

11-1-2003

Why Can't Discrimination Be Discrimination? Johnson v. K Mart Corp. and the Meaning of "Discrimination" Under the Americans with Disabilities Act

Todd Prall

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>

 Part of the [Civil Rights and Discrimination Commons](#), and the [Disability Law Commons](#)

Recommended Citation

Todd Prall, *Why Can't Discrimination Be Discrimination? Johnson v. K Mart Corp. and the Meaning of "Discrimination" Under the Americans with Disabilities Act*, 2003 BYU L. Rev. 1419 (2003).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2003/iss4/5>

This Note is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Why Can't Discrimination Be Discrimination?
Johnson v. K Mart Corp. and the
Meaning of "Discrimination" Under the
Americans with Disabilities Act

I. INTRODUCTION

In March of 1994, Ms. Helen Weyer "became unable to work because of severe depression" and has remained "totally disabled" since that time.¹ She began receiving disability benefits (payments in lieu of salary)² from a group long-term disability (LTD) plan in which she had enrolled through her employer.³ After two years, however, those benefits ceased because her LTD plan classified her disability as a mental illness. Under the group plan, individuals with physical disabilities were able to receive benefits until age sixty-five, while mental disabilities had a twenty-four-month cap.⁴ Weyer filed suit against her employer, claiming that the disparity in coverage of mental and physical disabilities under the LTD plan was discrimination under the Americans with Disabilities Act (ADA). Her claim failed because, according to the Ninth Circuit, the ADA did not prohibit this type of discrimination.⁵

At about the same time, the Equal Employment Opportunity Commission (EEOC) filed two separate suits. One was for a person who, due to a panic disorder, had become eligible for LTD benefits in 1992 and then received a letter two years later stating that the benefits had been terminated "pursuant to the two-year limitation" for "mental or

1. *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1108 (9th Cir. 2000).

2. A long-term disability (LTD) plan gives recipients payments in lieu of salary if their disability makes them unable to work.

3. *Weyer*, 198 F.3d at 1107.

4. *Id.* at 1107-08.

5. The Ninth Circuit explained that "insurance distinctions that apply equally to all employees cannot be discriminatory." *Id.* at 1116. Though disparate LTD plans may not be discrimination under the Ninth Circuit's interpretation of the ADA, discrimination does have a broader meaning, which includes the "effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class" or a "[d]ifferential treatment" where "no reasonable distinction can be found." BLACK'S LAW DICTIONARY 479 (7th ed. 1999). On a broader level, the term simply means the act of making a distinction. *See infra* text accompanying notes 48-51.

emotional conditions.”⁶ The other suit was for a person (and twenty-seven “similarly situated individuals”) who had become “unable to work because of major depression and anxiety” and who had been denied all LTD benefits after eighteen months because of a time limit placed on mental disability benefits.⁷ Like Weyer, these plaintiffs were unsuccessful in establishing discrimination claims under the ADA.⁸

Modern managed care systems have consistently contained “greater restrictions and limitations for mental illness than for physical illness.”⁹ While managed care continues to limit coverage for mental disabilities, mental illness and the disabilities associated with it are becoming more prevalent. Recent studies have indicated that “[t]he leading cause of hospital admissions nationwide is psychiatric illness”¹⁰ and that “one out of every two Americans alive today will suffer from a mental illness at some point in her lifetime.”¹¹ But as the need for mental health services has increased, the insurance companies’ willingness to cover the costs has decreased. *Weyer* noted that in the context of LTD plans, policies without a time limit on mental disabilities were “rare in the industry and more expensive because of the increased risk.”¹²

6. EEOC v. Staten Island Sav. Bank, 207 F.3d 144, 146 (2d Cir. 2000) (quoting the relevant language of the LTD plan).

7. *Id.* at 146–47 (consolidating EEOC v. Chase Manhattan Bank, 1998 WL 851605 (S.D.N.Y. 1998), with *Staten Island Sav. Bank*).

8. *Id.* at 149 (“[T]he complainants here enjoyed access to exactly the same benefit plans as did their physically disabled and non-disabled coworkers.”).

9. C. Geoffrey Weirich & Ashoo K. Sharma, *Tracking the Path to Parity Between Mental and Physical Health Benefits*, 17 LAB. LAW. 469, 470 (2002) (citing Brian D. Shannon, *The Brain Gets Sick, Too—The Case for Equal Insurance Coverage for Serious Mental Illness*, 24 ST. MARY’S L.J. 365, 370 (1993)). These restrictions have included “shorter duration of hospitalization and imposed lower annual or lifetime maximum coverage,” *id.*, and other limitations, such as

capping benefits at arbitrary, and often very low levels, on a per-treatment basis, an annual basis or through lifetime limits; requiring insurers to pay a high deductible; i.e., to make a major out-of-pocket investment before services are reimbursed; [and] requiring high co-payments by policyholders, e.g., limiting reimbursement to 50% of actual costs.

Shannon, *supra*, at 370 n.21 (quoting ANNE M. O’KEEFE, NATIONAL ALLIANCE FOR THE MENTALLY ILL, *ADVOCATING FOR INSURANCE REFORM* 13–14 (1991)).

10. Weirich & Sharma, *supra* note 9, at 469 (citation omitted).

11. *Id.* (citing Mental Health: A Report of the Surgeon General, U.S. Dep’t of Health & Human Servs. (1999), at <http://www.surgeongeneral.gov/library/mentalhealth/home.htm> (last visited Nov. 7, 2003)).

12. *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1108 (9th Cir. 2000). Most insurance and benefit plan providers justify the industry’s standards with cost-containment problems that parity between services would create due to the unique “consumer behavior” that accompanies many mental services. Maggie D. Gold, *Must Insurers Treat All Illnesses Equally?—Mental vs. Physical Illness: Congressional and Administrative Failure to End Limitations to and Exclusions*

The battle over mental health coverage is being waged on many fronts. For example, in 1996, proponents of parity pushed the Mental Health Parity Act (MHPA)¹³ through Congress. Additionally, scholars have attempted to demonstrate the misleading nature of distinctions between mental and physical diseases and disabilities.¹⁴ In the courts, the EEOC and other organizations have challenged disparate plans under the ADA. On the other side, insurance companies and their lobbyists have been fighting to create loopholes in disability statute mandates. They have lobbied diligently for provisions that have weakened the ADA and MHPA.¹⁵

A large portion of the battle in the courts has been waged against disparate LTD plans like the one that affected Weyer. Until *Johnson v. K*

from Coverage for Mental Illness in Employer-Provided Health Benefits Under the Mental Health Parity Act and the Americans with Disabilities Act, 4 CONN. INS. L.J. 767, 773–74 (1997–1998). There are basically “two consumer behavior related cost bases for [a] more restricted coverage for mental illness: moral hazard and adverse selection.” *Id.* at 774. Generally speaking, moral hazard defines the problem of a “higher demand” being directly related to a lower “out-of-pocket price.” *Id.* Scholars have argued that “demand for mental health services has been shown to be highly responsive to the presence or absence of insurance coverage” partially because “some forms of treatment . . . [are] similar to nonprofessional forms of human support and interaction.” *Id.* (citing James E. Sabin & Norman Daniels, *Determining “Medical Necessity” in Mental Health Practice*, HASTINGS CENTER REP., Nov.–Dec. 1994, at 5, 10). Gold explains that “[t]he basic premise of this . . . argument is that mental illness has vague end points, severe diagnostic ambiguity and more uncertain and less efficacious treatment than other areas of physical medicine—creating considerable moral hazard.” *Id.* “Adverse selection” deals with a fear that those plans that “offer substantially higher mental health benefits . . . will disproportionately attract higher cost populations,” and that the “increased number of high risk enrollees raises costs,” and will result in “either a reduction in coverage or an increase in premium cost.” *Id.* at 775. This second problem seems somewhat contrived because if all plans are required to provide equal coverage to mental and physical treatments, then the problem disappears. *See id.* at 775 n.31.

13. 42 U.S.C. § 300gg-5(a) (2000). MHPA requires “lifetime dollar limits for mental health coverage to be the same as for physical health coverage in group health plans,” requiring plans to either have the same limits for both medical/surgical conditions and mental conditions or different limits where the limits for mental health services “are no more restrictive than those for medical/surgical services.” *See Gold, supra* note 12, at 782–83. The MHPA, however, does not apply to LTD plans because LTD plans do not involve treatment of mental or physical disabilities but are rather payments in lieu of salary. *See generally Weirich & Sharma, supra* note 9.

14. *See Shannon, supra* note 9, at 367 (illustrating the “inconsistencies between medical research and insurance coverage for serious mental illnesses”); Weirich & Sharma, *supra* note 9, at 476–77 (illustrating the overlap between physical and mental illnesses by examining the struggle courts have had in determining whether a specific disease was mental or physical for the purpose of insurance coverage).

15. *See Gold, supra* note 12, at 779–94 (analyzing the effects and defects of the ADA and MHPA).

Mart Corp.,¹⁶ the circuit courts had unanimously upheld these plans, finding that such disparity did not amount to discrimination under Title I of the ADA.¹⁷ Though courts addressing this issue must address other legal obstacles before determining the validity of disparate LTD plans under Title I,¹⁸ the question of disparate treatment of physical and mental

16. 273 F.3d 1035 (11th Cir.) (panel), *reh'g en banc granted, panel opinion vacated* 273 F.3d at 1070 (11th Cir. 2001). The procedural posture of *Johnson* is peculiar because of the way in which the court addressed the issue of whether former employees are eligible to file suit under Title I of the ADA. See *infra* note 18. The Eleventh Circuit had already held that former employees are not eligible to file suit under Title I. See *Gonzales v. Garner Food Servs., Inc.*, 89 F.3d 1523 (11th Cir. 1996). The *Johnson* court held, over a strong dissent, that a recent Supreme Court ruling required the court to reconsider the ruling in *Gonzales*. *Johnson*, 273 F.3d at 1038 (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997)). Because *Robinson* was not exactly on point (a Title VII case) and *Gonzales* may have been decided with the input of earlier decisions similar to *Robinson*, it is questionable as to whether a three-judge panel could overrule *Gonzales*. See *Johnson*, 273 F.3d at 1066 (Carnes, J., dissenting) (“The prior panel precedent rule is an essential principle, the number one ground rule, by which all of us in this Court must abide.”); *United States v. Steele*, 147 F.3d 1316, 1317–18 (11th Cir. 1998) (en banc) (“Under our prior precedent rule, a panel cannot overrule a prior one’s holding even though convinced it is wrong.” (quoting *Cargill v. Turpin*, 120 F.3d 1366, 1386 (11th Cir. 1997))). Thus, the Eleventh Circuit in *Johnson* granted a rehearing en banc and vacated the panel ruling. In the interim, however, Kmart filed bankruptcy and the Eleventh Circuit withheld rendering a decision “in compliance with 11 U.S.C. § 362(a)(1).” *Johnson v. K Mart Corp.*, 281 F.3d 1368, 1368 (11th Cir. 2002). Though the *Johnson* ruling has been vacated for a rehearing and that rehearing has been stayed, the *Johnson* decision remains the most recent analysis of disparate LTD coverage under the discrimination standard of the ADA.

17. See *EEOC v. Staten Island Sav. Bank*, 207 F.3d 144, 149–50 (2d Cir. 2000); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1112 (9th Cir. 2000); *Kimber v. Thiokol Corp.*, 196 F.3d 1092 (10th Cir. 1999); *Lewis v. Kmart Corp.*, 180 F.3d 166 (4th Cir. 1999); *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998).

18. Challengers to the validity of disparate LTD plans under Title I of the ADA must overcome two other obstacles for a successful suit. First, because LTD plans deal with post-employment benefits, most challengers must convince courts that former employees are eligible to file suit under Title I of the ADA. This is because Title I of the ADA only prohibits discrimination against “qualified individual[s] with a disability.” 42 U.S.C. § 12112(a) (2000). The Act defines a “qualified individual with a disability” as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” *Id.* § 12111(8). The circuits are split over whether former employees fit into this definition of “qualified individuals with a disability.” For arguments in favor of the eligibility of former employees to file suit, see *Castellano v. City of New York*, 142 F.3d 58 (2d Cir. 1998); *Ford*, 145 F.3d at 601. For arguments against, see *EEOC v. Group Health Plan*, 212 F. Supp. 2d 1094 (E.D. Mo. 2002); *Morgan v. Joint Admin. Bd.*, 268 F.3d 456 (7th Cir. 2001); *Weyer*, 198 F.3d 1104; *Parker v. Metro. Life Ins. Co.*, 99 F.3d 181 (6th Cir. 1996), *rev'd on other grounds*, 121 F.3d 1006 (6th Cir. 1997) (en banc); *EEOC v. CNA Ins. Cos.*, 96 F.3d 1039 (7th Cir. 1996); *Gonzales*, 89 F.3d 1523. If this eligibility requirement is overcome, plaintiffs must show that LTD plans that offer different amounts of coverage based on the type of disability (whether mental or physical) amount to discrimination under Title I of the ADA. The threshold issue is subordinate to whether or not disparity in LTD coverage between mental and physical disabilities is cognizable discrimination under the ADA, because the validity of LTD plans does not hinge on a plaintiff’s eligibility to sue. Second, and more critical to the validity of the plan, is whether the ADA’s safe

disabilities is still at the crux of the legal debate. This Note focuses on the physical/mental disparity under Title I, which affects not only the future development of LTD plans in response to the increased awareness of the need for mental disability coverage, but also affects the more important issue of the development of a consistent discrimination standard under the ADA.

This Note contends that *Johnson* rightly held that the disparity in LTD coverage between mental and physical disabilities is discrimination under Title I of the ADA, subject to the exception created by the safe harbor provision,¹⁹ because *Johnson* correctly applied to Title I the broader definition of discrimination from Title II of the ADA as outlined by the Supreme Court.²⁰ The *Johnson* court's implementation of the Supreme Court's broader Title II definition appropriately accomplishes the goals underlying the ADA without discounting the delicate compromises that the Act struck in light of the insurance industry's cost-containment concerns. Although the safe harbor provision may except LTD plans from the general requirements of the Act, which even the *Johnson* court admits,²¹ this Note contends that such a provision should

harbor provision excepts LTD plans from the requirements of the ADA. *See* 42 U.S.C. § 12201(c). Although never properly addressed, *see infra* note 21, it is likely that LTD plans do qualify as benefit plans under the plain language of the Act. *See infra* Part II.C.

19. *See infra* note 21.

20. *Olmstead v. Zimring ex rel. L.C.*, 527 U.S. 581 (1999).

21. Even LTD plans that are determined to be discriminatory might be sheltered against the ADA within its own safe harbor provision, which allows insurance and "bona fide benefit plan[s]" to escape the requirements of the Act. 42 U.S.C. § 12201(c). If LTD plans can be classified as bona fide benefit plans, most disparate LTD plans will still be upheld under the ADA. While it is probable that LTD plans are bona fide benefit plans, the issue has never been properly addressed by the courts (except *Johnson*) because they have ruled that such plans do not amount to discrimination under the ADA without really determining whether they constitute "bona fide benefit plan[s]" under the safe harbor provision. Although most courts addressing disparate LTD plans have alluded to the safe harbor provision in developing an interpretation of the meaning of discrimination, *see Weyer*, 198 F.3d at 1118; *Rogers v. Dep't of Health & Envtl. Control*, 174 F.3d 431, 435 (4th Cir. 1999) ("The ADA's 'safe harbor' provision and the related legislative history suggest that Congress did not intend for the ADA to force a change in the way insurers do business."), and even alluded to the classification of LTD plans as benefit plans in dicta, *see Weyer*, 198 F.3d at 1115-16 (making the assertion as an alternative not essential to its holding); *Rogers*, 174 F.3d at 436 (addressing arguments concerning the requirements of § 12201(c) without stating whether or not the section applied to LTD plans); *Ford*, 145 F.3d 601 (same as *Rogers*), only *Johnson* has specifically examined and declared whether an LTD plan is, in fact, a bona fide benefits plan. *Johnson*, 273 F.3d at 1056-57. In fact, a few courts did not mention the safe harbor at all in examining LTD plans. *See Kimber*, 196 F.3d at 1101; *Lewis*, 180 F.3d 166. Though the safe harbor provision may be the ultimate arbiter in determining whether disparate LTD plans survive the mandates of the ADA, it is important that courts create consistent standards for recognizing prohibited discrimination under the Act without referring to its exceptions.

not shape the general definition of discrimination under the ADA. Rather, the safe harbor provision should be construed as a narrow exception to the broader interpretation of discrimination established by the Eleventh Circuit. The Eleventh Circuit's construction would provide greater protection to the mentally disabled and maintain a more consistent criteria and scope for determining cognizable discrimination under the Act.

Part II of this Note outlines Title I of the ADA and how circuit courts applied it to LTD plans prior to *Johnson*.²² To accomplish this, Part II begins by describing the interpretation of discrimination under the Rehabilitation Act of 1973, the predecessor to the ADA, and then compares the Rehabilitation Act's structure to that found within the ADA. Part III outlines Title II of the ADA and the Supreme Court's interpretation of discrimination in *Olmstead v. L.C.*²³ Part IV outlines the *Johnson* interpretation of discrimination under Title I and addresses critiques of its analysis from prior case law. Part V offers a conclusion.

II. THE ADA AND LTD PLANS

On July 26, 1990, President George Bush signed the ADA into law, describing it as "the world's first comprehensive declaration of equality for people with disabilities."²⁴ The Act was a "sweeping mandate [to] end[] discrimination against persons with disabilities in employment, public services and public accommodations provided by private entities."²⁵ The language of the Act mandated "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."²⁶ Thirteen years since its enactment, however, the Act has provided courts with very few "clear, strong, consistent, enforceable standards" and has instead left courts to puzzle over ambiguities in the

22. Part II citations to cases decided after the *Johnson* opinion serve as additional examples of the pre-*Johnson* analysis. The parts of those opinions that address the analysis of the *Johnson* court will be addressed in Part IV.

23. 527 U.S. 581 (1999).

24. George Bush, *Remarks on Signing the Americans with Disabilities Act of 1990*, 2 PUB. PAPERS 1068 (1990).

25. Gold, *supra* note 12, at 789.

26. 42 U.S.C. § 12101(b)(2).

language of the Act.²⁷ The central ambiguity of the Act is the meaning of “discrimination.”

Nowhere is the confusion over the meaning of discrimination more apparent than in cases in which the Act is applied to disability plans offering disparate coverage. Whether such plans are discriminatory has been the cause of much litigation and debate. On one level, it is clear that such plans make distinctions between different disabilities or conditions by the amount of coverage afforded and thus discriminate by type of disability.²⁸ On another level, proponents of disparate plans argue the distinctions made are not discriminatory because all individuals get the same coverage for any particular disability or condition. Although the Supreme Court has yet to address this issue directly, the circuit courts have generally held that the latter interpretation better suits the purposes of the ADA²⁹ by applying the Supreme Court’s discrimination analysis under the Rehabilitation Act of 1973.

A. Discrimination Under the Rehabilitation Act of 1973

Congress’ first attempt to bring equity and opportunity to disabled Americans resulted in the Rehabilitation Act of 1973. Although the Act contains some basic antidiscrimination provisions, Congress focused mostly on creating public programs to assist the disabled in leading happy, productive lives. The Act contains two basic discrimination provisions: one addressing federal government employees and the other addressing federally funded programs, contracts, and grants.³⁰ In relevant part, the Act provides that “[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity . . . conducted by any Executive agency”³¹ Two Supreme Court cases are central to the interpretation of discrimination under the

27. Scholars have argued that these ambiguities are the results of Congress’s allowing “idealistic . . . goals [to be] bargained away and dismantled by cost-containment concerns.” Gold, *supra* note 12, at 771 (citing Christopher Aaron Jones, *Legislative “Subterfuge”?: Failing to Insure Persons with Mental Illness*, 50 VAND. L. REV. 753, 757 (1997)).

28. *See infra* text accompanying notes 48–51.

29. *See infra* Part II.D.

30. 29 U.S.C. §§ 791, 794 (2000).

31. 29 U.S.C. § 794(a).

ADA, both of which stem from the Rehabilitation Act of 1973: *Alexander v. Choate*³² and *Traynor v. Turnage*.³³

In *Alexander*, plaintiffs challenged a reduction in the number of hospital days covered per year under their state Medicaid program from twenty to fourteen days.³⁴ They claimed specifically that the reduction violated section 504 of the Rehabilitation Act which, as amended, reads: “No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”³⁵ The plaintiffs argued that “given the special needs of the handicapped for medical care, any such limitation was likely to disadvantage the handicapped disproportionately.”³⁶ The Supreme Court reversed the Sixth Circuit’s recognition of cognizable discrimination holding that

[t]he new limitation does not invoke criteria that have a particular exclusionary effect on the handicapped; the reduction, neutral on its face, does not distinguish between those whose coverage will be reduced and those whose coverage will not on the basis of any test, judgment, or trait that the handicapped as a class are less capable of meeting or less likely of having.³⁷

This Court’s determination made clear that the Rehabilitation Act only requires that a federal program offer the same benefits to all, regardless of any one individual’s disability, thus implying that benefits for which only disabled individuals have any need, e.g., longer hospital visits, would not have to be covered. In making this determination, the Court noted the importance of “be[ing] responsive to two powerful but

32. 469 U.S. 287 (1985).

33. 485 U.S. 535 (1988).

34. *Alexander*, 469 U.S. at 289–90.

35. *Id.* at 290 (citing 29 U.S.C. § 794).

36. *Id.* The undisputed facts of the case indicated that “in the 1979–80 fiscal year, 27.4% of all handicapped users of hospital services who received Medicaid required more than 14 days of care, while only 7.8% of nonhandicapped users required more than 14 days of inpatient care.” *Id.* at 289–90.

37. *Id.* at 302. The only issue before the Supreme Court was whether or not a prima facie case for discrimination was present. *Id.* at 292. Prior to the appeal to the Supreme Court, the Sixth Circuit had remanded the case to determine whether there were any “alternative plans that would achieve the State’s legitimate cost-saving goals with a less disproportionate impact on the handicapped, or [whether] the State could offer a ‘substantial justification for the adoption of the plan with the greater discriminatory impact.’” *Id.* (citing *Jennings v. Alexander*, 715 F.2d 1036, 1045 (6th Cir. 1983)).

countervailing considerations—the need to give effect to the statutory objectives and the desire to keep section 504 within manageable bounds.”³⁸

Later, *Traynor* extended the reasoning of *Alexander* to distinctions made between types of disabilities. In *Traynor*, the Veterans’ Administration refused to extend a ten-year limitation on the educational benefits provided by the Veterans’ Readjustment Benefits Act of 1966 to veterans who were suffering from alcoholism during the limitation period.³⁹ While veterans normally must use the educational benefits within ten years of release from service,⁴⁰ veterans may apply for an extension of that ten-year period “if they were prevented from using their benefits earlier by ‘a physical or mental disability which was not the result of [their] own willful misconduct.’”⁴¹ The Veterans’ Administration had previously determined that “primary alcoholism,” or alcoholism that is not “secondary to and a manifestation of an acquired psychiatric disorder,” was a disability resulting from an individual’s willful misconduct. Veterans challenged the statute under the Rehabilitation Act because it offered benefits to some disabled individuals (an opportunity to extend the ten-year limit on educational assistance) while denying those same benefits to others.⁴² From these facts, the Court determined, “There is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons,”⁴³ indicating that the Court was unwilling to find discrimination where benefit plans preferred one category of disabled individuals over another category.

In summary, *Alexander* and *Traynor* created two distinct rules for determining discrimination under the Rehabilitation Act. First, under *Alexander*, if a policy is neutral in its application and provides the same benefits to all regardless of disability, any discriminatory effects of such a policy are not actionable discrimination. Second, under *Traynor*, a policy is not discriminatory simply because it provides benefits in connection with one class of disability but not with another. Although *Alexander* and *Traynor* came before the ADA, their interpretations of

38. *Id.* at 299.

39. *Traynor v. Turnage*, 485 U.S. 535, 538 (1988).

40. *See* 38 U.S.C. § 1662(a)(1) (2000).

41. *Traynor*, 485 U.S. at 538 (quoting 38 U.S.C. § 1662(a)(1)).

42. *Id.* at 548–49.

43. *Id.* at 549.

discrimination made a significant impact on judicial analyses of the far-reaching ADA. Through the ADA, Congress expanded the programs and entities that would have to avoid discriminatory behavior and policies.

B. The Americans with Disabilities Act

The ADA contains three central titles that specifically increase the number of entities prohibited from engaging in discriminatory behavior. Title I expands antidiscrimination requirements to employers, Title II to public programs and entities, and Title III to businesses and organizations open to the public. The ADA also has a safe harbor provision that shelters certain types of insurance and benefit plans from the requirements of the ADA. Relative to the Rehabilitation Act, the ADA prohibits a greater number of entities from engaging in discriminatory behavior. Although the ADA offers many examples of discrimination, including types of discrimination that Congress specifically recognized in its findings that were not mentioned in the Rehabilitation Act, the ADA offers no comprehensive or explicit definition of the term.

Generally, each title of the ADA addresses discrimination. However, rather than clearly defining discrimination, Congress outlined ways in which individuals with disabilities have been discriminated against including “intentional exclusion,” “exclusionary qualification standards,” and “segregation”⁴⁴ within a whole host of different areas.⁴⁵ Title I is a perfect example—it provides specific examples of discrimination including “limiting, segregating, or classifying a[n] . . . employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such . . . employee” or “participating in a contractual or other arrangement or relationship that has the effect of subjecting a[n] . . . employee with a disability to . . . discrimination . . . [including relationships to] organization[s] providing fringe benefits”⁴⁶ While Title I offers examples of discrimination, it lacks proper criteria for determining discrimination and scope in order to limit the types of discrimination prohibited, and therefore does not offer an inclusive definition of discrimination.

44. 42 U.S.C. § 12101(a)(5) (2000).

45. In whole, § 12101 recognizes that evidence of “discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.” *Id.* § 12101(a)(3).

46. *Id.* § 12112(b)(1), (2).

The Supreme Court has held that absent any “indication to the contrary, words in a statute are assumed to bear their ‘ordinary, contemporary, common meaning.’”⁴⁷ Discrimination has been defined as the act of “mak[ing] a clear distinction.”⁴⁸ It has often denoted a distinction that is “sometimes . . . unjust”⁴⁹ or made “on the basis of prejudice.”⁵⁰ *Black’s Law Dictionary* offers two central definitions of discrimination that are based loosely on Title VII of the Civil Rights Act. According to *Black’s Law Dictionary*, discrimination is either “[t]he effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion, or *handicap*” or “[d]ifferential treatment; esp[ecially] a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored.”⁵¹ Despite these broad definitions, circuit courts have tended to narrow the meaning of discrimination for purposes of the ADA. The various circuit court interpretations of discrimination concerning disparate treatment cannot be understood without first understanding the nature of the challenge against specific LTD plans and the applicable provisions of the ADA.

C. The General Challenge Against LTD Plans and the Applicable Provisions of the ADA

The most commonly challenged LTD plans, as described in the introduction, have distinguished between coverage of mental disabilities and physical disabilities by placing a time cap on mental disability benefits. Challenges against these types of plans have claimed that they are discriminatory because individuals with mental disabilities do not enjoy the same amount of coverage as those with physical disabilities. Each case involved an employee who had (1) enrolled in a disability plan that limited the coverage for mental disabilities to a period of years or months (while offering coverage for physical disabilities until the

47. *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997) (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 388 (1993)).

48. *See, e.g.*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 517 (Houghton Mifflin 4th ed. 2000) (defining “discriminate” as “to make a clear distinction,” “to distinguish,” or “to differentiate”).

49. FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 724 (Isaac K. Fund et al. eds., 1963).

50. AMERICAN HERITAGE DICTIONARY, *supra* note 48, at 517.

51. BLACK’S LAW DICTIONARY, *supra* note 5, at 479 (emphasis added).

disabled employee reached sixty or sixty-five years of age); (2) stopped working due to a mental disability; and (3) had his or her insurance benefits cancelled at the end of the limited-coverage period.⁵² The facts of *Johnson* are typical.

In 1996, James Johnson, a Kmart Corporation (“Kmart”) store manager, “sought medical treatment for severe depression and emotional illness.”⁵³ Johnson continued working for Kmart until October of 1997, when, following the advice of his physician, he “stop[ped] working due to his mental illness.”⁵⁴ At that point, Johnson applied for and began to receive long-term disability benefits. Under the Kmart LTD plan, “employees who [were] disabled due to a mental illness [received] salary-replacement benefits for two years,” while “employees disabled due to a physical illness [received] such benefits until age 65.”⁵⁵ Johnson filed a charge of discrimination in July of 1998 with the EEOC claiming that the mental-health-related disability cap on benefits violated the ADA.⁵⁶ After receiving a Right to Sue letter from the EEOC, Johnson brought the action in the United States District Court for the Middle District of Florida in November of 1998.⁵⁷

Two general provisions of the ADA are relevant to disparate LTD plans like the one in *Johnson*: Title I generally prohibits discrimination in employment practices, and the safe harbor provision generally excludes bona fide benefit plans from the requirements of the Act.

Title I of the ADA prohibits discrimination against disabled individuals by employers and related entities including “employment agenc[ies], labor organization[s], or joint labor-management committee[s].”⁵⁸ The Act declares that these entities shall not “discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures,

52. See *EEOC v. Staten Island Sav. Bank*, 207 F.3d 144, 146 (2d Cir. 2000); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1108 (9th Cir. 2000); *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1097 (10th Cir. 1999); *Lewis v. Kmart Corp.*, 180 F.3d 166, 168 (4th Cir. 1999); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 604 (3d Cir. 1998); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1008 (6th Cir. 1997) (en banc); *EEOC v. CNA Ins. Cos.*, 96 F.3d 1039, 1041 (7th Cir. 1996).

53. *Johnson v. K Mart Corp.*, 273 F.3d 1035, 1037 (11th Cir.) (panel), *reh'g en banc granted*, *panel opinion vacated* 273 F.3d at 1070 (11th Cir. 2001).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. 42 U.S.C. § 12111(2) (2000).

the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”⁵⁹ The bulk of this Note is devoted to determining the meaning of this provision as applied to disparate LTD plans.⁶⁰

Congress designed the safe harbor provision of the ADA to allow insurance companies and others to deal properly with risk factors in insurance plans.⁶¹ In relevant part, the safe harbor provision explains that the Act “shall not be construed to prohibit or restrict . . . 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”; nor shall the Act be construed to prohibit or restrict those who “establish[], sponsor[], observe[] or administer[] 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.”⁶² Along with requiring that the safe harbor protection only be available to health insurance or bona fide benefit plans that follow proper procedures of underwriting, classifying, or administering risks, the Act explains that the safe harbor provisions “shall not be used as a subterfuge to evade the purposes of subchapter [sic] I and III of this chapter.”⁶³

At first glance, LTD plans appear to be bona fide benefit plans under § 12201(c)(2). However, courts addressing disparate LTD plans generally, with the exception of *Johnson*, never reach the safe harbor analysis and focus instead on the complicated question of discrimination under the Act.⁶⁴ The *Johnson* court aside, only a single circuit judge, in a

59. *Id.* § 12112(a).

60. As noted above, the ADA defines a “qualified individual with a disability” as a person who “with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” *Id.* § 12111(8). Though the definition is applicable to LTD challenges, that issue is not addressed in this Note. *See supra* note 18.

61. The business of insurance includes carefully assessing the probabilities of members of the plan having need of any particular treatments. Those probabilities are then used to determine the amount of coverage the insurance can offer for different treatments, diseases, or disabilities and still maintain financial viability. This process is usually called underwriting, classifying, or administering risks and is referred to as such in the ADA. *See* 42 U.S.C. § 12201(c).

62. *Id.* § 12201(c)(1)–(2).

63. *Id.* § 12201(c).

64. *EEOC v. Staten Island Sav. Bank*, 207 F.3d 144, 146 (2d Cir. 2000); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1108 (9th Cir. 2000); *Lewis v. Kmart Corp.*, 180 F.3d 166, 168–69 (4th Cir. 1999); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 604 (3d Cir. 1998); *EEOC v. Group Health Plan*, 212 F. Supp. 2d 1094 (E.D. Mo. 2002); *Wilson v. Globe Specialty Prods., Inc.*, 117 F. Supp. 2d 92 (D. Mass. 2000).

legally insignificant concurrence in a Third Circuit case, has pointed out that § 12201(c)(2) applies to LTD plans as bona fide benefit plans, and that meandering through case law and congressional intent to understand the meaning of discrimination is therefore unnecessary.⁶⁵ The *Johnson* court, however, determined that LTD plans generally were bona fide benefit plans⁶⁶ and remanded the case for a determination of whether Kmart's disparate LTD plan was a "subterfuge to evade the purposes" of the ADA which would disqualify the plan from fitting within the safe harbor exemption.⁶⁷

Prior to *Johnson*, circuit courts generally applied the discrimination standard of the Rehabilitation Act of 1973 as promulgated in *Alexander* and *Traynor*⁶⁸ to disparate LTD plans. In doing so, the circuit courts have construed the safe harbor as narrowing the interpretation of discrimination in order to find that disparate LTD plans do not discriminate under the general provisions of the ADA. This renders any inquiry into whether such plans qualify for the safe harbor exception irrelevant.

D. Circuit Court Analysis of Disparate LTD Plans Under the ADA Prior to Johnson

Federal circuit courts have generally determined that disparate LTD plans lend themselves to a Title I analysis because they affect "terms, conditions, and privileges of employment" and often deal with a "contractual or other . . . relationship," such as "an organization providing fringe benefits."⁶⁹ When analyzing LTD plan challenges under the ADA, circuit courts have applied the definition of discrimination the

65. *Ford*, 145 F.3d at 614 (Alito, J., concurring in judgment).

66. *Johnson v. K Mart Corp.*, 273 F.3d 1035, 1056 (11th Cir.) (panel) (holding that the question was undisputed by the parties), *reh'g en banc granted, panel opinion vacated* 273 F.3d at 1070 (11th Cir. 2001).

67. *Id.* (citing 42 U.S.C. § 12201(c)). The *Johnson* court followed the analysis of the Supreme Court concerning the meaning of subterfuge under the Age Discrimination in Employment Act (ADEA), see *Pub. Employees Ret. Sys. v. Betts*, 492 U.S. 158 (1989), and remanded the case to determine whether Kmart had "specifically intended to use § 12201(c) as a subterfuge to evade the purposes of Title I." *Johnson*, 273 F.3d at 1059. For more analysis on the meaning of subterfuge, see H. Miriam Farber, *Subterfuge: Do Coverage Limitations and Exclusions in Employer-Provided Health Care Plans Violate the Americans with Disabilities Act?* 69 N.Y.U. L. REV. 850 (1994). *Johnson* remanded the case to determine whether Kmart had the intent to evade the Act.

68. See *supra* Part II.A.

69. 42 U.S.C. § 12112(a), (b)(2); see, e.g., *Johnson*, 273 F.3d at 1050–51; *Staten Island Sav. Bank*, 207 F.3d at 148–49.

Supreme Court used in interpreting the Rehabilitation Act of 1973. As applied to cases brought under the ADA, this definition requires that plaintiffs show differential treatment when comparing their position as a disabled individual with nondisabled individuals. In applying this definition to LTD plans, circuit courts have held that LTD plans are not discriminatory because they give the same benefits to all who enroll, despite the fact that the plans cover less for mental disabilities. Circuit courts have also added arguments to the Supreme Court's Rehabilitation Act analysis, relying heavily on government agency interpretation, congressional action since the passage of the ADA, and other provisions in the ADA. To pre-*Johnson* circuit courts, the cost-containment concerns of any type of insurance coverage like those offered in LTD plans justified a definition of discrimination that did not include differences in treatment or coverage allowances provided between mental and physical disabilities.

1. The circuit courts' general reliance on the interpretations of the Rehabilitation Act of 1973

Circuit courts have relied heavily on the Supreme Court's interpretation of the Rehabilitation Act when interpreting the ADA. For example, in *Ford v. Schering-Plough Corp.*, the Third Circuit addressed an issue identical to that in *Johnson*.⁷⁰ The court explained that the Supreme Court's analysis of the Rehabilitation Act in *Alexander v. Choate*⁷¹ and *Traynor v. Turnage*⁷² developed the basic meaning for discrimination under the ADA.

The *Ford* court adopted both the neutrality rule from *Alexander* and the general rule about distinctions between different disabilities from *Traynor* in holding that disparate LTD plans were not discrimination under the ADA. First, the *Ford* court referred to *Alexander*:

[T]he Supreme Court held that the limit on inpatient hospital care was "neutral on its face[]" and did not "distinguish between those whose coverage will be reduced and those whose coverage will not on the basis of any test, judgment, or trait that the handicapped as a class are less capable of meeting or less likely of having."⁷³

70. *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 603-04 (3d Cir. 1998).

71. 469 U.S. 287 (1985).

72. 485 U.S. 535 (1988).

73. *Ford*, 145 F.3d at 608 (summarizing and quoting *Alexander*, 469 U.S. at 302).

The *Ford* court was able to apply the *Alexander* Court's reasoning to comfortably claim that "[s]o long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has occurred even if the plan offers different coverage for various disabilities."⁷⁴ The *Ford* court then cited *Traynor*⁷⁵ and held that "[w]hile the [employer's] insurance plan differentiated between types of disabilities, this is a far cry from a specific disabled employee facing differential treatment due to her disability."⁷⁶

The holdings in *Ford* and other similar cases represent a typical understanding of the meaning of discrimination. This meaning involves a necessary comparison between the protected class (individuals with disabilities) and the general public (nondisabled persons). If both classes are given the same privileges or benefits at the same cost, then no discrimination has occurred.⁷⁷ Consequently, these cases conclude that distinctions between different types of disabilities cannot be discrimination because such a distinction does not involve a comparison between the protected class and the general public, but between two segments of the protected class.⁷⁸

2. Additional support for applying the Rehabilitation Act standard

Along with this basic interpretation of discrimination, circuit courts have identified additional support for the application of the Rehabilitation Act standard. Specifically, these courts point to the ADA's safe harbor provision that protects insurance companies, legislative history, past statements of the EEOC, congressional activity

74. *Id.*

75. *Id.* at 608–09 (“There is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons.” (quoting *Traynor*, 485 U.S. at 549)).

76. *Id.* at 608. The Third Circuit also noted a similar interpretation of the Rehabilitation Act within one of its own opinions. *Id.* at 609 (citing *Doe v. Colautti*, 592 F.2d 704 (3d Cir. 1979)).

77. See *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1116 (9th Cir. 2000) (“[I]nsurance distinctions that apply equally to all employees cannot be discriminatory.”); *EEOC v. CNA Ins. Cos.*, 96 F.3d 1039, 1044 (7th Cir. 1996) (“All employees—the perfectly healthy, the physically disabled, and the mentally disabled—had a plan that promised them [the same] long-term benefits This may or may not be an enlightened way to do things, but it was not discriminatory in the usual sense”).

78. See *Lewis v. Kmart Corp.*, 180 F.3d 166, 171 (4th Cir. 1999) (“[O]ur federal disability statutes ensure that disabled persons are treated evenly in relation to nondisabled persons.”).

1419]

Why Can't Discrimination Be Discrimination?

since the passage of the ADA and the continued debate over parity, and the destabilization of the insurance industry.

A couple of circuits have cited the safe harbor provision of the ADA⁷⁹ for support of the *Alexander* and *Traynor* definitions of discrimination, claiming that the safe harbor narrows the definition of discrimination used within the ADA. The Fourth Circuit's *Rogers* decision, for example, cited this provision as proof that Congress did not intend the definition of discrimination to affect benefit plans like LTD plans and thus narrowed the scope of cognizable discrimination under the Act in order to allow insurance companies to function.⁸⁰ *Rogers* thus reflects an interpretation of discrimination that utilizes the safe harbor provision to narrow the scope of cognizable discrimination rather than carve out a narrow exception to a broader interpretation of discrimination.

Several courts have relied on the committee statements made during the drafting of the ADA, which garner support for following the *Alexander* and *Traynor* interpretations of the Rehabilitation Act. For instance, the House and Senate committees working on the ADA explained:

[T]he Committee also wishes to clarify that in its view, as is stated by the U.S. Supreme Court in *Alexander v. Choate*, . . . employee benefits plans should not be found to be in violation of this legislation under impact analysis simply because they do not address the special needs of every person with a disability, e.g., additional sick leave or medical coverage.⁸¹

In addition, the Senate committee explained that it is “permissible for an employer to offer insurance policies that limit coverage for certain procedures or treatments, e.g., only a specified amount per year for

79. The safe harbor provision of the ADA is designed to allow insurance companies and others to deal properly with risk factors. For the basic text of the ADA safe harbor, see *supra* text accompanying notes 61–63.

80. See *Rogers v. Dep't of Health & Env'tl. Control*, 174 F.3d 431, 435 (4th Cir. 1999) (“The ADA’s ‘safe harbor’ provision and the related legislative history suggest that Congress did not intend for the ADA to force a change in the way insurers do business.” (citing S. REP. NO. 101-116, at 84–85 (1989); H.R. REP. NO. 101-485, at 136 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 419)); see also *Weyer*, 198 F.3d at 1116.

81. S. REP. NO. 101-116, at 85; H.R. REP. NO. 101-485, at 137, *reprinted in* 1990 U.S.C.C.A.N. 267, 420.

mental health coverage”⁸² Almost every circuit addressing this issue cites or quotes such statements.⁸³

Some courts found further support for the prevailing understanding of “discrimination” in statements by the EEOC indicating that plans similar to those at issue in *Johnson* complied with the ADA. The EEOC had previously indicated that disparate LTD plans were essentially legal under the ADA which, according to some courts, indicated compliance with the ADA. The Fourth Circuit pointed out that the EEOC had described typical health insurance plans as making

a distinction between the benefits provided for the treatment of physical conditions . . . and the benefits provided for the treatment of “mental/nervous” conditions 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.⁸⁴

Other courts upholding disparate LTD plans have since cited to the Fourth Circuit’s findings.⁸⁵

Subsequent congressional activity may also support this interpretation of discrimination within the ADA. Many circuit courts have cited a passage of the MHPA as proof that Congress did not intend discrimination under the original ADA to include disparate treatment of physical and mental disabilities. The MHPA requires that health insurance plans offer substantially the same lifetime and annual limits in coverage for mental health benefits as those offered for both medical and surgical benefits, with a few limited exceptions.⁸⁶ In passing the MHPA,

82. S. REP. NO. 101-116, at 29.

83. See, e.g., *EEOC v. Staten Island Sav. Bank*, 207 F.3d 144, 150 (2d Cir. 2000); *Rogers*, 174 F.3d at 434–35; *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 610 (3d Cir. 1998).

84. *Rogers*, 174 F.3d at 435 (citing EEOC: Interim Guidance on Application of ADA to Health Insurance (June 8, 1993), reprinted in *Fair Empl. Prac. Cas. (BNA)* 405:7115, at 7118). The issue in *Rogers* was addressed under Title II of the ADA because the employer in that case was a public entity. However, because the issue in that case involved a public entity as an employer rather than as a public program provider, it is arguable that the suit should have been brought under Title I.

85. *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1117 (9th Cir. 2000) (“Even the EEOC concluded in their guidance on health insurance, contrary to their litigation position in this case, that distinctions between types of disability *do not* violate the [ADA].”); *Lewis v. Kmart Corp.*, 180 F.3d 166, 170 (4th Cir. 1999) (citing *Rogers*’ use of a “public policy statement of the EEOC”).

86. 42 U.S.C. 300gg-5(a) (2000); see *supra* text accompanying note 13; Weirich & Sharma, *supra* note 9, at 470–74.

Congress specifically rejected an amendment to the Health Insurance Portability and Accountability Act of 1996 (HIPAA)⁸⁷ “which would have mandated parity in insurance coverage for mental and physical illnesses.”⁸⁸ Courts have determined that the passage of the MHPA necessarily means that the ADA did not account for such discrimination.⁸⁹ Other courts have simply used this piece of legislation and the rejection of the amendment as an example of the contested nature of the issue of parity for mental health coverage and have been “loath to read into [the Act] a rule that has been the subject of vigorous, sometimes contentious, national debate for the last several years.”⁹⁰

Finally, courts have almost universally feared that if the ADA “require[ed] equal coverage for every type of disability[,] such a requirement . . . would destabilize the insurance industry in a manner definitely not intended by Congress when passing the ADA.”⁹¹ Although there is no direct statutory language identifying this concern, it is evidenced not only in the safe harbor provisions,⁹² but also in the congressional statements concerning health insurance coverage of treatments for mental illness.⁹³

Most of the circuit decisions analyzing this issue, however, were handed down before the Supreme Court addressed the meaning of discrimination under the ADA and were based upon the Court’s interpretation of the Rehabilitation Act, a similar though not identical act. The Supreme Court finally analyzed the meaning of discrimination under the ADA in *Olmstead v. Zimring ex rel. L.C.*⁹⁴

87. Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified primarily in Titles 18, 26, and 42 of the U.S.C.).

88. *Ford*, 145 F.3d at 610.

89. *Rogers*, 174 F.3d at 436 (“All of this [passage of the MHPA and other legislation] suggests that Congress does not believe that the ADA already mandates equal treatment in benefits coverage for mental and physical disabilities.”); *Ford*, 145 F.3d at 610 (“Such congressional action reveals both that the ADA does not contain parity requirements and that no parity requirements for mental and physical *disability* benefits have been enacted subsequent to the ADA.”).

90. *EEOC v. CNA Ins. Cos.*, 96 F.3d 1039, 1044 (7th Cir. 1996).

91. *Ford*, 145 F.3d at 608; *see supra* note 12.

92. *See supra* Part II.C.

93. *See supra* notes 80–82 and accompanying text.

94. 527 U.S. 581 (1999). The cases decided after *Olmstead*, cited in Part II.C, are used to reference arguments that were also made in essentially the same context prior to the *Olmstead* decision.

III. *OLMSTEAD* AND THE MEANING OF “DISCRIMINATION” UNDER TITLE II

The plaintiffs in *Johnson* requested an expansion of the definition of discrimination under Title I of the ADA so that discrimination could be found when comparing two individuals within the protected class (mentally disabled individuals versus physically disabled individuals), rather than being limited to comparisons between individuals within the protected class and the general public. This request relied heavily on the Supreme Court’s interpretation of discrimination under Title II of the ADA in *Olmstead v. Zimring ex rel. L.C.*,⁹⁵ which found discrimination by comparing individuals within the protected class.

A. *Title II of the ADA*

The discrimination provision of Title II in the ADA is distinguishable from Title I in several ways,⁹⁶ but the only relevant difference for the purpose of interpreting the meaning of discrimination is an additional example of discrimination. Specifically, Title II not only prohibits any “discrimination by . . . [a public] entity,” but also specifically prohibits a “qualified individual with a disability” from “be[ing] excluded from participation in or be[ing] denied the benefits of the services, programs, or activities of a public entity.”⁹⁷ Thus, for the purpose of determining the meaning of discrimination, Title II’s statutory language only differs from the definition in Title I by adding an additional provision that specifically prohibits exclusion from the programs or services of public entities. *Olmstead*, however, expanded the meaning of discrimination under Title II beyond the definitions provided in *Alexander* and *Traynor* to recognize discrimination between individuals within the protected class.

95. *Id.*

96. As mentioned above, Title II applies to government entities rather than private employers and sets forth the prohibitions “against discrimination in . . . public services furnished by governmental entities.” *Olmstead*, 527 U.S. at 589. While Title II still requires that a person be a “qualified individual with a disability,” Title II defines this term as “an[y] individual with a disability who, with or without reasonable modifications . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity,” 42 U.S.C. § 12131(2) (2000), rather than “an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires,” *id.* § 12111(8).

97. 42 U.S.C. § 12132.

B. Cognizable Discrimination Under Olmstead

In *Olmstead*, two institutionalized, developmentally disabled women alleged that the State's procedures concerning their institutionalization were discriminatory under the ADA. Specifically, the women claimed that the "State's failure to place [them] in a community-based program, once [their] treating professionals determined that such placement was appropriate, violated, *inter alia*, Title II of the ADA."⁹⁸ The Court held that the women's institutionalization was discrimination prohibited by the ADA because their psychiatrists and other specialists had determined that the two women could live in a less-restrictive environment and the State maintained a less-restrictive community-based program.⁹⁹

While the Court seemed driven by several statements made within the ADA that condemned isolation and segregation of disabled individuals as a particularly heinous type of discrimination,¹⁰⁰ and gave deference to the Attorney General's regulations regarding institutionalization,¹⁰¹ the Court based its central legal analysis on a broader issue, namely, whether "[u]ndue institutionalization qualify[ed] as discrimination 'by reason of . . . disability.'"¹⁰² The State argued that "'discrimination' necessarily requires uneven treatment of similarly situated individuals" and attempted to shift the burden to the plaintiffs to identify a "comparison class, *i.e.*, . . . similarly situated individuals given preferential treatment."¹⁰³ To this argument the Court responded, "We

98. *Olmstead*, 527 U.S. at 594.

99. *Id.* at 600–03. The facts of *Olmstead* do not specifically indicate what other types of mentally disabled individuals utilized the community-based program, but it is clear that there were several types of community-based programs, *id.* at 593 (noting that "L. C.'s treatment team . . . [had] agreed that her needs could be met appropriately *in one of the community-based programs*" provided by the State) (emphasis added), and individuals utilizing these programs may have had many types of disabilities. Though the disabilities were probably mostly mental ones, the programs likely involved many types of mental disabilities all in a similar situation to the plaintiffs in *Olmstead*. At the very least, the Court had to compare different individuals from the same protected class whether they had similar disabilities or not.

100. *Id.* at 588–89 (citing 42 U.S.C. § 12101(a)(2), (3), (5)).

101. See 28 C.F.R. § 35.130(d) (1998). The "integration regulation" reads, "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." *Id.* "[T]he most integrated setting appropriate to the needs of qualified individuals with disabilities" has been defined as "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 C.F.R. pt. 35, app. A, at 469 (1998) (discussing 28 C.F.R. 35.130(d)–(e)).

102. *Olmstead*, 527 U.S. at 597.

103. *Id.* at 598 (citing petitioners' brief at 21). The dissent agreed with the State, arguing that "this Court has never endorsed an interpretation of the term 'discrimination' that encompassed disparate treatment among members of the *same* protected class." *Id.* at 616 (Thomas, J., dissenting).

are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA.”¹⁰⁴ In countering the State’s argument, the Court cited *O’Connor v. Consolidated Coin Caterers Corp.*,¹⁰⁵ where the Court, in interpreting the Age Discrimination in Employment Act of 1967 (ADEA), noted: “The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*.”¹⁰⁶ The Court’s use of the *O’Connor* discrimination standard marked the first time discrimination under the ADA was expanded to include disparate treatment of individuals within a protected class.

Though the Court refrained from directly recognizing the broader implications of its decision, the holding will force future courts to consider discrimination between individuals within a protected class, i.e., between two disabled individuals. This is because the only way to determine that the women in *Olmstead* were discriminated against because of institutionalization rather than community-based care program placement is to compare them with others who are already in community-based care programs, i.e., other disabled individuals. Therefore, the Court, in order to maintain its holding, had to compare how these women were treated in their situation with the way other disabled individuals, who possibly had different disabilities, were treated in theirs.

Within the opinion, the above analysis is overshadowed by the Court’s concern with the unnecessary institutionalization and segregation of disabled individuals gleaned from the ADA’s congressional findings.¹⁰⁷ The Court’s emphasis on the congressional purposes of the ADA made the Court appear unconscious of the expanded definition it was forming. The dissent seemed to be more aware than the majority of the change being made to the traditional understanding of discrimination under the ADA. Justice Thomas explained that “[t]emporary exclusion from community placement does not amount to ‘discrimination’ in the traditional sense of the word.”¹⁰⁸ Thomas noted this change from “the traditional sense of the word” by citing the differences between the rule

104. *Id.* at 598.

105. *Id.* at 598 n.10 (citing *O’Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312 (1996)).

106. *O’Connor*, 517 U.S. at 312.

107. *See Olmstead*, 527 U.S. at 588–89 (citing 42 U.S.C. § 12101(a)(2), (3), (5) (2000)).

108. *Id.* at 616 (Thomas, J., dissenting).

derived from *Olmstead* and the rules in *Alexander* and *Traynor*.¹⁰⁹ The dissent also noted that the majority “chiefly relies on certain congressional findings contained within the ADA” to reach its more comprehensive definition of discrimination, and then claimed that such congressional findings “provide little guidance to the interpretation of the specific language of § 12132 [of the ADA].”¹¹⁰ While the dissent did not value congressional findings in interpreting the ADA, it acknowledged that Congress may have intended Title I of the ADA to have a broader application because of its peculiar definition of discrimination.¹¹¹

The dissent’s argument, however, is not entirely persuasive because circuit courts do not rely solely upon the Supreme Court’s interpretation of the Rehabilitation Act in defining discrimination under the ADA. The majority noted several cases that had already expanded the meaning of discrimination in other legislation,¹¹² and there was no reason to believe that discrimination under the ADA was limited to the Court’s interpretation of discrimination under the Rehabilitation Act. The majority felt that the congressional findings relied on in enacting the ADA were a more appropriate source for a definition of discrimination than the Rehabilitation Act or statements made by the congressional committees during the passage of the ADA.¹¹³

With the understanding that *Olmstead* stands for the proposition that discrimination under the ADA can exist within the protected class, the next section focuses on disparate LTD plans under Title I in *Johnson*.

109. *Id.* at 619–20 (Thomas, J., dissenting) (explaining that *Alexander v. Choate* upheld a statute that appeared to put the disabled at a disadvantage because it was “neutral on its face,” 469 U.S. 287, 302 (1985), and that in *Traynor v. Turnage*, 485 U.S. 535, 548 (1988), the Court “reiterated that the purpose of [the Rehabilitation Act] is to guarantee that individuals with disabilities receive ‘evenhanded treatment’ relative to those persons without disabilities”—both of which differ from the “comprehensive” definition of discrimination upheld by the court here).

110. *Id.* at 620–21 (Thomas, J., dissenting); see also *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 260 (1994) (“We also think that the quoted statement of congressional findings is a rather thin reed upon which to base a requirement.”).

111. *Olmstead*, 527 U.S. at 622–23 (“The majority’s definition of discrimination . . . substantially imports the definition of Title I into Title II by necessarily assuming that it is sufficient to focus exclusively on members of one particular group.”).

112. See *id.* at 598 n.10 (citing several cases, the most relevant being *O’Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996)).

113. The Supreme Court does not mention the statements made by several congressional committees that were relied on so heavily in the circuit court definitions of discrimination previously. See *supra* text accompanying notes 80–82. This is most likely because those statements were directed mostly at the problem of insurance and benefits plans and had no real place in the scope or definition of discrimination. See *supra* Part III.A.

IV. THE *JOHNSON* ANALYSIS AND APPLYING *OLMSTEAD* TO TITLE I

In November 2001, more than a year after the *Olmstead* decision, the Eleventh Circuit used the Supreme Court's analysis to expand the definition of discrimination under Title I of the ADA and upend the traditional discrimination analysis,¹¹⁴ including two decisions that had briefly addressed *Olmstead*.¹¹⁵ In *Johnson*, the Eleventh Circuit relied on the implications of the *Olmstead* ruling and recognized that the expanded definition would not have any of the detrimental effects that troubled the other circuits.¹¹⁶ *Johnson* not only created a more reasonable definition of discrimination—one that takes into account all forms of discrimination¹¹⁷—but also properly used the safe harbor provision within its analysis to alleviate insurance concerns. Unlike many of its sister circuits, the Eleventh Circuit completely separated its application of the ADA's discrimination standard from its application of the safe harbor exception.¹¹⁸ This enabled the Eleventh Circuit to come to a clearer definition of discrimination, based on the findings of Congress and the language of the Act, without muddling the definition with the exception created by the safe harbor provision. Thus, though most disparate LTD plans will still be able to comply with the ADA by utilizing the safe harbor provisions, the Eleventh Circuit analysis should outlast its sister circuits' analyses because it creates a surer standard for determining cognizable discrimination under the ADA and will place LTD and other similar plans under the sharper scrutiny of the safe harbor provision.

A. *The Meaning of Discrimination Under Title I*

After describing the plain language of the ADA, the Eleventh Circuit determined the scope of "legally cognizable" discrimination under the ADA. In doing so, it recognized that the *Olmstead* definition of discrimination replaced the traditional meaning of discrimination in Title

114. See *supra* Part II.D.

115. See *EEOC v. Staten Island Sav. Bank*, 207 F.3d 144, 151 (2d Cir. 2000); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1117–18 (9th Cir. 2000).

116. See *supra* note 12 and Part II.D.2.

117. See *supra* notes 48–51.

118. See *Johnson v. K Mart Corp.*, 273 F.3d 1035, 1050 (11th Cir.) (emphasizing that "the concept of discrimination in Title I as a threshold matter" allowing the court "to proceed to a more specific consideration of disparate treatment in the insurance context, and, then, to an application of the insurance safe harbor provision . . ."), *reh'g en banc granted, panel opinion vacated* 273 F.3d at 1070 (11th Cir. 2001).

I cases, which was based on *Alexander* and *Traynor*, with *O'Conner's* interpretation of the term within the ADEA. The Eleventh Circuit reached this result through careful application of the Supreme Court's language in *Olmstead*. In addition, *Johnson* alleviates many of the policy concerns posed by other circuits.

First, the *Johnson* court noted the application of Title I specifically to LTD plans through the language of § 12112, which specifically prohibits employers from discriminating against “qualified individual[s] with a disability” in “terms, conditions, and privileges of employment”¹¹⁹ and from “participating in a contractual . . . relationship that has the effect of subjecting a covered entity’s qualified . . . employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee . . .).”¹²⁰ LTD plans are clearly either a “privilege of employment” or a “fringe benefit.”

Next, the court cited the *Olmstead* decision explaining that “[*Olmstead*] controls [the circuit’s] understanding of the concept of discrimination embodied in Title I of the ADA” and that “[t]he gravamen of a disability-based discrimination claim is that an individual has been treated less favorably because of her disability.”¹²¹ The court also noted the *Olmstead* dissent’s acknowledgement that Title I might include this type of discrimination while Title II does not.¹²² *Olmstead* had announced a standard for discrimination specifically for the ADA while previous Supreme Court cases, *Alexander* and *Traynor*, had only developed a standard for the Rehabilitation Act. This fact is even more significant considering the amendments Congress made to the Rehabilitation Act after the enactment of the ADA in 1992, because those amendments specifically adopted the discrimination standards of the ADA for the purposes of the Rehabilitation Act.¹²³

The Eleventh Circuit also dealt with the legislative history that other circuits claimed meant disparate LTD plans could not be discrimination under the ADA.¹²⁴ The court countered the committee statements by distinguishing the situations to which they applied from the facts of a

119. *Id.* (quoting 42 U.S.C. § 12112(a) (2000)).

120. *Id.* at 1051 (quoting 42 U.S.C. § 12112(b)(2)).

121. *Id.* at 1052–53.

122. *See supra* note 111.

123. *See infra* note 127.

124. *See supra* text accompanying notes 80–85.

disparate LTD plan. Specifically, the court noted that while “[t]he Committee Reports suggest no intention to interfere with insurance arrangements which set caps on ‘procedures or treatments’ that apply to persons with or without disabilities,” disparate LTD plans

deal[] not with a limitation on procedures and treatments equally available to all but a limitation on compensation in lieu of salary which is expressly contingent on what kind of disability has caused a former employee to lose his job. Giving the legislative reports their full weight, the type of differentiation that they [the committee statements] protect is not the type of differentiation at issue in this case.¹²⁵

The court declared that all of the Committee Report statements are completely “disability neutral” and simply refer to the ability of insurance companies to evaluate the coverage of “myriad potential medical procedures or treatments,” while disparate LTD plans contain a single payment “intended to partially replace . . . salary,” and “[d]enial of that benefit on the express ground that the claimant is mentally disabled is discrimination . . . prohibited by § 12112(a)—unless the ADA’s safe harbor provision exempts such discrimination from liability.”¹²⁶ In addition to the legislative history of the ADA, the Rehabilitation Act’s amendments support a change to the meaning of discrimination at the time the ADA was enacted.¹²⁷

Johnson’s rebuttal to the congressional committee statements can also be used to refute the other circuits’ reliance on a 1993 statement by the EEOC regarding application of the ADA to health insurance.¹²⁸ Like the congressional committee statements, the EEOC statement does not directly apply to LTD plans, but rather to health insurance plans. LTD plans can be distinguished from health insurance because they offer different benefits (payments in lieu of salary when disability makes it impossible for the recipient to work) and are not tied to treatments or procedures. Because the previous EEOC statement applies directly to insurance plans, the 1993 statement likely takes into account the safe harbor provision of the ADA, which protects insurance companies and may not apply to all employment benefits. Since the EEOC position in

125. *Johnson*, 273 F.3d at 1055–56.

126. *Id.* at 1056. For more on the safe harbor provision, see *supra* text accompanying notes 61–63.

127. See 29 U.S.C. §§ 791(g), 794(d) (“The standards used to determine whether this section has been violated in complaint alleging employment discrimination under this section shall be the standards applied under Title I of the Americans with Disabilities Act . . .”).

128. See *supra* text accompanying note 84.

1419]

Why Can't Discrimination Be Discrimination?

recent litigation is clearly contrary to the Fourth Circuit's interpretation of the 1993 EEOC statement, it is fitting that courts interpret the EEOC's original statement so as to coincide with its current position. Thus, courts should interpret the EEOC's statement narrowly.

While identifying a new standard for discrimination under the ADA, the *Johnson* court also fully addressed the safe harbor provision of the ADA and determined that the Kmart LTD plan was a "bona fide benefit plan" that qualified for the protection of the safe harbor provision and remanded for further proceedings to give the plaintiff the opportunity to show that the Kmart LTD plan "constitutes a use of the safe harbor provision as a 'subterfuge to evade the purposes' of Title I."¹²⁹

Unlike the Fourth Circuit's *Rogers* decision, *Johnson* properly used the ADA's safe harbor provision as an exception to the scope of discrimination in the Act rather than a provision that defines its scope.¹³⁰ An exception to the ADA ought not to dictate the scope of it. In fact, the existence of this exception contradicts the Fourth Circuit's conclusion,¹³¹ because an exception to the rule indicates that without the exception, the general prohibition of discrimination would include disparate insurance plans like many LTDs.¹³² Thus, the Fourth Circuit's concern that a more expansive definition of discrimination would interfere with insurance companies is unfounded because the concern is alleviated by the safe harbor provision rather than supported by it. In other words, because of the safe harbor provision, discrimination can be defined as expansively as necessary to address the purposes of the Act without affecting insurance risk classifying procedures.

129. *Johnson*, 273 F.3d at 1056 (quoting 42 U.S.C. § 12201(c) (2000)). The determination that the LTD plan was a bona fide benefits plan must have been stipulated to by the parties because the court noted that the only disputed issue regarding the safe harbor was concerning the subterfuge provision.

130. *See Rogers v. Dep't of Health & Envtl. Control*, 174 F.3d 431, 435 (4th Cir. 1999) ("The ADA's 'safe harbor' provision and the related legislative history suggest that Congress did not intend for the ADA to force a change in the way insurers do business." (citing S. REP. NO. 101-116, at 84-85 (1989); H.R. REP. NO. 101-485, at 136 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 419).

131. *See id.*; *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998).

132. *But see EEOC v. Staten Island Sav. Bank*, 207 F.3d 144, 150 (2d Cir. 2000) (arguing that the safe harbor provision "does not shed light on the scope of the anti-discrimination provision[] . . . [and] . . . is as consistent with the position of the defendants . . . as it is with the position of the [plaintiffs]"). This, however, only neutralizes the interpretative value of the provision.

B. Policy Considerations

The *Johnson* treatment of the safe harbor provision also answers the other circuits' policy concerns. These concerns include a fear of interfering with the current congressional debate and destabilizing the insurance industry.

Several circuit courts were concerned with marring the current debate in Congress. For instance, previous circuit decisions cited the MHPA and a refusal to amend HIPAA as an example of the continued debate.¹³³ The MHPA, however, applies directly to "group health plan[s],"¹³⁴ which were purposefully placed outside the scope of the ADA under the safe harbor provision. Thus, the MHPA is just as likely to be a congressional attempt to apply ADA principles to insurance companies where the ADA excluded them. Although there is still heavy debate regarding how to treat insurance companies and bona fide benefit plans with respect to parity for mental health coverage, courts may still interpret the ADA as classifying disparity in coverage between mental and physical disabilities as discrimination without marring the current debate because the safe harbor provision leaves insurance companies unaffected.

The fear among the circuits that the *Johnson* interpretation of discrimination under the ADA will disrupt the insurance industry is unfounded—not because the full enforcement of the ADA would not upset the insurance industry,¹³⁵ but because the ADA specifically exempts insurance and bona fide benefit plans from compliance with ADA standards when they are engaged in the usual insurance practices of underwriting, classifying, or administering risks¹³⁶ and are not using the safe harbor as a "subterfuge." Congress was aware of the insurance problem and specifically created the safe harbor to alleviate this concern.

One might argue that the Eleventh Circuit analysis does not affect the end result because disparate LTD plans will still withstand scrutiny within the safe harbor provision. While the end result will not always change, the rule derived from *Johnson* does tip the scales toward plaintiffs. This is because by completely separating the discrimination analysis from the safe harbor analysis, the *Johnson* court allows plaintiffs two additional avenues of attack. First, plaintiffs can attack the

133. See *supra* text accompanying notes 86–90.

134. 42 U.S.C. § 300gg-5(a)(1).

135. See *supra* note 12.

136. See *supra* text accompanying note 62.

proposition that the LTD plan is a “bona fide benefit plan” by showing that the administrator of the plan is not undertaking the process of “underwriting risks, classifying risks, or administering such risks.”¹³⁷ Second, if plaintiffs can show that a “bona fide benefits plan” is a “subterfuge that evades the purposes” of the ADA, the court can still find that such disparate LTD plans are discriminatory under the ADA. Although courts have interpreted “subterfuge” in many ways,¹³⁸ the *Johnson* court specifically interprets it to require that plaintiffs show that defendants had intent to evade the Act.¹³⁹ While these attacks are admittedly difficult to make, they are part of an important balance struck by the Act that gives plaintiffs more ground than a rule that disparate LTD plans are simply not cognizable discrimination.¹⁴⁰

C. Other Circuits' Dismissal of the Application of Olmstead to Title I

Though two other circuits have upheld disparate LTD plans since *Olmstead* was decided, both circuits dismissed *Olmstead* based on superficial factual distinctions without considering the change in the discrimination analysis, and instead relied heavily on arguments from

137. 42 U.S.C. § 12201(c)(2). Although many courts have established an extremely low threshold for proving this point, *see, e.g.*, *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 611–12 (3d Cir. 1998) (holding that there is no requirement that benefit plans or insurance show they are based on actuarial principles of classifying or underwriting risks); *Piquard v. City of East Peoria*, 887 F. Supp. 1106, 1120 (C.D. Ill. 1995) (holding that a benefits plan is “‘bona fide’ . . . if it ‘exists and pays benefits’”) (citations omitted), a few district courts have held that a defendant must show that the plan is based on sound actuarial principles, or actual or reasonably anticipated experience, *see, e.g.*, *Doe v. Mut. of Omaha Ins. Co.*, 999 F. Supp. 1188, 1195 (N.D. Ill. 1998), *rev'd on other grounds*, 179 F.3d 557 (7th Cir. 1999); *Cloutier v. Prudential Ins. Co.*, 964 F. Supp. 299, 304 (N.D. Cal. 1997).

138. Some courts create a nearly meaningless standard that simply restates other portions of the safe harbor provision, *see Piquard*, 887 F. Supp. at 1125 (holding that “the subterfuge sentence of [§ 12201(c)] means that a benefit plan disability-based distinction based on underwriting, classifying, or administering risks that is based on or not inconsistent with State law may not be used to discriminate in non-fringe-benefit areas of employment”), while other courts rely on the intent of the benefit plan administrator or developer, *see Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 678–79 (8th Cir. 1996).

139. *Johnson v. K Mart Corp.*, 273 F.3d 1035, 1056–59 (11th Cir.) (panel), *reh'g en banc granted, panel opinion vacated* 273 F.3d at 1070 (11th Cir. 2001).

140. It is true that circuit courts addressed arguments under the safe harbor provision. *See Rogers v. Dep't of Health & Env'tl Control*, 174 F.3d 431, 437 (4th Cir. 1999); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 610–11 (3d Cir. 1998). These opinions, however, are odd because they both hold that disparate plans are not discrimination without referring to the safe harbor until addressing a plaintiff challenge under the subterfuge doctrine. This type of analysis lends itself easily to omitting the safe harbor provision altogether as some courts have done. *See, e.g.*, *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1101–02 (10th Cir. 1999).

prior case law that *Olmstead* refuted. Because the arguments made by other circuits have already been addressed, this section focuses on the new analysis in *Weyer v. Twentieth Century Fox Corp.* and *EEOC v. Staten Island Savings Bank*.¹⁴¹

I. *Weyer v. Twentieth Century Fox Corp.*

In *Weyer*, the Ninth Circuit relied on other circuits for its ruling and inappropriately distinguished *Olmstead* on its facts. After citing previous case law and arguments similar to those made therein,¹⁴² *Weyer* addressed *Olmstead* directly. *Weyer* argued that “*Olmstead* d[id] not speak to insurance classifications . . . [, but] spoke to segregation of the

141. Recent cases, including *Weyer* and *Staten Island Savings Bank*, have claimed reliance upon the weight of previous case law, but there is not as much precedent as recent cases claim. The Second Circuit cites six other circuits as already having upheld disparate LTD plans, *EEOC v. Staten Island Sav. Bank*, 207 F.3d 144, 148 (2d Cir. 2000), when, in fact, only four of those six have addressed the issue. The Second Circuit cites the Sixth Circuit case, *Parker v. Metropolitan Life Insurance Co.*, 121 F.3d 1006, 1015 (6th Cir. 1997) (en banc), which only considers whether a benefit plan provider can be considered a covered entity under Title III of the ADA, and the Seventh Circuit case, *EEOC v. CNA Insurance Cos.*, 96 F.3d 1039, 1042–44 (7th Cir. 1996), which dismisses the suit because the plaintiff was a former employee and not eligible to file suit under the ADA. Neither case addressed whether disparate LTD plans amounted to discrimination under the ADA. Prior to this, the Ninth Circuit claimed that seven circuits had decided the issue, *Weyer v. Twentieth Century Fox Corp.*, 198 F.3d 1104, 1116 (9th Cir. 2000), and cited *Parker*, *CNA Insurance*, and an Eighth Circuit case that merely addressed whether or not infertility could be considered a disability under the ADA, *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674 (8th Cir. 1996). Part of the reason for such confusion among the circuits is that several circuits have either purposefully or inadvertently held that the plaintiff was not eligible to file suit under the ADA and then went on to address the substantive issue of whether or not discrimination had occurred. See *Weyer*, 198 F.3d at 1116; *CNA Ins. Cos.*, 96 F.3d at 1043–45. The holdings thus mix the two issues together and make for misleading and confusing opinions. For example, *CNA Insurance* contains a great deal of language concerning the validity of disparate LTD plans under Title I, but the court dismissed the case based on the plaintiff’s ineligibility to sue. The remaining opinion is therefore dicta. See *CNA Ins. Cos.*, 96 F.3d at 1043–45. It is arguable that in *Weyer* both issues were addressed because the plaintiff also filed suit under Title III, which has very different eligibility requirements; however, when defining the issue, the court specifically mentioned both Title I and Title III. 198 F.3d at 1116. In addition, *Weyer* found that the benefits plan did not meet the requisite standard of being a “public accommodation” under Title III. *Id.* at 1113–16. For purposes of this Note, the focus will be on the Title I analysis.

142. *Weyer* heavily cites *CNA Insurance* for the argument that since the same LTD plan was given to everyone and “[a]ll employees . . . had a plan that promised them long-term benefits from the onset of disability until age 65 if their problem was physical, and long-term benefits for two years if the problem was mental or nervous,” there could not be a claim for discrimination. *Weyer*, 198 F.3d at 1116 (citing *CNA Ins. Cos.*, 96 F.3d at 1044). It is interesting to note that this language in *CNA Insurance* was merely dicta since the court had already dismissed the action because the plaintiff was not eligible to file suit under the ADA. See *CNA Ins. Cos.*, 96 F.3d at 1045. *Weyer* also cited *Rogers* and *Ford* for their interpretive arguments and policy. *Weyer*, 198 F.3d at 1116–17. These arguments have been presented previously. See *supra* Part II.D.

disabled through unwarranted institutional confinement,” and concluded that “[a]pplying *Olmstead* to insurance classifications would conflict with . . . *Alexander v. Choate* and *Traynor v. Turnage*, which both endorse distinctions between types of disabilities, and Congress’s clear instruction in the insurance safe harbor that the [ADA] was not intended to reach common insurance.”¹⁴³

Weyer’s analysis contains several flaws. The factual distinction dismissing *Olmstead* is superficial. While *Olmstead* clearly deals with unnecessary institutionalization rather than LTD plans, *Weyer* fails to address the rule adopted in *Olmstead* that discrimination between individuals with disabilities, regardless of the types of disabilities, is prohibited discrimination under the ADA. Its reliance on *Alexander* and *Traynor* is inappropriate for two reasons. First, *Olmstead* directly interprets the provisions of the ADA, thereby making the Rehabilitation Act interpretation less important and even unnecessary in determining discrimination under the ADA. Second, the amended Rehabilitation Act is specifically required, by its own terms, to meet the standards of the ADA.¹⁴⁴ Had Congress considered the Rehabilitation Act’s discrimination standards to be the same as the ADA’s, it would not have amended the Rehabilitation Act to account for the ADA discrimination standards. Finally, the use of the ADA safe harbor provision as narrowing the meaning of discrimination under the ADA disallows the full statutory effect of the safe harbor provision.¹⁴⁵

2. EEOC v. Staten Island Savings Bank

In *Staten Island Savings Bank*, the Second Circuit addressed *Olmstead* under a broader argument made by the plaintiff that the ADA was designed to protect on an individual basis and not merely on the basis of the protected class as a whole.¹⁴⁶ The Second Circuit, however, declared that “the ADA’s ‘individualized focus’ d[id] not require [the court] to conclude that the ADA regulates the content of [LTDs],” but that the Act only requires that an individual’s “access to an employer’s fringe benefit program not be denied or limited on the basis of his or her

143. *Weyer*, 198 F.3d at 1117–18.

144. *See supra* note 127.

145. Note that the Rehabilitation Act interpreted in both *Alexander* and *Traynor* did not contain a safe harbor for insurance, and thus the Court needed to consider the ramifications of insurance distinctions when defining discrimination. Courts are no longer limited by those policy concerns.

146. *Staten Island Sav. Bank*, 207 F.3d at 151.

particular disability.”¹⁴⁷ The Second Circuit’s argument, however, fails to account for the fact that plans that offer the same benefits to all participants can intentionally single out certain disabilities by offering very little or no coverage to certain disabilities based on the type of disability rather than types of treatments. An individual has been discriminated against if he or she becomes unable to work because of a mental disability, and is denied payments in lieu of a salary after a limited time period for no reason other than that the disability was mental. The type of denial individuals with mental disabilities face from disparate LTD plans is based solely on the fact that their disabilities are mental; those individuals do not enjoy access to disability coverage equal to that enjoyed by those with physical disabilities.

V. CONCLUSION

Although the safe harbor provision will allow many disparate LTD and other benefit plans to be legally viable under the ADA, it is important that courts have a clear standard for determining discrimination that requires closer scrutiny of disparate LTD plans. Even more important is that the ADA be able to protect against those things specifically mentioned by Congress, including all types of “limiting, segregating, or classifying” disabled individuals in ways “that adversely affect[] [their] opportunities or status.”¹⁴⁸ With these important principles in mind, the Eleventh Circuit succeeded in developing an analysis that will properly account for all types of discrimination meant to be addressed by the ADA without overburdening the insurance industry or inhibiting the continued debate in Congress over parity within insurance plans.

Todd Prall

147. *Id.*

148. *See* 42 U.S.C. § 12112(b)(1) (2000). Other Congressional findings include those provisions which concerned the *Olmstead* court, *see supra* note 100, and other specific examples of discrimination, *see supra* Part II.B.