

LEGISLATING DISABILITY INTEGRATION IN EMPLOYMENT: COMPARING LEGAL SOLUTIONS FROM NIGERIA, SOUTH AFRICA AND THE UNITED STATES OF AMERICA*

Abstract

There are various legislations by which State governments can ensure the integration of disabled persons into the workforce: employment quota public procurement and disability nondiscrimination legislation. Nigeria's Disability Discrimination Act of 2018 enshrines the right of disabled persons to work and earn a living without discrimination and adopts a number of these disability integration provisions. This work examines the pros and cons of these types of legislation vis-a-vis the reality of Nigerians living with disabilities. A doctrinal and comparative methodology is espoused which seeks to fill lacunae in our jurisprudence by examining and recommending for adoption, more robust nondiscrimination policies and provisions from neighboring South Africa. Given the long history of discrimination against persons with disability, this work also recommends affirmative action in the nature of free education and skills acquisition for disabled persons and obligatory provision of reasonable adjustments in the organised private sector. The work further recommends the enactment of an 'Employment Rights Act' to replace the extant Labour Act and inculcate international anti-discrimination standards into the Nigerian workforce, most particularly the concept of unfair dismissal.

Keywords: Disability Integration, Employment Quota Legislation, Disability Discrimination Legislation, Reasonable Accommodation, Affirmative Action.

1. Introduction:

People with disabilities face enormous attitudinal, physical and informational barriers to equal opportunities in the world of work. They make up an estimated one billion or 15 per cent of the world population out of which 80 per cent are of working age and yet, are frequently denied access to work.¹ Compared to non-disabled people, they experience higher rates of economic inactivity, insufficient social protections and are at greater risk of abuse and exploitation at work. It can be extremely difficult to break out of the vicious cycle of extreme poverty and neglect in which majority of the disabled live.² Disability is the umbrella term for impairments, activity limitations and participation restrictions, referring to the negative aspects of the interaction between an individual with a health condition and that individual's contextual factors (environmental and personal factors).³ Environmental factors take account of a wider set of issues than just physical environment; it includes service delivery systems, laws and policies concerning the disabled, societal attitudes, prejudices and everything that acts as an obstacle to total integration of the disabled into society.⁴ Therefore, poor access to education and inadequate provision of special learning tutors and equipment, inability or difficulty in accessing structures, isolation, religion and so on, all fall under the umbrella of negative environmental factors which influence the prospects of disabled persons.

The disability index in Nigeria has not been formally captured in any recent census or survey; hence we make do with dated statistics and estimates.⁵ In 2011 the World Health Organization (WHO) estimated that there are roughly 25 million persons living with disabilities in Nigeria with up to 3 million of them so severely afflicted that they are unable to independently function physically and/or socially.⁶ In 2013, the Nigerian National Assembly gave an estimated figure of 20 million people living with disability,⁷ an optimistic figure which falls

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¹ World Health Organisation (WHO), *World Report on Disability 2011*, based on 2011 global population estimates, (Malta: WHO Library Cataloguing-in-Publication Data, 2011) 14, www.who.int/disabilities/world_report/2011/report/en/ accessed 14/7/19.

² WHO, www.ilo.org/global/topics/disability-and-work/WCMS_475650/land-en/index.htm, accessed 14/7/19.

³ World Health Organisation, *World Report on Disability 2011*, *op cit*.

⁴ *Ibid*.

⁵ N Amusat, 'Disability Care in Nigeria: The need for professional advocacy', (2009). *AJPARS*, Vol.1, No. 1, June 2009, p. 30-36, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.1031.9869&rep=rep1&type=pdf>. Accessed 13/7/2019.

⁶ World Health Organization, *World Report on Disability*, 2011, http://www.who.int/disabilities/world_report/2011/report.pdf?ua=1.

⁷ <http://www.nassnig.org/nass/news.php?id=420>.

below the world estimate of 15% of the global population living with disability.⁸ A disability survey in Kogi and Niger states of Nigeria⁹ investigated demographic characteristics of people with disabilities, including gender, age, religion, educational, occupational, employment and economic status. The survey found that the most common disabilities involved vision, mobility and/or hearing. A third of these cases were less than 21 years of age, had no occupation and were predominantly of muslim extraction. Over half of them had no education or skills and so the common occupation was begging, subsistence farming and trading.¹⁰ The conclusion is that in spite of their large numbers, persons with disabilities are commonly stigmatized and isolated resulting in near total unemployment and dire economic hardship.

2. Disability in Employment: the Nigerian Situation

In the context of employment, a person with disability (PWD) is an individual whose prospects of securing, returning to, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognized physical, sensory, intellectual or mental impairment.¹¹ Many of the obstacles which disabled people face arise not from their disability but rather from the way they are perceived in society and the inconsiderate organization of work places. Almost all jobs can be performed by the disabled because given the right milieu; most people with disabilities can be productive. Some of the barriers which prevent them from securing and/or retaining employment include inaccessible and inconvenient work places, restrictive rules relating to employee training; work practices which are impossible for people with certain disabilities to observe and negative assumptions which employers and others make about the capacity of disabled people. These obstacles can be overcome by putting in place more accommodating laws and policies.¹²

In Nigeria, structural and physical barriers to accessing places of business and employment adversely affect the employment prospects and performance of PWD's. Even essential infrastructures for basic necessities such as healthcare, education, transport, recreation and the justice system are for the most part, inaccessible to people with disabilities thereby denying them programs and services necessary for standard living. Persons who use mobility aids (including guide canes or wheelchairs) also experience restriction from programs and services. For instance, due to increasing insecurity in the country, banks in the major cities changed their public entrances to narrow security cages barely large enough for a standing adult to squeeze through. Access into these banks is impossible for people using walking aids or wheelchairs.¹³ For the few disabled persons who are fortunate to be employed, some of the physical challenges encountered include the lack of ramps, lack of lifts, narrow entrances and corridors, inaccessible restrooms and tight, over-crowded offices.¹⁴ Employers' negative attitude about their ability to work and to contribute to the performance of the enterprise is another major obstacle faced by people with disabilities. Even when employed, PWD's often find themselves either being stereotyped into certain tasks, for instance, putting blind people in call centers regardless of their education and training; or being employed as token gestures to make the company look good.¹⁵ On the other hand, some of the reasons put forward by employers as grounds for refusing to employ people with disabilities are quite plausible. For instance, employers perceive people with disabilities as less competent, requiring greater supervision and less able to adapt to the workflow or operational system. Employers fear that persons with disabilities are prone to requesting paid sick leaves,

⁸ World Health Organisation, based on 2011 global population estimates, www.who.int/disabilities/world_report/2011/report/en/ accessed 20/5/19.

⁹ Conducted by the Leprosy Mission Nigeria.

¹⁰ N Smith, 'The Face of Disability in Nigeria: A Disability in Kogi and Niger States', *Disability, CBR and Inclusive Development*, Vol 22, No 1, 2011, <http://dcidj.org/article/viewFile/11/27>.

¹¹ International Labour Organisation (ILO) Publications on Disability: Inclusion of Persons with Disabilities, <http://www.ilo.org/skills/areas/inclusion-of-persons-with-disabilities/lang--en/index.htm> accessed 12/7/19.

¹² CS Ibekwe & OC Aduma, 'Evolution of Disability Rights in Nigeria: Pitfalls and Prospects, (2019) 3(2) *African Journal of Law and Human Rights*, 40 – 49.

¹³ JC Eleweke and J Ebenso, 'Barriers to Accessing Services by People with Disabilities in Nigeria: Insights from a Qualitative Study,' (2016) 6(2) *Journal of Educational and Social Research*, MCSER Publishing, Rome-Italy.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

demanding payment of their hospital expenses and would often require compassionate waivers from certain duties, not to mention escalating the Organization's health insurance premiums.¹⁶

The above reasons notwithstanding, there is a constructive business case for employing people with disabilities. People with disabilities are part of the general population and therefore should also naturally be part of the workforce. Moreover, when they have skills and talents which qualify them for a particular job, what more is needed?¹⁷ Employers benefit from the employment of people with disabilities who can make a significant contribution at their place of employment if disability-related issues are appropriately managed.¹⁸ Further, many employees acquire their disabilities during their working lives and making simple adjustments to the work environment can allow employers to retain their valuable skills and experience, while maintaining maximum productivity. Significant savings can be made in terms of health costs, insurance payments and time lost, if an effective disability employment strategy is in place.¹⁹

3. Types of Legislation used to promote the Integration of Persons with Disability into the Labour Market

There are different types of labour market laws and policies used to promote integration of the persons with disability into the labor market both at national and international levels. In this section, we shall discuss the degree to which such integration laws/policies are featured in Nigeria's Disability Discrimination Act and suggest new ways in which they can best be used to serve the interest of their focal group.

Employment quota legislation

Quota legislation requires public and/or private sector employers to reserve a proportion of their employee positions for persons with disabilities, provided that the firm is above a specified size. National law or policy would usually set the minimum quantity of employment spaces to be reserved, say, five or ten percent but sometimes different quotas are set according to the size of the organization or the peculiar nature of a given industry. Reserving 5% quota of the workforce is a helpful form of affirmative action to propel the recruitment of persons with disability. Nigeria's Disability Act restricted this obligation to public companies, that is, government ministries, agencies and parastatals. It is contended that the obligation could be well absorbed by large private companies with a large number of employees, similar to the provisions regarding pension schemes.²⁰ Disability quota legislation is the key initial driver to encourage larger companies to employ a set percentage of disabled employees in their workforce. As a general rule, companies do not support quota legislation. However, many company representatives would also admit that in the absence of such a driver, most companies would not even start considering the employment of people with disabilities.²¹ This is not the only paradox with quota legislation. Even in those few countries where it is effective, quota legislation risks undermining the idea that people with disabilities should be employed for the same reasons as non-disabled employees, that is, for their skills and talents. Employing disabled persons in order to avoid fees or sanctions could lead employers to treat employees with disabilities differently, for instance, treating them as mere tokens to satisfy the legal quota requirements while offering them limited opportunities for career development. This would obviously not be good for people with disabilities as they would not grow on the job; neither is it beneficial to a company to pay for services not rendered. Another disadvantage of quota system is that employees with disabilities are obliged to reveal their disability, as employers need to be able to show to the relevant public authority how many people with disabilities are employed

¹⁶ M Christianson, 'Incapacity and Disability: A Retrospective and Prospective Overview of the Past 25 Years' (2004) *ILJ* 879- 896 in CS Ibekwe & OC Aduma, *ibid*.

¹⁷ ILO, 'Business as unusual: Making workplaces inclusive of people with disabilities' International Labour Office, Bureau for Employers' Activities (ACT/EMP), Conditions of Work and Equality Department (WORKQUALITY). – Geneva: ILO, 2014.

¹⁸ *Ibid*.

¹⁹ *Ibid*.

²⁰Section 2 of the Pension Reform Act 2014 (PRA) provides that private sector employers with fifteen (15) or more employees must establish a contributory pension scheme for the benefit of their employees, wherefrom retirement benefits would be paid to such employees. Section 2(3) of the PRA also provides that, notwithstanding the prescribed mandatory minimum threshold stated above, private sector employers with less than three (3) employees or self-employed persons are also entitled to voluntarily establish pension schemes, in accordance with guidelines issued by the National Pension Commission.

²¹ ILO and Irish Aid: *Achieving equal employment opportunities for people with disabilities through legislation. Guidelines*, revised edition (Geneva, 2007).

in order to meet the quota. This raises obvious privacy-related issues, as people with disabilities often do not want to declare their disability. This is especially the case for invisible disabilities, such as psychosocial disabilities.²²

Non-discrimination legislation

Non-discrimination provisions in mainstream legislation, such as Nigeria's Discrimination Act, can play an important role in promoting the inclusion of people with disabilities in the workplace. While disability non-discrimination legislation has a more indirect impact on the employment of people with disabilities, especially when compared to quota legislation, it has a potentially very relevant systemic impact. It often requires company to revise their internal practices to ensure that none of such policies directly or indirectly discriminate against people with disabilities. Complying with national disability non-discrimination legislation often has far-reaching influence on the way the company is run on a daily basis. For instance, it should lead companies to ensure that their current employees with disabilities and those that got disabled at a later point are given the same opportunities as other employees. It is non-discrimination legislation that can propel a company to undertake the expense and inconvenience of renovating office premises to provide reasonable accommodation for disabled employees. Disability non-discrimination legislation also has a positive impact on the attitudinal barriers that often prevent people with disabilities from accessing education and training. While this does not automatically lead to the employment of people with disabilities, experience has shown that it can make an important contribution.²³

Public procurement legislation

Other legislative measures promoting the employment of people with disabilities include public procurement procedures that give private companies better chances to sell their products or services to the public sector if these companies are inclusive of people with disabilities. For instance, under the Preferential Procurement Policy Framework of South Africa, enterprises are awarded contracts based on a preferential points system which features disability inclusion as one of the areas that positively impact the company's overall rating vis-à-vis the public sector. Another good practice can be found in the United States Federal Acquisition Regulation (FAR) which governs the procurement process of the United States government. The FAR stipulates affirmative action by the contractor to employ and advance in employment, qualified people with disabilities and applies this requirement also to subcontracting companies. Nigeria is yet to adopt such measures but they would be most welcome in the interest of disability rights.

4. Nigeria's Nascent Disability Act and its Implications for Disability Employment

Nigeria is a signatory to the United Nation (UN) Convention on the Rights of Persons with Disabilities (CRPD) and its accompanying Optional Protocol. The CRPD explicitly canvasses equality, inclusiveness and the elimination of discrimination in all facets of the lives of persons with disabilities. One of the fundamental obligations of the Convention is that national law should be enacted to guarantee the enjoyment of the rights enumerated in the Convention.²⁴ On the strength of this, and after much agitation from stakeholders and activists, Nigeria enacted the Discrimination against Persons with Disabilities (Prohibition) Act 2018 (shortened to Disability Discrimination Act) in 2018. Nigeria's Disability Discrimination Act contains vital provisions for the integration of persons with disability not only into the employment sector but into society at large. Part one prohibits the discrimination and harmful treatment of persons with disability²⁵ whilst parts two, three and four speak to accessibility of physical structures whether such structures are on land, sea or in transit. It made it mandatory for public buildings, roads, walk-ways to be constructed in such a way that a person with disability can access them without hindrance or difficulty and for vehicles, ships and aircrafts to reserve spaces and provide services that would ease safety and accessibility to disabled persons.²⁶ The Act also gives persons with disability the right to free and inclusive education and healthcare, the right of first consideration in queues, accommodation and emergencies and condemns the act of using a person with disability for begging.²⁷ A five-

²² ILO, 'Business as unusual: Making workplaces inclusive of people with disabilities' *ibid*.

²³ *Ibid*.

²⁴ Article 4 of the Convention identifies general and specific obligations on member States and parties in relation to the rights of persons with disabilities.

²⁵ Section 1, Disability Discrimination Act 2018.

²⁶ Sections 3 – 15 Disability Discrimination Act 2018.

²⁷ Section 16 *ibid*

year transitional period is stipulated within which public buildings, structures or automobiles are to be modified to be accessible to and usable by persons with disabilities, including those on wheelchairs.²⁸ The Act mandates that a government agency, body or individual responsible for the approval of building plans shall not approve the plan of a public building if the plan does not make provision for accessibility facilities in line with the new disability-friendly building code.²⁹ The Act provides for the establishment of a National Commission for Persons with Disability which shall be vested with the responsibility for the education, healthcare social, economic and civil rights of persons with disabilities.³⁰

One salutary feature of the Disability Discrimination Act is its restatement of the CRPD's equal right of disabled persons to work on an equal basis with others in employment freely chosen or accepted by them and its penalization of any infringement of such right to work.³¹ The Act encourages participation of persons with disabilities in politics and public life and tasks Government to actively promote an environment in which persons with disabilities can effectively participate in the conduct of public affairs without discrimination.³² Perhaps the most compelling of the integration measures provided in the Act is the mandate that all public organizations shall, as much as possible, have persons with disabilities constituting at least 5% of their workforce.³³

The Disability Discrimination Act (DDA) is a marked improvement to its predecessor – the Nigerians with Disabilities Decree of 1993³⁴ which was the first indigenous legislation specifically targeted at promoting the rights of disabled persons. One major limitation of the Decree was its silence on the issue of disability discrimination. Moreover, the National Commission for People with Disability which the Decree established was not ineffectual as it lacked adequate funding and political will to drive its agenda.³⁵ The DDA is more comprehensive and adopts a human rights approach to disability rights rather than the sometimes counter-productive philanthropic viewpoint of the past. Even the reservation of 5% of the workforce for the disabled is not predicated on philanthropy but on the pragmatic need to accelerate the integration of persons with disability into the labour force as a counter-balance to years of exclusion.

5. A Comparative Look at South Africa's Employment Disability Laws

Despite its new Disability Act, Nigeria can gain immensely from the laws and policies in countries that have effective legislation and policy implementation regarding disability. For one thing, Nigeria's Disability Act did not specifically emphasize the all-important aspect of providing reasonable accommodation for disabled persons in employment. We shall hereunder examine and compare the more evolved provisions on disability discrimination in South Africa. South Africa's Employment Equity Act of 1998³⁶ (EEA) is the principal legislation for protecting and promoting the right to equality in the South African workplace. The aim of the EEA as declared in its preamble is to 'achieve a diverse workforce broadly representative of our people; and to promote economic development and efficiency in the workforce'.³⁷ To achieve this goal the EEA requires employers to eliminate unfair discrimination in their employment practices and policies. In reality however, the prohibition and elimination of discriminatory practices do not guarantee equality. Attaining equality usually requires the deployment of support systems and assistance programs for vulnerable groups, this is what is called 'affirmative action.' Persons with disabilities in particular are entitled to affirmative action measures.³⁸ The EEA defines

²⁸ Section 6, *ibid.*

²⁹ Sections 3 – 8, *ibid.* An officer, who approves or directs the approval of a building plan that contravenes the building code commits an offence and is liable on conviction to a fine of at least N1, 000,000 or a term of imprisonment of two years or both.

³⁰ Section 33, *ibid.*

³¹ Section 28, *ibid.* Article 27 CRPD

³² Section 30(1) and (2) *ibid.*

³³ Section 29 *ibid.*

³⁴ Now Nigerians with Disability Act, Cap 202, LFN 2004

³⁵ CJ Eleweke and J Ebenso, 'Barriers to Accessing Services by People with Disabilities in Nigeria: Insights from a Qualitative Study', (2016) Vol 6(2) *Journal of Educational and Social Research*, Rome-Italy: MCSER Publishing, May 2016.

³⁶ The Employment Equity Act, No. 55 of 1998

³⁷ Preamble to the EEA

³⁸ MC Marumoagae, 'Disability discrimination and the right of disabled persons to access the labour market' (2012) 15(1) *South African Journal of Occupational Therapy* S. Afr. j. occup. ther., http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-3781201200100010, accessed 12/7/2019.

people with disabilities as those who have a long-term or recurring physical, including sensory or mental impairment which substantially limits their prospect of entry into or advancement in employment.³⁹

It is therefore safe to say that under the EEA, eliminating unfair discrimination and implementing affirmative action are twin measures designed to complement each other to achieve employment equity in the workplace. The EEA aims to redress the disadvantages in employment that have been experienced by those discriminated against in the past, which include persons with disabilities. The EEA established the Code of Good Practice⁴⁰ (Disability Code) to provide guidelines for employers and employees on practical ways to promote equal opportunities and fair treatment of persons with disabilities. The Disability Code aims to help employers and employees to understand their rights and obligations thereby reducing disputes. It is further intended to help create awareness of the contributions of persons with disabilities so as to encourage employers to maximize their potentials whilst giving the employed persons with disabilities the confidence to exercise their rights at work.⁴¹

Nevertheless, employers should not be obligated to employ a person who cannot perform the duties of a specified job nor to retain such employee merely because he/she is disabled. It is inarguable that any appointment or retention should be based on merit, or at least based on the assurance that a person with disability if hired should be capable of being trained and developed to adequately perform the tasks of the specified job. In the words of the Disability Code 'if an applicant with a disability is suitably qualified, an employer may make a job offer conditional on medical or functional testing to determine an applicant's actual or potential ability to perform the essential functions of a specific job'.⁴² This position was upheld in *Stoman v Minister of Safety and Security & Others*⁴³ where it was stated that 'the appointment of people who are wholly unqualified, or less than suitably qualified or incapable in responsible positions cannot be justified'.

The right to freedom from discrimination is further buttressed by the South African Constitution which states that discrimination on the basis of certain grounds is prohibited and a dismissal on a prohibited ground is automatically unfair.⁴⁴ The Nigerian Constitution⁴⁵ has a similar provision in section 42 which espouses a right to freedom from discrimination, including by reason of the circumstances of one's birth, a provision which the Nigerian Labour Courts have interpreted to mean that dismissal from employment on grounds of inherent disability is unfair and discriminatory. In *Dorothy Adaeze Awogu V. TFG Real Estate Limited*⁴⁶ the plaintiff was constantly threatened with dismissal, ill treatment and abuse from her line supervisor, particularly on grounds of her genotype/medical condition (Sickle Cell Anaemia (SS)), which required her to visit the hospital from time to time. In one episode in March 2013, whilst on her sick bed, the plaintiff received several text messages from her line supervisor threatening to have her dismissed because she was 'SS'. A few days later, her employment was abruptly terminated without notice. The National Industrial Court held that the actions of the company through the line manager were not only sufficient to ground actions in fundamental right infringement and in tort, they were dehumanizing and ran contrary to the tenets of dignity of labour. The Court awarded the sum of 2.5 million Naira (as against the 10 million claimed by the plaintiff) as damages for physical harassment, discrimination at work based on circumstance of her birth and false imprisonment. The Defendant Company was also ordered to pay the Plaintiff one month salary in lieu of notice for the abrupt termination. It is submitted that if this case of *Awogu* was to have been instituted after the passage of Nigeria's Disability Discrimination Act, the plaintiff, being disabled, would have had the option of bringing her action under said Act. However, the non-existence of such law at the time, forced *Awogu's* to hinge her action on fundamental rights infringement and torts. The problem here is that unlike South Africa, Nigeria does not have a specific legislation that prohibits all forms of employment discrimination whether based on gender, ethnic background, age, political orientation, religion etc. Therefore, a person who does

³⁹ EEA Section 1

⁴⁰ Code of Good Practice: Key Aspects on the Employment of People with Disabilities, GN 1345 in GG 23702 of 19 August 2002.

⁴¹ Disability Code, Items 2.3 and 2.4

⁴² Item 7.3 of the Disability Code.

⁴³ 2002 23 ILJ 1020 (T).

⁴⁴ Constitution of the Republic of South Africa 1996, S. 9(3).

⁴⁵ The 1999 Constitution of the Federal Republic of Nigeria (as amended).

⁴⁶ (Suit No. NICN/LA/262/2013)

not suffer any disability and whose employer has not discriminated any of his 'fundamental rights' as specifically listed in the Constitution, would not be able to institute an action for discrimination/unfair dismissal/, even where the employer's action is manifestly discriminatory.

In South Africa, the Labour Relations Act⁴⁷ (LRA) provides a blanket prohibition of any form of employment discrimination. Under the LRA, an employer is only entitled to dismiss an employee for reasons relating to his or her misconduct, incapacity and operational requirements. Moreover, such dismissals should be both procedurally and substantively fair.⁴⁸ The dismissal will be automatically unfair if the reason for the dismissal amounts to one of the listed grounds in section 187(1)(e) of the LRA, which includes disability. However, dismissal based on the employee's disability will be fair if it relates to the inherent requirements of the job in question.⁴⁹ Section 15(2)(c) of the EEA requires that the 'affirmative action measures implemented by a designated employer ... include reasonable accommodation for persons with disabilities. In terms of section 1 of the EEA, reasonable accommodation means 'any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment.' It remains unclear as to what the concept of reasonable accommodation precisely entails but guidance can be sought from the Disability Code. The Code lists several examples which 'constitute' reasonable accommodation; for example, adapting existing facilities to make them accessible, adapting existing equipment or acquiring new equipment including computer hardware and software, re-organising work stations, changing training and assessment materials and systems, restructuring jobs so that non-essential functions are re-assigned, adjusting working time and leave, providing readers, sign language interpreters, and providing specialised supervision, training and support.⁵⁰

The Disability Code further states that 'the employer need not accommodate a qualified applicant or an employee with a disability if this would impose an unjustifiable hardship on the business of the employer.'⁵¹ Unjustifiable hardship is explained to mean any 'action that requires significant or considerable difficulty or expense and that would substantially harm the viability of the enterprise'.⁵² It may be argued that an employer has a more onerous duty to accommodate an employee who is injured or disabled during employment. This is so because an employer would be required to adapt his or her workplace in order to assist the employee with disabilities to perform his or her duties. The employer may even have to make significant changes to the workplace to accommodate the employee concerned. However, there is authority to the effect that the employer can fairly dismiss an employee with disabilities for incapacity if such an employee refuses the employer's offer of reasonable accommodation.⁵³

Another burden on the employer is the duty to consult with the employee and explore ways in which the disability may be accommodated.⁵⁴ Reasonable accommodation depends upon the employer being aware of the applicant's or the employee's disability or impairment.⁵⁵ There is therefore a duty on the applicant or employee with disabilities to inform the employer about the disability so that the employer can consider ways of accommodating same.

6. Adopting United States Provisions on Reasonable Accommodation

South African jurisprudence with regard to the reasonable accommodation of persons with disabilities in the workplace does not offer much guidance. It has been suggested that in interpreting the extent of the duty to reasonably accommodate in particular circumstances, it will be useful to look at the interpretation given in the United States Americans with Disabilities Act (ADA) of 1990, by far one of the most advanced legislations on

⁴⁷ Labour Relations Act 66 of 1995

⁴⁸ Labour Relations Act 66 of 1995, Ss 188 and 189.

⁴⁹ Labour Relations Act 66 of 1995, s.187(2)(a). See also Christianson, *ibid.*

⁵⁰ Item 6.9 of the Disability Code, Marumoagae, *ibid.*

⁵¹ Item 6.11 of the Disability Code

⁵² Item 6.12 of the Disability Code

⁵³ *Standard Bank of South Africa Ltd v CCMA* 1998 6 BLLR 622 (LC); *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC).

⁵⁴ M Christianson, 'Disability Discrimination' (2004) *ILJ* 178.

⁵⁵ Christianson 'Disability Discrimination, *ibid.*, 179.

the topic.⁵⁶ The ADA protects qualified individuals with disabilities from discrimination in the workplace in the same way as the EEA does and also requires an employer to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship.⁵⁷ The ADA provides for three categories of reasonable accommodations:

- Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position where such qualified applicant desires modifications or adjustments to the work environment; or
- Modifications or adjustments to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
- Modifications or adjustments that enable an entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.⁵⁸

In *US Airways, Inc v Barnett*⁵⁹ the court held that a modification or adjustment is reasonable if it seems reasonable on the face of it and that an accommodation must also be effective in meeting the needs of the individual. A reasonable accommodation allows an employee with a disability an equal opportunity to enjoy the benefits and privileges of employment that employees without a disability enjoy.⁶⁰ The approach of the USA seems to be similar to that of South Africa, and it is left for South Africa to develop a model of reasonable accommodation which will reflect the challenges experienced by persons with disabilities in its jurisdiction.⁶¹

7. Conclusion and Recommendations

Nigeria's new Disability Act, 2018 imposes a duty on the government to take measures to promote the employment of the disabled. Accordingly, a disabled person shall not by reason only that he is such a person be subjected to any discrimination or adverse conditions by any (government) employer. The Act also prescribes positive discrimination or affirmative action by requiring employers of labour to reserve for the disabled not less than 5% of the workforce.⁶² These provisions are commendable but they should be extended, in a reduced manner, to the organized private sector. It is recommended that 2% of private sector employees in companies which have more than 15 workers should be persons with disability. This provision should be well publicized and companies given minor tax rebates for compliance in the initial stage. The National Commission for People with Disability is meant to co-ordinate the elimination of all employment, social and cultural discriminatory practices against the disabled and yet, is not empowered to monitor recruitment or institute legal action in cases of infraction by employers. The law is therefore a mere wishful policy instead of an enforceable right. The Commission should be so empowered.

This work recommends that as in South Africa's detailed provisions on reasonable accommodation in employment be imbibed in Nigeria's Disability Discrimination Act in order to furnish employees with specific ideas about what can be done to assist disabled employees. In the development and implementation of policies related to disability inclusion it is crucial to actively involve people with disabilities through their representative organizations, so they become an integral part of the decision-making processes. An employer should have a legal obligation to make reasonable adjustments that will enable a disabled person to work or continue to work, but where an adjustment is unreasonably expensive, cumbersome or will jeopardize the operations, the employer should not be liable. It would be impossible to create an exhaustive list but adjustments may include time off for

⁵⁶ ⁵⁶ PA MajaI, *et al*, Employing people with disabilities in South Africa, (2011) 41(1) *South African Journal of Occupational Therapy*, *S. Afr. j. occup. ther.* Pretoria, accessed 12/7/19.

⁵⁷ *US Airways, Inc v Barnett*, 535 US, 122 S Ct 1516, 1523 (2002); 42 USC §§ 12101-12117, 12201-12213 of the Americans with Disabilities Act of 1990 (as amended).

⁵⁸ See US Equal Employment Opportunity Commission 2002 www.eeoc.gov

⁵⁹ *US Airways, Inc v Barnett*, 535 US, 122 S Ct 1516, 1523 (2002).

⁶⁰ *US Airways, Inc v Barnett*, (*supra*).

⁶¹ MajaI *et al.*, *ibid*

⁶² Section 29 of Nigeria's Disability Discrimination Act.

such things as treatment, therapy, rehabilitation, training or waiting for structural adjustments to be executed under the name of 'disability leave.' A more holistic approach to tackling discrimination in general would be a repeal of the extant Labour Act of 1974 and a promulgation of a new labour regime. This work proposes a bill entitled the 'Employment Rights Act' which will be based on a minimum of general principles universally applicable to every employment contract: fundamental human rights and freedoms, dignity of labour, confidentiality, equal rights and the right not to be discriminated against; health and safety in the workplace; protection against sexual harassment in the workplace; equal pay for equal work; protection in the event of unfair dismissal; affirmative action in favour of disadvantaged classes; the right to family care and to a fair division of working time and leisure time; the right to life-long learning; free access to employment services; the right to join a union, including freedom to negotiate and to collective self-protection. Last but not least, one frequent issue raised by companies is that they cannot find people with disabilities that have the skills that companies require. To address this issue, government policies on vocational education and training inclusive of students and trainees with disabilities, are required. Furthermore, to ensure adequate matching of job vacancies with the skills and ambitions of jobseekers with disabilities, effective employment and placement agencies as well as disability based non-governmental organizations (DBO's) providing services to people with disabilities are instrumental. Further, DBOs and the National Disability Commission can assist companies in increasing awareness about disability issues among staff and thereby transforming mind-sets and attitudes of both employees and managers.