Eradicating Discrimination Among Individuals with Disabilities: Parity in Employer-Provided, Long-Term Disability Benefit Plans

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Eradicating Discrimination Among Individuals with Disabilities: Parity in Employer-Provided, Long-Term Disability Benefit Plans

Andrea K. Short*

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I. Introduction

Disability insurance benefits protect against the loss of earning power when an accident or illness renders an individual unable to work. Individuals commonly receive employer-provided disability insurance benefits through their employee benefit packages. In terms of ensuring financial security, long-term disability benefits arguably constitute the most significant component of an employee’s benefit package. Increasingly, however, those employ-

1. See EMPLOYEE BENEFIT RESEARCH INSTITUTE, FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS 289 (5th ed. 1997) (explaining that disability insurance plans replace individual’s income when illness or injury prevents him from working); JERRY S. ROSENBOOM & G. VICTOR HALLMAN, EMPLOYEE BENEFIT PLANNING 225 (1981) (defining disability benefits as cash payments that employers make in lieu of salary while individual is unable to work).

2. See EMPLOYEE BENEFIT RESEARCH INSTITUTE, supra note 1, at 289-90 (reporting that 41% of full-time employees in medium and large private establishments had employer-provided, long-term disability insurance in 1993); id. at 297 (reporting that 11.8 million full-time employees at medium and large private enterprises were eligible for long-term disability benefits); id. at 289 (stating that employer-provided disability plans "have gained wide acceptance").

3. See id. at 297 (concluding that disability insurance can mitigate "devastating" economic effect of disability on family); ROSENBOOM & HALLMAN, supra note 1, at 241 ("In terms of potential loss exposure of financial ruin for employees and their families, long-term disability
ers who offer long-term disability plans are placing caps on the provision of mental disability benefits. Most commonly, these plans cap mental disability benefits at twenty-four months unless the mental disability requires hospitalization. Meanwhile, these plans pay benefits to individuals with physical disabilities, regardless of hospitalization, from the onset of the disability until age sixty-five, the age at which individuals typically become eligible for social security benefits.

Individuals with mental disabilities who receive long-term disability benefits through employer-provided plans that cap mental disability benefits have sued their former employers under the Americans with Disabilities Act of 1990 (ADA). These plaintiffs have alleged that capping mental disability benefits without similarly capping physical disability benefits violates Title I of the ADA because the practice discriminates against individuals with mental disabilities. To succeed, these fully mentally disabled former employees must demonstrate both that they are proper plaintiffs and that the ADA mandates parity in mental and physical disability benefits. Specifically, courts have required fully mentally disabled former employees to show the following: (1) that individuals who no longer are able to perform the essential protection is perhaps one of the most important in the entire employee benefit plan."


5. See Schlitz, supra note 4, at 601 (explaining that "[m]ost common limit is 24 months for the life of the contract unless the insured is continuously hospitalized for the disorder").

6. See Giliberti, supra note 3, at 603 (stating that long-term disability plans continue paying physical disability benefits until age sixty-five — normal retirement age — unless disability ceases, while at same time limiting mental disability benefits to two or three year period).

7. 42 U.S.C. § 12112 (1994); see infra note 8 (citing cases in which such individuals have sued their employers).


9. See infra notes 10 and 11 and accompanying text (setting out two-pronged showing that courts require of fully disabled plaintiffs attempting to challenge disparity in employers’ provision of disability benefits).
functions of their employment positions are proper plaintiffs under Title I and (2) that a disparity between mental and physical disability benefits constitutes discrimination cognizable under Title I of the ADA.

Whether a fully disabled former employee is a proper plaintiff under Title I is the threshold issue. Two federal courts of appeals have dismissed fully disabled former employees' lawsuits, while two other federal courts of appeals and one federal district court have interpreted the ADA as permitting fully disabled former employees to challenge their disability benefit plans. Of the four federal courts of appeals to address the second issue, parity between mental and physical disability benefits, all have concluded that Title I permits employers to distinguish between mental and physical conditions in the provision of disability benefit plans.

10. See Ford, 145 F.3d at 604-05 (outlining preliminary question of whether fully disabled individual may bring ADA claim against former employer when plaintiff is unable to perform essential functions of position); Nicole L. Martinson, "Inequality Between Disabilities: The Different Treatment of Mental Versus Physical Disabilities in Long-Term Disability Plans," 50 Baylor L. Rev. 361, 363 (1998) ("One of the first obstacles presented to a plaintiff under Title I is the question of whether the plaintiff is entitled to the protection of Title I of the ADA (i.e. standing).").

11. See Ford, 145 F.3d at 608 (identifying second issue as whether ADA challenge to disparity between mental and physical disability benefits survives Rule 12(b)(6) motion).

12. See supra note 10 (identifying initial issue as whether fully disabled former employee is eligible to bring Title I claim); Bonnie Poitras Tucker, Insurance and the ADA, 46 DePaul L. Rev. 915, 920-21 (1997) (describing question of whether former employees even may bring Title I claims as "issue of dispute"); Wendy Wilkinson, "Judicially Crafted Barriers to Bringing Suit Under the Americans with Disabilities Act," 38 S. Tex. L. Rev. 907, 908 (1997) ("Many cases are being dismissed at the pretrial stage because the plaintiff has been unable to prove to the satisfaction of the courts that they have a disability as defined by the [ADA].") Because resolving the issue of eligibility is critical to reaching the ultimate issue of parity, this Note focuses primarily on the issue of whether an individual who suffers from a fully disabling mental condition is an eligible plaintiff under Title I.

13. See Parker, 121 F.3d at 1008-09 (approving panel's finding that plaintiff was ineligible to bring suit under Title I of ADA because she could not perform essential duties of her occupation); CNA Ins., 96 F.3d at 1044-45 (rejecting plaintiff's arguments that disability recipient qualifies as having employment position and that former employees may invoke protections of ADA as former employees invoke protections in Title VII suits).

14. See Ford v. Schering-Plough Corp., 145 F.3d 601, 607 (3d Cir. 1998) (allowing fully disabled plaintiff to file Title I claim in order to challenge discriminatory post-employment benefits), cert. denied, 119 S. Ct. 850 (1999); Castellano v. City of New York, 142 F.3d 58, 68 (2d Cir. 1998) (rejecting interpretation that would bar former employee suits because such interpretation would frustrate clear purpose of § 12112(a) and (b) of ADA in preventing discrimination in fringe benefits); Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158, 1163 (E.D. Va. 1997) (declining to bar former employees who are no longer able to perform jobs because doing so would "effectively prevent any plaintiff from challenging an employer's provision of disability benefits as discriminatory under Title I of the ADA"), vacated and remanded sub nom. Lewis v. K-Mart Corp., 180 F.3d 166 (4th Cir. 1999).

15. See Lewis v. K-Mart Corp., 180 F.3d 166, 172 (4th Cir. 1999) (upholding employer's
This Note examines the cases in which individuals who suffer from a full mental disability have challenged, under Title I of the ADA, their former employers' provision of disability insurance that limits long-term mental disability benefits but does not similarly limit long-term physical disability benefits. Part II of this Note provides an overview of the history, purpose, and provisions of Title I of the ADA. In Part III, this Note examines the disagreement among the federal courts that have addressed whether fully disabled former employees are eligible to file ADA claims and concludes that courts should permit these plaintiffs to file Title I claims for the limited purpose of challenging post-employment benefits. Part IV analyzes the substantive claim that disparity in long-term mental and physical disability benefits violates the ADA and ultimately reasons that the ADA does require parity in disability benefit plans, despite the current state of the law. Finally, Part V concludes that courts must allow fully disabled former employees to sue their employers and must require long-term disability benefit plans to cover mental disabilities and physical disabilities equally.

disability plan that provided less generous mental disability benefits based on conclusion that ADA only outlaws discrimination against class of individuals with disability, not discrimination among the individuals within the class); Ford, 145 F.3d at 608 (stating that disparity in mental and physical disability benefits does not constitute violation of Title I of ADA); Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1015 (6th Cir. 1997) (en banc) (stating that ADA does not require disability plans to treat mental and physical disabilities equally); EEOC v. CNA Ins., 96 F.3d 1039, 1044 (7th Cir. 1996) (refusing to read parity requirement into Title I of ADA).

16. See Ford, 145 F.3d at 604 (describing defendant's disability insurance plan as limiting mental disability benefits to two-year period while paying former employees physical disability benefits from time of disability until age sixty-five); Parker, 121 F.3d at 1008 (summarizing defendant’s disability insurance plan as limiting mental disability benefits to two years, absent hospitalization, while paying physical disability benefits until age sixty-five); CNA Ins., 96 F.3d 1041 (describing defendant’s disability insurance plan as limiting mental disability benefits to two-year period while paying physical disability benefits from time of disability until age sixty-five); Lewis v. Aetna Life Ins. Co., 7 F. Supp. 2d 743, 745 (E.D. Va. 1998) (same); Schroeder v. Connecticut Gen. Life Ins. Co., No. 93-M-2433, 1994 WL 909636, at *1 (D. Colo. Apr. 22, 1994) (summarizing defendant’s disability insurance plan as limiting mental disability benefits to thirty months without imposing same limitation upon physical disability benefits).

17. See infra Part II (summarizing legislative history, congressional intent, and statutory language of ADA).

18. See infra Part III (describing competing conclusions among federal courts and concluding that those allowing fully disabled individuals’ suits are correct).

19. See infra Part IV (reviewing arguments of cases on each side of parity issue and concluding that ADA does require parity in disability benefit plans).

20. See infra Part V (linking two issues and arguing that Title I permits fully disabled employees to sue their employers and requires employer-provided long-term disability benefit plans to provide equal coverage for mental and physical disabilities).
II. Title I of the Americans with Disabilities Act

A. History and Purpose of Title I

1. The Foundation: The Rehabilitation Act of 1973

Prior to the ADA's enactment, individuals with disabilities chiefly relied on the Rehabilitation Act of 1973\(^{21}\) to fight disability-based discrimination.\(^{22}\) The Rehabilitation Act, however, proved insufficient to provide comprehensive protection against disability-based discrimination.\(^{23}\) Although the statute outlawed discrimination against individuals with mental disabilities,\(^{24}\) courts and agencies rarely awarded relief to individuals with mental disabilities under the Rehabilitation Act.\(^{25}\) This reluctance stemmed, in part, from the lack of public understanding of and support for individuals with mental disabilities.\(^{26}\) For individuals with mental disabilities, therefore, the Rehabilitation Act was not enough.\(^{21}\) 29 U.S.C. § 794 (1994).

22. See Michel Lee, Searching for Patterns and Anomalies in the ADA Employment Constellation: Who Is a Qualified Individual with a Disability and What Accommodations Are Courts Really Demanding?, 13 LAB. LAW. 149, 149 n.2 (1997) (stating that before Congress enacted ADA, Section 504 of Rehabilitation Act constituted only other significant federal law prohibiting disability-based employment discrimination). In passing the Rehabilitation Act, Congress sought to better the lives of individuals with disabilities through vocational training, research, and increased federal employment of individuals with disabilities. See 29 U.S.C. § 701(b) (1999) (describing purposes of Rehabilitation Act as to "empower individuals with disabilities... through vocational training, research, and increased federal employment of individuals with disabilities.") See 29 U.S.C. § 706(8)(A) (1994) (stating that Rehabilitation Act counts either "physical or mental impairment" as covered disability).

23. See H. REP. NO. 101-485, pt. 2 at 48 (1990), reprinted in THE LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT, at 311 (G. John Tysee ed., 1990) [hereinafter LEGISLATIVE HISTORY] (summarizing statement of Attorney General Richard Thornburgh regarding federal disability discrimination law prior to ADA as "a patchwork quilt in need of repair. There are holes in the fabric, serious gaps in coverage that leave persons with disabilities without adequate civil rights protections"); NATIONAL COUNCIL ON DISABILITY, EQUALITY OF OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT 182 (1997) (summarizing characterization of pre-ADA law as "[a]swiss cheese covering a map of the United States: there were many holes where there were little to no civil rights protections for persons with disabilities").


25. See Leonard S. Rubenstein, Mental Disorder and the ADA, in IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT 209, 211 (Lawrence O. Gostin & Henry A. Beyer eds., 1993) (providing examples of ways in which courts have refused to extend protections of Section 504 to individuals with mental disabilities).

26. See id. at 220 (attributing Rehabilitation Act's failure to assist individuals with mental disabilities to fact that in 1973, Rehabilitation Act's applicability to individuals with mental disabilities represented forward thinking). Rubenstein asserts that "[n]either society nor the judiciary was prepared to accept its implications." Id.
tion Act offered little real assistance in combating discrimination and prejudicial stereotypes.27

The employment provision of the Rehabilitation Act, Title V, addressed only discrimination by federal agencies and entities contracting or otherwise associating with federal agencies.28 In Section 504 of Title V, Congress made a strong statement against disability-based discrimination in the employment context; however, the section lacked clear guidance on how to enforce its provisions.29 These deficiencies prevented the Rehabilitation Act from effectively redressing disability-based discrimination and motivated Congress to enact stronger legislation, the ADA.30

2. The Aspiration: The Purpose of Title I

In designing Title I of the ADA, Congress used Title V of the Rehabilitation Act as the foundation of the ADA’s substantive protections,31 but explic-
itly fortified Title I with a broader scope and stronger protections than Title V of the Rehabilitation Act. Unlike Section 504 of the Rehabilitation Act, Title I of the ADA is the product of strong public and congressional advocacy by and on the behalf of individuals with disabilities. Title I of the ADA seeks to enable individuals with disabilities to participate in the workforce and to gain economic independence. Congress designed Title I of the ADA to provide individuals with mental or physical disabilities comprehensive protection against and remedies for disability-based discrimination in the employment context.

B. Scope of Title I

1. Who Does Title I Protect?

The ADA's protections extend to individuals afflicted with mental, as well as physical, disabilities. Covered mental disabilities include conditions

A. Beyer eds., 1993) (identifying Sections 501, 503, and 504 of Rehabilitation Act as primary basis for ADA's substantive protections).

32. See NATIONAL COUNCIL ON DISABILITY, supra note 23, at 232 (stating that "[I]legally, [the ADA] will provide our disabled community with a powerful expansion of protections and then basic civil rights" (quoting President George Bush's Remarks at ADA Signing)); Miller, supra note 27, at 704 (explaining way in which ADA broadens Rehabilitation Act's coverage by including private employers and requiring employers to make reasonable accommodations for individuals with disabilities).

33. See NATIONAL COUNCIL ON DISABILITY, supra note 23, at 14 (describing Section 504 of Rehabilitation Act as "created silently by a group of congressional staff members"). Congress included the provision in the final version, despite the fact that no one had recommended its inclusion in congressional hearings, during floor debate, or in the original version of the Rehabilitation Act. Id. In contrast, the forces responsible for enacting the ADA formed "a solid foundation: of policy, legal principle, personal networks, coalition-forming, and an increasingly active disability community." Id. at 5; see Rubenstein, supra note 25, at 220 ("There is more than a technical difference between the Rehabilitation Act's few sentences, passed without national debate or attention, and a law with both sweeping and comprehensive language and the attention accompanying a Rose Garden signing ceremony.").

34. See 42 U.S.C. § 12102(2)(A) (1994) (defining term "disability" as "physical or mental impairment that substantially limits one or more of the major life activities" of individual).

35. See S. REP. No. 101-116, at 10, reprinted in LEGISLATIVE HISTORY, supra note 23, at 55 (stating that "critical goal" of ADA is to help individuals with disabilities become "part of the economic mainstream of our society").

36. 42 U.S.C. § 12101(b)(1994). Section 12101(b) states that the purpose of the ADA is:

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; . . .

Id. Title I contains the employment-specific provisions of the ADA. Id. § 12112.

37. See 42 U.S.C. § 12102(2)(A) (1994) (defining "disability" as "physical or mental impairment").
commonly thought of as psychological or emotional conditions, as well as mental deficiencies or injuries. Title I's protections, however, do not apply to all individuals with disabilities.

Title I addresses disability-based discrimination only in the employment setting. In defining the terms "employer" and "employee," Congress incorporated the exact definitions that it used in Title VII of the Civil Rights Act of 1964 (Title VII). Congress narrowed the scope of Title I's protections, however, by prohibiting only those disability-based decisions involving employees who also are "qualified individuals with disabilities." Qualified individuals with disabilities are individuals who are able, despite their disabilities, to perform the essential functions of the employment position they seek or hold. Congress explicitly inserted the "qualified individual with a disability" limitation to prevent Title I from infringing on an employer's ability to discharge or to reject an individual who is unable to perform the job in question.

38. See S. REP. No. 101-116, at 22 (1989), reprinted in LEGISLATIVE HISTORY, supra note 23, at 61 (defining "mental impairment" as "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities"). The EEOC has clarified the term "mental impairment" further by reference to the current edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders; the manual is helpful, though not conclusive, in determining what conditions the term "mental impairment" includes. EEOC GUIDANCE ON PSYCHIATRIC DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT, reprinted in 59 DAILY LAB. REP. (BNA) E1 (March 27, 1997). The EEOC gave some examples of covered emotional illnesses, including "major depression, bipolar disorder, anxiety disorders . . . , schizophrenia, and personality disorders." Id. The EEOC explained that although courts and employers should use the American Psychiatric Association manual as a reference, not all impairments listed therein constitute a disability under the ADA. Id. at E2. For instance, the ADA does not define either drug abuse or alcoholism as a protected disability; however, the manual does list them as impairments. Id.


40. See S. REP. No. 101-116, at 42, reprinted in LEGISLATIVE HISTORY, supra note 23, at 71 (stating that ADA "incorporates by reference the definition of the term 'employer' and 'employee' used in Title VII of the Civil Rights Act of 1964"); see also 42 U.S.C. § 2000e(f) (1994) (defining "employee" to mean "individual employed by an employer").

41. See 42 U.S.C. § 12112(a) (1994) (prohibiting employers from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual" in employment context).

42. See 42 U.S.C. § 12111(8) (1994) (defining term "qualified individual with a disability" for purposes of ADA). Section 12111 reads:

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

Id.; see S. REP. No. 101-116, at 26, reprinted in LEGISLATIVE HISTORY, supra note 23, at 63 (clarifying meaning of "essential functions" as "tasks that are fundamental and not marginal").

43. See S. REP. No. 101-116 at 26 (1989), reprinted in LEGISLATIVE HISTORY, supra note 23, at 63 (stating that purpose of inserting "qualified individual with disability" requirement is
2. What Does Title I Prohibit?

Title I of the ADA prohibits private employers\textsuperscript{44} from engaging in disability-based employment discrimination.\textsuperscript{45} Its provisions protect job applicants and employees with disabilities from receiving discriminatory treatment with respect to their employers' personnel decisions, compensation plans, training programs, and fringe benefits packages.\textsuperscript{46} Employer-provided insurance policies or training courses that third parties administer by virtue of a contractual agreement with the employer also fall within the ambit of Title I's protections.\textsuperscript{47}

to guarantee employers' freedom to hire and retain only those individuals capable of performing job. The Senate Committee on Labor and Human Resources explained in their report that the purpose of the term "qualified individuals with disabilities" is to "ensure that employers can continue to require that all applicants and employees, including those with disabilities, are able to perform the essential, i.e., non-marginal functions of the job in question." \textit{Id.}


45. \textit{See} 42 U.S.C. § 12112(a) (1994) (defining generally prohibited practices by employers). Section 12112(a) reads:

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. \textit{Id.; see} S. REP. No. 101-116, at 24-25 (1989), \textit{reprinted in} LEGISLATIVE HISTORY, \textit{supra} note 23, at 62-63 (explaining scope of coverage should include traditional employment relationship wherein employers employ at least 15 individuals who work every working day for at least 20 weeks per year).

46. \textit{See} 42 U.S.C. § 12112(a) (prohibiting discrimination in "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment" (emphasis added)).

47. \textit{See id.} §12112(b)(2) (including within prohibited discrimination any employer participation in contractual arrangement with fringe benefit provider that subjects employee with disability to discrimination); \textit{see also} S. REP. No. 101-116, at 25, \textit{reprinted in} LEGISLATIVE HISTORY, \textit{supra} note 23, at 63 (defining actions that Title I covers as including "fringe benefits available by virtue of employment, whether or not administered by the covered entity"). However, Title I covers insurance policies only in the sense that they are employer-provided; Title V explicitly sets forth the ADA's applicability to the substance of insurance policies. 42 U.S.C. § 12201(o) (1994); \textit{see} David A. Engel, \textit{The ADA and Life, Health, and Disability Insurance: Where is the Liability?}, 33 TORT & INS. L. J. 227, 234-35 (1997) (explaining that § 12201(o) provides exception from ADA requirements for insurers and other providers of ERISA plans so long as exempted entity is not using exception to thwart ADA's purpose). Essentially, the purpose of Section V is to permit insurers to continue using traditional means of underwriting and classifying risks, provided that the variance in coverage is actuarially-based. "The legislative history of [Title V] suggests that insured plans may subject a person with a
3. How Does Title I Work?

The Rehabilitation Act's silence with regard to enforcement hampered its effectiveness. Consequently, Congress expressly incorporated Title VII's enforcement procedures and remedies into Title I to ensure that its protections would be more meaningful than the Rehabilitation Act's. By infusing the substantive protections of the ADA with Title VII's remedies and enforcement powers, Congress intended to empower individuals with disabilities as it had empowered other historically disadvantaged minorities. To improve further upon the Rehabilitation Act's effectiveness, Congress explicitly directed that when interpreting or implementing the ADA, courts and agencies should construe the ADA's standards and requirements as equal to or more stringent than the Rehabilitation Act's standards and requirements.

C. Interpreting Title I of the ADA

In crafting the ADA, Congress intended to provide a clear statutory framework for identifying, redressing, and preventing discrimination against individuals with disabilities. As the flood of litigation that has followed the

disability to different coverage terms or conditions based on disability alone, if the disability poses increased risks." Id. at 234.

48. See Brandfield, supra note 29, at 116 (stating that not until Office of Civil Rights authored implementing guidelines some years after Rehabilitation Act's passage did Title V begin fulfilling its potential to end discrimination); supra notes 28-29 and accompanying text (discussing Rehabilitation Act's lack of enforcement guidance).

49. See 42 U.S.C. 12117(a) (1994) (defining "powers, remedies, and procedures" of Title VII of Civil Rights Act also to be "powers, remedies, and procedures" of Title I of ADA); H. REP. NO. 101-485, pt. 2, at 82 (1990), reprinted in LEGISLATIVE HISTORY, supra note 23, at 328 (defining powers, remedies, and procedures that ADA confers as "the same as, and parallel to" those contained within Title VII and stating that change in Title VII's enforcement necessarily causes simultaneous change in ADA's enforcement).


51. See 42 U.S.C. § 12201(a) (directing that no court should construe ADA standard as affording less protection than Title V of Rehabilitation Act unless Congress expressly specifies otherwise); 29 C.F.R. § 1630.1(b)-(c) (1998) (same); see also John Parry, Title I - Employment, in IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT 57, 59 (Lawrence O. Gostin & Henry A. Beyer eds., 1993) (explaining that under Title I of ADA, individuals with disabilities "enjoy all the protections found under the Rehabilitation Act... as well as additional protections found in Title I and its regulations").

52. See 42 U.S.C. § 12101(b) (1994) (stating purpose of ADA is "to provide a clear and comprehensive national mandate" against disability-based discrimination and "to provide clear, strong, consistent, enforceable standards" for redressing disability-based discrimination).
ADA's enactment demonstrates, however, the language of the ADA contains numerous ambiguities and inconsistencies.53 Exactly whom the ADA protects and what the ADA prohibits, therefore, has become a question for the courts, turning the question of how to interpret the ADA into a legal battleground.54

1. Principles of Statutory Interpretation

When Congress writes a statute that is clear on its face and clear in its effect, a court should look only to the statute's plain language in construing the statute.55 If the language of the statute is unclear but Congress has authorized an agency to administer the statute and that agency has issued clarifying regulations, then courts should defer to the agency if the agency's interpretation is reasonable.56 Absent a controlling congressional or agency interpretation, a court should examine the language itself, the context in which Congress used the language, and the legislative purpose in enacting the statute.57 The Supreme Court has held, however, that if the court finds the language contradictory it should not construe the ambiguity in a way that nullifies or threatens a substantive right.58

53. See Charles B. Lynch, The Americans with Disabilities Act and Disability Benefit Plans, 22 SETON HALL LEGIS. J. 561, 564 (1998) ("[T]he drafters of the ADA forged a legislative scheme that has probably created more questions and litigation than actually assisting the individuals that its provisions were designed to protect.").

54. See Lee, supra note 22, at 150 (quoting Congressman Norman Shumway's statement that ADA "is a swamp of imprecise language which will mostly benefit lawyers who will cash in on the litigation and result in judges writing the 'real' law").


56. See Chevron, 467 U.S. at 844 (explaining that if Congress has made implicit delegation to agency, then court must defer to agency's interpretation of statute unless interpretation is unreasonable).

57. See Robinson, 519 U.S. at 341 (explaining that court should decide whether statute is plain or ambiguous based on actual language, specific context of language, and context of statute as whole); United States Nat'l Bank v. Independent Ins. Agents of Am., Inc., 508 U.S. 439, 455 (1993) (emphasizing that court must "look to the provisions of the whole law, and to its object and policy" when construing statute (quoting United States v. Heirs of Boisdore, 311 U.S. 579, 582 (1849))).

58. See Reconstruction Fin. Corp. v. Prudence Sec. Advisory Group, 311 U.S. 579, 582 (1941) (stating that "[a]mbiguities in statutory language should not be resolved so as to imperil a substantial right which has been granted").
2. The Equal Employment Opportunity Commission's Interpretation

Primary responsibility for implementing and enforcing the ADA rests with the Equal Employment Opportunity Commission (EEOC). In accordance with the previously discussed principles of statutory interpretation, the Supreme Court has applied only a reasonableness requirement when analyzing the EEOC's statutory interpretations. The EEOC has yet to issue any formal guidance on the validity of disability-based distinctions in disability insurance benefit plans. However, the agency has argued that the ADA prohibits disability insurance plans from capping mental, but not physical, disability benefits, even though it has opined that the ADA permits such distinctions in health insurance plans. In furtherance of its position, the EEOC has taken an active role in litigating the issue of mental and physical parity in employer-provided disability plans. The agency has sought to enjoin employers from terminating mental disability benefits and has filed amici briefs on behalf of those plaintiffs who have challenged disparity in their disability benefit plans. Despite the tradition of according agency interpretations significant weight in construing statutes, federal courts of appeals thus far have ignored

59. See 42 U.S.C. § 12111(1) (1994) (defining "Commission" as Equal Employment Opportunity Commission); id. § 12117(a) (bestowing powers, remedies, and procedures for enforcement of ADA upon "the Commission"); id. § 12206 (c)(2)(A) (granting EEOC authority to assist covered entities in implementing and complying with Title I requirements).

60. See EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 115 (1988) (stating that EEOC's interpretation of statutes for which it bears primary enforcement responsibility "need only be reasonable to be entitled to deference" (citation omitted)).

61. See Giliberti, supra note 3, at 603 (discussing need for formal EEOC guidance or regulations with respect to disability insurance plans).

62. See Blakley, supra note 4, at 42 (stating that EEOC has argued that Title I requires employer-provided long-term disability plans to cover physical and mental disabilities equally); infra note 64 (cataloging cases in which EEOC has championed argument that disparity in disability benefits violates ADA).

63. See EEOC INTERIM GUIDANCE ON APPLICATION OF ADA TO HEALTH INSURANCE, reprinted in DAILY LAB. REP. (BNA) E2 (June 9, 1993) (explaining what constitutes disability-based distinction). The EEOC Interim Guidance states:

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.

Id.

or rejected the EEOC's interpretation of the ADA with regard to parity and disability benefit levels.

III. Are Fully Disabled Former Employees Eligible to Sue Under Title I?

Disability recipients challenging disparity between mental and physical disability benefits first must convince a court that they are entitled to Title I's protection. The difficulty of this first hurdle lies in the apparent discrepancy between what the ADA procedurally requires — individuals with disabilities who can perform their jobs — and what it substantively protects — nondiscrimination in disability benefits. Two federal courts of appeals that have examined this apparent discrepancy have precluded fully disabled former employees from suing under Title I. However, a closer reading of both the language and the purpose of the ADA, as well as reference to its sister statute, Title VII, supports allowing fully disabled former employees to bring Title I claims regarding their disability benefits.

A. Finding Fully Disabled Former Employees Ineligible

The United States Courts of Appeals for the Sixth and Seventh Circuits have found fully disabled former employees ineligible to bring Title I claims regarding employer-provided disability plans that offer less generous benefits for mental disabilities than for physical disabilities. In doing so, both circuits

65. See infra Part IVA (summarizing and analyzing case law rejecting plaintiffs' arguments for parity between physical and mental disability benefit levels).

66. See supra notes 6-12 (identifying question of whether fully disabled former employees are proper plaintiffs under Title I as primary issue).

67. See Ford v. Schering-Plough Corp., 145 F.3d 601, 605 (3d Cir. 1998) (finding "disjunction between the ADA's definition of 'qualified individual with a disability' and the rights that the ADA confers"), cert. denied, 119 S. Ct. 850 (1999); Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158, 1163 (E.D. Va. 1997) (finding that strictly requiring plaintiff to be "qualified individual with disability" when challenging disability benefits would prevent any plaintiff from bringing suit and create "enormous ... gap" in ADA's protections), vacated and remanded sub nom. Lewis v. KMart Corp, 180 F.3d 166 (6th Cir. 1999); see also Lee, supra note 22, at 194 (describing "catch-22" that results because courts require individual to prove disability is sufficiently limiting to render him "qualified individual with disability" but also prove that he is able to perform "essential functions" of position).

68. See Parker v. Metropolitan Life Ins. Co., 99 F.3d 181, 187 (6th Cir. 1996) (finding plaintiff ineligible because she could no longer perform essential functions of job), reh'g granted on other grounds and rev'd, 121 F.3d 1006 (6th Cir. 1997); EEOC v. CNA Ins. Cos., 96 F.3d 1039, 1045 (7th Cir. 1996) (same); see also Lynch, supra note 53, at 585 (finding that current law indicates that individual lacks standing to make Title I ADA claim when he is no longer able to perform job).

69. See infra Part III.C (analyzing case law on eligibility to file claim under Title I and finding arguments in support of permitting fully disabled former employees to sue persuasive).

70. See Parker, 99 F.3d at 187-88 (rejecting EEOC argument that "benefits recipient" is
rely on the Eleventh Circuit’s opinion, *Gonzales v. Garner Food Services, Inc.*, in which an estate administrator sued a decedent’s former employer alleging that the employer’s provision of a health insurance plan that capped coverage for AIDS-related illness violated Title I. The court in *Gonzales*, in turn, relied upon an Eighth Circuit case interpreting the Rehabilitation Act. Together, these two cases form the foundation for the Sixth and Seventh Circuits’ conclusions that fully disabled former employees are not proper plaintiffs under Title I of the ADA.

"employment position" under meaning of ADA and refusing to read Title I in way that ensures disability benefit recipients might be able to challenge provision of those benefits; *CNA Ins.*, 96 F.3d at 1044 (refusing to equate status as disability benefit recipient with "employment position" and finding Title VII construction of term "employee" for anti-retaliation claim inapplicable to disability benefit claim under ADA).

71. 89 F.3d 1523 (11th Cir. 1996).

72. See *Gonzales v. Garner Food Servs., Inc.*, 89 F.3d 1523, 1531 (11th Cir. 1996) (rejecting contention that for purposes of challenging employer-provided fringe benefits, individuals who are no longer able to perform functions of employment are eligible to sue under ADA). In *Gonzales*, the court addressed the question of whether a deceased individual’s estate could sue the decedent’s former employer regarding its health benefit policy under Title I of the ADA. *Id.* at 1524. The estate sought to challenge the defendant’s health insurance policy that capped AIDS-related health expenses at $40,000. *Id.* Plaintiff conceded that he was not a "qualified individual with a disability" under the statute’s plain meaning and instead argued that because Congress included post-employment benefits within the scope of the ADA, it necessarily "must have intended former employees to be protected under the ADA as well." *Id.* at 1526. Looking at the ADA’s definitions of the terms "discriminate" and "employee," the United States Court of Appeals for the Eleventh Circuit found no direct evidence in support of including former employees under the ADA. *Id.* Furthermore, the court reasoned, the ADA’s legislative history demonstrated Congress’s intent to limit Title I’s protections to those individuals able to perform their job duties at the time of the discriminatory act. *Id.* at 1527. The court determined that incorporating a broader definition of employee, and thereby expanding the pool of eligible plaintiffs, would undermine Congress’s actual intent. *Id.* at 1529. Because the court found that Congress had defined the term "employee" clearly in the ADA, it reached its conclusion without relying on Title VII for assistance in interpreting the term. *Id.* at 1528. Because the plaintiff conceded that he could not perform the essential functions of his former position, the court found him ineligible to bring an ADA claim. *Id.* at 1531.

Although *Gonzales* involves a challenge to a health insurance plan rather than a disability benefit plan, the case is relevant here for its treatment of a former employee in the ADA context, and because both the Seventh and Sixth Circuit Courts of Appeals relied heavily on the reasoning and holding in *Gonzales* in reaching their own conclusions. See infra Part III.A.2 (discussing reasoning of courts that reject fully disabled former employees’ right to sue under Title I).

73. See *Gonzales*, 89 F.3d at 1530 (comparing plaintiff’s claim to that of plaintiff in *Beaupre v. Father Flanagan’s Boys’ Home*, 831 F.2d 768 (8th Cir. 1987), and rejecting claim based on similar finding that ADA did not provide protection to individuals unable to perform jobs).

74. See infra notes 95 and 106 and accompanying text (describing Sixth and Seventh Circuits’ reliance on Rehabilitation Act precedent).
1. The Building Blocks: Gonzales and Beauford

In Gonzales, the Court of Appeals for the Eleventh Circuit ruled that the administrator of a decedent’s estate could not bring suit against the decedent’s former employer under Title I of the ADA because the decedent was not an employee at the time of the alleged discrimination.\textsuperscript{75} In arguing that the court should interpret the term "employee" to include former employees, the plaintiff argued that the court, when faced with ambiguous terms such as "employee" in the ADA, should interpret the ADA’s terms to correspond with those terms’ meanings in Title VII.\textsuperscript{76} The plaintiff argued further that the EEOC – the agency that Congress charged with interpreting the ADA – had issued interpretative guidelines that advocated the use of a broader interpretation of "employee."\textsuperscript{77} Unpersuaded, the Gonzales court concluded that the clarity of the ADA’s language made reference to Title VII unnecessary.\textsuperscript{78} Although the court acknowledged that the EEOC formally had indicated its support for inclusion of former employees within the ADA’s protections,\textsuperscript{79} the court rejected the plaintiff’s argument, reasoning that the more inclusive interpretation would undermine Congress’s intent to limit the ADA’s coverage to those individuals with a disability who could nonetheless perform the essential functions of their jobs.\textsuperscript{80}

The plaintiff in Gonzales also raised the "employment position" argument, attempting to analogize receiving health benefits to holding an employment position.\textsuperscript{81} Specifically, the plaintiff argued that being a benefit recipient

\textsuperscript{75} See Gonzales, 89 F.3d at 1530 (finding that because decedent had not been qualified applicant or employee at time of discrimination, ADA did not entitle plaintiff to file claim).

\textsuperscript{76} See id. at 1527 (summarizing plaintiff’s argument that ADA legislative history favors giving ADA terms same meaning as Congress gave them in Title VII).

\textsuperscript{77} See id. (summarizing plaintiff’s reliance upon EEOC interpretative guidelines advocating broad interpretation of terms such as "employee").

\textsuperscript{78} See id. at 1528 (rejecting EEOC’s interpretation of "employee" as including former employees and instead adopting narrow reading of term so as to include only job applicants and those currently employed). The court found that the "plain language of the ADA clearly demonstrates" that Congress intended the ADA to protect only applicants and current employees. Id. Finding the statutory language clear and decisive, the court reasoned that it need not look to Title VII case law. Id.

\textsuperscript{79} See id. (acknowledging that EEOC’s interpretative guidelines supported broader interpretation of term "employee"). The court stated, however, that the guidelines were not controlling. Id.

\textsuperscript{80} See id. at 1529 (concluding that allowing fully disabled former employee to sue employer would effectively negate Congress’s express intent to limit class of eligible ADA plaintiffs with "qualified individual with a disability" requirement).

\textsuperscript{81} See id. (summarizing plaintiff’s argument that decedent was "qualified individual with a disability" because qualifying for health benefits is equivalent to holding employment position).
is equivalent to being an employee. Just as an employee must be able to perform certain duties in order to hold an employment position, the argument runs, an individual must be able to meet certain conditions in order to receive disability benefits. An employee who is able, despite a disability, to perform the essential functions of an employment position is a "qualified individual with a disability." Similarly, a fully disabled former employee who is able, despite a disability, to meet the conditions of a disability benefit policy, the plaintiff argued, is a "qualified individual with a disability.

The Gonzales court relied on Beauford v. Father Flanagan's Boys' Home, a Rehabilitation Act case, in rejecting the plaintiff's analogy. In Beauford, the United States Court of Appeals for the Eighth Circuit concluded that under the Rehabilitation Act, an individual with a disability still must be able to perform the essential duties of his or her job to challenge discrimination in the provision of health insurance benefits. Likewise, the Gonzales court reasoned that under the ADA, an individual still must be able to perform the essential duties of his or her job to challenge discrimination in the prov-

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82. See id. (explaining employment position argument).
83. See id. (analogizing receiving health benefits to holding employment position).
84. Id.
85. Id.
86. 831 F.2d 768 (8th Cir. 1987).
87. See Beauford v. Father Flanagan's Boys' Home, 831 F.2d 768, 773 (8th Cir. 1987) (concluding that fully disabled former employee's claim of discrimination in post-employment provision of health benefits is not cognizable under Rehabilitation Act). In Beauford, the United States Court of Appeals for the Eighth Circuit addressed whether an individual who no longer is able to perform the essential duties of her job could bring a Rehabilitation Act claim regarding provision of post-employment benefits against her employer. Id. at 769. In implementing the Rehabilitation Act, the Department of Health and Human Services (HHS) defined a "Qualified Handicapped Person" in four contexts: employment, elementary and secondary education, post-secondary and vocational education, and other services. Id. at 772. The plaintiff conceded that her disability precluded her from performing her job. Id. at 771. She argued, however, that the "other services" provision, not the "employment" provision, governed her claim regarding employer-provided health benefits. Id. Therefore, she was a proper plaintiff under the Rehabilitation Act because her disability qualified her to receive the benefits at issue. Id. The court rejected her characterization of the claim, finding that HHS had clarified that "other services" includes general health and welfare programs that the federal government supports, not health benefits that an employer subsidizes. Id. at 772. Because Section 504 of the Rehabilitation Act, the employment section, is the relevant test of eligibility, and it extends only to individuals with disabilities who are "able to do the job in question," the Court concluded that the plaintiff could not bring her Rehabilitation Act claim. Id. at 772-73.
88. See Gonzales v. Garner Food Servs. Inc., 89 F.3d 1523, 1530 (11th Cir. 1996) (comparing plaintiff's claim to that of plaintiff in Beauford and rejecting claim based on similar finding that statute did not provide protection to individuals unable to perform jobs).
89. See Beauford, 831 F.2d at 772-73 (concluding that plaintiff was ineligible to file Rehabilitation Act claim because she could not perform essential functions of job).
sion of health insurance benefits. Therefore, because the decedent had been unable to perform his job when the alleged discrimination occurred, the court affirmed the district court's dismissal of the plaintiff's claim. 

Although Gonzales involved neither a fully disabled plaintiff nor a disability benefit plan, it provides the reasoning that the Sixth and Seventh Circuits would adopt and employ in considering fully disabled plaintiffs' claims regarding their disability benefits.

2. Courts Rejecting Fully Disabled Former Employees' Right to Sue Under Title I

Faced with a different factual predicate but similar legal arguments in EEOC v. CNA Insurance Cos., the Seventh Circuit refused to compel the plaintiff's former employer to continue paying the plaintiff's mental disability benefits. In CNA Insurance, the plaintiff used the employment position argument that the estate raised in Gonzales, contending that her status as a disability recipient was equivalent to holding an employment position. The Seventh Circuit, relying on the holdings in Gonzales and Beauford, rejected this argument. A lawsuit regarding disability insurance benefits, the court

90. See Gonzales, 89 F.3d at 1530 (finding, as did Eighth Circuit in Beauford, that "post-employment benefits recipient" is not "employment position" for which plaintiff was qualified).

91. Id. at 1531.

92. 96 F.3d 1039 (7th Cir. 1996).

93. See EEOC v. CNA Ins. Cos., 96 F.3d 1039, 1045 (7th Cir. 1996) (rejecting EEOC's arguments that plaintiff's status as disability recipient equaled employment position with defendant and that former employees may invoke ADA based on similar allowance of Title VII suits by former employees). In CNA Insurance, the Seventh Circuit considered the EEOC's motion to enjoin the defendant employer from terminating plaintiff's mental disability benefits while the agency investigated the merits of the plaintiff's ADA claim. Id. at 1041. The EEOC first argued that a disability recipient constitutes an employment position for which the only job duty is to collect a check. Id. at 1043-44. The plaintiff in CNA Insurance was able to collect a check; therefore, she was a "qualified individual with a disability" under 42 U.S.C. § 12112(a). Id. The agency also argued that former employees could file suit under Title I based on the fact that former employees may bring a Title VII challenge against their former employers. Id. at 1044. The court distinguished Title VII anti-retaliation suits because in the retaliation suit, the employee's right to pursue protected activity, such as filing a Title VII claim, arises during the employment period. Id. at 1045. In the plaintiff's case, the court found that no discriminatory act occurred during plaintiff's employment with CNA. Id. Therefore, the Seventh Circuit affirmed the district court's refusal to issue the injunction. Id.

94. See id. at 1043 (summarizing EEOC's argument that plaintiff's "employment position" is that of "disability recipient"); supra notes 81-85 and accompanying text (explaining reasoning of employment position argument).

95. See CNA Ins., 96 F.3d at 1044-45 (relying on Gonzales for conclusion that fully disabled former employee cannot bring Title I claim and finding that, as in Beauford, plaintiff's disabling condition rendered her ineligible to bring suit under ADA).
reasoned, involves the terms, conditions, and privileges of employment, not an "employment position." 96

The EEOC also argued that Title I permits fully disabled former employees to sue when challenging discrimination in employer-provided disability benefits, just as Title VII permits former employees to sue when challenging post-employment retaliation. 97 The court in CNA Insurance, however, rejected the EEOC's Title VII analogy. 98 Reducing the level of mental benefits available in a disability benefit plan is not analogous to retaliating against an individual who engaged in activity protected by Title VII, the court reasoned. 99 In the latter, the employee's right to sue stems from a protected interest that arose during the period of employment. 100 The court found that an employee possessed no similar interest in the terms of a disability benefit plan during the period of employment. 101

Like the plaintiff in CNA Insurance, the plaintiff in Parker v. Metropolitan Life Insurance Co. 102 began receiving disability benefits through an employer-provided disability plan after severe depression rendered her unable to work. 103 Upon notification that her employer would terminate her disability

96. See id. at 1044 (defining "employment position" as "a job" and characterizing pension plan as term, condition, or privilege of employment).
97. See id. (summarizing EEOC's alternate argument that former employees may sue under ADA based on similar rights under Title VII).
98. See id. at 1045 (finding no discrimination in plaintiff's case comparable to discrimination giving rise to former employee's right to sue under Title VII).
99. See id. (finding that unlike plaintiff in anti-retaliation case, plaintiff in disability benefit case suffers no harm arising out of employment relationship).
100. See id. (explaining basis for permitting former employees to make post-employment retaliation claims).
101. See id. (stating that mental disability benefits do not constitute "protected interest").
102. 99 F.3d 181 (6th Cir. 1996).
103. See Parker v. Metropolitan Life Ins. Co., 99 F.3d 181, 184 (6th Cir. 1996) (describing plaintiff's receipt of disability benefits after diagnosis that she suffered from severe depression).
benefits after twenty-four months, the plaintiff filed suit alleging that her employer’s limitation on mental benefits violated Title I of the ADA. On the plaintiff’s behalf, the EEOC argued that the court should find the fully disabled plaintiff to be a "qualified individual with a disability" for the limited purpose of challenging the discriminatory provision of disability benefits.

The Sixth Circuit followed the Seventh Circuit in relying on Gonzales and Beauford to reject the EEOC’s argument that being a benefit recipient is equivalent to holding an employment position. The EEOC also asked the Sixth Circuit to consider the remedial nature of the ADA, arguing that applying the qualified individual limitation in the context of a disability benefit challenge is incorrect because doing so essentially immunizes discrimination in disability benefits. The Parker court refused to view the qualified individual limitation as inapplicable to disability benefit suits, concluding instead that Congress limited the ADA’s coverage to prevent an individual who is unable to perform a job from making any Title I claims. Shortly after the Sixth and Seventh Circuits embraced a narrow reading of the term "employee,"
however, the Supreme Court rendered a decision that would prove valuable for fully disabled former employees seeking to file Title I suits.110

B. Finding Fully Disabled Former Employees Eligible

Fully disabled former employees succeeded in convincing both the United States Courts of Appeals for the Second and Third Circuits111 and the United States District Court for the Eastern District of Virginia112 that Title I of the ADA permits them to seek redress against their former employers. Faced with the task of deciding whether the ADA permitted these fully disabled plaintiffs to bring suit, these courts emphasized the importance of interpreting the ADA’s language and scope to effectuate the remedial goals of the ADA.113 Additionally, these courts relied upon the Supreme Court’s decision in Robinson v. Shell Oil Co.,114 in which the Court interpreted the term "employee" in Title VII to encompass former, as well as current and prospective employees.115

110. See infra Part III.B.1 (discussing reasoning and holding in Robinson v. Shell Oil Co., 519 U.S. 337 (1997)).

111. See Ford v. Schering-Plough Corp., 145 F.3d 601, 607 (3d Cir. 1998) (resolving ambiguity of term "employee" in ADA in favor of allowing individuals to sue former employers regarding individuals’ disability benefit packages), cert. denied, 119 S. Ct. 850 (1999); Castellano v. City of New York, 142 F.3d 58, 69 (2d Cir. 1998) (finding that prohibiting former employees from challenging provision of disability benefits under Title I of ADA would undermine remedial purpose of ADA which Congress intended).

112. See Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158, 1163 (E.D. Va. 1997) (denying motion to dismiss plaintiff’s ADA Title I claim because he was "qualified individual with a disability" when employer offered discriminatory plan to him), 7 F. Supp. 2d. 743 (1998) (awarding judgment to plaintiff), vacated and remanded sub nom. Lewis v. Kmart Corp., 180 F.3d 166 (4th Cir. 1999). Despite the Fourth Circuit’s recent decision vacating the district court opinion in Lewis based on the substance of the plaintiff’s parity claim, the District Court’s reasoning with regard to whether the plaintiff was eligible to sue is useful and instructive to this Note’s analysis.

113. See Ford, 145 F.3d at 606 (concluding that courts must permit fully disabled former employees to bring Title I claims "[i]n order for the rights guaranteed by Title I to be fully effectuated"); Castellano, 142 F.3d at 69 (holding, based on "ADA’s broad remedial purpose," that fully disabled former employee who performed essential functions of position long enough to earn fringe benefits could sue under Title I); Lewis, 982 F. Supp. at 1163 (rejecting limited reading of who may bring Title I claim to avoid contravening ADA purpose of redressing discrimination against individuals with disabilities in all areas of employment context).


115. See Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (holding that in Title VII, term "employee" includes former as well as current and prospective employees). In Robinson, the Court addressed the question of whether a former employee can invoke Title VII to challenge his former employer’s post-employment retaliation against him for filing a race discrimination claim with the EEOC. Id. at 339. Examining the statute’s plain language, the Court found that the omission of an explicit modifier such as "current" or "former" rendered the term "employee"
1. The Intervening Factor: Robinson v. Shell Oil

In Robinson, the Supreme Court considered the question of whether Title VII's coverage extends to former employees. The plaintiff in Robinson brought suit under Section 704(a) of Title VII, which forbids an employer from retaliating against an employee because the employee filed or assisted another employee in filing a discrimination charge under Title VII. The plaintiff, however, was a former employee, and in drafting Section 704(a), Congress failed to specify whether the term "employee" in Section 704(a) includes former, as well as current employees. Finding the statutory language unclear, the Court turned to the question of how to construe the term "employee" as used in Title VII.

The Court rejected the argument that Congress's explicit inclusion of former employees in other statutes precluded the possibility of implicit inclusion, especially in light of Congress's clear intent that former employ-
ees utilize some of Title VII's remedies. In accord with its tradition of deferring to the enforcing agency, the Court also considered the EEOC's interpretation of the term "employee" in Title VII. The EEOC argued that barring former employees from utilizing Section 704(a) would motivate employers to discharge potential Title VII claimants in order to avoid liability and thus leave a large number of discrimination victims without legal redress. This argument persuaded the Court that Title VII's purpose requires a court to include former employees within the scope of coverage that Section 704(a) provides. Otherwise, the Court reasoned, an individual would be without legal recourse once discharged, a consequence that would thwart the purpose of Title VII's anti-retaliation provisions.

2. Courts Upholding Fully Disabled Former Employees' Right to Sue Under Title I

Fully disabled former employees succeeded in bringing an ADA claim under Title I in Castellano v. City of New York, the first case to use the Supreme Court's reasoning in Robinson. Castellano, a Second Circuit deci-

122. See id. (highlighting Title VII's authorization of courts to order employers to reinstate or hire employees who were victims of discrimination). The Court explained that Sections 706(g)(1) and 717(b) of Title VII give courts remedial powers including "reinstatement or hiring of employees," and because an employer "does not reinstat[e] current employees, that language necessarily refers to former employees." Id. (citations omitted).

123. See supra notes 59-65 and accompanying text (discussing EEOC's role in interpretation of ADA and weight that Supreme Court accords those interpretations).


125. See id. (concluding that term "employee" must include former employees in order to realize Title VII's goal of providing statutory remedies for discrimination). The EEOC argued specifically that if the Court were to exclude former employees from Title VII claims, employers would be able to (1) deter potential Title VII claimants through threat of post-employment retaliation or (2) thwart the statute's purposes simply by firing employees who might bring such claims. Id.

126. See id. (concluding that context in which Congress used "employee" and broad purpose of Title VII support inclusion of former employees within term's scope).

127. 142 F.3d 58 (2d Cir. 1998).

128. See Castellano v. City of New York, 142 F.3d 58, 69 (2d Cir. 1998) (finding that prohibiting fully disabled former employees from challenging provision of retirement benefits under Title I of ADA would undermine remedial purpose that Congress intended ADA to have). The court in Castellano considered retired and fully disabled former city employees' ADA claims against the City of New York. Id. at 64. The Second Circuit modeled its analysis after Robinson, evaluating (1) the plain language, (2) the term "qualified individual with a disability" in its statutory context, and (3) the purpose and context of the statute as a whole. Id. at 67. Just as Congress did not temporally modify the term "employee" in Title VII, it similarly failed to specify
sion, involved fully disabled retirees who alleged that the defendant violated Title I by conditioning the level of benefits available to retirees on whether a disability forced the individual to retire. Looking at the plain meaning of Title I, the Castellano court could not reconcile Title I's prohibition on discrimination in the provision of post-employment benefits with the provision's requirement that a plaintiff be able to perform the "essential functions" of the job in order to sue. The court examined two specific concerns that the ADA addresses: (1) preventing individuals with disabilities from experiencing discrimination in employment benefits and (2) ensuring that employers remain free to refuse to employ unqualified individuals with disabilities.

The Castellano court reasoned that including former employees within the class of individuals eligible to bring ADA suits furthers the first objective without jeopardizing the second objective. Disability benefit claims, like the post-employment retaliation claims in Robinson, do not materialize until the plaintiff's employment terminates. Therefore, prohibiting former employees at what point an individual had to be "a qualified individual with a disability" able to perform the "essential functions" of the job in order to file an ADA claim regarding fringe benefits. Id. Congress inserted the "qualified individual with a disability" limitation to prevent the statute from forcing employers to hire or retain individuals unable to perform the "essential functions" of their positions. Id. at 68. An individual challenging the provision of disability benefits does not seek to be reinstated, therefore, in the limited context of redressing post-employment benefits, "Congress's expressed concern about qualifications is no longer implicated." Id. The court concluded that "[p]rovided that retired employees were qualified . . . while employed and on that basis became entitled to post-employment benefits, the purpose of the 'essential functions' requirement has been met." Id. After finding that reading the term "qualified individual with a disability" to permit lawsuits by former employees furthered, not contravened, the ADA's purpose, the court concluded that former employees are eligible to bring suit under Title VII. Id. at 69.

See id. at 62 (describing facts of Castellano). Although Castellano does not address the issue of mental parity, it is applicable to this discussion because it addresses the identical eligibility issue of whether a fully disabled former employee may make a Title I claim regarding post-employment benefits.

See id. at 67-68 (explaining that literally requiring individual to be able to perform "essential functions" of position at time of discrimination would permit employer to discriminate with impunity in its provision of post-employment benefits).

See id. at 68 (discussing Congress's intent to prevent discrimination in provision of fringe benefits which "are paid out to those who no longer work and who are no longer able to work, and some fringe benefits are paid out to individuals precisely because they can no longer work").

See id. at 67-68.

See id. at 68 (reasoning that, for purposes of remedying discrimination in disability benefits, including former employees within Title I's protections does not interfere with employers' discretion to refuse to hire unqualified individuals).

See id. (stating that employee's right to post-employment benefits arises during employment to equal or greater degree than does employee's right to avoid post-employment retaliation).
from challenging their post-employment disability benefits would render much of Title I’s protection a nullity.\textsuperscript{135} Allowing fully disabled former employees to file Title I claims regarding their post-employment benefits, the \textit{Castellano} court concluded, achieves the ADA’s remedial purpose but does so without infringing upon employers’ right to make legitimate hiring and discharge decisions.\textsuperscript{136}

Building on the reasoning in \textit{Robinson} and \textit{Castellano}, the Third Circuit in \textit{Ford v. Schering-Plough Corp.}\textsuperscript{137} joined the Second Circuit in permitting a fully disabled plaintiff to challenge her post-employment benefit plan under the ADA.\textsuperscript{138} The \textit{Ford} court found that the plaintiff’s position exposed an incongruity within Title I.\textsuperscript{139} The incongruity stems from the fact that Title I appears to apply only to individuals who, despite their disability, can perform their jobs; however, Title I also applies to discrimination in disability benefits, for which individuals are not eligible unless and until they are unable to perform their job duties.\textsuperscript{140} The Supreme Court’s reasoning in \textit{Robinson} and its inquiry into the meaning of the term "employee"\textsuperscript{141} guided the Third Cir-

\textsuperscript{135} See id. (explaining that barring former employees from bringing discrimination claims under ADA regarding post-employment benefits would thwart express purposes of §§ 12112(a) and (b)(2) of ADA).

\textsuperscript{136} See id. at 67-68 (finding that "[w]here the alleged discrimination relates to the provision of post-employment benefits, rather than to hiring, promotion, or firing, Congress’s expressed concern about qualifications is no longer implicated").

\textsuperscript{137} 145 F.3d 601 (3d Cir. 1998).

\textsuperscript{138} See \textit{Ford v. Schering-Plough Corp.}, 145 F.3d 601, 607 (3d Cir. 1998) (construing language of Title I to permit disabled former employees to sue former employers regarding disability benefits), \textit{cert. denied}, 119 S. Ct. 850 (1999). In \textit{Ford}, the court addressed the question of whether an individual receiving disability benefits from her former employer could challenge the provision of those benefits under the ADA even though she could no longer perform the essential functions of her former position. \textit{Id.} at 605. The court found that the ADA contains an "internal contradiction." \textit{Id.} Title I requires that plaintiffs be able to perform the essential functions of their jobs; however, Title I also protects against discrimination in disability benefits, for which individuals do not become eligible until they are unable to perform their jobs. \textit{Id.} at 605-06. This discrepancy rendered the statute ambiguous and required the court to determine how to reconcile the contradiction in order to effectuate fully both the statute and its purpose. \textit{Id.} at 607. Relying on the Supreme Court’s reasoning in \textit{Robinson}, the court concluded that the term "employee" encompasses both current and former employees. \textit{Id.} at 606-07. The Court determined that this broader interpretation better achieves the remedial purpose of the ADA and ensures protection of "the full panoply of rights guaranteed by the ADA." \textit{Id.} at 607.

\textsuperscript{139} See \textit{id.} at 605 (describing how plaintiff’s case "illuminates an internal contradiction in the ADA itself").

\textsuperscript{140} See \textit{id.} at 605-06 (finding Title I ambiguous as result of "disjunction" between rights that Title I confers and standards it requires for filing suit).

\textsuperscript{141} See \textit{id.} at 606 (stating that \textit{Robinson} decision bolsters argument in favor of including former employees within term "employee" and applying reasoning of Supreme Court).
cuit's inquiry in Ford. Relying on Robinson, the Third Circuit reached the conclusion that a reasonable interpretation of Title I would have to include former, as well as current, employees under the provision's protection. Furthermore, the court found, interpreting Title I to allow suits by fully disabled former employees better accomplishes the ADA's purpose.

The third case to allow a fully disabled individual to sue his former employer on the theory that the employer-provided, long-term disability benefit plan violated Title I of the ADA was Lewis v. Aetna Life Insurance Co., which the United States District Court for the Eastern District of Virginia decided. The Fourth Circuit recently vacated the opinion based on the district court's disposition of the parity argument, but this Note argues that the district court's opinion is still instructive. In Lewis, the plaintiff received disability benefits because of his severe depression, a condition from which he also suffered, albeit to a lesser extent, while employed. Alleging that the employer's disability benefit package violated Title I by providing less gener-

142. See id. at 608 (interpreting "employee" to include former employees based on lack of temporal qualifier and describing Robinson as "impetus" for conclusion).

143. See id. at 606 (finding that if ADA is to guarantee meaningful rights, Title I must permit suits by individuals who are no longer able to meet strict definition of "qualified individual with a disability").


145. See Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158, 1162 (E.D. Va. 1997) (finding plaintiff's broad reading of Title I of ADA for purposes of challenging disability benefits to be more rational interpretation of statute's language), vacated and remanded sub nom. Lewis v. Kmart Corp., 180 F.3d 166 (4th Cir. 1999). In Lewis, the court resolved the conflict between the requirement that a plaintiff be a "qualified individual with a disability" in order to file an ADA claim and the ADA's purpose of providing a statutory basis for attacking disability-based discrimination in fringe benefits and employee compensation. Id. at 1163. In permitting the plaintiff to pursue his ADA claim, the court reasoned that although at the time the plaintiff filed suit he was not a "qualified individual with a disability," he had been so qualified when the defendant offered him the disability benefit plan at issue. Id. at 1162. When the defendant offered the disability plan at issue to the plaintiff, the plaintiff was suffering from depression but still could perform his job duties. Id. The court pinpointed the discrimination as occurring at the time when the defendant offered the plaintiff the plan, even though the resulting injury occurred when the plaintiff lost his disability benefits. Id. Therefore, the plaintiff was a "qualified individual with a disability" when the defendant discriminated against him. Id. The court found that the language and purpose of Title I support this interpretation because, otherwise, discrimination in disability benefits would be impervious to challenge. Id. at 1163. The Lewis court distinguished the decisions in Parker and CNA Insurance because in those cases the plaintiffs did not become disabled until after having accepting their employer-provided disability plans. Id.

146. See generally Lewis v. Kmart Corp., 180 F.3d 166 (4th Cir. 1999) (vacating and remanding district court decision in Lewis v. Aetna Insurance Co.).

147. See Lewis, 982 F. Supp. at 1162 (describing plaintiff's history of depression and ability to perform job despite depression at time defendant offered benefit plan).
ous benefits for long-term mental disabilities than for long-term physical disabilities, the plaintiff brought an ADA action against his employer. The defendant employer moved to dismiss the plaintiff’s suit, reasoning that for purposes of filing a Title I claim, the plaintiff was no longer a qualified individual with a disability.

In assessing the defendant’s motion, the court first determined that the discrimination giving rise to the plaintiff’s suit occurred when the defendant offered the benefit plan at issue. The plaintiff’s condition when he actually filed the claim, therefore, is irrelevant in determining whether the plaintiff is eligible to bring a Title I claim. The time at which the defendant ceased providing the benefit, according to the court, was merely the time when the injury giving rise to the cause of action occurred.

The plaintiff was able to work despite his depression at the time the defendant offered the benefit plan at issue in Lewis. Therefore, under the court’s reading of Title I, the plaintiff was a qualified individual with a disability when the discriminatory act occurred. To find otherwise would, to a large extent, defeat Congress’s purpose in extending substantive protection against disability-based discrimination to disability benefit recipients, the court explained. The Lewis court concluded that if an employer offers a qualified individual with a disability a benefit plan that violates the ADA, that individual may later file an ADA claim regardless of his status at the time he files suit.

148. See id. at 1160 (summarizing plaintiff’s claim regarding disparity between mental and physical disability benefits).

149. See id. at 1161-62 (outlining defendant’s argument, based on holding in Parker, that plaintiff’s inability to perform essential functions of job precluded him from bringing Title I challenge).

150. See id. (identifying defendant’s offer of benefit plan as discriminatory act and point when benefits ceased as time of resulting injury).

151. See id. at 1162 (concluding that plaintiff’s right to file ADA claim "vested" when he was "qualified individual with a disability").

152. See id. (explaining how plaintiff’s inability to hold job at time of injury is irrelevant as long as he was "qualified individual with a disability" at time of discrimination).

153. See id. at 1163 (explaining that plaintiff met requirements for being "qualified individual with disability" when defendant offered plaintiff employee disability benefit plan).

154. See id. (finding plaintiff eligible to bring claim).

155. See id. (describing consequence of forbidding fully disabled individuals from challenging employer-provided disability plans as creating "[s]o enormous a gap in the protection afforded by Title I" that it would be "clearly at odds with the expressed purpose of the ADA").

156. Id. The court distinguished Parker and CNA Insurance because in those cases the defendants offered the plaintiffs disability plans before the plaintiffs became disabled. Id. When, as in Parker and CNA Insurance, disability does not occur until after the employer offers the benefit plan to the individual, the court explained, the plaintiff may never have been a qualified individual with a disability. Id.
C. Analysis of Fully Disabled Former Employees’ Right to Sue Under Title I

To give effect to Title I’s purpose, a court should construe the apparent discrepancy between what Title I protects and whom it deems is a proper plaintiff in favor of those whom Congress designed the statute to protect — individuals with disabilities. The Courts of Appeals for the Sixth and Seventh Circuits, however, wrongly rejected fully disabled former employees as proper Title I plaintiffs.\textsuperscript{157} First, both courts failed to recognize that the "qualified individual with a disability" limitation is inapplicable in the context of disability benefit claims because the individual is not seeking employment.\textsuperscript{157} Second, the factual predicate in \textit{Gonzales} differs significantly from those in \textit{Parker} and \textit{CNA Insurance}, making the Sixth and Seventh Circuits’ reliance on \textit{Gonzales} misplaced.\textsuperscript{159} Additionally, \textit{Gonzales} incorrectly relies on Rehabilitation Act precedent, despite the differences between the Rehabilitation Act and the ADA, and erroneously distinguishes Title VII anti-retaliation cases interpreting the scope of the term "employee."\textsuperscript{160} The Sixth and Seventh Circuits perpetuate the flawed reasoning of \textit{Gonzales}, both in the reliance they place upon \textit{Gonzales} and in the reasoning they employ in their own rulings.\textsuperscript{161}

1. Cross Purposes: The Qualified Individual Limitation and Post-Employment Benefits

Resolving the issue of whether a fully disabled former employee may bring a Title I action regarding disability benefits requires a court to reconcile two apparently contradictory goals of Title I: (1) preventing discrimination in benefits available only to individuals unable to work because of disability and (2) limiting relief to individuals able to work despite their disability.\textsuperscript{162} To

\begin{itemize}
  \item 157. \textit{See supra} Part III.A.2 (outlining reasoning and holdings of Sixth and Seventh Circuits in \textit{Parker} and \textit{CNA Insurance}).
  \item 158. \textit{See infra} Part III.C.1 (explaining primacy of Title I’s remedial purpose and finding "qualified individual with a disability" limitation only applicable to ADA suits in which employment performance is at issue).
  \item 159. \textit{See infra} Part III.C.2 (distinguishing \textit{Gonzales} because of differences in type of benefits at issue and status of plaintiff).
  \item 161. \textit{See infra} Parts III.C.3.a-b (explaining reasons why Title VII precedent should trump Rehabilitation Act precedent in suits regarding disability benefit recipients who are former employees).
  \item 162. \textit{See supra} note 67 (listing courts’ descriptions of apparent contradiction between what Title I substantively protects and procedurally requires).
\end{itemize}
make Title I comprehensive in its coverage of employment discrimination, Congress expressly prohibited discrimination in employee benefits. With respect to disability benefits, effectuating this goal is particularly important because long-term disability benefits replace, not merely supplement, employee salaries. Barring a fully disabled former employee from bringing suit renders the ADA's substantive protection of disability benefits hollow because no plaintiff can surmount the eligibility obstacle. The Castellano, Ford, and Lewis courts, recognizing the primacy of honoring Title I's broad remedial purpose, correctly refused to interpret Title I as barring fully disabled former employees from suing regarding their disability benefits under the ADA.

By contrast, the Parker and CNA Insurance courts' refusal to permit fully disabled former employees to sue under Title I stems primarily from a misdirected desire to give effect to the "qualified individuals with a disability" limitation. In using this phrase, Congress did intend to circumscribe the

163. See S. Rep. No. 101-116, at 6 (1989), reprinted in LegisLative History, supra note 23, at 53 (explaining that "[d]iscrimination also includes exclusion, or denial of benefits . . . "); id. at 25, reprinted in Legislative History, supra note 23, at 63 (prohibiting discrimination in "rates of pay or any other form of compensation and changes of compensation"); supra note 47 (summarizing ADA language that explains how fringe benefits fall within ambit of Title I protection).

164. See Lynch, supra note 53, at 570 (describing disability benefits as "a type of wage replacement"); see also notes 1-6 and accompanying text (outlining general attributes of disability benefit plans).

165. See Ford v. Schering-Plough Corp., 145 F.3d 601, 606 (3d Cir. 1998) (rejecting reading of ADA that would make individuals eligible for disability benefits and individuals able to redress discrimination in those benefits two mutually exclusive groups), cert. denied, 119 S. Ct. 850 (1999); Castellano v. City of New York, 142 F.3d 58, 69 (2d Cir. 1998) (finding it "inconceivable . . . that Congress would in the same breath expressly prohibit discrimination in fringe benefits, yet allow employers to discriminatorily deny or limit post-employment benefits to former employees who ceased to be 'qualified'"); Lewis, 982 F. Supp. at 1163 (concluding that adopting defendant's argument that former employees are ineligible under Title I would "prevent any plaintiff from challenging" discrimination in employer-provided fringe benefits).

166. Ford, 145 F.3d at 607 (permitting former employees to bring Title I claims in order "to effectuate the full panoply of rights guaranteed by the ADA"); Castellano, 142 F.3d at 68 (rejecting defendant's contention that former employees are ineligible to bring Title I claim because result would "undermine the ADA's broad remedial purpose to prohibit disability discrimination in all aspects of employment"); Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1162, 1163 (E.D. Va. 1997) (rejecting narrow reading of who may bring Title I claim as "clearly at odds with the expressed purpose of the ADA"), vacated and remanded sub nom. Lewis v. Kmart Corp., 180 F.3d 166 (4th Cir. 1999).

167. See Parker v. Metropolitan Life Ins. Co., 99 F.3d 181, 186 (6th Cir. 1996) (concluding that legislative history indicates Congress did not intend to include fully disabled former employee within Title I's protection); EEOC v. CNA Ins. Cos., 96 F.3d 1039, 1045 (7th Cir. 1996) (stating that plaintiff's inability to hold "employment position" disqualified her from bringing a Title I claim); cf. Gonzales v. Garner Food Servs. Inc., 89 F.3d 1523, 1529 (11th Cir. 1996) ("[I]nterpreting the ADA to allow any disabled former employee to sue a former em-
class of eligible Title I plaintiffs; however, Congress did so merely to protect an employer's discretion to hire and to retain only those individuals capable of performing their jobs. In the context of disability benefits, however, an existing employment contract requires an employer to compensate fully disabled former employees for work that they already have performed. If a court finds that an employer's provision of this compensation violates the ADA, the court does not require the employer to reinstate the fully disabled plaintiffs; the court merely requires the employer to fulfill its existing obligation in a nondiscriminatory manner. Therefore, reading the statute to include former employees for the limited purpose of challenging post-employment benefits effectuates Title I's substantive protection of employee benefits but does so without nullifying the "qualified individual with a disability" limitation.

2. Distinguishing Gonzales

The factual background in Gonzales distinguishes it from cases involving fully disabled former employees and employer-provided disability recipients. The plaintiff in Gonzales was not a former employee, but was the administration employer essentially renders the QID requirement under the Act, that an individual with a disability hold or desire a position the essential functions of which he or she can perform, meaningless.

168. See S. REP. NO. 101-116, at 26, reprinted in LEGISLATIVE HISTORY, supra note 23, at 63 ("By including the phrase 'qualified individual with a disability,' the Committee intends to reaffirm that this legislation does not undermine an employer's ability to choose and maintain qualified workers."); id. (explaining that "the point of" requiring an "individual with a disability" to be able to perform the essential functions of job is to protect employers' right to hire and maintain capable workforce). Inserting the "qualified individual with a disability" condition in Title I also prevents situations in which the specter of an ADA lawsuit forces an employer to hire or retain an unqualified individual with a disability. See id. (emphasizing that limitation is in place to reinforce idea that ADA does not require employer to choose individual with disability over more qualified individual without disability).

169. See Castellano, 142 F.3d at 67 (stating that fringe benefits "are earned during year of service before the employment has terminated but are provided in years after the employment relationship has ended"); Tucker, supra note 12, at 921 (concluding that barring former employees from challenging provision of disability benefits "clearly seems to defeat the purpose and spirit" of Title I based on fact that fully disabled former employees "are entitled to receive [disability benefits] due to their former employment relationship").


171. See Castellano v. City ofNew York, 142 F.3d 58, 68 (2d Cir. 1998) (concluding, after examining ADA's legislative history, that "where the alleged discrimination relates to the provision of post-employment benefits, rather than to hiring, promotion, or firing, Congress's expressed concern about qualifications is no longer implicated").
tor of the deceased former employee's estate. Furthermore, Gonzales involved a challenge to a cap on health insurance benefits, not disability insurance benefits. An employee has the opportunity to challenge discrimination in health benefits while employed, whereas an individual who suffers injury from discrimination in disability benefits only has standing to sue after the disability has rendered him unable to work. These differences in the plaintiff's status and the benefit plan at issue make Gonzales's holding generally inapplicable to the situation in which fully disabled former employees sue regarding their disability benefits. The flaws in the Eleventh Circuit's reasoning in Gonzales and the Sixth and Seventh Circuits' reliance thereon further weaken the position of those courts that refuse to permit fully disabled former employees to sue.

3. Competing Tools of Interpretation
   a. The Rehabilitation Act

The courts in Parker, CNA Insurance, and Gonzales all relied heavily upon Beauford v. Father Flanagan's Boys' Home, a Rehabilitation Act case involving employment benefits. Although Congress did intend for the Rehabilitation Act to provide a logical starting point for analyzing ADA language, Rehabilitation Act precedent does not necessarily control courts' interpretations of the ADA. Defining the ADA's coverage by the bound-
aries of the Rehabilitation Act contravenes Congress's intent to enact disabil-
ity discrimination legislation that is more comprehensive than the Rehabilitation
Act.\textsuperscript{178} Viewing the ADA as infused with not only the Rehabilitation
Act's substantive protections but also Title VII's broad remedial purpose and
powers better adheres to Congress's intent in enacting the ADA.\textsuperscript{179}

b. Title VII of the 1964 Civil Rights Act

Since the Gonzales and CNA Insurance decisions, the Supreme Court has
held in Robinson that in Title VII, the term "employee" includes former
employees for purposes of anti-retaliation suits.\textsuperscript{180} Because the ADA explicitly
adopts not only Title VII's definition of the term "employee,"\textsuperscript{181} but also
the statute's enforcement rights and remedies,\textsuperscript{182} the Robinson ruling seriously
diminishes the validity of the Eleventh and Seventh Circuits' narrow readings
of "employee." In view of Robinson, these explicit incorporations, and the
fact that the former employees already have earned their disability benefits,
it follows that the ADA, like Title VII, should protect former employees' right
to challenge their employers' provision of disability benefits.\textsuperscript{183}

ADA disability benefit claims are analogous to, not distinguishable from,
anti-retaliation claims, contrary to the opinions of the Eleventh and Seventh
Circuit Courts of Appeals.\textsuperscript{184} Anti-retaliation claims form the substance of

\textsuperscript{178.} See supra Parts IIA.1-2 (describing Congress's intent to improve upon Rehabilitation
Act through enactment of ADA).

\textsuperscript{179.} See NATIONAL COUNCIL ON DISABILITY, supra note 23, at 20 (describing 1964 Civil
Rights Act and 1973 Rehabilitation Act as "twin pillars" of ADA). The Civil Rights Act of
1964 constitutes the "philosophical foundation" of anti-discrimination law and the Rehabilitation
Act serves as the "framework for applying nondiscrimination to persons with disabilities." Id. at 181.

\textsuperscript{180.} See Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (holding that term "em-
ployee" in Section 704(a) of Title VII includes former, as well as current, employees).

\textsuperscript{181.} See supra note 40 and accompanying text (discussing that term "employee" in ADA
incorporates Title VII's meaning of term).

\textsuperscript{182.} See supra note 49 and accompanying text (stating incorporation of Title VII remedies
and enforcement powers in Title I).

\textsuperscript{183.} See Ford v. Schering-Plough Corp., 145 F.3d 601, 607 (3d Cir. 1998) (concluding
that affording former employees right to file ADA claim is in keeping with rights afforded
former employees under Title VII), cert denied, 119 S. Ct. 850 (1999); Castellano v. City of
New York, 142 F.3d 58, 69 (2d Cir. 1998) (same).

\textsuperscript{184.} See EEOC v. CNA Ins. Cos., 96 F.3d 1039, 1045 (7th Cir. 1996) (finding that, unlike
anti-retaliation claim in which protected interest develops during employment, ADA claim
both Robinson and the pre-Robinson Title VII case law on which the plaintiffs in CNA Insurance and Gonzales relied. Title VII prohibits post-employment retaliation when the employer takes retaliatory action in order to punish the former employee for participating, while employed, in activity that Title VII protects. Because the employer's impetus for taking retaliatory action occurred while the plaintiff was an employee, a nexus to the employment relationship exists even though the actual discrimination occurred post-employment. If protection from post-employment retaliation is to be meaningful, the Supreme Court emphasized in Robinson, it must extend to former employees.

An individual qualifies to participate in an employer-provided disability benefit plan when he is an employee, but he can receive the benefits only after his disability precludes him from being an employee. As with protection against post-employment retaliation or wrongful discharge, protection against discrimination in post-employment benefits can be effective only if former employees can utilize it. Therefore, procedural concerns, as well as policy

regarding benefits does not ripen until post-employment); Gonzales v. Garner Food Servs. Inc., 89 F.3d 1523, 1528 (11th Cir. 1996) (stating that plaintiff's supporting Title VII case law is "easily distinguishable" because it involved anti-retaliation claims).

185. See Robinson, 519 U.S. at 339 (phrasing question facing court as whether term "employee" in Section 704(a), Title VII's anti-retaliation provision, includes former employees); CNA Ins., 96 F.3d at 1045 (explaining that plaintiff's argument involves court's own anti-retaliation precedent); Gonzales, 89 F.3d at 1528 (explaining that plaintiff's supporting Title VII case law involves anti-retaliation claims).

186. See Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (concluding that post-employment retaliation by employer against former employee is cognizable under Title VII anti-retaliation provision).

187. See CNA Ins., 96 F.3d at 1045 (explaining that when employer retaliates after discharging employee, that retaliation is cognizable under Title VII because it has "nexus" to employment relationship).

188. See Robinson, 519 U.S. at 346 (agreeing with EEOC's contention that barring former employee suits under Title VII would thwart statute's remedial purpose by allowing employers to "retaliate with impunity against an entire class of acts under Title VII — for example, complaints regarding discriminatory termination").

189. See Castellano v. City of New York, 142 F.3d 58, 68 (2d Cir. 1998) (discussing that individuals earn disability benefits while employed but receive benefits post-employment).

190. See Ford v. Schering-Plough Corp., 145 F.3d 601, 606 (3d Cir. 1998) (recognizing that if ADA requires plaintiff to be qualified individual at time of suit then disabled employee loses his ability to challenge discriminatory post-employment benefits), cert. denied, 119 S. Ct. 850 (1999); Castellano, 142 F.3d at 68 (rejecting interpretation of ADA that would bar former employee suits because such interpretation would frustrate clear purpose of 42 U.S.C. §§ 12112(a) and (b) in preventing discrimination in fringe benefits); Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158, 1163 (E.D. Va. 1997) (declining to bar former employee suits because doing so would "effectively prevent any plaintiff from challenging an employer's provision of disability benefits as discriminatory under Title I of the ADA"), vacated and remanded sub nom. Lewis v. KMart Corp., 180 F.3d 166 (4th Cir. 1999).
and precedent, support allowing fully disabled individuals to sue regarding their disability benefit plans under Title I of the ADA. Finding otherwise eviscerates the ADA's protection of disability benefits by effectively eliminating challenges to disability benefit plans and thereby ensuring that disparate levels of mental and physical disability benefits continue.¹⁹¹

**IV. Parity in Long-Term Disability Benefit Levels for Mental and Physical Disabilities**

As many as thirty-three million individuals have mental disabilities severe enough to qualify them for protection under the ADA.¹⁹² The nation's growing awareness of this problem has given momentum to the movement for treating mental disabilities on a par with physical disabilities.¹⁹³ Unfortunately, the ADA does not offer an explicit answer as to whether it mandates parity in disability benefits, leaving courts with the task of designing an answer to this question.¹⁹⁴ Thus far, the federal courts of appeals that have faced the issue have refused to interpret Title I as requiring employers to provide equal levels of mental and physical disability benefits.¹⁹⁵

Current law on the issue of parity, however, is wrong. Title I of the ADA does require employers to provide mental disability benefits at the same level at which they provide physical disability benefits.¹⁹⁶ Although the Fourth Circuit Court of Appeals recently vacated the Eastern District of Virginia's disposition of *Lewis v. Aetna Life Insurance*,¹⁹⁷ the District Court's analysis

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¹⁹¹. See Wilkinson, supra note 12, at 937 (declaring that barring individuals who receive disability benefits from bringing ADA claims "has dire consequences for successful implementation of the ADA"); id. at 938 (stating that refusing to hear substantive discrimination claims that disability recipients bring "allows the very discrimination the law was enacted to address to continue unabated").

¹⁹². See Rubenstein, supra note 25, at 211 (citing survey stating that 3.3 million non-institutionalized Americans suffer from mental disorders "that seriously interfere with one or more aspects of daily life").

¹⁹³. See Blakley, supra note 4, at 42 (explaining that debate over disparity in mental and physical benefits increased after passage of ADA); Gibilerti, supra note 3, at 603 (reporting frequent inquiries about and administrative complaints regarding disparity in employer-provided health and disability benefit plans).

¹⁹⁴. See Gibilerti, supra note 3, at 600-01 (lamenting Congress's failure to include discussion of how Title I's prohibitions on discrimination affect disability-based distinctions in health and disability plans); Lynch, supra note 53, at 564 (describing Congress's treatment of insurance benefit issues as "ambiguous" and "legislative scheme that has probably created more questions and litigation than actually assisting" individuals with disabilities).

¹⁹⁵. See supra note 15 (cataloging treatment of parity claims by federal courts that have addressed issue of parity).

¹⁹⁶. See infra Part IV.B (concluding that Title I of ADA mandates parity between levels of employer-provided physical and mental disability benefits).

¹⁹⁷. See Lewis v. K Mart Corp., 180 F.3d 166, 167 (4th Cir. 1999) (vacating district court
and reasoning in Lewis offers an interpretation of Title I that correctly relies on Congress’s intent in enacting the ADA and federal case law interpreting similar civil rights statutes. It is this opinion, and not the constricted readings that the courts of appeals have given Title I, that illuminates the manner in which courts should address claims for parity in disability benefits under the ADA.

A. Case Law on Parity in Long-Term Disability Benefits

The plaintiffs in Ford v. Schering-Plough Corp., Parker v. Metropolitan Life Insurance, EEOC v. CNA Insurance, and Lewis v. Aetna Life Insurance all filed claims under the ADA alleging that the discrepancy between the levels of mental and physical disability benefits contained in their employer-provided disability insurance plans violated Title I of the ADA. In Lewis, the United States District Court for the Eastern District of Virginia held that Title I prohibits an employer from offering individuals with mental disabilities less extensive disability benefits than those offered to individuals with physical disabilities. The other three courts, and the Fourth Circuit in its opinion vacating the District Court’s opinion in Lewis, however, reached the opposite result and rejected the plaintiffs’ substantive parity arguments.

1. Courts Rejecting the Parity Argument

In CNA Insurance, the EEOC brought suit on behalf of a former employee alleging that the employer’s reduction in coverage of mental disabilities violated Title I of the ADA. When the former employee had begun judgment in favor of plaintiff claiming disparity in mental and physical disability benefits violated Title I of ADA).


199. See Lewis, 982 F. Supp. at 1168 (concluding that ADA prohibits benefit plans from conditioning duration of disability benefit payments on whether disabling condition is mental or physical).

200. See Ford, 145 F.3d at 608 (concluding that Title I does not recognize claim based on disparity between mental and physical benefits); Parker, 121 F.3d at 1015 (stating that ADA does not mandate parity in disability benefits); CNA Ins., 96 F.3d at 1044 (concluding that ADA does not protect against discrimination among individuals with disabilities, only discrimination against such individuals); KMart, 180 F.3d at 170 (finding employer-sponsored long-term disability plan that provides different levels of benefits for mental and physical disabilities not violative of Title I of ADA).

201. See CNA Insurance, 96 F.3d at 1041 (explaining procedural aspect of case).
working for the defendant, her long-term disability package covered both mental and physical disabilities from the time of onset until age sixty-five.\textsuperscript{202} Subsequently, however, the defendant reduced coverage of mental disabilities to two years, while continuing to cover physical disabilities from the time of onset until age sixty-five.\textsuperscript{203} In its suit, the EEOC claimed that this reduction in benefits violated Title I of the ADA by discriminating against those employees who contracted mental disabilities.\textsuperscript{204}

The Seventh Circuit began its inquiry by looking at congressional debate on the issue of parity in health benefits, rather than in disability benefits.\textsuperscript{205} In 1996, Congress had defeated a measure that would have required parity in health benefits.\textsuperscript{206} This defeat, although different in substance and six years subsequent to the ADA's passage, convinced the court that Congress did not intend the ADA to require parity in disability benefits.\textsuperscript{207}

In view of this related legislative debate and the absence of explicit language mandating parity, the Seventh Circuit ruled that the defendant's reduction in its coverage of mental disability benefits did not constitute disability-based discrimination because the plan still was available to all employees regardless of disability.\textsuperscript{208} Title I of the ADA, the court explained, prohibits an employer from offering individuals with disabilities benefit plans that provide lesser coverage or the same coverage at a higher cost.\textsuperscript{209} A plan that offers the same benefit package to all its employees on an equal basis, however, complies with the ADA regardless of what the benefit package includes.\textsuperscript{210} Therefore, the court upheld the benefit policy in \textit{CNA Insurance}.\textsuperscript{211}

\begin{itemize}
\item \textsuperscript{202} Id.
\item \textsuperscript{203} Id.
\item \textsuperscript{204} See id. (outlining EEOC's investigation and filing of suit after former employee filed ADA claim regarding disparate benefit levels with EEOC).
\item \textsuperscript{205} See id. at 1044 (postulating that even mental health advocates did not view ADA as mandating parity when they debated parity amendment to Health Insurance Portability and Accountability Act).
\item \textsuperscript{206} See id. (explaining that Congress defeated amendment proposing to include parity requirement in Health Insurance Portability and Accountability Act).
\item \textsuperscript{207} See id. (concluding that defeat of parity amendment in post-ADA legislation indicated that parity requirement is not within scope of ADA).
\item \textsuperscript{208} See id. at 1045 (stating that reducing mental disability benefits while defendant employed plaintiff did not constitute discriminatory act).
\item \textsuperscript{209} Id. at 1044.
\item \textsuperscript{210} See id. (reasoning, based on \textit{Alexander v. Choate}, 469 U.S. 287 (1985), that as long as all employees receive offer of identical coverage, terms of that coverage are irrelevant for ADA purposes). In admitting that such a result was unsatisfying, the Seventh Circuit referred to the plan and stated that, "[t]his may or may not be an enlightened way to do things, but it was not discriminatory in the usual sense of the term." Id.
\item \textsuperscript{211} See id. at 1045 (finding that former employee experienced no disability-based discrimination).
\end{itemize}
The next court to confront a parity claim was the Court of Appeals for the Sixth Circuit in *Parker v. Metropolitan Life Insurance*. In *Parker*, the Sixth Circuit concluded that the plaintiff was ineligible to sue; nevertheless, the court went on to discuss and reject the substantive merit of plaintiff’s parity claim. The Sixth Circuit reasoned that if Congress actually had intended the ADA to mandate parity in insurance, it would not have subsequently needed to pass the Mental Health Parity Act (MHPA). Addition-ally, the EEOC’s interim guidance, which suggests that a lower level of mental health insurance benefits does not necessarily violate the ADA, also persuaded the court to reject the plaintiff’s claim.

In addition to this extrajudicial evidence, the court relied on precedent interpreting the Rehabilitation Act as prohibiting only discrimination between individuals with disabilities and those without disabilities. Cases interpret-
ing the Rehabilitation Act uniformly hold that the Act does not recognize distinctions among individuals with different disabilities.\textsuperscript{217} Congress must not have intended the ADA, the \textit{Parker} court therefore determined, to eradicate distinctions in disability benefits among individuals with different disabilities.\textsuperscript{218} The court concluded that the ADA requires only that an employer offer all its employees the same plan; the fact that the offered plan makes disability-based distinctions is not sufficient to violate the ADA.\textsuperscript{219}

Next, in \textit{Ford v. Schering-Plough Corp.}, the Court of Appeals for the Third Circuit weighed in on the issue of parity in disability benefits.\textsuperscript{220} The plaintiff in \textit{Ford} brought a challenge to an employer-provided disability benefit plan that capped mental disability benefits after two years but did not similarly cap physical disability benefits.\textsuperscript{221} The Third Circuit, like its sister circuits, concluded that the ADA does not require a disability insurance plan to cover physical and mental disabilities equally.\textsuperscript{222}

To support its conclusion that the ADA does not require parity, the court relied primarily on precedent indicating that the Rehabilitation Act does not require equal treatment of different types of disabilities.\textsuperscript{223} The court also reasoned that if Congress had intended for the ADA to mandate mental and physical disabilities equally, the ADA would require both plans to cover physical and mental disabilities equally.

"as a class," whereas imposing caps on both kinds of benefits would disadvantage individuals with both kinds of illness. \textit{Id}. To read the Rehabilitation Act as requiring a plan to impose additional caps actually would penalize individuals with disabilities and thereby contravene the purpose of the law. \textit{Id}. Therefore, the court concluded, the plaintiff failed to state a claim under the Rehabilitation Act. \textit{Id}. at 1063.

\textsuperscript{217} See supra note 216 (explaining holdings in Rehabilitation Act cases).

\textsuperscript{218} See Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1019 (6th Cir. 1997) (finding that ADA does not prohibit making disability-based distinctions among individuals with disabilities in benefit plans).

\textsuperscript{219} See id. (stating that ADA outlaws discrimination against individuals with disabilities but "does not mandate equality between individuals with different disabilities").


\textsuperscript{221} Id. at 603.

\textsuperscript{222} See id. at 608 (stating that plan providing different coverage for beneficiaries does not violate ADA).

\textsuperscript{223} See id. at 608-09 (summarizing factual situations, reasoning, and holdings in \textit{Traynor, Alexander}, and \textit{Doe v. Colautti}, 592 F.2d 704 (3d Cir. 1979)); supra note 216 (summarizing reasoning and holdings in \textit{Traynor and Alexander}). The Third Circuit also discussed its reasoning in \textit{Colautti}, a case in which the plaintiff alleged that a Pennsylvania statute that did not limit its coverage of private hospitalization, but limited its coverage of private hospitalization in a mental institution to 60 days, violated the Rehabilitation Act. \textit{See Colautti}, 592 F.2d at 706. Looking to the "Analysis of Final Regulation" of the Rehabilitation Act, the court found that the Analysis did not support plaintiff's argument for parity in hospitalization. \textit{Id}. at 708-09. The court concluded that Congress, in passing the Rehabilitation Act, only intended to ensure that a government program or benefit was available equally to individuals with disabilities, not to mandate that the program provide additional services to those individuals. \textit{Id}.
PARITY IN LONG-TERM DISABILITY BENEFITS

physical parity in benefit plans, it would have made that evident in the ADA’s legislative history.224 Furthermore, the court placed weight on the fact that Congress passed the MHPA after already having passed the ADA; this fact, according to the court, indicated that the ADA, as currently written, does not require parity between mental and physical insurance benefits.225 The court concluded that rather than governing the terms of the benefit package, the ADA governs only the means by which the employer offers the benefit plan to individuals with disabilities.225

Faced with a challenge to the same type of benefit plan as in Ford,227 the United States District Court for the Eastern District of Virginia, in Lewis v. Aetna Life Insurance Co., ruled that a disability benefit plan that provides lesser benefits to recipients who suffer from mental disabilities rather than physical disabilities does violate Title I.228 Although the Fourth Circuit has vacated this opinion,229 this Note contends that the reasoning that the district court employed in Lewis, particularly the application of ADEA precedent, is the proper means of addressing and resolving the issue of parity in disability benefits.230

2. Lewis v. Aetna Life Insurance Co. and Lewis v. KMart Corp.

In Lewis v. Aetna Life Insurance Co., the plaintiff sued his employer after learning that he would lose his employer-provided disability benefits after two

224. See Ford, 145 F.3d at 610 (relying on Senate report to explain that employer may provide policy that limits amount or kind of treatment provided so long as amount provided is available equally to individuals with and without disability). The court also pointed to Congress’s rejection of an amendment to the Health Insurance Portability and Accountability Act that would have required insurers to cover mental and physical illnesses equally. Id. If the ADA already mandated parity, the Court reasoned, consideration of such an amendment would be unnecessary. Id.

225. See id. (finding that Mental Health Parity Act does not address disability benefits, and its passage subsequent to passage of ADA demonstrates that ADA does not contain parity requirements).

226. See id. (finding no discriminatory action in provision of insurance plan as long as employer offers every employee same plan regardless of whether employee is currently disabled). In justifying its conclusion, the court stated that to find otherwise would destabilize the current insurance market. Id.


228. See id. at 1169 (concluding that absent actuarial justification, benefit policy that provides differing level of coverage for physical and mental disabilities violates Title I of ADA).

229. See Lewis v. KMart Corp., 180 F.3d 166, 172 (4th Cir. 1999) (vacating district court opinion awarding plaintiff past and future disability benefits).

230. See infra Part IV.B (analyzing legal and policy arguments over parity and concluding that Title I of ADA mandates parity).
years because his benefit plan classified his disability as mental. Lewis alleged that KMart’s disability package violated Title I by discriminating against individuals whose disabilities were mental in nature. After concluding that the plaintiff was eligible to sue under Title I, the Eastern District of Virginia addressed the question of whether discrimination among individuals with disabilities constitutes a violation of the ADA.

Initially, in denying the defendant-employer’s motion to dismiss, the Lewis court first examined § 12201(c) of the ADA, which is a "safe harbor" provision that limits the statute’s substantive protection with regard to insurance benefits. The safe harbor provision permits an employer to offer benefit plans that make disability-based distinctions, but only to the extent that the offeror can demonstrate that it created the distinction based on actual

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231. See Lewis, 982 F. Supp. at 1159-60 (explaining factual predicate of case).
232. Id.
233. See id. at 1166 (summarizing plaintiff’s argument in favor of interpreting § 12201(c) as prohibiting benefit plans that differentiate among individuals with disabilities based on their disability and summarizing defendant’s argument that ADA does not prohibit differentiating among individuals with disabilities provided that plan is equally available to all individuals with or without disabilities).
234. See id. at 1169 (denying defendants’ motions to dismiss); see also supra note 145 (summarizing factual predicate and general reasoning of Lewis).
235. See Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1185, 1165 (E.D. Va. 1997) (noting defendants’ argument that Section 12201(c) of ADA circumscribes scope of protection that substantive Titles of ADA afford). Section 12201(c) states:

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

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations 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 subchapters I and III of this chapter.

42 U.S.C. § 12201(c) (1994). The legislative history of the ADA indicates that with regard to benefit plans, paragraph (2) is the relevant provision for employers. See S. REP. NO. 101-116, at 85 (1989), reprinted in LEGISLATIVE HISTORY, supra note 23, at 93 ("Point (2) recognizes the need for employers, and/or agents thereof, to establish and observe the terms of employee benefit plans, so long as these plans are based on underwriting or classification of risks.").
differences in the risk, and therefore, the cost, that the disability poses.\textsuperscript{236} Essentially, § 12201(c) requires that the distinctions adhere to traditional risk classification principles and not be an attempt to evade the ADA.\textsuperscript{237} To fall within the ADA’s safe harbor provision, an employer or insurer must draw any disability-based distinction carefully and base the distinction on the estimated cost of covering a particular disability; the safe harbor provision, the court reasoned, does not protect a broad-brush distinction between physical and mental disabilities.\textsuperscript{238}

The court next moved to the defendant’s contention that \textit{CNA Insurance} and \textit{Parker} – both of which concluded that disparity in disability benefit plans does not violate Title I – were dispositive of the parity claim in \textit{Lewis} as well.\textsuperscript{239} The court first noted that the \textit{CNA Insurance} and \textit{Parker} courts rendered decisions on the issue of eligibility, making their discussion of parity mere dicta.\textsuperscript{240} Additionally, the Rehabilitation Act cases on which the Sixth and Seventh Circuits had relied were not controlling based on differences in both the type of benefit at issue and the fact that neither involved "explicit discrimination against a particular category of disability."\textsuperscript{241} Finally, the court noted, even if the Rehabilitation Act would permit discrimination in the form

\begin{itemize}
  \item \textsuperscript{236} \textit{See Lewis}, 982 F. Supp. at 1166 (relying on legislative history of ADA in determining meaning of safe harbor provision), \textit{vacated and remanded sub nom. Lewis v. K Mart Corp.}, 180 F.3d 166 (4th Cir. 1999). The \textit{Lewis} court quoted at length from the ADA's legislative history, stating: Moreover, while a plan which limits certain kinds of coverage based on classification of risk would be allowed under this section, the plan may not refuse to insure, or limit the amount, extent, or kind of coverage available . . . solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principles . . . . Id. (citations omitted).
  \item \textsuperscript{237} \textit{See S. REP. NO. 101-116, at 85, reprinted in LEGISLATIVE HISTORY, supra note 23, at 93 (explaining Section 501(c) to mean that ADA does not upset otherwise legal insurance plan that limits coverage in manner that disadvantages individuals with disabilities if empirical underwriting data supports limitations).}
  \item \textsuperscript{238} \textit{See Lewis}, 982 F. Supp. at 1166 (summarizing legislative history of 42 U.S.C. § 12201(c)); \textit{see also S. REP. NO. 101-116, at 84, reprinted in LEGISLATIVE HISTORY, supra note 23, at 92 (stating that ADA does not insulate disability-based distinctions in insurance if disability at issue "does not pose increased risks"); id. at 85 (explaining that under ADA, covered plan "may not . . . limit the amount, extent, or kind of coverage available" unless issuer bases decision on "sound actuarial principles or [it] is related to actual or reasonably anticipated experience").}
  \item \textsuperscript{239} \textit{See Lewis}, 982 F. Supp. at 1166-67 (outlining defendants’ reliance upon \textit{CNA Insurance} and \textit{Parker}).
  \item \textsuperscript{240} \textit{See id. at 1167 (explaining that cases on which defendants relied "were decided on so-called ‘standing’ issues").}
  \item \textsuperscript{241} \textit{Id. at 1167 n.8.}
\end{itemize}
of disparate levels of coverage, Congress passed the ADA precisely because the Rehabilitation Act had proved inefficient and too narrow to remedy discrimination effectively.\textsuperscript{242}

Finding the conclusion of various courts of appeals unsatisfactory, the court placed weight upon the EEOC’s position\textsuperscript{243} and the purpose and language of the ADA.\textsuperscript{244} The court reasoned that a benefit policy that treats mental disabilities differently than physical disabilities violates the ADA because individuals with mental disabilities receive lesser coverage based solely on their disabilities.\textsuperscript{245} The defendant’s argument that the ADA permits distinctions between the two types of disability, provided that the distinctions do not differentiate between individuals with disabilities and those without disabilities, failed to persuade the court.\textsuperscript{246} The court ruled that disability-based discrimination occurring among individuals with disabilities has the same unwanted and unwarranted discriminatory effect as when it occurs between an individual with a disability and one without a disability.\textsuperscript{247}

The Lewis court relied on \textit{O'Connor v. Consolidated Coin Caterers Corp.},\textsuperscript{248} an Age Discrimination in Employment Act (ADEA) case in which the Supreme Court held that the ADEA prohibits age discrimination even if the individual whom the discrimination benefits falls within the age group that the ADEA protects.\textsuperscript{249} By analogy, the Eastern District of Virginia concluded that

\begin{itemize}
\item 242. \textit{See id.} ("Furthermore, even if such distinctions are valid under the Rehabilitation Act, the ADA was enacted because ‘current laws [e.g. the Rehabilitation Act] were "inadequate" to combat the pervasive problems of discrimination that people with disabilities are facing.’" (citations omitted)).
\item 243. \textit{See id.} at 1168 (noting EEOC’s advocacy in attempting to remedy distinctions in coverage of mental and physical disabilities in disability benefit plans).
\item 244. \textit{See id.} (finding argument that discrimination on basis of disability is acceptable among individuals with disabilities counter to purpose and language of ADA).
\item 245. \textit{Id.} at 1168.
\item 246. \textit{See id.} (finding defendant’s argument illogical because extension of theory would permit employer to "hire an employee with a physical disability over a more qualified employee with a mental disability solely because of the mental disability").
\item 247. \textit{See id.} (stating that permitting disability-based discrimination among individuals with disabilities "flies in the face of the language of the ADA").
\item 248. 517 U.S. 308 (1996).
\item 249. \textit{See O'Connor v. Consolidated Coin Caterers Corp.}, 517 U.S. 308, 313 (1996) (concluding that ADEA does not allow employer to discriminate between two individuals that ADEA covers). In \textit{O'Connor}, the Supreme Court addressed the issue of whether the defendant employer’s decision to fire the 56-year-old plaintiff and replace him with a 40-year-old, whom the ADEA also protected, violated the ADEA. \textit{Id.} at 309-10. The Court identified the question as being what elements a plaintiff must present to state an ADEA claim. \textit{Id.} at 311. The ADEA prohibits discrimination against an individual who is 40-years-old or older on the basis of that individual’s age. \textit{Id.} at 312. The Court reasoned that it is irrelevant whether the discriminatory act benefitted the person within the class of persons that the ADEA protects. \textit{Id.} The key
the ADA prohibits all disability-based discrimination, not merely disability-based discrimination that favors some individuals without disabilities.\textsuperscript{250} Ruling in favor of the plaintiff, the court ordered the defendant to pay past and future disability benefits.\textsuperscript{251}

One year later, in \textit{Lewis v. KMart Corp.},\textsuperscript{252} the United States Court of Appeals for the Fourth Circuit vacated and remanded \textit{Lewis v. Aetna Life Insurance Co.}\textsuperscript{253} The Fourth Circuit in \textit{KMart} essentially reiterated its decision in \textit{Rogers v. Department of Health and Environmental Control},\textsuperscript{254} a case involving a parity claim under Title II of the ADA.\textsuperscript{255} \textit{Rogers} presented the element in an ADEA claim is that the defendant discriminated against the plaintiff because of the plaintiff's age. \textit{Id.} Therefore, the Court concluded, "[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." \textit{Id.}

\textsuperscript{250} See \textit{Lewis v. Aetna Life Ins. Co.}, 982 F. Supp. 1158, 1169 (E.D. Va. 1997) (construing ADA, in light of \textit{O'Connor}, to "prohibit discrimination against individuals based on their specific disability, and not merely to prohibit discrimination that negatively affects the disabled as a class"), \textit{vacated and remanded sub nom. Lewis v. KMart Corp.}, 180 F.3d 166 (4th Cir. 1999).

\textsuperscript{251} See \textit{Lewis v. Aetna Life Ins. Co.}, 7 F. Supp. 2d 743, 750 (E.D. Va. 1998) (concluding that concerns about awarding back relief are not present in \textit{Lewis} and awarding retroactive benefits and continuation of disability benefits while plaintiff remains eligible recipient), \textit{vacated and remanded sub nom. Lewis v. KMart Corp.}, 180 F.3d 166 (4th Cir. 1999). The court computed the defendant's total liability, provided plaintiff remained disabled until age 65, to be \$654,532.77. \textit{Id.} at 751.

\textsuperscript{252} 180 F.3d 166 (4th Cir. 1999).

\textsuperscript{253} See \textit{Lewis v. KMart Corp.}, 180 F.3d 166, 172 (4th Cir. 1999) (vacating \textit{Lewis v. Aetna Insurance Co.} and remanding case to district court with instructions to enter judgment for KMart). In \textit{KMart}, the Fourth Circuit held that a defendant employer's provision of a disability benefit plan that provides lesser coverage for mental disabilities does not violate Title I of the ADA. \textit{Id.} at 168. After hearing oral arguments in \textit{KMart}, the Fourth Circuit had issued an opinion in which the court rejected a substantially identical claim under Title II of the ADA. \textit{Id.} at 169 & n.3; see also infra note 255 (explaining factual predicate and legal conclusions in \textit{Rogers v. Department of Health and Envt'l Control}, 174 F.3d 431 (4th Cir. 1999)). The court then examined the relevant provisions of Title I and Title II. \textit{Id.} at 170. Finding "no material distinction," the court adopted its reasoning in the Title II case and held that Title I does not require disability benefit plans to treat mental disabilities on a par with physical disabilities. \textit{Id.} In doing so, the court also rejected the plaintiff's contention that the Supreme Court's interpretation of the ADEA as prohibiting discrimination among individuals within the protected class should likewise apply to the ADA. \textit{Id.} at 171-72. The court reasoned that the Supreme Court had never before held that discrimination among individuals with disabilities violated the ADA or the Rehabilitation Act; therefore, the court was unwilling to read such a requirement into the ADA. \textit{Id.}

\textsuperscript{254} 174 F.3d 431 (4th Cir. 1999).

\textsuperscript{255} See \textit{KMart}, 180 F.3d at 170 (outlining reasoning in \textit{Rogers v. Department of Health and Envt'l Control}, 174 F.3d 431 (4th Cir. 1999) and finding it controlling of issue in \textit{Lewis}); \textit{Rogers v. Department of Health and Envt'l Control}, 174 F.3d 431 (4th Cir. 1999). In \textit{Rogers}, a former employee brought suit against his employer, the Department of Health and Environ-
court with a parity claim substantively identical to the one in Lewis, the only difference being that Rogers involved Title II, not Title I, of the ADA.\(^\text{256}\)

In Rogers the Fourth Circuit concluded that Title II of the ADA did not require South Carolina to cover physical and mental disabilities equally.\(^\text{257}\) The reasoning that the court employed to deny the plaintiff’s claim mirrored that which its sister circuits had used to deny similar claims alleging that Title I of the ADA required parity in disability benefits. Congressional history relating to health insurance legislation and cases addressing parity claims under the Rehabilitation Act factored prominently in the Fourth Circuit’s disposition of Rogers, and, in turn, of KMart.\(^\text{258}\)

The KMart court did face an argument that the plaintiff in Rogers had not presented. Based on the Supreme Court’s decision in O’Connor making discrimination among individuals whom the ADEA protected actionable, the plaintiff argued that discrimination among individuals whom the ADA protects should likewise be prohibited.\(^\text{259}\) The KMart court offered two reasons

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\(^{256}\) See KMart, 180 F.3d at 169 n.3 & 170 (explaining timing of Rogers decision and stating conclusion that Title II of ADA does not require state employer to provide parity in disability benefits).

\(^{257}\) See Rogers, 174 F.3d at 437 (concluding that plaintiff making claim for parity in benefits failed to state claim under Title II of ADA).

\(^{258}\) See id. at 433 (stating that "[t]he Rehabilitation Act is the most appropriate starting point for our discussion"). The Fourth Circuit anchored its reasoning in Rogers to Alexander v. Choate and Traynor v. Turnage, id., both of which the other courts of appeals considered central to their decisions against requiring parity. See supra notes 210, 216, 223 (discussing reasoning in and reliance on Rehabilitation Act precedent).

\(^{259}\) See Lewis v. KMart Corp., 180 F.3d 166, 171 (4th Cir. 1999) (summarizing plaintiff’s claim that "inasmuch as he received disability benefits for a shorter period of time because his disability was a mental disability, he ‘has lost out because’ of his disability and, therefore, under O’Connor, he has a viable claim under Title I").
for rejecting this argument. First, the Supreme Court had not previously held distinctions among disabilities to be violative of the ADA or the Rehabilitation Act. Second, the *KMart* court simply stated that "our federal disability statutes are not designed to ensure that persons with one type of disability are treated the same as persons with another type of disability." After concluding its cursory analysis of the *O'Connor* argument, the Fourth Circuit held that Title I of the ADA does not require parity in disability benefit plans.

The Fourth Circuit’s opinion in *KMart*, rather than the District Court’s opinion in *Lewis*, is legally controlling. However, thus far the Fourth Circuit’s narrow interpretation of the scope of protection afforded by civil rights laws has not survived Supreme Court review. Both *Robinson* and *O'Connor*, which this Note argues are instructive and controlling to analyzing the ADA, are cases in which the Supreme Court has reversed the Fourth Circuit and rejected that court’s constricted readings of the civil rights laws.

**B. Analyzing the Issue of Parity in Long-Term Disability Benefits**

With the exception of the Eastern District of Virginia in *Lewis*, federal courts have interpreted Title I too narrowly in concluding that disability plans providing different levels of benefits for mental and physical disabilities are not violative of Title I. First, these courts have relied on evidence relating to the debate over parity in health benefits, despite the fact that health and disability benefits differ vastly in their availability, purpose, and use. Second, the courts have adhered to Rehabilitation Act precedent rather than embracing more applicable and more recent ADEA and Title VII precedent.

**1. Distinguishing Disability Benefits from Health Insurance Benefits**

Employers, and arguably courts, are reluctant to provide mental disability benefits on par with physical disability benefits because they fear that doing...
so will increase the number and cost of long-term disability claims.\(^{266}\) The ADA, however, only protects individuals who suffer from severely limiting conditions.\(^{267}\) and long-term disability benefits require individuals to prove that they suffer from conditions that render them unable to work and that will continue into the foreseeable future.\(^{268}\) This heightened showing greatly diminishes the number of individuals eligible or able to feign eligibility for mental disability benefits.\(^{269}\)

In terms of cost, under the majority of disability plans, full disability benefits entail providing payments to an individual from onset of disability until age sixty-five.\(^{270}\) The overwhelming majority of disability insurance beneficiaries, however, do not become eligible to begin receiving benefits until their fifties or sixties.\(^{271}\) The relatively short duration between the average onset of disability and age sixty-five diffuses the cost argument by making the financial gap between the two years of coverage that most plans currently provide and full coverage far less expensive for providers to bridge.

Courts also rely on precedent, legislative history, and agency guidelines addressing health benefits when faced with the question of parity in the con-

\(^{266}\) See Blakley, supra note 4, at 42 (justifying use of time-limiting mental disability benefits because "overutilization and abuse of benefits is substantial and becoming even greater" (internal citations omitted)); Miller, supra note 27, at 710 (explaining employers' fear of proliferation of mental disability claims based on perception that mental disability is simple to fake); Christopher Aaron Jones, Special Project, 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, 764 (1997) (concluding that case for mandating mental health parity is sound except that mandate would create additional economic costs).

\(^{267}\) See 42 U.S.C. § 12102(2)(A) (1994) (explaining that disability sufficiently severe to qualify individual for ADA coverage "substantially limits one or more of the major life activities of such individual"); S. REP. No. 101-116, at 22 (1989), reprinted in LEGISLATIVE HISTORY, supra note 23, at 61 (defining major life activities to mean "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working").

\(^{268}\) See 44 AM. JUR. 2D Insurance § 1488 (1982) (summarizing majority position that "permanent disability" in disability income insurance context means that individual is "unable at any time to perform any work or engage in any business for compensation or profit ... [and] that such disability ... shall, with reasonable probability, continue for some indefinite period of time without any present indication of recovery therefrom").

\(^{269}\) See Miller, supra note 27, at 710 (illustrating fact that because ADA only protects individuals with disabilities when disability substantially limits major life activity, possibility of false claims is lessened).

\(^{270}\) See Giliberti, supra note 3, at 603 (stating that standard disability plan pays physical disability benefits until recipient reaches sixty-five or is no longer disabled); Schlitz, supra note 4, at 599 (identifying 65 as common age at which disability benefits stop).

\(^{271}\) See Walter Y. Oi, Employment and Benefits for People with Diverse Disabilities, in DISABILITY, WORK AND CASH BENEFITS 103, 120 (Jerry L. Mashaw et al. eds., 1996) (discussing 1992 study that found that 126,470 disability insurance recipients began receiving benefits at or above age 50 and only 66,304 recipients began receiving before turning 50).
text of disability benefits. Congress specifically addressed the issue of parity in health insurance benefits in 1996 by passing the Mental Health Parity Act (MHPA) as an amendment to the Health Insurance Portability Act. The MHPA, however, does not address the issue of parity in disability benefits. Disability benefits differ significantly from health benefits and, therefore, require different treatment under the ADA. Health benefits merely supplement an individual's salary, while disability benefits actually replace an individual's salary. Therefore, a disability plan that provides less generous benefits to an individual disabled by a mental, rather than a physical condition, actually pays the equally entitled individual with a mental disability less than it does an individual with a physical disability.

With regard to health insurance, providers predetermine what or how many treatments the plan will cover depending on the nature of treatment and the underlying condition. By definition, therefore, health benefits vary depending on the type of illness or disability. In contrast, disability benefit payments reflect a percentage of the recipient's pre-disability salary. The

272. See Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1017-18 (6th Cir. 1997) (en banc) (finding no parity requirement for disability benefits in ADA based on Congress's passage of Mental Health Parity Act, which addresses health benefits, and EEOC's statement in enforcement guidelines that health insurance plan may limit treatment for mental health conditions without imposing similar limit upon treatment of physical conditions); Parker v. Metropolitan Life Ins. Co. 99 F.3d 181, 187 (6th Cir. 1996) (determining plaintiff's standing in disability benefit by reference to Gonzales, health insurance benefit case); EEOC v. CNA Ins. Cos., 96 F.3d 1039, 1044 (7th Cir. 1996) (same).


274. See id. (forbidding lifetime and annual limitations on mental health benefits if plan does not impose like limitations upon physical health benefits).

275. See id. § 300gg-91(c)(1)(A) (stating that MHPA is inapplicable to disability benefit plans).

276. See Giliberti, supra note 3, at 603 (arguing that dissimilarity of health and disability benefits make EEOC enforcement guidelines for health insurance inapplicable to disability benefits).

277. See EMPLOYEE BENEFIT RESEARCH INSTITUTE, supra note 1, at 289 (contrasting purposes of health insurance with disability income insurance).

278. See S. REP. No. 101-116, at 25 (1989), reprinted in LEGISLATIVE HISTORY, supra note 23, at 63 (outlawing discrimination against individuals with disabilities in "rates of pay or any other form of compensation"). Presuming that disability benefits equal a form of salary, then an employer who provides such benefits in a discriminatory manner violates not merely the proscription on discrimination in fringe benefits, but also the proscription on discrimination in pay. Such a reading of the ADA severely undermines the ADA's effectiveness in remedying the fact that individuals with disabilities have lacked a "meaningful opportunity to participate in the economic and social mainstream." 135 CONG. REC. S10,711 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin), reprinted in LEGISLATIVE HISTORY, supra note 23, at 115.

279. See Giliberti, supra note 3, at 603-04 (explaining that recipient's monthly disability benefits reflects percentage of recipient's pre-disability salary, making "variations in symptoms or treatment regimens" irrelevant consideration in determining cost to provider).
mental or physical nature of the disability does not affect the amount of the monthly benefit, and it should be irrelevant to the cost of providing such disability benefits. 280

2. The Correct Interpretation Tools: The ADEA and Title VII

Courts refusing to order parity in mental and physical benefit levels also rely on Rehabilitation Act precedent 281 despite significant differences between the Rehabilitation Act and the ADA. For example, although Section 504 of the Rehabilitation Act is a precursor to the ADA, it lacks any explicit discussion of insurance benefits or the Rehabilitation Act's application to insurance. 282 Also, despite the fact that Section 504 protected individuals suffering from mental disabilities, the provision and the precedent interpreting that provision reflect traditional prejudices against people with mental disabilities. 283 Furthermore, the Rehabilitation Act cases that uphold differentiation among individuals with disabilities also have emphasized the fact that such discrimination does not harm individuals with disabilities as a class. 284

In contrast, Congress clearly has placed emphasis on protecting the individual from discrimination in enacting modern civil rights laws such as the ADA, Title VII, and the Age Discrimination in Employment Act. 285 In O'Connor, the Supreme Court explicitly stated that civil rights statutes like the ADEA seek to protect the individual who is within the protected class, not

280. See id. at 604 (explaining that variations in disability and treatment do not change recipient's monthly pay, therefore, underlying cause of disability should be irrelevant in limiting benefits).


282. See Giliberti, supra note 3, at 602 (distinguishing Rehabilitation Act cases that address mental and physical disparity from ADA cases on grounds that Rehabilitation Act contains no explicit language on insurance).

283. See Miller, supra note 27, at 701-02 (identifying fact that ADA possesses far broader authority than Rehabilitation Act and concluding that hostility and misunderstanding toward mental disabilities contained in Rehabilitation Act precedent makes it inapplicable ADA cases involving mental disability claims).

284. See Traynor v. Turnage, 485 U.S. 535, 549 (1987) ('There is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons be extended to all other categories of handicapped persons.); Modermo v. King, 82 F.3d 1059, 1062 (D.C. Cir. 1996) (stating that placing cap only on mental health coverage actually benefits "disabled as a class — mentally and physically disabled individuals in the aggregate").

285. See infra notes 286-90 and accompanying text (discussing importance of individual in ADEA and Title VII case law).
to protect the *class of individuals* who comprise the protected group.286 Therefore, an employer who favors one person in the protected class over another, but still makes the final decision based on consideration of the protected characteristic, violates the ADEA.287 This emphasis on the individual nature of civil rights laws also is evident in the Supreme Court’s Title VII precedent.288 The Supreme Court has ruled that in defending a Title VII action, an employer’s beneficence to a *disadvantaged class as a whole* does not excuse its discrimination against an *individual* member of that class.289 As discussed above, Congress explicitly incorporated Title VII’s enforcement procedures and remedies into the ADA in an attempt to protect individuals with disabilities as it has protected other historically disadvantaged minorities.290 By analogy, an employer who prefers an individual with a physical disability to an individual with a mental disability is still discriminating on the basis of the disability and thereby violating the ADA.

**V. Conclusion**

Current case law on the issue of parity in disability benefits is wrong. Title I of the ADA does in fact require employers to provide the same level of long-term disability benefits for mental and physical disabilities. Federal courts rejecting this position argue that the ADA only prohibits discrimination between individuals with disabilities and those without disabilities.291 Congress, however, did not temper the ADA’s protections in this manner.

Congress designed the ADA to afford individuals with disabilities the same protection available to other historically disadvantaged individuals.292 In deciding cases under similar civil rights statutes such as Title VII and the ADEA, the Supreme Court has emphasized the individual nature of civil rights
protections – that beneficence to a class of individuals does not excuse discrimination against the members of that class.\textsuperscript{293} "It is clear that Congress never intended to give an employer license to discriminate against some employees . . . merely because he favorably treats other members of the employees' group."\textsuperscript{294}

Likewise, the ADA does not permit an employer to treat equally disabled individuals inequitably based on the nature of their disabilities. Arbitrary, disability-based distinctions among individuals with disabilities are as invidious and discriminatory as those made between individuals with disabilities and those without disabilities. The language and spirit of the ADA prohibit employers from subjecting individuals with mental disabilities to less comprehensive benefit coverage. However, the ADA’s protections will remain a mere promise to individuals with mental disabilities until the courts release the ADA from the constraints of the Rehabilitation Act.

\textsuperscript{293} See supra Part IV.B.2 (discussing Supreme Court cases involving Title VII and ADEA).