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**AN OVERVIEW OF THE EFFECTIVENESS OF EMPLOYMENT LEGISLATION IN
PROTECTING PEOPLE WITH DISABILITIES AGAINST DISCRIMINATION IN
THE SOUTH AFRICAN WORKPLACE.**

By

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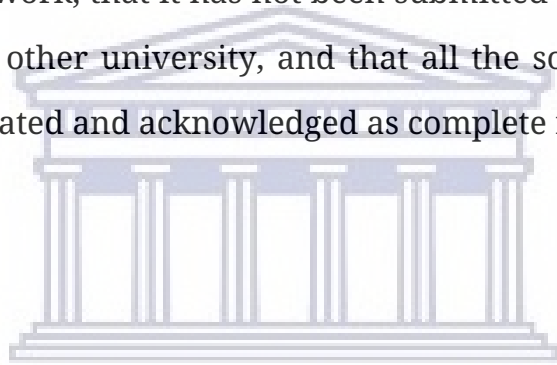
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PLAGIARISM DECLARATION

I declare that 'An overview of the effectiveness of employment legislation in protecting people with disabilities against discrimination in the South African workplace.' is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.



Signature: N. Sunday

Date: 04 November 2019

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KEY WORDS

- ❖ Exploitative labour
- ❖ Victimization
- ❖ Disability
- ❖ Equality
- ❖ Workplace
- ❖ Discrimination and Poverty
- ❖ Meaningful Employment
- ❖ Disability and workers' rights
- ❖ Transgressions
- ❖ Labour law legislation
- ❖ Reasonable Accommodation



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CHAPTER 1 – INTRODUCTION OF THE STUDY

The South African apartheid regime brought about many injustices. These injustices were mostly directed at people of colour, women and people with disabilities. People with disabilities were neglected, discriminated against and largely marginalised.¹ A person is considered as having a disability in terms of the Code of Good Practice on the Key Aspects on the Employment of Persons with Disabilities,² if they have a physical or mental impairment, which is a long term or recurring impairment and which significantly limits their prospects of entry into or any advancement within the workplace.³

After the Constitution was implemented in 1996, everyone was said to be equal before the law. Discrimination based on disability and various other grounds was essentially outlawed. Legislation had been enacted to rectify the wrongs of the past, but how effective was such legislation in redressing the transgressions of the past? Within the workplace, those people with disabilities have not been able to escape discrimination.

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¹ Dube AK 'The role and effectiveness of disability legislation in South Africa' 2005 *Disability Knowledge Research* 14.

² Employment Equity Act 55 of 1998.

³ The Code of Good Practice on the Key Aspects on the Employment of Persons with Disabilities, EEA 55 OF 1998.

1.1 Background/ Rationale

The Constitution of the Republic of South Africa, 1996, affords its citizens many rights and is the supreme law of the land.⁴ Chapter 1 of the Constitution stipulates that South Africa's (SA) democratic state is founded on the values of human dignity, the achievement of equality as well as the advancement of human rights and freedoms.⁵ Chapter 2 of the Constitution contains the Bill of Rights, and can be described as the cornerstone of South Africa's democracy.⁶



⁴ Mokgoro JY 'Ubuntu and the law in South Africa' (1998) 1 *Potchefstroom Electronic Law Journal (PER)* 7.

⁵ The Constitution of the Republic of South Africa, 1996.

⁶ The Constitution of the Republic of South Africa, 1996.

1.1.1 Discrimination against people with disabilities in SA under the apartheid regime

During the apartheid era discrimination based on gender, race and disability was particularly rife and these groups bore the brunt of discriminatory practices.⁷ Discrimination against these groups was aimed at keeping them subservient to a minority white group.⁸ People of colour, women and people with disabilities were generally denied of access to basic human rights and were generally left in conditions of poverty with little to no opportunities to share in the wealth of the country.⁹ Examples of legislation which entrenched this discrimination were acts such as the amended Pensions Laws Amendment Act of 1944, which made disability grants available with disproportionately more benefit available for white people than for non-whites.¹⁰ The amended Disability Grants Act 36 of 1946 and the amended Blind Persons Act 11 of 1936 were also examples of how the discrimination was enforced with the unequal provision of payment benefits, services resources and access for disabled people based on race.¹¹

People with disabilities (regardless of race or gender) were marginalised because of their disabilities and had inadequate (if any) access to important socio-economic rights, such as, education, employment, health and welfare

⁷ Dube AK 'The role and effectiveness of disability legislation in South Africa' 2005 *Disability Knowledge Research* 14.

⁸ Dube AK 'The role and effectiveness of disability legislation in South Africa' 2005 *Disability Knowledge Research* 14.

⁹ Dube AK 'The role and effectiveness of disability legislation in South Africa' 2005 *Disability Knowledge Research* 14.

¹⁰ 'Apartheid Legislation 1850s-1970s' available at <https://www.sahistory.org.za/article/apartheid-legislation-1850s-1970s> 2011 (accessed on 28 July 2020).

¹¹ Roskam KL 'Apartheid and Discrimination' 1960 *Leyden: A. W. Synthoff*

services.¹² People with disabilities were largely viewed as sickly and in need of care and assistance, instead of being viewed and treated as people with equal status, rights and responsibilities.¹³

With the implementation of the Constitution of 1996, people with disabilities have been awarded equal rights and responsibilities, and unfair discrimination on the basis of disability has been outlawed.¹⁴

1.1.2 Discrimination against people with disabilities in the employment environment in SA post-1994

The early 1990's witnessed the end of the apartheid era in SA, first with the implementation of the interim Constitution of South Africa of 1993, and subsequently the final Constitution of the Republic of South Africa, 1996 (the Constitution). Section 9 of the Constitution, known as the equality clause, prohibits unfair discrimination on grounds listed therein, which include the grounds of race, gender and disability.¹⁵ In the case of *Prinsloo v Van der Linde*,¹⁶ it was said that unfair discrimination 'principally means treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity'.

Section 2 of the Constitution stipulates that the Constitution is the supreme law of the land and any legislation or conduct that is inconsistent with the Constitution

¹² Howell C, Chalklen S & Alberts T 'A history of the disability rights movement in South Africa' 2006 *Disability and social change: A South African agenda*.

¹³ Howell C, Chalklen S, & Alberts T 'A history of the disability rights movement in South Africa' 2006 *Disability and social change: A South African agenda*.

¹⁴ Dube AK 'The role and effectiveness of disability legislation in South Africa' 2005 *Disability Knowledge Research* 14.

¹⁵ Section 9 of the Constitution of the Republic of South Africa, 1996.

¹⁶ *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC).

shall be deemed to be invalid and therefore unlawful.¹⁷ Section 9 of the Constitution further stipulates that everyone is to be treated equally before the law and should accordingly be awarded with equal protection.¹⁸ Section 9 also stipulates that legislation should be enacted to prevent such discrimination as well as to advance people with disabilities that have been previously disadvantaged purely based on their disability as a result of the apartheid regime.¹⁹ Finally, section 23(1) of the Constitution states that ‘everyone has the right to fair labour practises’.²⁰ Everyone undeniably includes individuals from any race and gender and irrespective of disability status.

Legislation enacted to give effect to the constitutional values provided for in section 23 of the Constitution include the Labour Relations Act 66 of 1995 (LRA), Basic Conditions of Employment Act 75 of 1997 (BCEA), and of particular importance to this study, the Employment Equity Act 55 of 1998 (EEA).²¹ The implementation of the Constitution, together with the various pieces of legislation to fulfil constitutional values, have contributed to the protection of people with disabilities and paved the framework for the prevention of unfair discrimination against such individuals within the workplace.²² Employers are no longer able to discriminate individuals based on disability. Instead they are encouraged, and in fact obligated, to employ people with disabilities in terms of the affirmative action provisions of the EEA.²³ The EEA also confer on employers the duty to

¹⁷ Section 2 of the Constitution of the Republic of South Africa, 1996.

¹⁸ Section 9 of the Constitution of the Republic of South Africa, 1996.

¹⁹ Section 9 of the Constitution of the Republic of South Africa, 1996.

²⁰ Section 23 of the Constitution of the Republic of South Africa, 1996.

²¹ The relevant legislative provisions dealing with disability will be more fully discussed in chapter 3.

²² Section 2 of the Employment Equity Act 55 of 1998.

²³ Section 15 of the Employment Equity Act 55 of 1998.

eradicate unfair discrimination in the workplace and to provide reasonable accommodation to people with disabilities with the view of assisting such individuals to effectively participate in the workplace.²⁴

Yet, despite legislative provisions that have been enacted since the implementation of the Constitution, questions still arise around meaningful employment of people with disabilities. Arguments are made that many employers are simply employing people with disabilities for appearance purposes, without providing such individuals with meaningful employment and having them do mundane jobs to keep them busy.²⁵ Many employers continue to place people with disabilities in a sheltered employment environment, which could be attributed to the on-going misconceptions surrounding disability.²⁶ Many employers still view people with disabilities as people who need assistance, unable to care for themselves.²⁷

People living with disabilities in South Africa as a group, experience less employment opportunities,²⁸ unemployment, have less economic participation, and are more likely to not have an education than those who are not disabled.²⁹ These experiences can be partly attributed to discrimination faced by disabled

²⁴ Section 15 (2)(a) of the Employment Equity Act 55 of 1998.

²⁵ Lagadien F 'Remove Barriers in Employment for Disabled People' available at <https://www.independentliving.org/docs4/fadila96.html> (accessed on 20 November 2017).

²⁶ Lagadien F 'Remove Barriers in Employment for Disabled People' available at <https://www.independentliving.org/docs4/fadila96.html> (accessed on 20 November 2017).

²⁷ Lagadien F 'Remove Barriers in Employment for Disabled People' available at <https://www.independentliving.org/docs4/fadila96.html> (accessed on 20 November 2017).

²⁸ Schur L 'The difference a job makes: the effects of employment among people with disabilities' 2002 *Journal of Economic Issue* XXXVI.

²⁹ Schneider M & Nkoli M 'Affirmative Action and disability in South Africa' available at <https://go.gale.com/ps/anonymouse?id=GALE%7CA323659339&sid=googleScholar&v=2.1&it=r&linkaccess=abs&issn=02587696&p=AONE&sw=w> (Accessed on 01 August 2020).

persons in employment environments and the barriers that come with it can manifest in different ways. In the workplace, structural discrimination can manifest implicitly in lack of physical access to built environments which does not accommodate disabled individuals. In society, discrimination can manifest in barriers to opportunities and promotion³⁰ as a result of the perceptions and prejudices towards those with disabilities which associates disability with an incapacity to do work³¹. Other experiences like education barriers can be attributed to the cost of treatment and special needs associated with a disability³², be it mental or physical.

1.1.3 Statutes protecting people with disabilities in South Africa

In relation to labour law, various statutes have been implemented to combat unfair discrimination of people with disabilities. Most importantly this includes the Labour Relations Act 66 of 1995 (LRA), Employment Equity Act 55 of 1998 (EEA), as well as the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).

The LRA states under 187 (1)(f) that a dismissal would be automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against an employee, whether directly or indirectly, on any arbitrary ground, such as disability.³³ In Schedule 8 to the LRA, the Code of Good Practice: Dismissal, it states

³⁰ Lagadien F 'Remove Barriers in Employment for Disabled People' available at <https://www.independentliving.org/docs4/fadila96.html> (accessed on 20 November 2017).

³¹ Ravaud et al 'Discrimination towards disabled people seeking employment' (1992) *Social Science and Medicine*

³² Schneider M & Nkoli M 'Affirmative Action and disability in South Africa' available at <https://go.gale.com/ps/anonymous?id=GALE%7CA323659339&sid=googleScholar&v=2.1&it=r&linkaccess=abs&iissn=02587696&p=AONE&sw=w> (Accessed on 01 August 2020).

³³ Section 187 of the Labour Relations Act 66 of 1995.

that employers should make every reasonable effort to accommodate disabled employees and seek alternatives to terminating employment.³⁴

PEPUDA was implemented to give effect to section 9 of the Constitution.³⁵ Section 9 stipulates that everyone has the right to equality, which includes persons living with disabilities. PEPUDA was enacted to work in tandem with the Constitution so as to prevent and prohibit any unfair discrimination and undue harassment, as well as to promote equality and eradicate unfair discrimination.³⁶

The EEA notes that as a result of apartheid and the implementation of past discriminatory laws, inequalities continue to exist in workplace. These inequalities create unfair disadvantages for certain groups of people, and the mere repeal of discriminatory laws and practices does not redress these continued inequalities.³⁷ The purpose of the EEA is thus to promote the Constitutional right to equality, which includes redressing the disadvantages, experienced by designated groups in the workplace, through eliminating unfair discrimination and implementing affirmative action measures.³⁸ The EEA defines designated groups as 'black people, women and people with disabilities'.³⁹ In section 3 of the EEA, which deals with the interpretation of the Act, it stipulates that the EEA is to be interpreted in line with the Constitution in order for it to give effect to its purpose.⁴⁰

³⁴ Schedule 8 the Code of Good Practice: Dismissal, section 10.

³⁵ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

³⁶ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

³⁷ Preamble of the Employment Equity Act 55 of 1998.

³⁸ Section 2 of the Employment Equity Act 55 of 1998.

³⁹ Section 1 of the Employment Equity Act 55 of 1998.

⁴⁰ Section 3 of the Employment Equity Act 55 of 1998.

The EEA further stipulates that affirmative action measures are aimed at ensuring that suitably qualified people from designated groups enjoy equal employment opportunities and are fairly represented within all occupational categories and or levels within the workplace.⁴¹ These measures include recognising and eradicating any employment barriers which results in unfair discrimination and reasonable accommodation of individuals from designated groups to ensure that they are able to enjoy equal opportunities in the workplace.⁴² The EEA defines reasonable accommodation as ‘any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment’.⁴³

The implementation of the aforesaid statutes to protect people with disabilities against unfair discrimination, and to advance their positions in the work environment, is definitely a step in the right direction. Victimisation and exploitation of these individuals however remain prevalent as people with disabilities are still seen as vulnerable, desperate and grateful for work, regardless of the working conditions they find themselves in.⁴⁴ It seems as if unscrupulous employers are constantly finding new ways to manipulate the law so as to suit them.⁴⁵

This research will as such consider the effectiveness of existing legislation in SA in providing protection against discrimination in the work environment to

⁴¹ Section 15 of the Employment Equity Act 55 of 1998.

⁴² Section 15 of the Employment Equity Act 55 of 1998.

⁴³ Section 1 of the Employment Equity Act 55 of 1998.

⁴⁴ Wilton R & Schuer S ‘Towards Socio-Spatial Inclusion? Disabled People, Neoliberalism and the Contemporary Labour Market’ (2006) 38 *Wiley on behalf of the Royal Geographic Society* 191.

⁴⁵ Wilton R & Schuer S ‘Towards Socio-Spatial Inclusion? Disabled People, Neoliberalism and the Contemporary Labour Market’ (2006) 38 *Wiley on behalf of the Royal Geographic Society* 193.

individuals with disabilities, and in promoting the advancement in the work environment of such individuals.

1.2 Aims of the Research

The main aim of this research is to explore the effectiveness of current legislation in SA in protecting individuals with disabilities against unfair discrimination in the employment environment. This will include considering how legislation attempts to advance individuals with disabilities in the workplace. This will be done by looking at the importance of legislation and the benefits thereof to people with disabilities in protecting them against victimisation and exploitation within the workplace.

The research will therefore consider whether existing workplace legislation concerning people with disabilities redresses historic transgressions against people with disabilities, not only on a theoretical level (i.e. not only on paper), but on a practical level as well. This will include looking at the reasonable accommodation of people with disabilities in the work environment and whether or not they have been meaningfully employed.

As mentioned earlier the EEA notes that reasonable accommodation includes the appropriate and necessary modification and adaptations made by the employer to accommodate the employee in the work environment, without imposing an undue burden on the part of the employer.⁴⁶ The EEA states that this is done in order to enable people with disabilities to enjoy equal rights in the workplace

⁴⁶ Section 1 of the Employment Equity Act 55 of 1998, as well as in Section 6 of the Code of Good Practice on the Key Aspects on the Employment of Persons with Disabilities.

when compared to those who are not disabled. This research will consider whether people with disabilities are employed meaningfully and treated the same as their abled bodied counterparts, or whether they are employed and given meaningless jobs; so that employers can simply state that they employ disabled individuals.

In keeping with the aims of the research, a comparative study will also be done with the United States of America (USA) in order to see what South African can learn from the USA with regard to disability legislation in the work environment. The USA was chosen as a comparative jurisdiction because there are many similarities between the USA and South Africa in the sense that lots of developments have been made in order to address the injustices that face people with disabilities. In this regard the main documents that would be looked at as far as the USA is concerned include Americans with Disabilities Act 1990, Civil Rights Act 1964, and the Disability Discrimination Act 1995.

The logo of the University of the Western Cape, featuring a stylized building with columns and a pediment.

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1.3 Problem Statement

People with disabilities are generally regarded as being more vulnerable, which renders them more prone to victimisation and exploitation.⁴⁷ Unfair discrimination against people with disabilities in the work environment has now been outlawed in legislation as referred to earlier. This however raises the question whether such legislative measures effectively redress the transgressions of the past on a practical basis. People with disabilities need to have their rights acknowledged, which includes receiving sufficient protection against ill-treatment and exploitation on the basis of disability in the work environment.⁴⁸

As mentioned earlier, the law also requires employers to employ people living with disabilities, and to reasonably accommodate them so as to allow them to do their job efficiently and effectively.⁴⁹ The law however also states that if this reasonable accommodation causes an undue hardship on the part of the employer and its business, then the employer is not obliged to reasonably accommodate the disabled employee.⁵⁰ This then raises the issue of the effectiveness of legislation in protecting and advancing employees with disabilities in the work environment.

On paper, legislation is therefore clearly in place to protect the rights of people with disabilities, which includes protecting them against unfair discrimination as well as advancing their circumstances in the work environment through

⁴⁷ Earle S 'Disability, facilitated sex and the role of the nurse' (2001) 36 *Journal of Advanced Nursing* 439.

⁴⁸ Section 1 of the Code of Good Practice on the Key Aspects on the Employment of Persons with Disabilities, EEA 55 OF 1998.

⁴⁹ Section 15(2)(c) of the Employment Equity Act 55 of 1998.

⁵⁰ Karlan & Rutherglen 'Disabilities, Discrimination, and Reasonable Accommodation' (1996) 46 *Duke Law Journal* 9.

reasonable accommodation. But when looking at the practical effect of the implementation of legislative measures it unfortunately tend to indicate that people with disabilities continue to struggle in the work environment.⁵¹ The struggle and hardship is evidenced through the fact that people with disabilities remain unprotected where an employer is unable to reasonably accommodate them due to an alleged undue hardship on the part of the employer. The disabled employee may therefore find him-/herself in the same position he or she had been in before the implementation of legislation.

1.4 Research Question

Whilst legislation in SA formally advances the employment situation of people with disabilities in the work environment through protecting them against unfair discrimination, does it practically protect the rights of these individuals as the employees in the work environment?

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⁵¹ Nxumalo LG 'Disability Discrimination and Undue within the Working Environment: A Critical Analysis' (LLM thesis, University of South Africa, 2014) 40.

1.5 Research Hypothesis

Legislation was enacted to protect people with disabilities in the work environment, through protecting them against unfair discrimination and advancing their employment position in the workplace. This was done as a result of the undue hardship they suffered under the pre-Constitutional regime. Statutes such as the EEA, LRA and PEPUDA all prohibit the unfair discrimination of people with disabilities within the workplace. As mentioned above, the EEA classifies people with disabilities as part of a 'designated group' of individuals whom are in need of extra protection within the workplace.⁵² This is so as to ensure equality with regard to employment opportunities as well as a fair representation within all occupational categories and or levels within the workplace.⁵³

There is often a misconception by employers that employees with disabilities will not be able to perform as well as their abled bodied counterparts.⁵⁴ This is mainly due to myths and misconceptions surrounding work ethic and ability of people with disabilities. It is only once employers employ people with disabilities that they see the potential and capability of these individuals.⁵⁵ When looking at the definition of 'reasonable accommodation' as provided by the EEA, it is clear that modifications and adjustments should be made to accommodate employees with disabilities. However, legislation is also clear that in making these adjustments it should not result in an undue or unjustified hardship for employers.⁵⁶ In essence

⁵² Employment Equity Act 55 of 1998.

⁵³ Employment Equity Amendment Act No 47 of 2013.

⁵⁴ Kitchin R 'Out of Place', 'Knowing One's Place': space, power and the exclusion of disabled people' (1998) 13 *Disability and Society* 343.

⁵⁵ Schwab & Willborn 'Reasonable Accommodation of Workplace Disabilities' (2003) 44 *William and Mary Law Review* 1220.

⁵⁶ Mann, Sing & Maja et al 'Employing people with disabilities in South Africa' (2011) 41 *South African Journal of Occupational Therapy* 28.

this means that it is up to the employer to decide and justify what constitutes justified or unjustified hardship.⁵⁷ Therefore, despite existing legislation being in place to advance the protection and accommodation of individuals with disabilities in the workplace, it seems as if discrimination may still be prevalent.⁵⁸

1.6 Scope/ Limitations of the Research

Whilst people with disabilities no doubt experience hardships in many areas of their lives,⁵⁹ this research study only focuses on discrimination within the workplace. The study will also only focus on the legislative protection afforded to people with disabilities in terms of the LRA, EEA and the PEPUDA.

Whilst briefly considering and explaining the right employees with disabilities enjoy against unfair discrimination in the work environment (since this forms an important part of the measures through which the positions of these individuals are advanced in the work environment), the study will largely focus on the terms 'reasonable accommodation' and 'undue hardship'. Based on the aforesaid, the research will look at whether existing legislation sufficiently addresses the injustices of the past experienced by employees with disabilities. For purposes of this study, disability will include both physical as well as mental disability within the workplace.

⁵⁷ Mann, Sing & Maja et al 'Employing people with disabilities in South Africa' (2011) 41 *South African Journal of Occupational Therapy* 28.

⁵⁸ Mann, Sing & Maja et al 'Employing people with disabilities in South Africa' (2011) 41 *South African Journal of Occupational Therapy* 25.

⁵⁹ Another hardship facing people with disabilities, lies in the fact that access to education is not readily available to people with disabilities; this in turn reduces the number of skilled workers. Mann, Sing & Maja et al 'Employing people with disabilities in South Africa' (2011) 41 *South African Journal of Occupational Therapy* 25. Whilst this is largely an area of great concern, the ambit of this study will not include this issue.

1.7 Significance of the Research

This study will look into apartheid and consider the transgressions committed against people with disabilities thereunder. The study will thereafter attempt to decipher whether or not existing legislation has done enough to redress these injustices of the past. It examines the existing legislation within the employment sphere which has been implemented to enrich the lives of people with disabilities, and the actual effect thereof on people with disabilities in the work environment.

Whilst many writers⁶⁰ on the topic of disability generally focus on specific aspects or forms of disability and the effect of legislation in that regard, this study will consider the overall protection and advancement of employees with disabilities through the relevant legislation. The study will consider whether legislation has done enough to improve the working situations of people living with disabilities. The study is significant in that it will explore whether the employment of people with disabilities is meaningful, or whether they are merely employed in positions offering little to no advancement simply because legislation stipulates that they may not be unfairly discriminated against.

⁶⁰ Writers such as Vincent L & Chiwandire D 'Wheelchair Users, Access and Exclusion in South African Higher Education' (2017) 6 *African Journal of Disability*, Cortiella C & Horowitz SH 'The State of Learning Disabilities: Facts, Trends and Emerging Issues' available at <https://www.nclد.org/wp-content/uploads/2014/11/2014-State-of-LD.pdf> (accessed on 14 October 2019) and Nas K, Yazmalar L & Aydin A et al 'Rehabilitation of Spinal Cord Injuries' (2015) 6 *World Journal of Orthopedics*.

1.8 Research Methodology and Chapters Outline

Throughout the study, prominent South African legislation such as PEPUDA, the LRA, and the EEA will be looked at as well as the Constitution of the Republic of South Africa.

This study is conducted through the examination of writings published through primary and secondary sources on the topic of disability. The secondary sources include articles in journals, academic books and writings, newspapers, and web publications. The primary sources include policies, laws, international conventions and original narratives by independent researchers as well as academic scholars. The research will largely follow a theoretical analysis and interpretation approach on disability, as well as constructing a narrative on the history of labour rights in both South Africa and the United States of America.

The study will also develop arguments based on discourse analysis of existing labour laws within SA and the USA. Here, the USA will be chosen as comparator because of its effective developments towards, and ratification of international laws, protecting the rights of people with disabilities. The comparative methodology allows for evaluation that can provide recommendations on improvements for SA.

Chapter two will explore the role of international laws and relevant organisations and conventions that addressing the rights of people with disabilities in the context of to South Africa.

Chapter three will include an in-depth look into relevant South African

legislation. The chapter will explore what legislation stipulates with regard to disability in the workplace. This will include considering how individuals with disabilities are protected against unfair discrimination and discussing reasonable accommodation and affirmative action.

In chapter four, a comparative study with the USA will be undertaken. A look into the stance adopted by the USA, and legislation implemented, in relation to the topic of disability will be made.

Chapter five will serve as a conclusion to the study and will consider what, if anything, SA can learn from the USA. It will look at whether or not South Africa's legislation has done enough to redress the transgressions of the past. It will also explore what can still be done to better the lives of employees living with disabilities and how the government can help.

CHAPTER 2 – INTERNATIONAL LAW ADDRESSING THE RIGHTS OF PEOPLE WITH DISABILITIES



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2.1 Introduction

Prior to the rise of the constitutional dispensation in South Africa in 1994, international law found little application in the development of labour law. International law was in fact seen as a threat by many.⁶¹ The Constitution however, placed an obligation on courts, tribunals and forums to consider applicable international law when interpreting any rights within the Bill of Rights.⁶² Section 233 of the Constitution further stipulates that when interpreting any legislation, courts are to prefer any reasonable interpretation of the legislation that is consistent with international law over any other alternative interpretation that is inconsistent with international law.⁶³



⁶¹ Nxumalo LG *Disability Discrimination and Undue within the Working Environment: A Critical Analysis* (LLM thesis, University of South Africa, 2014) 45.

⁶² Section 39 of the Constitution of the Republic of South Africa, 1996.

⁶³ Constitution of the Republic of South Africa, 1996.

2.2 International Labour Organisation Discrimination Convention (No. 111)

International law plays a significant role in addressing the rights of people with disabilities.⁶⁴ Ratification of international laws (see below, as example, Conventions of the International Labour Organisation ('ILO')) creates international law obligations and requires countries to adjust their domestic legislation in order to give effect to these obligations.⁶⁵ Both SA⁶⁶ and the USA⁶⁷ are members of the ILO. Member states of the ILO are required to promote, respect, and realise fundamental rights established in ratified conventions, such as those that have been established in the ILO Declaration on Fundamental Principles and Rights at Work, which was adopted in 1998.⁶⁸ The Declaration stipulates that the elimination of discrimination in employment is a fundamental principle of rights at work.⁶⁹

The ILO Discrimination (Employment and Occupation) Convention (No. 111), established by the ILO in 1958, necessitates member states to enact legislation which outlaws all discrimination as well as repeal any legislation that is not founded on equal opportunities for all.⁷⁰ SA ratified this convention in 1997 and in

⁶⁴ Nxumalo LG *Disability Discrimination and Undue within the Working Environment: A Critical Analysis* (LLM thesis, University of South Africa, 2014) 46.

⁶⁵ Beigbeder Y 'The United States' Withdrawal from the International Labor Organization' (1979) 34 *Industrial Relations* 224.

⁶⁶ Nxumalo LG *Disability Discrimination and Undue within the Working Environment: A Critical Analysis* (LLM thesis, University of South Africa, 2014) 43.

⁶⁷ Weissbrodt D & Mason M 'Compliance of the United States with International Labor Law' 98 *Minn. L. Rev.* 1873 (2014), available at http://scholarship.law.umn.edu/faculty_articles/368.

⁶⁸ Weissbrodt D & Mason M 'Compliance of the United States with International Labor Law' 98 *Minn. L. Rev.* 1873 (2014), available at http://scholarship.law.umn.edu/faculty_articles/368.

⁶⁹ Weissbrodt D & Mason M 'Compliance of the United States with International Labor Law' 98 *Minn. L. Rev.* 1873 (2014), available at http://scholarship.law.umn.edu/faculty_articles/368.

⁷⁰ International Labour Organization (ILO), *Discrimination (Employment and Occupation) Convention*, C111, 1958.

the US the ratification process has been initiated.⁷¹ Convention 111 also provides for equal access to vocational training because, without it, it can be said that there is no equality in the admission to employment.⁷² The Convention further ensures that everyone has access to employment as well as the enjoyment of freedom with regard to the choosing of an occupation.⁷³ South Africa has a Constitutional obligation to implement international law. Section 39 of the Constitution stipulates that when interpreting the Bill of Rights international law must be considered.⁷⁴ There is, therefore, an obligation created by the Constitution as well as the EEA to consider international law with regard to the interpretation of the rights contained in the Bill of Rights.



⁷¹ Unnamed author Globalization and Workers Rights. Available at http://training.itcilo.it/actrav_cdrom1/english/global/seura/ilostand.htm (accessed on 10 September 2018).

⁷² Tomei M 'Discrimination and Equality at Work: A Review of the Concepts' (2003) 142 *International Labour Review* 401.

⁷³ Tomei M 'Discrimination and Equality at Work: A Review of the Concepts' (2003) 142 *International Labour Review* 401.

⁷⁴ Section 39 of the Constitution of the Republic of South Africa, 1996.

2.3 The Convention on the Rights of Persons with Disabilities (CRPD)

The Convention on the Rights of Persons with Disabilities (hereinafter referred to as 'CRPD') was adopted by the United Nations General Assembly in 2006 and came into effect during May 2008.⁷⁵ SA signed and ratified the convention during 2007⁷⁶ and the US signed the convention during 2009.⁷⁷ This is a legal binding document that provides guidelines to member states of the ILO in respect to the full implementation of the rights of people with disabilities.⁷⁸ The purpose of the CRPD is to 'to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'.⁷⁹ The preamble of the CRPD notes that discrimination against any individual purely on the basis of disability is a direct violation of the human dignity and worth.⁸⁰

Article 9 of the CRPD relates explicitly to accessibility and also reiterates South Africa's policies in its mandate for member states to 'take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications...and to other facilities and services open or provided to the

⁷⁵ Marumoogae, MC 'disability discrimination and the right of disabled persons to access the labour market' (2012) 15 *PER* 354.

⁷⁶ Nxumalo LG *Disability Discrimination and Undue within the Working Environment: A Critical Analysis* (LLM thesis, University of South Africa, 2014) 46.

⁷⁷ United Nations Treaty Collection available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=en (accessed on 10 September 2018).

⁷⁸ Ortoleva S 'Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System' (2011) 17 *ILSA Journal of International & Comparative Law* 288.

⁷⁹ Marumoogae, MC 'disability discrimination and the right of disabled persons to access the labour market' (2012) 15 *PER* 354.

⁸⁰ Marumoogae, MC 'disability discrimination and the right of disabled persons to access the labour market' (2012) 15 *PER* 354.

public, both in urban and rural areas.’⁸¹

Article 27 of the CRPD requires member states to take appropriate steps to prevent and eradicate discrimination on the basis of disability. Such steps should be taken in all forms of employment, recruitment processes, hiring and employment processes, employment conditions and career advancement as well as equal employment opportunities.⁸² Member states also have to ensure that reasonable accommodation is afforded to people with disabilities in the workplace.⁸³ The CRPD largely resembles existing policies that have already been implemented in South Africa in which issues such as the prohibition of discrimination in all phases of the employment process are dealt with.⁸⁴

2.4 Conclusion

From the above it becomes clear that international law recognises the rights of people with disabilities and the ILO specifically places an obligation on member states to protect people with disabilities.⁸⁵

⁸¹ Merrill T ‘Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy’ available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

⁸² Marumoagae, MC ‘disability discrimination and the right of disabled persons to access the labour market’ (2012) 15 *PER* 354.

⁸³ Marumoagae, MC ‘disability discrimination and the right of disabled persons to access the labour market’ (2012) 15 *PER* 354.

⁸⁴ Merrill T ‘Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy’ available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

⁸⁵ Nxumalo LG *Disability Discrimination and Undue within the Working Environment: A Critical Analysis* (LLM thesis, University of South Africa, 2014) 46.



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CHAPTER 3 – DISABILITY PROTECTION IN EMPLOYMENT IN SOUTH AFRICA

3.1 Introduction

The aim of this chapter is to explore South African statutes relating to disability in employment such as the Constitution, the EEA and where relevant, the LRA. This will include exploring the meaning of ‘disability’ as provided for in legislation within the employment field. The concept of ‘reasonable accommodation’ will also be further explored.

3.2 The Constitution

The founding provisions of the Constitution establish it as the supreme legislative document in SA and is the lens through which all other legislation should be interpreted. Section 2 ‘Supremacy of Constitution’ unequivocally qualifies the supremacy of the Constitution by stating that it ‘...is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.’ Section 1(c) supports this, stating that the democracy of SA is founded on the supremacy of the constitution.⁸⁶ And the preamble describes the constitution as being adopted to ‘Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights...’⁸⁷ Section 1 of the Constitution states that the democratic state envisioned by the Constitution is founded on values of ‘Human dignity, the achievement of equality and the advancement of human rights and freedoms.’

Section 9 of the Constitution ‘Equality’ describes equality as it relates to equal

⁸⁶ Section 1 of the Constitution of the Republic of South Africa, 1996.

⁸⁷ Preamble of the Constitution of the Republic of South Africa, 1996.

rights, freedoms, benefits and protection for everyone and prescribes the grounds on which the state or individual persons may not unfairly discriminate, either directly or indirectly, against anyone.⁸⁸ In the context of this study, it prescribes that disabled persons may not be unfairly discriminated against on any one or more of the stipulated grounds, neither directly nor indirectly, and that they be afforded protection from this discrimination.⁸⁹

The right to human dignity as stated in Section 10 of the Constitution 'Human dignity', stipulates that 'Everyone has inherent dignity and the right to have their dignity respected and to be protected.'⁹⁰ In the context of this study, it qualifies that all disabled persons has the right to have their dignity respected and protected in their workplace by their employers and the state.

In section 23 of the Constitution 'Labour relations', the rights of workers, employers, trade unions, organisations and the role of legislation in the interactions between these stakeholders are outlined.⁹¹ There is a stipulation in this section which provides that if any rights provided in the Bill of Rights are limited, that those limitations comply with section 36 of the Constitution.

'Limitation of rights', Section 36 of the Constitution, stipulates that rights that have been awarded in terms of the Bill of Rights may be limited if certain requirements are met.⁹² The rights can only be limited in terms of law of general application to the extent that the limitation is reasonable as well as justifiable in an open and democratic society which is based on human dignity, freedom and

⁸⁸ Section 9 of the Constitution of the Republic of South Africa, 1996.

⁸⁹ Section 9 of the Constitution of the Republic of South Africa, 1996.

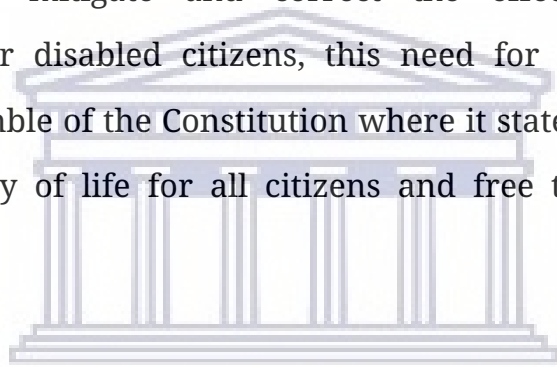
⁹⁰ Section 10 of the Constitution of the Republic of South Africa, 1996.

⁹¹ Section 23 of the Constitution of the Republic of South Africa, 1996

⁹² Section 36 of the Constitution of the Republic of South Africa, 1996.

equality, taking into account all relevant factors.⁹³ The factors to be taken into consideration include the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose as well as less restrictive means to achieve the purpose.⁹⁴ Section 36(2) does note that no law may limit or contradict any right enshrined by the Bill of Rights.⁹⁵

The constitution requires that protection is not enough, especially in the historical context of SA where it would be remissive to expect equality without affirmative action to mitigate and correct the effect the injustices of pre-democratic SA. For disabled citizens, this need for affirmative action is supported in the preamble of the Constitution where it states that it was adopted to ‘Improve the quality of life for all citizens and free the potential of each person...’



3.3 Labour Relations Act 66 of 1995 (LRA)

Section 1 of the Labour Relations Act 66 of 1995 (LRA) ‘Purpose of this Act’ states that the overarching aim of the LRA is ‘to advance the economic development, social justice, labour peace and the democratisation of the workplace’.⁹⁶ Section 3(b) ‘Interpretation of this Act’ further stipulates in that in interpreting the LRA, it must be done ‘in compliance with the Constitution’ and section 3(c) states that it must also be ‘in compliance with the international law obligations of the Republic.’⁹⁷

⁹³ Section 36 of the Constitution of the Republic of South Africa, 1996.

⁹⁴ Section 36 of the Constitution of the Republic of South Africa, 1996.

⁹⁵ Section 36 of the Constitution of the Republic of South Africa, 1996.

⁹⁶ Section 3 of the Labour Relations Act 65 of 1998.

⁹⁷ Section 3 of the Labour Relations Act 65 of 1998.

Section 187 of the Labour Relations Act 66 of 1995 (LRA) states that a dismissal will be automatically unfair where an employee is dismissed because the employer directly or indirectly discriminated against an employee on the basis of a prohibited ground, which includes the ground of disability.⁹⁸

In the case of *Steyn v South African Airways*⁹⁹ the employee had been dismissed on the basis of ill health. The employee had undergone knee surgery which rendered her unable to perform duties for a period of almost two years, as a result of which she was subsequently dismissed.¹⁰⁰ The employer ignored the advice of the company's own medical specialist whom recommended that the employee be sent to occupational therapy and chose to dismiss the employee instead. The Commissioner found that the dismissal had been unfair.¹⁰¹ The *Steyn* case depicts how employers are obligated to do all that they can before dismissing employees on the basis of a disability.

In Schedule 8 to the LRA, the Code of Good Practice: Dismissal, it is stipulated that in instances of permanent incapacity, an employer ought to determine the possibility of procuring alternative employment for the employee, as well as determining whether the employee's duties or work conditions could be adapted so as to accommodate for the employee's disability.¹⁰² This therefore means that in the event that an employee is permanently incapacitated, dismissal based on incapacity as a result of such disability should only be considered as a last resort.

⁹⁸ Labour Relations Act 65 of 1998.

⁹⁹ *Steyn v South African Airways* WE2717/2007.

¹⁰⁰ *Steyn v South African Airways* WE2717/2007.

¹⁰¹ *Steyn v South African Airways* WE2717/2007.

¹⁰² Schedule 8 the Code of Good Practice: Dismissal, section 10.

3.4 Employment Equity Act 55 of 1998 (EEA)

The EEA was enacted to further promote fairness within the workplace between employees and employers as well as prohibiting unfair discrimination.¹⁰³ The EEA stipulates that employers have to implement affirmative action measures¹⁰⁴ in order to redress the disadvantages in employment that was historically experienced by designated groups. Designated groups for purposes of the EEA are defined as 'black people, women and people with disabilities.'¹⁰⁵ The EEA states that 'black people' is a generic term which refers to Africans, Indians and Coloureds.¹⁰⁶

Part of the EEA's aim is to ensure that there are equitable representation within all occupational categories as well as levels within the workplace.¹⁰⁷ The EEA places a duty upon employers to eradicate any forms of discrimination that may be present in any employment policies and further states that the employment equity plans of designated employers must include ways and measures in which the employers will attempt to eliminate any forms of unfair discrimination which may adversely affect persons from a designated group.¹⁰⁸

¹⁰³ Section 2 of the Employment Equity Act 55 of 1998.

¹⁰⁴ Affirmative Action measures is defined in section 15 of the Employment Equity Act 55 of 1998.

¹⁰⁵ Section 1 of the Employment Equity Act 55 of 1998.

¹⁰⁶ Section 1 of the Employment Equity Act 55 of 1998.

¹⁰⁷ Section 2 of the Employment Equity Act 55 of 1998.

¹⁰⁸ Section 15 (2)(a) of the Employment Equity Act 55 of 1998.

3.4.1 Discussion of relevant sections in EEA

Section 6(1) 'Prevention and general prohibition of unfair discrimination', of the EEA further prohibits unfair discrimination, whether directly or indirectly, against any person on one or more of the grounds listed in the section, which includes the ground of disability. Section 54 'Codes of good practice' designates the Minister of Labour with the power to introduce Codes of Good Practises to further give effect to the provisions of the EEA. To this extent the Code of Good Practice on the Key Aspects on the Employment of Persons with Disabilities (the Disability Code) was enacted in 1998 and deals with vital aspects relating to the rights of people with disabilities in the workplace.¹⁰⁹

It has to be noted that not all forms of discrimination are simply prohibited. Section 9(5) of the Constitution 'Equality' provides that the discrimination on any of the grounds listed in subsection 3 would be unfair unless it is established that the discrimination is fair.¹¹⁰ Section 36 'Limitation of rights' of the Constitution further stipulates that rights that have been awarded in terms of the Bill of Rights may be limited if certain requirements are met.¹¹¹ The rights can only be limited in terms of law of general application to the extent that the limitation is reasonable as well as justifiable in an open and democratic society which is based on human dignity, freedom and equality, taking into account all relevant factors.¹¹² The factors to be taken into consideration include the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose as well as less

¹⁰⁹ Section 54 of the Employment Equity Act 55 of 1998.

¹¹⁰ Section 9 of the Constitution of the Republic of South Africa, 1996.

¹¹¹ Section 36 of the Constitution of the Republic of South Africa, 1996.

¹¹² Section 36 of the Constitution of the Republic of South Africa, 1996.

restrictive means to achieve the purpose.¹¹³

In the case of *Harksen v Lane*,¹¹⁴ it was established that mere differentiation, although giving rise to discrimination, does not amount to unfair discrimination. The case considered the meanings to be attached to discrimination and differentiation. The Constitutional Court (CC) held that mere differentiation does not necessarily amount to an infringement of the constitutional right to equality.¹¹⁵ The court held that where differentiation amounts to discrimination based on a specific ground listed in section 9 of the Constitution, then discrimination would be established.¹¹⁶ If the differentiation was not based on a listed ground, then establishing discrimination would depend on whether or not the ground differentiated upon was based on attributes as well as characteristics which have the potential to impair the fundamental human dignity of individuals as human beings or have the potential to affect them unfavourably in a significant manner.¹¹⁷ The court further held that if the differentiation was based on a ground listed in the Constitution, then unfairness will be presumed. If the differentiation was based on an unlisted ground, unfairness had to be established by the claimant. The test of unfairness predominantly focuses on the impact that the discrimination has on the claimant as well as others, had they been in the claimant's shoes.¹¹⁸

¹¹³ Section 36 of the Constitution of the Republic of South Africa, 1996.

¹¹⁴ *Harksen v Lane NO and others* 1998 (1) SA 300 (CC).

¹¹⁵ *Harksen v Lane NO and others* 1998 (1) SA 300 (CC).

¹¹⁶ *Harksen v Lane NO and others* 1998 (1) SA 300 (CC).

¹¹⁷ Nxumalo LG *Disability Discrimination and Undue within the Working Environment: A Critical Analysis* (LLM thesis, University of South Africa, 2014).

¹¹⁸ Nxumalo LG *Disability Discrimination and Undue within the Working Environment: A Critical Analysis* (LLM thesis, University of South Africa, 2014).

Section 3(a) of the EEA 'Interpretation of this Act' further stipulates in that in interpreting the EEA, it must be done 'In compliance with the Constitution' and section 3(b) states that it must also be 'in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (No. 111)...'¹¹⁹

The EEA defines people with disabilities as people who have long term or recurring physical or mental impairments which substantially limit their prospects of entry into, or the advancement in, employment.¹²⁰ In *IMATU and another v City of Cape Town*,¹²¹ the Labour Court (LC) had to determine whether or not an individual who had diabetes and who was dependent on insulin was regarded as having a disability for purposes of the EEA. The court found that type 1 insulin-dependent diabetes was a physical impairment which would have a long-term impairment as it would last for the rest of the employee's life.¹²² The court further had to decide whether the impairment substantially limited the employee's abilities to perform his job. The court noted that the Disability Code¹²³ stipulated that the availability of medical treatment or corrective devices aimed at controlling or correcting an impairment, so that the unfavourable effects of such impairment could subsequently be lessened or eradicated, had to be taken into account in determining whether an impairment was substantially limiting or not.¹²⁴ The court held that since the use of insulin had controlled the employee's diabetes to the extent that it did not pose a threat to his life, diabetes was not

¹¹⁹ Section 3 of the Employment Equity Act 55 of 1998.

¹²⁰ Section 1 of the Employment Equity Act 55 of 1998.

¹²¹ *IMATU and Another v City of Cape Town* 2005 11 BLLR 1084 (LC).

¹²² *IMATU and Another v City of Cape Town* 2005 11 BLLR 1084 (LC).

¹²³ Section 5 of the Code of Good Practice on the Key Aspects of the Employment of Persons with Disabilities, EEA 55 OF 1998.

¹²⁴ *IMATU and Another v City of Cape Town* 2005 11 BLLR 1084 (LC).

regarded as a substantially limiting impairment.¹²⁵ The LC concluded that a person living with diabetes was not constituted as a person with a disability for purposes of the EEA.¹²⁶

As seen in the above case, it is possible to have an impairment, without such impairment constituting a disability for purposes of the EEA. In order for the impairment to constitute a disability in terms of the EEA, it has to be an impairment that has long term effects or is recurring in nature.¹²⁷ It can be a mental or physical impairment, but it has to substantially limit the individual's prospect of entry into or the advancement in employment.¹²⁸ The EEA and the Disability Code has to be looked at in order to see whether an impairment meets the requirements for disability as discussed in the case of *IMATU and Another v City of Cape Town*.

3.4.2 Code of Good Practice on the Key Aspects of the Employment of Persons with Disabilities

The discussion will now turn to the Disability Code issued under the auspices of the EEA, as well as the concepts of reasonable accommodation and undue hardship.

The Code of Good Practice on the Key Aspects on the Employment of Persons with Disabilities (hereinafter referred to as the 'Disability Code') aims to further inform and educate employees, employers and trade unions on the rights of

¹²⁵ *IMATU and Another v City of Cape Town* 2005 11 BLLR 1084 (LC).

¹²⁶ *IMATU and Another v City of Cape Town* 2005 11 BLLR 1084 (LC).

¹²⁷ Section 1 of the Employment Equity Act 55 of 1998.

¹²⁸ The Code of Good Practice on the Key Aspects on the Employment of Persons with Disabilities, EEA 55 OF 1998.

people with disabilities and the obligations they have in this regard.¹²⁹ The goal is to ultimately promote and encourage equal treatment and opportunities for people with disabilities.¹³⁰

The Disability Code further elaborates on the definition of people with disabilities as provided in the EEA. It stipulates that physical impairment is indicative of a partial or total loss of a bodily function or part of the body, which may include a sensory impairment such as being deaf, hearing impaired as well as a visual impairment.¹³¹ The Disability Code describes mental impairment as an impairment that is a clinically recognised condition or illness that affects an individual's thought processes, emotions, as well as judgment.¹³² The Disability Code further states that the phrase 'long term' refers to an impairment that has lasted, or is likely to last, for a minimum of twelve months.¹³³ A recurring impairment refers to an impairment that is likely to occur again, and when it does, it will be substantially limiting to the individual suffering from the impairment.¹³⁴ The Disability Code notes that the extent of protection for persons with disabilities in employment stresses the effects of a disability on an individual in relation to the working environment, instead of the diagnosis of the impairment the individual has.¹³⁵

¹²⁹ Dupper O, Garbers C & Basson A et al *Essential Employment Discrimination Law* (2004)165.

¹³⁰ Dupper O, Garbers C & Basson A et al *Essential Employment Discrimination Law* (2004)165.

¹³¹ The Code of Good Practice on the Key Aspects on the Employment of Persons with Disabilities, EEA 55 OF 1998.

¹³² The Code of Good Practice on the Key Aspects on the Employment of Persons with Disabilities, EEA 55 OF 1998.

¹³³ The Code of Good Practice on the Key Aspects on the Employment of Persons with Disabilities, EEA 55 OF 1998.

¹³⁴ The Code of Good Practice on the Key Aspects on the Employment of Persons with Disabilities, EEA 55 OF 1998.

¹³⁵ The Code of Good Practice on the Key Aspects on the Employment of Persons with Disabilities, EEA 55 OF 1998.

The case of *Wylie and Standard Executors and Trustees*¹³⁶ was similar to that of IMATU and Another, though the CCMA arrived at a different outcome. The applicant in *Wylie* was diagnosed with multiple sclerosis and subsequently dismissed.¹³⁷ The Commissioner considered the Disability Code and concluded that her impairment amounted to a disability in terms of the EEA as well as the Disability Code.¹³⁸ Ms Wylie was therefore part of *designated group* for purposes of the EEA. Thus, it had to be considered whether or not the respondent could have done more to have reasonably accommodated her prior to dismissing her.¹³⁹



¹³⁶ *Wylie and Standard Executors and Trustees* (2006) 27 ILJ 2210 (CCMA).

¹³⁷ *Wylie and Standard Executors and Trustees* (2006) 27 ILJ 2210 (CCMA).

¹³⁸ *Wylie and Standard Executors and Trustees* (2006) 27 ILJ 2210 (CCMA).

¹³⁹ *Wylie and Standard Executors and Trustees* (2006) 27 ILJ 2210 (CCMA).

3.5 Affirmative Action

As mentioned above, the EEA was implemented in an attempt to redress the overwhelming challenge of employment equity within South Africa as a result of past discriminatory policies. The Act recognises that past discriminatory practices prior to the Constitutional dispensation created disadvantages for certain categories of people.¹⁴⁰ The EEA notes that in order to endorse an equitable workplace for the previously disadvantaged groups, a strenuous policy of redress was required.¹⁴¹ The EEA thus implemented affirmative action measures.¹⁴² As mentioned, these are measures that have been designed to enable people from designated groups that are suitably qualified, to have access to equal employment opportunities.¹⁴³

There is legislation in place to actualise the aim of equalising employment access and opportunities by affirmative action in the Constitution.¹⁴⁴ Affirmative action in the context of this study, seeks to redress lingering barriers to advancement, opportunity, and equity in the workplace. Section 9 of the Constitution¹⁴⁵ could be interpreted as making provisions for affirmative action by executing the founding principles of the Constitution as outlined in section 1, ‘...the achievement of equality and the advancement of human rights and freedoms.’¹⁴⁶

Affirmative action measures implemented must include the provisions of

¹⁴⁰ Employment Equity Act 55 of 1998.

¹⁴¹ Merrill T ‘Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy’ available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

¹⁴² Section 2 of the Employment Equity Act 55 of 1998.

¹⁴³ Section 15 of the Employment Equity Act 55 of 1998.

¹⁴⁴ The Constitution of the Republic of South Africa, 1996.

¹⁴⁵ Section 9 of the Constitution of the Republic of South Africa, 1996.

¹⁴⁶ Section 1 of the Constitution of the Republic of South Africa, 1996.

reasonable accommodation where appropriate.¹⁴⁷



¹⁴⁷ Section 15 of the Employment Equity Act 55 of 1998.

3.6 Reasonable Accommodation

Reasonable accommodation is a provision which ought to be taken into consideration throughout all levels of a business, as it should be a standard practice. It should also be reflected in daily activities and processes as well as in the company's strategic business plan.¹⁴⁸ There are various forms in which reasonable accommodation can take effect as each individual with a disability as well as each workplace is different.¹⁴⁹ This therefore means that the same type of reasonable accommodation that has been provided at a workplace for an individual with a disability might not be efficient for a different workplace with a different individual with the same disability. When an employer is to provide reasonable accommodation for an employee with a disability, it is necessary for the employer to consult with the employee as that employee is in possession of invaluable information pertaining to the specific barriers within the workplace as well as the barriers they are faced with in relation to the successful completion of vital requirements of the job.¹⁵⁰ They would also be able to inform the employer of past accommodations that have worked and which have not at other workplaces as well as provide information which will aid in best identifying the appropriate accommodations that's needed in order for them to successfully

¹⁴⁸ Merrill T 'Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy' available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

¹⁴⁹ Merrill T 'Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy' available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

¹⁵⁰ Merrill T 'Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy' available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

complete vital tasks of the job.¹⁵¹ Reasonable accommodation should not be provided if no consultation took place with the individual whom seeks the accommodation nor should it be provided if it was solely based on a diagnosis.¹⁵²



¹⁵¹ Merrill T 'Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy' available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

¹⁵² Merrill T 'Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy' available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

3.6.1 EEA

The EEA defines reasonable accommodation as ‘any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment’.¹⁵³ In South Africa the term reasonable accommodation is applicable to all individuals, regardless of disability, as this is an essential component of non-discrimination.¹⁵⁴ This therefore means that reasonable accommodation must be provided in order to ensure equal opportunities on an account of not only disability, but all other grounds for discrimination like marital status and age.¹⁵⁵ Within the EEA, reasonable accommodation is specifically provided for as part of affirmative action measures.¹⁵⁶

The EEA stipulates that designated employers¹⁵⁷ are to take reasonable steps in order to consult as well as reach an agreement with an employee in respect of all affirmative action measures.¹⁵⁸ This includes identifying and eradicating barriers to employment and the advancement thereof and providing reasonable accommodation required in order for an individual with a disability to succeed in

¹⁵³ Section 1 of the Employment Equity Act 55 of 1998.

¹⁵⁴ Merrill T ‘Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy’ available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

¹⁵⁵ Merrill T ‘Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy’ available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

¹⁵⁶ Merrill T ‘Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy’ available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

¹⁵⁷ EEA defines designated employer as an employer who employs more than 50 employees.

¹⁵⁸ Section 17 of the Employment Equity Act 55 of 1998.

fulfilling the requirements of the job.¹⁵⁹

In the case of *Bennett and Mondipak*,¹⁶⁰ the employee had suffered two nervous breakdowns as a result of work-related stress. The employer offered the employee alternative positions which the employee declined.¹⁶¹ Consequently, the employee was dismissed on the ground of incapacity as the employer feared that the employee might relapse.¹⁶² The employee claimed that the dismissal was unfair and accordingly took the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA).¹⁶³ The Commissioner relied on the Code of Good Practice: Dismissal and found that an employer had an obligation to fully investigate the causes of work-related stress as well as considering ways in which the employee's job could be adapted so as to remove the stress.¹⁶⁴ The CCMA noted that the employer had to investigate the circumstances, extent and the nature of the employee's incapacity. This included that the employee had to be consulted with in respect of his incapacity and possible steps the employer could take to reasonably accommodate the employee.¹⁶⁵ The Commissioner concluded that until such necessary steps were taken, an offer of alternative position(s) by the employer was premature and the fact that the employee declined such job offers did not justify adverse action to be taken against him.¹⁶⁶

The EEA further stipulates that affirmative action should also include measures

¹⁵⁹ Section 17 of the Employment Equity Act 55 of 1998.

¹⁶⁰ *Bennett and Mondipak* 2004 25 ILJ 583 (CCMA).

¹⁶¹ *Bennett and Mondipak* 2004 25 ILJ 583 (CCMA).

¹⁶² *Bennett and Mondipak* 2004 25 ILJ 583 (CCMA).

¹⁶³ *Bennett and Mondipak* 2004 25 ILJ 583 (CCMA).

¹⁶⁴ *Bennett and Mondipak* 2004 25 ILJ 583 (CCMA).

¹⁶⁵ *Bennett and Mondipak* 2004 25 ILJ 583 (CCMA).

¹⁶⁶ *Bennett and Mondipak* 2004 25 ILJ 583 (CCMA).

that further diversify the workplace.¹⁶⁷ These measures must be based on equal dignity as well as respect for all people.¹⁶⁸ A designated employer is to make reasonable accommodation for those individuals from designated groups in order to make sure that they receive and enjoy equal opportunities as well as to ensure that they are equitably represented in the workplace.¹⁶⁹ The EEA further requires employers to retain employees from designated groups, as well as providing them with skills training as required and appropriate.¹⁷⁰



¹⁶⁷ Section 15 of the Employment Equity Act 55 of 1998.

¹⁶⁸ Section 15 of the Employment Equity Act 55 of 1998.

¹⁶⁹ Section 15 of the Employment Equity Act 55 of 1998.

¹⁷⁰ Merrill T 'Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy' available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

3.6.2 The Disability Code

The Disability Code further defines the scope of reasonable accommodation found in the EEA.¹⁷¹ The Disability Code notes that reasonable accommodation should be applied to all workplaces in order to systematically remove any barriers to employment which people with disabilities experience.¹⁷² It further notes that reasonable accommodation should also be considered if and when a job assignment, or the environment of the workplace, changes in such a manner that it now creates barriers for employees with impairments. The Code also provides that reasonable accommodation should be considered when an employee acquires an impairment whilst being employed within the business.¹⁷³ Additionally, it notes that reasonable accommodation may be temporary or permanent and that it will vary depending on certain factors which involve the workplace as well as an individual with a disability.¹⁷⁴

The Disability Code ascertains that the provision of reasonable accommodation found within the EEA is applicable through all phases of the hiring and employment stages, which include recruitment and selection, workplace atmosphere, workplace processes, evaluations, applicable reward systems, as

¹⁷¹ Merrill T 'Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy' available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

¹⁷² Merrill T 'Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy' available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

¹⁷³ Section 6 of The Code of Good Practice on the Key Aspects on the Employment of Persons with Disabilities, EEA 55 OF 1998.

¹⁷⁴Section 6 of The Code of Good Practice on the Key Aspects on the Employment of Persons with Disabilities, EEA 55 OF 1998.

well as employee benefits and privileges.¹⁷⁵

When an individual with a disability seeks reasonable accommodation from his or her employer, it is required that the disability is disclosed to the employer as employers are only required to provide reasonable accommodation if a disclosure was made.¹⁷⁶ It is the right as well as the responsibility of those with disabilities to choose whether or not they wish to disclose disabilities.



¹⁷⁵ Section 7 of The Code of Good Practice on the Key Aspects on the Employment of Persons with Disabilities, EEA 55 OF 1998.

¹⁷⁶ Merrill T 'Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy' available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

3.6.3 TAG

In 2003 the Technical Assistance Guidelines on the Employment of People with Disabilities (hereinafter referred to as ‘TAG’) was published by the Department of Labour.¹⁷⁷ TAG is to be ‘read and used in conjunction with the Act, the Disability Code, other relevant Codes of Good Practice and other TAGs that have been issued by the Minister of Labour, as well as other related labour legislation and policies, including the UN Convention on the Rights of Persons with Disabilities (UNCRPD) and the White Paper on the Rights of Persons with Disabilities.’¹⁷⁸ TAG offers practical advice on ways in which people with disabilities can be accommodated for in the workplace.¹⁷⁹

TAG states that it is inappropriate for potential employers to request detailed information about the reasonable accommodation needs that an individual with a disability may require before a candidate for the job has been determined.¹⁸⁰ It notes that if reasonable accommodation is needed, details pertaining thereto should only be requested upon an employment offer.¹⁸¹ The reason for this is that

¹⁷⁷ Engelbrecht M & Lorenzo T ‘Exploring the tensions of sustaining economic empowerment of persons with disabilities through open labour market employment in the Cape Metropole’ (2010) 40 *South African Journal of Occupational Therapy* 8. (TAG can be accessed on <http://www.labour.gov.za/DOL/documents/useful-documents/employment-equity/technical-assistance-guidelines-on-the-employment-of-people-with-disabilities>).

¹⁷⁸ Department of Labour *Technical Assistance Guidelines on the Employment of People with Disabilities* (2003) 6.

¹⁷⁹ Engelbrecht M & Lorenzo T ‘Exploring the tensions of sustaining economic empowerment of persons with disabilities through open labour market employment in the Cape Metropole’ (2010) 40 *South African Journal of Occupational Therapy* 8.

¹⁸⁰ Merrill T ‘Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy’ available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

¹⁸¹ Merrill T ‘Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy’ available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

the condition of reasonable accommodation should not be a factor which determines whether or not an individual is to be offered a position or not.¹⁸² This, therefore, means that it is at the discretion of the individual with the disability, to divulge information in relation to their disability and what possible reasonable accommodation may be required in order to fulfil the job requirements.¹⁸³



¹⁸² Merrill T 'Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy' available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

¹⁸³ Merrill T 'Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy' available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

3.6.4 Unjustified Hardship

The Disability Code further stipulates that employers are not compelled to provide reasonable accommodation if it can be shown that the reasonable accommodation requested would place an ‘unjustified hardship’ on the employer.¹⁸⁴

If employers are able to show that in providing reasonable accommodation to an employee or prospective employee they would suffer an unjustified hardship, they are not legally required to provide such reasonable accommodation.¹⁸⁵

Unjustified hardship has been explained as ‘significant or considerable difficulty or expense’¹⁸⁶ and which would ‘substantially harm the viability of the enterprise’ this includes ‘the extent to which it would seriously disrupt the operation of the businesses’.¹⁸⁷

There are various types of reasonable accommodations as a result of so many different job requirements as well as disabilities. Accommodations made by employers must therefore suit the specific individual and the specific requirements of the job.¹⁸⁸ Adapting existing facilities or equipment as well as acquiring new work equipment and re-organising work stations are but a few examples of general or common reasonable accommodations made in order to

¹⁸⁴ Section 6 of The Code of Good Practice on the Key Aspects on the Employment of Persons with Disabilities, EEA 55 OF 1998.

¹⁸⁵ Section 6 of The Code of Good Practice on the Key Aspects on the Employment of Persons with Disabilities, EEA 55 OF 1998.

¹⁸⁶ Merrill T ‘Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy’ available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

¹⁸⁷ Merrill T ‘Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy’ available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

¹⁸⁸ Section 6 of The Code of Good Practice on the Key Aspects on the Employment of Persons with Disabilities, EEA 55 OF 1998.

aid people with disabilities in the successful completion of work tasks pertinent to the job.¹⁸⁹ If an employer refuses to provide reasonable accommodation it may be interpreted as discrimination.¹⁹⁰ Policies have been implemented not only to protect individuals from discrimination but also in order to protect employers as well as to ensure that there is a balance of fairness within the workplace.¹⁹¹

In the event that employers are unable to provide reasonable accommodation due to unjustifiable hardship, there should be extensive evidence which proves the unjustified hardship.¹⁹² Financial expense as well as inconvenience does not constitute an unjustified hardship, cost however may be a consideration when determining the most befitting reasonable accommodation.¹⁹³ The Disability Code notes that it is best for employers to seek the most cost-efficient means by which to provide reasonable accommodation to people with disabilities,¹⁹⁴ failure to

¹⁸⁹ Merrill T 'Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy' available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

¹⁹⁰ Merrill T 'Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy' available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

¹⁹¹ Merrill T 'Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy' available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

¹⁹² Merrill T 'Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy' available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

¹⁹³ Merrill T 'Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy' available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

¹⁹⁴ Section 6 of The Code of Good Practice on the Key Aspects on the Employment of Persons with Disabilities, EEA 55 OF 1998.

provide reasonable accommodation based exclusively on expense however might not satisfy the criteria for unjustified hardship.¹⁹⁵ In the case of reasonable accommodation being denied by a business, the onus is on the business to proof and demonstrate how such accommodations would substantially harm the enterprise should it have been approved.¹⁹⁶

The case of *Standard Bank SA v CCMA and others*¹⁹⁷ illustrates the narrow line to be drawn between an ordinary dismissal and that of an automatically unfair dismissal on the basis of disability. In this case, the employee had been in an accident and as a result, suffered severe back pains and accordingly found it hard to complete her normal work tasks.¹⁹⁸ The employer sympathised with the employee and provided her with light administrative work. The employee however, found the work to be uninspiring and accordingly requested to be moved to telephone sales, which the employer approved.¹⁹⁹ The employee found it challenging to sit for long periods of time and then requested the employer to provide her with a headset in order for her to work properly. The employer, however, refused and instead relegated her to a paper shredding job. The employee was subsequently absent from work frequently and the employer acknowledged that she would most likely never be able to resume her normal

¹⁹⁵ Merrill T 'Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy' available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

¹⁹⁶ Merrill T 'Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy' available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

¹⁹⁷ *Standard Bank SA v CCMA and others* [2008] 29 ILJ 1289 LC.

¹⁹⁸ *Standard Bank SA v CCMA and others* [2008] 29 ILJ 1289 LC.

¹⁹⁹ *Standard Bank SA v CCMA and others* [2008] 29 ILJ 1289 LC.

work functions.²⁰⁰ The employee was eventually dismissed for incapacity as a result of absenteeism. The employee referred the matter to the CCMA on the basis of an unfair dismissal.²⁰¹ It was held by the Commissioner that the dismissal was unfair, which finding was overturned by the LC on review.²⁰² The court agreed with the Commissioner that the employer had been patient, tolerable and charitable to the employee. The court, however, disagreed with the commissioner that the employer had gone to 'great lengths' to assist the employee.²⁰³ The court noted that the employer had refused to obtain a report from an occupational therapist as well as to consult the employee with regard to possible adaptations to her work station as was recommended by a medical professional.²⁰⁴ The employer had further rejected the employee's request for a headset as well as refused to purchase a special chair for the employee. As such the employer had failed to comply with the Disability Code.²⁰⁵ In application of the requirements found within the EEA, the LRA and both the Disability and Dismissal Codes, the court held that the employer had failed to investigate the nature of the employee's disability and the extent thereof.²⁰⁶ The court accordingly held that in failing to reasonably accommodate the employee, the employer had discriminated against her and therefore her dismissal was done in bad faith. The dismissal was also procedurally unfair as the employer did not follow the correct procedures as laid down by the relevant Codes of Good Practice.²⁰⁷

²⁰⁰ *Standard Bank SA v CCMA and others* [2008] 29 ILJ 1289 LC.

²⁰¹ *Standard Bank SA v CCMA and others* [2008] 29 ILJ 1289 LC.

²⁰² *Standard Bank SA v CCMA and others* [2008] 29 ILJ 1289 LC.

²⁰³ *Standard Bank SA v CCMA and others* [2008] 29 ILJ 1289 LC.

²⁰⁴ *Standard Bank SA v CCMA and others* [2008] 29 ILJ 1289 LC.

²⁰⁵ *Standard Bank SA v CCMA and others* [2008] 29 ILJ 1289 LC.

²⁰⁶ *Standard Bank SA v CCMA and others* [2008] 29 ILJ 1289 LC.

²⁰⁷ *Standard Bank SA v CCMA and others* [2008] 29 ILJ 1289 LC.

It is necessary to have a balance between reasonable accommodation and undue hardship.²⁰⁸ In the *Standard Bank* case mentioned above, the Bank had failed in leading evidence relating to why they would endure an unjustified hardship if they were to provide the reasonable accommodation to the employee they had dismissed. It was found that Bank had discriminated against the employee as they violated provisions in the Constitution, EEA, as well as the right to fair labour practice.²⁰⁹

In the case of *National Health & Allied Workers Union on behalf of Lucas and Department of Health (Western Cape)*,²¹⁰ the arbitrator applied the EEA and the Disability Code and held that the objective was to promote substantive as well as procedural fairness with regard to people with disabilities and to encourage employers to sustain the employment of people with disabilities if they are able to be reasonably accommodated for.²¹¹

In *Smith v The Kit Kat Group*,²¹² an employee alleged that he was unfairly discriminated against when the employer refused to allow him to resume his duties for 'cosmetically unacceptable' reasons. Incidentally, the employee had attempted suicide, which resulted in disfigurement to his face, as well as an impairment to his speech.²¹³ When the employee expressed his desire to return to

²⁰⁸ Nxumalo LG 'Disability Discrimination and Undue within the Working Environment: A Critical Analysis' (LLM thesis, University of South Africa, 2014).

²⁰⁹ Mann, Sing & Maja et al 'Employing people with disabilities in South Africa' (2011) 41 South African Journal of Occupational Therapy 29.

²¹⁰ *National Health & Allied Workers Union on behalf of Lucas and Department of Health (Western Cape)* [2004] 25 ILJ 2091 BCA.

²¹¹ Nxumalo LG *Disability Discrimination and Undue within the Working Environment: A Critical Analysis* (LLM thesis, University of South Africa, 2014).

²¹² (2017) 387 ILJ 483 (LC).

²¹³ *Smith v Kit Kat Group (Pty) Ltd* (2017) 387 ILJ 483 (LC).

work after recovering, he was told that his appearance was not acceptable and that it would remind employees of the unfortunate event.²¹⁴ Moreover, his speech was only 70% to 80% comprehensible but had on numerous occasions he informed the employer that he intended to return to work, but his e-mails either went unanswered or he was informed that he could not return to work.²¹⁵ Eventually he had a meeting with the employer, during which he was not formally dismissed but was simply told that he could not resume his duties for cosmetic reasons.

The employee then referred an unfair labour practice to the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA found that it did not have jurisdiction as the dispute had been referred late without a condonation application. He then abandoned the unfair labour practice claim and referred an unfair discrimination dispute to the Labour Court (LC).

Snyman J of the Labour Court was of the view that it was clear that the employee had a disability as defined in the Employment Equity Act 55 of 1998 (EEA). Furthermore, the employer was of the view that the employee had a disability and thus the protection for disabled persons applied.²¹⁶

It was found that by not allowing the employee to resume work and stopping the payment of his salary, this amounted to a termination of his employment and thus the employment practice within which the employer discriminated against the employee was dismissal. The onus was on the employer to prove that the

²¹⁴ *Smith v Kit Kat Group (Pty) Ltd* (2017) 387 ILJ 483 (LC).

²¹⁵ *Smith v Kit Kat Group (Pty) Ltd* (2017) 387 ILJ 483 (LC).

²¹⁶ *Smith v Kit Kat Group (Pty) Ltd* (2017) 387 ILJ 483 (LC).

discrimination was fair. The employer argued that because of the speech impediment the employee could not fully perform his job but there was no evidence to this effect. Snyman J observed that he did not think that the speech impediment was so severe that the employee would not be able to perform his duties and he was of the view that only minimal accommodation by the employer would have been required.²¹⁷ The employer did not carry out an investigation to determine the extent of the impairment nor did it consider whether the employee could be accommodated in another role.²¹⁸

While the Code of Good Practice: Dismissal provides that an employer need not accommodate an employee with a disability if it would impose unjustifiable hardship, Snyman J was of the view that it would not have constituted unjustifiable hardship to allow the employee to return to work to try and prove that he could perform his duties. If he could not perform, then the employer could simply proceed with an incapacity process. The fact that the employer refused to allow the employee to return to work amounted to discrimination on the grounds of disability.²¹⁹

In *Jansen v Legal Aid South Africa*,²²⁰ the Labour Court held that the true reason for Mr Jansen's dismissal by the respondent was, in fact, his mental condition and not his alleged misconduct and that the two were inextricably linked.²²¹ The court found that the respondent was required to take steps to reasonably accommodate Mr Jansen who repeatedly brought to the respondent's attention his mental

²¹⁷ *Smith v Kit Kat Group (Pty) Ltd* (2017) 387 ILJ 483 (LC).

²¹⁸ *Smith v Kit Kat Group (Pty) Ltd* (2017) 387 ILJ 483 (LC).

²¹⁹ *Smith v Kit Kat Group (Pty) Ltd* (2017) 387 ILJ 483 (LC).

²²⁰ (C678/14) [2018] ZALCCT 17.

²²¹ *Jansen v Legal Aid South Africa* (C678/14) [2018] ZALCCT 17.

condition.²²² It was held that what the respondent was required to do was to institute an incapacity enquiry in place of conducting a disciplinary enquiry for misconduct.²²³ Jansen had provided his employer with proof of his emotional and mental condition, but it had been ignored and thus the employer was aware that he had a disability. Moreover, a clinical psychologist had advised the employer that Jansen's condition required urgent attention, but the employer ignored these advices.²²⁴

The court pronounced the principles for determining an automatically unfair dismissal. First, would the dismissal have occurred if Jansen did not suffer from a mental illness? If the answer was yes, then the dismissal was not automatically unfair. If not, the question was whether Jansen's mental illness was the most likely cause of the dismissal? If this inference could be drawn, then the dismissal was automatically unfair. The court found Jansen's dismissal to be automatically unfair and constituted unfair discrimination. The court ordered retrospective reinstatement (just less than five years' back-pay).²²⁵

This case highlights that employers should exercise caution when dealing with disciplinary issues that may be related to mental illness. They should make sure to identify whether an employee's conduct is due to his or her mental illness. If so, the matter should be dealt with as one of incapacity rather than misconduct.

The above cases depict how reasonable accommodation is of utmost importance

²²² *Jansen v Legal Aid South Africa* (C678/14) [2018] ZALCCT 17.

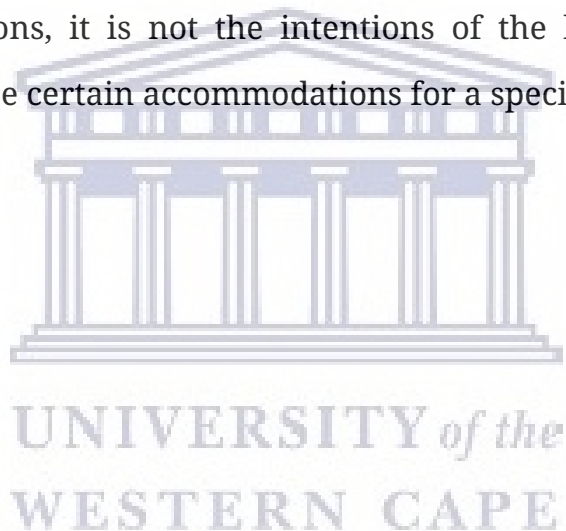
²²³ *Jansen v Legal Aid South Africa* (C678/14) [2018] ZALCCT 17.

²²⁴ *Jansen v Legal Aid South Africa* (C678/14) [2018] ZALCCT 17.

²²⁵ *Jansen v Legal Aid South Africa* (C678/14) [2018] ZALCCT 17.

and why employers should always strive towards providing such accommodation to people with disabilities where no undue hardship is present. These cases further show that there is a need for society to understand and to become more educated in ways in which they are able to accommodate people with disabilities.

It is of utmost importance to note that unjustified hardship will not be the same for every enterprise, as decisions with regard to reasonable accommodation that has been applied to one employee cannot be applied throughout the business as each case needs to be looked at and judged individually.²²⁶ For the above-mentioned reasons, it is not the intentions of the law to allow certain enterprises to generalise certain accommodations for a specific diagnosis.²²⁷



²²⁶ Merrill T 'Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy' available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

²²⁷ Merrill T 'Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy' available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

3.7 Conclusion

As discussed in previous chapters, throughout history people with disabilities have always been subjected to intense stigmatisation and have often been exposed to isolation, occasional abuse as well as segregation.²²⁸ People with disabilities have often been considered as objects of pity and in need of charity as they were seen as people whom are unfit or not able to take part in typical everyday activities, and this was the opinion that many individuals within many societies had with regard to people with disabilities and as a result, they weren't treated as having equal rights, status and responsibilities.²²⁹

Thanks to legislation, disability can now be recognised as a result of an environment that is not very accommodating towards people with disabilities instead of it being seen as people who have certain limitations or impairments.²³⁰ As a result of this, the focus shifts to social processes, institutions as well as behavioural expectations that have been limiting the participation of people with disabilities.²³¹ The consequences of this change in thought processes about people with disabilities are vital, as it compels individuals as well as institutions including businesses to carefully examine those barriers that hinder the

²²⁸ Merrill T 'Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy' available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

²²⁹ Dube AK 'The role and effectiveness of disability legislation in South Africa' 2005 *Disability Knowledge Research* 14.

²³⁰ Merrill T 'Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy' available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

²³¹ Merrill T 'Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy' available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

participation of people with disabilities.²³² It is now the responsibility of the government as well as businesses to detect the processes, physical structures as attitudes as well as social relations which have been limiting the full participation of people with disabilities in social, economic and political aspects.²³³ It is therefore evident that solutions to full access as well as liberation of people with disabilities centres around the identification as well as eradication or mitigation of barriers which people with disabilities are faced with.²³⁴

However, these protective measures, while mitigating, they do not yet sufficiently address the inequality and hardships that result from discrimination against disabled employees. The concept of reasonable accommodation is without a doubt of vital importance and can go a long way in increasing the employment of people with disabilities. But as indicated above, if an employer is to show that the reasonable accommodation would result in an undue hardship on the part of the employer, the employer no longer is obliged to provide such accommodation.

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²³²Merrill T 'Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy' available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

²³³Merrill T 'Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy' available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

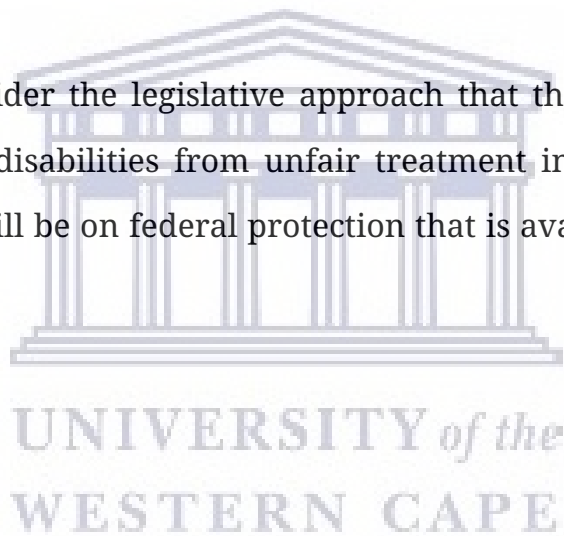
²³⁴ Merrill T 'Reasonable Accommodation Guidelines: An Instructional Guide to Reasonable Accommodation for People with Epilepsy' available at <https://epilepsy.org.za/new/uploads/files/NEDM/ReasonableAccommodationManuelPrintR.pdf> (Accessed on 16 August 2016).

STATES OF AMERICA

4.1 Introduction

In this chapter disability protection in the employment environment in the United States of America (USA) will be considered. The USA was chosen as comparator because of the developments that have been made in the country to address the historic injustices experienced by people with disabilities. The USA is a member state of the ILO and has also ratified the Convention on the Rights of Persons with Disabilities ('CRPD') in 2009.²³⁵

This chapter will consider the legislative approach that the USA takes towards protecting those with disabilities from unfair treatment in the workplace. The focus of this chapter will be on federal protection that is available to people with disabilities in America.



²³⁵ United Nations Treaty Collection available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=en (accessed on 10 September 2018).

4.2 Disability legislation in the United States of America

4.2.1 Introduction to disability in the USA

As discussed in chapter two, people with disabilities in South Africa suffered, and continue to suffer, many hardships.²³⁶ Life for people with disabilities in the USA does not seem to be much easier.²³⁷ People with disabilities in the USA were historically also subjected to discrimination and found themselves marginalised and oppressed.²³⁸ As example, prior to the 1700's, people suffering from mental illnesses in the USA were considered as being possessed by demons.²³⁹

During the 1800's what was known as the *Racial Hygiene Movement* started to take effect.²⁴⁰ This movement promoted an agenda through which reproduction could be controlled, with the aim of weeding out genetic traits that were at the time believed to weaken humanity.²⁴¹ This science came to be known as eugenics, and by the 1880's eugenics was largely accepted throughout the USA.²⁴² While not the only group affected by it, the eugenicist agenda did substantially affect people

²³⁶ Dube AK 'The role and effectiveness of disability legislation in South Africa' 2005 *Disability Knowledge Research* 14.

²³⁷ Winter J A 'The Development of the Disability Rights Movement as a Social Problem Solver' (2003) 23 *Disability Studies Quarterly* 33.

²³⁸ Winter J A 'The Development of the Disability Rights Movement as a Social Problem Solver' (2003) 23 *Disability Studies Quarterly* 33.

²³⁹ Starr J 'Life Before the ADA: A Brief History of Disability in America' 2016 available at <https://www.theodysseyonline.com/life-before-ada> (accessed on 10 April 2018).

²⁴⁰ Starr J 'Life Before the ADA: A Brief History of Disability in America' 2016 available at <https://www.theodysseyonline.com/life-before-ada> (accessed on 10 April 2018).

²⁴¹ Starr J 'Life Before the ADA: A Brief History of Disability in America' 2016 available at <https://www.theodysseyonline.com/life-before-ada> (accessed on 10 April 2018).

²⁴² Starr J 'Life Before the ADA: A Brief History of Disability in America' 2016 available at <https://www.theodysseyonline.com/life-before-ada> (accessed on 10 April 2018).

with disabilities.²⁴³ Through the eugenicist agenda, large numbers of people with disabilities were institutionalised or hidden within their homes.²⁴⁴ People with disabilities, i.e., those who were deemed physically or mentally ‘undesirable’ or ‘defective’, were forced to sterilise themselves.²⁴⁵ The eugenics law was passed in 29 states in the USA and by the 1970’s nearly 60 000 people with disabilities were sterilised without their consent.²⁴⁶

Working and generating an income forms a crucial part of an individual’s culture and identity, as many individuals organise their lives around their employment.²⁴⁷ Having employment therefore aids many individuals in defining their place in society at large, or within smaller communities at the very least.²⁴⁸ In as far as employment opportunities for people with disabilities, historically they were often expected to stay home and not to work.²⁴⁹ Employment policies of the past did not do much, if in fact anything, to place people with disabilities in



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²⁴³ Starr J ‘Life Before the ADA: A Brief History of Disability in America’ 2016 available at <https://www.theodysseyonline.com/life-before-ada> (accessed on 10 April 2018).

²⁴⁴ Starr J ‘Life Before the ADA: A Brief History of Disability in America’ 2016 available at <https://www.theodysseyonline.com/life-before-ada> (accessed on 10 April 2018).

²⁴⁵ Starr J ‘Life Before the ADA: A Brief History of Disability in America’ 2016 available at <https://www.theodysseyonline.com/life-before-ada> (accessed on 10 April 2018).

²⁴⁶ Starr J ‘Life Before the ADA: A Brief History of Disability in America’ 2016 available at <https://www.theodysseyonline.com/life-before-ada> (accessed on 10 April 2018).

²⁴⁷ Gottlieb A, Myhill WN & Blanck P ‘Employment of People with Disabilities’ 2010 available at https://www.researchgate.net/publication/287241020_Employment_of_People_with_Disabilities (accessed on 10 April 2018).

²⁴⁸ Gottlieb A, Myhill WN & Blanck P ‘Employment of People with Disabilities’ 2010 available at https://www.researchgate.net/publication/287241020_Employment_of_People_with_Disabilities (accessed on 10 April 2018).

²⁴⁹ Winter J A ‘The Development of the Disability Rights Movement as a Social Problem Solver’ (2003) 23 *Disability Studies Quarterly* 33.

competitive employment positions.²⁵⁰ People with disabilities consequently found themselves largely marginalised and oppressed.²⁵¹ With the passage of the Rehabilitation Act of 1973 a welcome change was effected to the position of people with disabilities in the USA.²⁵²



²⁵⁰ Gottlieb A, Myhill WN & Blanck P 'Employment of People with Disabilities' 2010 available at https://www.researchgate.net/publication/287241020_Employment_of_People_with_Disabilities (accessed on 10 April 2018).

²⁵¹ Winter J A 'The Development of the Disability Rights Movement as a Social Problem Solver' (2003) 23 *Disability Studies Quarterly* 33.

²⁵² Winter J A 'The Development of the Disability Rights Movement as a Social Problem Solver' (2003) 23 *Disability Studies Quarterly* 33.

4.2.2 The Rehabilitation Act of 1973

The 1960's and 1970's saw a rise in the USA in activism for the rights of people with disabilities.²⁵³ The civil rights movement of the 1960's sparked other civil rights movements, such as the disability rights movement as well as the women's rights movement.²⁵⁴ The 1960's saw the enactment of vital pieces of civil rights legislation, such as the Civil Rights Act of 1964, the Voting Rights Act of 1965 and the Civil Rights Act of 1968, nevertheless none of these acts provided protection to people with disabilities.²⁵⁵ Inspired by the civil rights movement of the time, a number of Acts were consequently enacted, which ultimately paved the way towards the passing of ²⁵⁶ the Rehabilitation Act of 1973 (which was the forerunner to the Americans with Disabilities Act of 1990, as discussed below).²⁵⁷

The Rehabilitation Act of 1973 prohibited discrimination against people with disabilities in any federal supported program.²⁵⁸ Section 504 of the Act stipulates that no person with a disability as defined in the Act should be excluded from agencies programs solely based on disability status.²⁵⁹ Section 7 of the Act defines disability as an individual who 'has a physical or mental impairment which for

²⁵³ Starr J 'Life Before the ADA: A Brief History of Disability in America' 2016 available at <https://www.theodysseyonline.com/life-before-ada> (accessed on 10 April 2018).

²⁵⁴ 'A Look Back in History: The Americans with Disabilities Act' available at <http://blog.disabilitycanhappen.org/the-americans-with-disabilities-act/> 2015 (accessed on 16 April 2018).

²⁵⁵ 'A Look Back in History: The Americans with Disabilities Act' available at <http://blog.disabilitycanhappen.org/the-americans-with-disabilities-act/> 2015 (accessed on 16 April 2018).

²⁵⁶ Starr J 'Life Before the ADA: A Brief History of Disability in America' 2016 available at <https://www.theodysseyonline.com/life-before-ada> (accessed on 10 April 2018).

²⁵⁷ Starr J 'Life Before the ADA: A Brief History of Disability in America' 2016 available at <https://www.theodysseyonline.com/life-before-ada> (accessed on 10 April 2018).

²⁵⁸ Section 504 of the Rehabilitation Act of 1973.

²⁵⁹ Section 504 of the Rehabilitation Act of 1973.

such individual constitutes or results in a substantial impediment to employment'.²⁶⁰ The protection awarded by section 504 is also awarded to individuals with severe or significant impairments, which the Act defines as 'an individual with a disability - (i) who has a severe physical or mental impairment which seriously limits one or more functional capacities'.²⁶¹

The section 504 further prohibited the exclusion of people with disabilities from making use of the same clinics as individuals who did not suffer from any impairments.²⁶² In terms of this Act, for the first time in the USA, segregation of people with disabilities was found to be discriminatory.²⁶³ Prior to the passing of the Rehabilitation Act of 1973 it was simply assumed that challenges faced by people with disabilities were the consequence of the 'inevitable' mental limitations to be imposed upon such individuals because of the disability.²⁶⁴ Section 504 of the Act also for the first time recognised that the inferior social as well as economic status people with disabilities experienced was not as a result of the disability itself, but rather as a result of societal barriers and prejudices they were faced with.²⁶⁵ Section 504 allowed for people with disabilities to not only

²⁶⁰ Section 7 of the Rehabilitation Act of 1973.

²⁶¹ Section 7 of the Rehabilitation Act of 1973.

²⁶² Section 504 of the Rehabilitation Act of 1973.

²⁶³ 'A Look Back in History: The Americans with Disabilities Act' available at <http://blog.disabilitycanhappen.org/the-americans-with-disabilities-act/> 2015 (accessed on 16 April 2018).

²⁶⁴ 'A Look Back in History: The Americans with Disabilities Act' available at <http://blog.disabilitycanhappen.org/the-americans-with-disabilities-act/> 2015 (accessed on 16 April 2018).

²⁶⁵ 'A Look Back in History: The Americans with Disabilities Act' available at <http://blog.disabilitycanhappen.org/the-americans-with-disabilities-act/> 2015 (accessed on 16 April 2018).

remain autonomous, but also to become a contributing member of society.²⁶⁶

The Rehabilitation, Comprehensive Services and Developmental Disabilities Amendment Act passed in 1978, which made amendments to the Rehabilitation Act of 1973,²⁶⁷ noted that people with disabilities should be involved in forming policies and practices which also affect their lives.²⁶⁸ Section 504 of the Rehabilitation Act did not however provide people with disabilities protection against discrimination by employers.²⁶⁹ Such protection would at long last only be addressed in the ADA.²⁷⁰



²⁶⁶ Winter J A 'The Development of the Disability Rights Movement as a Social Problem Solver' (2003) 23 *Disability Studies Quarterly* 33.

²⁶⁷ Winter J A 'The Development of the Disability Rights Movement as a Social Problem Solver' (2003) 23 *Disability Studies Quarterly* 33.

²⁶⁸ Winter J A 'The Development of the Disability Rights Movement as a Social Problem Solver' (2003) 23 *Disability Studies Quarterly* 33.

²⁶⁹ 'A Look Back in History: The Americans with Disabilities Act' available at <http://blog.disabilitycanhappen.org/the-americans-with-disabilities-act/> 2015 (accessed on 16 April 2018).

²⁷⁰ 'A Look Back in History: The Americans with Disabilities Act' available at <http://blog.disabilitycanhappen.org/the-americans-with-disabilities-act/> 2015 (accessed on 16 April 2018).

4.2.3 The Americans with Disabilities Act of 1990

Workplaces have traditionally been structured to accelerate performance by individuals who do not have any disability, which approach created a barrier to employment opportunities for individuals with disabilities.²⁷¹ The ADA sought to remove this barrier through its provisions protecting employees with disabilities against discrimination and through also introducing the requirement of reasonable accommodation.²⁷² Reasonable accommodation is grounded in the view that in order to treat people equally, they must be treated differently.²⁷³ As such the enactment of the ADA confronted historical views that people with disabilities could not, and accordingly should not, be expected to work.²⁷⁴

Supporters of the ADA argued that unequal access to jobs was the main barrier to employment and not an individual's impairment.²⁷⁵ It was also argued by supporters of the ADA that there is no such thing as a disabled employee, only a society that does not accommodate all its citizens.²⁷⁶ Consequently, the

²⁷¹ Cooper JO 'Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act' (1991) 139 *The University of Pennsylvania Law Review* 1430.

²⁷² Cooper JO 'Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act' (1991) 139 *The University of Pennsylvania Law Review* 1430.

²⁷³ Cooper JO 'Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act' (1991) 139 *The University of Pennsylvania Law Review* 1431.

²⁷⁴ Burkhauser RV & Daly MC 'United States Disability Policy in a Changing Environment' 2001 available at <https://www.frbsf.org/economic-research/files/wp02-21bk.pdf> (accessed on 9 April 2018).

²⁷⁵ Burkhauser RV & Daly MC 'United States Disability Policy in a Changing Environment' 2001 available at <https://www.frbsf.org/economic-research/files/wp02-21bk.pdf> (accessed on 9 April 2018).

²⁷⁶ Burkhauser RV & Daly MC 'United States Disability Policy in a Changing Environment' 2001 available at <https://www.frbsf.org/economic-research/files/wp02-21bk.pdf> (accessed on 9 April 2018).

implementation of the Americans with Disabilities Act of 1990 (ADA) is regarded by many as the most significant achievement to date in the disability rights movement in the USA.²⁷⁷ The ADA extended the provisions of the Rehabilitation Act of 1973 and the subsequent 1978 amendments to the former Act.²⁷⁸ The ADA codified into law vital principles that would essentially govern the relationship between the American society and that of its citizens with disabilities. It also changed public discourse surrounding disability, as well as addressing the role which people with disabilities would play within American society.²⁷⁹

The ADA has been crucial in outlawing discrimination and guaranteeing that individuals with disabilities have the same opportunities as everyone else in America.²⁸⁰ The ADA provides protection to all people with disabilities in all aspects of public life, with regard to schools, employment and transportation.²⁸¹ Chapter 126 of the ADA deals with equal opportunities for people with disabilities,²⁸² and section 12112 further prohibits the discrimination of people with disabilities within the workplace as it states that if an individual is suitably qualified for a position he or she shall not be discriminated against on the basis of his or her

²⁷⁷ Winter J A 'The Development of the Disability Rights Movement as a Social Problem Solver' (2003) 23 *Disability Studies Quarterly* 33.

²⁷⁸ Winter J A 'The Development of the Disability Rights Movement as a Social Problem Solver' (2003) 23 *Disability Studies Quarterly* 33.

²⁷⁹ Winter J A 'The Development of the Disability Rights Movement as a Social Problem Solver' (2003) 23 *Disability Studies Quarterly* 33.

²⁸⁰ 'A Look Back in History: The Americans with Disabilities Act' available at <http://blog.disabilitycanhappen.org/the-americans-with-disabilities-act/> 2015 (accessed on 16 April 2018).

²⁸¹ 'A Look Back in History: The Americans with Disabilities Act' available at <http://blog.disabilitycanhappen.org/the-americans-with-disabilities-act/> 2015 (accessed on 16 April 2018).

²⁸² Chapter 126 of the Americans with Disabilities Act 1990.

disability.²⁸³

In order to receive the protection afforded by the ADA an individual should have a disability as defined in the Act.²⁸⁴ The ADA defines disability as a physical or mental impairment which substantially limits one of more major life activities, a person whom is perceived by others as having such an impairment, as well as a person whom has a history or record of such an impairment.²⁸⁵ The ADA does not however contain a list of impairments which are potentially covered by the ADA.²⁸⁶

The ADA acknowledges that people with disabilities previously had no legal recourse to redress the discrimination which they previously and continue to face.²⁸⁷ The Act further notes that people with disabilities occupy an inferior status within society and are educationally, vocationally, socially and economically disadvantaged.²⁸⁸ The ADA states that the ongoing unfair discrimination and prejudice towards people with disabilities denies them the opportunity to compete on an equal basis. The ADA therefore sought to provide a comprehensive and clear mandate in which it calls for the elimination of

²⁸³ Section 12112 of the Americans with Disabilities Act 1990.

²⁸⁴ 'A Look Back in History: The Americans with Disabilities Act' available at <http://blog.disabilitycanhappen.org/the-americans-with-disabilities-act/> 2015 (accessed on 16 April 2018).

²⁸⁵ 'A Look Back in History: The Americans with Disabilities Act' available at <http://blog.disabilitycanhappen.org/the-americans-with-disabilities-act/> 2015 (accessed on 16 April 2018).

²⁸⁶ 'A Look Back in History: The Americans with Disabilities Act' available at <http://blog.disabilitycanhappen.org/the-americans-with-disabilities-act/> 2015 (accessed on 16 April 2018).

²⁸⁷ Chapter 126 of the Americans with Disabilities Act 1990.

²⁸⁸ Chapter 126 of the Americans with Disabilities Act 1990.

discrimination against people with disabilities.²⁸⁹ A further purpose of the ADA is to provide enforceable standards which address the discrimination against people with disabilities, as well as to guarantee that the Federal Government plays a vital role in enforcing the standards which have been established in chapter 126 on behalf of people with disabilities.²⁹⁰ The ADA prohibits the marginalisation and exclusion of people with impairments from mainstream society and stipulates that people with disabilities are an integral part of society and should therefore not be isolated, segregated, or subjected to discrimination.²⁹¹ The Act further seeks to encourage people with disabilities, and assist them, to take control of their lives by promoting equal employment opportunities.²⁹²



²⁸⁹ Chapter 126 of the Americans with Disabilities Act 1990.

²⁹⁰ Chapter 126 of the Americans with Disabilities Act 1990.

²⁹¹ Winter J A 'The Development of the Disability Rights Movement as a Social Problem Solver' (2003) 23 *Disability Studies Quarterly* 33.

²⁹² Winter J A 'The Development of the Disability Rights Movement as a Social Problem Solver' (2003) 23 *Disability Studies Quarterly* 33.

4.2.4 Reasonable accommodation and undue hardship

Title I of the ADA stipulates that employers must make reasonable accommodation for employees with disabilities, unless such accommodation would cause an undue hardship on the employer's business operations.²⁹³ Under the ADA, where the employer is able to accommodate an individual with a disability to perform the job and that accommodation does not impose an undue hardship, the employer's refusal to provide such reasonable accommodation ought to be treated as discrimination on the bases of disability.²⁹⁴

Reasonable accommodation does not however require employers to change their legitimate selection criteria.²⁹⁵ Instead it asks of employers to recognise the abilities of people with disabilities, and to investigate what reasonable modifications could be made to assist the employee to meet the requirements of the job, albeit in an unconventional manner.²⁹⁶ However, where the identified accommodation poses an undue hardship on the employer, the employer is not required to lesser work standards or even alter its business program in order to hire the employee.²⁹⁷ Additionally, when an employer is met with two equally qualified job candidates

²⁹³ Burkhauser RV & Daly MC 'United States Disability Policy in a Changing Environment' 2001 available at <https://www.frbsf.org/economic-research/files/wp02-21bk.pdf> (accessed on 9 April 2018).

²⁹⁴ Cooper JO 'Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act' (1991) 139 *The University of Pennsylvania Law Review* 1430.

²⁹⁵ Cooper JO 'Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act' (1991) 139 *The University of Pennsylvania Law Review* 1432.

²⁹⁶ Karlan P S & Rutherglen G 'Disabilities, Discrimination, and Reasonable Accommodation' (1996) 46 *Duke Law Journal* 9.

²⁹⁷ Cooper JO 'Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act' (1991) 139 *The University of Pennsylvania Law Review* 1432.

and one candidate is disabled, the employer is not obliged to choose the candidate with a disability purely because of the disability.²⁹⁸ Reasonable accommodation was intended to upsurge access to employment for people with disabilities, it however does not dictate that an individual's disability should weigh in favour during the hiring process.²⁹⁹

People with disabilities are entitled to the same rights and responsibilities as provided to those who do not have any impairment.³⁰⁰ This includes the right to fair and equal wages, workplace opportunities, and working hours.³⁰¹ The ADA notes that in order to achieve the aforesaid goals people with disabilities should be accommodated and supported in employment and not reduced to segregated or sheltered settings.³⁰² The ADA observes that whilst a disability may, at first sight, render an individual with a disability incapable of performing the job requirements, it may however not be as significant an obstacle as originally thought.³⁰³ Having a disability does not mean that a person is unable to perform

²⁹⁸ Cooper JO 'Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act' (1991) 139 *The University of Pennsylvania Law Review* 1432.

²⁹⁹ Cooper JO 'Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act' (1991) 139 *The University of Pennsylvania Law Review* 1432.

³⁰⁰ Gottlieb A, Myhill WN & Blanck P 'Employment of People with Disabilities' 2010 available at https://www.researchgate.net/publication/287241020_Employment_of_People_with_Disabilities (accessed on 10 April 2018).

³⁰¹ Gottlieb A, Myhill WN & Blanck P 'Employment of People with Disabilities' 2010 available at https://www.researchgate.net/publication/287241020_Employment_of_People_with_Disabilities (accessed on 10 April 2018).

³⁰² Gottlieb A, Myhill WN & Blanck P 'Employment of People with Disabilities' 2010 available at https://www.researchgate.net/publication/287241020_Employment_of_People_with_Disabilities (accessed on 10 April 2018).

³⁰³ Cooper JO 'Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act' (1991) 139 *The University of Pennsylvania Law Review* 1429.

the requirements of a job, it simply means that a different approach might be needed to fulfil the requirements of the job.³⁰⁴

As mentioned above, the ADA provides for reasonable accommodations to be made in the workplace for people with disabilities, such accommodations, however, should not pose an undue hardship on the employer. Undue hardship is defined as ‘significant difficulty or expense in, or resulting from, the provision of the accommodation and refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business’.³⁰⁵ When courts are determining what would pose an undue hardship, they will consider various factors such as the ‘financial resources of the facility and the size of the business’,³⁰⁶ as well as the ‘impact on the ability of other employees to perform their duties and the impact on the facility’s ability to conduct business’.³⁰⁷ The court looks at the nature as well as the size of the employer’s business in order to determine whether or not an expense would be regarded as ‘significant or difficult’.³⁰⁸ If the business is large, the company is expected to be able to make accommodations that require greater effort or expenses in comparison to a smaller company which would not be able to afford such accommodations.³⁰⁹ Financial constraint is however not the only factor that courts take into consideration as they also look proposed accommodations which

³⁰⁴ Cooper JO ‘Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act’ (1991) 139 *The University of Pennsylvania Law Review* 1429.

³⁰⁵ O’Donnell RK & Durivage LC ‘Undue Hardship’ *The Legal Intelligencer* 14 June 2011.

³⁰⁶ O’Donnell RK & Durivage LC ‘Undue Hardship’ *The Legal Intelligencer* 14 June 2011.

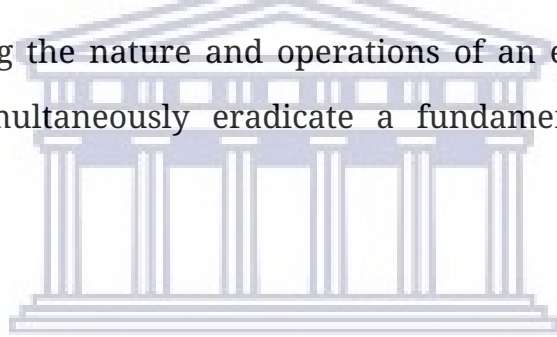
³⁰⁷ O’Donnell RK & Durivage LC ‘Undue Hardship’ *The Legal Intelligencer* 14 June 2011.

³⁰⁸ O’Donnell RK & Durivage LC ‘Undue Hardship’ *The Legal Intelligencer* 14 June 2011.

³⁰⁹ O’Donnell RK & Durivage LC ‘Undue Hardship’ *The Legal Intelligencer* 14 June 2011.

are ‘unduly extensive, substantial or disruptive to the point where they alter the nature or operation of the business’ can be seen to most likely fulfil the employer’s burden to prove ‘undue hardship’.³¹⁰

As a result of the meaning attached to undue hardship, employers are to take careful concern when evaluating job descriptions in order to verify that it is a fundamental function of the positions which are clearly identified.³¹¹ The job descriptions will serve as a vital piece of evidence when determining whether an employee’s proposed accommodation would create an undue hardship by ‘altering and disrupting the nature and operations of an employer’s business’,³¹² and which would simultaneously eradicate a fundamental function of the position.³¹³



4.2.5 Case law on reasonable accommodation and undue hardship

In the case of *Carter v Bennett*,³¹⁴ it was found that the federal government is not under an obligation to provide the plaintiff with all accommodations that he or she may request. There is only an obligation to provide reasonable accommodation that is necessary in order to enable the plaintiff to perform his essential work functions.³¹⁵

³¹⁰ O’Donnell RK & Durivage LC ‘Undue Hardship’ *The Legal Intelligencer* 14 June 2011.

³¹¹ O’Donnell RK & Durivage LC ‘Undue Hardship’ *The Legal Intelligencer* 14 June 2011.

³¹² O’Donnell RK & Durivage LC ‘Undue Hardship’ *The Legal Intelligencer* 14 June 2011.

³¹³ O’Donnell RK & Durivage LC ‘Undue Hardship’ *The Legal Intelligencer* 14 June 2011.

³¹⁴ *Carter v. Bennett* 840 F.2d 63 (D.C. Cir. 1988).

³¹⁵ *Carter v. Bennett* 840 F.2d 63 (D.C. Cir. 1988).

In *Harmer v. Virginia Electric and Power Company*³¹⁶ an employee had a pulmonary disability and requested that the entire workplace be declared a smoke-free zone in order to accommodate his disability. The employer produced a letter from his doctor which stated that the 'tobacco smoke would seriously impair his respiratory status and therefore, cause him to have to use medications with increased side effects'.³¹⁷ The employer then banned all smoking with the exception of designated smoking rooms and conducted a study on the carbon dioxide levels, which were found to be low.³¹⁸ The employee was, however, not satisfied and sued the employer under the ADA.³¹⁹ Evidence provided by the employer however showed that the employee was at all times able to perform his employment duties adequately.³²⁰ The court therefore, held that the employee is not entitled to be further accommodated under the ADA.³²¹ The court further found that a reasonable accommodation would have been the addition of air purifiers, fans as well as smoke-free sections within the workplace.³²²

The case of *Eisfelder v. Michigan Department of Natural Resources*³²³ involved an employee whom had multiple sclerosis and requested time off from work in order to undergo surgery. The employer refused to grant the request and terminated her employment instead.³²⁴ The court then held that it would have been a reasonable accommodation on the part of the employer to allow the employee

³¹⁶ *Harmer v. Virginia Electric and Power Company* 831 F. Supp. 1300, 1306 (E.D. Va. 1993).

³¹⁷ *Harmer v. Virginia Electric and Power Company* 831 F. Supp. 1300, 1306 (E.D. Va. 1993).

³¹⁸ *Harmer v. Virginia Electric and Power Company* 831 F. Supp. 1300, 1306 (E.D. Va. 1993).

³¹⁹ *Harmer v. Virginia Electric and Power Company* 831 F. Supp. 1300, 1306 (E.D. Va. 1993).

³²⁰ *Harmer v. Virginia Electric and Power Company* 831 F. Supp. 1300, 1306 (E.D. Va. 1993).

³²¹ *Harmer v. Virginia Electric and Power Company* 831 F. Supp. 1300, 1306 (E.D. Va. 1993).

³²² *Harmer v. Virginia Electric and Power Company* 831 F. Supp. 1300, 1306 (E.D. Va. 1993).

³²³ *Eisfelder v. Michigan Dept. of Natural Resources* 847 F. Supp. 78 (W.D. Mich. 1993).

³²⁴ *Eisfelder v. Michigan Dept. of Natural Resources* 847 F. Supp. 78 (W.D. Mich. 1993).

to take her two months of accumulated annual sick leave as the employee had requested instead of the termination of her employment.³²⁵ The court therefore ruled in favour of the employee.³²⁶

In *Wooten v Columbus Division of Water*³²⁷ the employee stipulated that he was unable to lift weights in excess of twenty pounds. The employer however felt that because that was an essential requirement of the job, his services were no longer needed and subsequently put on disability leave and then later had his employment terminated.³²⁸ Wooten then sued under the ADA and the Rehabilitation Act for disability discrimination.³²⁹ The employee stated that reasonable accommodation under the ADA includes reassignment to a vacant position especially if he is qualified for the position.³³⁰ The court held that appropriate vacant positions must be offered and that it is not necessary that a new position be created but if a disability prevents an employee from performing his present job, there should be an effort made in order to place the employee in an existing position which is vacant and which the employee is qualified for.³³¹

In the case of *Vande Zande v Wisconsin Department of Administration*,³³² the employer had taken extensive measures in order to reasonably accommodate an

³²⁵ *Eisfelder v. Michigan Dept. of Natural Resources* 847 F. Supp. 78 (W.D. Mich. 1993).

³²⁶ *Eisfelder v. Michigan Dept. of Natural Resources* 847 F. Supp. 78 (W.D. Mich. 1993).

³²⁷ *Wooten v. Columbus Division of Water* 91 Ohio App.3d 326 (1993).

³²⁸ *Wooten v. Columbus Division of Water* 91 Ohio App.3d 326 (1993).

³²⁹ *Wooten v. Columbus Division of Water* 91 Ohio App.3d 326 (1993).

³³⁰ *Wooten v. Columbus Division of Water* 91 Ohio App.3d 326 (1993).

³³¹ *Wooten v. Columbus Division of Water* 91 Ohio App.3d 326 (1993).

³³² *Vande Zande v. State of Wisconsin Department of Administration* 851 F. Supp. 353 (W.D. Wis. 1994).

employee who suffered from disability. The employee was a paraplegic state employee and the employer had allowed the employee to work from home, changed her work schedule, bought customized furniture as well as redesigned the office facilities in order to accommodate the employee.³³³ The employee was still unsatisfied with the accommodations made and subsequently quit her job and then sued the employer for disability discrimination.³³⁴ The court however held that former employer had acted reasonably, as many accommodations had been made in order to aid the employee in doing her job effectively.³³⁵

In *Guice-Mills v Derwinski*³³⁶ an employee whom worked as a head nurse at a hospital and worked flexible hours, stated that she was unable to work the early morning shifts due to her depression as well as a nervous problem. The hospital tried to accommodate the employee, and transferred her to a staff nurse position, which she subsequently refused.³³⁷ The court then held that ‘when an employer offers an employee an alternative position that does not require a significant reduction in pay or benefits, that offer is a reasonable accommodation as a matter of law.’³³⁸

When taking the above case law into consideration it is clear that the ADA has

³³³ *Vande Zande v. State of Wisconsin Department of Administration* 851 F. Supp. 353 (W.D. Wis. 1994).

³³⁴ *Vande Zande v. State of Wisconsin Department of Administration* 851 F. Supp. 353 (W.D. Wis. 1994).

³³⁵ *Vande Zande v. State of Wisconsin Department of Administration* 851 F. Supp. 353 (W.D. Wis. 1994).

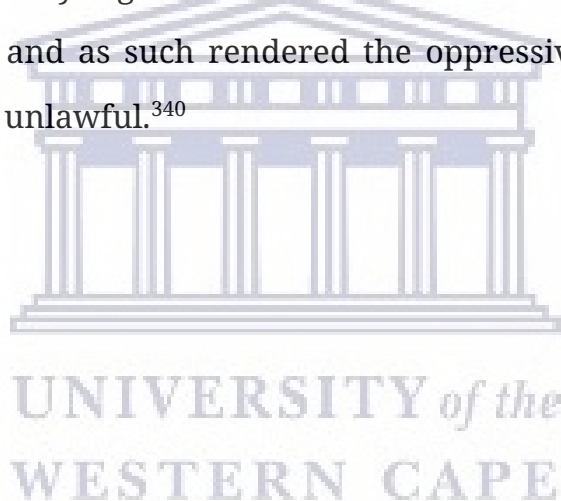
³³⁶ *Guice-Mills v. Derwinski* 967 F.2d 794 (2d Cir. 1992).

³³⁷ *Guice-Mills v. Derwinski* 967 F.2d 794 (2d Cir. 1992).

³³⁸ *Guice-Mills v. Derwinski* 967 F.2d 794 (2d Cir. 1992).

placed an obligation on employers to reasonably accommodate people with disabilities with regard to workplace hardships. An employer however does not need to do so if the employer or business suffers an undue hardship. An employer is to reasonably accommodate an employee in order to assist them in performing essential work functions.

The introduction of the ADA has been a step in the right direction in its aid at providing much-needed protection to people with disabilities.³³⁹ The ADA endorsed the slogan of the disability rights movement in the USA – ‘nothing about us, without us’, - into law and as such rendered the oppressive marginalisation of people with disabilities unlawful.³⁴⁰



³³⁹ Gottlieb A, Myhill WN & Blanck P ‘Employment of People with Disabilities’ 2010 available at https://www.researchgate.net/publication/287241020_Employment_of_People_with_Disabilities (accessed on 10 April 2018).

³⁴⁰ Winter J A ‘The Development of the Disability Rights Movement as a Social Problem Solver’ (2003) 23 *Disability Studies Quarterly* 33.

4.3 Supported employment

In the USA an approach known as supported employment was developed during the early 1980's.³⁴¹ *Supported employment* was developed by the federal government with the view of assisting people with disabilities to find employment.³⁴² As mentioned above, the Rehabilitation Act of 1973 made services available for persons with disabilities which included affirmative action during the hiring of people with disabilities³⁴³ and the prohibition of discrimination against people with disabilities.³⁴⁴ The Rehabilitation Act Amendments of 1986 was amended to make provision for additional funding for supported employment, those funds were made available to all states on a formula grant basis which was exclusively available for *supported employment*.³⁴⁵ In 1992, the Rehabilitation Act was amended once again, changes had been made to the principles, process, purpose and outcomes of the Rehabilitation Program, in order to support people with disabilities within the workplace no matter how severe their disability might be.³⁴⁶

Supported employment is an approach adopted in which an attempt is made to promote the inclusion of people with disabilities in the workplace.³⁴⁷ *Supported*

³⁴¹ Kamp M & Lynch C 'Handbook Supported Employment' available at <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1337&context=gladnetcollect> (Accessed on 30 July 2019).

³⁴² 'What Parents Need to Know About Supported Employment for Individuals with Multiple Disabilities' available at <https://www.familyconnect.org/info/multiple-disabilities/the-future-starts-now/supported-employment/135> (Accessed on 5 September 2019).

³⁴³ Section 503 of the Rehabilitation Act 1973.

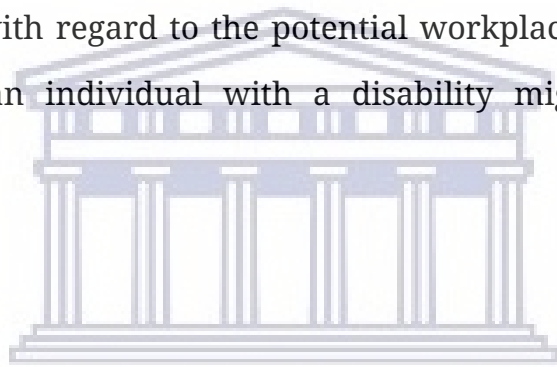
³⁴⁴ Section 504 of the Rehabilitation Act 1973.

³⁴⁵ The Rehabilitation Act Amendments of 1986.

³⁴⁶ The Rehabilitation Act Amendments of 1992.

³⁴⁷ Coetzee Z, Hajwani Z & Landman S et al 'Supported employment: Recommendations for successful implementation in South Africa' (2011) 41 *South African Journal of Occupational Therapy* 85.

employment may be defined as ‘competitive employment in an integrated setting with on-going support services for individuals with the most severe disabilities’.³⁴⁸ The objective behind the *supported employment* approach is premised on the assumption that with the correct type and intensity of support, persons living with even the most severe cases of disability will, in fact, be able to be integrated into competitive employment.³⁴⁹ *Supported employment* includes interventions such as enquiring about the skills as well as preferences that the person with disabilities has,³⁵⁰ it also includes job development in order to find the person’s ideal job by reaching out to employers,³⁵¹ job analysis can also be done in order to find out information with regard to the potential workplace,³⁵² colleagues as well as the support that an individual with a disability might have within the workplace.³⁵³



4.4 Conclusion

In conclusion, when taking the above into consideration, it becomes clear that there are some similarities in the approach adopted by the US in protecting the rights of people with disabilities. In both countries’ legislation was enacted to address the rights of people with disabilities since it was recognised that people with disabilities were often marginalised and oppressed.

³⁴⁸ Coetzee Z, Hajwani Z & Landman S et al ‘Supported employment: Recommendations for successful implementation in South Africa’ (2011) 41 *South African Journal of Occupational Therapy* 85.

³⁴⁹ Coetzee Z, Hajwani Z & Landman S et al ‘Supported employment: Recommendations for successful implementation in South Africa’ (2011) 41 *South African Journal of Occupational Therapy* 85.

³⁵⁰ O’Bryan A, Simons K & Beyer S et al *A Framework for Supported Employment* (2000) 2.

³⁵¹ O’Bryan A, Simons K & Beyer S et al *A Framework for Supported Employment* (2000) 2.

³⁵² O’Bryan A, Simons K & Beyer S et al *A Framework for Supported Employment* (2000) 2.

³⁵³ O’Bryan A, Simons K & Beyer S et al *A Framework for Supported Employment* (2000) 2.

The road to achieving such protection was however not quick, as seen in this chapter, with the ADA only enacted in 1990. South Africa's legislative approach to reasonable accommodation is similar to that provided for under the ADA. Reasonable accommodation is to be provided to employees with disabilities provided that the reasonable accommodation does not pose an undue hardship on the part of the employer.³⁵⁴ Employers can also find that the hiring of people with disabilities can, in fact, have a positive impact as it would benefit the society as a whole as well as the workplace.³⁵⁵

In the next chapter, which will also serve as the concluding chapter to the study, the approach SA adopted to disability in the workplace will be compared to the approach utilised in the USA. The aim would be to see whether SA can learn anything from the way in which the USA provides for disability protection in the workplace, and if so, what SA can learn from such an approach.

³⁵⁴ Cooper JO 'Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act' (1991) 139 *The University of Pennsylvania Law Review* 1430.

³⁵⁵ Winter J A 'The Development of the Disability Rights Movement as a Social Problem Solver' (2003) 23 *Disability Studies Quarterly* 33.



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CHAPTER 5 – RECOMMENDATIONS AND CONCLUSION

5.1 Introduction

In the previous chapters the hardships that people with disabilities have historically endured, and continue to endure, have been highlighted as a constant theme. The effectiveness of legislation enacted in SA and the USA respectively to protect the rights of people with disabilities in the workplace specifically, against the backdrop of applicable Conventions of the ILO, have been considered.

Whilst existing legislation formally advances the employment situation of people with disabilities in the work environment, chapter five serves as the conclusion to the research and considers to what extent applicable legislation meaningfully redress transgressions of the past suffered by people with disabilities in the workplace. At the same time, the chapter will consider whether more could be done to protect and better the lives of people with disabilities in the workplace, and what SA could perhaps learn from the legislative approach adopted in the USA.



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5.2 Overview of successes in SA and the USA

5.2.1 The USA

In the USA an approach known as supported employment was developed during the early 1980's.³⁵⁶ *Supported employment* has been found to be largely successful in the USA³⁵⁷ and it has been found that individuals in supported employment were more involved in competitive employment when compared to those individuals whom received the mere training in basic skills.³⁵⁸ It has further been found that individuals in supported employment received a higher paying income and worked more hours in a month in comparison to those individuals whom received the mere basic training in skills.³⁵⁹ *Supported employment* ensures that people with disabilities are afforded adequate employment opportunities.³⁶⁰ The result is that where people with disabilities meet the requirements of the job, they are able to access these jobs and receive fair compensation.³⁶¹

³⁵⁶ Kamp M & Lynch C 'Handbook Supported Employment' available at <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1337&context=gladnetcollect> (Accessed on 30 July 2019).

³⁵⁷ The European Union of Supported Employment was established in 1992, and member countries of this Union that have successfully implemented *supported employment*, is being supported by national policies and legislation. Incentives are made available to employers who participate in employing people with disabilities, whilst failure to comply may result in negative consequences, such as, for example, employers facing legal action or sanctions being imposed upon the company.

³⁵⁸ Coetzee Z, Hajwani Z & Landman S et al 'Supported employment: Recommendations for successful implementation in South Africa' (2011) 41 *South African Journal of Occupational Therapy* 85.

³⁵⁹ Coetzee Z, Hajwani Z & Landman S et al 'Supported employment: Recommendations for successful implementation in South Africa' (2011) 41 *South African Journal of Occupational Therapy* 85.

³⁶⁰ Coetzee Z, Hajwani Z & Landman S et al 'Supported employment: Recommendations for successful implementation in South Africa' (2011) 41 *South African Journal of Occupational Therapy* 85.

³⁶¹ Coetzee Z, Hajwani Z & Landman S et al 'Supported employment: Recommendations for successful implementation in South Africa' (2011) 41 *South African Journal of Occupational Therapy* 85.

The Americans with Disabilities Act, enacted in 1990, has played an important role in attempts to eliminate discrimination against all people with disabilities and to bring people with disabilities within the social and economic mainstream.³⁶² The ADA has brought about improvements with regard to public accommodations and transportations as people with disabilities are now able to make use of public transport through busses that are equipped with lifts and ramps which enables people with disabilities to get to work as well as gain access to other social settings.³⁶³ Before the implementation of the ADA, employers were able to deny employment purely based on disability,³⁶⁴ the implementation of the ADA promised equal opportunities for people with disabilities as well as the prohibition of discrimination on the basis of disability.³⁶⁵



³⁶² Cooper JO 'Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act' (1991) 139 *The University of Pennsylvania Law Review* 1430.

³⁶³ Frieden L 'The Impact of the ADA in American Communities' available at [file:///E:/thesis1/chapter%205-%20what%20can%20sa%20do/20150715%20ADA%20Impact%20Narrative%20\(Rév-Final%20v2\).pdf](file:///E:/thesis1/chapter%205-%20what%20can%20sa%20do/20150715%20ADA%20Impact%20Narrative%20(Rév-Final%20v2).pdf) (accessed on 15 October 2019).

³⁶⁴ Frieden L 'The Impact of the ADA in American Communities' available at [file:///E:/thesis1/chapter%205-%20what%20can%20sa%20do/20150715%20ADA%20Impact%20Narrative%20\(Rév-Final%20v2\).pdf](file:///E:/thesis1/chapter%205-%20what%20can%20sa%20do/20150715%20ADA%20Impact%20Narrative%20(Rév-Final%20v2).pdf) (accessed on 15 October 2019).

³⁶⁵ Frieden L 'The Impact of the ADA in American Communities' available at [file:///E:/thesis1/chapter%205-%20what%20can%20sa%20do/20150715%20ADA%20Impact%20Narrative%20\(Rév-Final%20v2\).pdf](file:///E:/thesis1/chapter%205-%20what%20can%20sa%20do/20150715%20ADA%20Impact%20Narrative%20(Rév-Final%20v2).pdf) (accessed on 15 October 2019).

5.2.2 SA

As noted in previous chapters, SA has come a long way in providing protection for people with disabilities. The EEA and the LRA prohibits discrimination against people with disabilities and provide these individuals with access to equal employment opportunities.³⁶⁶ As a result of these legislative works, employers are not only prohibited from unfairly discriminating against individuals on the basis of a disability, but also obligated (in particular designated employers) to employ people with disabilities within the confines of the affirmative action measures of the EEA.³⁶⁷

During 1998 the EEA initially had the employment target percentage for people with disabilities set at 2% of the national work-force.³⁶⁸ In 2002 1% of the national work-force was represented by people with disabilities.³⁶⁹ In 2016 the percentage of people with disabilities representing the national work-force fell to below 1%, with the result that the targeted 2% was not achieved.³⁷⁰ Failure to obtain the 2% target set by the EEA, may be credited to the fact that employers lack the understanding involved when dealing with people with disabilities within the

³⁶⁶ Dube AK 'The role and effectiveness of disability legislation in South Africa' 2005 *Disability Knowledge Research* 14.

³⁶⁷ Dube AK 'The role and effectiveness of disability legislation in South Africa' 2005 *Disability Knowledge Research* 14.

³⁶⁸ Hart T & Bohler-Muller N 'State dithering on disabled rights act' available at <https://www.iol.co.za/pretoria-news/state-dithering-on-disabled-rights-act-14820248> (Accessed on 01 July 2018).

³⁶⁹ Hart T & Bohler-Muller N 'State dithering on disabled rights act' available at <https://www.iol.co.za/pretoria-news/state-dithering-on-disabled-rights-act-14820248> (Accessed on 01 July 2018).

³⁷⁰ Hart T & Bohler-Muller N 'State dithering on disabled rights act' available at <https://www.iol.co.za/pretoria-news/state-dithering-on-disabled-rights-act-14820248> (Accessed on 01 July 2018).

workplace, as well as the failure to recruit people with disabilities.³⁷¹

5.3 Recommendations

Despite legislative developments in SA, people with disabilities in SA continue to be at a disadvantage as they continue to face difficulties in finding employment and enjoying equal rights.³⁷² When SA became a signatory to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), provisions of the UNCRPD were incorporated into national laws such as the EEA and its accompanying Disability Code.³⁷³ That having been said though, unlike the USA, SA does not have a single, comprehensive, piece of disability legislation applicable across the board.³⁷⁴ Instead, people with disabilities in the employment sphere are protected under scattered provisions, most notably provisions contained in the Promotion of Equality and the Prevention of Unfair Discrimination Act (PEPUDA)³⁷⁵ as well as the EEA and LRA.³⁷⁶ Such scattered legislative protection is not ideal and renders it difficult to comprehensively provide for proper protection. Scattered provisions also make it difficult for individuals to precisely understand their rights and obligations.

³⁷¹ Hart T & Bohler-Muller N 'State dithering on disabled rights act' available at <https://www.iol.co.za/pretoria-news/state-dithering-on-disabled-rights-act-14820248> (Accessed on 01 July 2018).

³⁷² Coetzee Z, Hajwani Z & Landman S et al 'Supported employment: Recommendations for successful implementation in South Africa' (2011) 41 *South African Journal of Occupational Therapy* 86.

³⁷³ Huysamen E & Welgemoed B 'Workplace Protection of Employees Suffering from Depression: A South African Perspective' (2019) 40 *Industrial Law Journal* 41.

³⁷⁴ Huysamen E & Welgemoed B 'Workplace Protection of Employees Suffering from Depression: A South African Perspective' (2019) 40 *Industrial Law Journal* 41.

³⁷⁵ PEPUDA is however not applicable to employees – [section 5(3) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000].

³⁷⁶ Hart T & Bohler-Muller N 'State dithering on disabled rights act' available at <https://www.iol.co.za/pretoria-news/state-dithering-on-disabled-rights-act-14820248> (Accessed on 01 July 2018).

It has been over two decades since the EEA has been implemented, yet the position in which people with disabilities find themselves have not been adequately addressed. They continue to face hardships as the EEA continues to have a rather limited impact on the lives of people with disabilities.³⁷⁷ It, therefore, seems as if the mere enactment of legislation is not sufficient in itself to achieve equity.³⁷⁸ There is, therefore, a need for further focussed programmes, such as supported employment, which would assist in the access to, and continued contribution of people with disabilities within, the workplace.³⁷⁹

One recommendation is that SA should adopt an approach, such as *supported employment* in the USA, which further promotes the inclusion of people with disabilities in the economy as it would lessen the economic burden on the government through financial support.³⁸⁰ Adopting such an approach would also provide people with disabilities the chance to be contributing and active members of society.³⁸¹ Such an approach would also positively influence the health

³⁷⁷ Hart T & Bohler-Muller N 'State dithering on disabled rights act' available at <https://www.iol.co.za/pretoria-news/state-dithering-on-disabled-rights-act-14820248> (Accessed on 01 July 2018).

³⁷⁸ Coetzee Z, Hajwani Z & Landman S et al 'Supported employment: Recommendations for successful implementation in South Africa' (2011) 41 *South African Journal of Occupational Therapy* 86.

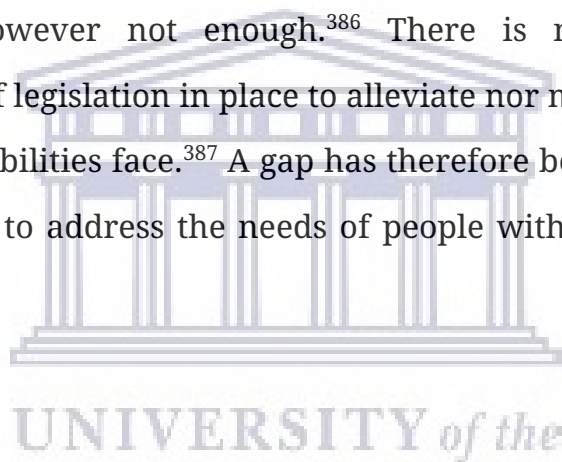
³⁷⁹ Coetzee Z, Hajwani Z & Landman S et al 'Supported employment: Recommendations for successful implementation in South Africa' (2011) 41 *South African Journal of Occupational Therapy* 86.

³⁸⁰ Coetzee Z, Hajwani Z & Landman S et al 'Supported employment: Recommendations for successful implementation in South Africa' (2011) 41 *South African Journal of Occupational Therapy* 86.

³⁸¹ Kamp M & Lynch C 'Handbook Supported Employment' available at <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1337&context=gladnetcollect> (Accessed on 30 July 2019).

and well-being of people with disabilities.³⁸²

As mentioned above SA does not have a specific legislation which pertains to people with disabilities, their rights are to be found in legislation like the EEA as well as PEPUDA.³⁸³ As a result of this, the needs of people with disabilities are being ‘addressed as incidentals of other national departments’.³⁸⁴ In the USA, which has specific disability legislation, it portrays that the government is committed in its protection of people with disabilities’ rights.³⁸⁵ SA has undoubtedly made some advancements in its quest to protect the rights of people with disabilities, these advancements are however not enough.³⁸⁶ There is no framework nor a comprehensive piece of legislation in place to alleviate nor monitor the hardships which people with disabilities face.³⁸⁷ A gap has therefore been created by the lack of legislation expected to address the needs of people with disabilities and as a



³⁸² Coetzee Z, Hajwani Z & Landman S et al ‘Supported employment: Recommendations for successful implementation in South Africa’ (2011) 41 *South African Journal of Occupational Therapy* 86.

³⁸³ Hart T & Bohler-Muller N ‘State dithering on disabled rights act’ available at <https://www.iol.co.za/pretoria-news/state-dithering-on-disabled-rights-act-14820248> (Accessed on 01 July 2018).

³⁸⁴ Sibanda R ‘The State of Disability Rights- Is South Africa Doing Enough?’ available at <http://www.cfc.org.za/index.php/docs-articles?download=445:the-state-of-disability-rights-is-south-africa-doing-enough&start=90> (Accessed on 15 August 2019).

³⁸⁵ Sibanda R ‘The State of Disability Rights- Is South Africa Doing Enough?’ available at <http://www.cfc.org.za/index.php/docs-articles?download=445:the-state-of-disability-rights-is-south-africa-doing-enough&start=90> (Accessed on 15 August 2019).

³⁸⁶ Sibanda R ‘The State of Disability Rights- Is South Africa Doing Enough?’ available at <http://www.cfc.org.za/index.php/docs-articles?download=445:the-state-of-disability-rights-is-south-africa-doing-enough&start=90> (Accessed on 15 August 2019).

³⁸⁷ Sibanda R ‘The State of Disability Rights- Is South Africa Doing Enough?’ available at <http://www.cfc.org.za/index.php/docs-articles?download=445:the-state-of-disability-rights-is-south-africa-doing-enough&start=90> (Accessed on 15 August 2019).

result, there has been a vast number of documents³⁸⁸ that have been developed.³⁸⁹ These documents or charters voices the needs as well as the demands that people with disabilities have with respect to equal rights, as well as mechanisms in order to address their hardships.³⁹⁰ There are even charters developed which especially focusses on specific disabilities, these charters could be used by legislature in order to develop and implement a disability specific legislation.³⁹¹ An all-inclusive disability-specific legislation would therefore address all the needs and hardships facing people with disabilities.

Awareness campaigns should also be intensified by Government, together with other public entities, in order to educate individuals on the reality of living with a disability and the abilities of such individuals.³⁹² This is vital for educating the public with regard to negative attitudes and misconceptions which are often associated with people with disabilities.³⁹³ Such campaigns should highlight that these negative attitudes and misconceptions serve as a serious obstacle to people with disabilities with regard to accessing training and work-related

³⁸⁸ Documents such as the Disability Rights Charter of South Africa.

³⁸⁹ Sibanda R 'The State of Disability Rights- Is South Africa Doing Enough?' available at <http://www.cfc.org.za/index.php/docs-articles?download=445:the-state-of-disability-rights-is-south-africa-doing-enough&start=90> (Accessed on 15 August 2019).

³⁹⁰ Sibanda R 'The State of Disability Rights- Is South Africa Doing Enough?' available at <http://www.cfc.org.za/index.php/docs-articles?download=445:the-state-of-disability-rights-is-south-africa-doing-enough&start=90> (Accessed on 15 August 2019).

³⁹¹ Sibanda R 'The State of Disability Rights- Is South Africa Doing Enough?' available at <http://www.cfc.org.za/index.php/docs-articles?download=445:the-state-of-disability-rights-is-south-africa-doing-enough&start=90> (Accessed on 15 August 2019).

³⁹² International Labour Office Geneva 'Promoting Equality and Addressing Discrimination' available at https://www.ilo.org/wcmsp5/groups/public/--ed_emp/-emp_policy/documents/publication/wcms_210461.pdf (accessed on 15 August 2019).

³⁹³ International Labour Office Geneva 'Promoting Equality and Addressing Discrimination' available at https://www.ilo.org/wcmsp5/groups/public/--ed_emp/-emp_policy/documents/publication/wcms_210461.pdf (accessed on 15 August 2019).

opportunities, as well as limiting the access to constitutional rights for these individuals.³⁹⁴

Another approach that the USA has adopted is stress management for people with disabilities.³⁹⁵ It has been found that disability management programs which have implemented stress management interventions improved the mental and physical health of people with disabilities, while also reducing costs incurred by employers and facilitates the reintegration of individuals that have been injured back into the workplace.³⁹⁶ Stress management programs provide assistance to employers as it can be used to decrease and control the costs with regard to disability in the workplace.³⁹⁷ Stress management programs provide the most effective behavioural interventions which allow employees, employers as well as health care professionals to work jointly in order to achieve optimal health and also cost-effectiveness.³⁹⁸ It has been found that people with disabilities are less likely to abstain from coming to work as they require less time off where such interventions have been implemented early in the course of disability.³⁹⁹ These programs assist people with disabilities as it increases individuals' coping proficiencies and lessen their vulnerability to distress, as well as boosting their

³⁹⁴ International Labour Office Geneva 'Promoting Equality and Addressing Discrimination' available at https://www.ilo.org/wcmsp5/groups/public/--ed_emp/-emp_policy/documents/publication/wcms_210461.pdf (accessed on 15 August 2019).

³⁹⁵ Jones DL, Tanigawa T & Weiss SM 'Stress Management and Workplace Disability in the US, Europe and Japan' (2003) 45 *Journal of Occupational Health* 1.

³⁹⁶ Jones DL, Tanigawa T & Weiss SM 'Stress Management and Workplace Disability in the US, Europe and Japan' (2003) 45 *Journal of Occupational Health* 1.

³⁹⁷ Jones DL, Tanigawa T & Weiss SM 'Stress Management and Workplace Disability in the US, Europe and Japan' (2003) 45 *Journal of Occupational Health* 1.

³⁹⁸ Jones DL, Tanigawa T & Weiss SM 'Stress Management and Workplace Disability in the US, Europe and Japan' (2003) 45 *Journal of Occupational Health* 1.

³⁹⁹ Jones DL, Tanigawa T & Weiss SM 'Stress Management and Workplace Disability in the US, Europe and Japan' (2003) 45 *Journal of Occupational Health* 1.

self-confidence.⁴⁰⁰ Implementation of such approaches could also be beneficial in SA. Such approaches could contribute to people with disabilities feeling more accepted and may also boost self-confidence and help develop coping proficiencies.

5.4 Conclusion

While SA has undoubtedly made progress in the protection and advancement of people with disabilities in the workplace, not enough has been done as yet to redress the transgressions of the past. People with disabilities are still subjected to prejudicial treatment within the workplace and not afforded equal rights with regard to job opportunities.⁴⁰¹ South Africa's legislative works have the ability to support the development of services that would facilitate equal access for people with disabilities within the workplace.⁴⁰²

SA can learn much from the approaches that have been adopted by the USA, as many of these approaches have been proven to be successful, such as, stress management and supported employment.⁴⁰³ As mentioned adopting such approaches would assist people with disabilities in SA to better cope with their disabilities within the workplace as well as positively influence the health and

⁴⁰⁰ Jones DL, Tanigawa T & Weiss SM 'Stress Management and Workplace Disability in the US, Europe and Japan' (2003) 45 *Journal of Occupational Health* 1.

⁴⁰¹ Hart T & Bohler-Muller N 'State dithering on disabled rights act' available at <https://www.iol.co.za/pretoria-news/state-dithering-on-disabled-rights-act-14820248> (Accessed on 01 July 2018).

⁴⁰² Engelbrecht M & Coetzee Z et al 'Supported Employment for People with Mental Disabilities in South Africa: Cost Calculation of Service Utilisation' (2017) 47 *South African Journal of Occupational Therapy* 12.

⁴⁰³ Coetzee Z, Hajwani Z & Landman S et al 'Supported employment: Recommendations for successful implementation in South Africa' (2011) 41 *South African Journal of Occupational Therapy* 86.

well-being of people with disabilities.⁴⁰⁴ When taking the above into consideration it is evident that the constitutional rights of people with disabilities not to be discriminated against on the basis of their disability is still not adequately protected.⁴⁰⁵ Government should do more in order to address the transgressions of the past through continuously striving to remove the historic barriers which people with disabilities have been faced with. This can be done by adopting approaches such as those adopted by the USA, increasing awareness with regard to disability and changing the misconceptions associated with living with a disability as well as the implementation of a single all-inclusive piece of disability legislation.



The word count is as follows: 24 373 words

⁴⁰⁴ Coetzee Z, Hajwani Z & Landman S et al 'Supported employment: Recommendations for successful implementation in South Africa' (2011) 41 *South African Journal of Occupational Therapy* 86.

⁴⁰⁵ Dube AK 'The role and effectiveness of disability legislation in South Africa' 2005 *Disability Knowledge Research* 14.



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