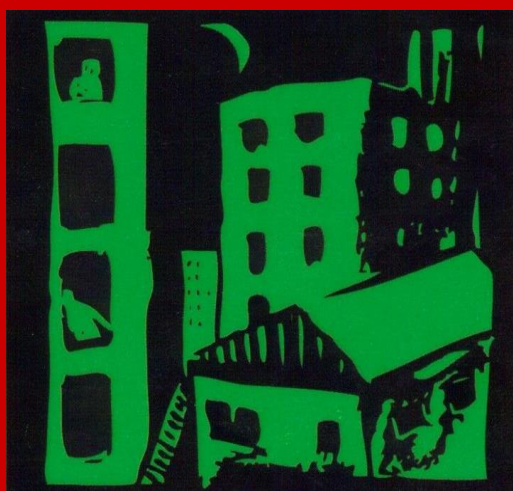
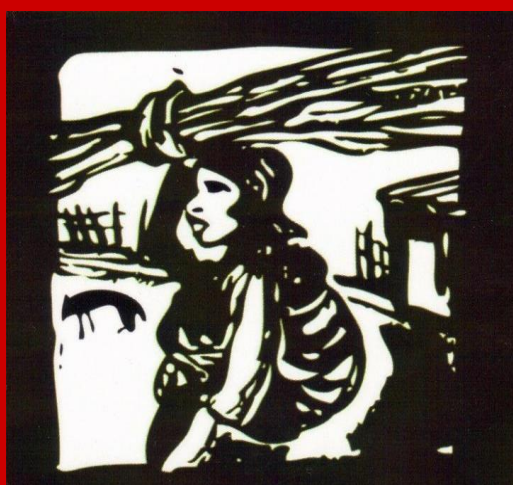


# LAW DEMOCRACY & DEVELOPMENT



VOLUME 25 (2021)

DOI: <http://dx.doi.org/10.17159/2077-4907/2021/idd.v25.2>

ISSN: 2077-4907  
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## THE DOUBLE PUNCH OF WORKPLACE BULLYING/HARASS MENT LEADING TO DEPRESSION: LEGAL AND OTHER MEASURES TO HELP SOUTH AFRICAN EMPLOYERS WARD OFF A FATAL BLOW

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### ABSTRACT

*Sadly, in addition to being cutting-edge, the modern-day workplace is also increasingly cut-throat, having become a breeding ground for interpersonal violence, including bullying and (sexual) harassment. In South Africa, the country's notorious problem with violence in broader society is perhaps partly to blame. Yet, when workplace bullying/harassment intersects with employee depression, this could be a*

*double punch with which very few workplaces are able to cope. The issue of workplace violence undoubtedly requires attention: from the 1944 Declaration of Philadelphia to the 2019 International Labour Organisation Recommendation 206 and Convention 190 call for a world of work free from violence and harassment. South Africa's National Development Plan, too, confirms every person's right to a working life that is conducive to productivity and embraces freedom, equality, human dignity and security. Nevertheless, South African employers and lawmakers remain sluggish in their response. This article adds momentum to the process (i) by defining workplace violence, and bullying and (sexual) harassment as forms thereof; (ii) by discussing the double punch of bullying/harassment and depression; and (iii) by establishing whether the South African legal framework sufficiently provides for bullied and harassed employees, particularly also those who consequently/already suffer from depression. Bullying is not recognised as a cause of action under South African law, and the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace 2005, while commendable, has no legal force. Furthermore, although depression may be seen as a disability in certain circumstances requiring reasonable accommodation from the employer, not all instances qualify. Recommendations are made to overcome these and other lacunae in the legal framework. However, since it will take more than laws and codes to ward off the double punch of workplace bullying/harassment and depression, additional measures are proposed, at both the levels of society and employers.*

**Keywords:** Depression; bullying; workplace violence; dignity; employees; harassment.

*"Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope, and ... those ripples build a current which can sweep down the mightiest walls of oppression and resistance."*<sup>1</sup>

## 1 INTRODUCTION

Human history has been marked by interpersonal violence from the very start. Yet, while interpersonal violence has grown into a global problem affecting the whole of society,<sup>2</sup> including the employment sphere, its prevalence in the workplace has until very recently<sup>3</sup> not received the attention it deserves from employers, employees and society at large. Bullying, as a form of interpersonal violence, has until recently not even formed the subject matter of claims in South Africa. Worldwide, however, the phenomenon of bullying has been investigated and laws have been passed to regulate

<sup>1</sup> Robert F Kennedy, adapted from *Prevent Workplace Violence "Remarkable Quotes"*, available at <https://pwviolence.wordpress.com/%20quotations/remarkable-quotations/> (accessed 17 June 2020).

<sup>2</sup> See Escribano RB, Beneit J & Garcia JL "Violence in the workplace: some critical issues looking at the health sector" (2019) 5(3) *Heliyon*, available at [DOI: 10.1016/j.heliyon.2019.e01283](https://doi.org/10.1016/j.heliyon.2019.e01283) at 2.

<sup>3</sup> With the adoption of Recommendation 206 and Convention 190 at the ILO's 108<sup>th</sup> general session, Geneva, 21 June 2019.

bullying as a separate cause of action.<sup>4</sup> In South Africa, for the most part, work on bullying was limited and fragmented<sup>5</sup>, but increased after the publication of the International Labour Organisation (ILO) 2019 report on violence and harassment at work.<sup>6</sup> The ILO Convention 109/2019, which South Africa still needs to sign, called upon States not only to ratify the Convention on violence and harassment at work, but to address these serious issues in the modern day workplace.<sup>7</sup> Knowing that depression is the illness of our century, two drivers thereof, namely, bullying and harassment, are investigated as key contributors to depression, whilst at the same acknowledging that depression could be a reason to be bullied.<sup>8</sup>

This article specifically aims to indicate the link between harassment, which includes bullying, sexual harassment and depression, and inextricably links these concepts in the modern-day workplace. Where harassment, bullying and depression had mainly been dealt with in silos, this article aims to show the intricate and delicate balance between bullying, harassment and depression as ills in the workplace. There is an intersectionality between these three concepts, that need to be taken cognisance of by employers, employees and policymakers alike. This article is also aimed at generating awareness around the ill effects of bullying and harassment, as forms of interpersonal violence and contributors to depression, whilst employees in turn could be bullied due to being depressed. It is aimed at academic scholars, practitioners and policymakers in the 21<sup>st</sup> century and addresses not only legal aspects, but focuses on socio-legal issues of this triangle as it presents itself in the workplace.

There is ample substantiation for the need to take workplace violence in all its forms seriously. In 1944 already, the Declaration of Philadelphia,<sup>9</sup> which restated the traditional objectives of the ILO, included as one of its key principles :

“All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.”<sup>10</sup>

To achieve this, the Declaration called for “effective international and national action”.<sup>11</sup>

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<sup>4</sup> For more information on bullying, see generally Smit DM *Workplace bullying: towards a uniform approach in South Africa* (LLD thesis, University of the Free State, 2014).

<sup>5</sup> Smit D (ed) & Viviers D *Vulnerable employees* Claremont : Juta (2017).

<sup>6</sup> This included bullying and harassment as a reason for the suffering of depression. This is more detailed in the ILO *Report V(2B) 2019: Ending violence and harassment in the world of work* available at [https://www.ilo.org/ilc/ILCSessions/108/reports/reports-to-the-conference/WCMS\\_673728/lang-en/index.htm](https://www.ilo.org/ilc/ILCSessions/108/reports/reports-to-the-conference/WCMS_673728/lang-en/index.htm) (accessed 11 March 2021).

<sup>7</sup> See ILO *Report V (2B)* (2019).

<sup>8</sup> Kaltiala-Heina R & Frojd S “Correlations between bullying and depression in adolescent patients” (2011) 2 *Adolescent Health, Medicine and Therapeutics* 37 at 37.

<sup>9</sup> See the *Declaration concerning the Aims and Purposes of the International Labour Organisation*, adopted at the ILO’s 26<sup>th</sup> session, Philadelphia, 10 May 1944 available at [https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-islamabad/documents/policy/wcms\\_142941.pdf](https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-islamabad/documents/policy/wcms_142941.pdf) (accessed 19 June 2020).

<sup>10</sup> See ILO (1944) at II, a.

<sup>11</sup> See ILO (1944) at IV.

More recently, the United Nations 2030 Agenda for Sustainable Development emphasised decent work by including it as a separate, dedicated Goal,<sup>12</sup> calling for full and productive employment and decent work for all women and men (Goal 8). It stands to reason that decent work presupposes a workplace free of interpersonal violence. In addition, the call for decent work cuts across a number of other Sustainable Development Goals, including ensuring healthy lives and promoting wellbeing for all (Goal 3), achieving gender equality (Goal 5)<sup>13</sup> and reducing inequality (Goal 10). Moreover, in a 2018 report, the ILO for the first time acknowledged bullying and harassment as forming part of the phenomenon of violence at work, also extending the term “violence” to include both the physical and psychological.<sup>14</sup> In the light of ILO Convention 190 of 2019, this article specifically sets out to link depression as either being a result of, or a contributing factor to, harassment or sexual harassment in the workplace. The 2018 report no doubt paved the way for the ILO’s adoption of Recommendation 206<sup>15</sup> and Convention 190<sup>16</sup> in June 2019, recognising everyone’s right to a world of work free of violence and harassment, including gender based violence and harassment.<sup>17</sup>

On home soil, being a founding member of the ILO, South Africa is expected to adhere to the principles set out in Recommendation 206 and Convention 190. In addition, South Africa’s National Development Plan (NDP)<sup>18</sup> confirms that everyone has the right to a working life that is conducive to productivity and embraces principles of liberty, equality, dignity and security.<sup>19</sup> The imperative to address the issue of workplace violence has therefore been established. As a next step in the process, this article intends to sensitise, educate and galvanise employers, employees, legislators and policymakers into action. It does so, first, by defining violence at work and discussing

<sup>12</sup> See ILO *Decent work and the sustainable development goals: a guidebook on SGD labour market indicators* Geneva: ILO (2018) at 2–3.

<sup>13</sup> See ILO (1944). Goal 5 ties in with the ending of violence against men and women in the world of work, as both depend on ending discrimination, promoting equality and extending economic security. See ILO *Ending violence and harassment against women and men in the world of work* Report V(1) Geneva: ILO (2018) available at [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_553577.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_553577.pdf) (accessed 17 June 2020) at 1–2.

<sup>14</sup> See ILO (2018) at 26.

<sup>15</sup> See international labour conference *r206 - eliminating violence and harassment in the world of work: ilo convention no 190, recommendation no 206, and the accompanying resolution* (2019) available at [https://www.ilo.org/ilc/ilcsessions/108/committees/violence-harassment/wcms\\_711575/lang--en/index.htm](https://www.ilo.org/ilc/ilcsessions/108/committees/violence-harassment/wcms_711575/lang--en/index.htm) (accessed 17 June 2020). it is important to note that since this article refers to the interaction between harassment and depression and will the full content of the latest ilo convention and recommendation not be discussed in detail in this article.

<sup>16</sup> ILO (2019).

<sup>17</sup> See generally ILO (2019).

<sup>18</sup> National Planning Commission *National Development Plan 2030 Our future – make it work Executive summary* (2012) available at <https://www.gov.za/sites/default/files/Executive%20Summary-NDP%202030%20-%20Our%20future%20-%20make%20it%20work.pdf> (accessed 17 June 2020).

<sup>19</sup> See National Planning Commission (2012) at 17. See also Harnois G, Gabriel P & World Health Organization *Mental Health and Work: impact, issues and good practices* Geneva: World Health Organization (2000).

bullying and (sexual) harassment as forms thereof. Secondly, the interface between bullying, harassment and depression is highlighted as a potential double punch to employees, employers and the country at large. Thirdly, the article questions whether South African laws sufficiently accommodate employees who fall victim to bullying or harassment at work, including those who develop depression as a result, or whose depression initially sparked the victimisation. While predominantly a South Africa centred evaluative and investigative study, reference will be made to foreign jurisdictions where appropriate.

## 2 VIOLENCE IN THE WORKPLACE, AND ITS UNDERLYING SOCIETAL ROOTS

Despite their core right to physical and psychological integrity,<sup>20</sup> millions of workers worldwide suffer the scars of workplace violence.<sup>21</sup> In the United States alone, for instance, more than two million employees are said to be victims of workplace violence, ranging from verbal abuse to bullying and more serious physical assaults.<sup>22</sup> This affects not only the employees themselves, but has a ripple effect on co-workers, employers, families, and society as a whole.<sup>23</sup>

As yet, there is no universally accepted definition of violence at work.<sup>24</sup> Globally, however, it is understood to encompass not only physical, but also psychological violence (including threats of violence)<sup>25</sup> and can originate outside or inside the workplace.<sup>26</sup> To some degree, South Africa has shown leadership in this regard, having had a working definition<sup>27</sup> of workplace violence since 2003. The definition was formulated in conjunction with the ILO as well as with inputs from the Commission for Conciliation, Mediation and Arbitration (CCMA), trade unions, trade union federations, the health sector and other interested parties. It reads:

“Incidents where employee(s) are physically or emotionally abused, harassed, threatened or assaulted (overt, covert, direct, indirect) in circumstances related to

<sup>20</sup> See Baker J “Editorial” in *Labour Education VI* (2003) available at [https://www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---actrav/documents/publication/wcms\\_111456.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/publication/wcms_111456.pdf) (accessed 17 June 2020).

<sup>21</sup> See Baker (2003) at V.

<sup>22</sup> See Wesley *Workplace violence: Three measures to stay safe* (2015) available at <https://www.expresspros.co.za/workplace-violence-three-measures-to-stay-safe/> (accessed 17 June 2020).

<sup>23</sup> See Baker (2003) at VI.

<sup>24</sup> Despite growing consensus that intentionality, hurt, intergroup and inter-category dynamics, the normality of the perpetrators and the underlying ideology are key criteria. See Escribano, Beneit & Garcia (2019) at 3.

<sup>25</sup> See ILO (2018) at 210.

<sup>26</sup> See generally Baker (2003).

<sup>27</sup> The definition was compiled for consideration by government, labour and business at an appropriate forum, although no further trace of its adoption could be found. See Steinmann S *Workplace violence in the health sector Country case study: South Africa* (2003) available at <https://www.hrhresourcecenter.org/node/1132.html> (accessed 17 June 2020) at 4.



their work, including commuting to and from work, involving an explicit challenge to their safety, well-being or health.”<sup>28</sup>

This working definition ties in well with the definition adopted in 2003 by an ILO tripartite meeting of experts, and subsequently broadened by the 2016 ILO Meeting of Experts on Violence against Women and Men in the World of Work.<sup>29</sup> That definition includes in its understanding of workplace violence “a continuum of unacceptable behaviours and practices that are likely to result in physical, psychological or sexual harm or suffering”.<sup>30</sup>

Multiple scholars have also attempted definitions of their own. In their 2019 research, Escribano and colleagues, for instance, suggest that violence at work refers to “intentional verbal and physical actions (verbal abuse, physical assaults, harassment, bullying, intimidation, threatening, discrimination, etc.)”, all within a specific organisational culture.<sup>31</sup> Workplace violence, the authors continue, is a form of aggression intended to cause physical or psychological harm, which, in turn, challenges the safety, wellbeing and health of professionals and affects entire organisations.<sup>32</sup>

Most studies on workplace violence – whether conducted in the fields of political science, sociology, psychology, ethology and criminology – identify the harm caused to victims and those around them as the single most important feature of this phenomenon.<sup>33</sup> This harm extends well beyond the physical to include cognitive effects (disbelief and a threat to personal integrity), emotional effects (anger and sadness), social effects (insecurity, impaired relationships with colleagues, and damage to social identity), and, of course, psychological effects (such as, anxiety, irritability and, at its worst, post-traumatic stress disorder (PTSD)).<sup>34</sup> It is equally devastating for the employer: the ILO has acknowledged that workplace violence affects workplace relations, worker engagement, productivity and enterprise reputation, and is not compatible with the furthering of sustainable enterprises.<sup>35</sup>

At this point, a brief reference to the greater problem of violence in South African society would not be inappropriate. This would serve a dual purpose. First, it would show that, given the extent of the violence problem in society, it is not far-fetched to think that violence in the workplace has its roots in violence in our communities and

<sup>28</sup> See Steinmann (2003) at 4.

<sup>29</sup> See ILO (2018) at 5 & 6.

<sup>30</sup> See ILO (2018) at 6.

<sup>31</sup> See Escribano, Beneit & Garcia (2019) at 4.

<sup>32</sup> See Escribano, Beneit & Garcia (2019) at 3.

<sup>33</sup> See Escribano, Beneit & Garcia (2019) at 4, with reference to other authors.

<sup>34</sup> See Escribano, Beneit & Garcia (2019) at 8.

<sup>35</sup> In the preamble to the ILO C190 - Violence and Harassment Convention, 2019 (No. 190) (2019) available at [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C190](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190) (accessed 18 June 2020). C190/2019 has since been effected, but South Africa is yet to ratify this Convention at the time of finalising this article. Although a Draft Code on harassment and violence at work, inclusive of bullying, has been drafted, it is yet to be tabled before Parliament and finalised.

homes. Secondly, it would demonstrate that many a worker in South Africa comes to work already victimised and is more likely to suffer far-reaching consequences if exposed to violence in the workplace as well.<sup>36</sup>

South Africa has the dubious reputation of having one of the highest violent crime rates in the world, hence the amount of detail provided to educate the reader of the severity thereof.<sup>37</sup> I am of the opinion that a full understanding of the severity of the violence problem in South Africa is warranted as this is a prime reason why violence, harassment and bullying need to be addressed in South Africa, in line with ILO Convention 109/2019. In 2018, a total of 499 911 sexual offence cases and 29 945 rape cases were reported,<sup>38</sup> the latter representing an increase of 0,9% on the previous year,<sup>39</sup> which caused the media to dub the country the rape capital of the world.<sup>40</sup> The reporting period October 2020 - December 2020 painted an even worse picture during lockdown, in that rape was up by 1,5% and sexual assault by 4,5%.<sup>41</sup> The Criminal Sexual Offences and Related Matters Amendment Act<sup>42</sup> defines more than 70 sexual offence subcategories relating to, for instance, rape, sexual assault, trafficking of persons for sexual purposes, abduction, and other indecent, immoral or sexual offences.<sup>43</sup> To ease reporting, the South African Police Service has created five special daily summary of serious crime (DSSC) codes for rape, sexual assault, contact sexual offences, attempted sexual offences, and sexual offences detected as a result of police action.<sup>44</sup>

The country also has one of the world's highest murder rates, with 20 308 murders reported in 2018 – 6,9% more than the previous year.<sup>45</sup> A steep increase in truck and

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<sup>36</sup> See Leoschut L "The influence of family and community violence exposure on the victimization rates of South African youth." (2008) 6(3) *Journal of Ethnicity in Criminal Justice* at 203. See also Eagle G "Crime, fear and continuous traumatic stress in South Africa: what place social cohesion?" (2015) *Psychology in Society* 49 at 91.

<sup>37</sup> See Møller V "Resilient or resigned? Criminal victimisation and quality of life in South Africa" (2005) 72(3) *Social Indicators Research* 263 at 264.

<sup>38</sup> Crime Stats SA "Crime stats simplified" (2020) available at <https://www.crimestatssa.com/#!/statistics/> (accessed 17 June 2020).

<sup>39</sup> See South African Police Service *Annual Crime Report 2017/2018* (2018) , available at [https://www.saps.gov.za/services/annual\\_crime\\_report2019.pdf](https://www.saps.gov.za/services/annual_crime_report2019.pdf) at 11 (accessed 17 June 2020).

<sup>40</sup> See News24 *The rape capital of the world* 2014-08-21 available at <https://www.news24.com/MyNews24/The-Rape-Capital-of-the-World-20140821> (accessed 17 June 2020).

<sup>41</sup> See Masweneng K "Crime stats: murder and rape increased in past three months" available at <https://www.timeslive.co.za/news/south-africa/2021-02-19-crime-stats-murder-and-rape-increased-in-past-three-months/> (accessed 3 March 2021). I do not want to elaborate on the figures in detail during the time of COVID, as a major disrupter occurred which merely exacerbated the already high violence figures.

<sup>42</sup> The Criminal Sexual Offences and Related Matters Amendment Act 32 of 2007 (CSORMA).

<sup>43</sup> SAPS (2018) at 74.

<sup>44</sup> SAPS (2018) at 74.

<sup>45</sup> SAPS (2018) at 11.

car hijackings is noted, while drug related offences and domestic violence rates are high.<sup>46</sup> When this greater violence problem in society spills over into the workplace, employers have a duty to act not only to manage actual incidents, but also to eliminate any organisational and psychosocial factors (organisational climate, supervisory style and interpersonal relationships) that may contribute to their occurrence.<sup>47</sup> In fact, the ILO's acknowledgement that violence at work could give rise to human rights violations, threatens equal opportunity and infringes on the right to decent work<sup>48</sup> should spur employers, employees, legislators and policymakers to act to ensure that dignity at work prevails.

The following parts unpack bullying and (sexual) harassment as two specific forms of workplace violence and explore the extent to which South African law accommodates employees who fall victim to office bullies or harassers.

### 3 BULLYING AS A FORM OF WORKPLACE VIOLENCE

#### 3.1 ITS PREVALENCE, SALIENT FEATURES AND EFFECTS

Bullying is said to be the most widely reported form of "adverse social behavior"<sup>49</sup> worldwide. In the United States, 2017 statistics suggested that 60,3 million workers were affected by workplace bullying.<sup>50</sup> In South Africa, too, bullying was already found to be part of the greater violence problem as far back as 2003,<sup>51</sup> serving as a source of conflict in the workplace, although often originating from the external environment.<sup>52</sup>

In 2002, the European Agency for Safety and Health at Work described bullying as "repeated, unreasonable behaviour directed towards an employee, or group of employees, that creates a risk to health and safety".<sup>53</sup> For lack of a single accepted definition of bullying, however, the phenomenon is probably best described with reference to examples of bullying behaviour. Workplace bullying may be perpetrated physically, similar to the typical school ground bully, but often also occurs at a psychological level. It may be direct or indirect,<sup>54</sup> occur once-off or repeatedly over

<sup>46</sup> Crime Stats SA (2020).

<sup>47</sup> See Escribano, Beneit & Garcia (2019) at 4.

<sup>48</sup> In the preamble to the Violence and Harassment Convention 190 (ILO (2019)).

<sup>49</sup> See ILO (2018) at 25.

<sup>50</sup> See WBI 2017 WBI U.S. survey: *National prevalence, 60.3 million workers affected by workplace bullying* (2017) available at <https://www.workplacebullying.org/2017-prevalence/> (accessed 17 June 2020). Of those, 19% suffered abusive conduct at work, 19% witnessed such conduct, and 63% were aware that workplace bullying occurred.

<sup>51</sup> See Steinmann (2003) at 3.

<sup>52</sup> See SABPP *Bullying in the workplace* Fact Sheet 2018/2 (2018) available at [https://cdn.ymaws.com/www.sabpp.co.za/resource/resmgr/website\\_files\\_1/publications/fact\\_sheets/fact\\_sheet\\_2018/fact-sheet\\_march-2018\\_with-a.pdf](https://cdn.ymaws.com/www.sabpp.co.za/resource/resmgr/website_files_1/publications/fact_sheets/fact_sheet_2018/fact-sheet_march-2018_with-a.pdf) (accessed 17 June 2020) at 2.

<sup>53</sup> See Renaut A "Moral harassment: work organization to blame" (2003) in *Violence at Work* Geneva: ILO 1 at 1.

<sup>54</sup> Cunniff L & Mostert K "Prevalence of workplace bullying of South African employees" (2012) 10(1) *SA Journal of Human Resource Management* at 3.



time, or be vertical or horizontal, although the former (ie managers bullying subordinates) is most prevalent.<sup>55</sup> It may take the form of:

- belittling remarks;
- withholding important information or manipulating info received, setting the person up for failure;
- taking key responsibilities away from an employee to effectively demote him/her;
- deliberately assigning the victim to do “donkey work” or menial tasks;
- spreading gossip about the individual; or
- setting unreasonable targets or unreasonable deadlines.<sup>56</sup>

In the digital age, workplace bullying also occurs in cyberspace through social media and other platforms.

Substantiating the earlier argument<sup>57</sup> regarding workplace violence (including bullying) having its roots in the broader violence problem in society, the effects of workplace bullying are indeed said to mirror the effects of exposure to more physical forms of violence elsewhere.<sup>58</sup> This statement is supported through findings by the ILO, expressed in their 2018 report on the ending of violence and harassment against women and men in the world of work.<sup>59</sup> The stress symptoms noticed in bullying victims are similar to those seen in those exposed to traumatic events.<sup>60</sup> Even the root cause of bullying behaviour seems to correspond with the rationale behind violent crimes, namely, the perpetrator’s desire to demonstrate power and control over the victim.<sup>61</sup>

The devastating effects of bullying on the victim and, by implication, their loved ones could last up to two years later<sup>62</sup> and include:

- psychosomatic illness, specifically also musculoskeletal disorders;<sup>63</sup>
- burnout, depression;<sup>64</sup>

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<sup>55</sup> Some 71% of workplace bullies outrank their victims. Cunliff & Mostert (2012) at 4. Up to 75 per cent of direct bullying reported is perpetrated by someone in a superior hierarchical position. Tepper BJ “Abusive supervision in work organizations: review, synthesis, and research agenda” (2007) 33(3) *Journal of Management* 261 at 267.

<sup>56</sup> See Smit & Viviers (2017) at 17.

<sup>57</sup> See part 2 above.

<sup>58</sup> See Escribano, Beneit & Garcia (2019) at 1, 3 & 4.

<sup>59</sup> ILO Report V(1) *Ending violence and harassment against women and men in the world of work* (2018) available at [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_553577.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_553577.pdf) (accessed 3 March 2021).

<sup>60</sup> See Mikkelsen EG & Einarsen S “Basic assumptions and symptoms of post-traumatic stress among victims of bullying at work” (2002) 11(1) *European Journal of Work and Organizational Psychology* 87 at 88.

<sup>61</sup> See Heilman B & Barker G *Masculine norms and violence: making the connections* Washington DC ; Promundo (2018) at 48.

<sup>62</sup> Sansone R & Sansone L “Workplace bullying: a tale of adverse consequences” (2015) 12(1-2) *Innov Clin Neurosci* 32 at 32.

<sup>63</sup> See Vie TL, Glaso L & Einarsen S “How does it feel? Workplace bullying, emotions and musculoskeletal complaints” (2012) 53(2) *Scand J Psychol* 165 at 171.

- a lack of concentration;
- a lack of motivation;
- high levels of anxiety;<sup>65</sup>
- nervous breakdowns; and
- even suicide attempts.<sup>66</sup>

A full investigation into the ill effects of bullying will not be undertaken in this article, since the focus is on depression and the intersectionality thereof with bullying and harassment.<sup>67</sup> As will be discussed later, bullying in the workplace is also strongly linked to depression,<sup>68</sup> with some employees developing depression as a result of bullying, and others being easy targets for bullies due to suffering from depression.

Employers, too, are feeling the effect of workplace bullying in the form of higher absenteeism, lost workdays<sup>69</sup> and diminished productivity. In 2007, organisations in the United Kingdom reportedly lost 33,5 million workdays due to absenteeism brought on by bullying. Bullying had seen nearly 200 000 United Kingdom employees leave their employment by 2007, and more than 100 million days' productivity lost at a cost of £13,75 billion per year.<sup>70</sup> Similarly, bullying costs Australian employers and the economy \$6 billion to \$36 billion per year, says the 2018 Australian Productivity Commission report.<sup>71</sup> In the United States, 41% of bullied women and 36% of bullied

<sup>64</sup> Kivimäki M, Virtanen M, Vartia M, Elovainio M, Vahtera J & Keltikangas-Järvinen L "Workplace bullying and the risk of cardiovascular disease and depression" (2003) 60(10) *Occup Environ Med* 779 at 782.

<sup>65</sup> See Vie, Glaso & Einarsen (2012) at 171.

<sup>66</sup> See Vega G & Comer DR "Sticks and stones may break your bones, but words can break your spirit: bullying in the workplace" (2005) 58(1) *Journal of Business Ethics* 101 at 106. See also Yildiz S "A 'new' problem in the workplace: psychological abuse (bullying)" (2007) 9 (34) *Journal of Academic Studies* 113 at 115; Branch S, Ramsay S & Barker M "Workplace bullying, mobbing and general harassment: a review" (2013) 15(3) *International Journal of Management Reviews* 280 at 280-299; Einarsen S, Hoel H, Zapf D & Cooper C *Bullying and harassment in the workplace: developments in theory, research, and practice* 2 ed Hoboken : CRC Press (2010) at 25.

<sup>67</sup> For more information on the different ill effects of bullying, see Sansone & Sansone (2015) 12(1-2) at 32-37; Lahelma E *et al* "Workplace bullying and common mental disorders: a follow-up study" (2012) 66(6) *Epidemiol Community Health* available at <https://pubmed.ncbi.nlm.nih.gov/21252256/> (accessed 12 March 2021).

<sup>68</sup> See Einarsen *et al* (2010) at 25.

<sup>69</sup> See Branch, Ramsay & Barker (2013) at 4.

<sup>70</sup> See ILO (2018) at 28. United Kingdom 2020 statistics show that the UK lost 35,2 million workdays for the period 2019/20, due to stress, depression, anxiety and musculo-skeletal disorders, which equates to 21.6 days per working person taken off for stress, depression or anxiety per year, as per Working days lost in Great Britain, available at <https://www.hse.gov.uk/statistics/dayslost.htm> (accessed 3 March 2021).

<sup>71</sup> See the Australian Government Productivity Commission *Performance Benchmarking of Australian Business Regulation: Occupational Health and Safety* (2018) available at <https://www.pc.gov.au/inquiries/completed/regulation-benchmarking-ohs/report> (accessed 17 June 2020) at 279.

men leave their jobs.<sup>72</sup> Claims for post-traumatic stress disorder also cost employers thousands of dollars each year.<sup>73</sup>

Figures for South Africa are hard to come by and are mostly sector specific.<sup>74</sup> Yet, in one of the very few studies in this regard conducted in South Africa, 31,1% of the survey sample confirmed having suffered at the hands of bullies, while 50,6% were unaware of any policies to manage violence in their workplace.<sup>75</sup>

### 3.2 WORKPLACE BULLYING AND THE LAW

Various foreign jurisdictions cater for bullying victims, albeit on different continuums, from harassment to occupational health and safety. The United Kingdom treats bullying as a form of harassment in terms of their Protection from Harassment Act,<sup>76</sup> although with limited success.<sup>77</sup> The United States, too, approaches bullying as a form of harassment if it is perpetrated based on one of the protected, immutable characteristics, including race, sex, national origin, religion, disability or age.<sup>78</sup> Australia, in turn, addresses bullying on the occupational health and safety continuum.<sup>79</sup> Countries, such as, Sweden<sup>80</sup> and France<sup>81</sup>, passed specific legislation to curb bullying, with France being the only jurisdiction where bullying is criminalised.

The South African legal framework, however, does not acknowledge bullying as a cause of action. The Constitution of the Republic of South Africa<sup>82</sup> (Constitution) guarantees, among others, all persons' right to dignity<sup>83</sup> and fair labour practices<sup>84</sup> in

<sup>72</sup> See Mikkelsen & Einarsen (2002) at 88.

<sup>73</sup> Namie G & Namie RF *The bully-free workplace: stop jerks, weasels, and snakes from killing your organization* Hoboken NJ : John Wiley & Sons (2011) at 31.

<sup>74</sup> The health and academic sectors. See Cunliff & Mostert (2012) at 2.

<sup>75</sup> See Cunliff & Mostert (2012) at 9.

<sup>76</sup> Protection from Harassment Act 1997 c 40.

<sup>77</sup> See Parliament of United Kingdom *The Protection from Harassment Act 1997* (2017) available at <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06648> (accessed 17 June 2020).

<sup>78</sup> Harthill S "Workplace bullying as an occupational safety and health matter: a comparative analysis" (2011) 34 *Hastings International and Comparative Law Review* 253 at 293.

<sup>79</sup> See Safe Work Australia *Bullying* (2019) available at <https://www.safeworkaustralia.gov.au/bullying> (accessed 17 June 2020).

<sup>80</sup> Ordinance of the Swedish National Board of Occupational Safety and Health containing provisions on measures against victimisation at work, Ordinance AFS 1993: 17, and the Swedish Work Environment Act SFS 2008. See Strandmark *Workplace bullying and harassment in Sweden: Mobilizing against bullying* available at [https://www.jil.go.jp/english/reports/documents/jilpt-reports/no.12\\_sweden.pdf](https://www.jil.go.jp/english/reports/documents/jilpt-reports/no.12_sweden.pdf) (accessed 17 June 2020).

<sup>81</sup> Social Modernization Act, 17 January 2002. See Lloyd *French law prohibiting bullying in the workplace* (2013) available at <https://www.thehrdirector.com/business-news/diversity-and-equality-inclusion/french-law-prohibiting-bullying-in-the-workplace/>. (accessed 17 June 2020).

<sup>82</sup> The Constitution of the Republic of South Africa. 1996 .

<sup>83</sup> Section 9 of the Constitution.

<sup>84</sup> Section 23 of the Constitution.

terms of section 36(1). Moreover, section 6(1) of the Employment Equity Act (EEA)<sup>85</sup> prohibits unfair discrimination based on listed, unlisted, as well as arbitrary grounds. However, bullying is not mentioned by name anywhere, and even the courts are hesitant to acknowledge it as a cause of action.<sup>86</sup>

In response to the applicant's attempt to action bullying as an arbitrary ground under the EEA, the Labour Court in *Naidoo v Parliament of the Republic of SA*<sup>87</sup> opted for a narrow interpretation of the law. This required the applicant to establish on a balance of probabilities that the alleged bullying had been perpetrated based on characteristics and attributes that had the potential to impair her fundamental human dignity or affect her rights in a comparably serious manner to a listed ground. It remains to be seen whether any bullying victim would be able to successfully discharge this heavy burden of proof, particularly since the reason for the bullying is in many instances unknown to the victim.

In *Mkize and Dube Transport (Mkize (2019))*<sup>88</sup> the Commissioner treated bullying as a form of harassment, a view with which the legislator seems to agree. Developments in South African case law indicate that bullying is to be treated as a form of harassment by the judiciary.<sup>89</sup> In no case to date has bullying at work been found to be a *causa* in itself.

South Africa's Protection from Harassment Act<sup>90</sup> also offers a potential vehicle to action bullying claims, following the United Kingdom's example. However, it was primarily enacted as an anti-stalking act directed at domestic violence, implying police involvement. Since one would not necessarily want the police involved in the workplace, nor want staffers to have protection orders against managers,<sup>91</sup> this would simply not be a workable solution in practice.

A more likely option for bullying victims to seek relief would be South Africa's occupational health and safety laws, which has not been utilised nor tested, or the development of the common law. Occupational health and safety is not only a common law duty, but employers have a duty, either through themselves or through their

<sup>85</sup> Employment Equity Act 55 of 1998.

<sup>86</sup> See *Mkhize and Dube Transport (2019)* 40 ILJ 929 (CCMA) 292, where the CCMA Commissioner found that the real reason for the claim was victimisation and not bullying, after the employee had been dismissed on grounds of incapacity.

<sup>87</sup> See *Naidoo v Parliament of the Republic of SA* 2019 (3) BLLR 291 (LC) 864.

<sup>88</sup> (2019) 40 ILJ 929 (CCMA), where the CCMA assumed the role of developing the legislator's intention so as to include bullying at work as a form of harassment, protected under current legislation. It is interesting to note that the newly drafted document on Violence and Harassment at work, if accepted, favours this approach as such document has been drafted as a Code to the EEA.

<sup>89</sup> See *Mkhize (2019)*. Also see *Simmadari v Absa Bank Ltd* (2018) 39 ILJ 1819 (LC) where the Labour Court found that referrals based on unfair discrimination and unfair dismissal are not mutually exclusive as the discrimination could lead to an automatically unfair dismissal as a result of the harassment.

<sup>90</sup> Protection from Harassment Act 17 of 2011.

<sup>91</sup> The Act provides for a protection order to be granted against the perpetrator, and if the order is breached, it is punishable by a fine and/or imprisonment.

employees, to take reasonable care of their employees.<sup>92</sup> It has now become clear that not only the physical needs to be protected, but that this duty extends to the psychological as well.<sup>93</sup> There is a plethora of legislation available to regulate the safety of employees and deal with compensation, where an injury or accident occurred; what is important, is the fact that despite the overall objective of these pieces of legislation to protect employees regarding safety, individually they serve different purposes.<sup>94</sup>

Section 5(1) of the Occupational Health and Safety Act (OHSA)<sup>95</sup> provides that "(t)o the extent that it is reasonably practicable, every employer must provide and maintain a working environment that is safe and without risk to the health of employees". Bullying *per se* has not formed the subject matter of any claim in terms of health and safety legislation, but I can see no reason why bullying victims should be precluded from instituting claims on grounds of the OHSA. Seeing that the Constitution<sup>96</sup> guarantees every person a safe and healthy workplace,<sup>97</sup> and the OHSA is the embodiment of these rights, surely a victim of bullying would theoretically have the right to call upon the provisions of the OHSA? This proposition has not been tested in South Africa. Merely as a matter of interest, the state of Victoria in Australia passed a new workplace manslaughter law, whereby an employer could be prosecuted if there is criminal negligence or an illness is developed through persistent workplace bullying and harassment that causes a person to commit suicide.<sup>98</sup> Any provision to this effect would be helpful in South Africa, but bullying, as a cause *per se*, has not been found by any court of law in South Africa.

The common law duty of employers relating to health and safety forms part of our law, but is not created by legislation and stems from the Roman-Dutch Law.<sup>99</sup> To claim damages at common law, the injured or ill employee would need to prove negligence on the part of the employer, thus proving that the employer did not meet the "reasonable man" test, to ensure a successful claim in delict, thus a claim for damages from the

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<sup>92</sup> Le Roux "When is a workplace safe or unsafe: the safety criterion in terms of the Occupational Health and Safety Act and the Mine Health and Safety Act" (2011) 8 *J S Afr Inst Min Metall* 529.

<sup>93</sup> See *Media 24 Ltd & another v Grobler* [2005] 3 ALL SA 297 (SCA) at para 68, where it was stated that the legal convictions of the community require an employer to guard against sexual harassment in the workplace and allow for compensation of the victim for harm caused. Although this case deals with sexual harassment, there is no reason why the same principles could not be extended to cover bullying cases. See also para 77 where the possibility of the use of COIDA was left open as possible redress for the ill effects suffered by the victim. See also *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ 169 (LC) and *Odayar v Compensation Commissioner* 2006 (2) SA 202 (N).

<sup>94</sup> See Tshoose IC "Employer's duty to provide a safe working environment: a South African perspective" (2011) 6(3) *Journal of International Commercial Law and Technology* 165 at 165.

<sup>95</sup> Occupational Health and Safety Act 85 of 1993.

<sup>96</sup> See Tshoose (2011) at 166.

<sup>97</sup> Section 24 of the Constitution states: "Every person has the right to an environment which is not harmful to their health and well-being".

<sup>98</sup> See Windholz EL "Victoria's new workplace manslaughter laws: it's all in the messaging" (2020) 25(8) *Employment Law Bulletin* 87 at 87.

<sup>99</sup> See Tshoose (2011).



employer.<sup>100</sup> COIDA<sup>101</sup> altered the common law position in that the employee no longer has to prove negligence on the part of the employer to claim damages, albeit now stated as only a fixed amount to be claimed. It is common cause that a “state of zero risk does not exist”,<sup>102</sup> hence the obligation in OHS Act that an employer’s duty is to maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health and safety of their employee.<sup>103</sup> In most civil law jurisdictions the common law duty of care is being refined and given meaning through judgments of the courts and by the passing of legislation,<sup>104</sup> but we are yet to have bullying recognised as a cause for claims in terms of the common law.

Seeing that the legislature seems to prefer bullying as a form of harassment, which could lead to depression, this work will not be complete unless reference is made to harassment as a form of workplace violence, in line with ILO Report V2(B)(2019).<sup>105</sup>

## 4 (SEXUAL) HARASSMENT AS A FORM OF WORKPLACE VIOLENCE

### 4.1 ITS PREVALENCE, SALIENT FEATURES AND EFFECTS

Despite some decisive legal intervention in South Africa,<sup>106</sup> sexual harassment remains prevalent in the workplace,<sup>107</sup> serving as a barrier to equality and equity. There is, however, no compulsory separate record keeping for workplace harassment in South Africa. Generally, sexual harassment is said to affect more females than males.<sup>108</sup> Female victims also tend to be hesitant to report it immediately,<sup>109</sup> often believing the rhetoric of “toxic masculinity”, which asserts that they have somehow brought the sexual harassment on themselves due to their “inability to self-regulate”.<sup>110</sup> In the United

<sup>100</sup> See Tshoose (2011) at 167. For more information on the common law duty of providing health and safety to employees, read Tshoose (2011).

<sup>101</sup> Compensation for Occupational Injury and Diseases Act 130 of 1993.

<sup>102</sup> See Tshoose (2011) at 169.

<sup>103</sup> See *PSA obo Members v Minister of Health & others* 2018 SALCJHB 34. For more on Health and Safety and the ILO, see Ally BO *Fundamental Principles of Occupational Health and Safety* available at [https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms\\_093550.pdf](https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_093550.pdf) (accessed 8 March 2021). See also Tshoose (2011).

<sup>104</sup> See Tshoose (2011) at 174.

<sup>105</sup> See ILO Report V2(B) (2019).

<sup>106</sup> See ILO Report V2(B) (2019) at para 3.2.

<sup>107</sup> See Khumalo L, Gwandure C & Mayekiso T “Examining perceptions of sexual harassment among recent female graduates in the workplace” (2015) 44(4) *Africa Insight* 106 at 106-123.

<sup>108</sup> Le Roux R, Orleyn T, Rycroft AJ & Singlee S *Harassment in the workplace: law, policies and processes* Durban : LexisNexis (2010) at 178 & 140. Note that the liability of an employer in terms of s 60 of the EEA does not affect the liability of the employer under the common law, because the latter aims to address harm caused by unlawful conduct, and the first-mentioned deals with unfair discrimination.

<sup>109</sup> See Nemavhidi M “Understanding the beast of sexual harassment in the workplace” (2018) 12 *Pretoria Student Law Review* 146 at 149.

<sup>110</sup> See Warton G *Toxic masculinity and violence in South Africa* (2020) available at <https://www.saferspaces.org.za/understand/entry/toxic-masculinity-and-violence-in-south-africa> (accessed 17 June 2020).

States, for instance, one in three women is believed to face harassment in the workplace, yet 70 per cent of women say they have never reported it.<sup>111</sup>

Sexual harassment has been defined as “persistent, unwanted sexual advances, verbal abuse, and/or demands for sexual favo[u]rs”, often as a condition of continued employment, which “creates an environment that is hostile or intimidating”.<sup>112</sup> While general harassment can be described as an ongoing “drip-by-drip action that builds up”,<sup>113</sup> sexual harassment can comprise a single act.<sup>114</sup>

In terms of causes, many instances of sexual harassment involve a power differential, with older men in authoritative positions being the perpetrators.<sup>115</sup> The social-cultural theory of sexual harassment implies that sexual harassment is often used by males to demonstrate their perceived superiority over females.<sup>116</sup> Where males sexually harass fellow males, it could be seen as a demonstration of the perpetrator’s manhood and power by undermining the masculinity of his victim.<sup>117</sup>

As with bullying, the effects of sexual harassment on the victim range from physical (loss of sleep and appetite, weight fluctuations, nausea and headaches) to emotional and psychological (stress, anxiety, decreased confidence and self-esteem) harm.<sup>118</sup> Like bullying, sexual harassment, too, can lead to mental health issues, including symptoms of depression.<sup>119</sup>

Effects also include professional and financial distress. Victims tend to withdraw from the workplace, disengage from colleagues, be tardy and distracted, and neglect duties. Reporting harassment may cause them to be passed over for promotions, being

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<sup>111</sup> See 360 Training *Effects of sexual harassment in the workplace* (2018) available at <https://www.360training.com/blog/effects-of-workplace-sexual-harassment/> (accessed 17 June 2020).

<sup>112</sup> See 360 Training (2018).

<sup>113</sup> See Renault (2003) at 1.

<sup>114</sup> In terms of s 5.3.3 of the *Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace*, GN 1357 GG 27865 of 4 August 2005.

<sup>115</sup> See *SA Broadcasting Corporation Ltd v Grogan NO 2006* (27) ILJ 1519 (LC) 1532A; *Gaga v Anglo Platinum Ltd* 2012 (3) BLLR 285 (LAC).

<sup>116</sup> See Khumalo, Gwandure & Mayekiso (2015) at 106.

<sup>117</sup> See Khumalo, Gwandure & Mayekiso (2015) at 107. For more information on the power differential, see UN Women *Handbook addressing Violence and Harassment against women at work* (2019) available at <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2019/addressing-violence-and-harassment-against-women-in-the-world-of-work-en.pdf?la=en&vs=4050> (accessed on 17 June 2020) at 6.

<sup>118</sup> See 360 Training (2018).

<sup>119</sup> Friberg MK *et al* "Workplace sexual harassment and depressive symptoms: a cross-sectional multilevel analysis comparing harassment from clients or customers to harassment from other employees amongst 7603 Danish employees from 1041 organizations" (2017) 17(1) *BMC Public Health* 1 at 1.

left out of key meetings, retaliation, and being labelled a troublemaker. Lost wages and unpaid leave are among the financial consequences that victims may suffer.<sup>120</sup>

For the organisation, sexual harassment could lead to low morale, animosity, decreased company productivity, higher absenteeism, and increased sick pay and administrative expenses.<sup>121</sup> Moreover, high employee turnover due to harassment at work often sees employers not only losing some of their best workers, but also having to foot the bill to recruit and train new staff.<sup>122</sup>

## 4.2 WORKPLACE (SEXUAL) HARASSMENT AND THE LAW

Internationally, movements, such as, #MeToo and #NotInMyName, have turned the spotlight on the problem of sexual harassment. These have not only sensitised members of the public to the issue, but also called for a sensitised and specially trained justice system to properly deal with such cases.<sup>123</sup>

In terms of United Kingdom law, for instance, sexual harassment is seen as a form of unlawful discrimination under that jurisdiction's Equality Act,<sup>124</sup> with sex being a listed protected characteristic. The focus is on the effect of sexual harassment, such as, the violation of dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment.<sup>125</sup> While harassment is not distinctly defined, it involves conduct, including verbal remarks, on at least two occasions, that either alarms the person or causes the person distress, and which the perpetrator<sup>126</sup> must know or ought to know amounts to harassment.<sup>127</sup>

In South Africa, too, it is trite law that harassment, including sexual harassment, is regarded as a form of unfair discrimination<sup>128</sup> and is prohibited. This is in line with ILO Convention 111,<sup>129</sup> which South Africa ratified. In terms of sexual harassment in the workplace, the constitutionally guaranteed rights to equality (section 9), dignity

<sup>120</sup> See 360 Training (2018).

<sup>121</sup> See 360 Training (2018); ILO (2018) at 28.

<sup>122</sup> See ILO (2018) at 28.

<sup>123</sup> Badenhurst H "Sexual harassment—the most heinous misconduct that plagues the workplace" (2019) 19(1) *Without Prejudice* 24.

<sup>124</sup> Equality Act of 2010 c 15.

<sup>125</sup> Sexual harassment could include sexual comments or jokes; physical behaviour, including unwelcome sexual advances and touching; various forms of sexual assault; displaying pictures, photos or drawings of a sexual nature; and sending e-mails with a sexual content. Citizens Advice *Sexual harassment* (2020) available at <https://www.citizensadvice.org.uk/law-and-courts/discrimination/what-are-the-different-types-of-discrimination/sexual-harassment/> (accessed 17 June 2020).

<sup>126</sup> See *Jones v Ruth* [2012] 1 WLR 1495 (2011) at 3-4.

<sup>127</sup> This Act allows both civil and criminal remedies to be pursued, with special provisions in the event of stalking.

<sup>128</sup> In terms of ss 5 and 6(3) of the EEA, as amended by the Employment Equity Amendment Act 47 of 2013.

<sup>129</sup> Discrimination (Employment and Occupation) Convention, which South Africa ratified in 1997. Le Roux R, Orleyn T & Rycroft A *Sexual harassment in the workplace: law, policies and processes* Durban: LexisNexis Butterworths (2005) at 27.

(section 10) and fair labour practices (section 23) are given effect to by, inter alia, the EEA,<sup>130</sup> the Protection from Harassment Act (PHA),<sup>131</sup> the Labour Relations Act (LRA)<sup>132</sup> and the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace<sup>133</sup> ( 2005 Code).<sup>134</sup>

The 2005 Code serves as a guide to employers, although its application also extends much further.<sup>135</sup> In an effort to eliminate sexual harassment from the workplace, it urges employers to issue policies on workplace harassment (although this is not regulatory),<sup>136</sup> not to trivialise reports of sexual harassment, to ensure an environment free of sexual harassment and of fear of reprisal should an incident be reported, and to respect employees' dignity.<sup>137</sup>

Commendable features of the 2005 Code include that it unequivocally refers to sexual harassment,<sup>138</sup> cites examples and factors to help employers and employees establish whether sexual harassment has occurred, and defines unwelcome conduct.<sup>139</sup> Item 6 of the Code allows different types of sexual harassment to be identified, item 8.3 permits both a formal and an informal route to be taken to deal with sexual harassment, while item 8.4 offers guidance on how best to assist complainants.

However, as the Code is not prescriptive, but a mere guideline, and there is no real sanction for employers that do not implement policies on sexual harassment,<sup>140</sup> many employers, particularly smaller ones, do nothing to implement the Code's recommendations. In this regard, elaboration in layman's terms on section 60 of the EEA<sup>141</sup> and the employer's potential vicarious liability in terms thereof could have been

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<sup>130</sup> EEA as amended.

<sup>131</sup> Act 17 of 2011.

<sup>132</sup> Act 66 of 1995.

<sup>133</sup> GN 1367 of 1998. Also see Du Plessis JV, Fouche MA & Van Wyk MW *A practical guide to labour law* 5 ed Durban: LexisNexis Butterworths (2002) Appendix 2.

<sup>134</sup> One could also add to this list the *Code of Good Practice: Dismissals Schedule 8* ("Code") and Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). The latter finds limited application in the workplace, but does have a clear definition of harassment, and specifically mentions sex, gender and sexual orientation. For more in this regard, see Le Roux R, Orleyn T, Rycroft A (2005) at 20.

<sup>135</sup> In terms of item 2(1), the Code applies to owners, employers, managers, supervisors, employees, job applicants, clients, suppliers, contractors, and others having dealings with a business.

<sup>136</sup> Code items 5, 6 and 7.

<sup>137</sup> Code guiding principles in item 5.

<sup>138</sup> Code item 4.5, which reads: "Sexual harassment is unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace ...".

<sup>139</sup> Code item 5.2.

<sup>140</sup> Item 7 states that employers "should" adopt a sexual harassment policy, as opposed to "must" or "have to".

<sup>141</sup> Which compels employers to immediately take steps to investigate allegations of (sexual) harassment, and states that employers could be held liable if (sexual) harassment has been brought to their attention, but they failed to act, and if an employee contravenes a provision of the EEA whilst at work.

beneficial. The PHA<sup>142</sup>, in turn, provides for the granting of protection orders against alleged harassers. The Act contains a broad definition of harassment,<sup>143</sup> which encompasses both direct and indirect conduct that causes harm, including mental, psychological and economic harm, and then goes on to define sexual harassment specifically.<sup>144</sup> The acknowledgement by the Act that the harm inflicted by harassment could include psychological harm is welcomed.

However, the solution offered by the Act – having a magistrate issue a protection order against the alleged harasser – seems impractical in an employment setting. No workplace would be able to operate optimally where one staffer has a protection order against a co-worker or even a superior. In addition, should such order be breached, this would imply police involvement, which could disrupt the workplace and work activities. The relief offered by the PHA, therefore, is more theoretical than practical as it pertains to sexual harassment in the workplace.

The Labour Relations Act (LRA)<sup>145</sup> finds application where unfair dismissal is being claimed, including due to having been sexually harassed.<sup>146</sup> It is common knowledge that many victims of harassment at work eventually feel themselves forced to resign, claiming that the workplace has become untenable,<sup>147</sup> which makes the relief offered by the LRA essential. Yet the Act is not specifically aimed at preventing sexual harassment in the workplace, but to remedy a situation that has already arisen.

Finally, claims for sexual harassment, purely based in delict,<sup>148</sup> are seldom used as the common law claim for sexual harassment is most likely to be found in employers' duty to provide a safe and healthy working environment, which could see employees terminate their contracts following sexual harassment as well as claim for breach of

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<sup>142</sup> See PHA.

<sup>143</sup> See s1 of the PHA.

<sup>144</sup> It states : “sexual harassment’ means any- ( a) unwelcome sexual attention from a person who knows or ought reasonably to know that such attention is unwelcome: (b) unwelcome explicit or implicit behaviour, suggestions, messages or remarks of a sexual nature that have the effect of offending, intimidating or humiliating the complainant or a related person in circumstances, which a reasonable person having regard to all the circumstances would have anticipated that the complainant or related person would be offended, humiliated or intimidated; (c) implied or expressed promise of reward for complying with a sexually oriented request; or (d) implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually oriented request; ...”.

<sup>145</sup> See LRA, as amended, ss 188 & 186(e).

<sup>146</sup> See *Grobler v Naspers* (2004) 25 ILJ 439 (IC) and the subsequent appeal, *Media 24 v Naspers* (2005) 26 ILJ 1007 (SCA), which are the seminal cases on employer responsibilities in cases of employee sexual harassment.

<sup>147</sup> See Calitz K "Sexual harassment: why do victims so often resign? E v Ikwezi Municipality (2016) 37 ILJ 1799 (ECG)" (2019) 22(1) *PER: Potchefstroomse Elektroniese Regsblad*. For more information on “workplace”, see UN Women (2019) at 7.

<sup>148</sup> See Le Roux, Orleyn & Rycroft (2005) at 12.



contract.<sup>149</sup> After all, the common law duty to keep workplaces safe extends to not being assaulted or abused at work.<sup>150</sup>

In summary, therefore, while the same could not be said for the approach to workplace bullying, the legislator clearly did attempt to prohibit and deal with sexual harassment in employment. Such legal intervention is key, as it helps retain workers in the workplace and in the country's workforce.<sup>151</sup> Despite these legislative efforts, however, a 2003 study in South Africa<sup>152</sup> found that awareness of sexual harassment in the workplace was very low.<sup>153</sup> In fact, a number of male study participants argued that there was no such thing as sexual harassment, just "male nature".<sup>154</sup> It would therefore seem that the European Foundation for the Improvement of Living and Working Conditions was correct in insisting that no single law, policy or other instrument would succeed in managing the complex phenomenon of harassment, "only a holistic model, incorporating individual, situational, organizational and societal or socio-economic factors" would do.<sup>155</sup>

## **5 DEPRESSION IN THE WORKPLACE**

### **5.1 THE DOUBLE PUNCH: WHEN BULLYING/HARASSMENT INTERFACES WITH DEPRESSION**

Running like a silver thread through the above discussion of the effects of both workplace bullying and (sexual) harassment on victims is the psychological harm this could inflict. Indeed, in both instances, a clear link has been found with depression.<sup>156</sup> In 2018, the ILO found that workers exposed to physical violence, which would include some forms of bullying and sexual harassment, were three times more likely to suffer from not only physical scars, but also emotional and psychological lesions, particularly also depression.<sup>157</sup> In another ILO study in 2003, it was established that 65 per cent of bullying victims displayed symptoms of depression up to five years after having been bullied.<sup>158</sup>

Interestingly, the link between these phenomena works both ways, with depression either a potential antecedent or a consequence of bullying and sexual harassment:

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<sup>149</sup> See Le Roux, Orleyn & Rycroft (2005) at 14.

<sup>150</sup> See Moulton (ed) "On the record. Nicolette Naylor and Sibongile Ndashe discuss local and global developments on sexual harassment and the role of the law in responding" (2018) 65 *SA Crime Quarterly* 60.

<sup>151</sup> See ILO (2018) at 27–28.

<sup>152</sup> See Steinmann (2003).

<sup>153</sup> The study was conducted in the healthcare sector, but did state that the definition of workplace violence and the findings regarding bullying and harassment could be applied to other sectors as well. Steinmann (2003) at 4.

<sup>154</sup> See Steinmann (2003) at 29.

<sup>155</sup> As cited in Renaut (2003) at 1.

<sup>156</sup> See ILO (2018) at 25.

<sup>157</sup> See ILO (2018) at 26.

<sup>158</sup> See Steinmann (2003) at 6.

Workers may be bullied or harassed due to their suffering from depression,<sup>159</sup> or their exposure to bullying or harassment may result in depression.<sup>160</sup> Either way, employers can no longer afford to turn a blind eye. The toxic combination of workplace bullying, harassment and depression lowers employee performance, overall business productivity and the quality of the organisation's services, with possible damage to enterprise image and reputation, and causes labour and workplace relations to deteriorate. At the same time, it increases both the direct and indirect costs of the employer, with an impact on the organisation's financial bottom line. These include medical costs, disability costs and litigation costs; high illness rates and, therefore, excessive sick leave taken; high staff turnover (often of the wrong people) and subsequent retraining costs; as well as increased absenteeism and presenteeism.<sup>161</sup> For affected employees, it causes extreme personal distress, damages family relationships, and may lead to loss of income, alcohol/drug use, disability and, in extreme cases, suicide attempts. Society more broadly may also incur higher costs to cover State-funded healthcare.<sup>162</sup>

There is also a dual irony here worth noting. Being able to work is key in improving the condition of those suffering from depression,<sup>163</sup> as access to employment, retention and advancement in the workplace promote mental health and wellbeing. Working contributes to one's sense of identity, self-esteem, social participation and self-worth.<sup>164</sup> First, though, where employees struggling with depression find themselves in a workplace characterised by bullying and/or harassment, this essentially deprives them of a fair opportunity to draw on work as a means of healing and enhancing economic and social integration.<sup>165</sup> Secondly, there is a common misconception that depressed employees can, in fact, not work,<sup>166</sup> leaving a large portion of this group – estimated by

<sup>159</sup> Possibly as an unlisted or arbitrary ground. See s 6 of the EEA, as amended.

<sup>160</sup> See *Helen Green v DB Group Services (UK) Ltd* [2006] EWHC 1898 (QB) at 36–37, where it was found that the claimant had been bullied, treated with little respect and harassed, which caused her depression, for which the employer was held vicariously liable, despite the fact that she had had a troubled childhood and was already vulnerable when she took up her position at the employer.

<sup>161</sup> Being present at work, although not fully productive. Stander MP, Korb FA, de Necker M, de Beer JC, Miller-Janson HE & Moont R "Depression and the impact on productivity in the workplace: findings from a South African survey on depression in the workplace" (2016) 2(12) *Journal of Depression and Anxiety* 1.

<sup>162</sup> See Baker (2003) at 25; Harnois & Gabriel (2000) at 1. Women need a voice and agency, and gender based harassment and violence serve to maintain existing hierarchies and gendered power relations. For more information on the gendered power relations, see UN Women (2019) at 56-57.

<sup>163</sup> See Baldwin ML & Marcus SC "Stigma, discrimination, and employment outcomes among persons with mental health disabilities" in Schultz IZ & Rogers ES (eds) *Work accommodation and retention in mental health* (2011) New York NY: Springer (2011) 53 at 55; Jackson JM "The Americans with Disabilities Act, mental illness, and medication: a historical perspective and hope for the future" (2010) 12 *Marquette Elder's Advisor* 219 at 223.

<sup>164</sup> See Porter S Lexén A, Johanson S & Bejerholm U "Critical factors for the return-to-work process among people with affective disorders: Voices from two vocational approaches" (2018) 60(2) *Work* 221 at 222.

<sup>165</sup> See Harnois & Gabriel (2000) at 1.

<sup>166</sup> Stefan S *Hollow promises: employment discrimination against people with mental disabilities* Washington DC : American Psychological Association (2002); Krupa T "Employment and serious

some to be as high as 90 per cent – unemployed.<sup>167</sup> Often this merely perpetuates the cycle of discrimination and interpersonal violence such employees may have already faced while employed.

## 5.2 DEPRESSION – ITS PREVALENCE, SALIENT FEATURES AND EFFECTS

Based on the Diagnostic and Statistical Manual of Mental Disorders (DSM V), the primary source for establishing mental health conditions in law, psychology and psychiatry,<sup>168</sup> and, in South Africa at least, the International Classification of Diseases (ICD 11),<sup>169</sup> two key types of depression may be diagnosed. These are major depression (clinical depression) and minor depression (dysthymia).

For major depression to be found, an individual must experience either a depressed mood, loss of interest or irritability, display more than five depressive symptoms, and have no history of minor or mixed depressive episodes.<sup>170</sup> Those with major depression may experience persistent feelings of sadness and hopelessness, and loss of interest in activities previously enjoyed. These symptoms must cause clinically significant distress or impairment in social, occupational or other important areas of functioning, and must not be the result of substance abuse or any other medical condition.<sup>171</sup> A diagnosis of major depression by a medical practitioner could, in turn, lead to disability in the workplace, for which an employer needs to make reasonable accommodation. For minor depression to be found, a person must display at least two, but fewer than five, depressive symptoms during a period of three weeks (provided that one of the symptoms is either a depressed mood or loss of interest) and have no history of major depression.<sup>172</sup>

Contrary to popular belief,<sup>173</sup> mental health conditions, such as depression, are not at all rare. In fact, many employees or workers globally will develop some or other mental health condition in their lifetime.<sup>174</sup> Major depression, in particular, affects 16,1

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mental health disabilities" in Schultz IZ & Rogers ES (eds) *Work accommodation and retention in mental health* New York NY : Springer (2011) 91 at 93.

<sup>167</sup> See Harnois & Gabriel (2000) at 1.

<sup>168</sup> See Viviers & Smit (2017) at 176.

<sup>169</sup> See Viviers & Smit (2017) at 176.

<sup>170</sup> See Fils JM, Penick EC, Nickel EJ, Othmer E, DeSouza C, Gabrielli WF & Hunter EE "Minor versus major depression: a comparative clinical study" (2010) 12(1) *Prim Care Companion J Clin Psychiatry* available at [DOI : 10.4088/PCC.08m00752blu](https://doi.org/10.4088/PCC.08m00752blu) . See also Truschel J *Depression definition and DSM-5 diagnostic criteria* (2019) available at <https://www.psycom.net/depression-definition-dsm-5-diagnostic-criteria/> (accessed on 17 June 2020).

<sup>171</sup> See Truschel (2019).

<sup>172</sup> See Truschel (2019); Fils *et al* (2010).

<sup>173</sup> Blair DA "Employees suffering from bipolar disorder or clinical depression: fighting an uphill battle for protection under Title I of the Americans with Disabilities Act" (1999) 29(4) *Seton Hall Law Review* 1347 at 1351.

<sup>174</sup> See Bowman B, Matzopoulos R & Seedat M "An overview of the economic burden and workforce effects of violence in South Africa" (2007) 5(2) *African Safety Promotion* 32 at 32-33.

million people annually.<sup>175</sup> In 2016, the World Health Organisation identified depression as the leading cause of disability worldwide, affecting 350 million people.<sup>176</sup> The ILO has also confirmed that “mental illness hits more human lives and gives rise to a greater waste of human resources than all other forms of disability”.<sup>177</sup> Although statistics for South Africa are not readily available, one in four employees in the country is said to have been diagnosed with depression, with the age band of 25-44 years being most affected.<sup>178</sup>

A diagnosis of depression comes with significant stigma,<sup>179</sup> often infringes on sufferers’ right to access employment and engage in the world of work<sup>180</sup> and has resulted in this category of workers being regarded as vulnerable.<sup>181</sup> In Sweden, for instance, depression is currently the leading cause of exclusion from the workplace,<sup>182</sup> even though research has shown that employment in fact benefits these employees.<sup>183</sup> Workplace intolerance towards those with depression affects these workers’ self-esteem and serves to marginalise and ostracise them.<sup>184</sup>

This stigmatisation prevents many employees from disclosing their mental health status to their employers,<sup>185</sup> as disclosure of depression has been shown to result in being assigned degrading tasks, experiencing increased pressure from managers, and being branded as “crazy”.<sup>186</sup> Consequently, employees with depression miss the

<sup>175</sup> See Halliwell P “The psychological & emotional effects of discrimination within the LGBTQ, transgender, & non-binary communities” (2019) 41(2) *Thomas Jefferson Law Review* 222 at 223.

<sup>176</sup> Ridge D, Broom A, Kokanović R, Ziebland S & Hill N “Depression at work, authenticity in question: experiencing, concealing and revealing” (2019) 23(3) *Health* 344 at 345. Also see Björkelund C, Svenningsson I, Hange D, Udo C, Petersson EL, Ariai N, Nejati S, Wessman C, Wikberg C, Andre M & Wallin L “Clinical effectiveness of care managers in collaborative care for patients with depression in swedish primary health care: a pragmatic cluster randomized controlled trial” (2018) 19(1) *BMC FAM PRACT* 2.

<sup>177</sup> See Harnois & Gabriel (2000) at 19, with reference to Jansen MA “Emotional disorders and the labour force - prevalence, costs, prevention and rehabilitation” (1986) 125(5) *International Labour Review* 605 at 605.

<sup>178</sup> Stander *et al* (2016) at 1 & 7.

<sup>179</sup> Persons with mental health conditions have been disadvantaged, discriminated against, stigmatised and marginalised throughout history, and modern society is no exception. See Swanepoel M *Law, psychiatry and psychology: a selection of constitutional, medico-legal and liability issues* (LLD thesis, University of South Africa, 2009) at 3.

<sup>180</sup> In terms of Art 23(1) of the Universal Declaration of Human Rights, 1948. Also see Janda AC “Keeping a productive labor market: crafting recognition and rights for mentally ill workers” (2009) 30 *Hamline Journal of Public Law and Policy* 403 at 404.

<sup>181</sup> See Porter *et al* (2018) at 222; Ngweni CG “Disabled people” and the search for equality in the workplace: an appraisal of equality models from a comparative perspective (LLD thesis, University of the Free State, 2010) at 56; *Standard Bank of South Africa v CCMA* 2008 (4) BLLR 356 (LC) 65.

<sup>182</sup> See Porter *et al* (2018) at 221.

<sup>183</sup> Porter *et al* (2018) at 222. Work provides autonomy, reduces depression and increases social status. Also see last paragraph of Part 4.1.

<sup>184</sup> Harnois & Gabriel (2000) at 26.

<sup>185</sup> Ridge *et al* (2019) at 349.

<sup>186</sup> Porter *et al* (2018) at 223–224.

opportunity to secure the necessary support,<sup>187</sup> including reasonable accommodation. Non-disclosure for fear of stigmatisation is no myth. Globally, 71 per cent of employees do not disclose their mental status; and 47 per cent anticipate discrimination due to their mental condition and fear that they would be unable to find or keep a job if their condition was made known.<sup>188</sup>

In terms of effect, the loss of productivity experienced in the workplace tops the list.<sup>189</sup> While those with depression are not incapable of performing work, they tend to operate at 70 per cent of their optimal productivity.<sup>190</sup> On the brink of the Fourth Industrial Revolution, which will require ever sharper cognitive and mental functioning, problem-solving and higher-order thinking,<sup>191</sup> this ends up costing employers. In the United States decreased productivity due to depression cost employers an estimated US\$51,5 billion in 2016, and £92 billion in the United Kingdom.<sup>192</sup> Moreover, the United Kingdom is said to lose 12 million workdays per annum due to stress, anxiety and depression.<sup>193</sup>

In South Africa, 9,8 per cent of the population have been diagnosed with major depressive disorder.<sup>194</sup> South African employees with depression reportedly take 18 days off from work during depressive episodes, and are “out of role” for an average of 27 days per annum.<sup>195</sup> Some 54 per cent of depressed employees believe that their disorder results in decreased productivity.<sup>196</sup> Considering that South Africa already ranks a low 91 out of 140 countries in terms of productivity,<sup>197</sup> the added burden of depression in the workforce might further impede the country’s efforts to attract investors and grow the economy in line with the 2030 National Development Plan Agenda.<sup>198</sup>

Other practical problems posed by depression in the workforce include increased absenteeism and presenteeism. Absenteeism causes increased workplace stress for co-

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<sup>187</sup> Evans-Lacko S & Knapp M "Importance of social and cultural factors for attitudes, disclosure and time off work for depression: findings from a seven country European study on depression in the workplace" (2014) 9(3) *PloS one* 1 at 2.

<sup>188</sup> Evans-Lacko & Knapp (2014) at 2.

<sup>189</sup> Evans-Lacko & Knapp (2014) at 1.

<sup>190</sup> Stander *et al* (2016) at 1.

<sup>191</sup> Therefore, the current workplace demands more flexible people. Ridge *et al* (2017) at 345.

<sup>192</sup> Stander *et al* (2016) at 2.

<sup>193</sup> Ridge *et al* (2017) at 345.

<sup>194</sup> Stander *et al* (2016) at 1.

<sup>195</sup> Stander *et al* (2016) at 2.

<sup>196</sup> See SADAG *New research on depression in the workplace* (2015) available at [http://www.sadag.org/index.php?option=com\\_content&view=article&id=2391:new-research-on-depression-in-the-workplace&catid=11:general&Itemid=101](http://www.sadag.org/index.php?option=com_content&view=article&id=2391:new-research-on-depression-in-the-workplace&catid=11:general&Itemid=101) (accessed 18 June 2020).

<sup>197</sup> See World Economic Forum *The Global Competitiveness Report 2018* (2018) available at [http://www3.weforum.org/docs/WEF\\_TheGlobalCompetitivenessReport2019.pdf](http://www3.weforum.org/docs/WEF_TheGlobalCompetitivenessReport2019.pdf) (accessed 18 June 2020) at 524.

<sup>198</sup> See National Planning Commission (2012).



workers, reduced output and lost income due to the hiring of temporary workers.<sup>199</sup> Presenteeism, in turn, costs employers up to five times more than absenteeism.<sup>200</sup>

### 5.3 DEPRESSION AND THE LAW

On the international front, many instruments have been introduced to govern mental health issues, including at work. These include the United Nations Convention on the Rights of Persons with Disabilities,<sup>201</sup> the ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention,<sup>202</sup> the Code of Practice on Managing Disability in the Workplace,<sup>203</sup> executive summaries on mental health in the workplace,<sup>204</sup> *Mental Health and Work: Impact, issues and good practice*<sup>205</sup>, and the latest ILO Convention 190 of 2019.<sup>206</sup> Yet, while jurisdictions, such as, Australia and the United Kingdom<sup>207</sup>, have implemented policies specifically aimed at protecting employees who suffer from mental illness, such as depression,<sup>208</sup> the South African legislator has not followed suit, even though most of the international instruments above apply to South Africa as well.

Those with mental health conditions in South Africa are not completely unprotected, however. These conditions are provided for by the Constitution,<sup>209</sup> various legislative provisions<sup>210</sup> and the common law.<sup>211</sup> This constitutes a complex area of the

<sup>199</sup> See Stander *et al* (2016) at 1.

<sup>200</sup> Evans-Lacko & Knapp (2014) at 1-2.

<sup>201</sup> See United Nations *Convention on the Rights of Persons with Disabilities*, A/RES/61/106, 24 January 2007 (2007) available at [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_61\\_106.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_61_106.pdf) (accessed 18 June 2020).

<sup>202</sup> See ILO *Vocational Rehabilitation and Employment (Disabled Persons) Convention (No. 159)*, 1983 (1983) available at [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C159](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C159) (accessed 18 June 2020). South Africa has not yet ratified this convention, nor has Canada.

<sup>203</sup> See the ILO *Tripartite Meeting of Experts on the Management of Disability at the Workplace*, TMEMDW/2001/2, Geneva, October 2001 (2001) available at <https://www.ilo.org/public/english/standards/relm/gb/docs/gb282/pdf/tmemdw-2.pdf> (accessed 18 June 2020). The preface of the Code states: "Throughout the world, people with disabilities are participating and contributing in the world of work at all levels. However, many persons with disabilities who want to work do not have the opportunity to work due to many barriers."

<sup>204</sup> Gabriel P & Liimatainen M-R *Mental health in the workplace – an introduction, executive summaries* (2000) Geneva: ILO.

<sup>205</sup> See Harnois & Gabriel (2000).

<sup>206</sup> See ILO (2019).

<sup>207</sup> See Ridge *et al* (2017) at 348.

<sup>208</sup> Ridge *et al* (2017) at 344.

<sup>209</sup> The Constitution, ss 10 (dignity), 9 (equality), 12 (freedom and security of the person), 14 (privacy) and 23 (fair labour practices).

<sup>210</sup> Mainly the Employment Equity Act 55 of 1998, the Labour Relations Act 66 of 1995, the Basic Conditions of Employment Act 75 of 1997, the Occupational Health and Safety Act 85 of 1993, the Compensation for Occupational Injuries and Diseases Act 130 of 1993, the Protection from Harassment Act 17 of 2011 and the Mental Health Care Act 17 of 2002.

South African legal system, as it involves an interplay between fundamental human rights and extends across various areas of employment law, including the law of disability, dismissal, unfair discrimination and reasonable accommodation.

Mental health is not specifically listed as a ground for non-discrimination in South African anti-discrimination legislation. However, section 6(1) of the EEA,<sup>212</sup> as amended, allows mental health to be included as either a non-listed ground or an arbitrary ground. This is because, in accordance with the findings in *President of the Republic of South Africa v Hugo*,<sup>213</sup> any ground of discrimination is to be outlawed if it leads to a prejudicial form of stereotyping that stems from societal attitudes.

In *Jansen v Legal Aid South Africa*,<sup>214</sup> it was found that an employee with depression could be regarded as a person with a disability, which is in accordance with section 5 of the EEA. For this to occur, the mental impairment should be long-term or recurring, and substantially limiting. The appeal in this matter, reported recently,<sup>215</sup> found in favour of Legal Aid South Africa, but the judgement did not negate the legal position regarding depression as a disability; it merely found on the facts presented that the employee had failed to prove that he was treated differently because of his depression.<sup>216</sup> The respondent also failed to prove discrimination based upon a prohibited ground under the EEA, and the appeal court found that there was no proper claim for substantive fairness before it.<sup>217</sup> It did, however, confirm the seriousness of depression and stressed that employers had to deal with depression sympathetically and consider reasonable accommodation before dismissal.<sup>218</sup>

Once established as a disability, being a listed ground of unfair discrimination,<sup>219</sup> a rebuttable presumption is created that discrimination against the claimant based on his/her depression is unfair, and the requirement for reasonable accommodation is triggered.<sup>220</sup> Only if a mental health condition results in incapacity, may the employee be dismissed, although the employer carries the burden of proof to show the link between the mental disorder and incapacity to perform the work.<sup>221</sup>

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<sup>211</sup> Among others, the common law principle of vicarious liability, and the common law right to bodily integrity.

<sup>212</sup> Act 55 of 1998.

<sup>213</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) 80.

<sup>214</sup> *Jansen v Legal Aid South Africa* (2018) 39 ILJ 2024 (LC).

<sup>215</sup> *Legal Aid South Africa v Jansen* 41 ILJ 2580 (LAC) at paras 48-49.

<sup>216</sup> *Legal Aid South Africa v Jansen* 41 ILJ 2580 (LAC) at paras 48-49.

<sup>217</sup> *Legal Aid South Africa v Jansen* 41 ILJ 2580 (LAC) at para 49.

<sup>218</sup> *Legal Aid South Africa v Jansen* 41 ILJ 2580 (LAC) at para 50.

<sup>219</sup> See s 9(3) of the Constitution, s 6(1) of the EEA, and the Revised Draft Code of Good Practice on the Employment of People with Disabilities GN 1345 GG 23702 of 19 August 2002.

<sup>220</sup> Reasonable accommodation includes any modification or adjustment to a job or to the working conditions or environment that would enable a person to have access to or participate or advance in employment, according to s 1 of the EEA.

<sup>221</sup> LRA 66 s 188; Du Plessis & Fouché (2002) at 322-324.

To this effect, the findings in *Media 24 v Naspers* (2005) 26 ILJ 1007 (SCA) cannot be ignored. Although the case dealt with sexual harassment at the workplace, Farlam JA confirmed that an employer has a common law duty to take reasonable care for the safety of their employees, which extended not only to physical harm, but included psychological harm.<sup>222</sup> The Court aptly referred to the *locus classicus* case of *Minister van Polisie v Ewels*<sup>223</sup> to address the test for wrongfulness, and confirmed that not only should the negligence of the employer be addressed, but whether the actions or negligence of the *bonus paterfamilias* extended to a legal duty to act reasonably. It should be mentioned that the SCA in *Media 24 v Naspers*<sup>224</sup> left open the possibility of the victims of sexual harassment, which occurred in the course of their employment, being successful with a claim for compensation under COIDA. It is thus possible that the victims of violence in whichever capacity could lodge a claim for compensation under COIDA<sup>225</sup>, if the necessary requirements have been met and the *causa* was proven.

Probably the most significant shortcoming in current South African legislation, however, is that not all instances of depression lead to a finding of disability and, as such, do not qualify for legal protection. Victims who suffer unfair discrimination and harassment based on their mental health will therefore be unable to rely on disability as a listed prohibited ground and will carry an excessive burden of proof.<sup>226</sup>

Indeed, the South African courts have had to deal with depression as a ground of unfair discrimination in, for instance, *Marsland v New Way Motor and Diesel Engineering (Pty) Ltd* (*Marsland* (2009))<sup>227</sup> and the subsequent appeal,<sup>228</sup> as well as in *Makau v Department of Education Limpopo Province*.<sup>229</sup> From these cases it appears as if the courts require the employer's conduct to have impaired the complainant's human dignity to find unfair discrimination on the ground of depression.<sup>230</sup> It is worth noting that in both these cases, the depression was the result of harassment or psychological assault<sup>231</sup> by the employer.

Finally, it remains to be seen whether South African employers' common law duty<sup>232</sup> to ensure a reasonably safe and healthy working environment, which is now

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<sup>222</sup> At para 66.

<sup>223</sup> 1975 (3) SA 590 (A) at 597A-B.

<sup>224</sup> At para 77.

<sup>225</sup> Section 65 Compensation for Occupational Injuries and Diseases Act 130 of 1993.

<sup>226</sup> Viviers & Smit (2017) at 205.

<sup>227</sup> (2009) 30 ILJ 169 (LC).

<sup>228</sup> *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) ( *New Way Motor* (2009))

<sup>229</sup> 2014 JDR 1458 (LC).

<sup>230</sup> See *New Way Motor* (2009).

<sup>231</sup> See *New Way Motor* (2009) where it was stated that the employee had returned to work after a messy divorce and suffered a regressive attack by the employer, which impaired his dignity and was found to be unfair discrimination.

<sup>232</sup> Du Plessis & Fouche (2020) at 17.

also contained in legislation,<sup>233</sup> extends to ensuring mental health and safety as well. The courts have made an effort to develop the matter further, albeit only as it pertains to compensation. In *Urquhart v Compensation Commissioner*,<sup>234</sup> for example, it was stated that, for purposes of compensation, a psychiatric disorder or psychological trauma was as much a personal injury as a cracked skull, and that there was nothing in the definition of accident and occupational injury in the COIDA to indicate the contrary. This principle was later confirmed in *Odayar v Compensation Commissioner*<sup>235</sup> and *Marsland v New Way Motor and Diesel Engineering (Pty) Ltd*.<sup>236</sup>

Therefore, although the South African legislator has made noteworthy strides to address the rights of, and the granting of protection to, those suffering from depression in the workplace, a substantial amount of work still needs to be done,<sup>237</sup> especially where the depression has been brought on by violence at work, including bullying and (sexual) harassment.

## 6 RECOMMENDATIONS

The modern-day workplace is not only characterised by smart collaboration, a mobile workforce and modern tools. Sadly, it has also become the scene of interpersonal violence, including bullying and (sexual) harassment. South African workplaces are no exception, and it may be argued that the country's infamous problem with violence in society at large could be to blame.

However, when the harm inflicted by workplace bullying/harassment interfaces with depression – whether as a cause or as a result of bullying and harassment – this may be a double punch with which few employers and employees are equipped to deal. Also, an overview of the current South African legal framework governing workplace bullying, harassment and depression does not seem to offer much in the form of workable, effective and practical solutions either.

### 6.1 ENHANCEMENTS TO LEGISLATION

As pointed out earlier, bullying is neither recognised as a cause of action by the South African legal framework and courts, nor is it mentioned anywhere by name. Since the Constitution, EEA, and PHA do not seem to offer a viable avenue for bullying victims to claim relief,<sup>238</sup> it is suggested that health and safety laws be explored instead. A step in the right direction, therefore, would be for bullying to be explicitly incorporated in South Africa's health and safety provisions. Labour inspectors could then be easily

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<sup>233</sup> Occupational Health and Safety Act 130 of 1993.

<sup>234</sup> *Urquhart v Compensation Commissioner* (2006) 27 ILJ 96.

<sup>235</sup> *Odayar v Compensation Commissioner* 2006 (2) SA 202 (N).

<sup>236</sup> *Marsland* (2009) , which dealt with depression at work. The Court specifically asked whether the dignity of the employee was impaired and, secondly, whether, objectively speaking, the specific characteristic relied upon (depression) had the ability to impair the employee's fundamental dignity.

<sup>237</sup> See Swanepoel (2009) at 3.

<sup>238</sup> As explained in Part 3.2 .

trained to assess bullying in the workplace, especially if the tripartite National Economic Development and Labour Council (NEDLAC), representing government, labour and business, recognises bullying as a major contributor to workplace violence.

The enhancements to legislation as well as the suggestions are proposed in addition to the recently drafted Draft Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the World of Work (Draft Code),<sup>239</sup> in accordance with the EEA, and in respect of which comments are currently still awaited. For this reason, the Draft Code will not be discussed in this article, but will form a separate study once the legislative processes have been completed.

With regard to sexual harassment at work, the provisions and guidelines of the 2005 Code are sufficient to manage this form of workplace violence. However, it is recommended that they be incorporated into formal legislation instead of a mere guiding document. In accordance with the remarks made by the SCA in *Media 24 Ltd & another v Grobler (Media 24 (2005))*<sup>240</sup>, it is proposed that victims of any kind of assault, perpetrated in the course of employment, specifically be named in COIDA, to enable them to claim compensation for the ill effects thereof. Legislative reform of COIDA is thus called for.

To further enhance the legal framework in this regard, it is also suggested that a national policy against physical and mental violence in the workplace, including bullying and sexual harassment, be introduced. Such policy should ideally go beyond mere guidelines, and include punishment for non-compliance. Whether one calls this document a Policy or Code becomes insignificant, as the content thereof will determine its enforceability. At the time of finalising this article, the Draft Code has been published, but is still open for comment; it is thus not part of this article, but once promulgated it will be examined in its entirety in another article.

Staying at a national level, mental health issues, such as depression, will probably only receive the attention they deserve if they are specifically mentioned in South Africa's health system goals. Formal recognition of depression as a workplace issue is needed,<sup>241</sup> whether as a cause of action in itself, or as a result of bullying and harassment at work. However, as this article has shown, reliance on international and national legislation, codes and policies alone is insufficient. What we need is a multi-pronged approach, including the following elements.

## 6.2 INTERVENTIONS AT A BROAD SOCIETAL LEVEL

As argued earlier, drawing a link between the persistent prevalence of violence in the workplace, including bullying and sexual harassment, and the scourge of violence plaguing South African society at large is not far-fetched. It follows, then, that getting the

<sup>239</sup> South African Government Employment Equity Act: Code of Good Practice on Prevention and Elimination of Violence and Harassment in the World of Work available at <https://www.gov.za/documents/employment-equity-act-code-good-practice-prevention-and-elimination-violence-and#> (accessed 8 March 2021).

<sup>240</sup> [2005] 3 ALL SA 297 at para 77.

<sup>241</sup> This would be in accordance with the SCA in *Media 24 (2005)* at para 77.



basics right at a societal level could help prevent macro-level ills from spilling over into the microcosmos of the workplace. An appropriate place to start could be interventions aimed at building and improving social cohesion.<sup>242</sup> While such interventions alone may not reduce the prevalence of violence, the mere willingness to intervene should in itself result in a form of internal social control, which could be highly beneficial in complementing formal regulation.<sup>243</sup> A transformative approach to ending harassment and violence in the workplace is called for.<sup>244</sup>

In addition, community violence prevention programmes should be based on a holistic understanding of violence and of best practices in curbing violence. Considering that many instances of sexual harassment are perpetrated in the name of “masculine power”,<sup>245</sup> programmes should directly challenge harmful masculine and other gender norms in society.

### 6.3 WORKPLACE INTERVENTIONS TO ROOT OUT BULLYING AND SEXUAL HARASSMENT

Until such time as a comprehensive and implementable national policy on harassment and bullying is drafted and introduced, employers are urged to adopt zero-tolerance policies in the workplace. Is it opined that legislation in itself will be insufficient to regulate human conduct in the workplace; hence a need for a multi-pronged approach.<sup>246</sup> Policies should clearly define the concepts of violence at work, including bullying and sexual harassment, and take care to reflect the spirit, purport and objects of ILO Convention 190.<sup>247</sup> Moreover, once adopted, these policies should be properly communicated to all stakeholders, including employees, management, trade unions and workplace forums, to ensure buy-in.

Employers are further advised to consciously reduce and eliminate current workplace barriers to help-seeking and health-seeking behaviour by those exposed to bullying and harassment.<sup>248</sup> This would include proactively raising awareness and educating the workforce on workplace injustices, bullying and sexual harassment.

### 6.4 WORKPLACE INTERVENTIONS TO MANAGE DEPRESSION

The management of depression in the workplace requires a person-centred approach.<sup>249</sup> This would, for instance, include the facilitation of return-to-work plans for employees who have had to leave their jobs temporarily to recover from a depressive

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<sup>242</sup> Eagle (2015) at 93–94.

<sup>243</sup> Eagle (2015) at 94.

<sup>244</sup> The full spectrum of opportunities cannot be discussed in this article, but for more information on this specific aspect, see UN Women (2019) at 52–53.

<sup>245</sup> As explained in Part 4.1 .

<sup>246</sup> See Hoel H & Einarsen S “Shortcomings of anti-bullying regulations: the case of Sweden” (2010) 19(9) *European Journal of Work and Organizational Psychology* 30 at 47 & 48.

<sup>247</sup> Heilman & Barker (2018) at 76.

<sup>248</sup> Heilman & Barker (2018) at 77.

<sup>249</sup> Porter *et al* (2018) at 230.

episode. Such plans should be based on the employer's genuine belief in the individual's ability to resume work,<sup>250</sup> which would only be achieved through mental health literacy among vocational rehabilitation professionals.<sup>251</sup>

Employers would also be well advised to consider adopting a care management model.<sup>252</sup> From the perspective of depression, such a model would be generally aimed at helping the employee who is struggling with depression achieve the best health and quality of life possible by preventing chronic disease, stabilising the depressive condition, and preventing acceleration to higher-risk categories. This should not only increase mental health among employees, but also assist employers to improve company outputs.<sup>253</sup>

Finally, the development of an appropriate early intervention policy for the workplace is key.<sup>254</sup> For any such policy to succeed, however, the employer should make the mind-shift from regarding workplace policies as simply a means to prevent litigation, to a tool designed to truly assist those suffering from depression.

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<sup>250</sup> Porter *et al* (2018) at 230–231.

<sup>251</sup> Porter *et al* (2018) at 231.

<sup>252</sup> Stander *et al* (2016) at 7.

<sup>253</sup> Stander *et al* (2016) at 7.

<sup>254</sup> Harnois & Gabriel (2000) at 11.

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