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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

8 Kory Dean Krieger,

9 Plaintiff,

10 vs.

11 Nationwide Mutual Insurance Company,

12 Defendant.

No. CV-11-1059-PHX-DGC

**ORDER**

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14 Kory Krieger is a former employee of Nationwide Mutual Insurance Company.  
15 He suffered a panic attack at work on August 20, 2008, went on disability leave the next  
16 day, and began receiving benefits under an employee long-term disability income  
17 benefits plan on March 1, 2009. The benefits were terminated February 28, 2011.

18 Krieger filed suit against Nationwide three months later. Doc. 1. Counts one  
19 through three of the complaint assert ERISA claims for recovery of benefits, breach of  
20 fiduciary duty, and failure to provide an adequate summary plan description. *Id.*  
21 ¶¶ 15-20. Count four seeks injunctive relief in the form of reinstatement of benefits. *Id.*  
22 ¶¶ 21-24.

23 Plaintiff has filed a motion for a preliminary injunction. Doc. 16. Defendant has  
24 filed a response. Doc. 19. No reply has been filed. For reasons stated below, the motion  
25 will be denied.<sup>1</sup>

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27 <sup>1</sup> Plaintiff's request for oral argument is denied because the issues have been  
28 briefed and oral argument will not aid the Court's decision. *See* Fed. R. Civ. P. 78(b);  
*Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

1 To obtain a preliminary injunction, Plaintiff must show that he is likely to succeed  
2 on the merits, that he is likely to suffer irreparable harm in the absence of preliminary  
3 relief, that the balance of equities tips in his favor, and that an injunction is in the public  
4 interest. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 129 S. Ct. 365, 374 (2008).  
5 The test includes a sliding scale. If Plaintiff shows that the balance of hardships will tip  
6 sharply in his favor, he need not make as strong a showing of the likelihood of success on  
7 the merits – the existence of serious questions will suffice. *Alliance for Wild Rockies v.*  
8 *Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011).

9 The termination of benefits was wrongful, Plaintiff asserts, because it was based  
10 on an ambiguous, and narrowly construed, mental health limitation contained in the  
11 summary plan description. Doc. 16 at 2-4, 7. Defendant disputes that this was the reason  
12 for the termination of benefits. Doc. 19 at 2-5. As explained in a letter to Plaintiff dated  
13 May 18, 2011 (Doc. 19-3 at 9-10), Defendant claims to have terminated his benefits  
14 because he had exhausted the maximum benefits allowable under the plan regardless of  
15 the cause of his disability. Specifically, because Plaintiff’s long-term disability coverage  
16 had been in effect for only 16 months before he began receiving benefits, he was entitled  
17 to a maximum of 24 months of benefits under the plan. Doc. 19-2 at 42. Plaintiff does  
18 not challenge the applicability of this durational limitation.

19 Defendant argues, correctly, that Plaintiff has not shown that he is likely to  
20 succeed on the merits. Nor has he demonstrated the existence of serious questions,  
21 that is, “a fair chance of success on the merits.” *Republic of the Philippines v. Marcos*,  
22 862 F.2d 1355, 1362 (9th Cir. 1988) (citation omitted). Because Plaintiff has failed to  
23 show a likelihood of success on the merits or the existence of serious questions, the Court  
24 will not issue a preliminary injunction. The Court need not address the other  
25 requirements for preliminary injunctive relief.

26 **IT IS ORDERED:**

- 27 1. Plaintiff’s motion for preliminary injunction and reinstatement of disability  
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benefits (Doc. 16) is **denied**.

2. The Court will set a case management conference by separate order.

Dated this 25th day of August, 2011.



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David G. Campbell  
United States District Judge