NOT ALL ILLNESSES ARE TREATED EQUALLY - DOES A DISABILITY BENEFITS PLAN VIOLATE THE ADA BY PROVIDING LESS GENEROUS LONG-TERM BENEFITS FOR MENTALLY DISABLED EMPLOYEES THAN FOR PHYSICALLY DISABLED EMPLOYEES?

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I. INTRODUCTION

In 1996, Senator Pete Domenici of New Mexico stated, "[a]lthough we now understand that mental illnesses are, . . . for the most part, physical illnesses, they are still treated differently than other physical conditions . . . . [O]nly 2 percent of all individuals with mental illnesses are covered by insurance which provides benefits equal to the coverage for physical illnesses."¹ Now, more than any other time in United States history, Americans are working longer hours and workweeks, taking less vacation time, sleeping less, and acquiring more stressful positions and tasks. These activities contribute directly to many of the mental health problems that Americans are diagnosed with every year. One of the most recognizable mental health problems is depression. The late Senator Paul Wellstone of Minnesota stated in an address to the Senate that "[t]he National Institute of Mental Health ("NIMH"), a NIH research institute within the U.S. Department of Health and Human Services, describes serious depression as an extremely critical public health problem."² It was estimated that

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"[m]ore than 18 million people in the United States [would] suffer from a depressive illness" in 2001.3

Another staggering statistic is the NIH's estimation that:

22.1 percent of Americans ages 18 and older—about 1 in 5 adults—suffer from a diagnosable mental disorder in a given year. When applied to the 1998 U.S. Census residential population estimate, this figure translates to 44.3 million people. In addition, 4 of the 10 leading causes of disability in the U.S. and other developed countries are mental disorders—major depression, bipolar disorder, schizophrenia, and obsessive-compulsive disorder.4

Due to the prevalence of these disorders and the disparity between benefits for mentally disabled persons and those for physically disabled persons, many will be crippled for weeks, months, or years because their mental illnesses will go untreated.

If one were told that a long-term disability plan provided different treatment to individuals with physical disabilities than to individuals with mental disabilities, one would question this disparity. One might even think that such a plan was a type of discrimination against people with mental health problems. This type of disparate treatment has been litigated before four of the United States Circuit Courts of Appeals.5 In each case, the circuit court has held that none of Titles I, II, or III of the Americans with Disabilities Act6 ("ADA") requires an employer-sponsored long-term disability plan to provide the same level of benefits for mental disabilities as for physical disabilities.7

Various mental health advocates have observed that:

[T]he disparity between physical and mental illness [is] "the last bastion of open discrimination in health insurance in this country." These advocates argue that historical public and political biases and stigmas associated with individuals suffering from mental illness are the primary reason for the prevalence of coverage limitations, and . . . the costs of ending insurance

3. Id.
discrimination against people with mental illness are minimal and estimable. . . . [They] maintain that the distinction drawn between mental and physical [disabilities] for purposes of insurance coverage is baseless: the limitations are discriminatory, arbitrary and without sound scientific or economic basis.⁸

The disparity in coverage suggests this discrimination should be stopped and employer-provided mental disability benefit plans should be made equal to physical disability benefit plans in regards to both treatment and length of time of the benefits received. One argument in favor of this notion is that the Equal Employment Opportunity Commission⁹ ("EEOC") has recently recognized that the term "discrimination" in the ADA includes the prohibition of disparity between mental and physical disabilities. Also, an argument can be made that an interpretation of the provisions in the ADA not only prohibit discrimination between the disabled and the non-disabled, but, in fact, also prohibit discrimination among individuals within the same protected class. This conclusion is not only supported by a federal district court decision, but it appears to be sustained by the U.S. Supreme Court decision, O'Connor v. Consolidated Coin Caterers Corp.¹⁰ Johnson v. K Mart Corp.,¹¹ although later vacated, has provided several persuasive arguments to challenge the disparity between physical and mental disability benefits. In Johnson, the Eleventh Circuit held that: (1) the U.S. Supreme Court decision in Olmstead v. L.C.¹² "stand[s] for the proposition that the ADA demands more than [just] impartial treatment of the disabled as compared to the non-disabled";¹³ and (2) a reading of the Senate and House Committee reports should be interpreted to prohibit a cap

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⁸ Maggie D. Gold, Must Insurers Treat All Illnesses Equally? – Mental vs. Physical Illness: Congressional and Administrative Failure to End Limitations to and Exclusions From Coverage for Mental Illness in Employer-Provided Health Benefits Under the Mental Health Parity Act and The Americans with Disabilities Act, 4 CONN. INS. L.J. 767, 775-77 (1998) (quoting CBO Analysis Doesn't Tell Full Story on Mental Health Parity, Coalition Says, 4 BNA HEALTH CARE POL’Y REP., 908 (May 27, 1996)).

⁹ Most courts give at least some deference to the Commission’s guidelines and regulations on the ADA. See, e.g., Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (noting precedent that EEOC guidelines are properly referred to by courts and litigants for guidance).

¹⁰ 517 U.S. 308 (1996). O’Connor was an age discrimination case in which a unanimous court held the plaintiff need not show he was discriminated against in favor of someone outside the protected class, but just that his membership in the class was the cause of the discrimination, even if the job was awarded to someone else within the class.

¹¹ 273 F.3d 1035 (11th Cir. 2001), vacated and reh’g en banc granted, Id. at 1070. At rehearing, the Eleventh Circuit, en banc, declined to render a decision on the merits until K Mart’s bankruptcy petition was disposed by the bankruptcy court. 281 F.3d 1368, 1368 (11th Cir. 2002).


¹³ Johnson, 273 F.3d at 1052-53.
on mental disability benefits because this type of limitation discriminates in a manner that is prohibited by Section 12112(a) of the ADA.14

This article will discuss a wide variety of issues, including different courses of action that the mentally disabled have embarked on to achieve parity with the physically disabled. Broadly, this article will examine the courts’ failure to extend the necessary protections to individuals suffering from mental health illnesses. More narrowly, this article will discuss: 1) the issue of whether former employees have standing to sue their former employers; 2) some of the negative decisions handed down by the circuit courts; 3) the EEOC’s position on the subject; 4) some alternative paths that plaintiffs have taken to extinguish the disparity between mental and physical illnesses; 5) a few of the positive court decisions that, although never adopted, provide persuasive arguments to dispel the discrimination and restore parity between the illnesses; and 6) various legislative actions taken by Congress to achieve parity.

II. STANDING OF FORMER EMPLOYEES TO SUE EX-EMPLOYERS

Many of plaintiffs in disparate treatment cases must first address the important obstacle that is standing.

In order to have standing to challenge an employer-provided disability insurance policy as discriminatory under the ADA, a plaintiff must be a “qualified individual with a disability.” The ADA . . . defines a “qualified individual with a disability” as a person who can perform the essential functions of his or her position with or without reasonable accommodation.15

“A number of courts have held that a former employee . . . lacks standing to bring suit under Title I of the ADA [because the] employee is not a ‘qualified individual with a disability’ [if] he or she can no longer perform the essential functions of the former job.”16 However, other courts have

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14. Id. at 1055-56.
16. Befort & Thomas, supra note 15, at 62; see also Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1015 (6th Cir. 1997) (finding that a long-term disability plan offered by an employer does not discriminate against a former employee in violation of Title I of the ADA because Title I only applies to employment); EEOC v. CNA Ins. Cos., 96 F.3d 1039, 1044 (7th Cir. 1996) (holding that a totally disabled former employee lacks standing to challenge a company’s disability plan that limits benefits only for mentally disabled as discriminatory under the ADA); Gonzales v. Garner Food Servs., Inc., 89 F.3d 1523, 1526 (11th Cir. 1996) (finding that a former employee maintaining medical coverage under a COBRA plan had no standing to challenge a limitation of AIDS-related medical expenses as discriminatory under the ADA).
taken the opposite view and have permitted former employees to pursue their ADA claims.\textsuperscript{17}

One of the first courts to address the issue of standing in this context was the United States Court of Appeals for the Seventh Circuit. In \textit{EEOC v. CNA Insurance Cos.},\textsuperscript{18} the EEOC attempted to bring an action on behalf of Cynthia Valladares-Toledo, who suffered from a long-term mental disability, against her former employer, the CNA Insurance Company ("CNA").\textsuperscript{19} The EEOC "filed a complaint seeking a preliminary injunction that would require CNA to continue paying benefits to Valladares-Toledo pending the outcome of the EEOC's investigation" of her claim that CNA's limitation on mental disability benefits violated the ADA.\textsuperscript{20} "The district court denied the requested injunction on the ground that Valladares-Toledo, and hence the EEOC, had no standing to bring a claim under Title I of the ADA because Valladares-Toledo did not meet the statutory definition of a "'qualified individual with a disability.'"\textsuperscript{21} Consequently, the EEOC appealed to the Seventh Circuit.

The Seventh Circuit first defined a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that [the] individual holds or desires."\textsuperscript{22} The court stated that the question that must be answered is how a person who no longer is able to hold a position of employment can fit the definition above.\textsuperscript{23} Since Valladares-Toledo was not a current employee, the EEOC argued that her "'employment position' vis-à-vis CNA [was] . . . that of 'disability benefit recipient.'"\textsuperscript{24} The court rejected this argument by stating that an "employment position" is a job and the term "disability benefit recipient" does not fit within the definition required by 42 U.S.C. §

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\item \textsuperscript{17} See Castellano v. City of New York, 142 F.3d 58, 68 (2d Cir. 1998) ("Provided that retired employees were qualified . . . while employed and on that basis became entitled to post-employment benefits, the purpose of the 'essential functions' requirement has been met."); Ford v. Schering-Plough Corp., 145 F.3d 601, 607 (3rd Cir. 1998) (deciding that Title I of the ADA allows disabled former employees standing "to sue their former employers regarding disability benefits so as to effectuate the full panoply of rights guaranteed by the ADA."); Johnson v. K Mart Corp., 273 F.3d 1035, 1048 (11th Cir. 2001) (finding that reading section 12112(a) to exclude former employees would nullify Title I protections against discriminatory discharge so former employees must have standing), \textit{vacated and reh'g en banc granted}, id. at 1070.
\item \textsuperscript{18} 96 F.3d 1039 (7th Cir. 1996).
\item \textsuperscript{19} \textit{Id.} at 1041.
\item \textsuperscript{20} \textit{Id.} at 1041-42.
\item \textsuperscript{21} \textit{Id.} at 1042.
\item \textsuperscript{22} \textit{Id.} at 1043 (quoting 42 U.S.C. § 12111(8)) (alteration in original).
\item \textsuperscript{23} EEOC v. CNS Ins. Cos., 96 F.3d 1039, 1043 (7th Cir. 1996).
\item \textsuperscript{24} \textit{Id.}
The court held that the plain meaning of the statute prevents Valladares-Toledo from asserting a claim under Title I because "[she] no longer has an 'employment position' with CNA."26

Another court that held a former employee is not a "qualified individual with a disability" was the Eleventh Circuit in *Gonzales v. Garner Food Services, Inc.*27 In this case, August Gonzales, administrator of the estate of Timothy Bourgeois, filed an action under Title I of the ADA alleging that the defendants discriminated against Bourgeois by imposing a cap on his health insurance benefit coverage.28 Gonzales appealed soon after the district court granted the defendant's motion to dismiss. The Eleventh Circuit, consistent with the Seventh Circuit, stated that Bourgeois did not satisfy the requirements of the ADA because "he neither held nor desired to hold a position with [the defendant] at or subsequent to the time the alleged discriminatory conduct was committed."29 Rather, the court believed he was a mere participant in a health plan.30

In its analysis, the court opined that, "a review of both the ADA and its legislative history suggests that Congress intended to limit the protection of Title I to either employees performing, or job applicants who apply and can perform the essential functions of available jobs which their employers maintain."31 Gonzales countered "on the basis that other legislative history of the ADA, as well as [the EEOC] interpretive guidance, suggest that" former employees do have standing.32 The Eleventh Circuit disagreed and held that:

Absent clearly expressed legislative intent to the contrary, the plain language of the statute should be conclusive. . . . [W]e find the plain language of the ADA clearly demonstrates the intent of Congress to limit the scope of the Act to only job applicants and current employees capable of performing essential functions of available jobs. We find no clearly expressed legislative intent suggesting that former employees . . . should be covered under

25. Id. at 1044.
26. Id. at 1045.
27. 89 F.3d 1523 (11th Cir. 1996). It should be noted that this case was overruled by Johnson v. K Mart Corp., 273 F.3d 1035 (11th Cir. 2001), vacated and reh'g en banc granted, id. at 1070. Although the Johnson opinion was vacated on other grounds, the author of this comment believes that the holding that permits a former employee to have standing will be upheld. See supra note 11 and accompanying text.
28. Gonzales, 89 F.3d at 1524.
29. Id. at 1526.
30. Id.
31. Id. at 1527.
32. Id.
Although these cases have prevented former employees from asserting their claims under the ADA, other courts, such as those in the Second and Third Circuits, have held that former employees do have standing.

In *Castellano v. New York*, several retired New York City employees brought separate Title I federal disability claims against the City of New York. These actions were dismissed as “the district court[s] determined that disabled retirees, who no longer ‘hold[[]]’ ‘employment position[s]’... do not fall within the plain language of the ADA.” The employees appealed. The Second Circuit held that such retired employees met the statutory definition of “qualified employees with a disability” and thus had standing to claim discrimination in their benefit packages under the ADA. The Second Circuit commenced its analysis by stating that 42 U.S.C. § 12111(8) “fails to specify when a potential plaintiff must have been a ‘qualified individual with a disability’ in the context of a claim that the provision of retirement or fringe benefits is discriminatory.” The court went on to say that such an interpretation “would also undermine the ADA’s broad remedial purpose to prohibit disability discrimination in all aspects of the employment relationship, leaving disabled retirees unprotected from discrimination.” In support of this conclusion, the court cited the 1997 U.S. Supreme Court decision of *Robinson v. Shell Oil Co.*

In *Robinson*, “[t]he Supreme Court held, consistent with Title VII’s text and broad remedial purpose, that section 704(a) of Title VII... protects former employees... , even though ‘former’ employees are nowhere

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33. *Id.* at 1528 (citations omitted).
34. 142 F.3d 58 (2d Cir. 1998).
35. *Id.* at 66 (alterations in original) (citations omitted) (citing one such district court case).
36. *Id.* at 68 (“[R]etired employees who receive fringe benefits... plainly need not perform the essential functions, or indeed any functions, of their former employment... [to] be entitled under the ADA to non-discriminatory treatment in the provision of... benefits.”)
37. *Id.* at 67 (emphasis added).
38. *Id.* at 68. According to the Court, the purpose of those sections is to “provide comprehensive protection from discrimination in the provision of fringe benefits.” *Id.*
39. *Id.*
41. This section provides “an antiretaliation provision, which prohibits an employer from discriminating against any of his employees or applicants for employment.” *Castellano v. New York*, 142 F.3d 58, 68 (2d Cir. 1998) (quoting 42 U.S.C. § 2000e-3(a) (1994)).
mentioned in that section.”\textsuperscript{42} The Second Circuit in \textit{Castellano} noted that the holding in \textit{Robinson} would apply with equal force to the \textit{Castellano} case because “the definition of ‘employee’ under the ADA parallels that under Title VII and was intended to be given the ‘same meaning.’”\textsuperscript{43} Thus, the court held that former employees do have standing to challenge alleged discrimination under Title I of the ADA.

The Third Circuit, like the Second Circuit, has also held that a former employee has standing to sue under Title I. In \textit{Ford v. Schering-Plough Corp.},\textsuperscript{44} a former employee brought suit against her employer and insurance company alleging disparity between disability benefits. Before addressing the merits of the claim, the court first had to ascertain whether Ford had standing under Title I.\textsuperscript{45} The court noted that the case illustrated an “internal contradiction in the ADA . . . , namely the disjunction between the ADA’s definition of ‘qualified individual with a disability’ and the rights that the ADA confers.”\textsuperscript{46} The court went on to say, “[t]his disjunction . . . causes us to view [the definition] as ambiguous rather than as having an unassailable plain meaning.”\textsuperscript{47} The court ultimately held that:

Title I of the ADA does permit disabled individuals to sue their former employers regarding their disability benefits. . . . [T]he ADA’s proscription of discrimination in fringe benefits generates the need for disabled individuals to have legal recourse against such discrimination and exposes the temporal ambiguity in the ADA’s definition of “qualified individual with a disability.”\textsuperscript{48}

Moreover, the court reasoned that \textit{Robinson} and cases dealing with Title VII of the Civil Rights Act of 1964\textsuperscript{49} are relevant as the “ADA is essentially a sibling statute of Title VII.”\textsuperscript{50} Thus, the court interpreted Title I to permit suits by former employees.\textsuperscript{51}

To add support to the view that former employees have standing, the Eleventh Circuit in \textit{Johnson v. K Mart Corp.} overturned its previous decision in \textit{Gonzales v. Garner Food Services} and held that former employees

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\item \textsuperscript{42} \textit{Id.} at 69.
\item \textsuperscript{43} \textit{Id.} (quoting 29 C.F.R. § 1630, App. at 349 (1997)). There are sections of Title VII where, in context, the use of the term “employee” refers unambiguously to a current employee (for example, those sections addressing salary or promotions). \textit{See Robinson}, 519 U.S. at 343 (discussing sections which permit “different standards of compensation for ‘employees who work in different locations’” (citing 42 U.S.C. § 2000e-2(h) (1994)). However, such an exception was not applicable in this case.
\item \textsuperscript{44} 145 F.3d 601 (3d Cir. 1998).
\item \textsuperscript{45} \textit{Id.} at 604.
\item \textsuperscript{46} \textit{Id.} at 605.
\item \textsuperscript{47} \textit{Id.} at 606.
\item \textsuperscript{48} \textit{Id.} at 608.
\item \textsuperscript{49} 42 U.S.C. § 2000e to 2000e-17 (1994).
\item \textsuperscript{50} \textit{Ford}, 145 F.3d at 606.
\item \textsuperscript{51} \textit{Id.} at 608.
\end{itemize}
employees do indeed have standing to sue under Title I. However, as mentioned before, the opinion was vacated and will be re-heard en banc. Although the case does not have any binding authority, it does provide persuasive reasoning in favor of granting standing.

In Johnson, the Eleventh Circuit stated that the Supreme Court’s decision in Robinson undermined the Gonzales court’s decision that the meaning of the term “employee” plainly excludes a former employee. In Gonzales, the Johnson court noted, “the ADA definition of ‘employee’ was imported from Title VII, [and] now that the Supreme Court has held that the term is ambiguous in [the context of] Title VII, we can no longer maintain that the term ‘employee’ unambiguously excludes former employees in the ADA.”

The court then turned to the analysis that the Gonzales court used in defining a “qualified individual with a disability” and declared that the Gonzales court “relied, without elaboration, on the statutory definition.” The court also discussed the Ninth Circuit’s decision in Weyer v. Twentieth Century Fox Film Corp., which declared that former employees do not have standing. In that case, the Ninth Circuit determined “that the use of the term ‘qualified individual’ and the use of the present tense forms of the verbs ‘hold’ and ‘desire’ [in 42 U.S.C. § 12111(8)] reveal congressional intent to ‘unambiguously exclude[ ] totally disabled persons’ and ‘to unambiguously exclude former employees.’” Furthermore, the Weyer court stated that “the word ‘holds’ refers exclusively to current employees and the term ‘desires’ refers exclusively to applicants. “Thus, the Ninth Circuit found that . . . Title I is ‘well designed to help people get and keep jobs, not to help those no longer able to work get disability pay.”

In response, the Eleventh Circuit in Johnson stated that the court “in Gonzales and the Ninth Circuit in Weyer . . . found more clarity in the language of § 12111(8) than [was] justified.” The court stated:

Although, “at first blush,” the use of the words “qualified” and “holds or desires” may appear to refer to applicants and current employees, this initial impression does not withstand the level of scrutiny required by Robinson, particularly in light of the fact that at least some former employees were intended beneficiaries of

53. Johnson, 273 F.3d at 1044.
54. Id. at 1046.
55. 198 F.3d 1104 (9th Cir. 2000).
56. Johnson, 273 F.3d at 1046 (quoting Weyer, 198 F.3d at 1112) (omission in original).
57. Id. (quoting Weyer, 198 F.3d at 1112).
58. Id. at 1047.
Title I—that is, victims of discriminatory discharge and those who would benefit from reinstatement. Consequently, the court found that the decision in Robinson, "and the evidence that Title I protects former employees from discriminatory discharge and provides them the remedy of reinstatement," were enough to overturn its previous view on the definition of a "qualified individual with a disability." Thus, the court held that a "former employee, is entitled to bring a claim against his former employer under . . . Title I."62

Although a handful of courts have permitted former employees standing to assert a claim for the disparate treatment that they receive from their employers' long-term disability plans, these cases present something of a Pyrrhic victory. The reason, as will be shown in the next section of this article, is that most of the circuit courts have held that the ADA does not require any type of parity between physical and mental disability benefits.

III. CIRCUIT COURT DECISIONS

The most common avenue that the mentally disabled have traveled is to argue that the long-term disability plans provided by employers and administered by carriers violate the ADA by not providing the same level of benefits for mental disabilities that they do for physical disabilities. However, nearly all of the circuit courts that have addressed this issue have held that the ADA does not require the same level of benefits for mental and physical disabilities.

This section of the article discusses four key circuit court decisions, all of them holding that: (1) the Supreme Court decisions in Alexander v. Choate63 and Traynor v. Turnage64 are relevant precedent and are to be interpreted only to prohibit discrimination between disabled and non-disabled individuals; (2) the passage of the Mental Health Parity Act proves that Congress did not intend any sort of parity for individuals within the protected class (disabled individuals) when it first passed the ADA; (3) the interpretation of the Senate and House Committee reports of the ADA support the claim that there is no violation of the ADA when it comes to

59. Title I of the ADA protects employees from discriminatory discharge. See 42 U.S.C. § 12112(a) (2000) (prohibiting discrimination of disabled individuals). Title I also authorizes remedial action, including reinstatement. See 42 U.S.C. § 12117(a) (providing the basis of powers, remedies, and procedures against discrimination on disability).
60. Johnson, 273 F.3d at 1047.
61. Id.
62. Id. at 1048.
the disparity among the disabilities; and (4) the EEOC's interim policy manual also supports the finding that the disparity between mental and physical disability plans does not violate the ADA.

In 1997, the Sixth Circuit Court of Appeals heard Parker v. Metropolitan Life Insurance Co.,\(^6\) one of the first cases that dealt with the disparity of benefits among disabled persons. Ouida Sue Parker participated in a long-term disability plan\(^6\) offered by her employer, Schering-Plough Health Care Products, Inc. ("Schering-Plough").\(^7\) During her employment, Parker became disabled due to severe depression and received benefits under the plan.\(^8\) Pursuant to the terms of the plan, Schering-Plough terminated her benefits.\(^9\) After many unsuccessful attempts to get her benefits reinstated, she filed an action alleging violations of Titles I\(^7\) and III\(^7\) of the ADA. The district court dismissed both of Parker's claims.\(^7\) On appeal, the Sixth Circuit held that:

\[T\]he ADA does not mandate equality between individuals with different disabilities. Rather, the ADA prohibits discrimination between the disabled and the non-disabled. . . . Because all employees . . ., whether disabled or not, received the same access to the long-term disability plan, neither the defendants nor the plan discriminated between the disabled and the able bodied.\(^7\)

In support of this holding, the Sixth Circuit cited Traynor v. Turnage.\(^7\) In that case, the United States Supreme Court examined the issue of whether a benefit to a certain class of disabled persons and not to

65. 121 F.3d 1006 (6th Cir. 1997).
66. Under this plan, an individual who was deemed to be totally disabled due to a mental or nervous disorder could receive benefits for up to twenty-four months. However, for physical disorders, the plan provided for benefits until the individual reached the age of sixty-five. *Id.* at 1008.
67. *Id.*
68. *Id.*
69. *Id.*
70. See 42 U.S.C. § 12112(a) (2000) ("No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."). Many courts have held that "other terms, conditions, and privileges of employment" include long-term disability benefits. See also 42 U.S.C. § 12112(b)(2) (2000) (explaining that the term "discriminate" includes "participating in a contractual or other arrangement or relationship" that has the effect of discrimination).
72. *Parker*, 121 F.3d at 1008.
73. *Id.* at 1015-16.
other classes violated the Rehabilitation Act. Specifically, the Court was confronted with the issue of whether the "GI Bill," could deny the plaintiff an extension because the Veteran's Administration concluded that his alcoholism constituted "willful misconduct." The Supreme Court held, "[t]here is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons." The Sixth Circuit in Parker interpreted this to mean that the ADA, like the Rehabilitation Act, only prohibits discrimination between the disabled and the non-disabled.

The Sixth Circuit continued its analysis in determining that the defendant's plan does not discriminate by stating that:

[The] passage of the Mental Health Parity Act [of 1996] suggests Congress believed that the ADA neither governs the content of insurance policies nor requires parity between physical and mental illnesses; thus, passage of a law requiring such parity was required if Congress desired insurance carriers to cease [the disparity] in insurance policies.

Accordingly, the Sixth Circuit affirmed the judgment of the district court.

One of the next cases to deal with this issue was Ford v. Schering-Plough Corp., which came before the Third Circuit. Colleen Ford was an employee of Schering-Plough and eventually became disabled by virtue of a mental disorder. During her employment, she participated in an employee welfare benefits plan offered by her employer. When her benefits were exhausted, she filed a complaint against Schering alleging discrimination in violation of the ADA. The district court dismissed her claims and she appealed to the Third Circuit, which focused its analysis on the issue of "whether the disparity between mental and physical disability

75. Id. at 537 (citing Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2002)).
76. Veterans' Readjustment Benefit Act of 1966, 38 U.S.C. § 1661 (2000). This bill provides that the assistance benefits "must be used within ten years following the veteran's discharge; however, if the veteran was unable to utilize his or her benefits within the ten year period due to 'a physical or mental disability which was not the result of his or her own willful misconduct,' the veteran may obtain an extension." Parker, 121 F.3d at 1016 (citing Traynor, 485 U.S. at 538) (citing 38 U.S.C. § 1662(a)(1)).
77. Parker, 121 F.3d at 1016.
78. Traynor, 485 U.S. at 549.
79. Parker, 121 F.3d at 1015.
80. Id. at 1018.
81. 145 F.3d 601 (3d Cir. 1998).
82. This plan, like the one in Parker, provided that benefits for physical disabilities would continue until age sixty-five so long as the physical disability persisted. As for mental disabilities, the plan stopped benefits after two years if the employee was not hospitalized. Id. at 604.
83. Id. at 603.
84. Id.
benefits violates the ADA. The Third Circuit held that:

While the defendants' insurance plan differentiated between types of disabilities, this is a far cry from a specific disabled employee facing differential treatment due to her disability. Every Schering employee had the opportunity to join the same plan . . . [thus] every Schering employee received equal treatment. So long as every employee is offered the same plan . . . then no discrimination has occurred even if the plan offers different coverage for various disabilities. The ADA does not require equal coverage for every type of disability; such a requirement . . . would destabilize the insurance industry in a manner definitely not intended by Congress when passing the ADA.

The Third Circuit stated that its analysis was supported by United States Supreme Court and Third Circuit precedent interpreting the Rehabilitation Act ("the Act"). Writing for the Third Circuit, Judge Robert E. Cowen cited the Supreme Court case Alexander v. Choate as precedent for their decision. In that case, the Tennessee Medicaid program reduced the number of inpatient hospital days that it would pay for. It was claimed that the reduction would have a disproportionate effect on handicapped individuals as they require longer inpatient care than non-handicapped individuals.

In response, the Supreme Court held that the limit on inpatient hospital care was facially neutral and "did not 'distinguish between those whose coverage will be reduced and those whose coverage will not.'" The Court's rationale was that the handicapped would not suffer from discrimination because both classes were "subject to the same durational limitation." Just as the Sixth Circuit did in Parker, Judge Cowen also cited Traynor v. Turnage as Supreme Court guidance on this issue.

In further support of its decision, the Third Circuit stated that the cases that determined that the disparity between disabilities was not a violation of

85. Id. at 604.
86. Id. at 608.
89. Ford, 145 F.3d at 608.
90. Id. (citing Alexander 469 U.S. at 290).
91. Id. (quoting Alexander, 469 U.S. at 302).
92. Id. (quoting Alexander, 496 U.S. at 302).
the ADA were supported by the ADA’s legislative history. The pertinent section in support of this interpretation is contained in the Senate Labor and Human Resources Committee report which states:

[Employers may not deny health insurance coverage completely to an individual based on the person’s diagnosis or disability. For example, while it is permissible for an employer to offer insurance policies that limit coverage for certain procedures or treatments . . . a person who has a mental health condition may not be denied coverage for other conditions such as for a broken leg or for heart surgery because of the existence of the mental health condition.]

In addition, the Third Circuit believed that Congress did not intend for the ADA to mandate parity due to the defeat of an amendment to the Health Insurance Portability and Accountability Act of 1996, which would have commanded parity between mental and physical illnesses. The court stated that “[s]uch an amendment would have been unnecessary altogether if the ADA already required such parity.”

Lastly, the Third Circuit agreed with the Seventh Circuit’s discussion in EEOC v. CNA Insurance Companies, when the Seventh Circuit stated that, “[w]ithout far stronger language in the ADA supporting [parity between mental and physical disabilities], we are loath to read into it a rule that has been the subject of vigorous, sometimes contentious, national debate for the last several years.” Consequently, the Third Circuit affirmed the order of the district court in dismissing Ford’s complaint.

In 1999, the U.S. Court of Appeals for the Fourth Circuit dealt with this issue of disparity in the context of Title II of the ADA in Rogers v. Department of Health & Environmental Control. Major Rogers was employed by the South Carolina Department of Health and Environmental Control (“DHEC”) and was a participant in a long-term disability plan sponsored by the State of South Carolina (“the State”). After Rogers was diagnosed with a panic-anxiety disorder, he applied for long-term benefits

96. Ford, 145 F.3d at 610.
99. Ford, 145 F.3d at 610; See also 104 CONG. REC. S3587-89 (discussing the proposed amendment and documenting the vote that defeated it).
100. Ford, 145 F.3d at 610.
101. Id. at 609 (quoting EEOC v. CNA Ins. Cos., 96 F.3d 1039, 1044 (7th Cir. 1996)).
102. Ford, 145 F.3d at 614.
103. 174 F.3d 431 (4th Cir. 1999).
104. Similar to the plans in Parker and Ford, this plan provided for physical disability benefits until age sixty-five and mental disability benefits for one year. Id. at 432.
105. Id.
under the plan. He began receiving the benefits and when they ended after one year, he sued claiming that the State’s plan discriminated against him because of his mental disability. The district court found that the disparity in benefits was not wrongful discrimination under the ADA. Consequently, Rogers appealed.

Title II of the ADA “applies to ‘public entities,’ which include states and their departments and agencies.” Title II states that “no qualified individual with a disability shall, by reason of such disability, [1] be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or [2] be subjected to discrimination by any such entity.” In dismissing Rogers’ complaint, the court stated that South Carolina fulfilled the first part of Title II in that “Rogers was not ‘excluded from participation in or denied the benefits of’ the long-term disability plan . . . [as] the State provided the same plan to all of its eligible employees, and Rogers received his allotted benefits.”

The last case to be discussed is the Fourth Circuit’s decision in Lewis v. K Mart Corp. In 1984, Harold Lewis was hired by K Mart Corporation (“K Mart”). During his employment, he participated in a long-term disability benefit plan. Over the course of his employment, Lewis had suffered from severe depression and ultimately, his condition worsened to the point where he had to take a leave of absence.

Lewis initially received his benefits, but they were terminated two years later as his condition was classified as mental in nature. Sometime later, Lewis filed an action alleging that K Mart’s plan violated Title I. The district court conducted a bench trial and, surprisingly, found in favor of Lewis, providing: “(1) a declaration that the two-year cap on disability benefits for employees disabled by mental illness violates Title I . . . of the ADA; and (2) a permanent injunction mandating the continued payment of monthly benefits . . . until he reaches age sixty-five.” Subsequent to this decision, K Mart filed an appeal to the Fourth Circuit.

106. Id.
107. Id.
108. Id. at 433 (construing 42 U.S.C. § 12131 (1994)).
110. Id. (quoting 42 U.S.C. § 12132 (1994)).
111. 180 F.3d 166 (4th Cir. 1999).
112. Id. at 168.
113. Id. This plan, like all the others discussed in this article, capped disability benefits for mental disabilities at two years, but benefits for physical disabilities were stopped when the participant turned sixty-five. Id.
114. Id.
115. Id.
116. Id.
118. Id. at 169.
The Fourth Circuit commenced its holding with the statement that it had already resolved this question in the context of Title II of the ADA in Rogers. 119 The court determined that "no material distinction exist[ed] between Title I . . . and Title II . . . of the ADA." 120 As such, the reasoning in Rogers would equally apply in resolving Lewis and consequently, the court held that "Title I . . . of the ADA does not require a long-term disability plan . . . to provide the same level of benefits for mental and physical disabilities." 121

In summary, the Third, Sixth, and Fourth Circuit Courts of Appeals have all held that the ADA does not require long-term disability plans to provide the same level of benefits for mental and physical disabilities. These courts have determined that even though the Supreme Court has never specifically ruled on this issue, Alexander and Traynor provide the basis for supporting the legality of the inequality between the disabilities. The circuit courts have also determined that the legislative history of the ADA sustains the notion that Congress never intended the ADA to provide parity. In essence, the courts are implying that without stronger language by Congress, they will continue to find that the ADA does not mandate any type of parity between the disabilities.

IV. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION’S POSITION

As mentioned in the discussion of the Fourth Circuit’s opinion in Rogers, the EEOC issued an interim policy guidance manual on the application of the ADA to disability-based distinctions in employer-provided health insurance in 1993. 122 Generally, this interim policy manual has dictated that a lower level of benefits for mental conditions is not a type of distinction that the ADA prohibits. 123

The purpose, as set forth in the notice, states that the “interim enforcement guidance sets forth the Commission’s position on the application of the [ADA] to disability-based distinctions.” 124 The pertinent part of the manual reads:

Insurance distinctions that are not based on disability, and that are applied equally to all insured employees, do not discriminate

119. Rogers v. Dep’t of Health & Envtl. Control, 174 F.3d 431, 431 (4th Cir. 1999) (holding that Title II of the ADA does not require the state to provide the same level of benefits for mental and physical disabilities in its long-term disability plan).
120. Lewis, 180 F.3d at 170.
121. Id.
122. See EEOC Notice, No. 915.002 (June 8, 1993), available at http://www.eeoc.gov/policy/docs/health.html (showing that although this is an interim policy, it has and will remain in effect because it has yet to be rescinded or superseded).
123. Id.
124. Id.
on the basis of disability and so do not violate the ADA. For example, a feature of some employer provided health insurance plans is a distinction between the benefits provided for the treatment of physical conditions on the one hand, and the benefits provided for the treatment of 'mental/nervous' conditions on the other. Typically, a lower level of benefits are provided for the treatment of mental/nervous conditions than is provided for the treatment of physical conditions. . . . Consequently, although such distinctions may have a greater impact on certain individuals with disabilities, they do not intentionally discriminate on the basis of disability and do not violate the ADA.125

As a result of this interim policy manual, the EEOC initially took the position that the ADA does not prohibit disparity between mental and physical disability benefits. This position would only prevent discrimination between the disabled and the non-disabled. Because of the agency’s narrow construction of the ADA insurance provision, it has been stated that the interim policy is “both a boon for insurers and a substantial detriment to persons with serious mental illnesses who confront discriminatory insurance coverage.”126 However, it seems that the EEOC has reconsidered its original stance. Its new position, which will be discussed in further detail, was revealed to the Eleventh Circuit Court of Appeals through an amicus curiae brief filed in Johnson v. K Mart Corp127 and again in Lewis v. Aetna Life Insurance Company.128 In Lewis, the defendants argued that the ADA does not prohibit disparity between mental and physical disabilities, pointing to the EEOC’s position that the health insurance distinctions between mental and physical illness do not violate the ADA.129 However, the district court judge responded, “[t]o the extent that this was ever the position of the EEOC with regard to disability benefit plans, it does not appear to be so now.”130 Hopefully, with this recent change in position, the EEOC will issue a final policy guidance manual.

Although courts are not bound by the EEOC’s interpretive guidelines, the guidelines “do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”131

Because of substantial deference that courts have accorded the EEOC

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125. Id. (citations omitted).
127. 273 F.3d 1035 (11th Cir. 2001).
129. Id.
130. Id. at 1168 n.9.
regulations, a final policy manual on the subject could be used to persuade courts to change their stance and find that the disparity in long-term benefits is a type of discrimination that needs to cease.

V. OTHER AVENUES USED BY PLAINTIFFS

A. Does the Disparity Between Mental and Physical Benefits Violate the Equal Protection Clause?

Despite the interim policy manual by the EEOC and the decisions by many of the circuit courts, plaintiffs have tried other arguments to persuade the courts to require the same level of benefits for mental and physical disabilities. One avenue used has been to argue that the distinctions between mental and physical benefits violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Two cases have involved plaintiffs who have done exactly this. However, both were unsuccessful in their attempts to use the Equal Protection Clause to achieve parity.

The first case was Thompson v. Roberson. Deborah Thompson, who suffered from Tourette's Disorder, worked as an employee for the State of Indiana. Initially, she received short-term disability benefits and then obtained long-term benefits. Under Indiana's benefits plan, an individual could only receive long-term benefit payments for a maximum duration of four years. Before the Indiana legislature passed the plan, it determined that due to the cost and increased chance for fraudulent claims, it would limit the short-term and long-term benefit period for mental and/or nervous disabilities to a maximum period of twenty-four months. Because of this limitation, Thompson sought a declaration of unconstitutionality regarding the benefit program.

The United States District Court for the Southern District of Indiana began its analysis by setting forth the appropriate standard for an equal protection violation. The court determined that "[d]isabled individuals—including the mentally disabled—are not members of a suspect class,"

134. Id. at *3.
135. Id.
136. Id. at *2.
137. Id. at *1-2.
138. Id. at *4.
139. Thompson v. Roberson, No. TH00-099-C-M/H, 200 WL 33281120, at *5 (S.D. Ind., Dec. 4, 2000). In support of this assertion, the Court notes that "mentally retarded
thus, the rational basis standard was the most appropriate standard of review.\textsuperscript{140}

To support their positions, both parties cited \textit{Geduldig v. Aiello}.\textsuperscript{141} "In \textit{Geduldig}, the plaintiffs challenged the constitutionality of a California [benefits] program that . . . excluded certain disabilities resulting from pregnancy.\textsuperscript{142} The Supreme Court of the United States held that there was no violation of the Equal Protection Clause by stating:

We cannot agree that the exclusion of [certain] disabilit[ies] from coverage amounts to invidious discrimination under the Equal Protection Clause. . . . This Court has held that, consistently with the Equal Protection Clause, a State 'may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind . . . . The Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all.'\textsuperscript{143}

The State of Indiana contended that "because all state employees receive[d] the same benefit package and the same coverage, there simply [was] no disparate treatment whatsoever."\textsuperscript{144} The court agreed, holding that the plaintiffs "were not denied eligibility in the program because of their mental disabilities; instead, they happen[ed] to suffer from a condition that [was] outside the state program's protection . . . [and, thus, did not have] a valid claim under the Equal Protection Clause."\textsuperscript{145}

Moreover, the court remarked that even if they accepted the plaintiff's argument, it would not end their inquiry as a "'State [may] single out the disabled for different treatment so long as it has a rational or legitimate purpose.'"\textsuperscript{146} In conclusion, the court declared:

Indiana's desire to control its costs and to control the expenditure of public funds is a rational basis for its classification scheme. . . . [This] court cannot hold legislation in violation of the Equal Protection Clause simply because it believes a better solution exists. Whether the State should provide longer coverage for mental disabilities is the type of policy judgment that the Court

persons, a subset of the disabled class, [are] neither a suspect nor a quasi-suspect class." \textit{Id.} (citing \textit{City of Cleburne v. Cleburne Living Ctr.}, 473 U.S. 432, 446 (1985)).

\textsuperscript{140} Thompson, 2000 WL 33281120, at *5. The rational basis standard is defined to "uphold a law as valid under the Equal Protection Clause if it bears a reasonable relationship to the attainment of some legitimate governmental objective." Black's Law Dictionary 1269 (7th ed. 1999).

\textsuperscript{141} 417 U.S. 484 (1974).

\textsuperscript{142} Thompson, 2000 WL 33281120, at *6.

\textsuperscript{143} \textit{Id.} (quoting \textit{Geduldig}, 417 U.S. at 494-95) (internal citations omitted).

\textsuperscript{144} \textit{Id.} at *7.

\textsuperscript{145} \textit{Id.}

\textsuperscript{146} \textit{Id.} at *8 (quoting Stevens v. Illinois Dept. of Transp., 210 F.3d 732, 738-39 (7th Cir. 2000)).
simply is not allowed to impose under rational basis scrutiny. Instead, such decisions are entrusted to the Indiana legislature.\footnote{Id. at *9.}

A second case dealing with the Equal Protection Clause is \textit{Currie v. Group Insurance Commission.}\footnote{147 F. Supp.2d 30 (D. Mass. 2001).} This case involved a class action suit brought by Valjeanne Currie “alleging that the [Group Insurance Commission]'s Long Term Disability ("LTD") policy violate[d] her constitutional . . . rights.”\footnote{Id. at 31.} Starting in 1985, Currie worked for the Commonwealth of Massachusetts.\footnote{Id. at 32.} In 1999 she was forced to leave work long-term as she suffered from schizophrenia.\footnote{Id.} She applied for long-term disability benefits and was eventually notified that her long-term benefits would cease after one year if she were not hospitalized.\footnote{Id. at 33.} She filed suit, and a preliminary injunction to continue the benefit payments was ordered by the state Superior Court.\footnote{Id.}

In hearing the case, the United States District Court for Massachusetts began its analysis of the plaintiffs' constitutional claims by stating that “[t]he touchstone [of the case was whether there was a] rational relationship between the underwriting decisions made and the legitimate ends that were sought.”\footnote{Currie v. Group Ins. Comm'n, 147 F.Supp. 2d, 30, 38 (D. Mass. 2001).} In essence, the heart of the “plaintiffs' equal protection claim [was] that... the plan treat[ed] as unequal those mentally disabled patients who [were] committed to an institution and those who [were] treated on an outpatient basis”.\footnote{Id.} In response, the court held:

[T]here is strong evidence that the disputed limitations of LTD coverage for mental disabilities are rationally related to the goal of protecting the program's overall viability. Additionally, it is certainly true that maintaining a workable disability plan for the Commonwealth's employees, accomplished in part by keeping premiums at an affordable level, is a legitimate state interest. Therefore . . . defendants have not set up a system of administering disability benefits that violates the Equal Protection Clause.\footnote{Id.}

\textbf{B. Classifying a Mental Disability as a Physical Disability}

Another avenue, which has recently been successful in the court

\begin{itemize}
\item \footnote{147 F. Supp.2d 30 (D. Mass. 2001).}
\item \footnote{Id. at 31.}
\item \footnote{Id. at 32.}
\item \footnote{Id.}
\item \footnote{Id. at 33.}
\item \footnote{Id.}
\item \footnote{Currie v. Group Ins. Comm’n, 147 F.Supp. 2d, 30, 38 (D. Mass. 2001).}
\item \footnote{Id.}
\item \footnote{Id.}
\end{itemize}
system, has been to either classify a mental disability, such as bipolar disorder, as a physical disability, or to argue that the term "mental illness" is ambiguous as used in a given policy. This technique would then allow an individual to receive benefits equal to those of individuals who have a physical disability instead of having the benefits capped. When a policy is ambiguous on its face, courts have concluded that some mental illnesses do fall outside the definition in the policy and have thus treated those illnesses as physical disabilities. 157

One case that dealt with a reclassification of a disability was *Arkansas Blue Cross & Blue Shield, Inc. v. Doe.* 158 John Doe and his minor daughter were insured under a group health insurance policy issued by his law firm. 159 Although the group policy provided broad benefits for physical illnesses, it limited coverage for mental conditions. 160 The policy did not define mental or physical disabilities. "[Doe’s] daughter was hospitalized and treated for . . . bipolar affective disorder." 161 Doe sued for recovery of the full policy benefits for physical illnesses since his daughter's treating psychiatrist stated that the disorder was physical. 162 The Court of Appeals of Arkansas stated, "[w]e agree with the trial court that the issue for its determination was whether bipolar affective disorder is a physical illness or a mental or psychiatric condition within the terms of the policy." 163 The trial court found that, "the illness of Jane Doe is a physical condition within the meaning of the Blue Cross contract" and not a mental one, and the appeals court would not disturb such a finding. 164

A second case, dealing with ambiguous terminology, is *Kunin v. Benefit Trust Life Insurance Co.* 165 In this case, Benefit Trust administered a plan that limited payment of medical benefits for mental illnesses to $10,000 per calendar year. 166 "Kunin's son . . . received treatment for

157. See, e.g., Phillips v. Lincoln Nat'l Life Ins. Co., 978 F.2d 302, 314 (7th Cir. 1992) (upholding summary judgment in favor of insured on grounds that the term "mental illness" was sufficiently analogous to include organic brain syndrome); Akins v. Washington Metro Area Transit Auth., 729 F. Supp. 903, 906 (D.D.C. 1990) (holding that policy is ambiguous and appears to cover mental disabilities that are caused by physical injury, which included depression following a stabbing heart surgery); Malerbi v. Cent. Reserve Life of North America Ins. Co., 407 N.W.2d 157, 163 (Neb. 1987) (affirming trial court's determination that organic brain syndrome was not a mental illness for purposes of insurance policy when the policy does not define mental illness).
159. Id. at 430.
160. Id.
161. Id. at 431.
162. Id.
163. Id. at 432.
164. Id. (citing the lower court opinion).
165. 910 F.2d 534 (9th Cir. 1990).
166. Id. at 535.
autism for approximately thirty days... [in which he] incurred $54,696.96 in hospital bills."\textsuperscript{167} Benefit Trust refused to pay any amount in excess of the $10,000.\textsuperscript{168} The Ninth Circuit determined that the term "mental illness" as used in the policy was ambiguous, at least with respect to autism.\textsuperscript{169} Accordingly, the court invoked the rule of \textit{contra proferentem}\textsuperscript{170} and construed the ambiguity against the insurance company.\textsuperscript{171} Therefore, the court upheld the trial court's determination that autism was not a mental illness for purposes of the policy and, in doing so, required the insurer to pay for the treatment of autism in full.\textsuperscript{172} In reaching this decision, the court relied heavily on the testimony of the Kunins' expert witness who "testified that 'mental illness' refers to 'a behavioral disturbance with no demonstrable organic or physical basis.'"\textsuperscript{173}

More recently, the holding in \textit{Fitts v. Federal National Mortgage Ass'n},\textsuperscript{174} was so significant that it was a headline in the Wall Street Journal.\textsuperscript{175} In 1995, after Fitts was diagnosed with a bipolar disorder, she applied for disability benefits.\textsuperscript{176} The policy defined mental illness as a "mental, nervous or emotional disease[ ] or disorder[ ] of any type."\textsuperscript{177} Fitts was informed that she would only receive benefits for twenty-four months because of her mental illness.\textsuperscript{178} After the defendants rejected her challenge to the administration of payments, she filed suit claiming the Federal National Mortgage Association violated the Employee Retirement Income Security Act of 1974 (ERISA).\textsuperscript{179}

In her complaint, Fitts maintained that her disorder was physical in

\textsuperscript{167.} Id.
\textsuperscript{168.} Id.
\textsuperscript{169.} Id. at 541.
\textsuperscript{170.} This term is used in connection with the construction of written documents to the effect that an ambiguous provision is construed most strongly against the persons who selected the language. Black's Law Dictionary 327 (6th ed. 1990). On this issue, the court stated that, "[i]nsurance contracts generally spell out in inordinate detail the meaning of terms that lack a fixed meaning. Great efforts are ordinarily made to eliminate the natural ambiguity that exists in so many of the words and phrases we use daily. In this policy, however, Benefit Trust made no attempt whatsoever to describe the scope of a term that has no precise or generally accepted definition." \textit{Kunin v. Benefit Trust Life Ins. Co.}, 910 F.2d 534, 541 (9th Cir. 1990).
\textsuperscript{171.} \textit{Kunin}, 910 F.2d at 539.
\textsuperscript{172.} Id. at 541-42.
\textsuperscript{173.} Id. at 536.
\textsuperscript{176.} \textit{Fitts}, 191 F. Supp. 2d at 69.
\textsuperscript{177.} Id (omissions in original).
\textsuperscript{178.} Id.
\textsuperscript{179.} Id.
She argued, with the support of her expert witness, "that that she [was] genetically predisposed to develop bipolar disorder because both her father and brother showed symptoms . . . . [and that] brain scans indicat[ed] that the parietal lobe on the left side of her brain ha[d] atrophied beyond what would be expected of a person of her age." It was these physical changes that took her bipolar disorder out of the realm of a mental disability. To counter this, the "[d]efendants argue[d] that bipolar disorder plainly qualifies as a 'mental, nervous, or emotional disease or disorder of any type,'" and that treatment with psychotropic drugs is evidence that bipolar disorder is a mental illness.

After hearing these arguments, the district court stated that "[d]efendants' argument was without merit because the . . . definition merely re-phrases the term mental illness by using equally vague terms." "In sum . . . [w]hile mere disagreement does not suffice to create ambiguity, the lack of consensus on the meaning of mental illness and the prevalence of different definitions for the term indicate that more than one reasonable interpretation of the term exists." Accordingly, the court held the definition was ambiguous and Fitts was "entitled to judgment on her ERISA claim."

Even though this case, and other cases like it, has enjoyed a courtroom victory in the battle for long-term disability benefits, the reality of this newfound success will eventually catch up with it. Professor Brian Shannon of the Texas Tech University School of Law summed up this reality by stating: "Because insurance policies are creatures of contract law, insurers may simply react to adverse court decrees by amending their policies to assure the continued discrimination against persons suffering from serious mental illnesses." Professor Shannon believes these policy amendments would not only set forth specific exclusionary language to limit coverage, but also provide a clear and unambiguous definition of what constitutes a mental illness.
VI. FAVORABLE DECISIONS FOR THE MENTALLY DISABLED

As was done in *Parker, Ford, Rogers,* and *Lewis,* plaintiffs will most frequently argue that the disparity between mental and physical disabilities violates Title I, II, or III of the ADA. However, as explained in Part II of this article, virtually every decision has held that the ADA does not mandate parity. Although most courts have followed the current trend of the Third, Fourth and Sixth Circuits, a few have disagreed and provided very persuasive arguments to the contrary. These arguments include a conflicting interpretation of the legislative history on the ADA and citation to a Supreme Court opinion that seems to prohibit discrimination against disabled members of a class. One example of a deviation from the current trend is the district court decision in *Lewis v. Aetna Life Insurance Co.*

In this case, United States District Judge Brinkema held that “the ADA prohibits K Mart from offering a ‘qualified individual with a disability’ disability benefits that discriminate on the basis of that disability,” and that “an insurer may not provide different levels of coverage for mental, as opposed to physical, disabilities, unless such classification is grounded on sound actuarial principles.” Judge Brinkema determined:

> Both a decision to deny coverage on the basis of mental disability and to provide inferior coverage for mental disabilities target the mentally disabled for inferior treatment. In both cases, an insurer has subjected the mentally disabled individual to treatment inferior to that accorded to others solely on the basis of that individual’s disability. . . . Defendants’ attempt to categorize such discrimination as discrimination between categories of disability rather than discrimination between the disabled and the non-disabled fails here. Under [the] defendants’ logic, an employer could hire an employee with a physical disability over a more qualified employee with a mental disability solely because of the mental disability without violating the ADA, simply because both applicants were members of the protected class.

> . . . [T]he ADA prohibits discrimination on the basis of an individual’s particular disability. Thus, whether a disabled person is treated differently than a non-disabled person or another disabled person, the same wrong has occurred. That is, the person has been discriminated against because of his...

189. 982 F. Supp. 1158 (E.D.Va. 1997). This is the trial court decision of the previously analyzed Fourth Circuit case, *Lewis v. K Mart Corp.,* 180 F.3d 166 (4th Cir. 1999); see *supra* notes 109 to 119 and accompanying text.


191. *Id.* at 1169.
particular disability."

Judge Brinkema noted that such a holding was supported and affirmed within the context of age discrimination in the Supreme Court decision of *O'Connor v. Consolidated Coin Caterers Corp.* Judge Brinkema explained:

"The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age." . . . [T]he [Age Discrimination in Employment Act] "does not ban discrimination against employees because they are aged 40 or older; it bans discrimination because of their age, but limits the protected class to those who are 40 years or older." Similarly, the ADA must be construed to prohibit discrimination against individuals based on their specific disability, and not merely to prohibit discrimination that negatively affects the disabled as a class.

In essence, it has been argued that if an "individual receives benefits for a shorter period of time because her disability is a mental disability versus a physical disability, she has 'lost out' because of her disability and should have a claim" under the ADA. This conclusion and corresponding analysis is compelling because the ADA was created to protect persons with disabilities and prohibit the discrimination that can arise because of such a disability. Such a conclusion only furthers "Congress' goal to 'bring individuals with disabilities into the economic and social mainstream of American life.'"

A second case to disagree with the trend of the circuit courts was *Johnson v. K Mart Corp.* This case was significant because the holding by the Eleventh Circuit was the first of its kind within the U.S. Circuit Court of Appeals. On November 21, 2001, the Eleventh Circuit held that the denial of disability benefits because an individual is mentally disabled

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192. *Id.* at 1168 (emphasis added); see also *Conners v. Me. Med. Ctr.* 42 F. Supp. 2d 34, 54-55 (D. Maine 1999) (making note of the *Lewis* court decision that the ADA prohibits discrimination among the disabled as well as between the disabled and non-disabled in contrast to other decisions).
197. 273 F.3d 1035 (11th Cir. 2001), *vacated, rehe'g en banc granted, id.* at 1070. In 2002 the circuit court declined to hear the case until the bankruptcy court disposed of K Mart's bankruptcy petition. 281 F.3d 1368, 1368 (11th Cir. 2002). As of January 2006, a rehearing has not taken place. See supra note 11.
is a type of discrimination that is prohibited by the ADA.\textsuperscript{198} It should be noted that this decision was short-lived, as the court vacated the opinion and granted an order requiring a rehearing en banc on December 19, 2001.\textsuperscript{199} Even though the court has yet to re-hear this case, the initial monumental holding has provided hope for those who have been denied benefits for their mental health disabilities. Because of the persuasive arguments set forth in the decision, this case will be discussed in detail. In fact, a federal district court in Massachusetts found its logic to be worth considering in its own decision on the subject.\textsuperscript{200}

In the \textit{Johnson} case, Mr. Johnson worked for K Mart and sometime during his employment, he was diagnosed with severe depression and emotional illness.\textsuperscript{201} His physician soon advised him to stop working and he then began to receive long-term disability benefits from K Mart.\textsuperscript{202} Shortly before his benefits ended, Johnson filed a charge of discrimination with the EEOC and was issued a right-to-sue letter. He then filed a complaint in the United States District Court for the Middle District of Florida in February 1999.\textsuperscript{203} K Mart filed a motion to dismiss, which was granted by the district court. Johnson then filed a timely appeal.\textsuperscript{204}

The Eleventh Circuit started its analysis with 42 U.S.C. § 12112(a), the general anti-discrimination provision of Title I.\textsuperscript{205} Next, the court reviewed the amicus curiae brief filed by the EEOC. In reversing its initial position, the EEOC contended that the district court in this case erred by arguing that K Mart’s long-term disability plan was discriminatory because “it precludes disabled individuals with mental illnesses from obtaining benefits that are available to all other disabled individuals.”\textsuperscript{206} In support of its position, the EEOC argued that the U.S. Supreme Court in \textit{Olmstead v. L.C.}\textsuperscript{207} “made [it] clear that the concept of discrimination embodied in the

\begin{itemize}
\item \textsuperscript{198} Johnson, 273 F.3d at 1056.
\item \textsuperscript{199} \textit{Id.} at 1070.
\item \textsuperscript{200} Iwata v. Intel Corp., 349 F. Supp. 2d 135, 148 (Mass. Dist. Ct. 2004) (holding that disparity of benefits provided for mental and physical disabilities could violate the ADA if motivated by stereotypes about mental disability).
\item \textsuperscript{201} Johnson, 273 F.3d at 1037
\item \textsuperscript{202} \textit{Id.} These benefits came from K Mart’s long-term disability plan, which provided benefits to employees who were disabled due to a physical illness until age sixty-five, whereas an employee who had a mental illness could only receive benefits for two years. \textit{Id.}
\item \textsuperscript{203} \textit{Id.}
\item \textsuperscript{204} \textit{Id.} at 1038.
\item \textsuperscript{205} Americans with Disabilities Act of 1990 § 102, 42 U.S.C § 12112 (1990).
\item \textsuperscript{206} Johnson, 273 F.3d at 1051.
\item \textsuperscript{207} 527 U.S. 581 (1999). In this case “two mentally ill women were housed in a Georgia state psychiatric hospital. They sued state officials because the refusal to transfer them from the institutional setting to community-based treatment programs violated Title II of the ADA. They contended that they would have a greater opportunity to interact with non-disabled individuals. When the case came before the Eleventh Circuit, the court specifically rejected Georgia’s contention that the ADA only prohibits discrimination
\end{itemize}
ADA encompasses differential treatment of one disabled individual as compared to another disabled individual. As discussed before, it is this newly publicized position that exhibits the change in the EEOC's stance. K Mart countered the EEOC's argument by stating that Traynor and Alexander, rather than Olmstead, are the pertinent precedents. The Eleventh Circuit ruled that although Olmstead arose under Title II, that case controlled their understanding of the concept of discrimination embodied in Title I. Thus, the court found that the ADA demanded more protection than merely that against discrimination between the disabled and non-disabled.

The Eleventh Circuit finished its analysis by addressing whether the ADA’s legislative history would protect what otherwise would seem to be discrimination. In doing so, the court analyzed the relevant sections of the reports from the Senate Labor and Human Resources Committee, the House Judiciary Committee, and the House Education and Labor Committee. In interpreting these reports, the court stated:

The Committee Reports suggest no intention to interfere with insurance arrangements which set caps on "procedures or treatments" that apply to persons with or without disabilities. But we are here dealing not with a limitation on procedures and treatments equally available to all but a limitation on compensation in lieu of salary which is expressly contingent on what kind of disability has caused a former employee to lose his job. . . . Instead of limiting insurance coverage for a particular type of procedure or treatment, the K Mart plan, on its face, limits [disability benefits] for those with a specified type of disability. . . . Denial of that benefit on the express ground that the claimant is mentally disabled is discrimination of a sort prohibited by §12112(a).

As a result of this in-depth analysis, the court concluded that the ADA prohibits the disparity between mental and physical disability benefits.

One of the most recent cases providing a favorable decision for the
mentally disabled is *Iwata v. Intel Corp.* In this case, Jeanne Iwata was diagnosed with major depression and post-traumatic stress syndrome. She first applied for, and eventually began receiving, short-term disability benefits. When they expired, she applied for long-term disability. Her company denied her application citing the plan’s limitation of benefits for the mentally ill. She subsequently filed suit alleging her plan discriminated against persons with mental health disabilities.

The court focused its attention on the core issue of whether the ADA prohibits a limitation of benefits as between the mentally and physically disabled. In its analysis, the court reviewed most, if not all, of the circuit court cases on this subject and conceded that they all have held that there is no such prohibition. However, the court noted that the Eleventh Circuit’s decision in *Johnson* contains the strongest argument any court has made to the contrary. Interestingly enough, the court felt the logic of the *Johnson* opinion was worth considering despite its vacation and questionable precedential authority. Thus, the court thoroughly reviewed and agreed with the Eleventh Circuit’s analysis determining that Title I of the ADA does prohibit discrimination among classes of the disabled. In reaching its decision, the court relied heavily on the Supreme Court’s ruling in *Olmstead.* In addition, the court found that some of the main bases that many of the circuit courts cited as authority, such as the ADA’s legislative history and Congressional action after the passage of the ADA, were, at best, neutral and could cut in either direction on the issue. In its closing

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216. *Id.*
217. *Id.*
218. *Id.*

219. *Iwata* brought suit under the Employee Retirement Income Security Act (“ERISA”). Although the U.S. Supreme Court has stated in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983) that ERISA does not mandate that employers provide any particular benefits and does not proscribe discrimination in the provision of employee benefits, the district court’s analysis did not stop there. ERISA and federal civil rights laws such as the ADA and the Rehabilitation Act must coexist peacefully, and if Iwata could establish that the ADA or the Rehabilitation Act renders the allegedly discriminatory term in the Plan unenforceable, then she would be able to invoke the equitable remedy of striking the offending term in the plan. *Iwata*, 349 F. Supp. 2d at 142.

221. *Id.*
222. *Id.* at 149.

223. The Massachusetts district court found the Supreme Court’s statement in *Traynor* that “nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons” to be dicta. *Id.* (quoting *Traynor*, 485 U.S. at 549). Furthermore, the district court also noted that *Olmstead* was decided after *Traynor* and if its interpretation of *Olmstead* was correct, then that decision had abrogated *Traynor*. *Id.*

224. *Id.* at 150-54.
thoughts, the court shrewdly recognized the complexity of this area of the law and the issues surrounding it, and noted the significance of public policy concerns.\textsuperscript{225}

VII. LEGISLATIVE ACTION

Despite numerous attempts by plaintiffs to have the court system cease the discrimination between mental and physical disability benefit plans, most of the efforts have been to no avail. Therefore, it would seem that Congress must act to permit mentally disabled individuals to obtain parity. This section of the article will look into past and present attempts by members of Congress to achieve parity between physical and mental disabilities. Specifically, the history behind the Mental Health Parity Act will be discussed along with the original Mental Health Equitable Treatment Act. In addition, the 2003 and 2005 Senator Paul Wellstone Mental Health Equitable Treatment Act will be reviewed. Finally, it will be shown that cost, the main reason that legislators have opposed parity, is not as significant as insurers and employers argue it to be. In fact, the costs of untreated or under-treated mental illnesses pose a bigger problem than rising premiums for employers.

A. Mental Health Parity Act

Since the early 1990s, Congress has passed very few bills that deal with the disparate treatment persons with mental illnesses face. However, it was the 104th Congress that took several major measures to introduce some form of mental health parity. The most notable action was the 1996 Domenici-Wellstone Amendment,\textsuperscript{226} which was designed to require health plans to have the same lifetime caps or annual limits on mental illness benefits that they have for medical or surgical services.\textsuperscript{227} The amendment was passed in the Senate by a unanimous voice vote on April 18, 1996.\textsuperscript{228} However, the amendment slowed due to a debate regarding the potential cost of such parity and eventually the sponsors retreated to a less comprehensive measure.\textsuperscript{229} By the time Congress completed its work on the final bill; House-Senate conferees had eliminated the parity amendment.\textsuperscript{230}

\textsuperscript{225} Id. at 158.
\textsuperscript{226} This amendment was named for the co-authors of the bill, Senator Pete Domenici (R-NM) and late Senator Paul Wellstone (D-MN).
\textsuperscript{227} E-mail from Paul Wellstone, U.S. Senator from Minnesota, to the author while a student at Duquesne University School of Law (Apr. 3, 2002) (on file with author).
\textsuperscript{228} Gold, supra note 8, at 780.
\textsuperscript{229} Id.
\textsuperscript{230} Shannon, supra note 126, at 99.
Determined to improve mental health coverage, Senators Pete Domenici and Paul Wellstone introduced an initiative called the Mental Health Parity Act of 1996 ("MHPA"). After some discussion and a few slight changes in the coverage provisions, the Act was passed by both the Senate and House and signed by President Bill Clinton on September 24, 1996.

The core of the MHPA required annual and aggregate lifetime dollar limits for mental health coverage to equal those for physical health coverage in group health plans. However, as most proponents would agree, the MHPA, in large part, did not aid in the fight against the disparity those with mental disabilities were facing. The main reason, as set forth by some, stemmed from the fact that the Act did not govern any terms or conditions relating to mental health benefits other than lifetime caps or annual limits. Therefore, there were various ways that employers could circumvent the Act. As author Maggie Gold has pointed out, "[A]n employer’s health plan could cover up to a certain percentage of the costs of mental health care, even though the plan might cover a higher percentage of the cost of physical care." In addition, she stated that "an employer could maintain an insurance plan that covers physical impairments but provides no mental health benefits at all." All in all, the MHPA was not an effective tool in eradicating the disparity between treatment of mental and physical disabilities.

B. Mental Health Equitable Treatment Act

On September 30, 2001, the MHPA expired, as it was sanctioned for only five years. The current law then reverted back to not providing the mentally disabled any protection at all. In an effort to address this problem, Senators Domenici and Wellstone introduced the Mental Health Equitable Treatment Act of 2001 ("MHETA"). As Senator Wellstone stated:

This bill seeks to ensure greater parity in the coverage of mental health benefits by prohibiting a group health plan from treating mental health benefits differently . . . . It is patterned after the mental health benefits offered through the Federal Employees Health Benefits Program (FEHBP) . . . . Like FEHBP, MHETA provides full parity for all types of mental illness and does not

232. Gold, supra note 8, at 781.
234. Gold, supra note 8, at 783.
235. Id.
236. Id. at 784.
discriminate by diagnosis.\textsuperscript{238}

In 2001, the Senate voted to include MHETA as an amendment to the Fiscal Year 2002 Labor-Health and Human Services-Education appropriations bill.\textsuperscript{239} However, the amendment was not included in the House version of the bill and, eventually, the bill was rejected by the House Republican conference members.\textsuperscript{240} Instead, a one-year continuation of the 1996 MHPA was enacted.\textsuperscript{241}

In 2003, there were new efforts by both the House and Senate to equalize coverage for mental health benefits. H.R. 953, introduced by Representatives Patrick Kennedy of Rhode Island and Jim Ramstad of Minnesota, and S. 486, introduced by Senators Pete Domenici of New Mexico and Edward Kennedy of Massachusetts, were bills that indicated willingness on the part of Congress to mandate parity in coverage.\textsuperscript{242} Collectively, the Acts were called the "Senator Paul Wellstone Mental Health Equitable Treatment Act of 2003," in memory of the late Senator Paul Wellstone, a leader in the fight for equal access to mental health treatment and benefits until his tragic death in 2002.

The Act was sought to prevent group health plans from imposing treatment limitations or financial requirements on mental health benefits unless comparable limitations were imposed on medical and surgical benefits. Moreover, the Act clearly defined mental health disorders and no longer left these definitions open to interpretation by employers, insurers or the courts. Although it was a clear improvement over the MHPA, the Act did have some significant limitations. First, the bill did not require a group health plan or health insurance coverage offered in connection with the plan to provide coverage for specific mental health services, except to the extent that the failure to do so would result in disparity between the coverage of mental health and medical and surgical benefits. The bill also had a small-employer (less than fifty employees) exemption and only applied to private health benefit plans.

Despite these limitations, numerous groups, including the American Medical Association, the American Psychiatric Association, and the American Academy of Pediatrics, agreed that actions like this Act were

\textsuperscript{238} E-mail from Paul Wellstone, \textit{supra} note 227.
\textsuperscript{239} \textit{Id.} See also Mental Health Parity Timeline, http://www.nmha.org/state/parity/parityTimeline.cfm (last visited Sept. 12, 2005) (introducing the process of the adoption and drop of MHETA in 2001).
\textsuperscript{240} E-mail from Paul Wellstone, \textit{supra} note 227.
\textsuperscript{241} \textit{Id.}
needed to ensure fair mental health coverage. However, these bills were
visited in various congressional committees and no action was scheduled
for the passage of the Act. Specifically, the bills became "stuck" in
committees because of concerns about driving up health care coverage
costs.²⁴³

Most recently, the same players in the House of Representatives who
introduced the 2003 Act introduced an exact twin, named the Paul
Wellstone Mental Health Equitable Treatment Act of 2005.²⁴⁴ After it was
introduced, the bill was then immediately referred to both the House
Committee on Education and the Workforce and the Committee on Energy
and Commerce.²⁴⁵ In April of 2005, the bill was sent to the House
Subcommittee on Employer-Employee Relations and the Subcommittee on
Health.²⁴⁶

C. Cost of Parity

Whether it is the Domenici-Wellstone Amendment, the MHPA, the
MHETA or the Senator Paul Wellstone Act, the most debated issue centers
on the cost of parity. Many state that "[c]overage for mental illness is
generally subject to higher deductibles and co-payments [and] lower limits
on the number of covered visits . . . than those for physical illnesses."²⁴⁷
Furthermore, insurers have maintained cost containment as the most
substantial justification for the lack of parity in insurance coverage.²⁴⁸ In
most cases, insurers and employers believe that "[b]y declining to cover
mental illnesses or covering them only up to a minimal level . . . they can
hold down costs and maintain premium levels and services to other
[customers]; thus, granting health care access to a greater number of
people."²⁴⁹ In support of this position, a study was conducted and prepared
for the Association of Private Pension and Welfare Plans which estimated
that parity, just for serious mental illnesses would "increase total health
plan expenses between 8.4 and 11.4 percent."²⁵⁰

Tom Daschle)).
Cong. (2005).
http://thomas.loc.gov (type "H.R. 1402" and click "search" button; then follow "Bill
Summary & Status" hyperlink; then follow "All Information" hyperlink) (last visited Sept.
12, 2005).
²⁴⁶. Id.
²⁴⁷. Gold, supra note 8, at 773 (internal citations omitted).
²⁴⁸. Id. (internal citations omitted).
²⁴⁹. Id. (internal citations omitted).
²⁵⁰. See Shannon, supra note 126, at 92 (citing ACTION CENTER FOR QUALITY HEALTH
CARE, ASS’N OF PRIVATE PENSION AND WELFARE PLANS, THE COSTS OF UNIFORM PLAN
It is undeniable that parity for the treatment of mental illness in health plans will cost insurers more. However, the cost of parity in actuality is not as expensive as some believe. Senator Domenici observed that "'[i]f it was done across the board in all policies, [parity] would add about 1.6 percent net to the insurance coverage across the land.'" Senator Kent Conrad from North Dakota added that after his state had ordered parity, their experience had been that "'[i]t does not cost more money.'" He further stated, "'[o]h, it does as you begin, but as you go forward, it does not cost more money . . . because, if you fail to treat [the mental disabilities], the physical ailments mount and become much more expensive.'"

Since 1996, many of the proponents of parity have cited figures that would show that parity is achievable through a nominal increase. For example, a 1998 study sponsored by the National Advisory Mental Health Council Parity Workgroup, a division of the federal National Institute of Mental Health, estimated that mental health parity would add less than one percent to the cost of a health insurance policy of an HMO. In addition, the Congressional Budget Office did a study and estimated that the Paul Wellstone Mental Health Equitable Treatment Act of 2003 and its predecessor, the Mental Health Equitable Treatment Act of 2001, would increase health insurance premiums by 0.9%. Moreover, on August 1, 2001, the American Psychological Association retained PricewaterhouseCoopers to do an analysis of the added cost for coverage under the MHETA. It determined that mental health coverage on par with physical health coverage will cost employers just one percent more, or $1.32 per enrollee per month. Finally, the Office of Personnel Management estimated that the implementation of parity under the Federal Employee Health Benefits Program ("FEHBP"), which granted federal employees mental health parity, increased plan premiums by 1.3%. This figure is important because that Office, which administers the FEHBP, has
tangibly seen the costs associated with mental health parity.

In summary, it would seem that for somewhere around $16.00 more a year, per person, an individual may receive the necessary care that is needed if that person should develop a mental illness. As prevalent and serious as some mental illnesses are, saving a mere $16.00 a year does not seem to be a legitimate justification to limit mental health benefits.

D. Untreated/Under-treated Mental Illness Costs

It is interesting to note that although many insurers and employers are concerned with the bottom line cost of parity, many may not fully realize or comprehend the ultimate loss if parity is not achieved. Although mental health parity will add minimally to plan premiums, the bigger cost surrounds the way that mental health illness injures the operation of businesses.

Untreated or under treated mental illnesses are truly costly to businesses, government and families. Mental illnesses can affect a worker’s productivity and health just as much as physical illness. It adds to costs by way of absenteeism, turnover expenses, poor morale, injury and compensation costs, and conflict among employees. Overall, mental illness has been estimated to cost the United States, which includes businesses, governments and families, around $113 billion dollars annually. The National Mental Health Association’s Labor Day 2001 Report found that the total cost for mental illness in both the private and public sector is $205 billion, but less than half of that amount, $92 billion, is spent on treatment. Untreated and under treated mental illnesses cost $105 billion in lost productivity and $8 billion in costs from crime and welfare.

In summary, legislative action seems to be the only viable solution to provide mentally disabled individuals with the necessary protection from the outright discrimination they face because the courts have failed to protect them. Although the solution lies in the hands of Congress, it has been, as discussed before, reluctant to move forward with a bill that would
provide full parity for mentally disabled individuals, mainly because of the cost. However, as demonstrated above, the cost is minimal and, in fact, it would seem that untreated/under-treated costs pose a bigger problem.

Despite the failure to enact a bill for full parity, the passage of the MHPA signaled that a majority of Congress is concerned and interested in parity. Furthermore, the number of co-sponsors for the 2003 and 2005 Paul Wellstone Mental Health Equitable Treatment Act is encouraging. However, for parity to be achieved one day, members of Congress must set aside their various special interests and become more involved and resolute to pass an all-encompassing bill.

VIII. CONCLUSION

On its face, the ADA states that no covered entity shall discriminate against an individual with a disability because of that individual’s disability in regards to employment. In addition, a long-term disability benefit plan has been found to be included within the “terms, conditions, and other privileges of employment” language of the Act. Furthermore, the term “discrimination”, as Congress has stated, includes, “limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such [individual] because of the disability.” When an employer or carrier limits or caps the benefits an individual may receive because that individual has a mental disability rather than a physical one, this is a type of discrimination against individuals with mental disabilities and an employer and/or insurance carrier should not be able to differentiate between disabilities. However, it is quite evident that the law has been interpreted to permit them to do so.

The heart of this article suggests that the ADA can and should be interpreted to prohibit the disparity between mental and physical disability benefits. This blatant discrimination against individuals with mental disabilities must cease and the courts should interpret the statute to prevent it. The Eleventh Circuit’s decision in Johnson, though vacated, provides a more persuasive rationale than the Third, Fourth and Sixth Circuits’ narrow interpretation of the statute. The Eleventh Circuit’s expansive interpretation of the committee reports is more appropriate as it fully protects all individuals with disabilities. In addition, the Supreme Court cases of Olmstead and O’Connor are more on point with this issue than Traynor and Alexander. One could interpret the Supreme Court’s holding, that it is irrelevant who a person in a protected class has lost out to so long he has lost out, as conclusive evidence that you cannot discriminate against

263. Id. § 12112(a).
264. Id. §12112 (b)(1).
persons within a protected class.\textsuperscript{265} Individuals with mental and physical disabilities are within the same protected class in that these individuals are persons with disabilities. Thus, a fair reading of \textit{O'Connor} can stand for the proposition that these individuals, regardless of their disability, should be afforded the same protection and receive the same benefits. Employers and insurance carriers can argue their technical statistics and cost/benefit analysis figures, but the unequal treatment is discriminatory and must be stopped.

Sadly, there is a realization that most of the courts of this country are unwilling to deviate from the trend of interpreting the ADA to prohibit this type of discrimination. Although some success has been achieved by creating unique arguments and using alternative paths and claims, these "victories" will only go so far, as insurance companies and employers will draft "better" policies to limit the coverage.

Despite the trend that the court system has established, it is encouraging to know that support is growing on other fronts. To begin with, many members of Congress have been willing to look at the core of the problem and take steps to stop this type of discrimination instead of yielding to the interests of major corporations and insurance companies. The introduction and re-introduction of congressional bills to provide equal coverage for mental health benefits is reassuring. Hopefully, the call for parity legislation will come to the forefront and Congress will ultimately take steps to provide the full parity that mentally disabled persons so desperately need. In addition, one can hope that the EEOC, with its recent switch in position, will be propelled to issue a final manual that courts can look to for guidance in ruling on these cases. These actions would re-focus attention to the fact that disparity in mental health benefits is a type of discrimination that needs to be remedied.

It is the hope that this article has provided both an overview and some background surrounding mental health parity and the issues that are preventing it. In researching this topic, it became apparent that there is major support for mental health parity on the public opinion front. A 2004 national survey conducted by Public Opinion Strategies for the Coalition for Fairness in Mental Illness Coverage showed that seventy-eight percent of Americans believe it is unfair for health insurance policies to routinely limit mental health benefits and require people to pay more out-of-pocket for mental health care than for any other medical care.\textsuperscript{266} This survey demonstrates that immediate action needs to be taken to achieve absolute parity.

\begin{footnotes}
\item[266] Mental Health Parity Timeline, \textit{supra} note 239.
\end{footnotes}
Mental illness has and will continue to affect people of all races, colors, creeds, religions, genders, social status and income. Although long-term disability benefit plans may discriminate against the mentally ill, mental illness, when mental strikes, it will never discriminate against an individual.