

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 TOYOTA MOTOR MANUFACTURING, :

4 KENTUCKY, INC., :

5 Petitioner :

6 v. : No. 00-1089

7 ELLA WILLIAMS. :

8 - - - - -X

9 Washington, D.C.

10 Wednesday, November 7, 2001

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:02 a.m.

14 APPEARANCES:

15 JOHN G. ROBERTS, JR., ESQ., Washington, D.C.; on behalf
16 of the Petitioner.

17 BARBARA B. McDOWELL, ESQ., Assistant to the Solicitor
18 General, Department of Justice, Washington, D.C.; on
19 behalf of the United States, as amicus curiae.

20 ROBERT L. ROSENBAUM, ESQ., Lexington, Kentucky; on behalf
21 of the Respondent.

22

23

24

25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	JOHN G. ROBERTS, JR., ESQ.	
4	On behalf of the Petitioner	3
5	BARBARA B. McDOWELL, ESQ.	
6	On behalf of the United States,	
7	as amicus curiae	18
8	ROBERT L. ROSENBAUM, ESQ.	
9	On behalf of the Respondent	26
10	REBUTTAL ARGUMENT OF	
11	JOHN G. ROBERTS, JR., ESQ.	
12	On behalf of the Petitioner	49
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 00-1089, Toyota Motor Manufacturing v. Ella
5 Williams.

6 Mr. Roberts.

7 ORAL ARGUMENT OF JOHN G. ROBERTS, JR.

8 ON BEHALF OF THE PETITIONER

9 MR. ROBERTS: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 The Sixth Circuit below held that the
12 respondent, Ms. Williams, was substantially limited in
13 performing manual tasks and therefore disabled under the
14 Americans with Disabilities Act because she could not
15 perform the manual tasks associated with her assembly line
16 job, specifically gripping a sponge and repetitively
17 wiping down cars with her arms at shoulder level for an
18 extended period of time.

19 That test for disability status was wrong. It
20 was wrong because it is inconsistent with the statute
21 which requires a substantial limitation on a major life
22 activity. Repetitively wiping down cars with arms at
23 shoulder level for an extended period of time is not a
24 major life activity, and being limited in that activity
25 does not constitute being substantially limited in the

1 major life activity of performing manual tasks in general.

2 A plaintiff must show a substantial limitation
3 in a broad range of manual tasks to meet the statutory
4 standard. The most that the court of appeals could
5 extrapolate was that Ms. Williams was substantially
6 limited in the tasks associated with jobs that required
7 gripping tools and repetitive activity with arms at
8 shoulder level for an extended period of time. That is a
9 specialized and idiosyncratic limitation. It is not a
10 substantial limitation --

11 QUESTION: Mr. Roberts, can I just ask you at
12 the outset, so you have plenty of time to comment, there's
13 expert testimony, as I read the briefs, that -- on your
14 opponent's side that she suffers a lack of access to the
15 labor market of from 50 to 55 percent of the jobs, both
16 nationwide and in Kentucky.

17 MR. ROBERTS: A number of things about that.
18 First, that was not pertinent on the manual tasks inquiry.
19 That was submitted under the major life activity of
20 working in an effort to show a substantial limitation as
21 to working. The district court rejected that limitation.
22 The court of appeals did not reach it.

23 The district court rejected it for a number of
24 reasons. First, the 50 to 55 percent was based largely on
25 the assumption that she -- she could not do medium duty

1 work, but as the evidence showed -- and I would point
2 particularly to page 24 of Dr. Weikel's deposition -- she
3 never established that she could do medium duty work in
4 the first place and had never done medium duty work. And
5 what Dr. Weikel said is, if you take out that loss -- in
6 other words, the loss of eliminating medium duty work --
7 her loss of jobs goes down to 10 to 15 percent, which
8 would not be sufficient to show a substantial limitation
9 in working.

10 The district court also said that that evidence
11 was not geographically specific enough. It was based on
12 national figures and it was not narrowed down to the
13 particular job market, so that the -- the evidence was
14 properly rejected by the district court and never reached
15 by the court of appeals because it was submitted on the
16 working life activity and not the manual tasks.

17 QUESTION: When you say it was rejected by the
18 district court, you don't mean it was inadmissible. You
19 mean it was given no weight by the district court.

20 MR. ROBERTS: The district court considered it
21 and said it was not probative of what it purported to
22 show, a loss of access to the job market. She failed to
23 -- to meet the test for working because she didn't show an
24 exclusion from a class of jobs. All she showed was that
25 some assembly line jobs were closed to her. That was the

1 main reason.

2 The other reason was because the evidence that
3 she showed wasn't probative of what it purported to show,
4 again an issue that the court of appeals did not reach.

5 What the court of appeals erred in doing was
6 artificially narrowing the manual tasks inquiry. It said
7 quite clearly it was adopting a class-based analysis.
8 We're only going to look at the manual tasks associated
9 with your job.

10 QUESTION: Mr. Roberts, in the same vein as
11 Justice Stevens' question, how does the worker's
12 compensation notion of disability fit in? As I understand
13 it, she was assessed as having a 20 percent -- what was it
14 -- partial disability for worker's compensation purposes.
15 So, that's another statutory scheme -- uses the same
16 concept, disability.

17 MR. ROBERTS: But -- but pursuant to very
18 different standards. And there are two worker's
19 compensation proceedings. The first one, before she was
20 rotated into this new job, was the 20 percent that Your
21 Honor referred to. The second one, she sought worker's
22 compensation also after this one, and that was denied in
23 -- in a denial affirmed by the Kentucky Supreme Court.

24 But there are different standards. Worker's
25 compensation is looking to very different things than --

1 than the Americans with Disabilities Act. And under the
2 Americans with Disabilities Act, you have to show a
3 substantial limitation on a major life activity. That's
4 not the standard --

5 QUESTION: Well, why wouldn't 20 percent
6 limitation -- 20 percent occupational impairment be a
7 substantial limitation?

8 MR. ROBERTS: Well, first of all, it may be
9 pertinent if the standards were the same, but only under
10 the working category. The worker's compensation system is
11 looking to impact on work. The court of appeals analysis
12 was under the performing manual tasks category. But
13 again --

14 QUESTION: Why did the court of appeals avoid
15 addressing the work approach? Was it because it thought
16 this Court had rejected that?

17 MR. ROBERTS: Well, a couple of reasons. My
18 brother, the respondent's counsel, represented to the
19 Sixth Circuit that the strongest claim was under
20 performing manual tasks and not under working, and a
21 recent Sixth Circuit precedent, the McKay case, I think
22 made it quite clear that she would not qualify as
23 substantially limited in the major life activity of
24 working.

25 QUESTION: Should we address that, or because it

1 was not addressed below, leave that alone?

2 MR. ROBERTS: Well, I think the more typical
3 approach would be not to address the major life activity
4 of working since it was not addressed below, except to
5 this extent. The major problem with what the Sixth
6 Circuit did in looking only at the manual tasks associated
7 with working replicates, under that category, all of the
8 problems that this Court has noted or the concerns,
9 rather, that this Court has noted with respect to the
10 major life activity of working. The test is circular.

11 QUESTION: In -- in looking at a substantial
12 limitation, do we focus on the things that the person
13 cannot do or the things they still can do or both? What
14 do we do?

15 MR. ROBERTS: Certainly with respect to manual
16 tasks, you have to look at both because it's not enough,
17 obviously, to say there's one particular manual task that
18 I can't do. That wouldn't show a substantial limitation,
19 and that particular manual task is probably not going to
20 be a major life activity. So, you have to look at the
21 broad range.

22 And that is what the courts of appeals have
23 done. They've taken a list of everyday manual tasks that
24 we all perform and said, well, where does the plaintiff
25 fall in this -- in this -- against this list of everyday

1 tasks? The Sixth Circuit did not do that. They looked
2 just at the work-related activities.

3 When you do that, the record is quite clear that
4 Ms. Williams can do a broad range of manual tasks. With
5 respect to personal hygiene, she can brush her teeth, wash
6 her face, bathe. With respect to everyday activities
7 around the house, the record shows she makes breakfast,
8 can cook, laundry, pick up and organize around the house.
9 And, of course, what the district court, in particular,
10 found most compelling, she can do assembly line work at
11 the Toyota plant.

12 QUESTION: Mr. Roberts, may I just stop you on
13 something you just said? I thought the Sixth Circuit said
14 in its opinion that it had considered `recreation,
15 household chores, living generally, as well as the work-
16 related impairments.

17 MR. ROBERTS: A very important sentence that I
18 think has to be read carefully. In the first place, it
19 doesn't say that we've looked at the record and considered
20 those. It was a generic assumption. The assumption is,
21 well, if she can't do this assembly line work, that must
22 affect other areas, recreation and household chores.

23 A generic assumption like that is wrong, first,
24 because the ADA specifies you have to look at the
25 individual impacts; second, because the impairments we're

1 talking about, myotendinitis and that sort of thing,
2 affect different people in widely different ways. You
3 can't assume, just because someone cannot do the
4 repetitive work for an extended period of time, that
5 that's going to have an effect. Of course --

6 QUESTION: You can assume that, though, in some
7 cases, couldn't you? I mean, you're not -- if -- suppose
8 a person says I cannot be a watchmaker and the reason he
9 can't is he's blind. That would be the end of the case,
10 wouldn't it? I mean, it would be clear he's disabled.

11 MR. ROBERTS: Certainly.

12 QUESTION: Even though he only mentioned
13 watchmaking.

14 MR. ROBERTS: Certainly.

15 QUESTION: All right. So, why can't this woman
16 here say I cannot lift more than 20 pounds ever, I cannot
17 lift more than 10 pounds frequently? I cannot perform
18 repetitive motions with both hands over an extended period
19 of time, and I cannot work with my hands above my head.
20 Now, that's the problem. Now, in addition, that -- I'll
21 tell you that makes me too -- it makes it hard for me to
22 find a job.

23 MR. ROBERTS: Well --

24 QUESTION: But it's -- it's really the
25 disability that we're focusing on, and in the

1 circumstances someone like that would be able not only not
2 to perform the job but also not to do the things that the
3 judge said below, a reasonable inference from the nature
4 of the disability.

5 MR. ROBERTS: First, because that type of an
6 inference is contradicted by the record. She says I can
7 do other assembly line work, including work that involves
8 manual tasks. The record shows she can take care of
9 personal hygiene. She can do chores around the house.
10 The inference would be -- it's contradicted by the record.

11 Second, the type of manual task that you're
12 looking at -- the problem is no one suggests that she
13 can't use a sponge and wipe down the side of a car. The
14 problem is with the repetitive aspect of it, doing it for
15 an extended period of time. The only setting in which
16 someone would have to do that is in an assembly line job,
17 and therefore, if anything, the -- the disability should
18 be analyzed under the major life activity of working, if
19 that is a major life activity.

20 QUESTION: Why -- that's what I -- my -- until
21 you said the last part, my thought was, well, we need a
22 trial on this.

23 MR. ROBERTS: Oh, no.

24 QUESTION: How serious is this disability? What
25 does it disqualify her from doing? But do we have to go

1 on to categorize between whether it's working, gardening,
2 what is a major life activity? I mean, isn't it just is
3 this person hurt badly enough that there are an awful lot
4 of things that she can't do?

5 MR. ROBERTS: No, no. The statute sets forth a
6 standard, substantial limitation on a major life activity.
7 Therefore, the way the cases have been tried, you identify
8 a major life activity.

9 QUESTION: That's the part that's bothering me.
10 You're absolutely right. And what I wonder is whether
11 this statute intends the courts to be so rigid as to say,
12 well, you've got to get into an argument about whether
13 it's working, gardening, this or that or the other thing,
14 or to use a more broad, general judgment, is this person
15 incapable of doing a lot of things that people do in life.

16 MR. ROBERTS: Well, first of all, with respect
17 to working, it is important I think to identify what major
18 life activity you're talking about because as the EEOC has
19 recognized in its regulations, as this Court has
20 indicated, there are all sorts of problems when you say
21 working is a major life activity. The problems are,
22 first, that it's completely circular. The -- the need for
23 an accommodation establishes the entitlement to it if your
24 life activity is working. That's not how the statute
25 should work. It should work by identifying a disability

1 and then seeing if it can be accommodated.

2 Working is also unusual in the sense that it is
3 not the individual's physical characteristics or condition
4 that are primarily significant in deciding whether there's
5 a disability, but the demands of the job. That's unlike
6 the other major life activities that Congress was talking
7 about, seeing, hearing, breathing, walking. Working -- it
8 suddenly becomes not only circular, but it looks like
9 you're talking more about the job than the individual.

10 That's why I do think it is important to -- to
11 draw a distinction, and what the court of appeals did, of
12 course, was look at manual tasks but then say only the
13 manual tasks associated with work.

14 And with respect again to the record, the record
15 shows that Ms. Williams can do a broad range of manual
16 tasks. When you compare the approach here to the approach
17 of the other courts of appeals, the Eleventh Circuit in
18 cases that we've discussed in our brief, Chanda and
19 Hillburn, or the Fifth Circuit in Dutcher. This doesn't
20 come close. She can do a broad range of manual
21 activities. Yes --

22 QUESTION: Well, Mr. Roberts, can I just
23 interrupt again? I -- you've explained by the 50 percent
24 figure is -- is wrong. But assume for the moment that
25 there were -- she was disabled from performing 50 percent

1 of the job opportunities available in the State, and in
2 addition, there were a random number of additional things
3 like playing tennis and playing the piano and so forth
4 that she could not do. Would it still not be -- would it
5 be impermissible to analyze this as the disability being
6 inability to use the hands like most people can and the
7 major part of the evidence relates to work, but then there
8 are these other things she also cannot do? Does she have
9 to have the other things -- you have to separate them.
10 Can't you look at the two together?

11 MR. ROBERTS: Yes, you can, and -- and certainly
12 in a manual tasks case, you can submit evidence and say,
13 here's an example of manual tasks that I can't perform,
14 the ones that are required at work. There's nothing wrong
15 with that.

16 The problem is in artificially limiting it to it
17 and looking only at the manual tasks associated with work.
18 That's not enough. But yes, it certainly could be part of
19 her case that I can't do this job at work. But there has
20 to be more because otherwise she hasn't shown a
21 substantial limitation on the major life activity of
22 performing manual tasks.

23 QUESTION: Is it -- is it your view that by
24 including the non-work impairment that she has, you sort
25 of increase the universe of things she has to -- you

1 compare it to, and therefore, there's a smaller percentage
2 of an impairment, and therefore, it's not substantial?

3 MR. ROBERTS: If the claim is I'm limited in
4 manual tasks, you do have to look, and this is what all
5 the other courts of appeals have done, the broad range of
6 manual tasks. It's not enough, obviously, at one extreme
7 if there's a peculiar task that you can't do, but you can
8 do everything else.

9 QUESTION: What you're objecting to particularly
10 I suppose is the sentence of the court's opinion which
11 says the fact that Williams can perform a range of
12 isolated, non-repetitive manual tasks performed over a
13 short period of time, such as tending to her personal
14 hygiene or carrying out personal or household chores, does
15 not affect a determination that her impairment
16 substantially limits her ability to perform the range of
17 manual tasks associated with an assembly line job.

18 MR. ROBERTS: That's right.

19 QUESTION: In other words, it made that
20 criterion of whether she's -- she's substantially limited.

21 MR. ROBERTS: That's wrong. In that sentence,
22 the court of appeals said, okay, you can do a lot of
23 things, but you can't do the assembly line job, and not
24 being able to do the assembly line job is enough for us.
25 And that was what was wrong with the court of appeals --

1 QUESTION: So, the nub of it is the -- the
2 limitation to considering one job; i.e., an assembly line
3 job.

4 MR. ROBERTS: With respect to working --

5 QUESTION: That if -- if there was one
6 overriding sin, that was it, wasn't it? Instead of
7 considering a range of jobs -- I'm sorry -- a class of
8 jobs --

9 MR. ROBERTS: If -- if they're going to look at
10 it under manual tasks, you've got to look at all manual
11 tasks.

12 QUESTION: Yes.

13 MR. ROBERTS: If you're going to look at it
14 under working, you've got to look at either a class or a
15 broad range of jobs.

16 QUESTION: I was going to say if you're doing it
17 under -- under the major life activity of manual tasks,
18 you wouldn't just look at jobs.

19 MR. ROBERTS: Not just jobs. It has to be the
20 broad range. And typically what the courts have done --

21 QUESTION: Yes, but it -- I didn't mean to
22 interrupt you. I was going to say, but if -- assume they
23 start out, our category is going to be manual tasks, and
24 they had come up with 100 jobs in which she could not
25 perform manual tasks, would that not have satisfied the --

1 the required inquiry under -- under manual tasks?

2 MR. ROBERTS: I would still need to know what
3 about everyday activities. Maybe the jobs involved
4 specialized, idiosyncratic manual tasks. Can she --

5 QUESTION: Yes, but at this point, aren't we
6 getting sort of academic about it? If somebody -- let's
7 assume the category is manual tasks, but they identify 100
8 jobs which she -- I mean, a great range of things that she
9 can't do. Isn't it a little unrealistic to say, well, she
10 might be able to vacuum the floor at home? I mean, at
11 that point, you've made a pretty good prima facie case,
12 haven't you?

13 MR. ROBERTS: The -- the evidence then would
14 probably not be that she can take care of herself
15 generally. She can cook. She can do laundry. She can --
16 as the evidence is in this case.

17 QUESTION: No. But the question that he's --
18 what if the evidence did show she could do all these
19 things?

20 MR. ROBERTS: Then it would seem to me to be
21 properly analyzed as a working case. That's where her
22 problem is, according to the -- this unusual record we've
23 hypothesized, only a problem at work. Then look at it as
24 a working case. If it's a manual task case, you have to
25 look at the broad range of manual tasks.

1 I'd like to reserve the remainder of my time.

2 QUESTION: Very well, Mr. Roberts.

3 Ms. McDowell, we'll hear from you.

4 ORAL ARGUMENT OF BARBARA B. McDOWELL

5 ON BEHALF OF THE UNITED STATES

6 MS. McDOWELL: Thank you, Mr. Chief Justice, and
7 may it please the Court:

8 We agree that the Sixth Circuit applied an
9 incorrect test in determining whether a person is
10 substantially limited in the major life activity of
11 performing manual tasks.

12 The correct test asks whether a person is
13 significantly restricted relative to the average person in
14 performing those basic manual tasks that are central to
15 everyday life, tasks such as grasping objects,
16 manipulating objects, holding objects. That inquiry is
17 indicated by the statutory focus on substantial limits and
18 major life activities.

19 The Sixth Circuit's approach, which focuses only
20 on a plaintiff's ability to perform particular manual
21 tasks required by a specific job, seems to us both over-
22 inclusive and under-inclusive.

23 First, the Sixth Circuit's approach would extend
24 the protections of the act to persons who are
25 substantially limited only in performing a particular job,

1 not in everyday life and not in performing a range of jobs
2 or a class of jobs. That approach would undermine the
3 established test for establishing a substantial limitation
4 based on the major life activity of working. That test,
5 as the Court recognized in Sutton, requires the plaintiff
6 to show that she's substantially limited in a class or a
7 range of jobs.

8 QUESTION: Ms. McDowell, I didn't think that the
9 Sixth Circuit had said we're looking only at one job. I
10 thought they were looking at assembly line work as a broad
11 category of jobs.

12 MS. McDOWELL: No, we don't think so, Your
13 Honor. And I would refer you to page 4a of the petition
14 appendix where the court is engaging its analysis. It
15 refers to certain types of manual assembly line jobs that
16 require the gripping of tools and repetitive work with
17 hands and arms extended out or above shoulder level for
18 extended periods of time. So, it appears that the Sixth
19 Circuit was focusing on a particular category of assembly
20 line jobs and not assembly line jobs generally.

21 QUESTION: Types. It uses the plural. So, it
22 wasn't just talking about a particular job, which is what
23 I thought you reduced this to, and I think that is not
24 quite a fair characterization of what the court said.

25 MS. McDOWELL: That may be correct, Justice

1 Ginsburg. It may be that the Sixth Circuit was thinking
2 about categories of jobs that would require these
3 particular limits. There is no indication in the record,
4 though, of how many other assembly line jobs there are
5 that would -- the plaintiff would be disqualified from
6 performing.

7 QUESTION: It refers to painting, plumbing, and
8 roofing, et cetera.

9 MS. McDOWELL: That's correct. And that appears
10 to be an assumption by the court of appeals. There does
11 not appear, at least from our examination of what record
12 has been presented to this Court, any specific discussion
13 of building trades, plumbing, roofing, et cetera in the
14 record.

15 QUESTION: I suppose it's perfectly obvious a
16 person who can't raise their hands above heart level
17 couldn't paint the ceiling at least.

18 MS. McDOWELL: That may well be correct, Your
19 Honor. The analysis, if one --

20 QUESTION: She'd have to paint floors
21 presumably. Right?

22 (Laughter.)

23 QUESTION: And most painters are not limited to
24 just painting floors, I don't think.

25 MS. McDOWELL: That's correct.

1 And if one is focusing on limitations in work,
2 the correct analysis is whether a plaintiff is
3 disqualified from a class of jobs, jobs that require
4 similar training, abilities, skills, et cetera, or a range
5 of jobs, jobs that do not necessarily require the same
6 skills and training, but jobs that the plaintiff could
7 perform.

8 We have no position at this point whether the
9 plaintiff in this case could or couldn't demonstrate that
10 she is substantially disabled under the working test the
11 court --

12 QUESTION: Under the working test, do you just
13 look at the whole scope of jobs, or isn't it just limited
14 to jobs that this person is -- has some 'demonstrated
15 capacity for or interest in? I mean, you know, what if I
16 can't be a -- you know, a jet pilot? You know, I'm
17 disabled from being a jet pilot. I have no interest in
18 being a jet pilot. My other abilities would not -- would
19 not enable me to be a jet pilot anyway. Is -- is that
20 irrelevant to the -- to working inquiry?

21 MS. McDOWELL: No, it's not irrelevant, Justice
22 Scalia. The analysis focuses on those jobs that the
23 plaintiff, without her impairment, would have the skills
24 and ability to perform.

25 QUESTION: Right. And had she been a roofer

1 before?

2 MS. McDOWELL: No, Your Honor.

3 QUESTION: I didn't think so.

4 QUESTION: Under the Longshore Harbor Workers
5 and Compensation Act, the courts routinely look at what
6 jobs are in the community that this person is eligible for
7 after they've suffered an injury. Is that about the same
8 approach that we should use in this case -- in these kinds
9 of cases --

10 MS. McDOWELL: I'm not entirely familiar with
11 the statutory --

12 QUESTION: -- when we're looking at the -- when
13 we're looking at the employment aspect?

14 MS. McDOWELL: Yes. I'm not entirely familiar
15 with the specific statutory scheme you're referring to,
16 but it may be similar to that under the Social Security
17 Act which looks at whether somebody can perform any
18 gainful activity in the national economy, and the
19 Disabilities Act doesn't require that broad a standard.
20 It looks at -- in a more limited way at whether a
21 plaintiff is substantially limited in performing jobs.
22 There still may be jobs that she can perform. The
23 question is whether there is a substantial limitation that
24 would disqualify her from a --

25 QUESTION: Ms. McDowell, in looking at the

1 manual task approach, how -- how is the fact finder
2 supposed to decide which manual tasks are sufficiently
3 important to constitute a substantial limitation? How do
4 you weigh that? How do we decide it? Is there any
5 guidance on that?

6 MS. McDOWELL: The courts of appeals thus far
7 have looked at -- aside from the Sixth Circuit, of course,
8 have looked to those manual tasks that are basic to
9 everyday life. We would say, perhaps in some disagreement
10 with Toyota, that it's not necessary to be substantially
11 impaired in a broad range of manual tasks. There may be
12 certain manual tasks that are particularly important to
13 everyday life, such as the ability to grasp a pen or
14 pencil and write, that in themselves may be sufficient to
15 constitute a -- a substantial limitation on the major life
16 activity.

17 QUESTION: On -- on a question like substantial,
18 certainly you would get to a jury question at some point,
19 wouldn't you?

20 MS. McDOWELL: Oh, certainly it would become a
21 jury question in many cases.

22 QUESTION: Conceptually it seems to work better
23 your -- your way. You say life activity is just like
24 lifting or breathing, and the issue turns on what's
25 substantial. What do we do about the EEOC regs that seem

1 to embody what you would call a conceptual confusion?
2 They talk about working being a substantial life activity,
3 that working shouldn't be there. It should be evidentiary
4 of whether the -- of whether the impairment of being able
5 to lift your hands is substantial, and if you can't hold
6 half the jobs, that's fairly good evidence. And if you --
7 you know, whether it's enough or not, I don't know.

8 But what do we do about the EEOC regs that don't
9 seem to take the simple conceptual way you're advocating?

10 MS. McDOWELL: The EEOC regs that you're
11 referring to discuss the major life activity of working.

12 QUESTION: Yes, that wrecks it.

13 MS. McDOWELL: The regs also recognize that
14 performing manual tasks is a separate major life activity.

15 QUESTION: I know. I know, but they're taking
16 the wrong -- they're taking the wrong approach in your
17 view. So, whereas I find your view much simpler -- and I
18 agree with you, it isn't any harsher or more lenient, just
19 simpler. What do we do about the fact that the agency in
20 charge seems not to have taken that route?

21 MS. McDOWELL: I believe this route is
22 consistent with what the agency has said, specifically
23 that one should consider working as a major life activity
24 only if a plaintiff cannot satisfy any of the other major
25 life activities, including performing manual tasks.

1 QUESTION: May I ask you one question? Is it
2 relevant that she may not be able to perform a lot of jobs
3 she never performed? For example, is it relevant that she
4 couldn't be a roofer, for example?

5 MS. McDOWELL: It may or may not, and I'm not
6 sure that we have a position on that at this point,
7 Justice Stevens. It may, in fact, be the defendant's
8 burden to come forward with evidence that a plaintiff
9 couldn't perform, for example, in this case medium duty
10 work. The mere fact that she hadn't done it --

11 QUESTION: But you don't -- you don't suggest we
12 just look at her employment history and that's the only
13 possible thing we look at in determining whether her
14 working ability has been impaired.

15 MS. McDOWELL: No, I don't think you look only
16 at the plaintiff's working history.

17 QUESTION: It would be relevant then that she
18 couldn't be a roofer, electrician, or a painter or a lot
19 of other things.

20 MS. McDOWELL: It may well be relevant. There
21 may also be countervailing evidence that she had other
22 lack of skills and so on that would prevent her from
23 performing those particular jobs.

24 I'd also like to note that the Sixth Circuit's
25 approach not only is over-inclusive in some respects, but

1 it's also under-inclusive in some respects. It would seem
2 to preclude a plaintiff from establishing a disability in
3 the performance of manual tasks based on manual tasks
4 performed outside the work place. In many cases, a
5 plaintiff may be capable of performing manual tasks in the
6 work place, when the work place does not impose
7 particularly demanding obligations in that regard, but
8 still may be limited outside the work place.

9 QUESTION: To what extent do we take account of
10 the particular individual? For example, for someone who
11 is making a high income as a corporate executive, it
12 wouldn't matter that she couldn't vacuum the rug because
13 she has paid someone else to do that for many years. So,
14 to what extent do we -- are we thinking of a generalized
15 person to what extent the particular individual who is
16 claiming to be disabled?

17 MS. McDOWELL: May I answer, Your Honor?

18 QUESTION: Yes.

19 MS. McDOWELL: In focusing on a major life
20 activity of manual tasks, we would suggest looking at the
21 generalized person. With respect to working, it's a
22 somewhat more tailored analysis.

23 QUESTION: Thank you. Thank you, Ms. McDowell.

24 Mr. Rosenbaum, we'll hear from you.

25 ORAL ARGUMENT OF ROBERT L. ROSENBAUM

1 ON BEHALF OF THE RESPONDENT

2 MR. ROSENBAUM: Mr. Chief Justice, and may it
3 please the Court:

4 This case is not about the inability to perform
5 a single job. The Sixth Circuit did not rest its opinion
6 upon a finding that Ms. Williams was only unable to
7 perform one solitary job. While I believe that there are
8 inconsistencies in the Sixth Circuit opinion which cannot
9 be reconciled and while I disagree with part of the legal
10 analysis for reasons other than the reasons advanced by
11 petitioner, it's not a single job case.

12 The Sixth Circuit stated at 6a of the opinion of
13 the appendix to the petition, here the impairments of
14 limbs are sufficiently severe to be like deformed limbs,
15 and such activities affect manual tasks associated with
16 working, as well as manual tasks associated with
17 recreation, household chores, and living generally.

18 QUESTION: Mr. Rosenbaum, so far as the question
19 presented here is, you would defend the Sixth Circuit's
20 opinion?

21 MR. ROSENBAUM: I defend the result, Mr. Chief
22 Justice.

23 QUESTION: But not the reasoning?

24 MR. ROSENBAUM: Not in its entirety, but part of
25 it I do.

1 QUESTION: Well, where do you disagree?

2 MR. ROSENBAUM: I disagree when the Sixth
3 Circuit says that after you determine an individual is
4 substantially limited, you must go farther and that
5 individual must show that their limitation affects their
6 work. And I think that that is the additional requirement
7 that the Sixth Circuit would place on defining substantial
8 limitation. I think it's, at best, superfluous and, at
9 worst, makes every disability a working disability.

10 But the Sixth Circuit -- I must defend them to
11 some extent. They quoted the correct statute.

12 QUESTION: Well, they ruled for your client.
13 Yes.

14 (Laughter.)

15 MR. ROSENBAUM: Well, then I -- yes, sir, and I
16 appreciated that.

17 (Laughter.)

18 MR. ROSENBAUM: At -- at 3a of the appendix,
19 they cite the correct statutory language. They emphasize
20 that the impairment must substantially limit. They know
21 what the law is. They specifically refer to this Court's
22 opinion in Sutton and says you can't prove a disability
23 based upon a failure to do one particular job.

24 QUESTION: Well, do you think a -- a fair
25 reading of the opinion in the -- at the end of the

1 carryover paragraph at 4a, it says, it would appear,
2 nevertheless, from the language of the act, the EEOC's
3 interpretation of the Supreme Court analysis in Sutton,
4 that in order to be disabled, the plaintiff must show that
5 her manual disability involves a class of manual
6 activities affecting the ability to perform tasks at work.
7 You want us to read that as saying to perform tasks at a
8 class of work activities, at a broad range of work
9 activities.

10 MR. ROSENBAUM: Your Honor --

11 QUESTION: I -- I think --

12 MR. ROSENBAUM: I'm sorry.

13 QUESTION: -- you want us to interpret it that
14 way and that we have to interpret it that way in order to
15 save it, don't we?

16 MR. ROSENBAUM: Your Honor, I would say that
17 that sentence --

18 QUESTION: -- come close to saving it.

19 MR. ROSENBAUM: -- that sentence has no place in
20 the analysis at all. That's what's superfluous about the
21 Sixth Circuit analysis.

22 QUESTION: Okay. So, I'll x that out of the
23 opinion then.

24 MR. ROSENBAUM: That's correct.

25 (Laughter.)

1 QUESTION: I though that was the heart of the
2 opinion.

3 MR. ROSENBAUM: Well, it is not, Your Honor.

4 QUESTION: It's x'ed out now.

5 (Laughter.)

6 MR. ROSENBAUM: The -- the Sixth Circuit found
7 that she has the impairment, myotendinitis, myofacial
8 pain, carpal tunnel syndrome. They found that she
9 identified the major life activity of working -- excuse me
10 -- of manual tasks. And then they found that she was
11 substantially limited in performing the major life
12 activity of manual tasks because of the uncontroverted,
13 uncontradicted evidence as to how this affected her life.

14 And they should have stopped there. ` It was when
15 they went on, apparently out of some kind of concern about
16 Sutton, that I think they lost their way, and I think that
17 this concept of class probably only fits into an analysis
18 of the major life activity of working.

19 If you look at the regulations involving this,
20 which are in the petitioner's brief on the merits at 19a,
21 subparagraph number 2, it says with respect to the major
22 life activity of working, substantially limits means
23 significantly restricted in the ability to perform either
24 a class of jobs or a broad range of jobs. I would suggest
25 to you this only has to do with working. It doesn't have

1 to do with manual tasks. Manual tasks is at the top of
2 page 19a.

3 And really, in formulating what the correct
4 analysis of substantial limitation under the ADA is, I
5 think the question is obvious. It is spelled out in the
6 regulation. No party to this proceeding challenges the
7 regulations, says that the Equal Employment Opportunity
8 Commission didn't have authority to promulgate the
9 regulations. Everyone agrees that the regulations are
10 valid, and in past cases in -- in that circumstance, this
11 Court has been willing to accept those regulations as
12 valid.

13 And the regulations say what substantially
14 limited means. It means that they are significantly
15 restricted as to the condition, manner, or duration -- or
16 -- that is disjunctive, not conjunctive -- under which an
17 individual can perform a particular major life activity as
18 compared to the condition, manner, or duration under which
19 the average person in the general population can
20 perform --

21 QUESTION: Yes, a particular major life
22 activity, not a single major -- not a single manual task
23 and not a limited number of manual tasks. But it is
24 disjunctive, either the duration or the -- the severity,
25 whatever. But of the major life activity. So, you're

1 talking about a person who cannot perform for a long
2 duration substantial -- substantially can't perform manual
3 tasks. And -- and the evidence here didn't support that
4 except for -- except for certain manual tasks done for a
5 long period above shoulder level.

6 MR. ROSENBAUM: Your Honor, I would respectfully
7 differ with you. I think the record is to the contrary.
8 I would point out to you the restrictions found in the
9 joint appendix at, I think, page 45. These restrictions
10 were permanent in nature. They existed since May of 1992.
11 Justice Breyer referred to them a moment ago. I don't
12 want to be unduly repetitive about this, but it said that
13 she cannot repetitively flex or extend her wrists, flex or
14 extend her elbows. She can't use her arms. She can't use
15 her shoulders repetitively. She can't pick up more than
16 20 pounds ever. She can only regularly pick up 10 pounds,
17 and she can't use vibratory or pneumatic type tools. And
18 a vibratory -- or appliance, I presume -- a vibratory
19 appliance would be a vacuum cleaner, a hair drier, a hand
20 mixer.

21 It's not that she wants to maintain that on each
22 individual thing such as gardening, getting dressed,
23 playing with her children, picking up a grandchild who
24 weighs -- weighs more than 20 -- 20 pounds, that she has
25 got to prove she's substantially limited as to all of

1 that, it's that she has the generic overall limitation
2 which manifests itself in these specific examples. And
3 when --

4 QUESTION: So, that's -- that's what I'd like to
5 know how to deal with exactly. My impression, which may
6 be yours, is that the simplest thing to say is the words,
7 major life activity, refer really to the nature of the
8 disability. For example, use of hands. A person who has
9 torticollis, for example, would be restricted in moving
10 his neck, and that interferes with lots of things. But
11 you don't necessarily have to pin down one. You say it
12 interferes with dealing with other people. It interferes
13 with working around the house. It interferes with holding
14 a job. It interferes with all of them.

15 Then the issue becomes whether it's substantial.
16 And all of these work-related things that you're talking
17 to are evidentiary in respect to the question of
18 substantiality. Is that the right framework? And if so,
19 how do we get there?

20 MR. ROSENBAUM: I think we are there.

21 QUESTION: We are there. Good.

22 Well, what about -- so, then I saw the EEOC reg,
23 which talks about the major -- the major life activity of
24 working, and that would be a category mistake because it
25 isn't -- there isn't a major life activity of working.

1 What happens at work is evidentiary of whether the
2 restriction on moving your hands is a substantial
3 restriction.

4 MR. ROSENBAUM: I would submit it's a question
5 of substantiality always, that you're correct in stating
6 that the degree of impairment and the definition of the
7 major life activity are inevitably linked together in the
8 analysis. But what this Court I hope will do is to give
9 guidance and clarification as to how substantial the
10 limitation has to be before it is a substantial limitation
11 under the Americans with Disabilities Act, that this Court
12 will view the regulations, which are uncontroverted,
13 uncontradicted, not questioned, and will say that this, at
14 least in this case certainly, is the standard of how
15 substantial it is.

16 QUESTION: Do you think we should say that
17 working is a major life activity?

18 MR. ROSENBAUM: It is my opinion that working is
19 a major life activity. It is a major life activity which
20 is separate from performing manual tasks, and we are in
21 agreement in this case that, as regards the separate life
22 activity -- major life activity of performing manual
23 tasks, we can consider how that affects work.

24 QUESTION: It's a little hard to think of a
25 disability that affects a broad range of employment tasks

1 that doesn't affect other areas of life.

2 MR. ROSENBAUM: Well, of course.

3 QUESTION: I -- I can't -- and as Justice Breyer
4 said, these are evidentiary matters that go to a larger
5 point.

6 MR. ROSENBAUM: Well, that's why Ms. Williams --

7 QUESTION: But the statute does talk about major
8 life activity.

9 MR. ROSENBAUM: That's why this -- Ms. Williams'
10 case is a strong case.

11 QUESTION: But the Sixth Circuit did not rely on
12 working being a major life activity.

13 MR. ROSENBAUM: They never got there because
14 they had already found Ms. Williams to be disabled as a
15 matter of law and hence it was unnecessary to find her
16 disabled.

17 QUESTION: As a -- as a matter of law, Mr.
18 Rosenbaum, no, they did not say simply that summary
19 judgment should not have been granted for Toyota, but that
20 summary judgment should be granted for Ms. Williams?

21 MR. ROSENBAUM: It is my belief that that's what
22 the opinion says, and I --

23 QUESTION: Well, but -- but now surely we
24 shouldn't have to talk about beliefs as to what an opinion
25 said.

1 MR. ROSENBAUM: I -- I have to give a caveat
2 about my remarks, which is that there are inconsistencies
3 in this opinion. I know that on the first page of the
4 opinion the court enunciates the summary judgment standard
5 and says, we're here to determine whether or not the
6 summary judgment against Ms. Williams was appropriate,
7 giving Ms. Williams the benefit of the inferences. But at
8 the end of the opinion, they say, because we have found
9 her ADA disabled as a matter of law, we remand solely to
10 determine whether the requested accommodation was
11 reasonable or whether the employer had some other defense.
12 I can't reconcile it.

13 QUESTION: That's one -- that's one of the
14 inconsistencies.

15 MR. ROSENBAUM: Yes, Your Honor, that is one of
16 the inconsistencies.

17 And there's -- and I also disagree with the
18 legal analysis. They didn't make the mistake that the
19 petitioner says they made. The mistake they met -- they
20 made was by going that extra step, after finding her
21 substantially disabled, and said you've got to relate that
22 particularly to her work, and I don't think that that's
23 the law, nor do I think it should be the law.

24 QUESTION: The trouble, of course, is -- is
25 defining what substantially disabled means. Unlike

1 employment compensation laws, this statute was not
2 intended to require accommodation for everybody who is in
3 fact disabled in -- in one way or another. I mean, lost a
4 thumb, you know, lost -- lost an arm, whatever.

5 You know, in our earlier opinions in this area,
6 we have -- we have referred to the fact that -- that
7 Congress clearly did not think that half of the population
8 would be covered by -- by this. It was addressing what it
9 thought was a limited class of people, the handicapped, a
10 limited class of people against whom there had been
11 traditional -- what should I say -- feelings of -- of
12 disfavor.

13 And now, do you think that -- that given that
14 limited notion of the handicapped and what it meant by
15 substantial limitation of a major life activity, it's
16 sufficient to -- to refer to simply what you referred to
17 in the appendix, the statement of Dr. Kleinert, which says
18 she cannot lift 20 pounds -- she can only lift 20 pounds
19 maximum and no frequent lifting or carrying of objects
20 weighing up to 10 pounds? She cannot make constant,
21 repetitive use of flexion/extension of wrist/elbow.
22 Constant. She can do it, but not constantly. No overhead
23 work and no use of vibratory or pneumatic tools. Those
24 are the only things that he -- now, do you think that's
25 enough to bring her within the -- the category of the

1 handicapped that this piece of legislation was addressing?

2 And that's really the question here.

3 MR. ROSENBAUM: It was several questions, Your
4 Honor.

5 (Laughter.)

6 MR. ROSENBAUM: The -- first of all, the
7 evidence in this case that you recited I think is
8 sufficient to bring her within the coverage of the act.

9 Secondly, there is more evidence in the record
10 that supports Ms. Williams' position than what you
11 referred to, and I can go into it in detail if you would
12 care for me to.

13 QUESTION: I only used that because that's what
14 you referred to.

15 MR. ROSENBAUM: I can't -- I have limited time,
16 and -- and I can tell you that this is not simply a sore
17 wrist case. Ms. Williams was diagnosed by a board
18 certified orthopedic surgeon. She had muscular spasms and
19 knotting which were palpable. Those were injected with
20 medications, with trigger point injections. There was an
21 MRI of her shoulder showing inflammation and
22 peritendinitis. There is uncontradicted testimony that
23 she has trouble dressing. She has -- does do housework.
24 She has pain when she vacuums. Gardening has been pretty
25 much abandoned.

1 QUESTION: Well, now she did get workman's
2 compensation benefits presumably.

3 MR. ROSENBAUM: As a result of the initial event
4 where she initially --

5 QUESTION: Does -- does the existence of
6 workman's compensation schemes help us in giving meaning
7 to substantial limitation language under the Disabilities
8 Act? I mean, it wasn't intended to replace workman's comp
9 schemes, and somebody who gets a bad back or a tendinitis
10 or a carpal tunnel syndrome presumably can resort to
11 workman's comp to get some compensation and some relief.
12 But do you think that the Disabilities Act had a broader
13 scope and maybe was focused more on discrimination against
14 people who are wheelchair-bound or something like that
15 where employers tended to say, gosh, I'm not going to
16 consider hiring anybody like that?

17 MR. ROSENBAUM: The worker's compensation award
18 is probative as to the issue of whether or not she is ADA
19 disabled. It is not preclusive one way or the other, but
20 it -- but it's a good piece of evidence because the
21 worker's compensation award says that this is a lady who,
22 because of her injuries, has suffered a decrease in the
23 earning capacity in the area of where she lives of 20
24 percent of what was available to her, and that's
25 substantial.

1 I also want to go back, if I might, to Justice
2 Scalia's comment on the limited number. When the ADA was
3 passed in 1990, Congress specifically noted there were 43
4 million Americans who would come within the protection of
5 the act. The National Employment Lawyers amicus brief
6 refers to census data of 1989, the year before, which
7 indicates that at the time Congress passed this
8 legislation, 17.3 percent of the population were going to
9 be considered ADA disabled, and it was anticipated that
10 the number of individuals meeting that disability would
11 increase as time went by. And so, I think it's fair to
12 say that, yes, it's a limited and discrete group of
13 people, but it's close to 20 percent of the American
14 population. One out of five Americans is going to
15 qualify.

16 QUESTION: Well, you're exaggerating it now.
17 It's -- it's under 20 percent, and -- and I wonder whether
18 -- you know, when you count just -- just the wheelchair-
19 bound or, you know, the homebound, those who really cannot
20 -- cannot walk, cannot walk outside the house, it brings
21 you -- it brings you pretty high up towards that figure.
22 And -- and when you start adding people who have, you
23 know, relatively minor manual disabilities -- let's take
24 carpal tunnel syndrome, for example. Is that a
25 disability? Does it disable you from certain manual

1 things? Certainly it does. Would you consider that a --
2 a disability that qualifies as a -- an impairment of a
3 major life activity?

4 MR. ROSENBAUM: We know that the inquiry as to
5 whether or not an individual is disabled is an
6 individualized inquiry. That's per Sutton. You can't
7 have a per se finding of disability based upon the
8 nomenclature of a medical diagnosis. I understand and I
9 think the AFL-CIO brief talks about what carpal tunnel and
10 tendinitis and all of this in a medical sense. But there
11 are varying degrees of severity, and so to tell me that an
12 individual has carpal tunnel syndrome doesn't answer the
13 question of whether that individual is ADA disabled.
14 We've got to go on and look.

15 QUESTION: So -- so, you think that the most
16 severe case of carpal tunnel syndrome would qualify.

17 MR. ROSENBAUM: If it --

18 QUESTION: Otherwise you could have answered my
19 question no. You -- you think --

20 MR. ROSENBAUM: I -- I certainly --

21 QUESTION: -- there has to be an individualized
22 determination because the most severe case of carpal
23 tunnel syndrome could qualify as rendering that person a
24 disabled person within the meaning of this -- this
25 specialized legislation.

1 MR. ROSENBAUM: That's right because the
2 regulations say is that if they're significantly
3 restricted concerning the condition, the manner, or the
4 duration of the activity, then they are substantially
5 disabled. And in this situation, no one would say that
6 the average person in the American society can't flex and
7 extend repetitively, can't do repetitive motion, is
8 limited in lifting, has trouble --

9 QUESTION: Mr. Rosenbaum, do you have any notion
10 of what percentage of the population would be taken in if
11 we use the standard -- the class that she was put in for
12 worker's compensation purposes, a 20 percent occupational
13 impairment -- how many people?

14 MR. ROSENBAUM: I have no figures that would
15 relate that to the population as a whole.

16 QUESTION: Is there anything that suggests that
17 those people, the people who are in a sense not the most
18 disabled, but the people who are not quite in that
19 category are the ones who are really discriminated
20 against? Because the ones who can't work at all,
21 obviously, are not discriminated against. The ones who
22 would be discriminated against would be the ones who --
23 who might work, but -- which is something bothering me
24 about using the major life activity of working. How is
25 that -- how does that play out?

1 MR. ROSENBAUM: Well, I'm not sure that I can
2 explain all of its ramifications, but I can say that there
3 was certainly a concern that people who were labeled
4 disabled would be stereotyped and that employers would be
5 hesitant to give them the same vocational opportunities as
6 non-disabled people would be, even though the disability
7 had no effect on the job. They would perhaps be afraid of
8 having more worker's compensation claims. They would
9 perhaps be afraid of excess absenteeism, all of this type
10 of thing. But --

11 QUESTION: One -- one of the problems with this
12 is we're looking at the entry classification, disability,
13 but on the facts of this case, she was able to do a job if
14 the employer sliced it a certain way. And then the
15 employer says, well, for the good of my work force and
16 company, I don't want people to do just that narrow thing.
17 I want them to be able to do four different jobs and
18 rotate. That's a common business practice. And the --
19 the concern is does it mean if she is able to do, as she
20 was able to do for 3 years, a simple job, she uniquely and
21 all the people who work there has to be able to have this
22 special job when the others all have to rotate into four
23 different positions.

24 MR. ROSENBAUM: That issue is not reached in
25 this case. That is an issue of whether or not, with or

1 without accommodation, Ms. Williams can perform all of the
2 essential tasks of the employment. And --

3 QUESTION: I -- I know that we -- we don't get
4 to what is the -- how much accommodation would be
5 required, but it's a little hard to keep that from view
6 because if the employer doesn't have -- would not have to
7 make the accommodation that she's seeking, then this case
8 is not very significant. It's just a question at what
9 stage she loses.

10 MR. ROSENBAUM: Well, let me -- let me say a
11 couple of things. It wasn't an essential task of Ms.
12 Williams' job that she performed the wiping in the shell
13 body for 3 years. She could perform a full job for 3
14 years without having to do that, and so, we would say
15 that --

16 QUESTION: But the employer decided to change
17 what the workers do, and as I understand assembly lines,
18 that's not uncommon to take people from doing the same
19 thing every day, day in and day out, train them for
20 several jobs, and then they rotate.

21 MR. ROSENBAUM: In the Sixth Circuit, there's
22 the case of Kiphart v. Saturn where that issue was put to
23 the jury where the employer said, you've got to be able to
24 rotate through all of the tasks in your group, and since
25 you, the allegedly disabled person, were not able to,

1 we're entitled to fire you. The jury did not accept the
2 employer's statement because the jury determined that the
3 employer did not, in fact, require all employees to do
4 every job.

5 And in this particular case, the evidence is
6 that the area that Ms. Williams went back into, the
7 inspection job, was a job where medically placed people
8 would be put, people who were known to have problems with
9 their hands and arms and shoulders. That's the quote from
10 Kendall Hall. And so, this entire group was made up of
11 physically limited people and were put there as a matter
12 of accommodation by Toyota. And in those circumstances,
13 if Toyota on remand, if -- if we go there, wants to argue
14 to the jury that it was essential, then this is a -- a
15 matter the jury will have to determine, but we say it
16 wasn't.

17 QUESTION: Essential is not the standard of
18 accommodation, is it?

19 MR. ROSENBAUM: Excuse me?

20 QUESTION: Isn't -- essential isn't the
21 standard, is it, that the employer has to show that it's
22 essential --

23 MR. ROSENBAUM: No.

24 QUESTION: -- that their work be arranged --

25 MR. ROSENBAUM: No, no. There are

1 reasonableness considerations to accommodation. It is --
2 the definition of the individual who is eligible to ADA
3 protection is that that individual is a qualified
4 individual with a disability, meaning that although they
5 are significantly and substantially limited in a major
6 life activity, they can do all of the essential tasks of
7 the employment either with or without accommodation.

8 And there was a -- if I might go on, there was a
9 refrain in the -- in the question that you asked about,
10 well, if they can do all of these things, how can they be
11 disabled. The ADA looks at what a person can't do. It
12 doesn't help or further the inquiry to say what they do,
13 if they can do all these things.

14 QUESTION: Well, doesn't -- don't you have to
15 look at both in -- in trying to assess the extent of
16 somebody's incapacity to do a major life activity?

17 MR. ROSENBAUM: You -- you inevitably --

18 QUESTION: What they can do and what they can't?

19 MR. ROSENBAUM: In fact, inevitably by
20 considering one, you consider the other, obviously. But
21 it's not a defense to the ADA claim to say, look, they can
22 do a lot of stuff. You've got to look at what they can't
23 do.

24 That's what the Southeastern Community College
25 case is about. That's what Bragdon means when it says,

1 you don't have to be utterly unable. You have to have a
2 lot of capacity to do ADA -- to be an ADA disabled person.

3 The ADA is about working. It's about a lawsuit
4 to try to keep a job. This is a basic, fundamental
5 American value. Why shouldn't it be promoted?

6 QUESTION: Mr. Rosenbaum, could -- could you
7 tell us what you want us to do? Assuming we agree with
8 you, you want us to take the Sixth Circuit opinion as --
9 as affirming a summary judgment for you on the disability
10 portion. Correct?

11 MR. ROSENBAUM: Correct.

12 QUESTION: Now, let's assume we don't agree with
13 you on -- on the point. As I understand it, the
14 petitioner wants us to reverse the Sixth Circuit and
15 reinstate the district court's summary judgment against
16 you. Isn't that correct?

17 MR. ROSENBAUM: Not in total. They --

18 QUESTION: I thought that's -- that's what they
19 say, and I'm wondering --

20 MR. ROSENBAUM: They want --

21 QUESTION: -- wondering why we can do that when
22 the Sixth Circuit hasn't addressed the -- you know, the
23 other areas of disability.

24 MR. ROSENBAUM: The case is before the Court in
25 the procedural posture of proceedings for a summary

1 judgment. The outcomes in the case can be, as a matter of
2 law, she's insubstantially, insignificantly disabled and
3 she loses, or as a matter of law, she is substantially and
4 is significantly impaired and she wins, or she's someplace
5 in the middle, and there's a --

6 QUESTION: It goes to a jury.

7 MR. ROSENBAUM: It goes to the jury.

8 This Court, I think, can probably reach that as
9 concerns manual tasks, but certainly this Court can
10 clarify, say what the correct standards are, send the case
11 back and let the lower courts apply the standard to the
12 record before it. And -- and so, if -- if we are not
13 going to prevail on our contention that Ms. Williams is
14 disabled as a matter of law, then we want to go back for
15 the jury trial, is what we want to do.

16 And I know I'm almost out. I've got to say on
17 the 50 percent, Justice Stevens, the 50 to 55 percent
18 vocational testimony, that was related to Ms. Williams'
19 geographical area. It is in the record. It is
20 appropriate evidence, and it is not mentioned at all by
21 petitioner in any of petitioner's filings. And I think as
22 concerns working, it is extremely strong evidence.

23 I also want to say we have never conceded that
24 Ms. Williams is incapable of prevailing on working.

25 QUESTION: Thank you, Mr. Rosenbaum.

1 MR. ROSENBAUM: Thank you.

2 QUESTION: Mr. Roberts, you have 2 minutes
3 remaining.

4 REBUTTAL ARGUMENT OF JOHN G. ROBERTS, JR.

5 ON BEHALF OF THE PETITIONER

6 MR. ROBERTS: Thank you, Your Honor.

7 Justice Kennedy, it will not be enough to x out
8 that one sentence on page 4a. You would also have to x
9 out the sentence on page 5a saying that an individual is
10 disabled if their impairment, quote, seriously reduces her
11 ability to perform the manual tasks that are job-related.
12 You would also have to x out the other sentence on page 4a
13 that says a plaintiff is disabled if they're limited in
14 performing, quote, manual tasks associated with an
15 assembly line job, end quote. And you would have to x out
16 the sentence on page 2a that says the key issue is whether
17 the plaintiff in this case can use her arms, hands, and
18 shoulders, quote, as required by her new job, end quote.
19 I respectfully submit that by the time you get through
20 x-ing out all those sentences, you should go one step
21 further and x out the opinion as a whole by holding that
22 it is reversed.

23 Thank you, Your Honor.

24 QUESTION: What about the other -- the other two
25 issues? I mean, the -- the court of appeals did not

1 purport to reach the working as a substantial life
2 activity and what else? Lifting as a substantial life
3 activity. How can we reverse it without addressing those
4 issues also, which I don't think we have the tools to do
5 here?

6 MR. ROBERTS: You can certainly reverse with
7 respect to the summary judgment on performing manual
8 tasks. The issues with respect to lifting and working
9 were not addressed by the court of appeals.

10 QUESTION: So, you acknowledge we would have to
11 remand for -- for its consideration of those.

12 MR. ROBERTS: Unless the Court felt, given the
13 fact that the issues with respect to working were
14 insinuated into the case by the Sixth Circuit's approach,
15 that it was appropriate to address that major life
16 activity as well.

17 QUESTION: Even as to manual tasks, are you
18 asking for a ruling in your favor on summary judgment on
19 that, or are you saying it shouldn't have been effectively
20 summary judgment for the plaintiff and then we go to the
21 next stage, that -- that it could be a jury question on
22 manual tasks?

23 MR. ROBERTS: No, no. Summary judgment should
24 be granted in favor of Toyota because you have, with
25 respect to manual tasks, an undisputed factual record, and

1 the question is whether that meets the legal standard of
2 substantially limited with respect to a major life
3 activity. A jury can decide things like whether can she
4 lift 20 pounds or not, if there's a dispute, can she do
5 this or that. But those facts are all undisputed with
6 respect to manual tasks. It is a purely legal question
7 whether she meets the statutory standard.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
9 Roberts.

10 The case is submitted.

11 (Whereupon, at 11:02 a.m., the case in the
12 above-entitled matter was submitted.)

13

14

15

16

17

18

19

20

21

22

23

24

25