. It describes the encounter between the person with the disability and the environment. The purpose of this term is to emphasise the focus on the shortcomings in the environment and in many organised activities in society, for example, information, communication and education, which prevent persons with disabilities from participating on equal terms. Harnois & Gabriel op cit note 6.

[265] Weiten op cit note 36.

The EU, with the WHO, have brought about universal definitions in the *Equal Treatment Directive*[266] (Directive 2000/78). The Directive 2000/78, prohibits any discrimination on grounds of religion or belief, disability, age and sexual orientation, but only in an employment and vocational training context.[267]

However, for the Directive 2000/78 to function effectively, a universal definition of disability was needed. In order to achieve a definition of disability the WHO constructed the ICF. [268] The ICF is to provide a global standard for the description of health, which is to the benefit of all countries, including non EU members.

The European Disability Forum[269] (EDF) provides that 'for the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination whatsoever on the grounds of disability and no discrimination in the form of a failure to make reasonable accommodation…'.[270] Article 2.7 elaborated further stating that '…a person shall be regarded as having a disability if they currently have a disability, they had a disability in the past, they may have a disability in the future, they are associated with a person with a disability through a family or other relationship, or they are assumed to fall into one of these categories.' These definitions cover direct discrimination and discrimination by association, dealing with the person rather than the disability itself.[271]

Directive 2000/78 was aimed at discrimination in employment and occupational settings. Within that context, the concept of 'disability' is to be understood as referring to a limitation

[266] Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

[267] Countries such as Finland (Yhdenvertaisuuslaki 21/2004, s.6 (1) (Finnish Non-Discrimination Act 21/2004)), Holland (Wet gelijke behandeling op grond van handicap of chronische ziekte, Staatablad (Official Gazette) 2003, 206, Art. 1 (Dutch Act on Equal Treatment on the Grounds of Disability or Chronic Illness (2003)), and the UK(Disability Discrimination Act 2005 c.50, S. 1(1)) have included disability in their respective anti-discrimination legislation.

[268] World Health Organisation op cit note 258.

[269] European Disability Forum op cit note 43.

[270] Art. 2.1.

[271] Schiek, Waddington & Bell op cit note 68.

which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.[272]

This definition took a step further, building upon the ILO and UN definition by addressing the individual, instead of the disability exclusively. All three definitions recognised the psychological element of the definition as well as the anti-discriminatory nature of it.

The United Kingdom, a foundational source of South African law, has a body of legislation that deals with psychological disorders such as depression. The legislation is the Disability Discrimination Act (DDA).[273] The DDA provides that disabled persons are not to be directly or indirectly discriminated against on the grounds of their disability, it also provides for the employers to make reasonable adjustments for the employee to continue working. The DDA defines disability as a physical or mental impairment that has a substantial long-term adverse effect on their ability to carry out normal day to day activities.

This definition was said to include depression as held by English Tribunals.[274] However, because of the nature of depression, the fluctuation in severity and duration, it may not meet the long-term requirement within the definition. This was seen to be unfair as even short periods of depression may result in long term effects of stigma and discrimination. Thus, the recommendation, which was upheld by the WHO,[275] is that if the periods of depression amount to more than six months over a two year period, then the long-term requirement is deemed to have been met.[276]

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[272] Ibid. Various member states, including Germany and Holland have added another element to the Directive 2000/78 definition of disability. They have included a long-term physical, mental or psychological impairment.

[273] Of 1995.

[274] *Heathrow Express Operating Company Ltd v Jenkins UKEAT/0497/06/MAA* In this case, the applicant successfully claimed unfair dismissal to an employment tribunal in England due to her depression, a comment was made by a solicitor, Maxine Cox, saying that with the new revision, it has made it easier for employees with depression and stress to bring successful disability claims. In the case of depression, it has to be substantial and have long lasting effects on an individuals ability to carry out their normal daily activities, reasonable adjustments that need to be made to the working environment such as reduced working hours. She also went on to state that large organisations with more significant resources are expected to keep an employee's post open for longer periods than a very small company as they would suffer considerable financial hardship by doing so. Mild depression is unlikely to be covered.

[275] The ICD-10 Classification of Mental and Behavioural Disorders published by the World Health Organisation. Available at *http://www.who.int/classifications/icd/en*, accessed on 23 July 2010.

[276] Anna L Christie 'Is the Disability Discrimination Act Discriminatory?' (2006) 10 *Edinburgh Law Review*155

The South African Society of Psychiatry (SASOP) defines impairment as an alteration of normal functional capacity due to a disease. Disability is defined as an alteration of capacity to meet the personal, social or occupational demands due to an impairment. This definition is the preferred definition used by psychological practitioners as it is global in its nature.[277]

Since the initial definition of disability proposed by the ILO, the definition has become more comprehensive and specific. The UN, ICF, UK and SASOP have all built upon the ILO definition. This is due to the fact that both the UN and ILO do not offer a comprehensive body of legislation. They provide the outline, the guidelines for individual countries to then develop their own unique body of legislation addressing the issue at hand, such as disabilities. Thus, the guidelines are given and, in turn, the laws made are progressive. The definitions provided emphasise the essential elements of what constitutes a disability, a recognised mental or physical impairment. The UN definition has built upon the ILO definition, however they are still guidelines, requiring member states to develop the definitions according to the country's individual needs.

(c) The Application of the Employment Equity Act's definition of disability to Depression

Statistics of depression among employees are at their highest yet, and it is not an illness to be ignored. As previously discussed, the ILO and UN offer guidelines and a framework, but it is the responsibility of each country to then develop and implement their own disability legislation. The ADA is an example as it developed the framework provided for by the ILO.[278]

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[277] One must note the difference between impairment and a disability by stating that in order to assess a disability, an assessment of the extent of the individuals impairment needs to be judged in context with their job description. Impairment affects four main areas, which are assessed in order to determine the degree of impairment. These areas were suggested by the American Medical Association Guides to the Evaluation of Permanent Impairment. The first is daily living activities. These activities include such activities as self care, personal hygiene, communication, sleep, recreation etc. The second is social functioning. Social functioning refers to an individuals' capacity to communicate and interact effectively, e.g. the ability to get along with others, participate in group activities, co-operation, and awareness of others feelings. The third is concentration, persistence and pace. This determines the individuals' ability to sustain focus in order to complete a task, such as in a work situation. The final area is that of the ability to adapt to stressful circumstances. Kaplan op cit note 46.

[278] On July 26 1990, the American Congress enacted the ADA, in line with the ILOs recommendations, in order to remedy what was perceived as employment discrimination against individuals with disabilities. 42 U.S.C §12101 (1998)*;MacCoy v Pennsylvania Power and Light Co.,* 933 F. Supp. 438,440 (M.D. Pa. 1996). The ADA is to protect persons with disabilities from this discrimination in areas of employment, both public and private sectors. Title V of the Federal Rehabilitation Act of 1973 imposes an obligation upon the government in its capacity as

Both the Constitution and the LRA have general equality provisions for persons with disabilities,[279] although there is no statutory definition of disabilities in these Acts.[280] The EEA, in Item 5.1, however, does define persons with disabilities. It defines them as 'people with long term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in the workplace'.[281] This definition has the same fundamental elements as those contained in the definitions offered by the SASOP, UK, UN and ILO, but has been made more specific and applicable to the employment context. *Basson et al*[282] states that the term disability includes severe stress and depression as it may affect an employee in the workplace to such a debilitating extent.[283]

In order to understand the intention of the legislature in the EEA, the definition must be broken down into the necessary components. Impairment is defined as being either mental or physical.[284] Mental impairment means 'a clinically recognised condition or illness that affects a person's thought process, judgement or emotions'.[285] It must be noted, however, that a mental impairment does not necessarily imply that the impairment amounts to a mental disability.[286] Long-term means that the 'impairment has lasted or likely to persist for at least 12 months',[287] and reoccurring has the meaning that it 'is likely to happen again and to be substantially limiting'.[288] In order for the disability to be substantially limiting, it must substantially limit the person's ability to perform the essential functions of the job.[289] In determining if the impairment

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employer to adopt programs for the hiring, promotion and advancement of disabled persons. Simon Deakin & Gillian S Morris *Labour Law* 1 ed (1995) ch 6. The ADA is also to ensure access to state and local government programs and services, and public accommodations. 42 U.S.C. § 12101. The ADA is divided into subchapters called titles. Title 1 of the ADA is the subchapter of the statute that is applicable to employment. The remainder of the subchapters cover public transport and other state and government services such as public accommodation, telecommunications and miscellaneous provisions.

[279] Section 9 in the Constitution and Section 187 of the LRA.

[280] Basson et al op cit note 60.

[281] Section 1.

[282] Op cit note 60.

[283] This is the only direct reference to depression as a disability in textbooks.

[284] Item 5.1.1 (i).

[285] Item 5.1.1 (iii).

[286] Blair op cit note 38.

[287] Item 5.1.2 (i).

[288] Item 5.1.2 (ii).

[289] Item 5.1.3 (i).

is substantially limiting, medical treatment or other devices must be considered in order to prevent or remove the adverse effects.[290]

The court in the case of *IMATU & Another v City of Cape Town*[291] held that disability can be addressed with medication and thus although it may be a long-term impairment, it does not necessarily amount to substantially limiting. Thus, in order for depression, which is long-term, to amount to a disability, it must be substantially limiting.

In applying the above EEA definition to depression, which is clinically recognised as a mental impairment, which impairs a person's cognitive functioning, emotions and judgement. It not only affects and impairs the individuals' daily life, but also their ability to perform their given work. Depression is seen as substantially limiting as the depressed employee becomes increasingly more inefficient looses interest inability to finish tasks, difficulty in concentrating, lack of motivation and lack of ambition, and ultimately the inability to take care of oneself.[292]

In the *Strydom*[293] case, both the arbitrator and Labour Court addressed depression as a disability. Thus, it can be said that depression does fall within the ambit of the disability definition. But, one is required to read in and interpret the definition. Cases such as the *Strydom* case are few and far between. This is as a result of courts generally not knowing how to classify depression as the law on disabilities has not been developed sufficiently to allow for such clarity.

(d) Protection for Depression as a Disability in terms of the Constitution

The law requires an employer to consider their employees and not discriminate against them due to their ill health or disability in any manner or form. Section 9 of the Constitution ensures each persons right to equality before the law and the right to equal protection and benefit of the law. Depression falling within the scope of disability gains added protection from dismissals under the Constitution. The equality provision found in Section 9 of the Constitution provides that

[290] Item 5.1.3 (iii).
[291] (2005) 11 BLLR 1084 (LC)
[292] Mendels op cit note 88; Refer to Chapter 4 for the discussion on the affects of depression.
[293] *Strydom v Witzenberg Municipality* op cit note 25.

everyone has equal right and protection under the law,[294] full enjoyment of the law including measures to protect and advance persons[295] as well as not to be unfairly discriminated against directly or indirectly on any ground including disability.[296] This fundamental right ensures that an employee is not discriminated against, in terms of rights, protections, promotions or even dismissals, due to their disability. This constitutional principles is further reiterated by Section 187 of the LRA which provides that any dismissal that was based upon the discrimination of a disabled employee constitutes an automatically unfair dismissal.

The grounds contained in Section 9 are objective as they are based on characteristics which may have an effect on the individual's dignity. Section 10 of the Constitution provides protection for the fundamental right of ones dignity. Dignity is believed, by the constitutional court, to lie at the heart of any prohibition of unfair discrimination.[297] This right recognises 'the intrinsic worth of human beings' as well as the fact that 'human beings are entitled to be treated as worthy of respect and concern'.[298]

Thus, an employees' disability does not entitle the employer to treat that person in an undignified manner nor discriminate against them on that basis.[299] Discrimination against the employee due to their illness also infringes on their dignity, as they are entitled to respect and concern and thus the employers have a duty to uphold it. By categorising depression as a disability, the employees' right against unfair discrimination as well as their dignity is protected. Recognising depression as a disability would ensure that greater care be taken by the employer before dismissing an employee for simply suffering from depression and thus not performing up to the required standard. The employer would then have an active interest in the well being of their employees and thus aiding in the employee seeking treatment, as an early detection system would then be put into place.[300]

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[294] Section 9(1).
[295] Section 9(2).
[296] Section 9 (3) and (4).
[297] Currie & De Waal op cit note 156.
[298] *S v Makwanyane* 1995 (3) SA 391 (CC) at para 44.
[299] *Harksen v Lane NO 1998 (1) SA 300 (CC)*.
[300] Discussed further under recommendations. If an intervention is made in the workplace through assessments and monitoring of the employees and encouraging them to report depression, then the root of the problem may be addressed before the onset of full blown depression. Thus, the early detection approach is beneficial to companies. Burns op cit note 32.

Section 23 provides for the right to fair labour practices. This encompasses the rights to equality contained in Section 9 as well as the right to a fair relationship between the employee and their employer, including accommodation of both interests to arrive at an agreement.[301]

Thus, an employee with depression has the right to be treated equally with the other employees and to approach the employer to come to a common understanding with regard to the disorder. The rights discussed above aid in preventing a dismissal by discriminating against the employee by the mere fact that the employee is ill.

Section 22 of the Constitution provides for the freedom of trade, occupation and industry. This fundamental right contained in the bill of rights guarantees each citizen the right to choose their trade, occupation or profession. This right protects the freedom of commercial activity. An occupation is said to be defined as an activity through which individuals seek to provide for not only their material needs, but also in the idealistic sense of their occupation being their vocation, their calling. An individual has the right to choose or change their occupations or workplace. This right also encompasses an implied right that protects the right to practice as it would be unfair to allow an individual to choose their trade, do the necessary training, preparations and legal requirements, then not allow them to practice.[302]

Since depression is a disorder that is manageable, it would be constitutionally unfair to dismiss an employee who has chosen a trade, fulfilled all the necessary requirements (such as training etc.) and simply due to their treatable psychological disorder, are not allowed to practice. This is clearly unconstitutional in terms of Section 22[303] and clearly a violation of Sections 9 and 23 as the employee is being discriminated against on the ground of their disability, as discussed above.

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[301] *National Education Health and Allied Workers Union v University of Cape Town* 2003 (3) SA 1 (CC). Currie & De Waal op cit note 156.

[302] Iain Currie & Johan De Waal *The Bill of Rights Handbook* 5 ed (2005) ch 22.

[303] Currie & De Waal op cit note 156.

It is thus vital to have an awareness of mental health issues, especially in order for a manager to be an effective leader. Dealing with depression in the workplace is important, particularly in regard to the growth and development of employees, upholding their basic human rights.

(e) Protection for Depression as a Disability in terms of the LRA

Section 187(f) of the LRA addresses automatically unfair dismissals listing grounds that constitute an automatically unfair dismissal, including disabilities. The purpose of the inclusion of disability under Section 187 is to prevent discrimination against this minority.[304] If an employee is dismissed on one of these listed grounds, regardless of procedure, it is automatically unfair. A dismissal due to any of the listed grounds in Section 187 of the LRA is an infringement on the employees' basic human rights and thus the employer cannot argue that the dismissal was for a fair reason (unless it falls within the inherent requirements of the job, which will be discussed below).[305]

The case of *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland*[306] dealt with the issue of a depressed employee being constructively dismissed[307] due to his depression and thus was an automatically unfair dismissal.[308] The employers did not dispute that the dismissal had been constructive. However, both the court a quo and the Labour Appeal Court found that the employee had been automatically unfairly dismissed.[309] However, the court noted that it was not necessary to decide whether depression constituted a disability, but recognised that it was a form of mental illness, and persons with mental illness should be protected from unfair dismissals as the discrimination against mental illnesses falls within the ambit of Section 187(1)(f), automatically unfair dismissals. Thus the court in this case addressed the employee with depression as having his dignity infringed[310] due to the negative stigma of his employer, avoiding the question of depression and whether or not it constitutes a disability. This case does,

[304] Basson et al op cit note 60.
[305] Ibid.
[306] op cit note 27.
[307] Section 186(1)(e) of the LRA: 'an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee'.
[308] Section 187(1)(f).
[309] Refer to paragraph 36.
[310] Refer to paragraph 24.

however, afford a precedent that depression does not fall within one of the dismissal categories,[311] but rather as a category protected by Section 187. The court awarded the employee 24 months compensation as provided by Section 194.[312]

Section 194 of the LRA provides for compensation for employees who are unfairly dismissed. S194(1) provides that the employee is entitled to no more than the equivalent of 12 months remuneration, whereas subsection 3 provides that if the employee's dismissal was automatically unfair, then the employee is entitled to no more than the equivalent of 24 months remuneration. This section adds emphasis on the severity and protection given to employees whose dismissals fall under Section 187. This remedy is unique to the LRA, and reiterates the seriousness of discrimination by an employer.

If an employee is dismissed on any ground listed in Section 187, the LRA provides the employer with two defences. The first is that the dismissal was based on the inherent requirements of the job, and the second deals with age as the employee has reached retirement age.[313] The law does not clearly explain what is meant by the inherent requirements of the job, however inherent requirements is said to depend on the nature of the work, thus if the employee cannot perform his work, then he cannot satisfy the requirements.[314]

Although a justification for dismissing an employee with a disability is the inherent requirements of the job, it is not necessarily the last available nor the appropriate remedy when the employee has depression. Thus, dismissing an employee with depression is not justified or substantially fair as with treatment, it is a manageable disorder. As required in the Disability Code, alternative work or accommodation is required as through therapy and / or medication, an employee will regain the inherent requirements after a relatively short period. Thus, the debate of the larger companies being able to afford to keep a non-producing employee when compared to the smaller companies becomes relevant. If a company simply cannot afford to keep non-producing employees, they cannot be expected to, as discussed earlier under incapacity.

[311] Incapacity, misconduct and operational requirements.
[312] Op cit note 27.
[313] Section 187 (2)(a) and (b).
[314] Grogan op cit note 55.

(i) Disability and Incapacity

There exists an overlap between the provisions dealing with dismissals for incapacities in the LRA and the prohibition of discriminating on the grounds of disabilities found in the Disability Code. This overlap is the perception that depression can both be classified as both a disability, as well as fall under ill-health in incapacities as was found in the case of *De Bruyn.*[315]

Christianson,[316] in her article, addresses disabilities as an incapacity for ill health. She notes that disability receives a passing mention in item 10 and 11 of the Dismissal Code. She notes that dismissal and incapacity are used interchangeably. However, although incapacity refers to ill health or injury, or poor performance, the definition provided in the EEA for disability is far more specific. The EEA, in item 5.1 defines persons with disabilities. It defines them as 'people with long term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in the workplace'.[317] Although ill health or injury, or poor performance may be factors under the EEAs definition, it is not an element of the definition.

There are similar characteristics between incapacity and disability, such as the requirement for assessing the extent of the disability of the employee and reasonable accommodation. However, as Christianson noted, it is submitted that there is indeed a distinction. If an employee is dismissed for an incapacity, it is implied that the employee could not perform the essential functions of the job. However, an employee with a disability who is suitably qualified can continue performing the essential function of the job given the correct accommodation.[318]

Incapacities suggest that the employee cannot perform their expected duties at an acceptable standard. Disabilities suggest that the employee is able to perform their expected duties at an acceptable level with reasonable accommodation and assistance. The overlap occurs when an employee with a disability is dismissed, as their disability falls under the definition given in the

[315] *Public Servants Association of SA obo De Bruyn v Minister of Safety and Security and Another* (2009) 30 ILJ 1631 (LC).
[316] Christianson op cit note 60.
[317] Item 5.1 of the Employment Equity Act 55 of 1998.
[318] Ibid.

EEA.[319] The commissioners have held that in such circumstances, the employer should follow the guidelines laid down in the Disability Code.[320]

Because of the nature of depression, it may be regarded as a disability or incapacity, thus enabling the employer to dismiss the employee for incapacity due to ill health or injury. The purpose of the anti-discrimination legislation[321] is to protect employees from dismissals based on their disability. According to Sec 187(1) of the LRA, dismissal for a disability is automatically unfair.

Dismissal for incapacity may be valid if substantially and procedurally fair. For the incapacity dismissal to be fair the employer must have investigated the nature and extent of the disability, as well as all other alternatives short of dismissal. Although the degree and cause of the incapacity is relevant to the fairness of the dismissal, it may still be justified. Dismissing an employee because he has a disability that may be remedied through treatment is automatically unfair. Thus, depression as a disability offers far stricter protection then to classify it as an incapacity.

However, the law is unclear as to which category disabilities would fall within.[322] In both the *Strydom* and *De Bruyn* cases[323] there seems to be a growing trend of depression being addressed as a disability. But, they do not apply it as such. The only requirement addressed is the one of reasonable accommodation, if it has been considered and whether or not it is in fact possible. However, many employees with depression who are dismissed are not dismissed solely based on their ill health. As discussed in the previous chapter, poor performance or misconduct tend to accompany the depression and as a result, depression is overlooked and their conduct becomes the focus for their dismissal.

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[319] Chapter 1 of the EEA defines People with Disabilities as having the meaning: 'people who have a long –term or reoccurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment'.

[320] *National Education Health & Allied Workers Union obo Lucas and Department of Health, Western Cape* (2004) 25 ILJ 2091 (BCA)*; Wylie and Standard Executors & Trustees* (2006) 27 ILJ 2210 (CCMA).

[321] S9 and S23 of the Constitution as well as S187 of the LRA.

[322] Basson et al op cit note 60.

[323] Strydom v Witzenberg Municipality op cit note 25; *Public Servants Association of SA obo De Bruyn v Minister of Safety and Security and Another* (2009) 30 ILJ 1631 (LC).

(f) Protection given to Depression as a Disability in terms of the Code of Good Practice: Disabilities

The Disability Code provides protection for employees against dismissals.[324] Item 6.1 of the Disability Code, provides that employers should make reasonable accommodation for employees with disabilities, in the most cost effective manner.[325] This idea is echoed in the USAs ADA, as employers are expected to make reasonable accommodation for their disabled employees.[326]

Reasonable accommodation in the Disability Code applies to the recruitment and selection process, the work environment, the way work is done, evaluated and rewarded as well as benefits and privileges.[327] This must be done either when the employee discloses the disability voluntarily or when it is obvious,[328] as well as when the work environment changes and thus impacts on the employee's ability to work.[329]

Experts must be brought in when necessary.[330] The accommodation will depend on the degree and nature of the disability as well as on the employee,[331] it may also be permanent or temporary.[332] Reasonable accommodation may also include adjusting working time and leave[333] as well as offering support.[334] However, the employer is not obliged to accommodate a disabled employee if it would impose an unjustifiable hardship[335] on the business of the employer.[336] Thus, an employee in a larger company is afforded greater protection against dismissal than in a smaller company as there is a greater chance of accommodation in the larger company.

[324] Code of Good Practice: Dismissals (Schedule 8 of the Labour Relations Act)
[325] Item 6.2.
[326] 42 U.S.C § 12111(9) (1998).
[327] Item 6.3 (i) – (iv).
[328] Item 6.4.
[329] Item 6.5.
[330] Item 6.6.
[331] Item 6.7.
[332] Item 6.8.
[333] Item 6.9 (vi).
[334] Item 6.9 (vii).
[335] Unjustifiable hardship is defined in Section 6.12 of the EEA code as an action that requires significant or considerable difficulty or expense. Effectiveness of the accommodation and the extent to which, it would seriously disrupt the functioning of the business but also be taken into account.
[336] Item 6.11.

Item 11 of the Disability Code addresses the situation of retaining employees with disabilities. Subsection 4 provides that if an employee is frequently absent from work for reasons of illness, the employer is obliged to assess if the employee requires reasonable accommodation. Employers do have the option of offering alternative work.[337] The general test is whether the employer can be reasonably expected to retain an under-performing employee for the time necessary for the employee to again produce at an acceptable level.[338] Once again we have the distinction between small and large companies becoming apparent. Larger companies can afford to keep an under-performing employee for a much longer period then smaller companies, thus affording the employee more time to recover and begin performing again. However, with available modern medication, depression is easily controlled, further, there are numerous outpatient programs available to deal with depression such as visiting a psychologist regularly.[339]

The Disability Code offers guidance to all parties affected by the code. However, the shortfall of the Disability Code is that it is merely a guideline, and not law and therefore not sufficiently developed to offer guidance to the parties and the courts.

(g) Conclusion

The various bodies of legislation, discussed above, all provide a form of protection for employees suffering from depression against dismissals. The EEAs definition of disability should thus include depression as it would provide a far more stable and consistent method of addressing depression. Although it is the most suitable form, it is not ideal and falls short upon comparing it to other foreign disability Acts, such as the ADA (discussed in the next chapter) which has been developed exclusively to manage employees with disabilities, such as depression.

The UN, and ILO produce international law guidelines for all member states. The definition contained in the UKs DDA and ADA was based on the foundations these law making bodies

[337] Item 11.5.
[338] Grogan op cit note 55.
[339] Ibid.

provided as they realised that the increasing problem of depression in the workplace needs to be addressed. Although the EEAs definition too is based on the guidelines, it has stagnated in its development as the only further development made, Disability Code, is not binding law, but only a guideline.

In the foreword of the Disability Code, it is noted that the purpose of this code is to protect persons with disabilities. The justification is that disability is a natural part of the human experience and does not diminish the right of the individual to belong and contribute to the labour market. In order to do this, the Disability Code provides that where there is opportunity, reasonable accommodation is to be made for the individual as they not only contribute to the workplace with skills and abilities but also ultimately to the country's economy.

Both the category of incapacity and the Disability Code require the employer to accommodate the employee, offer alternative work when possible and dismiss only as a last resort. Under the Disability code, the problem with accommodation and alternative work is the same as was discussed under incapacity – that it is more viable for larger companies to accommodate an employee with depression than smaller companies.

The advantage[340] of depression falling within the scope of the definition of disabilities in the EEA,[341] is that the employee is afforded more substantial protection from dismissal as protection will stem from not only the Disability Code, but also the LRA,[342] and most importantly, the Constitution, as well as international and foreign legislation (discussed below) making the dismissal automatically unfair. The protection given to the depressed employee if classified as a disability is far more comprehensive than under any other form of dismissal in South African Labour Law.

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[340] The advantage is a limited one, as depression is indirectly noted as it would fall within the category of disabilities. However, recognizing depression as a disability allows for added protection against unfair dismissals found in s187 of the LRA and against the effects of a negative stigma that is attached to depression.

[341] Item 5.1 of the Code of Good Practice: Disabilities of the EEA defines persons with disabilities as 'people with long term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in the workplace'.

[342] Refer to note 22. Namely S187 of the LRA addresses the issue of automatically unfair dismissals, of which disability is one of the listed grounds by which employers cannot dismiss an employee. Further discussed in Chapters 5 and 8.

Chapter 7

THE AMERICANS WITH DISABILITIES ACT

As mentioned in the previous chapter, Section 39 of the Constitution, Section 3 of the LRA and case law[343] require foreign law to be considered when interpreting labour legislation in South Africa. It is thus essential to consider the legislation as well as the debates in other countries. The USA,[344] UK,[345] Japan,[346] as well as the EU,[347] have implemented laws to address an employee with a disability in the workplace.

However, this chapter will analyse the USAs Americans with Disabilities Act (ADA)[348] in order to gain an understanding with regard to the definition of disability as well as its application to persons with disabilities in the workplace. A conclusion will be drawn as to the insights that may be gained from the ADA in order to develop disability provisions in the workplace law within South Africa's labour law.

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[343] Section 39 of the Constitution; Section 3 of the LRA; *Numsa & Others v Bader Bop(Pty) Ltd & another* (2003) 2 BLLR 103 (CC).

[344] Which has the *Americans with Disabilities Act of 1990* which provides protection for employees suffering from mental illnesses such as depression.

[345] *Disability Discrimination Act of 1995,* which defines disability as a physical or mental impairment that has a substantial long-term adverse effect on their ability to carry out normal day to day activities. This definition has been held to include depression by English Tribunals such as in the case of *Heathrow Express Operating Company Ltd v Jenkins UKEAT/0497/06/MAA.* In this case, the applicant successfully claimed unfair dismissal due to her depression to an employment tribunal in England, a comment was made by a solicitor, Maxine Cox, saying that with the new revision, it has made it easier for employees with depression and stress to bring successful disability claims. In the case of depression, it has to be substantial and have long lasting effects on an individuals ability to carry out their normal daily activities, reasonable adjustments that need to be made to the working environment such as reduced working hours. She also went on to state that large organisations with more significant resources are expected to keep an employee's post open for longer periods than a very small company as they would suffer considerable financial hardship by doing so.

[346] Which has a *Basic Law for Persons with Disabilities No. 84 of 1970 amended 2004.*

[347] The EU has a very strong legal basis for anti-discriminatory legal action in Article 13 of the Treaty of Amsterdam of 1997, which will provide the grounding for anti-discriminatory legislation to protect employees with disabilities. The Anti-Discrimination Unit resulted from this treaty. The EU Framework Employment Directive of 2000 has adopted some concepts from the ADA. Article 21.1 of the EU Charter of Fundamental Rights reinforces Article 13. Thus, dismissing an individual on the grounds of their disability is prohibited due to the anti-discrimination legislation in place.

[348] of 1990.

With such high statistics of depression among employees, it is not an illness to be ignored. The USA is among the countries with the highest recorded rate of depression among employees.[349] Thus, by adopting the recommendations of both the UN and ILO, the USA has developed a body of legislation in 1990, the ADA, which regulates disabilities in the workplace.

The USAs ADA was chosen as the body of legislation that will be discussed as opposed to the other aforementioned countries as it is the most developed Act dealing with disabled persons. Although it is one of the more recent acts addressing disabilities, it offers a comprehensive body of law. The research available on the topic of employees with depression is also far more extensive than in any of the above mentioned countries. Thus, only the applicable sections on disability in the workplace in the ADA, namely Title 1,[350] will be dealt with. The definition of disability will be broken down into its components in order to gain an understanding into its application to disabled employees and compared to the definition offered by the EEA.

(a) The Americans with Disabilities Act (ADA)

In the USA, employers of various sizes are recognising that depression often constitutes their highest mental health and disability costs. As a result, employers are understanding the direct relationship between health and productivity and thus are improving their management strategies and implementing supportive programs for a variety of relevant issues such as work or family.[351]

(i) Background

On July 26 1990, the American Congress enacted the ADA, in line with the ILOs recommendations, in order to remedy what was perceived as employment discrimination against individuals with disabilities.[352] The ADA is to protect persons with disabilities from this

[349] One in ten, according to the WHO. Gabriel & Liimatainen op cit note 43.
[350] Title 1 of the ADA is a subchapter of the statute that is applicable to employment.
[351] Kempe op cit note 43.
[352] 42 U.S.C §12101 (1998)*;MacCoy v Pennsylvania Power and Light Co.*, 933 F. Supp. 438,440 (M.D. Pa. 1996).

discrimination in areas of employment in both the public and private sectors,[353] and to ensure access to state and local government programs and services, and public accommodations.[354]

The ADA is a body of legislation dealing exclusively with disabilities. Title 1 is dedicated to disabilities in the workplace.[355] Title 1 of the ADA was build upon the definition and foundations provided by the ILO, as was the EEA. However, compared to the EEA and Disability Code, the ADA has further developed the law accordingly regarding disabilities to provide certainty and clarity to the parties as well as to the courts. It has been summarised as an employer interacting with an individual who has a known disability, but is qualified for a job and is capable of performing the essential functions with or without reasonable accommodation, is prohibited from discriminating against that individual and must provide reasonable accommodation unless it can establish that the individual poses a direct threat or that the accommodation would create an undue hardship.[356]

The ADA guarantees equal employment opportunity for individuals with disabilities. Simply stated, the ADA 'is an antidiscrimination statute that requires the individuals with disabilities to be given the same consideration for employment that individuals without disabilities are given'.[357] Congress intended to overcome the discriminatory effects caused by the employer 'basing their employment decision on unfounded stereotypes'.[358] Congress realised that disabled employees had little or no recourse against employers for dismissals in the past.[359]

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[353] Title V of the Federal Rehabilitation Act of 1973 imposes an obligation upon the government in its capacity as employer to adopt programs for the hiring, promotion and advancement of disabled persons. Deakin & Morris op cit note 278.

[354] 42 U.S.C. § 12101. The ADA is divided into subchapters called titles. Title 1 of the ADA is the subchapter of the statute that is applicable to employment. The remainder of the subchapters cover public transport and other state and government services such as public accommodation, telecommunications and miscellaneous provisions.

[355] 29 C.F.R. pt. 1630 app.

[356] Blair op cit note 38. The disability provisions only apply to employers with fifteen or more employees. However, the public accommodations provisions apply to all sizes of business, regardless of the number of employees. State and local governments are covered regardless of size. Virginia Commonwealth University (2010) 'Americans with Disabilities Act (ADA)' available at *http://www.workworld.org/wwwebhelp/americans_with_disabilities_act_ada_.htm#Americans_with_Disabilities_Act_ADA_Title_I* accessed on 23 July 2010.

[357] 29 C.F.R § 1630.1(a) (1998).

[358] *Siefken v Village of Arlington Heights*, 65 F.3rd 664, 666 (7th Cir. 1995).

[359] 42 U.S.C § 12101 (a)(1).

Section 187 of the LRA is similar. The purpose of the inclusion of disability under Section 187 is to prevent discrimination against this minority. A dismissal due to any of the listed grounds in Section 187 of the LRA is an infringement on the employees' basic human rights and thus the employer cannot argue that the dismissal was for a fair reason.[360]

The Equal Employment Opportunity Commission (EEOC) was established to implement Title 1 of the ADA as well as act as a body of expertise in order to inform and provide both courts and litigants with guidance on any Title 1 issues.[361]

The ADA was enacted in accordance with the Fourteenth Amendment of the Civil Rights Act of 1964, which is similar to South Africa's Section 9 equality clause in the Constitution. The Fourteenth Amendment provides that all persons are entitled to equal protection before the law.[362] The ADA fills in the gap left by Section 504 of the Rehabilitation Act of 1973 as both laws cover any situation a disabled person may be in. Section 504 defined disability in the same way as the ADA[363] thus including psychological disorders but not listing the disorders. The deciding factor under Section 504 is whether the impairment limits one or more major life activity.[364] Both of these pieces of legislation have resulted in an effective source of protection for employees with depression on the basis that discrimination on such grounds is no longer valid and there is an onus on the employer to accommodate the employee.

(ii) Disability in the ADA

The ADA defines the term 'disability' as a physical or mental impairment that substantially limits one or more of the major activities of such individual. Commonly recognised impairments

[360] Basson et al op cit note 60.

[361] *Meritor Savings Bank, F.S.B v Vinson*, 477 U.S 57, 65 (1996)*; Halperin v Abacus Tech. Corp.*, 128 F.3rd 191, 199 n.12 (4th Cir. 1997).

[362] Lawyers.com, 'Americans with Disability Act summary' available at *http://labor-employment-law.lawyers.com/americans-with-disabilities-act/ADA-and-employment.html*, accessed on 23 July 2010. The website Martindale-Hubbell Lawyers.com is a trusted source for identifying qualified legal counsel and offers a variety of online legal services. It is a product of LexisNexis, a division of Reed Elsevier Inc.

[363] Disability is a physical or mental impairment that substantially limits one or more of the major activities of such individual.

[364] Such as walking, performing mental tasks and , learning and working. This list is not exhaustive. Everyday Law Encyclopedia, 'ADA and Section 504' available at *http://www.enotes.com/everyday-law-encyclopedia/educational-accomodations.html*, accessed on 23 July 2010.

that may interfere with the performance of life activities include any mental or psychological disorder that is generally recognised by medical authorities such as depression.[365] This definition was upheld in *McClarty v Totem Electric*,[366] the tribunal added that disability means a sensory, mental or physical impairment that is medically recognised and diagnosed, or that exists in a record of history or is perceived to exist. This statute expressly states that it can be permanent or temporary as well as that a disability can exist whether or not it impairs the ability to do a particular job or engage in any other activity. Thus, numerous courts have held that depression, under the right circumstances,[367] is a disability under the ADA,[368] however, the determination of whether a plaintiff has a disability must be made on a case-by-case basis.[369]

Title 1 of the ADA has been summarised as an employer interacting with an individual who has a known disability, but is qualified for a job and is capable of performing the essential functions with or without reasonable accommodation, is prohibited from discriminating against that individual and must provide reasonable accommodation unless the employer can establish that the individual poses a direct threat or that the accommodation would create an undue hardship.[370]

[365] Upheld in *Leisen v Shelbyville* 135 F.3d 805 (7th Cir. 1998).

[366] 157 Wn.2d 214 (2006).

[367] The 'right circumstances' are when the depression falls within the definition of disability found in the ADA, which states that a disability is a physical or mental impairment that substantially limits one or more of the major activities of such individual. 42 U.S.C. §12101(2) of the Americans with Disability Act of 1990.

[368] *Bombard c Fort Wayne Newspapers, Inc*., 92 F.3rd 560, 561 (7th Cir. 1996); *Guise-Mills v. Derwinski*, 967 F.792, 796-97 (2nd Cir. 1992). An amendment to the definition of disability in the ADA has been proposed. These proposed amendments were published by the EEOC to focus on the definition of disability under the ADA and significantly broaden it. The revised definition will remain the same, however it will contain a list of examples. The list adds to the ADA Amendment Act of 1998 which contains: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending speaking, breathing, learning, reading, concentrating, thinking, communicating and working. Major bodily functions are also major bodily functions. The addition is the factor of 'interacting with others' as a major life activity. Anderson & Will op cit note 71.

[369] *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999).

[370] Blair op cit note 38. The disability provisions only apply to employers with fifteen or more employees.[370] However, the public accommodations provisions apply to all sizes of business, regardless of the number of employees. State and local governments are covered regardless of size. Virginia Commonwealth University op cit notes 356.

The following subsection contains a list of seven types of conduct that can be proved by an employee to establish their employers discrimination towards them based on their disability.[371] The list is far more extensive than the list in Section 187(1) (e) and (f) of the LRA, which outlines the action of discrimination against the employee, not merely listing the types of discrimination as in the LRA.

Titles 1's antidiscrimination clause states that 'No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, discharge of employees, employees compensation, job training, and other terms, conditions and privileges of employment'.[372] Section 187 of the LRA contains a similar provision as it emphasises the unacceptability of discrimination, regardless of the phase and lists the characteristics and behaviours an employee may displace and as a result be discriminated for.

However, the ADA requires that an employee who believes that he has been discriminated against must do more than merely alleging so in order to have a successful claim. Although case

[371] Ibid. 12112(b): [T]he term 'discriminate' includes -
(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee; (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labour union, an organization providing fringe benefits to an employee of the covered entity, or an organisation providing training and apprenticeship programs); (3) utilising standards, criteria, or methods of administration - (A) that have the effect of discrimination on the basis of disability; or (B) that perpetuates discrimination against others who are subject to common administrative control; (4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association; (5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant; (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and (7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

[372] 42 U.S.C § 12112(a).

law has not reached a consensus, the employee will have to prove that he is disabled due to: an impairment which substantially limits a major life activity; must have a record of such impairment; or having been regarded by his employer as having such an impairment. The employee is also required to show that he is qualified for the job (with or without reasonable accommodation) and that he has been discriminated against on the basis of such a disability.[373] Once the employee has proven a prima faci case, the burden of proof turns to the employer who is required to prove a defence to the allegations.

The ADA offers an insight as to how the burden of proof may be implemented so as to ensure that neither party abuses the system, nor have their rights ignored. This ADA provision ensures that the employee is not discriminated against, nor does he take advantage of his disability prejudicing the employer.

A 'qualified individual with a disability' is entitled to reasonable accommodation in the workplace as provided for by the ADA. This term refers to 'an individual with a disability who satisfies the requisite skill, experience, education, and other job requirements of the employment and who, with or without reasonable accommodation, can perform the essential functions of the position'.[374] A two-fold test is thus drawn from this term. The first part is to determine if the employee has the required skill, qualification, experience etc for the position. The second part is to determine if the employee can in fact perform the essential functions of that position. The EEOC defines essential functions as the 'fundamental duties of the employment position'.[375]

The particular functions required by the second part are determined on a case-by-case basis and are fact specific.[376] In short, the employee must prove that he is both disabled and can in fact perform the required essential functions required by the position in question.

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[373] *Pouncy v Vulcan Materials Co*. 920 F. Supp. 1566, 1578-79; 29 C.F.R §§ 1630.4 – 1630.13 (1998).

[374] 29 C.F.R § 1630.2(m); *Garcia-Ayala v. Lederle Partenterals, Inc.*, 212 F.3d 638, 648 (1st Cir. 2000).

[375] 29 C.F.R § 1630.2 (n)(1). First, the employees' disruptive behaviour or other misconducts prevent him from being able to perform his job as required, thus no longer a 'qualified individual' nor is an employee who cannot cope with certain stress levels in the work environment as an essential part of the job. Thus an employee not able to cope with the stress is not a qualified individual.

[376] 29 C.F.R pt. 1630 app.

The ADAs definition is not workplace specific, as is the EEA definition. However, it is broken down into its elements and further explained in the Act directly addressing the employment aspects of the definition. The EEA could benefit from this approach. In developing the individual elements of the disability definition, it offers clarity and guidance to the parties concerned, especially with regard to the rights and obligations of the parties, as will be discussed below.

(iii) What Constitutes a Disability

In order for the employee to prove that he does in fact have a disability, the burden is on the plaintiff to establish three factors.[377] The first factor provides that the employee has a physical or mental impairment that substantially limits one or more life activities of the individual. The second factor requires that the employees prove that they have a record of such impairment. The plaintiff must show that the 'life activity' limited by the impairment qualifies as major and that it substantially limits the plaintiff's identified major life activity.[378]

The final factor requires that the employee be regarded as having such impairment. This stage includes an employee who may not have an impairment but is perceived to have one. This is because 'regarded as having such an impairment' refers to an employee who first, has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitations; secondly, has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others towards such impairment; or lastly, has none of the impairments defined in the ADA[379] but is treated by a covered entity as having a substantially limiting impairment.[380]

[377] *Bailey v. Georgia-Pacific Corp.,* 306 F.3d 1162, 1167 (1st Cir.2002).
[378] *Bragdon v. Abbott,* 524 U.S. 624, 630- 31, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998).
[379] 29 C.F.R. § 1630.2(h)(1) and (2).
[380] 42 U.S.C. § 12102(2)(C); 29 C.F.R § 1630.2(g)(3).

1. Physical or mental impairment

Physical or mental impairment is defined as: '1. Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organ), cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or 2. Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities'.[381]

The courts have recognised that the mental impairment does not have to be permanent[382] and that on certain occasions depression is thus a mental impairment.[383] Depression is reoccurring in over half of the individuals suffering from depression, and between twenty and thirty-five percent will experience a chronic episode.[384] As a result, the EEOC stated that 'chronic, episodic conditions may constitute substantially limiting impairments if they are substantially limiting when active or have a high likelihood of reoccurrence. For some individuals, psychiatric impairments such as bipolar disorder, depression, and schizophrenia may remit and intensify, sometimes repeatedly, over the course of several months or several years'.[385]

2. Substantially Limits a 'Major Life Activity'

The term 'substantially limits' in this instance, refers to one of two scenarios. First, to a physical or mental impairment that causes an individual to be unable to perform a major life activity that

[381] 29 C.F.R. § 1630.2(h). Exclusions to this definition: physical characteristics such as eye and hair color, left-handedness, weight, height, characteristic predisposition to a disease or illness, pregnancy, environmental, cultural or economic disadvantages.

[382] *Paterson v Downtown Med. Ctr.*, 866 F. Supp. 1379, 1381 (M.D. Fla. 1994).

[383] *Criado v. IBM Corp.*, 145 F.3d 437, 442 (1st Cir.1998). A number of other circuits have also recognised depression as a qualifying mental impairment. See, e.g., *Ogborn v. United Food & Commercial Workers Union, Local* No. 881, 305 F.3d 763, 767 (7th Cir.2002) held that major depression can constitute a disability under the ADA; *Snead v. Metro. Prop. & Cas. Ins*. Co., 237 F.3d 1080, 1088 n. 8 (9th Cir.2001). The judge in this case held that in Oregon, stress and depression can be considered mental impairments. The same is true under the ADA; *Pritchard v. Southern Co. Servs.*, 92 F.3d 1130, 1132 (11th Cir.1996) held that depression has been held to constitute a mental impairment; *Doe v. Region 13 Mental Health-Mental Retardation Comm'n.*, 704 F.2d 1402, 1408 (5th Cir.1983).

[384] Blair op cit note 38.

[385] The U.S. Equal Employment Opportunity Commission 'EEOC Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities' 25 March 1997 available at *http://www.eeoc.gov/policy/docs/psych.html* , accessed on 23 July 2010.

he may ordinarily be able to do. The second refers again to a physical or mental impairment that causes significant restriction as to the condition, manner or duration under which the individual can perform a particular major life activity.[386]

The courts have various factors which they consider when determining a substantial limitation.[387] The factors include the nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.[388] These are economic impact factors that are to ensure that the business size, type, sales, and relevant labour markets are not affected by the accommodation that would 'cause a financial hardship to the operation of the business' or that would 'fundamentally alter the nature of the business'.[389]

Thus, it is insufficient for the employee to simply claim he has depression, the court is expected to look at the underlying symptoms and complications in order to determine if the depression does in fact substantially limit the employee's performance of a major life activity.[390] In *McClinton El v. Potter*[391] the court held the that plaintiff who suffered from depression had provided sufficient evidence that he was substantially limited in the major life activities of caring for himself, sleeping, and eating, which supported his claim that he had an ADA disability. Due to the courts needing to investigate each claim.[392]

Substantially limiting refers not only to caring for oneself on a daily basis, performing tasks such as speaking, breathing, learning, but also includes working.[393] When addressing the substantial limitation of working, substantially limiting is defined further as meaning a significant restriction 'in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and

[386] 29 C.F. R §1630.2 (j) (1) (i) and (ii). An irritable employee is not substantially limited.
[387] 29 C.F. R §1630.2 (j) (2); and C.F. R pt. 1630.2 app.; EEOC, Enforcement Guidance, *supra* note 23 at 6.
[388] 29 C.F. R §1630.2 (j) (2); and C.F. R pt. 1630.2 app.; EEOC, Enforcement Guidance, *supra* note 23 at 6.
[389] Peter D Blanck 'Individual Rights and Reasonable Accommodations under the Americans with Disabilities Act: The Economics of the Employment Provisions of the Americans with Disabilities Act: Part I – Workplace Accommodations' (1997) 46 *DePaul L. Review* 877.
[390] Blair op cit note 38.
[391] WL 5111182 (N.D. Ill. 2008).
[392] *Adams v Rochester General Hospital.*, 977 F. Supp. 226, 232 (W.D.N.Y. 1997).
[393] Blair op cit note 38.

abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activities of working'.[394]

There are various other factors that are taken into account when determining substantial limitation in terms of the major life activity of working, which are: The geographical area to which the individual has reasonable access; the job from which the individual has been disqualified because of an impairment, the number and types of jobs utilising similar training, knowledge, skills or abilities within the geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilising similar training, knowledge, skill or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).[395]

Consequently, the employee is not substantially limited simply because they are unable to perform a particular task or unable to perform a specialised job requiring extraordinary skill. However the employee also does not need to be completely unable to work, only substantially restricted when performing a task compared to the average employee with comparable qualifications performing the same task.[396]

The determination of substantial limitation of a major life activity is based on a comparison of the individual's ability to perform general activities that the average individual has no problems with. The EEOC Proposed Regulations[397] provide guidance as to how this comparison should take place, using common sense and without scientific or medical evidence. An impairment need not prevent or significantly or severely restrict an individual from performing a major life activity in order for it to be considered a disability, it need not be permanent. The proposal indicated that even impairments in which the duration is expected to be less than six months qualify as a disability. The EEOC Proposed Regulations identify certain impairments that will

[394] *Stewart v Happy Herman's Cheshire Bridge, Inc.*, 177 F. 3d 1278, 1285 (11th Cir. 1997); *Crumpton v St. Vincent Hospital*., 963 F. Supp. 1104, 1112 (N.D. Ala. 1997).
[395] 29 C.F.R. §1630.2(j)(3).
[396] Blair op cit note 38.
[397] Anderson & Will op cit note 71.

fall within the ambit of disability, which includes psychiatric disorders such as major depression.[398]

The best route of defence that an employee with depression has is to show that a major life activity has been substantially limited, such as thinking, concentrating, sleeping and interacting with others.[399] An employee with depression has undoubtedly been affected by a major life activity being substantially limited, most common being thinking and concentrating. Depressive symptoms often manifest in an obvious manner, and attention should be brought to these symptoms as proof of the employers' contractive knowledge of the disorder.[400]

Although clinical depression is a mental impairment under the ADA, not everyone with clinical depression will qualify for coverage. The Supreme Court has ruled[401] that to determine whether a person has a disability or not will depend on whether the person is substantially limited in performing a major life activity when using a mitigating measure such as medication. In other words, even though clinical depression is a permanent condition, if you are able through medications and therapy to perform major life activities without difficulty you will not meet the ADAs definition of disability. However, if the employee can prove that they continue to experience limitations despite their medications and therapy and thus their job performance is compromised as a result of the depression, the employee would still be protected under the ADAs definition of disability.[402]

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[398] Others include requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV or AIDS, multiple sclerosis, muscular dystrophy, asthma, high blood pressure, psychiatric disorders such as bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, schizophrenia, panic disorders, anxiety disorders and other forms of depression that are not major depression. This list is not exhaustive.

[399] Blair op cit note 38.

[400] Blair op cit note 38. Co-employees may also give testimony to the symptoms thus refuting the employers' argument that he had no knowledge.

[401] *Sutton v. United Air Lines, Inc.* (97-1943) 527 U.S. 471 (1999) 130 F.3d 893; *Murphy v. United Parcel Service, Inc.* (97-1992) 527 U.S. 516 (1999) 141 F.3d 1185; *Albertsons, Inc. v. Kirkingburg* (98-591) 527 U.S. 555 (1999) 143 F.3d 1228.

[402] N Schimelpfening 'The Americans With Disabilities Act and You: Know Your Rights Under the Americans With Disabilities Act', *About.com Guide*, available at *http://depression.about.com/cs/disability/a/ada.htm.*, accessed on 23 July 2010. (This is a website hosted by a panel of experts answering questions on a variety of legal and medical topics.

3. Reasonable Accommodation

The Disability Code[403] provides that employers should make reasonable accommodation for employees with disabilities, in the most cost effective manner.[404] This idea is echoed in the ADA, as employers are expected to make reasonable accommodation for their disabled employees. However, the ADA is far more developed as it provides guidelines and suggestions to what reasonable accommodation is possible.[405]

The ADA provides that an employer must reasonably accommodate those employees with psychological disorders as long as it does not result in undue hardship for the employer.[406] The concept of unlawful discrimination is extensively defined in the ADA, including an employers' failure to reasonably accommodate a qualified disabled employee, so as to enable them to perform their work.[407] According to the ADA, reasonable accommodation may include, but is not limited to: 'Making existing facilities used by employees accessible to and usable by individuals with disabilities; and job restructuring, part-time or modified time schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustments or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodation for individuals with disabilities'.[408]

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[403] Item 6.1

[404] Item 6.2.

[405] 42 U.S.C § 12111(9) (1998).

[406] Undue hardship is determined by the tribunals on a case by case basis, but it is usually seen as not being difficult or expensive, as often for depressed employees all it requires is a change in the work schedule.

[407] Deakin & Morris op cit note 278.

[408] 42 U.S.C § 12111(9) (1998). Schimelpfening op cit note 402, provides examples of reasonable accommodation for those with depression might include: clear delineation of performance expectations, schedules which incorporate flex-time, part-time positions or job sharing, time off for scheduled medical appointments or support groups, the use of break time according to individual needs rather than a fixed schedule, physical arrangements (such as room partitions or an enclosed office space) to reduce noise or visual distractions, extending additional leave to allow a worker to keep his or her job after a hospitalization, allowing workers to phone supportive friends, family members, or professionals during the work day, joint meetings between the employer, supervisor, and job coach or other employment service provider.

The ADA contains provisions that require the employee to prove his disability, and thus experts are needed.[409] This ensures that the employee is in fact disabled, and thus requires the employer to act accordingly, such as providing the necessary reasonable accommodation.

The purpose of the reasonable accommodation requirement is not to place the disabled employee in a superior position, but rather to enable such employees to enjoy the same benefits and privileges of employment as are enjoyed by employees without disabilities.[410] However, one must bear in mind that simply because an accommodation is possible, does not necessarily mean it's reasonable.[411] The employer should first attempt to reassign the employee to an available position of the same or similar salary status. Only if this is not possible may the employer reassign the employee to a lower grade job. However, reassignment may not be used to segregate or in any way discriminate against the employee by forcing the employee to accept undesirable positions.[412] The intention of the USA congress upon legislating the ADA was to do away with the prejudices that surround mental disabilities.[413]

In order to provide better protection for employees, is for the employee claiming to have the mental disability to present the employer with a documented diagnosis from a mental health professional with suggested accommodation. This would enable the courts to dismiss false claims of depression and proof thereof after dismissal. This suggestion would also aid the employer with how to accommodate the employee and obviate the need to guess as to what the appropriate accommodation would be.[414]

A study conducted by the U.S. Labour Department has shown that most reasonable accommodation for mentally disabled employees would in fact cost very little, as fifty per cent of the accommodation would in fact cost nothing.

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[409] 29 C.F.R §§ 1630.4 – 1630.13 (1998).
[410] *Pegues v Emerson Electronics Co.*, 913 F. Supp. 976, 981 (N.D. Miss. 1996).
[411] *Mohamed v Marriott International, Inc.*, 905 F. Supp. 141, 152 (S.D.N.Y. 1995).
[412] 29 C.F.R. pt. 1630 app.; The U.S. Equal Employment Opportunity Commission op cit note 301.
[413] 42 U.S.C. §12102 (2).
[414] Mika & Wimbiscus op cit note 43.

One may argue that depression, as a mood disorder, would require prolonged leaves of absence from the workplace. However, with available modern medication, depression is easily controlled, further, there are numerous outpatient programs available to deal with depression such as visiting a psychologist regularly.[415]

(iv) Employers Position

The ADA has also addressed the issue of an employer being either unable to keep a disabled employee. Prima facie, the ADA appears to be completely in favour of the employee. However, the act is not completely unfavourable towards the employer. The employer has a number of defences he may use to rebut the plaintiffs / employees case. He may argue that the plaintiff does not have sufficient evidence of the elements as required by Part II.[416] This is accomplished through proving any of the following: First, that the employees disability was not known to the employer. The ADA does not require an employee to be accommodated by his employer if the employer is unaware of his disability. The courts have held that the initial burden of proof is on the employee to prove that he has brought his disability to the attention of the employer.[417]

However, this factor poses a problem as usually employees suffering from depression do not like to disclose this to their employer in fear of prejudice or other undesirable consequences due to the employers' ignorance of the disorder. However, courts have held that an employer noticing abnormal or disruptive behaviours is considered to have known.[418]

Secondly, refusal of reasonable accommodation. If the employee refuses what the court has found to be reasonable accommodation offered by the employer, then the employee is no longer

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[415] Ibid.

[416] *Pouncy v Vulcan Materials Co. 920 F. Supp. 1566, 1578-79*; 29 C.F.R §§ 1630.4 – 1630.13 (1998) provide the elements required for a prima facie case, they are as follows: an impairment which substantially limits a major life activity; must have a record of such impairment; or having been regarded by his employer as having such an impairment. The employee is also required to show that he is qualified for the job (with or without reasonable accommodation) and that he is discriminated against on the basis of such a disability.

[417] 29 C.F.R. pt. 1630 app.; *Taylor v Principal Financial Group, Inc.* F.3d 155, 165 (5th Cir. 1996); *Adams v Rochester General Hospital*, 977 F. Supp. 226, 235 (W.D.N.Y. 1997).

[418] *Stola v Joint Indus. Bd.*, 889 F. Supp. 133, 135 (S.D.N.Y. 1995).

deemed a 'qualified individual with a disability'.[419] However, the employer is required, when possible and if not too costly, to accommodate the employee.[420]

Thirdly, undue hardship for the employer. Another valid defence against the employees claim would be if the employer can prove that by providing the employee with reasonable accommodation would cause undue hardship on the employer. An 'undue hardship' refers to any accommodation that would be 'costly, extensive, substantial, or disruptive, or would fundamentally alter the nature or operation of the business'.[421] It is considered in light of factors such as an employer's size, financial resources and the nature and structure of its operation. An employer is not required to lower quality or production standards to make an accommodation.[422]

When taking all the relevant factors into account, the EEOC regulations advise the employee to work with the employer in order to determine what, if any, accommodations are available and possible.[423] The balance between reasonable accommodation and undue hardship is to be determined on a case-by-case basis as it is specific to the employee and employer at hand.

Lastly, direct threat to the health and safety of others in the workplace. Direct threat is defined in the EEOC as a significant risk of substantial harm to the health or safety of the

[419] *Willett v Kansas*, 942 F. Supp. 1387, 1395 (D. Kan. 1996). In this case a nurse was offered a position of dispensing medication which required her to walk less as she suffered from lupus. She refused the accommodation. The court found that due to her refusal, she was deemed to not be a 'qualified individual with a disability'.

[420] *Calero-Cerezo v. U.S. Department of Justice*, 355 F.3d 6, 19 (1st Cir. 2004).

[421] 29 C.F.R §1630.2(p); 42 U.S.C. § 12111(10) (B) provides the factors that are considered are the nature and cost of the accommodation needed: the overall financial resources of the employer, the number of persons employed by the employer, the effect on expenses and resources and upon the operation of the employer; the overall financial resources and size of the covered entity; and the type of operations of the employer, its structure, composition and functions of the workforce. The courts have found the following to be unreasonable accommodation expected from the employer: unpaid leave of an indefinite duration; keeping an employee on unpaid leave indefinitely until the position opens; creating a new position for a disabled employee; eliminating or reallocating the essential functions of the position; providing an employee with the specific accommodation that individual requests; and allowing employees to work only when their mental or physical impairment permits. *Aquinas v Federal Express Corporation.*, 940 F. Supp. 73, 79 (S.D.N.Y. 1996).

[422] Cornell University: Employment and Disability Institute 'What is Reasonable Accommodation', *What the Law Says*, available at *http://www.ilr.cornell.edu/edi/accessforall/index.htm?page=lawsays&CFID=24812869&CFTOKEN=49784162*, accessed on 23 July 2010. Schimelpfening op cit note 402.

[423] 29 C.F.R §1630.2(o)(3). The regulations state: to determine the appropriate reasonable accommodation it may be necessary for the covering entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

individual or others that cannot be eliminated or reduced by reasonable accommodation. This is determined by means of medical evidence; the individuals' assessment, and an assessment of the individuals' behaviour that could pose a direct threat.[424] Having a history of the mental disorder or currently being treated for it does not constitute a direct threat.

Currently in terms of the LRA, the employee may be dismissed under a misconduct should they become a threat to others. Dismissing an employee with depression for a misconduct ignores the disability. The ADA has recognised that within the context of disabilities, a direct threat is to be treated differently to a misconduct. The LRA, EEA or Disability Code do not have this distinction as the aforementioned bodies have not been sufficiently developed.

A guideline as drawn up by the ADA to aid in determining a 'direct threat' lists various factors. The first factor was the duration of the risk. The second was then the nature and severity of the potential harm. The third was the likelihood that the potential harm will occur, and the fourth was the imminence of the potential harm.[425] In determining if the depressed employee is a threat to others, one must ascertain if there is a history or violence and if the diagnosis is one of violence.[426]

Thus, when there is an employee who poses a direct threat to others or themselves as a result of their disability, the employer must determine whether reasonable accommodation would reduce or eradicate the risk to an acceptable level. If reasonable accommodation is not possible, then the employer may refuse to hire the individual or dismiss the employee.[427]

(v) Insights South Africa may gain from the ADA

In terms of the LRA, a dismissal must be for either incapacity, misconduct or operational requirements. If it is not, it may constitute a substantially and procedurally unfair dismissal. As

[424] 29 C.F.R §1630.2(r).

[425] 29 C.F.R §1630.(r). An elaboration of the four factors listed can be found in a publication by the EEOC entitled *A Technical Assistance Manual on the Employment Provisions (Title I) of the ADA*

[426] Ibid. This is not common, however if it is argued, the employee may show that with the correct medication, all symptoms are drastically decreased.

[427] 29 C.F.R pt.1630 app.

discussed in the previous chapter, there are a number of short falls within the LRAs dismissals categories that render them less than ideal in addressing an employee with depression. Thus, in recognising depression as a disability, as the ADA did, brings South Africa on par with foreign developments and offers the employees far more protection against unfair dismissals.

The most obvious advantage to employee's employed in the USA is the fact that an Act has been enacted to deal exclusively with employees with disabilities. In South Africa, the Disability Code, which addressed disabilities in the workplace, is not law but only a guideline. The ADA not only offers aid to the disabled, but also to others who have an association with them, such as parents. Having an Act such as the ADA provides a level of protection as it is a body of laws to which both employers and employees can rely upon for guidelines, direction and protection. As an employee with depression, the ADA provides the factors which the employee must prove in order to be declared disabled, in order to fall within the ambit of the Act. Neither the EEA nor Disability Code provide a similar provision, nor the clarity.

The USAs federal government plays a crucial role in interpreting, translating, and the implementation of the ADA. There are a number of primary government agencies and offices actively involved in enforcement, technical assistance, research, and dissemination of information for all mental health disorders and/or psychiatric disabilities. Through their various activities, these agencies and offices offer support on mental health issues in the workplace to both employers and employees. Some of their activities specific to depression and employment are subsumed under the larger framework of psychiatric disabilities and local community support.[428] Thus, the EEOC was established in order to implement Title 1 of the ADA as well as act as a body of expertise in order to inform and provide both courts and litigants with guidance on any Title 1 issues.[429]

The ADA contains lists of specific factors that must be taken into account by the employers before they may consider dismissing the disabled employee, such as what constitutes 'mental impairment' and 'substantially limiting'. In the EEA, mental impairment highlights the essential

[428] Gabriel & Liimatainen op cit note 43.

[429] *Meritor Savings Bank, F.S.B v Vinson,* 477 U.S 57, 65 (1996)*; Halperin v Abacus Tech. Corp.*, 128 F.3rd 191, 199 n.12 (4th Cir. 1997).

elements, such as clinical recognition as well as the effects upon ones judgement, thought process or emotions. The ADA definition is far more specific. Substantially limiting in the EEA refers exclusively to ones ability to perform the job at hand. However, in the ADA, it refers to limiting any major life activity, be it work or normal daily tasks. The ADA also requires that the geographical area be taken into account with regard to reasonable access to the employer. The EEA does not. The factors listed are far more extensive and specific to disabilities thus requiring the employer to assess the employee correctly as well as allowing the employee to have some control by placing the onus to prove the extent of the disability upon himself.

The ADA provides a definition for what constitutes a disability.[430] The definition of disability is broken down and its main components further defined. The specificity in the Act enables both the employer and employee to determine if they fall within the Act and what disabilities in fact fall within its ambit. The various definitions of disability instituted by the UN, ILO, ADA and EEA are fundamentally the same as they all require a mental element to be affected, whether permanent or temporary, in order to qualify as a disability. However, compared to the ADA, the disability definition contained in the EEA is not as thoroughly dealt with in the Act. This is also due to the fact that the South African courts have not yet had a case before them in which they address the scenario of a depressed employee falling within the disability category to examine the matter and allow them to interpret the definition further.

The provisions in the ADA ensure consistency in its application as well as security to both employer and employee as both parties know what is to be expected from them. It also requires the courts to play an active role in determining the underlying cause. ADA regulations and case law provide that the inability to perform a particular job is not a disability, unless it is an inability by the employee to be unable to perform a class of jobs or a broad range of jobs in various classes. The EEOC Proposed Regulations propose a significant change in that an impairment that substantially limits an individual's major life activity of working by way of

[430] The definition of disability found in the ADA states that a disability is a physical or mental impairment that substantially limits one or more of the major activities of such individual. 42 U.S.C. §12101(2) of the Americans with Disability Act of 1990.

substantially limiting the individual's ability to perform, or to meet the qualifications for the type of work at hand, thus falls within the definition of disability.[431]

The ADA also encompasses what is to be expected from both the employee and the employer, especially in terms of reasonable accommodation. Reasonable accommodation is required by both the LRA, EEA and by the ADA. However, only the dismissal category of incapacity for ill health requires the employer to reasonably accommodate the employee. Thus, as mentioned previously, should the employer dismiss an employee for operational requirements, as a tactic of avoiding all of the prerequisites required to be met for incapacity, reasonable accommodation is not a factor.

The ADA provides some specific examples of what constitutes reasonable accommodation, the LRA does not. The EEA's Disability code provides a little more specificity and clarity than the LRA. Although the Disability code is an improvement on incapacity dismissals, it is still not as developed as the ADA. However, the Disability Code is not law, but only a guideline.

Thus the ADA offers the employees a certain level of control as they are required to prove that they in fact do have a disability and that he is qualified for the job. This provides further protection as the employee has some control in protecting his employment. There are tests put in place in order to determine the employees' ability to retain his employment that must be carried out by the employer.

The EEOC Proposed Regulations will have the effect that it would be sufficient for an employee to show that the employer took adverse action against them because of an actual or perceived impairment as opposed to proving that the employer had known of the impairment. Another impact of the EEOC Proposed Regulations is that all the elements of proving a disability come into question when there is a claim of failure to reasonably accommodate, or a claim of discrimination. If the individual does not fall within the definition of disabilities, he would not be accommodated. The effect of these proposed regulations is that the employers will

[431] Anderson & Will op cit note 71.

now need to make reasonable accommodation for more employees than they had done so in the past.[432]

The Courts have rules that upon assessing the disability of the employee, the mitigating measures must be taken into account.[433] This precedent offers further protection as depressed employees can continue to perform as normal when given the correct medical attention, such as medication. This provides that the employee with depression cannot, in fact, be dismissed arbitrarily, that all options need to be considered.

In terms of both South African labour laws and ADA, undue hardship is a reality with regard to reasonable accommodation and thus the employer may not accommodate the employee if the accommodation is unreasonable. However, the US Labour department has shown that often accommodation costs either nothing or very little.

An antidiscrimination clause against disability, found in Title 1, provides for protection against discrimination through the application, employment and dismissal stages. South Africa's antidiscrimination class also applies to employees. A similar antidiscrimination clause is found in the South African Constitution. However, in the LRA, should an employee be dismissed for his disability, in other words, should an employee be discriminated against based on his disability, the dismissal is in the form of an unfair dismissal found in Section 187 and is automatically unfair as it amounts to discrimination in terms of the UN, ILO and ADA anti-discrimination clauses.

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[432] Ibid.

[433] The U.S. Supreme Court has ruled that the determination of a disabled person under the ADA must have due regard to the mitigating measures, however it is determined on a case-by-case basis. Cornell University op cit note 387. However, the EEOC recommends that the individual's mental impairment limitations be evaluated without taking into consideration the mitigating effects of any auxiliary aids, medicines or other mitigating measures. The courts however are split in opinion about whether the mitigating effects of the medication are to be considered or not. *Gilday v Mecosta County*, 124 F.3d 760, 762-63 (6th Cir. 1997); *Compare Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997); *Harris v. H & W Contracting Co.*, 102 F.3d 516, 520-21 (11th Cir. 1996); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1349 (1997).

Case law has found that depression, if sever enough, falls within the ADA.[434] In the ADA, there is no other method of dismissing an employee with a disability than the method set out in the ADA. South Africa lacks this clarity. As previously discussed, the courts do not have a set act or guidelines to follow when faced with a depressed employee. Thus, the courts are uncertain and inconsistent in their approach as South African courts appear to be addressing depression as a disability but not applying it as such. The result being that the individual must challenge the dismissal, not in terms of his disability, but rather in terms of the dismissal category.

The ADA also contains a list of factors, which are far more specific that S187 of the LRA,[435] which must be proved by the employee to prove that they have been discriminated against by the employer. This specific list offers a guide to behaviours which the employee can look out for and which the employer must not be party to avoid being found guilty of discrimination.

The ADA places some responsibility upon the employee by requiring the employee to prove that he has a disability and that he is a qualified individual. The employer is then required to prove and defend his contrary allegations. Both the LRA and EEA place the responsibility of proving the dismissal category requirements upon the employer. The onus of proof is thus divided between the two parties. In an incapacity dismissal, the employer must show that there is a required standard, that the employee was given time to improve, if dismissed for ill health, the extent of the employees dismissal and if reasonable accommodation is possible, and finally that dismissal was the last resort. In misconduct dismissals, the employer must show that a rule existed, it was contravened, the employee should have been or was aware of the rule and that the dismissal was appropriate. For operational requirement dismissals, it must be shown that the dismissal was for structural, technological or economic reasons of the employer. In all these dismissal categories, the employee is only required to defend.

The ADA provides more protection to disabled employees than the current legislation in South Africa. This is due to the act dealing exclusively with disabled employees and what must

[434] *McClarty v Totem Electric* 157 Wn.2d 214 (2006); *Bombard c Fort Wayne Newspapers, Inc*., 92 F.3rd 560, 561 (7th Cir. 1996); *Guise-Mills v. Derwinski*, 967 F.792, 796-97 (2nd Cir. 1992).

[435] 42 U.S.C § 12111(5)(A) (1998). However, this number had been lowered from the initial requirement of 25 employees for the legislation to apply.

be expected from both parties. This prevents arbitrary dismissals by the employer as well as abuse on the part of the employee.

(vi) Conclusion

Both the South African Constitution and the LRA require that foreign and international law be taken into account when interpreting either body of legislation. Thus, the ADA was discussed in this chapter and valuable insights were gained that would further develop the LRA, EEA and Disability Code.

The UN, and ILO produce international law guidelines for all member states. The definition contained in the EEA and ADA are based on the foundations these law making bodies provided. However, the USA developed their disability workplace law far more have far more research available on disabled employees, namely depressed employees.

The ADA was enacted in the USA to bridge the gap between antidiscrimination legislation and employees with disabilities. It provides an extensive definition of disabilities, and then defines the main components. This enables both the employer and employee to determine whether or not they fall within the ambit of the act. In addition, there are various factors which must be taken into account by an employer before he may dismiss an employee. The ADA is specific in its factors. It further provides for criteria an employee must show in order to fall within the definition of disability.

Although there was certain similarity between the EEA, LRA and ADA, the ADA is far more developed and specific body of legislation. In light of this, South Africa can adopt several of the principles, such as how the definition of disability is developed, the manner in which the employer employee relationship is regulated, and the active role the courts and government play in the interpreting and implementing of the ADA in order to ensure clarity and consistency for all.

The courts in the USA have taken the position that depression does, in certain instances, constitute a disability. This places an employee with depression under the protection and scrutiny of the ADA. South African courts are undecided on how to go about adjudicating the dismissal of an employee with depression and as a result, the employee is dismissed for either the misconduct he committed, as an operational requirement or medically boarded for ill health under incapacity dismissals. In short, offering a body of legislation such as the ADA provides a common ground from which all employers, employees and courts may work from, which is urgently required in South Africa.

Chapter 8

RECOMMENDATIONS AND CONCLUSIONS

(a) Recommendations

(i) Depression as a Disability

The principle recommendation made is for depression to be recognised as a disability. Depression as a disability offers both an understanding of the illness as well as the needed protection against dismissals. The Disability Code requires that alternative reasonable accommodation be made for the disabled employee.[436] Although this requirement exists in other dismissal categories, only S187 of the LRA provides added protection by placing disabilities under automatically unfair dismissals and thus allowing for up to twenty-four months compensation as a result of an unfair dismissal as opposed to the twelve months compensation for unfair dismissals.

Placing depression under the heading of disability provides far more protection for the employee with depression, as it is required by the employer to have exhausted every avenue to avoid dismissal. The requirements of reasonable accommodation, which often carry a nominal cost, and that of the employer being required to prove that the employee no longer possesses the requirements that are necessary for the inherent requirements of the job are echoed in the ADA, although not as extensively, nor as specific as are found in the ADA.

Measures which are recommended include: measures to create job opportunities on the open labour market; appropriate government support for the establishment of various types of sheltered employment for disabled persons for whom access to open employment is not practicable; appropriate government support for vocational training and vocational guidance, placement services, etc.; encouragement of the establishment and development of cooperatives

[436] Item 6 of the Employment Equity Act 55 of 1998.

by and for disabled persons; elimination by stages if necessary of physical, communication and architectural barriers and obstacles; non-discrimination and information on successful instances of integration; and research on the various types of disability.[437]

Although it seems that these factors are burdensome on the employer, not all the factors are applicable to an employee with depression. If the employer has made all necessary and reasonable attempts to accommodate the employee, and the employee still lacks the inherent requirements of the job, or does not accept the offered reasonable accommodation or insists upon accommodation that would cause undue hardship on the employer, the employer has a substantive reason to dismiss the employee.

The ultimate result would be that the employer takes greater care of the employees and the necessary accommodation required before dismissing. Disabilities are also protected by Section 9 of the Constitution as well as by the Disability Code providing for more comprehensive protection to the employee than any other section.

South Africa has implemented many UN and ILO guidelines, but seems to have fallen short with regard to the disability recommendations given by those bodies. The Disabilities Code as a guideline has already been implemented, but it is not an act, and as a result, it has not been further developed. Thus, a body of laws is required for consistency and clarity in addressing such problems. The Disability Code should either be made an Act of parliament, or another body of legislation addressing disabilities in the workplace exclusively should be enacted, such as the ADA and DDA.

The manner in which depression is currently dealt with in the workplace is unsatisfactory.[438] The general consensus is that there is no adequate protection afforded to employees suffering from psychological disorders, most notably depression, as there is no set of laws addressing such issues. Categorising depression as a disability, and creating a specific act for disabilities in the

[437] Harnois & Gabriel op cit note 6.

[438] As the dismissal categories found in the LRA do not adequately address the depression of an employee, but rather dismiss the employee on the various grounds of dismissal as a result of the various manifestations of the depression. Discussed extensively in Chapter 5.

future, would be in line with international legislation and trends and afford depressed employees far more protection against dismissals than is currently available.

The ideal solution to the growing problem of depression in the workplace would be to draft and implement national mental health legislation. However, acknowledging that depression falls within the definition of disability in the EEA, and thus implementing it accordingly is a practical short term solution. Therefore, should depression be regarded as a disability, and an Act be promulgated in which disabilities are addressed in detail, South Africa would be in line within international trends. This would provide a depressed employee with protection from unfair dismissals.

(ii) Early Detection Approach

The ILO in agreement with the WHO recognises that mental illness is one of the worlds most critical social health problems. It affects more individuals and wastes more resources than any other disabling condition. As a result, the ILO has various programs within the employment sector in which to bridge the gap between the ILOs programs and the various disadvantaged groups such as the disabled[439] in order to raise awareness and combat ignorance and negative stigmas in the workplace.[440]

Due to the study conducted in 2000 by the ILO, the ILO decided that emphasis needs to be given to mental health, namely depression, in the workplace and that the workplace is an appropriate environment for educating the employees and raising awareness of mental health difficulties. The employers may also make available either counselling to the employees with a

[439] Harnois & Gabriel op cit 6.

[440] The ILO, from the very beginning, prioritised the fundamental objective of equality of opportunity and treatment. In 1938 the International Labour Conference invited the member States of the ILO to 'apply the principle of equality of treatment to all workers resident in their territory, and renounce all measures of exception which might in particular establish discrimination against workers belonging to certain races or confessions with regard to their admission to public or private posts'. This principle was upheld by the 1944 Declaration of Philadelphia (Art. II (a)). Quoted by the ILO Committee of Experts in its 1988 *General Survey on Equality in Employment and Occupation, Geneva* 1988. In 1958, the Conference adopted the Discrimination (Employment and Occupation) Convention no. 111 which obliges members to declare and pursue a national policy which is designed to promote equality of opportunity and treatment in respect of employment and occupation, with the goal of eliminating any discrimination. Art. 2.

mental health professional, or a mechanism in which the employee or their colleagues, on their behalf, may approach management for help will reduce the onset of full blown depression. This is in order to target mental health problems and prevent them from developing,[441] an early detection approach is the best solution.

Research has found that many employees are depressed due to dissatisfaction at work.[442] Depression is only temporarily debilitating, and is treatable. Depressive illnesses have been found to arise from the conflict between the employer and the employee. If an intervention is made in the workplace through assessments and monitoring of the employees and encouraging them to report depression, then the root of the problem may be addressed before the onset of full blown depression[443] as often no reasonable accommodation can aid in the employee performing their job as they virtually cease to function.[444] Thus, this early detection approach is beneficial to both large and small companies. For a large company, early detection prevents extended sick leave as well as costly employee accommodation having to be implemented or the replacement and retraining of new staff. This approach is the best approach for smaller companies for the same reasons.

However, currently in South African labour law, there are no national mechanisms in place that aid in identifying psychological disorders in employees in the workplace, and much less that offer any protection or guidelines regarding those employees.

Thus, in South Africa, a national early detection policy should be put in place or an incentive for companies to have their own mental health policies in place as that would not only save the company costs on retraining new staff but also the lowered productivity of the depressed employee. Early detection[445] allows the depression to be treated before becoming incapacitated

[441] Gabriel & Liimatainen op cit note 43.
[442] Burns op cit note 32; Van der Bijl & Oosthuizen op cit note 33.
[443] Burns op cit 32.
[444] Blair op cit note 38.
[445] Discussed in Chapter 4, under the subheading ‘Depression in the Workplace’.

and costing the employer money, and thus ultimately improving the country's economy as a whole.[446]

(iv) Raising Public Awareness

The ILO emphasised that more attention needs to be given to mental health, namely depression, in the workplace. The workplace is an appropriate environment for educating employees and employers, as well as raising awareness of mental health disorders. The UN suggests raising public awareness campaigns in order to raise awareness and combat ignorance in the workplace for both employers and employees with a dual purpose to protect their economy, but also to afford some aid to the workforce suffering from depression.[447] The ILO and the WHO both offer programs in raising awareness and combating ignorance on the issue of disabilities and depression in the workplace.[448] The reason for this is to end both the negative stigma attached to depression as well as to place employees on an equal footing with one another.

D/ART (Depression Awareness, Recognition and Treatment Program), a program by the USA governmental agency, National Institute of Mental Health (NIMH), has been successful in de-stigmatising and creating general public awareness regarding the etiology, intervention, and treatment of depressive disorders. D/ART also spurred the increased receptiveness of employers to recognising the impact of depression on costs and performance. D/ART was reconfigured as the National Worksite Program, which works almost exclusively with employers and organisations handling employment issues. Non governmental organisations have also played a fundamental role in raising awareness on mental health issues, namely depression.[449]

South Africa has had various successful campaigns in raising awareness about domestic violence and HIV / AIDS, among others. Similar campaigns could be organised to raise awareness of the reality of mental disorders such as depression in the workplace. These

[446] As the South African economy is losing up to R12 billion a year due to absenteeism, of which the main cause is depression. HR Future op cit note 143.

[447] United Nations. 'The standard rules on the equalization of opportunities for persons with disabilities'. Adopted at the 48th Session, 20 Dec. 1993 (Resolution 48/96) Part II.

[448] International Labour Organisation Convention on the Vocational Rehabilitation and Employment of Disabled Persons No. 159 of 1983.

[449] Gabriel & Liimatainen op cit note 43.

campaigns should outline the nature and symptoms of depression in order to identify it as well as the treatments available and the rights of both the employee and employer.

The campaigns would both inform and educate the employer and employees about depression and its effects, not only on them as individuals, but also on their work performance and on the company's bottom line. The ILO, UN and ADA have found that raising awareness is a cost effective manner in which to address depression in the workplace and thus reduce related expenses.

This approach would thus be a cost efficient mechanism through which to educate the affected parties in the South African workplace. It would educate them on how to combat the illness, which interventions are available as well as what are the rights and responsibilities of the employer and employee in terms of the law, providing clarity and consistency for both the employer and employee.

(v) Financial Incentives

Part II of the ILO Convention 159 suggests financial incentives as an appropriate measure to create employment. These financial incentives are to encourage employers to make reasonable adaptation to workplaces, job design, tools, machinery, and work organisation in order to facilitate disabled persons' training and employment.[450] Financial assistance may also include the award of credits or tax reductions to employers. In many cases, minor adjustments have often been sufficient for the employee to be able to perform his job efficiently.[451] Hiring subsidies is another incentive to encourage employers to hire persons with disabilities.[452]

As previously mentioned, minor adjustments often are sufficient for the employee to be able to perform his job efficiently. Hiring subsidies is another incentive with which to encourage employers to hire persons with disabilities.

[450] Art. 2.19.11.1 of Convention 159. Rubin op cit note 69. Countries implementing this are Belgium, Canada, Germany, Greece, Ireland, Spain, UK and USA.
[451] Rubin op cit note 69. Countries implementing this are Argentina, Chile, Costa Rica and El Salvador.
[452] Ibid.

The South African government would do well to offer a form of tax or hiring incentive to hire and / or retain employees with disabilities such as depression in a similar manner to the way the Black Equity Empowerment plan is implemented.

(vi) Increased Health Benefits for Mental Illness

In a survey conducted by the Depression and Anxiety Support Group of South Africa, it was discovered that the benefits for employees are far lower for mental illness than for other medical conditions, and are in most cases completely inadequate. The results are poor treatment of mental disorders such as depression.[453]

The South African government and both private and public companies could address this shortfall in a similar manner to how the USA has addressed it. In order to attempt to alleviate both the employee of depression and the financial strain that will be placed upon the employer, the USA implemented their parity legislation (health benefits) as it was found that it would cost less than one per cent cost increase to include mental health benefits, to what the employers currently offer.

South African employers could thus implement a more comprehensive medical aid cover for their employees which would include mental health cover at a nominal cost. This approach would save the companies millions of Rands which they lose due to low productivity caused by the employees not being treated for their depression, as well as for the costs associated with hiring and training of new staff.

(vii) Government Agencies

Part II of ILO Convention 159 urges states to 'formulate, implement and periodically review a National Policy on vocational rehabilitation and employment of disabled persons,' reiterates the

[453] South African Depression & Anxiety Group *Pride and Prejudice: The Stigma of Mental Illness* op cit note 35.

principle of equal opportunity between disabled workers and workers in general, and puts forward the fact that 'representative organisations of employers and workers shall be consulted on the implementation of the said policy'.[454]

The USAs federal government plays a crucial role in interpreting, translating, and the implementation of the ADA. There are a number of primary government agencies and offices actively involved in enforcement, technical assistance, research, and dissemination of information for all mental health disorders and/or psychiatric disabilities. Through their various activities, these agencies and offices offer support on mental health issues in the workplace to both employers and employees. Some of their activities specific to depression and employment are subsumed under the larger framework of psychiatric disabilities and local community support.[455]

The Equal Employment Opportunity Commission (EEOC) is such an agency. It was established to implement Title 1 of the ADA as well as act as a body of expertise in order to inform and provide both courts and litigants with guidance on any Title 1 issues.

Disability assessment is a legal and not a medical decision, which should be carried out by a panel of experts including a medical advisor, legal advisor and claims consultant.[456] South Africa, upon legislating an act to address exclusively the issue of disabilities in the workplace, should also form a commission which would be made up of a panel of experts. The experts should be psychiatrists and psychologists specialising in mental disorders as well as attorneys specialising in the said disability act, in order to aid the courts and litigants on mental health issues in the workplace and the laws surrounding them. This is a long term goal, but a highly recommended one as it will ensure certainty, consistency and clarity in the law.

[454] United Nations. 'The standard rules on the equalization of opportunities for persons with disabilities'. Adopted at the 48th Session, 20 Dec. 1993 (Resolution 48/96) Part II.
[455] Gabriel & Liimatainen op cit note 43.
[456] Kaplan op cit note 46.

(b) Conclusions

Depression is a debilitating psychological disorder that is affecting the workplace, both in South Africa, and abroad. It causes the sufferer to lose their will to live, as they cease enjoying the activities they once did. The effects are far reaching, affecting not only the individuals' personal life, but their professional life as well.

Despite this, no research has been conducted on this topic, and as a result, employees with depression remain unnoticed by South African labour legislation. Thus, this dissertation provides a unique analysis of the role South African labour legislation takes with regard to the dismissal of an employee suffering from depression.

Due to a lack of funding in mental health in South Africa, there is a lack of resources and thus a distinct lack of valid data available on mental health, especially depression in the workplace. The data that is available is provided largely by medical insurance companies and corporate absenteeism management companies, which indicates the quantum of money lost due to the effects of depression, absenteeism and low productivity, as well as the pay-outs for medical expenses to combat this illness.[457]

The data available only alerts us to the growing problem of mental illness. However, it does not provide a solution, nor does it analyse the problem. Thus, this dissertation provides a starting point for future research, not only on depression in the workplace, but also, mental illness in the workplace, and as recommended, legislation addressing the issue of mental illness in the workplace, or re-addressing current disability legislation to adopt a more inclusive definition of mental impairment. It also offers suggestions of a number of cost effective methods of addressing this growing problem.

Depression has been announced as a concern by the WHO, ILO and UN and as a result, various attempts to address it have been made. These bodies have drafted conventions and guidelines to aid their member states in addressing depression, and other debilitating disorders,

[457] Coetzer op cit note 5; AIC Insurance op cit note 5.

in the workplace. Countries such as the USA have enacted legislation as a result of the conventions and guidelines to deal with mental health in the workplace.

The foundational definition for disability offered by the ILO has been built upon by the UN, EU, USA and EEA. All these definitions have the same principle elements, such as the elements of there being a limitation which results in particular from physical, mental or psychological impairments, but have added to it, becoming more specific and individual. The definitions offered by the UN and ILO were intended to be guidelines for member states to build upon and create a body of legislation addressing their countries specific needs. The USA has successfully built the ADA upon those foundations and has developed the law offering the employers and employees clarity and guidance.

As recommended, depression should be recognised as a disability. The definition contained in the EEA has the same founding principles as contained in the definitions of disability abroad which under certain circumstances, include depression. Thus, depression should fall within the ambit of the definition of disability in the EEA and thus fall within the Disability Code.

Once depression is recognised as a disability, disabilities automatically then gain further protection in terms of Sections 9, 10, 22 and 23 of the Constitution and the LRA. The LRA provides that dismissing an employee due to his disability amount to an automatically unfair dismissal. The Disability Code provides that the employer should provide reasonable accommodation, whenever possible.

The LRA and EEA, however, do not provide a clear and concise framework in which to address the growing concern of depression in the workplace. Abroad in countries such as the USA, policies and legislation have been put in place in order to govern persons with psychological disabilities, such as depression, in the workplace.

The various LRA dismissal categories, namely incapacity, operational requirements and misconduct[458] have been found not to address the problem of depression in the workplace

[458] Section 188 of the LRA.

effectively. The category of incapacity addresses the issue of depression more so then the other dismissal category. Incapacity is divided into two sub-categories, which are ill health or injury and poor performance. In terms of both, little protection is given to a depressed employee. Although, incapacity for ill health is the best route, employers often choose to medically board off employees who are depressed, who can in fact continue to perform, given the right medication and reasonable accommodation.

However, with regard to poor performance, if the depression is not addressed, the performance level will not improve, regardless of the time period given to improve. The result is the dismissal of the employee wherein the symptoms are thus punished and the cause ignored. Therefore, dealing with depression under poor work performance is not affording sufficient protection to the employee nor addressing the growing problem of depression.

In order to dismiss an employee for a misconduct, found in Section 188(1)(a) of the LRA, various factors must be determined. These factors include the enquiry that the employee must have been aware or should have been reasonably aware of the rule they broke. The mental element of intention is required at this stage of the enquiry. A depressed employee lacks the intention to knowingly break the workplace rule. Thus any misconduct committed by a depressed employee cannot be dealt with as such as the element of intention is lacking. Therefore, dealing with depression as a misconduct results in the dismissal of an employee who ordinarily would not have committed the misconduct. The dismissal is thus due to the effects of the depression and the growing issue of depression itself remains overlooked.

In terms of Sections 189 and 189A, an employee may be dismissed due to an operational requirement. Addressing depression under this category is unsatisfactory. This is because the employer needs to show that a profit can be made by making that employees' position redundant. If an employee is not performing and thus not bringing in a profit to the company, they become a liability. Companies cannot afford to keep employees who are liabilities. Employees with depression often do not disclose their depression for fear of dismissal. As a result, they do not receive the necessary treatment, and thus become the liability a company cannot retain.

S189A goes further than S189 as it requires the Labour Court to evaluate the dismissal. However, S189A does not apply to a single employee who is being dismissed as it deals exclusively with large scale dismissals, thus providing to aid to an employee being dismissed for depression. However, neither S189 nor S189A have the procedures in place to deal effectively with an employee who is depressed as their depression is not identified, they become liabilities and thus redundant.

Thus, the dismissal categories discussed above, with the BCEA,[459] only address the manifestation of depression and not the depression itself. This results in inadequate protection for employees with depression from dismissal. No labour legislation in South Africa directly addresses the growing problem of depression in the workplace and thus no adequate solution is provided.[460] However, a solution is found indirectly in the EEA and Disability Code, by way of the definition of disability.

Both the Constitution and the LRA require international and foreign law to be taken into account whilst interpreting their provisions.[461] Thus, this dissertation discussed laws, conventions and guidelines offered by the UN and ILO, of which South Africa and the USA are members.

The principle recommendation made and the best solution found by this dissertation is to recognise depression as a disability. However, the shortfall within South African labour legislation is that there is no clear guidance as to disabilities. Although the EEA defines disabilities, the Disability Code addresses disabilities, but it is only a guideline and not binding. Thus, South Africa needs to either enact the Disability Code, making it binding, or draft a new extensive body of legislation, such as the ADA, to address disabilities in the workplace.

[459] Refer to Chapter 5.
[460] Ibid.
[461] This dissertation looked specifically at the definition of ‘disability’ found in Section 9 of the Constitution and Section 187 of the LRA.

South Africa requires certainty when addressing disabilities, and in turn, depression in the workplace. Employers, employees as well as the courts and litigants require clarity and consistency as currently depression is ignored as a result of neither parties nor courts know under which category depression falls, whether it is a incapacity or disability.

The USA developed the ADA, which is considered to be one of the more developed Acts on disabilities. The definition contained in the ADA was based on the foundations of the UN and ILO and thus is also anti-discriminatory in nature. It offered a guideline and framework in which both parties know what they are to expect from one another.

It contains a list of behaviour that amounts to discrimination on the part of the employer towards an employee with a disability. The ADA also provides specific definitions for terms in the definition such as ‘mental impairment’, ‘substantially limiting’ and ‘reasonable accommodation’ which are more in-depth than those in the EEA or Disability Code. It includes suggested reasonable accommodations, not amounting to undue hardship, that an employee may expect from the employer.

South Africa has various insights it may gain from the ADA which may be implemented at a low cost, such as the manner in which the disability definition is broken down and each element defined and developed (as this will occur over time through, most likely, precedent) and the extent to which reasonable accommodation is defined and suggestions made in the ADA. Due to the fact that the Disability Code is not binding, the courts as well as the parties do not know how to address depression, as the disability legislation has not been developed. This has resulted in prejudice for the employee suffering from depression.

The ADA was analysed and it provides more protection to disabled employees than the current legislation in South Africa. This is due to the act dealing exclusively with disabled employees and providing guidelines for both parties, a framework in which they may act. This prevents arbitrary dismissals by the employer as well as abuse on the part of the employee.

Recommendations were made that may be implemented by either the employer, or the legislature on a national level, such as rasing awareness among employers and employees as to what depression is and what are the legal rights and responsibilities of both parties, as well as increased health benefits in order for the employee to seek treatment. Employers may also choose to implement an early detection approach in order to address the issue of depression before it becomes a costly problem by either offering counselling or a manner in which the employee or fellow colleagues may approach management for help. The government may also get involved either by way of financial incentives and creating administrative bodies tasked with interpreting, translating and implementing the respective workplace disability Act.

The problem that has been posed is thus of vital importance to answer as it will provide employers, employees and the courts with a direction in which to follow, and consistent application when addressing the issue of dismissing an employee with depression. This dissertation has offered a practical solution to the problem.

‘The good of the people is the supreme law’

Cicero.

(2nd Century B.C Roman Statesman, Orator and Writer)

Reference List

Textbooks

- Barlow, David. H. and Durand Mark, V. (2005) *Abnormal Psychology: An Integrative Approach.* (United States of America: Wadsworth/ Thomson Learning).
- Basson, Annali, C., Christianson, Marylyn, A., Garbers, C., Le Roux, P.A.K., Mischke, E. and Strydom (2005) *Essential Labour Law* (Pretoria: Labour Law Publications). Fourth Edition.
- Betten, Lammy. (1993) *International Labour Law* (Boston: Kluwer Publications). First Edition.
- Brown, George W. and Harris, Tim (1982) *Social Origins of Depression* (Great Brittain: Tavistock Publications)
- Currie, Iain. and De Waal, Johan. (2005) *The Bill of Rights Handbook* (South Africa : JUTA & Co, Ltd). Fifth Edition.
- Currie, Iain. and De Waal, Johan. (2001) *The New Constitutional and Administrative Law* (South Africa : JUTA Law). First Edition.
- Deakin, Simon. and Morris, Gillian. S., (1995) *Labour Law* (London: Butterworths). First Edition
- Du Toit, D., Bosch, D., Woolfrey, D., Godfrey, S., Rossouw, J., Christie, S., Cooper, C., Giles, G. and Bosch, C. (2006) *Labour Relations Law: A Comprehensive Guide* (Durban : LexisNexis Butterworths). Fifth Edition.
- Gilbert, Paul. (1993) *Counselling for Depression* (London: SAGE Publications). First Edition.
- Grogan, John. (2004) *Dismissal* (South Africa : JUTA & Co Publications.). First Edition.
- Grogan, John. (2005) *Dismissal, Discrimination and Unfair Labour Practices* (South Africa: JUTA & Co. Publications)
- Grogan, John. (2007) *Workplace Law* (South Africa: JUTA & Co. Publications). Ninth Edition.

- Heston, Leonard L. (1992) *Mending Minds: A Guide to the New Psychiatry of Depression, Anxiety, and Other Serious Mental Disorders.* (United States of America: W.H. Freeman and Company). First Edition.
- Jordaan, Wilhelm, and Jordaan, Jackie. (2003) *People in Context.* (Johannesburg: Heinemann). Third Edition.
- Neethling, J., et al (2001) *Law Of Delict* (Durban: Butterworths). Fourth Edition.
- Mendels, Joseph. (1970) *Concepts of Depression.* (New York: John Wiley & Sons).
- Rubin, Neville. (2005) *Code of International Labour Law: Law, Practice and Jurisprudence . Volume II, Book I.* (Italy: Cambridge University Press). First Edition.
- Schiek, Dagmar., Waddington, Lisa. and Bell, Mark. (2007) *Non-Discrimination Law* (Oregon: Hart Publishing). First Edition.
- Snyman, C. R. (2003) *Criminal Law* (Durban: LexisNexis Butterworths). Fouth Edition.
- Van Niekerk, Andre. & Le Roux, P. A. K, (1994) The South African Law of Unfair Dismissal (South Africa: JUTA Publications)
- Weiten, Wayne. (2001) *Psychology: Themes and Variations* (United States of America: Wadsworth/ Thomson Learning). Fifth edition.

Journal Articles

- Atkinson, S & Brown, S 'Anxiety and depression in the workplace: Effects on the individual and organizations' (2005) 88 *Journal of Affective Disorders*, vol. 209
- Bender, Kimberly. and Furman, Rich. (2003) 'The Social Problem of Depression: A Multi-theoretical Analysis', *Journal of Sociology and Social Welfare*, vol. 30 no 3, pp. 123 – 138
- Blair, Douglas A. (1999) 'Employees Suffering from Bipolar Disorder or Clinical Depression: Fighting an Uphill Battle for Protection Under Title 1 of the Americans with Disabilities Act', *Seton Hall Law Review*, vol. 12, no. 4, pp 1347 – 1404.
- Christianson, Marylyn. (2004) 'Incapacity and Disability: A Retrospective and Prospective Overview of the Past 25 Years', *Industrial Law Journal*, vol. 25, May, pp. 879 – 895.

- Christie, Anna. L. (2006) 'Is the Disability Discrimination Act Discriminatory?', *Edinburgh Law Review*, vol. 10, no. 1, pp155-163.
- Du Plessis, Meryl. (2009) 'Mental Stress Claims in South African Workers' Compensation', *Industrial Labour Journal*, vol. 30, pp.1476 - 1480
- Fujimori, Yuiko., Muto, Takashi. and Suzuki, Keiko. (2004) 'Characteristics of an external employee assistance program in Japan', *Occupational Medicine Journal*, vol. 54, pp.570 – 575
- Goetzel, Ron, Z. et al.,(2002) 'The Business Case for Quality Medical Health Services: Why Employers Should Care About Mental Health and Well-Being of their Employees', *Occupational & Environmental Medicine*. vol. 44 J, pp. 320 – 321.
- Guiduli, Karen, A. (1996) 'Challenges for the Mentally Ill: The 'Threat to Safety' Defence Standard and the Use of Psychotropic Medication Under Title 1 of the Americans with Disabilities Act of 1990', *U. Pa. Law Review*, vol 144 pp. 1149 – 1155.
- Kempe, M (2000) 'S.O.S. Stress at Work', *World of Work: an ILO publication*, no. 37, pp 4-5.
- Mika, Karen. and Wimbiscus, Denise. (1996/1997) 'Responsibilities of Employers Towards Mentally Disabled Persons Under the Americans with Disabilities Act', *J.L. & Health*, vol 11, pp. 173-175
- Mynhardt, Johan. and Nhlapo, Bongani (1998) 'The Psychology of Work', *UNISA Psychologia*, vol. 25, no. 2, pp.46 – 50
- Pechman, L. (1994) 'Mental Disabilities in the Workplace', *New York Law Journal*, March 2, p.1
- Tomlinson, M., et al (2009) 'The Epidemiology of Major Depression in South Africa: results from the South African Stress and Health Study', *South African Medical Journal*, vol. 99, pp. 367 - 373
- Van der Bijl, H. and Oosthuizen, P (2007) 'Anxiety, depression, health attitudes and coping strategies in doctors and teachers in a Cape Town setting'. *South African Journal of Psychiatry*, vol. 13, no.2, pp. 46 – 51.
- Van Niekerk, A 'Dismissal for Incapacity' (1991) vol 5, no 1 *Contemporary Labour Law* p 52
- World Health Organization, (2000) Global Strategy on Occupational Health for All.

- World Health Organization, (2002) 'Towards a Common Language for Functioning, Disability and Health', ICF, WHO/IEP/GPE/CAS/01.3 (WHO, Geneva,) .

Legislation

- Basic Conditions of Employment Act No. 75 of 1997
- The Constitution of the Republic of South Africa Act no. 108 of 1996
- The Code of Good Practice: Dismissals (Schedule 8 of the Labour Relations Act)
- Employment Equity Act: Code of Good Practice on the Employment of People with Disabilities GN R1345 in GG 23718 of 19 August 2002
- Employment Equity Act No. 55 of 1998
- Pension Funds Act No. 24 of 1956
- Promotion of Administrative Justice Act No. 3 of 2000
- The Labour Relations Act No. 66 of 1995

Foreign Legislation

- Americans with Disabilities Act of 1990
- Basic Law for Person with Disabilities (BLPD) No. 84 of 1970 amended 2004
- Disability Discrimination Act of 1995
- European Disability Forum Directive 2000/78/EC
- European Disability Law of 2007
- European Disability Forum, Proposal for a Directive Implementing the Principle of Equal Treatment for Persons with Disabilities, 12 March 2004.
- European Union, Equal Treatment Directive, Directive 2000/78/EC.
- United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities A/RES/48/96, December 1993
- Wet gelijke behandeling op grond van handicap of chronische ziekte, Staatablad (Official Gazette) 2003, 206, Art. 1 (Dutch Act on Equal Treatment on the Grounds of Disability or Chronic Illness (2003))
- Yhdenvertaisuuslaki 21/2004), s.6(1) (Finnish Non-Discrimination Act 21/2004)

Conventions

- European Disability Forum, A Proposal for a Directive Implementing the Principle of Equal Treatment for Persons with Disabilities, 12 March 2004.
- International Labour Organisation Convention on the Termination of Employment Convention 158 of 1982.
- International Labour Organisation Convention on the Vocational Rehabilitation and Employment of Disabled Persons No. 159 of 1983.
- Treaty of Amsterdam of 1997.
- United Nations. 'The standard rules on the equalization of opportunities for persons with disabilities'. Adopted at the 48th Session, 20 Dec. 1993 (Resolution 48/96), Part II.

Case Law

- A-B v SA Breweries (2001) 22 ILJ 495 (CCMA)
- Adams v Impala Platinum Mine (2004) 12 BALR 1510 (CCMA).
- AECI Explosives Ltd (Zomerveld) v Mambalu (1995) 16 ILJ 1505 (LAC)
- Anglo America Farms t/a Boschendal Restaurant v Komjwayo (1992) 13 ILJ 573 (LAC)
- Anthony v Telkom S.A. (2005) ARB Case no. ECPE959-04
- BCAWU v Murray and Roberts (Pty) Ltd (1991) 12 ILJ 112 (LAC)
- Building Construction & Allied Workers Union of SA v Johnson Tiles (1985) 6 ILJ 210 (IC)
- Chemical Workers Industrial Union & Others v Algorax (Pty) Ltd (2003) 24 ILJ 1917 (LAC)
- Country Fair Foods (Pty) Ltd v OCGAWU & another (2003) 7 BLLR 647 (LAC)
- Cowie v Ellard & Co (1994) 9 EDC 132
- Croucamp v Le Carbonne (SA) (PTY) Ltd (1995) 16 ILJ 1223 (IC)
- Davies v Clean Deale CC (1992) 13 ILJ 1230 (IC);
- Dlokweni v A (1984) ICD (1) 16

- East Lindsay District Council v Daubney (1977) IRLR 181
- Enterprise Foods (Pty) Ltd v Allen & others (2004) 25 ILJ 1215 (LAC)
- FAWU obo Meyer v Rainbow Chicken (2003) 2 BALR 140 (CCMA)
- FAWU v SA Breweries (2004) 25 ILJ 1979 (LC)
- Food Workers Council of SA & another v SA Breweries Ltd (1992) 13 ILJ 204 (IC)
- Food & Allied Workers Unions & others v SA Breweries Ltd (2004) 25 ILJ 1979 (LC)
- Food & Allied Workers Unions & others v Kellogg SA (Pty) Ltd (1993) 14 ILJ 406 (IC)
- Friedlander v Hodes 1944 CPD 169
- Fry's Metals (Pty) Ltd v NUMSA & others (2003) 24 ILJ 133 (LAC)
- Gostelow v Datakor Holdings (Pty) Ltd t/a Corporate Copolith (1993) 14 ILJ 171 (IC)
- Grows v Mpumalanga Provincial Government & another (2001) 22 ILJ 1822 (LC)
- *Harksen v Lane NO* 1998 (1) SA 300 (CC)
- Heigers v UPC Retail Services (1998) 1 BLLR 45 (LC);
- Hendricks v Mercantile & General Reinsurance Co of SA Ltd (1994) 15 ILJ 304 (LAC)
- Hendry v Adcock Ingram (1998) 19 ILJ 85 (LC)
- Hoffman v SA Airways (2000) 21 ILJ 2357 (CC)
- IMATU & another v City of Cape Town (2005) 11 BLLR 1084 (LC)
- Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union & others (1999) 20 ILJ 89 (LAC)
- Johnson v The Department of Justice (2003) 12 GPSBC
- Joy Manufacturing (Pty) Ltd and NUMSA (1990) ARB 8.1.6
- Lynoch v Cereal Packaging Ltd (1988) IRLR 510
- Madolo v SA Breweries Ltd (1992) 1 LCD 49 (IC)
- Mahlati v SA Broadcasting Corporation (2003) 1 BLLR 33 (LC)
- MAN Truck & Bus (SA) (Pty) Ltd v UAMAWU (1991) 12 ILJ 181
- Metal & Allied Workers Union v Horizon Engineering (Pty) Ltd (1989) 10 ILJ 278 (ARB)
- Môrester Bande (Pty) Ltd n NUMSA & others (1990) 11 ILJ 687 (LAC)
- Mphoreng v Connex Travel (2001) 10 CCMA
- Nadamase v Fyfe-King 1939 EDL 259
- Naidoo v Old Mutual Healthcare (Pty) Ltd (2004) ARB case no. WE8760-03

- National Education Health and Allied Workers Union v University of Cape Town 2003 (3) SA 1 (CC)
- National Education Health & Allied Workers Union obo Lucas and Department of Health, Western Cape (2004) 25 ILJ 2091 (BCA)
- NCBAWU & others v Natural Stone Processors (Pty) Ltd (2000) 21 ILJ 1405 (LC)
- Negro v Continental Spinning & Knitting Mills (Pty) Ltd (1954) 2 SA 203 (W)
- New Way Motor & Diesel Engineering (Pty) Ltd v Marsland (2009) 12 BLLR 1181 (LAC)
- NUMSA & Others v Bader Bop (Pty) Ltd & another (2003) 2 BLLR 103 (CC)
- NUMSA v Atlantis Diesel Engines (Pty) Ltd (1992) 13 ILJ 405 (IC)
- NUMSA v Atlantis Diesel Engines (Pty) Ltd (1993) 14 ILJ 642 (LAC)
- NUM & another v Rustenburg Base Metals Refiners (Pty) Ltd (1993) 14 ILJ 1094 (IC)
- Public Servants Association of SA obo De Bruyn v Minister of Safety and Security and Another (2009) 30 ILJ 1631 (LC)
- Rikhotso v MEC for Education (2005) 3 BLLR 278 (LC)
- S v Makwanyane 1995 (3) SA 391 CC
- SA Mutual Life Assurance Society v Insurance & Banking Staff Association & Others (2001) BLLR 1045 (LAC)
- SA Chemical Workers Union & others v Toiletpak Manufactureres (Pty) Ltd & others (1988) 9 ILJ 295 (IC)
- SACTWU & others v Discreto (1998) 19 ILJ 1451 (LAC)
- Shabani v Thales Geosolutions SA (PTY) Ltd (2001) 10 CCMA
- Strydom v Witzenberg Municipality (2008) No.C558/2006 ZALC 68
- TAGWU v City Council of Durban (1991) 12 ILJ 156 (IC)
- Unilong Freight Distributors (Pty) Ltd v Muller (1998) 19 ILJ 229 (SCA)
- Van Niekerk v Cape Municipal Pension Fund and others (2004) No. 230404 (PFA)
- Van Rensburg v Austen Safe Co (1998) 19 ILJ 158 (LC)
- Venter v Renown Food Products (1989) 10 ILJ 320 (IC)
- Wolfaardt & another v Industrial Development Corp of SA Ltd (2002) 23 ILJ 1610 (LC)
- Wylie and Standard Executors & Trustees (2006) 27 ILJ 2210 (CCMA)
- X v Elvey International (Pty) Ltd (1995) 16 ILJ 1210 (IC)

Foreign Case Law

- Adams v Rochester General Hospital., 977 F. Supp. 226, 232 (W.D.N.Y. 1997)
- Albertsons, Inc. v. Kirkingburg (98-591) 527 U.S. 555 (1999) 143 F.3d 1228
- Aquinas v Federal Express Corporation., 940 F. Supp. 73, 79 (S.D.N.Y. 1996)
- Bailey v. Georgia-Pacific Corp., 306 F.3d 1162, 1167 (1st Cir.2002)
- Bragdon v. Abbott, 524 U.S. 624, 630- 31, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998)
- Bombard c Fort Wayne Newspapers, Inc., 92 F.3rd 560, 561 (7th Cir. 1996)
- Calero-Cerezo v. U.S. Department of Justice, 355 F.3d 6, 19 (1st Cir. 2004)
- Cody v Cigna Healthcare of St. Louis, Inc., 139 F.3d 595 (8th Cir. 1998)
- Compare Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir. 1997)
- Criado v. IBM Corp., 145 F.3d 437, 442 (1st Cir.1998)
- Crumpton v St. Vincent Hospital., 963 F. Supp. 1104, 1112 (N.D. Ala. 1997)
- Doe v. Region 13 Mental Health-Mental Retardation Comm'n., 704 F.2d 1402, 1408 (5th Cir.1983)
- Equal Employment Opportunity Comm'n v Amego, Inc., 110 F.3d 135 (1st Cir. 1997)
- European Court of Justice Case C-13/05, C 69/8, O.J. 19.3.2005
- Friedlander v Hodes 1944 CPD 169
- Guise-Mills v. Derwinski, 967 F.792, 796-97 (2nd Cir. 1992)
- Leisen v Shelbyville 135 F. 3d 805 (7th Cir. 1998)
- Halperin v Abacus Tech. Corp., 128 F.3rd 191, 199 n.12 (4th Cir. 1997)
- Harris v. H & W Contracting Co., 102 F.3d 516, 520-21 (11th Cir. 1996)
- Heathrow Express Operating Company Ltd v Jenkins UKEAT/0497/06/MAA
- Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996)
- Garcia-Ayala v. Lederle Partenterals, Inc., 212 F.3d 638, 648 (1st Cir. 2000)
- Gilday v Mecosta County, 124 F.3d 760, 762-63 (6th Cir. 1997)
- MacCoy v Pennsylvania Power and Light Co., 933 F. Supp. 438,440 (M.D. Pa. 1996)

- McClarty v Totem Electric 157 Wn. 2d 214 (2006)
- McClinton El v. Potter WL 5111182 (N.D. Ill. 2008)
- Meritor Savings Bank, F.S.B v Vinson, 477 U.S 57, 65 (1996)
- Mohamed v Marriott International, Inc., 905 F. Supp. 141, 152 (S.D.N.Y. 1995)
- Murphy v. United Parcel Service, Inc. (97-1992) 527 U.S. 516 (1999) 141 F.3d 1185
- Nadamase v Fyfe-King 1939 EDL 259
- Ogborn v. United Food & Commercial Workers Union, Local No. 881, 305 F.3d 763, 767 (7th Cir.2002)
- Paterson v Downtown Med. Ctr., 866 F. Supp. 1379, 1381 (M.D. Fla. 1994)
- Pegues v Emerson Electronics Co., 913 F. Supp. 976, 981 (N.D. Miss. 1996)
- Pouncy v Vulcan Materials Co. 920 F. Supp. 1566, 1578-79
- Pritchard v. Southern Co. Servs., 92 F.3d 1130, 1132 (11th Cir.1996)
- Siefken v Village of Arlington Heights, 65 F.3rd 664, 666 (7th Cir. 1995)
- Snead v. Metro. Prop. & Cas. Ins. Co., 237 F.3d 1080, 1088 n. 8 (9th Cir.2001)
- Stewart v Happy Herman's Cheshire Bridge, Inc., 177 F. 3d 1278, 1285 (11th Cir. 1997)
- Stola v Joint Indus. Bd., 889 F. Supp. 133, 135 (S.D.N.Y. 1995)
- Sutton v. United Air Lines, Inc., 527 U.S. 471, 483, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999)
- Taylor v Principal Financial Group, Inc. F.3d 155, 165 (5th Cir. 1996)
- Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002)
- Weiler v Household Finan. Corp., (1994) No. 93 C 6454 WL 262175 at p.3
- Willett v Kansas, 942 F. Supp. 1387, 1395 (D. Kan. 1996)

Internet Resources

- American Academy of Child and Adolescent Psychiatry, (2006) 'Legislative Action 110th Congress' http://www.aacap.org/cs/legislative_action_110th_congress/mental_health_parity_legislation_approved_in_senate_committee

- Anderson, Steven R., and Will, Jennifer H., (2009) 'EEOC Proposes Revised ADA Proposed Regulations', The Law Firm of Faegre & Benson LLP, October. http://www.faegre.com/showarticle.aspx?Show=10296
- Ashfords, (2007) 'Brief Note – Does Disability Discrimination Law Protect Workers with Mental Illness?' http://www.ashfords.co.uk
- Burns, Lesley. (2005) 'Incapacity Matters – Depression in the Workplace', http://www.b-h.co.za/downloads/depression_article.pdf
- Coetzer, Pieter, Chief Medical Advisor for Sanlam, (2007), Sanlam's Life's Stats for 2007, personal communication
- Cornell University: Employment and Disability Institute, (2000) 'What is Reasonable Accommodation', What the Law Says, http://www.ilr.cornell.edu/edi/accessforall/index.htm?page=lawsays&CFID=24812869&CFTOKEN=49784162;
- Everyday Law Encyclopaedia, ADA and Section 504 http://www.enotes.com/everyday-law-encyclopedia/educational-accomodations.html
- Gabriel, Phyllis. and Liimatainen, Marjo-Riitta. (2000) 'Mental health in the workplace: Introduction', *International Labour Office*, Geneva. October. http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang--en/WCMS_007910/index.htm .
- Harnois, Gaston. and Gabriel, Phyllis. (2000) 'Mental Health and Work: Impact, Issues and Good Practice', *Geneva: World Health Organization*, pp. 32 – 37. http://www.who.int/mental_health/media/en/712.pdf
- HR Future. (2005) 'Absenteeism reaches new highest in South Africa', Internet Supplement, www.hrfuture.net/display_web_article.php?article_id=144&category_id=5
- Kaban, Elif, (2000) 'Gloom and doom at work on the rise – survey', Reuters Internet Supplement, 10 October http://www.iol.co.za/index.php?set_id=1&click_id=31&art_id=qw971155381875M534.
- Kaplan, R. (1996) 'Guidelines to the Management of Disability Claims on Psychiatric Grounds: Issued by the South African Society of Psychiatry'. South African Medical Journal. vol. 86, no. 6, p 646. http://www.sasop.co.za/A_aboutus_Guidelines.asp

- Law department at the University of KwaZulu Natal, 'Employee Relations'. http://labourrelations.ukzn.ac.za/EmployeeRelations/IncapacityIHI.aspx
- Lawyers.com, 'Americans with Disability Act summary', Internet Supplement, http://labor-employment-law.lawyers.com/americans-with-disabilities-act/ADA-and-employment.html
- Matsui, Ryosuke. (2002) 'Japanese National Plan of Action on Disability (case study)', *Hosei University: Internet Supplement* http://www8.cao.go.jp/shougai/english/basicprogram/foreword.html
- Pharmaceutical research & Manufacturers of America. (2007) 'Productivity Impact Model', Internet Supplement, http://www.depressioncalculator.com
- Quinn, G. European Disability Law (2007) http://www.nuigalway.ie/law/documents/working/1%20cp5%202007.pdf
- The Royal College of Psychiatrists, (2006) Effects of depression on work, *Internet Supplement:* http://www.rcpsych.ac.uk/mentalhealthinformation/mentalhealthproblems/depression/depressionintheworkplace.aspx
- Schimelpfening, N. (2010) 'The Americans With Disabilities Act and You: Know Your Rights Under the Americans With Disabilities Act', About.com Guide, http://depression.about.com/cs/disability/a/ada.htm.
- South African Depression & Anxiety Group. (2010) 'Improving Mental Health in Developing Countries: South Africa as a Case Study', Internet Supplement. http://www.sadag.co.za/index.php/Mental-Illness-SA/IMPROVING-MENTAL-HEALTH-IN-DEVELOPING-COUNTRIES.html
- South African Depression & Anxiety Group. (2010) 'Does Depression Threaten Your Job: Personal Stigma of Depression in Corporate Life', Internet Supplement, http://www.sadag.co.za/index.php/Depression-in-work-place/Does-depression-threaten-your-job.html
- South African Depression & Anxiety Group. (2010) 'Pride and Prejudice: The Stigma of Mental Illness', Internet Supplement, http://www.sadag.co.za/index.php/Mental-Illness-SA/STIGMA.html

- South African Press Association (SAPA). (2007) 'Sick Absenteeism Costs SA R19m a Year', CAMS in the Media – Internet Articles Supplement , 14 February. http://www.camsolutions.co.za/sick-absenteeism-costs-sa-r19m-year-a-17.html.
- Swinton, Lyndsay. Dealing with Depression in the Workplace www.mftrou.com.
- The U.S. Equal Employment Opportunity Commission (1997) 'EEOC Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities', 25 March, pp. 2-3 http://www.eeoc.gov/policy/docs/psych.html
- Unknown Author, Americans With Disability Act Summary http://www.labor-employment-law.lawyers.com/americans-with-disabilities-act/ADA-and-employment.html
- Virginia Commonwealth University (2010) 'Americans with Disabilities Act (ADA)', Internet Supplement. http://www.workworld.org/wwwebhelp/americans_with_disabilities_act_ada_.htm#Americans_with_Disabilities_Act_ADA_Title_I

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