2000

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THE TOLERATION OF UNJUSTIFIED DISTINCTIONS BETWEEN THE MENTALLY AND PHYSICALLY DISABLED IN

LEWIS v. KMART CORP. MAKES ONE THING CLEAR: NOT ALL DISABILITIES WERE CREATED EQUAL

I. INTRODUCTION

Discrimination against the disabled is not a new problem.¹ Historically, these people have been considered less than human.² This historical prejudice has been aimed not only at the physically disabled, but also the mentally disabled.³ For example, in medieval England, people would pay to see mentally disabled individuals publicly displayed.⁴ Although such open mistreatment would be impermissible today, the mentally disabled continue to wage a battle against discrimination.⁵

1. See 42 U.S.C. § 12101(a)(2) (1994) (noting that “historically, society has tended to isolate and segregate individuals with disabilities . . .”); Timothy M. Cook, The Americans with Disabilities Act: The Move to Integration, 64 Temp. L. Rev. 393, 399-414 (1991) (describing historical and modern practice of segregating disabled from nondisabled); Michael A. Rebell, Structural Discrimination and the Rights of the Disabled, 74 Geo. L.J. 1435, 1436-37 (1986) (recounting history of discrimination against disabled individuals); Jonathan C. Drimmer, Comment, Cripttes, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities, 40 UCLA L. Rev. 1341, 1359-60 (1993) (providing historical background of prejudice against disabled individuals). Discrimination against the disabled in 20th Century America was open, as evidenced by the unabashed views of the Supreme Court in its opinions. See, e.g., Buck v. Bell, 274 U.S. 200, 207 (1927) (concluding that sterilization of feeble-minded woman was constitutional and pointing out that “[i]t would be strange if [the public welfare] could not call upon those who already sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence”).

2. See Rebell, supra note 1, at 1436-37 (noting that eugenics movement of early 20th Century viewed handicapped individuals as subhuman creatures).


4. See Rael J. Issac & Virginia C. Armat, Madness in the Streets: How Psychiatry & the Law Abandoned the Mentally Ill 1 (1990) (stating that people would pay to have inmates at England’s Bedlam hospital for mentally insane displayed to public). As a mental institution, Bedlam was “representative of private medieval institutions to which the insane were committed.” Spencer v. Lee, 864 F.2d 1376, 1381 (7th Cir. 1989).

5. See Ramage, supra note 3, at 951 (“Society’s disdain of the mentally ill still exists . . .”); see also Philip Boyle, Managed Care in Mental Health: A Cure, Or a Cure Worse Than the Disease?, 40 St. Louis U. L.J. 437, 439-40 (1996) (noting that people stereotype mentally ill as group that causes its own problems and thus deserving of lesser benefits); Michael L. Perlman, The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?, 8 J.L. & Health 15, 26 (1993-94) (“Surveys show that mental disabilities are the most negatively perceived of all disabilities.”). Congress recognized that the stigma associated with disabilities continues to exist in today’s society. See 42 U.S.C. § 12101(a)(2) (stating that discrimination against disabled
The United States Congress has seemingly entered this battle by enacting legislation designed to thwart discrimination against disabled individuals. One such piece of legislation is the Americans with Disabilities Act of 1990 ("ADA"). Title I of the ADA specifically addresses discrimination in the workplace. It prohibits discrimination on the basis of disability in "terms, conditions, and privileges of employment." Despite this language, employers often provide plans that cap long-term benefits for mental disabilities earlier than those for physical disabilities. Although the ADA contains a "safe harbor" provision, which per-


7. 42 U.S.C. §§ 12101-12213 (1994). The stated purpose of the ADA is to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Id. § 12101(b)(1).

8. See 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, 789 (1997-98) ("Title I of the ADA addresses employment practices, Title II concerns public services and Title III addresses public accommodations provided by private entities.").

9. 42 U.S.C. § 12112(a) (1994). The ADA mandates that: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . terms, conditions, and privileges of employment." Id.

10. See, e.g., Ford v. Schering-Plough Corp., 145 F.3d 601, 603-04 (3d Cir. 1998) (noting that benefit plan provided physical disability benefits until employee reached age 65, while mental disability benefits "cease[d] after two years if the disabled employee was not hospitalized"), cert. denied, 119 S. Ct. 850 (1999); Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1008 (6th Cir. 1997) (same), cert.
mits classification of risks, this provision does not give employers unbridled discretion to distinguish between the mentally and physically disabled in their benefit plans. The provision is limited in that it cannot be used to evade the purposes of Title I and Title III of the ADA. Thus, the question is whether one purpose of these titles is to ensure that individuals with different classes of disabilities are afforded equal disability benefits.

Most courts have concluded that the ADA does not require equal levels of benefits for the mentally and physically disabled. Recently, in Lewis v. Kmart Corp., the United States Court of Appeals for the Fourth Circuit addressed this issue. The Fourth Circuit followed the majority of courts and held that Title I of the ADA does not require employers to offer equal long-term disability benefits for mental and physical disabilities.

This Note considers the Fourth Circuit’s holding in Lewis in light of the plain language of the ADA, its legislative history and relevant court
denied, 118 S. Ct. 871 (1998); EEOC v. CNA Ins. Cos., 96 F.3d 1039, 1041 (7th Cir. 1996) (noting benefit plan that provided long-terms benefits to physically disabled until age 65, but discontinued long-term benefits to mentally disabled after two years). Temporal caps are not the only example of unequal treatment of the mentally disabled as compared to the physically disabled when insurance is involved; one can find unequal treatment of the mentally disabled in almost every aspect of insurance. See Leonard S. Rubenstein, Ending Discrimination Against Mental Health Treatment in Publicly Financed Health Care, 40 ST. LOUIS U. L.J. 315, 315 (1996) (noting that "[c]ompared to physical health care, mental health care has been subjected to stricter limits on utilization, higher co-payments, lower benefit caps and more restricted types of offered services"). This Note exclusively addresses whether the ADA requires employers to provide equal levels of long-term disability benefits to the mentally and physically disabled. It does not discuss the permissibility under the ADA of affording the mentally disabled lesser health insurance benefits.

11. See 42 U.S.C. § 12201(c) (1994) (stating that insurers may continue “underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law”). The provision allowing for such underwriting, classifying and administering of risks, however, cannot be used as a “subterfuge to evade the purposes of subchapter I and III of this chapter.” Id.

12. See id. ("Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter I and III of this chapter.") (footnote omitted). For a discussion of the ambiguity behind the meaning of the term “subterfuge,” see infra note 33 and accompanying text.

13. For a discussion of the different views courts have taken as to whether the ADA requires equality of long-term disability benefits for the mentally and physically disabled, see infra notes 52-83 and accompanying text.

14. For a discussion of the courts that have held that drawing distinctions between disabilities is not a form of discrimination the ADA protects against, see infra notes 64-83 and accompanying text.

15. 180 F.3d 166 (4th Cir. 1999).

16. See id. at 168 (noting that issue before court was whether Title I, § 102(a) of ADA requires equal long-term disability benefit plans for mentally and physically disabled).

17. See id. at 172 (concluding that Kmart’s long-term disability benefit plan did not violate Title I of ADA).
holdings regarding the same or similar issues.\textsuperscript{18} Part II of this Note reviews the statutory language of the ADA.\textsuperscript{19} Part II also addresses the legislative history of the ADA and legislative developments since the enactment of the ADA.\textsuperscript{20} Additionally, Part II discusses the manner in which other courts have disposed of the same or similar issues.\textsuperscript{21} Part III discusses the relevant facts of \textit{Lewis}.\textsuperscript{22} Part IV analyzes and critiques the Fourth Circuit's approach in \textit{Lewis} in determining that Title I of the ADA does not require long-term disability benefits for the mentally disabled to be equivalent to those of the physically disabled.\textsuperscript{23} Finally, Part V considers the possible impact of allowing employers to offer different levels of benefits for mental and physical disabilities without providing a factual justification for the distinction.\textsuperscript{24}

\section{II. Background}

\subsection{A. Relevant Statutory Language of the ADA}

Congress enacted the ADA to eliminate discrimination against the disabled.\textsuperscript{25} This protection was intended for both the physically and the

\textsuperscript{18} For a discussion of the ADA's statutory language, the ADA's legislative history and court holdings relevant to the issue raised in \textit{Lewis}, see infra notes 25-95 and accompanying text.

\textsuperscript{19} For an overview of the statutory language of the ADA, see infra notes 25-34 and accompanying text.

\textsuperscript{20} For a discussion of the ADA's legislative history and legislative developments following the enactment of the ADA, see infra notes 35-51 and accompanying text.

\textsuperscript{21} For a discussion of the approaches used by other courts to resolve the same or similar issues, see infra notes 54-95 and accompanying text.

\textsuperscript{22} For a discussion of the facts of \textit{Lewis}, see infra notes 96-103 and accompanying text.

\textsuperscript{23} For a discussion and critical analysis of the court's reasoning in \textit{Lewis}, see infra notes 104-72 and accompanying text.

\textsuperscript{24} For a discussion of the possible consequences of permitting employers to offer without justification benefit plans that distinguish between mental and physical disabilities, see infra notes 173-83 and accompanying text.

\textsuperscript{25} See 42 U.S.C. § 12101(b)(1) (1994) (providing that purpose of chapter is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"). Preceding the stated purpose of the ADA, Congress enumerated its findings regarding discrimination against the disabled. See 42 U.S.C. § 12101(a) (1994) (giving overview of congressional findings). For example, Congress noted that studies show that the disabled continue to be disadvantaged in several aspects of life. See 42 U.S.C. § 12101(a)(6) (1994) ("[C]ensus data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally."). These studies are especially significant considering the large number of Americans that have one or more disabilities. See 42 U.S.C. § 12101(a)(1) (1994) (stating that approximately 43,000,000 Americans suffer from at least one disability, whether physical or mental, and that number is increasing).
mentally disabled.26 Title I of the ADA addresses employment discrimination, stating that employers cannot discriminate against disabled individuals regarding "terms, conditions, and privileges of employment."27 Although Congress did not expound upon the meaning of the phrase "privileges of employment" in the ADA, it is likely that Congress intended the phrase to include long-term disability insurance.28

26. See 42 U.S.C. § 12102(2) (1994) (defining "disability" with respect to individual as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment"); see also Cong. Rec. S10785-10786 (daily ed. Sept. 7, 1989) (noting compromise amendment to exclude certain conditions such as homosexuality from definition of disability, but retaining protection for mental impairments); Mary T. Giliberti, The Application of the ADA to Distinctions Based on Mental Disability in Employer-Provided Health and Long-Term Disability Insurance Plans, 18 MENTAL & PHYSICAL DISABILITY L. REP. 600, 600 (1994) (noting that mental and physical disabilities are covered equally under ADA). Although the ADA expressly applies to mental disabilities, there is a lack of examples in the legislative history of discrimination against the mentally disabled. See Perlin, supra note 5, at 19 (noting that mental disabilities are scarcely addressed in legislative history of ADA, early commentaries and practice manuals).

27. 42 U.S.C. § 12112(a) (1994). Specifically, the statutory language states, "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." Id. Courts must determine whether a claimant is a qualified individual with a disability to establish that the claimant has standing to bring the action under Title I of the ADA. See Charles B. Lynch, The Americans with Disabilities Act and Disability Plans, 22 Seton Hall Legis. J. 561, 576 (1998) (noting that one prevalent ADA issue is whether claimant is a qualified individual with a disability and thus has standing to bring claim under ADA). Courts (and commentators), however, disagree as to the meaning of the term. Compare Bril v. Dean Witter, 986 F. Supp. 171, 176 (S.D.N.Y. 1997) (holding that plaintiff did not have standing to bring claim under ADA because she was totally disabled and thus not qualified individual with a disability), and Esfahani v. Medical College of Pa., 919 F. Supp. 832, 836 (E.D. Pa. 1996) (holding that plaintiff's ADA claim only applied to period before plaintiff became totally disabled), with Ford v. Schering-Plough Corp., 145 F.3d 601, 605-06 (3d Cir. 1998) (noting that because Title I of ADA guarantees right to bring claim when discrimination occurs regarding fringe benefits, which includes disability benefits, then "[i]n order for the rights guaranteed by Title I to be fully effectuated, the definition of 'qualified individual with a disability' would have to permit suits . . . by more than just individuals who are currently able to work with or without reasonable accommodations"). cert. den., 119 S. Ct. 850 (1999), and Gonzales v. Garner Food Servs., Inc., 89 F.3d 1523, 1532 (11th Cir. 1996) (Anderson, J., dissenting) ("It would be counter-intuitive . . . to suppose . . . that Congress intended to protect current employees' fringe benefits, but intended to then abruptly terminate that protection upon retirement or termination, at precisely the time that those benefits are designed to materialize.").), and Nancy Lee Firak, Threshold Barriers to Title I and Title III of the Americans with Disabilities Act: Discrimination Against Mental Illness in Long-Term Disability Benefits, 12 J.L. & HEALTH 205, 263-66 (1998) (noting reasons that "qualified individual with a disability" language should not be deemed to prevent those discriminated against in terms of long-term disability benefits from having standing to bring claim under ADA).

28. See Giliberti, supra note 26, at 600 (noting that § 12112(a) "mandates non-discrimination in all employee benefits, which presumably include health, life,
Although the ADA’s language seems to suggest that employers may not use classification of disabilities as mental or physical as a basis for distinctions in their long-term benefit plans, the issue is not so straightforward.\textsuperscript{29} For example, it is uncertain whether the scope of the ADA’s protection extends to discrimination between two categories of disabilities, or whether it only protects the disabled from discrimination in relation to the nondisabled.\textsuperscript{30} Even assuming that the ADA protects against discrimination between disabilities, the precise role of the ADA’s safe harbor provision, which allows insurance companies to classify risks, is likewise unclear.\textsuperscript{31} The safe harbor provision explicitly allows for the classification of risks, but it may not be used as a “subterfuge to evade the purposes of subchapter I and III of this chapter.”\textsuperscript{32} What Congress meant to be included under the term “subterfuge,” however, is not readily apparent from

and long-term disability insurance”); see also Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1015 (6th Cir. 1997) (noting that “discrimination in the provision of fringe benefits during employment is governed strictly by Title I and the provision of a long-term disability plan is a fringe benefit of employment”), cert. denied, 118 S. Ct. 871 (1998). Under the ADA, an employer discriminates against an employee if he or she enters into a contract that is discriminatory within the meaning of the ADA. See 42 U.S.C. § 12112(b)(2) (1994) (stating that discrimination includes “participating in a contractual or other arrangement” that would result in discrimination against employee with disability that is prohibited under ADA).

29. For a discussion of the various views taken by the courts regarding this issue, see infra notes 54-83 and accompanying text.

30. Compare Parker, 121 F.3d at 1015 (holding that ADA does not prohibit disparate treatment between disabilities), and Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 678 (8th Cir. 1996) (concluding that if distinction applies equally to disabled in relation to nondisabled, then distinction is not disability-based discrimination), with Schroeder v. Connecticut Gen. Life Ins. Co., No. CIV.A.93-M-2433, 1994 WL 909636, at *4 (D. Colo. Apr. 22, 1994) (looking to ADA to reach conclusion that if employer decides to make distinction between mental and physical disabilities in insurance plan, it must justify distinction with actuarial data or reasonably anticipated experience).

31. See 42 U.S.C. § 12201(c) (1994) (allowing for classification of risks provided such classification is not subterfuge). This provision states:

Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict—

(1) an insurer . . . or entity that administers benefit plans . . . from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter I and III of this chapter.

Id. (footnote omitted).

32. Id.
the statutory language. Because the statutory language does not clarify the circumstances in which an insurance plan may offer unequal benefits based on disability, the legislative history can help to determine Congress’ intent.

B. Legislative History of the ADA and Relevant Post-Enactment Legislation

The legislative history of the ADA helps determine its intended role in the elimination of disability discrimination. In broad terms, the goal of the ADA is to “permit the United States to take a long-delayed but very necessary step to welcome individuals with disabilities fully into the main-

33. See Alexander Abbe, Comment, “Meaningful Access” to Health Care and the Remedies Available to Medicaid Managed Care Recipients Under the ADA and the Rehabilitation Act, 147 U. Pa. L. Rev. 1161, 1176-77 (1999) (noting that courts disagree as to what actions by insurance companies constitute subterfuge for purposes of ADA). Prior to the ADA’s enactment, Congress had used the word “subterfuge” in the original version of the ADEA. See RUTH COLKER & BONNIE POITRAS TUCKER, THE LAW OF DISABILITY DISCRIMINATION 637 (2d ed. 1998) (noting that Congress used term “subterfuge” when it enacted Age Discrimination in Employment Act of 1967). The Equal Employment Opportunity Commission (“EEOC”) interpreted “subterfuge” in this context to include making decisions based on age without justifying such decisions with evidence of valid cost considerations. See id. at 638 (“The EEOC had taken the position in its interpretive regulations that [benefit] plans [that made distinctions based on age] would have to satisfy an economic test of cost considerations to pass muster.”). The Supreme Court disagreed with the EEOC’s interpretation and instead concluded that for a decision based on age to be a subterfuge, the claimant had to show there was intent to discriminate. See Ohio Pub. Employees Retirement Sys. v. Betts, 492 U.S. 158, 167 (1989) (noting that in previous case, Court “held that the term ‘subterfuge’ must be given its ordinary meaning as ‘a scheme, plan, stratagem, or artifice of evasion’”) (quoting United Air Lines, Inc. v. McMann, 434 U.S. 192, 203 (1977)). Congress, however, did not agree with the Supreme Court’s interpretation. See COLKER & TUCKER, supra, at 638 (noting that Congress excluded term “subterfuge” when it amended ADEA in 1990 “to reverse the Betts decision”). Comments made by several House Representatives provide additional evidence that Congress did not intend the Betts interpretation of the term “subterfuge” to be applied to the ADA. See 136 Cong. Rec. H4624 (daily ed. May 17, 1990); id. at H4622-H4623 (daily ed. July 12, 1990); id. at H4626. For example, Representative Waxman stated, “[T]he term ‘subterfuge’ in the ADA should not be read as the Supreme Court read that term in Betts. Thus, there is no requirement of an intent standard under the ADA . . . .” 136 Cong. Rec. H4626 (July 12, 1990).


stream of American society."\textsuperscript{36} Although Congress passed previous legislation, such as the Rehabilitation Act,\textsuperscript{37} to accomplish a similar goal, the ADA was probably enacted because earlier legislation failed in its objective.\textsuperscript{38}

In addition to spelling out the general anti-discrimination goals of the ADA, the legislative history also addresses specific issues, such as disability-based distinctions in insurance plans.\textsuperscript{39} For example, the legislative history of the ADA suggests that one disability may receive lesser benefits than another disability, provided the disability receiving lesser benefits poses increased risks.\textsuperscript{40} The legislative history also reveals that Congress did not intend for the classification of risks to be arbitrary, but intended that the classification be supported either by actuarial evidence, actual experience or reasonably anticipated experience.\textsuperscript{41}

Just as legislative history can be used to determine congressional intent, so too can subsequent legislation.\textsuperscript{42} Relevant legislation passed after the enactment of the ADA includes the Mental Health Benefits Parity Act of 1996 ("Parity Act").\textsuperscript{43} The Parity Act requires limited mental health

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\item \textsuperscript{37} 29 U.S.C. §§ 701-796l (1994).
\item \textsuperscript{38} See Helen L. v. DiDario, 46 F.3d 325, 331 (3d Cir. 1995) (noting congressional displeasure with laws that had been enacted to aid in fight against disability discrimination). Congress enacted the ADA when it realized that existing laws were "inadequate to combat 'the pervasive problems of discrimination that people with disabilities are facing.'" \textit{Id.} (quoting S. Rep. No. 101-116, at 18 (1989); H.R. Rep. No. 101-485(II), at 47 (1990), \textit{reprinted in} 1990 U.S.C.C.A.N. 329); see also Robert L. Burgdorf, \textit{The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute}, 26 Harv. C.R.-C.L. L. Rev. 413, 431 (1991) (noting that "[l]egal commentators have extensively described and lamented the flaws in the wording, interpretation, and implementation of federal disability non-discrimination statutes prior to the ADA").
\item \textsuperscript{39} See, e.g., H.R. Rep. No. 101-485(II), at 136 (1990), \textit{reprinted in} 1990 U.S.C.C.A.N. 419 (noting disabled "cannot be denied insurance or be subject to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks").
\item \textsuperscript{40} See \textit{id.} (proposing disability-based distinction is justified if disability poses increased risks).
\item \textsuperscript{41} See \textit{id.} at 71 ("ADA requires that underwriting and classification of risks be based on sound actuarial principles or be related to actual or reasonably anticipated experience."). "Actuarial" is defined as "relating to statistical calculation." \textit{Webster's Third New International Dictionary} 22 (3d ed. 1971).
\item \textsuperscript{43} 29 U.S.C. § 1185a (Supp. II 1996).
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parity.\textsuperscript{44} In general terms, the Parity Act requires “certain dollar limits” in health care plans to apply equally to the mentally and physically disabled.\textsuperscript{45} Notably, the provisions of the Parity Act apply to health care benefits but not to long-term disability plans.\textsuperscript{46}

Although the Parity Act requires a plan covering mental and nonmental health benefits to provide equal “annual and lifetime dollar limits,” it does not compel employers to offer mental health benefits in the first place.\textsuperscript{47} Also, the Parity Act does not apply if its application would result in a one percent or greater increase in insurance costs.\textsuperscript{48} In addition, the Parity Act is limited to employers who employ more than fifty employees in a given year.\textsuperscript{49} For these and other reasons, several commentators have concluded that the Parity Act will have a negligible effect on discrimination against the disabled in health care plans.\textsuperscript{50} The weight

\textsuperscript{44} See Allison C. Blakley, Is Depression Disabling America’s Group Insurance Plans? Mental Health Benefit Parity and the ADA, 27 THE BRIEF 40, 45 (1998) (noting that Parity Act was enacted as amendment to ERISA and requires limited mental health parity). “Parity” is defined as “equality of rank, nature, or value.” Webster’s, supra note 41, at 1642. Under the Parity Act, a plan’s annual and lifetime caps on mental health benefits must be equal to those set for nonmental health benefits included in the same plan. See Blakley, supra, at 45 (noting that under Parity Act, mental and physical disabilities must be treated equally regarding annual and lifetime caps). If the mental health benefit plan is separate from the nonmental health benefit plan, however, parity is not required under the Act. See id. (noting that Parity Act mandates such equality when same benefit plan provides for both mental and nonmental health benefits).

\textsuperscript{45} See Brandenburg et al., Recent Developments in Employee Benefits, 34 TORT & INS. L.J. 519, 330 (Winter 1999) (stating that purpose of Parity Act is “to require parity in the application of certain dollar limits on mental health benefits with dollar limits on medical/surgical benefits under the same group health plan”).

\textsuperscript{46} See Powers, Kinder & Keeney, Providing Lesser Benefits for Mental Disabilities May Violate Federal Law, 12 R.I. EMPLOYMENT L. LETTER 5 (1999) (noting that Mental Health Benefit Parity Act “applies only to group plans providing health benefits, and it doesn’t apply to plans offering other employee benefits—most notably, disability benefit plans”) (emphasis in original); see also Gold, supra note 8, at 787 (noting that Mental Health Benefit Parity Act only applies to health plans provided by employers).

\textsuperscript{47} Blakley, supra note 44, at 45.

\textsuperscript{48} See 29 U.S.C. § 1185a (c)(2) (Supp. II 1996). This section provides:

This section shall not apply with respect to a group health plan (or health insurance coverage offered in connection with a group health plan) if the application of this section to such plan (or to such coverage) results in an increase in the cost under the plan (or for such coverage) of at least 1 percent.

\textit{Id.}

\textsuperscript{49} See 29 U.S.C. §§ 1185a(c)(1)(A)-(B) (Supp. II 1996) (stating that Parity Act does not apply to small employers and defining “small employer” as “an employer who employed an average of at least 2 but not more than 50 employees on business days during the preceding calendar year and who employs at least 2 employees on the first day of the plan year”).

\textsuperscript{50} See Gold, supra note 8, at 786 (noting that Parity Act allows, and may even encourage, employers to sidestep its mandate of providing health benefit parity); Bonnie Poitras Tucker, Insurance and the ADA, 46 DePAUL L. REV. 915, 928-29 (1997) (noting minimal effect of Parity Act in limiting disparate treatment of
that courts should give the Parity Act in interpreting the ADA is uncertain, although several courts have labeled it as one indication that Congress did not intend the ADA to require benefit parity.51

C. The ADA Dispute Reaches the Courts

It is clear from the plain language of the ADA that discrimination against an individual on the basis of his or her disability violates the ADA.52 The issue remains, however, whether the ADA only protects against discrimination between the disabled and the nondisabled, or whether it also protects against discrimination between different disabilities. At this point, the answer depends upon which court is addressing the issue.53

1. Some Courts Require Actuarial Data or Experience

Some courts conclude that the ADA permits disability-based distinctions in benefit plans only when actuarial evidence, actual experience or reasonably anticipated experience justifies the distinction.54 In Schroeder v.

mental disabilities in relation to physical disabilities). For example, Tucker has noted several ways in which employers can get around the Parity Act. See id. (pointing out that (1) Parity Act allows employers to completely exclude mental disabilities from coverage; (2) Parity Act would arguably not apply if employers placed mental and physical disability benefits in separate plans; and, (3) Parity Act would allow employer to cover mental disabilities up to percentage of health care costs that was lower than percentage of health care costs covered for physical disabilities).


52. See 42 U.S.C. § 12112(a) (1994) (stating that "[n]o covered entity shall discriminate against a[n]... individual with a disability because of the [individual's] disability").

53. For a discussion of the different views the courts have taken regarding this issue, see infra notes 54-83 and accompanying text.

54. For a discussion of the courts that take this view, see infra notes 55-62 and accompanying text. It should be noted that the actuarial data issue only arises after the claimant first proves that he or she has standing to bring a claim under the ADA. See Ford 145 F.3d at 607-08 (addressing whether plaintiff had standing to bring claim under Title I of ADA before turning to substance of discrimination claim); see also Nicole Martinson, Inequality Between Disabilities: The Different Treatment of Mental Versus Physical Disabilities in Long-Term Disability Benefit Plans, 50 Baylor L. Rev. 361, 363 (1998) (observing that "[o]ne of the first obstacles presented to a plaintiff under Title I [of the ADA] is the question of whether the plaintiff is entitled to the protection of Title I of the ADA (i.e., standing)"). For a discussion of the requirement that the claimant be a qualified individual with a disability to have standing under the ADA, see supra note 27 and accompanying text.
Connecticut General Life Insurance Co., the plaintiff’s benefit plan covered long-term disability insurance. When the plaintiff was hospitalized for a heart condition, the defendant insurance company notified him that coverage would discontinue after thirty months because it had determined that the heart condition resulted from a mental condition. The District Court for the District of Colorado held that such a distinction between mental and physical disabilities in insurance plans could only be made if supported by actuarial principles or reasonably anticipated experience.

Similarly, in Baker v. Hartford Life Insurance Co., the plaintiff’s father brought an action against the defendant insurance company, claiming that the insurance company violated Title III of the ADA when it refused to provide insurance to the plaintiff. Plaintiff asserted that the refusal was disability based. The District Court for the Northern District of Illinois held that despite the ADA’s safe harbor provision, “[i]t is possible that the decision to deny plaintiff coverage was not based on considerations of underwriting or classifying risks, in which case plaintiff might be entitled to recover under the ADA.” Despite this view, the more popular

56. See id. at *1 (noting that Schroeder chose long-term disability coverage and had premium costs withdrawn from his payroll).
57. See id. (noting insurance company’s refusal to provide further benefits after 30 months because after that time its policy did not cover disabilities caused by emotional or mental conditions). Although the plaintiff claimed that the mental or emotional condition was secondary to the heart condition, the insurance company stood by its determination that the heart condition resulted from a mental or emotional condition. See id. (noting insurance company’s refusal to continue providing benefits despite plaintiff’s assertion that heart condition was primary problem). This case illustrates the difficulty in drawing a line between mental and physical disabilities; here, both mental and physical disabilities may have been simultaneously present. See id. For a further discussion of situations that present characterization problems, see infra notes 179-80 and accompanying text.
58. See Schroeder, 1994 WL 909636, at *4. The court stated:
[T]he plan may not . . . limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience.
Id.; See Doukas v. Metropolitan Life Ins. Co., 950 F. Supp. 422, 432 (D.N.H. 1996) (holding that although insurers may classify risks under ADA, methods for such classification must be based on either “sound actuarial principles or related to actual or reasonably anticipated experience”).
60. See id. at *1 (noting defendant insurance company’s failure to provide health insurance to plaintiff).
61. See id. (noting that plaintiff sought “declaratory and injunctive relief . . . for defendant’s alleged disability-based refusal to provide health insurance to plaintiff”). In one phone call between plaintiff and defendant, the reason given for the denial of coverage was that the plaintiff’s “risk [was] greater than we like to take on.” Id.
62. Id. at *4. The court also noted that basing a denial of coverage on actuarial facts does not dispositively prove that the insurer complied with the ADA. See
position is that the ADA does not prohibit disparate treatment between disabilities because such treatment is not a form of discrimination that Congress intended the ADA to eliminate.63

2. Most Courts Hold That The ADA Does Not Protect Against Discrimination Between Disabilities

All federal circuits that have addressed the issue have held that Title I of the ADA affords no protection against insurance plans that offer different levels of benefits for different disabilities.64 The United States Court of Appeals for the Seventh Circuit first took this view in EEOC v. CNA Insurance Cos.65 In that case, the court held that discrimination, as it was normally understood, did not occur although the benefits offered to those with mental disabilities were different from the benefits offered those with physical disabilities.66 The Seventh Circuit reasoned that no discrimination had occurred because all employees, whether nondisabled, mentally disabled or physically disabled, were offered the same plan—long-term benefits until age sixty-five if the problem was physical in nature and long-term benefits for two years if the problem was mental in nature.67

id. (noting that subterfuge issue remains even when denial of coverage is claimed to be based on actuarial considerations).

63. See Martinson, supra note 54, at 373-74 (concluding that courts generally hold that ADA protection only applies to discrimination between disabled and nondisabled and not to discrimination between individuals with different disabilities).

64. For a discussion of federal circuit views regarding different levels of benefits for mental and physical disabilities, see infra notes 65-83 and accompanying text. State courts have also held that distinctions between disabilities are valid under the ADA. See, e.g., Cramer v. Florida, 885 F. Supp. 1545, 1551 (M.D. Fla. 1995) (holding that ADA did not apply to discrimination between disabilities in class action suit alleging, in part, that Florida’s workers’ compensation statute violated ADA), aff’d, 117 F.3d 1258 (11th Cir. 1997). Although employees rarely win suits brought against employers that provide insurance plans offering different levels of benefits for mental and physical disabilities, some cases settle in favor of the employee. See, e.g., Tucker, supra note 50, at 926 (noting that in Harris v. City of Phoenix, No. CIV-95-0361 (D. Ariz. May 1, 1996), case settled pursuant to consent decree in which city agreed to abolish distinction between mental and physical disabilities in its long-term disability plan).

65. 96 F.3d 1039 (7th Cir. 1996).

66. See id. at 1044 (explaining that although plan “may or may not be an enlightened way to do things,” it was not discriminatory “in the usual sense of the term”).

67. See id. (noting that plan’s terms were same regardless of whether employee was disabled or not). The plaintiff argued that the plan discriminated against employees who would become mentally disabled in the future. See id. (noting plaintiff’s argument that those employees were now paying towards plan that would later provide lesser benefits to them than would be provided to employees who later became physically disabled). The court rejected this argument as a “dressed up” version of the argument that benefits must be equal for mental and physical disabilities. See id.

One commentator has dismissed as weak the argument that plans providing different levels of benefits based on disability are not discriminatory if they are
The United States Court of Appeals for the Sixth Circuit, in *Parker v. Metropolitan Life Insurance Co.*,\(^68\) followed suit.\(^69\) The Sixth Circuit held that Title I of the ADA does not require the mentally disabled to receive the same level of benefits as the physically disabled.\(^70\) Instead, the ADA "prohibits discrimination between the disabled and the non-disabled."\(^71\) Thus, the Sixth Circuit was only concerned with determining whether the disabled had the "same access to the long-term disability plan" as the nondisabled.\(^72\)

Additionally, when the United States Court of Appeals for the Third Circuit addressed the same issue in *Ford v. Schering-Plough Corp.*,\(^73\) it used similar reasoning to dismiss the plaintiff’s discrimination claim.\(^74\) The plaintiff’s insurance policy in that case also treated mental and physical disabilities differently.\(^75\) The Third Circuit dismissed the claim that discrimination had occurred in violation of Title I of the ADA.\(^76\) The Third Circuit reasoned that because the same benefit plan had been offered to the disabled and the nondisabled alike, no discrimination had occurred.\(^77\)

equally offered to all employees, regardless of disability. See Rubenstein, *supra* note 10, at 329-30 (noting that although argument appears valid on its face, its flaws become apparent when put in context of race or gender hypothetical). Rubenstein noted that the Supreme Court in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), embraced this argument in a gender context. See Rubenstein, *supra* note 10, at 329 & n.74 (noting that Court in *Gilbert* held that exclusion of coverage for disabilities arising from pregnancy did not discriminate against women because same plan was offered to both men and women). Congress disagreed with this holding and "promptly enacted the Pregnancy Discrimination Act to clarify that anti-discrimination law forbids a health plan from intentionally denying coverage for services needed by a protected class." Id. at 329-30.


69. See *id.* at 1019 (holding ADA is similar to Rehabilitation Act in that it too only protects against discrimination between disabled in relation to nondisabled).

70. See *id.* at 1015 (noting that ADA does not require "equality between individuals with different disabilities").

71. *Id.*

72. *Id.* One court has dismissed such reasoning as obviously flawed. See Lewis *v. Aetna Life Ins. Co.*, 982 F. Supp. 1158, 1168 (E.D. Va. 1997) (noting that under logic that permits discrimination between disabilities, employer could refuses employment to person with mental disability and give job to person with physical disability, even if mentally disabled individual were more qualified than physically disabled individual).


74. See *id.* at 608 (concluding that "[s]o long as every employee is offered the same plan regardless of . . . contemporary or future disability status, then no discrimination has occurred even if the plan offers different coverage for various disabilities").

75. See *id.* at 603 (noting plan provided two-year cap on benefits for mental disabilities, but no such cap for physical disabilities).

76. See *id.* at 614 (dismissing complaint for failure to state claim).

77. See *id.* at 608 (noting that as long as disabled and nondisabled employees were offered same “opportunity to join the same plan with the same schedule of coverage” then no discrimination had occurred).
Specifically, the Third Circuit noted that the ADA does not mandate coverage parity for the mentally and physically disabled.78

In Rogers v. Department of Health & Environmental Control,79 the United States Court of Appeals for the Fourth Circuit took the same stance regarding distinctions between disabilities under Title II of the ADA.80 Initially, the Fourth Circuit noted that the plain language of the ADA does not specifically address the issue of whether the Act mandates equal levels of benefits for the mentally and physically disabled.81 Thus, instead of relying on the language of the ADA, the Fourth Circuit arrived at its decision by looking to other sources for support—the Supreme Court’s interpretation of the Rehabilitation Act, the legislative history of the ADA, Equal Employment Opportunity Commission (“EEOC”) policy, the safe harbor provision of the ADA and subsequent legislation.82 After analyzing these sources, the Fourth Circuit came to the conclusion that the ADA does not require equality of benefits for mental and physical disabilities.83

In Traynor v. Turnage,84 the United States Supreme Court addressed a similar issue under the Rehabilitation Act, which is considered the predecessor of the ADA.85 In Traynor, the Court upheld the extension of educa-

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78. See id. (noting that “[t]he ADA does not require equal coverage for every type of disability”). The court determined that it was not possible that Congress intended the ADA to require coverage parity for all disabilities because such a requirement “would destabilize the insurance industry.” Id.

79. 174 F.3d 431 (4th Cir. 1999).

80. See id. at 436 (holding equal benefits between disabilities are not mandated under Title II of ADA).

81. See id. at 433 (noting that it is not clear from language of ADA whether “subjected to discrimination” phrase in 42 U.S.C. § 12132 (1994) requires same level of benefits for mentally and physically disabled).

82. See id. at 433-36 (discussing sources of support for holding).

83. See id. at 436 (noting that all sources analyzed lead to conclusion that benefit parity is not required under ADA).


Traynor enlarged upon the Supreme Court’s holding in Alexander v. Choate, 469 U.S. 287 (1985). See Rogers, 174 F.3d at 434. In Alexander, Tennessee Medicaid recipients requested an injunction against the Tennessee Medicaid program’s decision to reduce the number of days that it would cover inpatient care per year from 20 to 14. See Alexander, 469 U.S. at 289 (noting that Tennessee Medicaid program decided to reduce number of inpatient days it would cover after finding projected costs were 42 million dollars over budget). The recipients claimed that such a reduction violated the Rehabilitation Act because it would have a discriminatory impact on the handicapped. See id. at 289-90. The Supreme Court rejected this argument and held that the 14-day limitation did not “invoke criteria that have a particular exclusionary effect on the handicapped.” Id. at 302. In addition, the Court pointed out that the reduction was valid because it imposed the same durational limit on the handicapped and the nonhandicapped. See id. (stating that because handicapped and nonhandicapped would be “subject to the same dura-
tional benefits to disabled veterans who became mentally or physically disabled without any willful misconduct on their part.\textsuperscript{86} Because Congress considered alcoholism to be a disability caused by willful misconduct, it denied the extension to plaintiffs who claimed disability due to alcoholism.\textsuperscript{87} The \textit{Traynor} Court determined that the Rehabilitation Act does not mandate equal benefits for disabilities brought on by willful misconduct and those not brought on by willful misconduct, and some courts have reasoned, by analogy, that the ADA does not require equal benefits for mental and physical disabilities.\textsuperscript{88}

Although several Courts of Appeals have determined that the ADA does not mandate equality of benefits between disabilities in insurance plans, advocates for benefit parity suggest that the Supreme Court opinion in \textit{O'Connor v. Consolidated Coin Caterers Corp.}\textsuperscript{89} supports a contrary holding.\textsuperscript{90} In \textit{O'Connor}, an age discrimination case, the plaintiff brought a claim of violation under the Age Discrimination in Employment Act of 1967 ("ADEA").\textsuperscript{91} The Court rejected the defendant's argument that because someone who was also in the protected class replaced the plaintiff, there was no case.\textsuperscript{92} The Court held that "[t]he 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."\textsuperscript{93} Thus, parity

\textsuperscript{86} See \textit{Traynor}, 485 U.S. at 545 (noting that Congress made exception to usual time limit on educational benefits afforded veterans for veterans who became disabled without any willful misconduct on their part).

\textsuperscript{87} See \textit{id.} at 538 (noting that "Veterans' Administration determined that petitioners' alcoholism constituted 'willful misconduct' . . . and accordingly denied the requested extensions").

\textsuperscript{88} See, e.g., \textit{Lenox v. Healthwise of Ky., Ltd.}, 149 F.3d 453, 457 (6th Cir. 1998) (noting that \textit{Traynor} supports conclusion that ADA does not prohibit disparate treatment between disabilities); \textit{Ford v. Schering-Plough Corp.}, 145 F.3d 601, 608-09 (3d Cir. 1998) (same); \textit{Parker v. Metropolitan Life Ins. Co.}, 121 F.3d 1006, 1019 (6th Cir. 1997) (same). Another Supreme Court Rehabilitation Act case that has been cited as support for the conclusion that the ADA does not require equal treatment of benefits is \textit{Alexander}. See \textit{Lenox}, 149 F.3d at 457 (citing \textit{Alexander} as support for determination that ADA does not prohibit distinctions between disabilities); \textit{EEOC v. CNA Ins. Cos.}, 96 F.3d 1039, 1044 (7th Cir. 1997) (same).

\textsuperscript{89} 517 U.S. 308 (1996).

\textsuperscript{90} See Martinson, supra note 54, at 376 (noting that claimants continue to "forge forward" despite courtroom setbacks, arguing that \textit{O'Connor} supports their argument that discrimination between disabilities is not permissible).

\textsuperscript{91} See \textit{O'Connor}, 517 U.S. at 309 (noting that petitioner O'Connor brought suit under ADEA, alleging he was fired because of his age).

\textsuperscript{92} See \textit{id.} at 312 (noting that it is equally discriminatory to replace 40-year-old with 39-year-old as it is to replace 56-year-old with 40-year-old, even though both 56-year-old and 40-year-old are members of protected class).

\textsuperscript{93} \textit{Id.} The Supreme Court, in a recent ADA case, came to a similar conclusion, noting that Title II of the ADA applies to distinctions between disabilities. See \textit{Olmstead v. Zimring}, 527 U.S. 581, 591 n.10 (1999) (concluding that "as a matter of precedent and logic" term "discrimination" encompasses "disparate treatment among members of the same protected class"). Significantly, although the dissent
advocates argue that prohibited discrimination occurs when insurance plans treat mental disabilities differently from physical disabilities because the mentally disabled have "lost out" because of their disability. The Fourth Circuit in Lewis v. Kmart Corp. rejected this argument and held that Kmart's long-term disability benefit plan was valid under the ADA even though Kmart did not produce evidence supporting the need for a distinction between mental and physical disabilities.

III. FACTS OF LEWIS V. KMART CORP.

According to the facts set forth in Lewis, the plaintiff, Harold Lewis, began working for Kmart Corporation in 1984. Lewis worked at various Kmart stores for eleven years until the severe depression he had been coping with since 1979 forced him to take a leave of absence on March 13, 1995. Lewis had elected to participate in a long-term disability plan offered by Kmart that capped benefits for mental disabilities at two years, but capped benefits for physical disabilities upon a participant turning age sixty-five. Because the insurance company classified Lewis' condition as mental in nature, the benefits he had been receiving under the plan ceased after the two-year period was up.

Lewis filed suit, alleging that Kmart had violated Title I, Section 102(a) of the ADA by offering an insurance plan that discriminated on the

concluded that discrimination under Title II of the ADA did not include disparate treatment among members of the same protected class, it did not reach this conclusion for Title I of the ADA. See id. at 2197-98 (Thomas, J., dissenting) ("The majority's definition of discrimination . . . substantially imports the definition of Title I [of the ADA] into Title II [of the ADA] by necessarily assuming that it is sufficient to focus exclusively on members of one particular group."). Thus, the dissent appears to support the proposition that Title I of the ADA protects against disparate treatment between disabilities, even though it does not believe the same is true for Title II of the ADA. See id at 2198 (noting that definition of discrimination under Title I of ADA includes circumstance when "some members of a protected group are treated differently from other members of that same group").

94. See Martinson, supra note 54, at 377 (noting argument that because O'Connor stands for proposition that it is discrimination when someone in protected class loses out to another person in protected class, treating mentally disabled persons differently from physically disabled persons is discrimination, and thus violates ADA, which "prohibits discrimination against individuals because of the individual's disability").

95. For a further discussion of the Lewis court's holding, see infra notes 104-38 and accompanying text.

96. See Lewis v. Kmart Corp., 180 F.3d 166, 168 (4th Cir. 1999) (noting that Kmart hired Lewis to train to be manager in 1984).

97. See id. (noting that Lewis worked at several Kmart stores over course of 11 years and took leave of absence from management position at Virginia Kmart store on March 13, 1995).

98. See id. (stating that Kmart began offering optional long-term disability plan in 1976 and Lewis had decided to participate in plan).

99. See id. (noting that insurance company ceased benefits after two years because it classified Lewis' condition as mental in nature).
basis of disability. The district court denied Kmart’s summary judgment motion and subsequently conducted a bench trial, entering judgment in favor of Lewis. Kmart filed a timely appeal of the district court’s ruling, and the Fourth Circuit heard the case. The Fourth Circuit vacated the district court’s entry of judgment in favor of Lewis and concluded that Title I of the ADA does not require employers to offer the same level of long-term disability benefits for the mentally and physically disabled.

IV. Analysis of the Fourth Circuit’s Holding in Lewis v. Kmart Corp.

A. Narrative Analysis

In vacating the district court’s holding that Kmart violated Title I of the ADA by providing an insurance plan that treated mental and physical disabilities disparately, the Fourth Circuit in Lewis relied heavily on its previous decision in Rogers. In Rogers, the Fourth Circuit held that Title II of the ADA does not require long-term disability plans sponsored by public entities to provide the same level of benefits for mental and physical disabilities. Because the Lewis court determined that there was no material difference between Title I, Section 102(a) and Title II, Section 202 of the ADA, it reached its holding by tracking the analysis of the Rogers court.

100. See id. (noting that Lewis filed suit, alleging that “Kmart violated his rights under Title I, § 102(a) of the ADA to be free from discrimination on account of his disability in the terms and conditions of his employment”).

101. See id. (summarizing prior history of case). The district court declared that the two-year cap on mental disability benefits violated Title I, § 102(a) of the ADA and ordered Kmart to continue providing Lewis with disability benefits until he turned 65, so long as he continued to be disabled. See id.

102. See id. at 169 (noting Kmart’s timely appeal).

103. See id. at 172 (holding that Title I, § 102(a) of ADA does not require insurance plan to provide same level of long-term disability benefits for mental and physical disabilities).

104. See id. at 170 (noting that reasoning applied in Rogers also applies to Lewis).

105. See Rogers v. Department of Health & Envtl. Control, 174 F.3d 431, 436 (4th Cir. 1999) (concluding that “ADA does not require South Carolina to provide the same level of benefits for mental and physical disabilities in its long-term disability plan for state employees”).

106. See Lewis, 180 F.3d at 170 (stating that nature of employing entity is only difference between Title I, § 102(a) and Title II, § 202 of ADA). The Fourth Circuit considered it unlikely that Congress intended to treat public and private employing entities differently regarding discrimination liability under the ADA. See id. (“Certainly Congress did not intend for an employer’s liability for illegal discrimination under the ADA to turn on the private versus public nature of the employing entity.”).
1. The Lewis Court Applies the Rogers Court’s Reasoning by Analogy

The issue in Rogers was whether the “subjected to discrimination” phrase in Title II, Section 202 of the ADA requires equal benefits for mental and physical disabilities.\(^\text{107}\) The court noted that the plain language of the ADA does not answer the question.\(^\text{108}\) Thus, the Fourth Circuit looked to other sources for guidance on the issue.\(^\text{109}\)

The first of these sources, relied upon by the Fourth Circuit in Rogers, and thus Lewis, was the Supreme Court’s interpretation of Rehabilitation Act cases.\(^\text{110}\) The Fourth Circuit determined that it was appropriate to compare the ADA and the Rehabilitation Act because of the similarity between the two Acts and because the Rehabilitation Act is arguably the precursor to the ADA.\(^\text{111}\) The Fourth Circuit in Rogers relied upon two Supreme Court Rehabilitation Act cases to support its holding.\(^\text{112}\) The first was Alexander v. Choate.\(^\text{113}\) In Alexander, the Supreme Court determined that a fourteen-day limitation on a Medicaid program’s inpatient care, reduced from twenty-one days, was valid under the Rehabilitation

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107. See Rogers, 174 F.3d at 433 (noting that issue is whether insurance plan “subjected [Rogers] to discrimination’ on the basis of his disability”).

108. See id. (noting that plain language of ADA fails to answer whether “subjected to discrimination” phrase in Title II mandates benefit parity for mentally and physically disabled).

109. See id. (noting that although plain language does not help answer question, there is other material that can be turned to for guidance).

110. See Lewis, 180 F.3d at 170 (noting that Rogers court found support for its holding in Supreme Court Rehabilitation Act cases).

111. See Rogers, 174 F.3d at 433 (“The Rehabilitation Act is the most appropriate starting point for our discussion because, in many ways, it is the precursor to the ADA.”). The Fourth Circuit went on to note that the Rehabilitation Act and the ADA share similar language. See id. One such similarity is the definition of disability. Compare 29 U.S.C. § 706(8)(B) (1994) (“[T]he term ‘individual with a disability’ means . . . any person who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.”), with 42 U.S.C. § 12102(2) (1994) (“The term ‘disability’ means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”).

Additionally, the Acts use similar language to refer to their nondiscrimination mandate. Compare 29 U.S.C. § 794(a) (1994) (“No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity . . . conducted by any Executive agency . . . .”), with 42 U.S.C. § 12132 (1994) (“[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”).

112. See Rogers, 174 F.3d at 434 (looking to “[r]elevant Rehabilitation Act precedent”).

Act. It rejected the argument that the reduction discriminated against the handicapped, reasoning that the same level of coverage was provided to the handicapped and the non-handicapped.

The second case the Fourth Circuit looked to for support was Traynor v. Turnage. In Traynor, the Court upheld the extension of educational benefits to disabled veterans who became physically or mentally disabled without any willful misconduct on their part. Willful misconduct was presumed to cause alcoholism. Plaintiffs, who suffered from alcoholism, claimed this was a violation of the Rehabilitation Act because it discriminated against them on the basis of their disability. The Supreme Court rejected this argument and held that the Rehabilitation Act does not require that equal benefits be granted to all categories of disabilities.

After analyzing Alexander and Traynor, the Fourth Circuit determined that Congress must have been aware of the Supreme Court holdings in these cases when it drafted the ADA language. The Rehabilitation Act and the ADA contain comparable anti-discrimination language. Thus, the Fourth Circuit reasoned, Congress must not have intended the ADA to require parity of benefits when it knew the Supreme Court had interpreted the Rehabilitation Act as not requiring such parity.

In addition to the Supreme Court cases interpreting the Rehabilitation Act, the Fourth Circuit found support for its holding in Rogers, and thus Lewis, in the Equal Employment Opportunity Commission's Gui-

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114. See id. at 309 (holding that reduction does not violate § 504 of Rehabilitation Act).

115. See id. (noting equal accessibility of coverage for handicapped and non-handicapped and pointing out that "the State is not required to assure the handicapped 'adequate health care' by providing them with more coverage than the non-handicapped").

116. See Rogers, 174 F.3d at 434 (using Traynor as support for its holding that ADA does not prohibit discrimination between disabilities).


118. See id. (noting that Veterans' Administration considered primary alcoholism to result from willful misconduct).

119. See id. at 542 (noting petitioners claimed that regulation violated Rehabilitation Act because it discriminated against handicapped individuals).

120. See id. at 549 ("There 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.").

121. See Rogers v. Department of Health & Envtl. Control, 174 F.3d 431, 434 (4th Cir. 1999) (presuming that Congress knew of Supreme Court’s interpretation of § 504 of Rehabilitation Act when it enacted ADA).

122. See id. (noting that ADA contains "antidiscrimination language in § 12132 that parallels § 504 of the Rehabilitation Act").

123. See id. (noting that Supreme Court interpreted Rehabilitation Act not to require benefit programs "to provide precisely the same benefits to all classes of disabled persons").
dance ("EEOC Guidance") on the ADA’s application to health insurance.\(^\text{124}\) The EEOC has the responsibility of enforcing and interpreting the ADA.\(^\text{125}\) The EEOC Guidance explained that providing lower levels of health insurance benefits to the mentally disabled as compared to the physically disabled does not violate the ADA.\(^\text{126}\) Although the EEOC Guidance only addressed the role of the ADA in health insurance benefits, the Fourth Circuit applied the EEOC’s construction in the EEOC Guidance by analogy to long-term disability benefits.\(^\text{127}\)

The Fourth Circuit also pointed to the ADA’s “safe harbor” provision to support its conclusion that the ADA does not require equal levels of benefits for the mentally and physically disabled.\(^\text{128}\) The Fourth Circuit determined that this provision embodies Congress’ intent that the ADA not force insurance companies to change the way they do business.\(^\text{129}\) The court also pointed to the legislative history behind this provision to confirm that it was Congress’ intent that the ADA not restrict insurance companies in their classification of risks.\(^\text{130}\)

Finally, the Fourth Circuit noted that legislation subsequent to the enactment of the ADA supported its holding that the ADA does not require benefit parity for the mentally and physically disabled.\(^\text{131}\) Specifi-

\(^{124}\) See id. at 435 (noting that EEOC Guidance supports construing ADA as not requiring health insurance benefit parity).

\(^{125}\) See Lexch, supra note 85, at 1841 (noting that responsibility of EEOC is to enforce and interpret ADA).

\(^{126}\) See EEOC: Interim Enforcement Guidance on Application of ADA to Health Insurance, [Fair Employment Practices Manual] Lab. Rel. Rep. (BNA) 405:7115, at 7117-18 (June 8, 1993) (hereinafter EEOC Guidance). The EEOC said: “Typically, a lower level of benefits is provided for the treatment of mental/nervous conditions than is provided for the treatment of physical conditions . . . . Such broad distinctions, which apply to the treatment of a multitude of dissimilar conditions and which constrain individuals both with and without disabilities, are not distinctions based on disability. 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.

Id. (footnotes omitted)

\(^{127}\) See Firak, supra note 27, at 271 (pointing out that EEOC Guidance only applies to health insurance, not disability insurance); Giliberti, supra note 26, at 603 (same).

\(^{128}\) See Rogers, 174 F.3d at 435 (noting that insurance generally funds disability benefits and safe harbor provision applies to restrict ADA’s leverage in eliciting changes in business practices of insurance companies).

\(^{129}\) See id. (noting that safe harbor provision provides proof of Congress’ intent not to alter insurance companies’ methods of doing business).

\(^{130}\) See id. (noting legislative history of safe harbor provision). For example, a House Report explained that the ADA should not affect “the way the insurance industry does business in accordance with the State laws and regulations under which it is regulated.” H.R. Rep. No. 101-485(II), at 136 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 419.

\(^{131}\) See Rogers, 174 F.3d at 436 ("Congressional activity since the passage of the ADA indicates that Congress does not read the ADA to require parity of coverage for mental and physical disabilities.").
cally, the court noted that the 1996 Parity Act and its legislative history establish that Congress did not intend the ADA to require parity of benefits for mental and physical disabilities.\(^{132}\) In addition, the Fourth Circuit pointed out that the Parity Act does not regulate disability benefits, but only addresses parity for health insurance benefits.\(^{135}\) From all of these sources, the *Lewis* court, by adopting the reasoning of the *Rogers* court, came to the conclusion that Title I of the ADA does not require parity of benefits for mental and physical disabilities.\(^{134}\)

2. *The Fourth Circuit Rejects the O'Connor Argument*

The Fourth Circuit also rejected Lewis' argument that the Supreme Court's opinion in *O'Connor* supported his proposition that it is discrimination under the ADA for an employer to offer a different level of benefits for mental and physical disabilities.\(^{135}\) Lewis asserted that he had been discriminated against because he had "lost out" because of his disability, just as the plaintiffs in *O'Connor* had "lost out" because of their age.\(^{136}\) The Fourth Circuit rejected this argument, noting the lack of Supreme Court precedent supporting the view that the ADA and Rehabilitation Act require different disabilities be treated equal.\(^{137}\) In short, the Fourth Circuit concluded that Lewis' reliance on *O'Connor* did not "make intuitive sense."\(^{138}\)

B. *Critical Analysis of Lewis v. Kmart Corp.*

The Fourth Circuit's holding in *Lewis* is consistent with the conclusion reached by all other federal circuits addressing the issue.\(^{139}\) The

\(^{132}\) See *id.* (noting that Senator Domenici, co-sponsor for Parity Act, stated that Act was "a compromise to begin down the path of parity and nondiscrimination for the mentally ill people in this country who have health insurance" (quoting 142 CONG. REC. S9917 (daily ed. Sept. 5, 1996) (emphasis added))).

\(^{133}\) See *id.* (declaring it is significant that Parity Act does not apply to disability insurance).

\(^{134}\) See *Lewis v. Kmart Corp.*, 180 F.3d 166, 170 (1999) (adopting reasoning of *Rogers* court); *Rogers*, 174 F.3d at 436 (noting that one conclusion can be drawn from all sources considered in relation to issue, and that conclusion is that ADA does not require parity of long-term disability benefits for mentally and physically disabled).

\(^{135}\) See *Lewis*, 180 F.3d at 171 (noting that Lewis argued that *O'Connor* supported proposition that ADA prohibits employers from providing lesser level of benefits to one type of disability as compared to another type of disability).

\(^{136}\) *Id.*

\(^{137}\) See *id.* (noting that Supreme Court precedent, such as *Traynor*, reveals that Supreme Court does not interpret ADA as prohibiting preferential treatment between disabilities). The Fourth Circuit further noted that *Traynor* is indistinguishable from *Lewis*. See *id.* (comparing provisions in Rehabilitation Act and ADA and concluding there is no "meaningful way to distinguish" *Traynor* from *Lewis*).

\(^{138}\) *Id.* at 171-72.

\(^{139}\) See *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 608 (3d Cir. 1998) (holding that discrimination between mental and physical disabilities is not prohibited under Title I of ADA), cert. denied, 119 S. Ct. 850 (1999); *Parker v. Metro-
Fourth Circuit's sources of support for its holding, however, contain various flaws. First, the Fourth Circuit applied the holdings of Rehabilitation Act cases by analogy to the ADA case before it.140 There are reasons, however, that the provisions of the ADA should not be compared to those of the Rehabilitation Act.141 The ADA was enacted because the then current laws were "inadequate to address the pervasive problems of discrimination that people with disabilities [were] facing."142 This could be interpreted to mean that the Rehabilitation Act was inadequate legislation because it was enacted prior to the ADA.143 In addition, as applied to Lewis, the ADA is distinguishable from the Rehabilitation Act because it explicitly addresses insurance coverage, while the Rehabilitation Act does not contain language discussing the insurance industry.144

Even assuming that the Rehabilitation Act is sufficiently analogous to the ADA to justify looking to Rehabilitation Act cases for support, Alexander is a weak source of authority for the Fourth Circuit's holding in Lewis.145 In Alexander, the Court was careful to point out that the limitation on hospital stays was facially neutral and did not have a particular exclusionary effect on the handicapped.146 In Lewis, however, the insurance plan discriminated between disabilities on its face.147 In addition, Alexander may even support Lewis' argument because Kmart's insurance plan arguably has a particular discriminatory effect on the mentally disabled, as they are the only group whose long-term disability benefits are

140. See Lewis, 180 F.3d at 170 (noting that Rehabilitation Act cases decided by Supreme Court are informative in determining whether ADA prohibits distinctions between disabilities).
141. See Stephanie Proctor Miller, Keeping the Promise: The ADA and Employment Discrimination on the Basis of Psychiatric Disability, 85 CAL. L. REV. 701, 701 (1997) (stating that in many contexts, Rehabilitation Act cases are inappropriate basis for interpreting ADA).
143. See Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158, 1167 n.8 (E.D. Va. 1997) (construing Rehabilitation Act as one of laws that did not adequately remedy problem of disability discrimination, leading to enactment of ADA); see also Miller, supra note 141, at 704 (noting that cases decided under Rehabilitation Act are infused with biases against mentally disabled persons).
144. See Gold, supra note 8, at 801 (noting that ADA surpasses scope of Rehabilitation Act by explicitly addressing insurance industry and plainly prohibiting use of subterfuge to evade purposes of ADA).
145. For a discussion of the facts of Alexander, see supra notes 114-15 and accompanying text.
146. See Alexander v. Choate, 469 U.S. 287, 302 (1985) ("The new limitation does not invoke criteria that have a particular exclusionary effect on the handicapped; the reduction, neutral on its face, does not distinguish between those whose coverage will be reduced and those whose coverage will not . . . .").
147. See Lewis v. Kmart Corp., 180 F.3d 166, 168 (4th Cir. 1999) (noting that Kmart's long-term disability benefit plan capped mental disability benefits at two years and physical disability benefits upon turning age 65).
limited. The Alexander Court explicitly stated that a finding of discrimination depends on the way the benefit is defined. There is a strong argument that the limitation in Lewis is disability-based under Alexander because the benefit is defined in specific terms of mental disability benefits, when it should be defined in general terms of adequate disability benefits.

The Fourth Circuit’s reliance on Traynor as essentially indistinguishable from Lewis is also flawed. The Traynor court made it clear that the denial of benefits to veterans suffering from alcoholism did not violate Section 504 of the Rehabilitation Act because willful misconduct caused the disability. In Lewis, however, Kmart’s long-term disability benefit plan discriminated against the mentally disabled, which is not a class that became disabled due to willful misconduct. Finally, if Traynor and Alexander are read to support the proposition that the ADA does not protect

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148. Cf. Giliberti, supra note 26, at 602-03 (noting that EEOC Guidance, which allows for unequal treatment in health care between mentally and physically disabled, conflicts with Alexander because “the Guidance permits a ‘particular exclusionary effect’ on those with mental disabilities”). There is a difference between a denial or a limitation based on number of days in a hospital and a denial or a limitation based on the characterization of a disability as mental. See id. at 603 (distinguishing broad disability-based characterization, as in Lewis’ insurance plan, from limit on type of treatment, such as length of hospital stay).

149. See Alexander, 469 U.S. at 301 (“The benefit . . . cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled . . . .”).

150. Cf. H. Miriam Farber, Note, Subterfuge: Do Coverage Limitations and Exclusions in Employer-Provided Health Care Plans Violate the Americans with Disabilities Act?, 69 N.Y.U. L. Rev. 850, 904-06 (1994) (criticizing EEOC for permitting limitations on mental health care when presumably EEOC would not permit such limitations on cancer health care). Specifically, Farber notes that it is inconsistent to define mental health care as the relevant benefit in mental disability cases when the relevant benefit in cancer cases is defined as comprehensive health care. See id. at 906 (“Because a mental/nervous condition limitation, just like a cancer treatment limitation, is a limitation defined in terms of health, not time or place, the two limitations should be treated in the same manner.”). If the relevant benefit relating to mental disabilities were comprehensive health care, providing lesser levels for mental disabilities than for physical disabilities would be a disability-based distinction. See id. at 905-06 (noting that EEOC would presumably consider limitation in cancer coverage as disability based because it defines "the relevant benefit as 'comprehensive health care' rather than 'cancer care'") (emphasis added).

151. See Lewis, 180 F.3d at 171 (determining that “there is no meaningful way to distinguish Traynor from this case”).

152. See Traynor v. Turnage, 485 U.S. 535, 549-50 (1988) (“Those veterans are not, in the words of § 504, denied benefits ‘solely by reason of [their] handicap,’ but because they engaged with some degree of willfulness in the conduct that caused them to become disabled.”).

153. See id. at 545 (pointing out that Veterans’ Administration considers willful misconduct to include primary alcoholism, which is alcoholism not caused by acquired psychiatric disorder).
against discrimination between disabilities, this will result in a large number of valid disability discrimination claims being dismissed.  

In addition, the Fourth Circuit rejected as untenable Lewis' argument that O'Connor supported his position that providing lower levels of benefits for mental disabilities violated the ADA. The Fourth Circuit rejected the argument on the premise that the ADA does not provide protection against disparate treatment between disabilities, whereas the ADEA protects against disparate treatment between members of the protected class. The Supreme Court, however, does not agree with this position and has determined that the O'Connor holding can be applied analogously to ADA cases.

The Fourth Circuit also pointed to the EEOC Guidance, which declares that it is not a disability-based distinction to offer a lower level of health care benefits for the treatment of mental conditions than for physical conditions. The EEOC reasoned that distinctions between mental and physical disabilities were permitted because: "(1) mental conditions affect persons with and without disabilities, and (2) mental disorders include dissimilar conditions." As one commentator pointed out, however, this reasoning could be applied to physical disorders that are covered by the ADA. In addition, the EEOC Guidance does not apply to long-term disability benefits. Actions brought by the EEOC support the inference that the EEOC did not intend the reasoning in its Guidance to

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154. See Ennis v. National Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55, 58-59 (4th Cir. 1995) (noting requirement that benefited individual be outside protected class "would lead to the dismissal of many legitimate disability discrimination claims" because of enormous number of people who fall within ADA's broad scope of protection).

155. See Lewis, 180 F.3d at 171 (concluding that O'Connor "is of no help to Lewis").

156. See id. at 171-72 (concluding that although ADEA protects individuals in protected class against discrimination in relation to anyone, even other members of protected class, ADA was not "designed to ensure that persons with one type of disability are treated the same as persons with another type of disability").


158. See EEOC Guidance, supra note 126, at 7117-18 (noting that distinctions between mental and physical disabilities in health insurance plans are not based on disability and thus do not violate ADA).

159. Giliberti, supra note 26, at 602.

160. See id. (noting that "cancers comprise a multitude of dissimilar conditions, and someone with skin cancer probably is not a person with a disability, whereas a person with leukemia may be covered under the ADA"). Immune deficiency disorders also include the characteristics that the EEOC has used to distinguish mental disorders. See id. (noting that under EEOC's logic, insurers could limit or refuse coverage for immunodeficiency disorders because they include dissimilar conditions such as AIDS and allergies, and people with and without disabilities suffer from such disorders).

161. See Firak, supra note 27, at 271 (noting that EEOC Guidance does not apply to disability insurance); Giliberti, supra note 26, at 603 (same).
apply to long-term disability benefits. For example, in EEOC v. CNA Insurance Cos., the EEOC sought to compel an employer to pay long-term mental disability benefits to a former employee until the EEOC had the opportunity to ascertain whether the employee had a valid claim under the ADA. Although the case was dismissed before the EEOC had the chance to determine the validity of the claim, the EEOC presumably would not have sought to enjoin the employer if the EEOC Guidance applied to long-term disability benefits.

In addition, the Fourth Circuit looked to the “safe harbor” provision of the ADA to support its conclusion that Kmart could offer an insurance plan that did not provide the same level of benefits for the mentally and physically disabled. The Fourth Circuit, however, failed to address the final sentence of the safe harbor provision, which states that the provision cannot be used as a subterfuge to evade the purposes of the ADA. In addition, the Fourth Circuit did not address the legislative history that supports the view that Congress intended such distinctions only be made when actuarial data or previous experience justifies the distinction. Because Kmart provided no evidence that the distinction in its plan was made with classification principles in mind, the court erred in holding that the distinction was permissible under the ADA.

162. See EEOC v. CNA Ins. Cos., 96 F.3d 1039, 1041 (7th Cir. 1996) (bringing action for employee because employer’s long-term disability benefit plan provided different levels of benefits for mental and physical disabilities); EEOC v. Chase Manhattan Bank, No. 97 Civ. 6620(WK), 1998 WL 851605 *1, *1 (S.D.N.Y. 1998) (arguing that long-term disability benefit plan violates ADA because plan treats mental and physical disabilities disparately); EEOC v. Avamark Corp., Civ. No. 97-734 (RMV) (D.D.C. 1997), noted in Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158, 1168 (E.D. Va. 1997) (same). In addition, the EEOC noted that a reason for the distinction between mental and physical disabilities in health care benefits is that mental disorders affect people with and without disabilities. See EEOC Guidance, supra note 126, at 7117 (grouping mental and physical disabilities under category of conditions that “cannot be treated uniformly with or without disabilities”). In cases involving long-term disability benefits, however, such reasoning is inapplicable because all persons receiving such benefits are disabled. See Giliberti, supra note 26, at 603 (noting that all recipients of long-term disability insurance are disabled, so part of EEOC’s logic behind distinguishing between mental and physical disorders would not apply in these cases).

163. See CNA, 96 F.3d at 1041 (noting that EEOC brought action on behalf of woman suffering from long-term mental disability).

164. See id. at 1045 (dismissing plaintiff’s claim).

165. See Lewis v. Kmart Corp., 180 F.3d 166, 170 (4th Cir. 1999) (noting that ADA’s safe harbor provision is source of guidance on issue).

166. For a discussion of the different interpretations of the word subterfuge, see supra note 33 and accompanying text.

167. For a discussion of the legislative history supporting the requirement for actuarial data or experience to justify distinctions between mental and physical disabilities, see supra note 41 and accompanying text.

168. See Blakley, supra note 44, at 45 (noting that weight of authority says burden of proof falls on insurer to provide sound actuarial justification for disparate treatment of mental and physical disabilities). Before the issue of burden of proof is ever reached, however, the claimant must convince the court that he or she has
Finally, the Fourth Circuit pointed to Congress’ enactment of the Parity Act, which was passed subsequent to the enactment of the ADA, as evidence that Congress did not intend the ADA to require benefit parity.\(^{169}\) Although subsequent legislation may be used to interpret congressional intent, the credence that should be lent to such legislation is debatable.\(^{170}\) In addition, even if subsequent legislation were regularly given substantial weight, in this case the subsequent legislation is arguably inapplicable.\(^{171}\) Whereas the Parity Act requires “automatic parity” between mental and physical disabilities in health insurance, the ADA does not require “parity,” but simply requires a justifiable basis for distinctions between mental and physical disabilities.\(^{172}\)

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standing to bring the claim. See Martinson, supra note 54, at 363 (noting that standing is one of first issues claimant must address when seeking protection under Title I of ADA).

One commentator has suggested that actuarial data is relevant when justifying disparities between mental and physical health insurance benefits, but that there is no justification for treating mental and physical long-term disability benefits disparately. See Firak, supra note 27, at 270 (suggesting that because long-term disability benefits are paid as proportion of employees’ prior wages and amount of benefits bears no relation to type of disability, “insurers cannot justify limits for persons with mental disabilities based on the cost of the benefit”).

169. See Lewis, 180 F.3d at 170 (noting that “post-ADA congressional activity” is source of guidance in determining congressional intent behind ADA). The argument is that because Congress enacted the Parity Act after the ADA’s enactment, then Congress must not have intended the ADA to require parity of benefits. See Blakley, supra note 44, at 46 (“[T]he limited mental health benefit parity now required under federal law for group health plans is the best evidence that nothing in Titles I or III of the ADA requires parity in the benefit treatment of mental and physical disorders.”). In terms of long-term disability benefits, the argument is that Congress could not have intended parity for such benefits because it did not include long-term disability benefits in the Parity Act. See Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1018 (6th Cir. 1997) (“[I]t appears that Congress did not believe the necessity for parity between mental and physical disabilities in long-term disability plans was sufficiently compelling to include them . . . [in the Parity Act].”), cert. denied, 118 S. Ct. 871 (1998).

170. For a discussion of the use of subsequent legislation to determine congressional intent, see supra note 42 and accompanying text. Reliance on legislative silence in subsequent legislation may be an even more questionable practice. See Zuber v. Allen, 396 U.S. 168, 185 (1969) (stating that “legislative silence is a poor beacon to follow in” statutory interpretation); cf. Symons v. Chrysler Corp. Loan Guarantee Bd., 670 F.2d 238, 242 (D.C. Cir. 1981) (“Drawing inferences as to congressional intent from silence in legislative history is always a precarious business.”).

171. See Appellee’s Brief at 57, Lewis, 180 F.3d 166 (No. 98-2179) (noting that Parity Act serves different purpose than ADA).

172. See id. (observing that ADA “seeks to ensure that disability-based disparities in any type of insurance coverage are justified by . . . factual basis rather than mere bias” while Parity Act “seeks to impose a form of automatic parity in health insurance benefit levels for mental and physical health treatment costs”).
V. IMPACT OF THE LEWIS HOLDING

The Fourth Circuit in Lewis has added to the case law that concludes that the ADA allows unjustified distinctions to be drawn between mental and physical disabilities.173 This holding is unsettling for several reasons.174 First, as a group that has been historically subjected to discrimination, the mentally disabled need the ADA’s protection.175 In fact, Congress recognized the prevalence of discrimination against individuals with disabilities, mental and physical alike, when it enacted the ADA.176 One excuse that has been used in an attempt to justify lesser benefits for the mentally disabled is that mental disabilities are not as easily substantiated as physical disabilities.177 As science progresses and the biological bases for mental disabilities continue to be discovered, however, this excuse for disparate treatment between the mentally and physically disabled becomes unacceptable.178

In addition, permitting distinctions to be drawn between mental and physical disabilities will likely lead to increased litigation to determine whether a particular disability or illness is more properly characterized as “physical” or “mental.” Several cases will unfortunately be ambiguous.179

173. For a discussion of other courts that held the same way, see supra notes 64-83 and accompanying text.

174. For a discussion of the reasons the Lewis holding is unsettling, see infra notes 175-80 and accompanying text.

175. For a discussion of the historical mistreatment of the mentally disabled, see supra notes 1-5 and accompanying text.


177. See Christopher C. Taintor, Comment, Federal Agency Nonacquiescence: Defining and Enforcing Constitutional Limitations on Bad Faith Agency Adjudication, 38 Me. L. Rev. 185, 195 (1986) (noting that mental disabilities are “less susceptible to objective evaluation and more difficult to substantiate than purely physical problems”).

178. See Brian D. Shannon, The Brain Gets Sick, Too: The Case for Equal Insurance Coverage for Serious Mental Illness, 24 St. Mary’s L.J. 365, 366 (1995) (noting that medical research shows that organic diseases of brain are cause of major mental illnesses). If a mental illness is determined to have a biological basis, one commentator has suggested that a claimant might argue that a distinction between that illness and physical illnesses is arbitrary, and thus violates the ADA. See Christopher Aaron Jones, Legislative “Subterfuge”: Failing to Insure Persons with Mental Illness Under the Mental Health Parity Act and the Americans with Disabilities Act, 50 Vand. L. Rev. 753, 780-81 (1997) (noting that individual with proven biological mental illness could claim that mental/physical distinction in his or her case “is evidence of a lack of sound principles or of stereotypical notions and has no cost-effectiveness basis when compared to treatment for illnesses such as heart disease”).

179. See generally Youndy C. Cook, Comment, Messing with Our Minds: The Mental Illness Limitation in Health Insurance, 50 U. Miami L. Rev. 345 (1996) (noting instances when it is difficult to label disorder as either physical or mental). For example, depression often accompanies terminal illnesses such as cancer. See id. at 353 (noting that several terminal illnesses are frequently accompanied by cancer); see also Saah v. Contel Corp., 780 F. Supp. 311, 313, 316 (D. Md. 1991) (determining that insurance company was not unreasonable when it applied limitation on
This ambiguity can be blamed to some extent on the fact that different courts use different reasoning to classify a disability as physical or mental, and the outcome of a case may depend entirely on the reasoning a court chooses to apply.\(^{180}\)

Mental health advocates continue to press forward in their fight, despite setbacks such as the holding in *Lewis*. The current trend is against psychiatric coverage to plaintiff who needed behavior modification and group therapy following car accident that caused injury to plaintiff's brain, *aff'd*, 978 F.2d 1256 (4th Cir. 1992); Simons v. Blue Cross & Blue Shield, 536 N.Y.S.2d 431, 434-35 (App. Div. 1989) (holding that although plaintiff was malnourished due to anorexia nervosa, which is psychiatric condition, cause of disorder is not relevant and plaintiff was entitled to insurance benefits for hospitalization).

180. See Cook, *supra* note 179, at 348-49 (noting that courts either use symptom/manifestation approach, treatment approach or causation approach to make mental/physical distinction).

The different results that may arise under different approaches can be illustrated by looking at *Tolson v. Avondale*, 141 F.3d 604 (5th Cir. 1998). In *Tolson*, plaintiff's depression was allegedly caused by hepatitis and resulting drug treatment. *See id.* at 605-06 (noting that plaintiff argued that he should be covered because mental condition was result of either Hepatitis C or Interferon treatment). The court held that the insurer could properly exclude the depression from coverage. *See id.* at 610-11 (holding that mental disorder is still mental disorder regardless of its cause or effect and thus insurance company interpreted language of plan correctly). In *Tolson*, the court did not concern itself with the fact that the depression may have been caused by a physical illness. *See id.* at 609 (noting that court held in previous case that "depression is a 'mental disorder,' irrespective of its physical causes or symptoms").

This result, however, was not obvious from the facts of the case because, presumably, if the *Tolson* court had taken the causation approach, it would have held differently. *See Cook, supra* note 179, at 349 (noting that courts that adopt causation approach "interpret the term 'mental illness' to mean those illnesses or disorders that have a purely functional or psychological cause"). Under the causation approach, if a physical disorder causes a mental disorder, the disorder is considered "physical." *See id.* (stating that physical illnesses under this approach include any illness with physical origin). In *Tolson*, if the court applied the causation approach and found that the depression had been caused by either the hepatitis or the treatment for the hepatitis, the court probably would have classified the disorder as physical. *See Kunin v. Benefit Trust Life Ins.* Co., 696 F. Supp. 1342, 1347 (C.D. Cal. 1988) (holding that autism does not come under category of mental illness because it has "identifiable organic basis"), *aff'd*, 898 F.2d 1421 (9th Cir. 1990), amended and superseded by *910 F.2d 534* (9th Cir. 1990); *Prince v. United States Life Ins. Co.*, 257 N.Y.S.2d 891, 892-93 (App. Div. 1965) (holding that insured, who suffered mental illness after loss of eye, was covered under insurance plan that excluded coverage for mental diseases because reasonable person would assume he or she was "covered for all disorders or reactions . . . directly resulting from an accidental bodily injury"), *aff'd*, 17 N.Y.2d 742 (1966). In a case, however, where a mental disorder could have a physical cause, but it is not entirely certain whether the physical problem caused the mental disorder, the court may refuse to group the disorder under the "physical" category because of the lack of proof. *See Killebrew v. Abbott Lab.*, 352 So. 2d 332, 334-35 (La. Ct. App. 1977) (finding that medical experts' failure to uncover organic brain damage supported conclusion that functional disorder caused plaintiff's mental problems even though medical experts did not deny that encephalitis may have played some role in manifestation of mental problems), *aff'd*, 359 So. 2d 1275 (La. 1978).
equal treatment. One commentator noted that if the courts continue to conclude that the ADA allows for disparate treatment of the mentally disabled in insurance plans, mental health advocates will increase their efforts in the legislative arena. And the legislative arena is where some believe the decision ultimately belongs.

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181. For an overview of the courts that have taken the predominant view that mental and physical disabilities need not be treated equally, see supra note 64-83 and accompanying text.

182. See Employment Law Alert (visited Oct. 22, 1999) <http://frontpage.nhdd.aa.psiweb.com/emplaw/apr98/elarta.htm#pagetop> (noting that if courts "continue to declare they will not remedy the disparity in standard [long-term disability] policy coverage between mental and physical disabilities," mental health advocates "will redouble their efforts to mandate such a policy change at the congressional level”).

183. See, e.g., Blakley, supra note 44, at 47 (stating that "[w]hether full mental health parity should be mandated in health and disability insurance plans is a choice best left to the legislative arena"); Martinson, supra note 54, at 380 (noting that some courts believe that because ADA does not expressly say whether discrimination between disabilities is prohibited, if Congress intended ADA to prohibit discrimination between disabilities, "it is for Congress to make those changes, not the courts").