2004

The Chevron Two-Step and the Toyota Sidestep: Dancing Around the EEOC's Disability Regulations under the ADA

Lisa A. Eichhorn

THE *CHEVRON* TWO-STEP AND THE *TOYOTA* SIDESTEP: DANCING AROUND THE EEOC'S "DISABILITY" REGULATIONS UNDER THE ADA

*Lisa Eichhorn**

The definition of "disability" is among the most frequently litigated issues under the Americans with Disabilities Act ("ADA") because the statute protects only individuals with disabilities. The ADA defines a disability, in part, as an impairment that substantially limits a major life activity, and the Equal Employment Opportunity Commission ["EEOC"] has issued a regulation further defining the term "substantially limits" for purposes of the ADA's employment-related provisions. Although the EEOC's regulation is the product of a valid rulemaking process and is entitled to a high degree of deference under settled administrative law principles, the Supreme Court, in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, *recently sidestepped the regulation altogether and applied the Court's own, narrower, interpretation of the term "substantially limits" in assessing whether an employee's difficulty in performing manual tasks rendered her disabled under the ADA.*

The Toyota *Court did not invalidate the EEOC regulation, but the Court's sidestep around the EEOC language has effectively and inappropriately narrowed the ADA disability definition, especially now that several circuit courts have applied* Toyota's *interpretation of "substantially limits" to cases involving a broad range of major life activities. Nevertheless, in cases where the difference between the EEOC's and the* Toyota *Court's interpretation of "substantially limits" makes all the difference, some hope remains for plaintiffs who wish to assert ADA claims. Because the EEOC regulation remains valid, because* Toyota*—in some circuits—can still be limited to its facts, and because other prongs of the statutory disability definition may suffice as a source of coverage, individuals whose impairments significantly affect the manner in which*

* Associate Professor, University of South Carolina School of Law. The author would like to thank Professor Richard Seamon for his extremely helpful comments on earlier drafts of this Article.

they go about their lives may still find ways of invoking the ADA's protections.

I. INTRODUCTION

Much fanfare accompanied the passage of the Americans with Disabilities Act of 1990[1] ("ADA"), which, in President George H.W. Bush's words, promised to "open up all aspects of American life to individuals with disabilities."[2] Perhaps most significant among those aspects of American life is the realm of private employment.[3] The ADA's text contains express congressional findings that people with disabilities face persistent discrimination in employment[4] and that the "Nation's proper goals" should include the assurance of "economic self-sufficiency" for such individuals.[5] In response to these findings, Title I of the ADA prohibits certain private employers[6] from discriminating on the basis of disability with respect to "terms, conditions, and privileges of employment."[7]

By extending its coverage to private employers, the ADA significantly expands upon the protections offered by an older statute, the Rehabilitation Act of 1973,[8] which prohibits disability-based discrimination in federally-funded programs and activities.[9] To facilitate this expansion of rights into the private sector, Congress authorized the Equal Employment Opportunity Commission ("EEOC") to issue regulations implementing Title I of

1. 42 U.S.C. §§ 12101-12213 (2000). For accounts of the history of the disability rights movement and events leading to the ADA's passage, see generally FRED PELKA, THE DISABILITY RIGHTS MOVEMENT (1997); JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT (1993).

2. Statement on Signing the Americans with Disabilities Act of 1990, 2 PUB. PAPERS 1070 (July 26, 1990).

3. While the ADA also protects individuals with disabilities from discrimination on the part of public entities, 42 U.S.C. § 12132, and public accommodations, § 12182(a), most of the reported ADA cases concern the statute's employment provisions, § 12112(a). *See* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 n.7 (1999) (noting that employment discrimination cases constituted 76 percent of the author's database of appellate decisions applying the ADA).

4. 42 U.S.C. § 12101(a)(3).

5. § 12101(a)(8).

6. Title I applies generally to employers with fifteen or more employees. *See* § 12111(5)(A).

7. § 12112(a).

8. 29 U.S.C. §§ 701-796*l* (2000).

9. *Id.* § 794(a).

the ADA within a year of the statute's passage.[10] The EEOC responded with an extensive set of administrative rules[11] describing types of prohibited conduct,[12] defenses available to employers,[13] and, most significantly, an elucidation of the ADA's statutory definition of "disability."[14] Because an ADA plaintiff must prove the existence of a "disability" as a threshold matter in order to pursue an employment discrimination claim,[15] hundreds of federal opinions have relied upon the EEOC's disability regulations to determine whether a given plaintiff is disabled and thus covered by the statute.[16] Within the disability regulations, courts have relied particularly on the EEOC's explanation of the term "substantially limits"[17] because the statutory text defines a disability as an impairment that "substantially limits" a major life activity but does not define that two-word phrase.[18]

In the last four years, the United States Supreme Court has twice questioned the validity of the disability regulations promulgated by the EEOC. First, in 1999, a majority of the Court in *Sutton v. United Air Lines, Inc.*,[19] noted that no agency was given authority to interpret the term "disability,"[20] whose definition

---

10. 42 U.S.C. § 12116.

11. Regulations to Implement the Employment Provisions of the Americans with Disabilities Act, 56 Fed. Reg. 35,734 (July 26, 1991) (codified at 29 C.F.R. pt. 1630 (2003)). These regulations, like Title I itself, became effective on July 26, 1992. *See* 42 U.S.C. § 12117 (specifying Title I's effective date as being twenty-four months after the Act's passage on July 26, 1990); 56 Fed. Reg. 35,726 (July 26, 1991) (specifying the regulations' effective date as July 26, 1992).

12. *See* 29 C.F.R. §§ 1630.4-1630.13 (2003).

13. *See id.* § 1630.15.

14. *See id.* § 1630.2(g)-(*l*).

15. *See* 42 U.S.C. § 12112(a) (protecting only "a qualified individual with a disability" from employment discrimination).

16. This author's Westlaw search for federal cases citing the EEOC's disability regulation, conducted on June 23, 2003, turned up 1,916 opinions. Indeed, the threshold issue of whether a plaintiff in an ADA suit is in fact disabled is one of the most frequently litigated questions under the statute; one expert noted in 1998 that the issue arose in more than 50 percent of the ADA cases being litigated at the time. *See* Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 303 (2000) (noting that the most common defense in ADA employment cases is the assertion that the plaintiff is not disabled).

17. 29 C.F.R. § 1630.2(j). A Westlaw search performed by the author on October 23, 2003, revealed 1,630 cases citing this specific EEOC regulation.

18. 42 U.S.C. § 12102(2)(A).

19. 527 U.S. 471 (1999).

20. *Id.* at 479.

appears in an introductory section of the ADA rather than in any specific title of the statute.[21] Three years later, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[22] the Court went a step further. While not explicitly invalidating the EEOC's regulations defining disability, a unanimous Court substituted its own more restrictive interpretation of "substantially limits" for the EEOC's definition of that element.[23] Thus, while ostensibly sidestepping the issue of the regulations' validity, the *Toyota* Court implicitly invalidated a critical aspect of the EEOC's disability regulations, at least in the context of the case before it. And the Court's sidestep has caught on. In the past year, several federal circuit courts have applied the Court's restrictive interpretation of "substantially limits" in a broad variety of contexts, while not explicitly invalidating the EEOC's definition of that same term.[24]

This Article argues that *Toyota*'s implicit invalidation of the EEOC's "substantially limits" regulation is based upon a misreading of the regulation itself, and that *Toyota*, through its ripple effects in the federal circuits, has resulted in an inappropriate restriction of the statutory definition of disability. Part II traces the origins of the EEOC's disability regulations, including the "substantially limits" regulation, and explains the regulatory gloss that the EEOC has placed upon the ADA's definition of disability. Part III defends the validity of the disability regulations by analyzing the Supreme Court's discussion of that issue in *Sutton* and by invoking principles of deference derived from *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[25] Part IV then explains how the Court in *Toyota* inappropriately ignored the EEOC's "substantially limits" regulation and instead developed its own more restrictive interpretation of that term. Part V analyzes what has been lost through this new interpretation, and what could still be lost as the effect of *Toyota* works its way through the lower courts. Lastly, Part VI offers some suggestions for salvaging what remains of the EEOC's "substantially limits" regulation after *Toyota*.

---

21. *See* 42 U.S.C. § 12102(2) (defining "disability"). Title I of the ADA begins at section 12111.

22. 534 U.S. 184 (2002).

23. *Id.* at 196-98.

24. *See, e.g.*, Fenney v. Dakota, Minn. & E. R.R. Co., 327 F.3d 707, 713-15 (8th Cir. 2003) (analyzing whether plaintiff was substantially limited in the major life activity of caring for himself); EEOC v. United Parcel Serv., Inc., 306 F.3d 794, 802-03 (9th Cir. 2002) (analyzing whether individuals were substantially limited in the major life activity of seeing).

25. 467 U.S. 837 (1984).

II. INVITATION TO THE DANCE: ORIGINS OF THE ADA'S DISABILITY DEFINITION AND OF THE EEOC'S DISABILITY REGULATIONS

Plaintiffs pursuing discrimination claims under the ADA must prove as a threshold matter that they belong to the statutorily protected class of people with disabilities.[26] The ADA defines "disability" in terms of three alternatives:

(A) a physical or mental impairment that substantially limits one or more of the major life activities [of the person in question];

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.[27]

This definition has its origins in the Rehabilitation Act of 1973,[28] whose section 504 prohibits discrimination on the basis of disability in programs and activities that receive federal financial assistance.[29] In 1974, Congress amended the Rehabilitation Act to add a definition of "handicapped individual" (which has since been

---

26. Title I of the ADA, which covers the employment context, specifically prohibits discrimination only against "a qualified individual with a disability." 42 U.S.C. § 12112(a). Title II, which covers public services, programs, and activities, contains identical language. *Id.* § 12132. While Title III, which covers public accommodations, is not phrased in terms of a "qualified individual with a disability," plaintiffs must still prove their disabled status in order to pursue a claim under this provision. *See, e.g.*, Bragdon v. Abbott, 524 U.S. 624, 630-47 (1998) (analyzing, as a threshold matter, whether the plaintiff in a Title III action had a disability).

Scholars have criticized the limitations imposed by the ADA's inclusion of a defined protected class. *See, e.g.*, Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 441-44 (1991) (criticizing the "protected-class" structure of the ADA's protections); Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1473 (1999) (advocating statutory amendment to eliminate the protected class requirement, so that plaintiffs need only prove discrimination "on the basis of disability"). Nevertheless, Congress is unlikely to eliminate the protected class requirement any time soon. *See* Lisa Eichhorn, *Applying the ADA to Mitigating Measures Cases: A Choice of Statutory Evils*, 31 ARIZ. ST. L.J. 1071, 1120 (1999) [hereinafter Eichhorn, *Mitigating Measures*] ("[G]iven the lingering public belief in a class of 'truly' disabled people, Congress never had the political will to [eliminate the protected class provision] and will probably not muster such will in the near future."); Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321, 373 (2000) ("Given the current political climate, in which there is a great dissatisfaction with civil rights laws in general . . . and . . . with the ADA in particular, new congressional discussions about the ADA might well lead to a reduction in the protections granted by the Act rather than an expansion . . . .").

27. 42 U.S.C. § 12102(2).

28. *See* 29 U.S.C. §§ 701-796*l*.

29. *Id.* § 794(a).

changed to "individual with a disability"[30]) specifically applicable to section 504.[31] This definition speaks in terms of three alternative prongs: It describes an individual who has "a physical or mental impairment which substantially limits one or more . . . major life activities," a "record of such an impairment," or the experience of being "regarded as having such an impairment."[32] In developing this three-pronged structure, Congress took account of the fact that disability discrimination can be based upon actual current impairments, past diagnoses (or misdiagnoses) of impairments, and non-existent but perceived impairments.[33]

Over a decade later, when the ADA drafters were designing a new statute to extend the prohibition on disability-based discrimination to the private sector, they borrowed the Rehabilitation Act's three-pronged disability definition as a matter of political expediency.[34] The drafters correctly calculated that Congress would likely accept the familiar definition, which had caused few problems since its addition to the Rehabilitation Act.[35] As a result of the borrowed language, the Rehabilitation Act is an important reference point in interpreting the ADA's disability definition.

Regulations issued under the Rehabilitation Act also play a

---

30. *See* Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, § 102, 106 Stat. 4346, 4349 (1992) (codified as amended at 29 U.S.C. § 705(20) (2000)). This change responded to the fact that by the early 1990s, many people with disabilities had come to view the word "handicapped" as demeaning. *See* ROBERT L. BURGDORF JR., DISABILITY DISCRIMINATION IN EMPLOYMENT LAW 17 (1995).

31. Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, § 111(a), 88 Stat. 1617, 1619 (1974) (codified as amended at 29 U.S.C. § 705(20)(B) (2000)).

32. *Id.*

33. *See* S. REP. NO. 93-1297, at 38-39 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6389-90.

34. *See* Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 127-29 (2000) (discussing the ADA drafters' decision to rely upon the Rehabilitation Act's definition of disability).

35. *See* Feldblum, *supra* note 34, at 128-29; *see also* H.R. REP. 101-485, pt. 3, at 27 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 450 (noting that the Rehabilitation Act's three-prong disability definition "has worked well since it was adopted"). Early section 504 cases seldom raised the issue of whether plaintiff was, in fact, a "handicapped individual." *See* Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 623 (1999) (noting that the issue was "rarely litigated"); *see also* Feldblum, *supra* note 34, at 106-13 (reviewing early case law). Instead, the cases tended to focus on whether the alleged discrimination had occurred because of the plaintiff's disability. Feldblum, *supra* note 34, at 106.

significant role in elucidating the definition of disability in the ADA. Indeed, the ADA explicitly provides that its protections extend at least as far as the protections offered by Title V of the Rehabilitation Act and its accompanying regulations.[36] More specifically, the ADA's legislative history provides that the analysis of the term "handicapped individual"[37] appearing in regulations accompanying section 504 of the Rehabilitation Act should also apply to the term "disability" in the ADA.[38]

Those regulations were originally issued by the Department of Health, Education, and Welfare ("HEW") in 1977.[39] In drafting the regulations, HEW chose not to create a specific list of illnesses or diseases constituting disabilities because of "the difficulty of ensuring the comprehensiveness of any such list."[40] Instead, the agency opted to clarify some specific elements of the statutory disability definition including "[p]hysical or mental impairment" and "major life activities."[41] While some comments received during the rulemaking process expressed concern that this approach was overbroad and that the agency should have limited the definition to "traditional" disabilities,[42] HEW believed that the statutory language mandated the inclusion of impairments beyond the "severe, permanent, or progressive conditions that are most commonly regarded as handicaps."[43]

HEW's definitional regulations expand upon the statutory term "[p]hysical or mental impairment" by explaining that the category includes "any physiological disorder or condition, cosmetic

36. 42 U.S.C. § 12201(a) (2000); *see also* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 193-94 (2002) ("Congress' repetition of a well-established term generally implies that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations.") (citations omitted).

37. *See* 42 Fed. Reg. 22,676 (May 4, 1977) (codified as amended at 45 C.F.R. § 84.3(j) (2003)) (defining "handicapped person"). While the Rehabilitation Act has changed its terminology from "handicapped person" to "individual with a disability," *see supra* note 30 and accompanying text, the regulations accompanying the statute continue to use the older term.

38. S. REP. NO. 101-116 (1989).

39. 42 Fed. Reg. 22,676. Later, when HEW was split into the Department of Education and the Department of Health and Human Services ("HHS") in 1979, HHS adopted the section 504 regulations, which currently appear at 45 C.F.R. pt. 84 (2003). For the sake of conciseness, this Article will hereinafter refer to these regulations as the "HEW regulations."

40. *See* 42 Fed. Reg. at 22,685 ("Appendix A—Analysis of Final Regulation").

41. *See id.* at 22,678 (codified as amended at 45 C.F.R. § 84.3(j)(2) (2003)).

42. *Id.* at 22,685 (codified at 45 C.F.R. pt. 84 app. A, at 350 (2003)).

43. *Id.* at 22,685-86 (codified at 45 C.F.R. pt. 84 app. A, at 350 (2003)).

disfigurement, or anatomical loss" affecting any of a long list of bodily systems, or "any mental or psychological disorder."[44] The regulations define "major life activities" to include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[45] Thus, under the first prong of the Rehabilitation Act's disability definition, as supplemented by the HEW regulations, a person has a disability if he or she has a disorder or condition that substantially limits an activity of the type listed. Significantly, HEW chose not to define the term "substantially limits"; in an explanatory appendix to its original regulation, the agency noted simply that it did "not believe that a definition of this term is possible at this time."[46]

The HEW regulations also amplify the second two prongs of the Rehabilitation Act's disability definition. HEW provisions explain that a person has a "record" of a disability under the second prong of the statutory definition if he or she "has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities."[47] With respect to the third prong, the regulations note that people can be "regarded" as disabled if their non-limiting impairments are mistakenly viewed by others as substantially limiting; if their impairments effectively become substantially limiting because of the attitudes of other people; or if they have no impairments at all but are mistakenly treated as if they had substantially limiting impairments.[48]

In 1990, thirteen years after HEW issued its section 504 regulations under the Rehabilitation Act, President George H.W. Bush signed the ADA into law.[49] The new statute directed the EEOC and the Department of Justice ("DOJ") to issue regulations to implement the non-discrimination mandates appearing in Titles I through III of the ADA.[50] The DOJ regulations accompanying Titles II and III, which prohibit discrimination in state and local

44. *Id.* at 22,678 (codified as amended at 45 C.F.R. § 84.3(j)(2)(i) (2003)).

45. *Id.* (codified as amended at 45 C.F.R. § 84.3(j)(2)(ii) (2003)).

46. *Id.* at 22,685 (codified at 45 C.F.R. pt. 84 app. A, at 350 (2003)).

47. *Id.* at 22,678 (codified as amended at 45 C.F.R. § 84.3(j)(2)(iii) (2003)).

48. *Id.* (codified as amended at 45 C.F.R. § 84.3(j)(2)(iv) (2003)).

49. *See* BURGDORF, *supra* note 30, at 47-48. For a brief history of the events leading to the ADA's passage, see *id.* at 43-48.

50. Congress granted the EEOC authority to issue regulations to implement Title I of the ADA. *See* 42 U.S.C. § 12116 (2000). Congress granted the DOJ, through the Attorney General, authority to issue regulations to implement subtitle A of Title II, *see id.* § 12134, and to implement the non-transportation provisions of Title III, *see id.* § 12186.

government programs[51] and in public accommodations,[52] respectively, track the HEW regulatory language almost verbatim with respect to defining disability.[53] On the other hand, the EEOC's definitional regulations accompanying Title I's employment provisions are more expansive. While the EEOC and HEW regulations define "physical or mental impairment" and "major life activities" in almost identical terms,[54] the EEOC regulations add an extremely detailed, if ungrammatical, definition of "substantially limits," a term that the HEW and DOJ regulations do not define at all:

> The term substantially limits means:
>
> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.[55]

To supplement the above definition, the EEOC regulations specify several factors bearing on whether an impairment is substantially limiting: the impairment's "nature and severity," its actual or expected "duration," and its actual or expected "permanent or long term impact."[56] In addition, the regulations explain how a person can be substantially limited in the specific major life activity of "working."[57] An eighteen-paragraph entry in the EEOC's Interpretive Guidance to these regulations elaborates even further upon all of these aspects of the term "substantially limits."[58] Because the Rehabilitation Act, its accompanying HEW regulations,

---

51. *See id* § 12131(1).

52. *See id.* § 12181(7).

53. *Compare* 28 C.F.R. § 35.104 (2003) (implementing Title II), *and* 28 C.F.R. § 36.104 (2003) (implementing Title III), *with* 45 C.F.R. § 84.3(j)(2) (2003) (implementing section 504 of the Rehabilitation Act).

54. *Compare* 29 C.F.R. § 1630.2(h)-(i) (2003) (defining "physical or mental impairment" and "major life activities," respectively, for purposes of EEOC regulation), *with* 45 C.F.R. § 84.3(j)(2)(i)-(ii) (2003) (defining "physical or mental impairment" and "major life activities," respectively, for purposes of HEW/HHS regulation).

55. 29 C.F.R. § 1630.2(j)(1) (2003).

56. *Id.* § 1630.2(j)(2).

57. *Id.* § 1630.2(j)(3).

58. *See id.* pt. 1630 app. § 1630.2(j), at 351.

and the ADA are all silent as to the meaning of "substantially limits," the EEOC's explanations do not contradict any of these earlier sources.[59] Further, because other agencies charged with implementing other titles of the ADA have not defined the phrase in their own regulations,[60] the "substantially limits" regulation represents a completely independent contribution of the EEOC to the ADA's disability definition. Thus, the significant gloss represented by this regulation, which has found its way into so many federal court opinions,[61] is uniquely a product of the EEOC.

III. SITTING OUT THE *CHEVRON* TWO-STEP: THE *SUTTON* COURT QUESTIONS, BUT DOES NOT DECIDE, THE VALIDITY OF THE DISABILITY REGULATIONS

A. *The* Sutton *Pronouncement*

In *Sutton v. United Air Lines*,[62] a 1999 decision, the Supreme Court first questioned the validity of the EEOC regulations elaborating upon the ADA's definition of disability.[63] The case concerned an employment discrimination claim made by twin sisters who were both pilots.[64] The plaintiffs each had severe myopia but wore lenses to correct the condition.[65] After they applied for jobs as commercial airline pilots with United Air Lines, the company informed the plaintiffs that because they failed to meet United's visual acuity requirement, it could not hire them.[66] The plaintiffs brought suit under the ADA, and the district court dismissed the

59. In a preamble to its ADA Title II regulations, the DOJ mentions that a person is disabled under the first prong of the disability definition if his or her activities are "restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people." 28 C.F.R. pt. 35 app. A at 534 (2003). However, the DOJ's Title II regulations do not explicitly define "substantially limits." *See id.* § 35.104. Thus, only the EEOC's regulations contain a specific and detailed definition of this statutory term.

60. DOJ regulations implementing the non-transportation provisions of Titles II and III of the ADA define "physical or mental impairment" and "major life activities" but not "substantially limits." *See id.* §§ 35.104, 36.104. Department of Transportation regulations implementing the transportation provisions of those titles are similar in this respect. *See* 49 C.F.R. § 27.5 (2003).

61. This author's Westlaw search for federal cases specifically citing the EEOC's "substantially limits" regulation, conducted on October 31, 2003, turned up 1,287 opinions.

62. 527 U.S. 471 (1999).

63. *Id.* at 479.

64. *Id.* at 475.

65. *Id.*

66. *Id.* at 476.

action, holding that the plaintiffs did not have a disability because their corrective lenses prevented their myopia from being substantially limiting.[67] The Tenth Circuit affirmed the dismissal.[68]

In arguing to the Supreme Court that their myopia was indeed a disability, the plaintiffs relied on the EEOC's regulation defining "substantially limits" and upon that agency's Interpretive Guidance, which specified that "the determination of whether an individual is substantially limited in a major life activity be made without regard to mitigating measures" such as corrective lenses.[69] Thus, the plaintiffs' right to pursue their ADA claims depended directly upon the validity of the EEOC guidance regarding mitigating measures.

Before turning to the Interpretive Guidance, Justice O'Connor, writing for the majority, discussed the EEOC's disability regulations themselves. In dicta, she noted that while Congress explicitly granted the EEOC authority to implement Title I of the statute,[70] "[n]o agency . . . has been given authority to issue regulations implementing the generally applicable provisions of the ADA."[71] Among the generally applicable provisions, which precede Title I in the statutory text, is a "Definitions" section containing the statutory disability definition.[72] This structural framework allowed Justice O'Connor to conclude more specifically that "no agency has been delegated authority to interpret the term 'disability.'"[73] Nevertheless, because the parties in *Sutton* accepted the EEOC's disability regulations as valid, the Court found it unnecessary to rule upon their validity or to decide "what deference they are due, if any."[74] The Court went on, however, to invalidate the mitigating measures provision of the EEOC's Interpretive Guidance as "an impermissible interpretation of the ADA," reasoning that the statutory phrase "substantially limits" must require "that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability."[75] *Sutton* thus

67. *Id.*

68. *Id.* at 477.

69. *Id.* at 481.

70. *Id.* at 478 (citing 42 U.S.C. § 12116).

71. *Id.* at 479. The generally applicable provisions of the ADA comprise a "Findings and purpose" section, 42 U.S.C. § 12101 (2000), and a "Definitions" section, *id.* § 12102.

72. 42 U.S.C. § 12102(2).

73. *Sutton*, 527 U.S. at 479.

74. *Id.* at 480.

75. *Id.* at 482. The majority buttressed its decision by noting that the ADA defines disability "with respect to an individual," and the required individualized inquiry should take into account any measures that a specific individual uses to mitigate the effects of an impairment, rather than relying upon generalized notions of how a given impairment tends to affect human

invalidated both the plaintiffs' ADA claims and the EEOC's Interpretive Guidance on mitigating measures. In addition, while the majority opinion left the EEOC's disability regulations intact, it cast doubt upon the notion that courts should defer to them.

In a well-reasoned dissent, Justice Breyer took issue with the majority's assertion that Congress had not granted any agency—including the EEOC—authority to interpret the statutory definition of "disability."[76] He noted that the term "disability" appears not only in the general Definitions section of the ADA, but also in Title I, which prohibits discrimination "against a qualified individual with a disability because of the disability."[77] Thus, he reasoned, EEOC regulations elaborating upon the word "disability" for purposes of Title I would fall within the EEOC's delegated authority.[78] Justice Breyer went on to note that "[t]he physical location of the

---

activities. *Id.* at 483. The Court also noted that the ADA includes an explicit Congressional finding that "some 43,000,000 Americans have one or more physical or mental disabilities," and that this figure would appear to exclude people who use measures such as corrective lenses to alleviate the effects of their impairments. *Id.* at 484-87 (quoting 42 U.S.C. § 12101(a)(1) (1994)). Numerous scholars have since criticized the majority's reasoning. *See, e.g.*, Eichhorn, *Mitigating Measures*, *supra* note 26, at 1108 (stating that the majority imposed "a 'plain meaning' analysis upon statutory language that is far from plain"); Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 326 (2001) (noting that the majority's "exercise in sentence diagramming" did little to unveil actual congressional intent); Mark A. Rothstein et al., *Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act*, 80 WASH. U. L.Q. 243, 244 (2002) (stating that *Sutton* and its two companion cases exemplify the "inconsistent and implausible results" the Court has reached when interpreting the scope of the ADA); Aviam Soifer, *The Disability Term: Dignity, Default, and Negative Capability*, 47 U.C.L.A. L. REV. 1279, 1302 (2000) (characterizing the majority's opinion as "a curious mixture of extreme procedural formalism and sweeping substantive legerdemain"); Tucker, *supra* note 26, at 350 (arguing that the "Court erred in refusing to look to the legislative history of the ADA for aid" in interpreting statutory ambiguity); Rebecca Hanner White, *Deference and Disability Discrimination*, 99 MICH. L. REV. 532, 565 (2000) (noting that "[n]one of the statutory provisions relied upon by the Court in finding congressional intent was dispositive of the question presented").

76. *Sutton*, 527 U.S. at 514-15. At least two scholars have argued that Justice Breyer's view represents the more reasonable interpretation of the ADA's delegation provisions. *See* Barbara Hoffman, *Reports of Its Death Were Greatly Exaggerated: The EEOC Regulations that Define "Disability" Under the ADA After* Sutton v. United Air Lines, 9 TEMPLE POL. & CIV. RTS. L. REV. 253, 268 (2000); White, *supra* note 75, at 579-80.

77. *Sutton*, 527 U.S. at 514 (quoting 42 U.S.C. § 12112(a) (1994)).

78. *See id.*

definitional section [within the ADA] seems to reflect only drafting or stylistic, not substantive, objectives," and that "to pick and choose among which of [Title I's] words the EEOC has the power to explain would inhibit the development of law that coherently interprets this important statute."[79]

The same day it decided *Sutton*, the Court also issued decisions in two companion cases, both of which also raised the issue of whether mitigating measures should factor into the disability analysis under the ADA. The plaintiff in *Murphy v. United Parcel Service, Inc.*[80] had high blood pressure, which he controlled through medication.[81] The plaintiff in *Albertson's, Inc. v. Kirkingburg*[82] had extremely poor vision in one eye but had developed "subconscious mechanisms for coping" with this impairment.[83] As it had in *Sutton*, the Court in these cases held that the effects of the mitigating measures used by the plaintiffs were relevant to the analysis of whether their impairments substantially limited any major life activities and thus qualified as disabilities.[84] In so holding, the *Albertson's* majority invalidated the EEOC Interpretive Guidance concerning mitigating measures but specifically declined to rule on what level of deference, if any, to accord the rest of the Interpretive Guidance and to the agency's disability regulations.[85]

B. Administrative Law Background

In *Sutton* and its two companion cases, the Court left open the possibility that the EEOC's disability regulations might be valid, even if the EEOC lacked "authority to interpret the term 'disability.'"[86] An analysis of the regulations' validity, and of the level of deference due them if they are in fact valid, requires preliminarily an explanation of some principles of administrative law. First, agency regulations may be either legislative or interpretive, depending on their capacity to bind courts and the public and on the process leading to their issuance.[87] Legislative regulations are intended to have the force of law, and agencies must enact them in accordance with the Administrative Procedure Act

79. *Id.* at 515.
80. 527 U.S. 516 (1999).
81. *Id.* at 519.
82. 527 U.S. 555 (1999).
83. *Id.* at 559, 565.
84. *See Murphy*, 527 U.S. at 521; *Albertson's*, 527 U.S. at 565-66.
85. *See Murphy*, 527 U.S. at 523 (assuming, arguendo, the validity of the EEOC disability regulations); *Albertson's*, 527 U.S. at 563 n.10 (same).
86. Sutton v. United Air Lines, Inc., 527 U.S. 471, 479 (1999).
87. *See* RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 324-26 (4th ed., 2002) (distinguishing legislative and interpretive rules).

("APA").[88] Interpretive regulations are merely explanatory, are not meant to bind the public, and need not issue through the APA rulemaking process.[89] While a federal agency cannot issue valid legislative regulations without express or implied authorization from Congress, the agency is always free to issue interpretive regulations of any statute it is charged with administering.[90]

Next, in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council Inc.*,[91] the Supreme Court clarified the level of deference that courts must accord to legislative regulations. Under *Chevron*, a court must defer to a legislative regulation, provided that the agency had express or implied authority to issue it, and provided that the regulation clarifies a true statutory ambiguity with a permissible interpretation of the statutory language.[92] This principle of deference stems from the fact that Congress, as an elected and accountable branch of government, has the power to delegate its legislative authority to federal agencies, which are in turn indirectly accountable through the Chief Executive. Once Congress has delegated legislative authority to an agency, a federal court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of [the] agency."[93] Courts "are not part of either political branch of the

88. *Id.* at 324-25. Under the APA, agencies may issue binding legislative rules through either a formal or an informal process. *Compare* 5 U.S.C. § 556 (2000) (describing formal rulemaking), *with* 5 U.S.C. § 553 (2000) (describing informal rulemaking). Informal rulemaking, also known as "notice and comment" rulemaking, is the much more common process. PIERCE, *supra* note 87, at 411-12. Notice and comment rulemaking requires an agency to allow interested parties an opportunity to comment in writing upon draft rules, which are published in the Federal Register. *See* 5 U.S.C. § 553 (2000). Formal rulemaking, on the other hand, requires an agency to conduct an oral evidentiary hearing regarding a proposed rule. *See* 5 U.S.C. §§ 556-57 (2000).

89. PIERCE, *supra* note 87, at 324-34 (distinguishing legislative and interpretive rules); 5 U.S.C. § 553(b)(A) (2000) (exempting interpretive rules from notice and comment requirements); *see also* Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 79 (describing an interpretive rule as "the agency's pronouncement of what it thinks a statute means").

90. PIERCE, *supra* note 87, at 325; *see also* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and Courts?*, 7 YALE J. ON REG. 1, 5 (1990) ("Under our system of limited government, an agency cannot announce actions that bind citizens and the courts unless Congress has delegated to it the authority to do so.").

91. 467 U.S. 837 (1984). For a concise explanation of *Chevron* and its conceptual foundations, see PIERCE, *supra* note 87, at 137-47.

92. *Chevron*, 467 U.S. at 842-44.

93. *Id.* at 844.

Government"[94] and "have no constituency."[95] Thus, they may not usurp the power to make policy choices from Congress, or, in turn, from an agency to which Congress has delegated policy-making authority with respect to a given statute.[96]

The process that *Chevron* instructs courts to follow when confronting agency regulations has become known as the *Chevron* two-step.[97] In step one, after determining that Congress has granted an agency rulemaking authority with respect to a given statute, a court must consider whether the applicable statutory provision is in fact ambiguous or silent with respect to the issue before the court. If the provision speaks unambiguously to the issue, then the court must apply the statute in light of Congress' express intent. However, if the provision is ambiguous or silent, then the court must proceed to step two by determining whether the agency's amplifying regulation "is based on a permissible construction of the statute."[98] In general terms, an agency's construction will be deemed permissible if it is "reasonable,"[99] as opposed to "arbitrary" or "capricious."[100] If the court holds in step two that the regulatory construction is reasonable, then it must give "controlling weight" to that construction.[101]

This two-step analysis applies only to legislative regulations; *Chevron* deference does not extend to mere interpretive regulations, which are not normally issued through the APA's notice and comment process and lack the force of law.[102] Instead, such regulations receive a lower level of deference described by the

---

94. *Id.* at 865.

95. *Id.* at 866.

96. *See* Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG., 283, 309 (1986) (explaining that "[w]hen Congress has not spoken to an issue, *Chevron* forbids the courts to engage in supervisory oversight of the agencies").

97. *See* John F. Coverdale, Chevron's *Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings After* Mead, 55 ADMIN. L. REV. 39, 42 (2003) (attributing the coinage to Kenneth Starr).

98. *Chevron*, 467 U.S. at 843.

99. *Id.* at 845.

100. *Id.* at 844.

101. *Id.*

102. *See* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 157 (1991) (holding that interpretive rules and enforcement guidelines are "not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers"); *see also* Christensen v. Harris County, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.").

Supreme Court in *Skidmore v. Swift & Co.*:[103]

> The weight of such [an agency interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[104]

Thus, *Skidmore* deference is a far cry from *Chevron* deference; under *Skidmore*, a court simply takes an agency's interpretation for whatever the court thinks it may be worth, given the above factors.

C. *The Post-*Sutton *Status of the EEOC's Disability Regulations*

The Supreme Court has yet to decide whether the EEOC's disability regulations are valid and whether they are entitled to *Chevron* deference.[105] The *Sutton* majority expressly avoided the questions because the parties had agreed to the regulations' validity and because, in the end, the question before the Court turned on the validity of the EEOC's Interpretive Guidance rather than on the disability regulations themselves.[106]

Nevertheless, the majority opinion cast an unfortunate and inappropriate doubt upon the regulations' validity by pronouncing that "no agency has been delegated authority to interpret the term 'disability'" under the ADA.[107] The pronouncement is inappropriate

---

103. 323 U.S. 134 (1944).

104. *Id.* at 140; *see also* United States v. Mead Corp., 533 U.S. 218, 235-38 (2001) (discussing the continuing role of *Skidmore* deference after *Chevron*); *Christensen*, 529 U.S. at 587 ("[I]nterpretations contained in formats such as opinion letters are entitled to respect under our decision in *Skidmore*.") (quotation and citation omitted); *Martin*, 499 U.S. at 157 (noting that interpretive rules are entitled to "some weight on judicial review") (citing *Skidmore*, 323 U.S. at 140); Anthony, *supra* note 90, at 55-58 (explaining the level of deference due to interpretive rules).

105. *See* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 194 (2002) ("Because both parties accept the EEOC regulations as reasonable, we assume without deciding that they are, and we have no occasion to decide what level of deference, if any, they are due."); Sutton v. United Air Lines, Inc., 527 U.S. 471, 480 (1999) ("Because both parties accept [the EEOC disability] regulations as valid, and determining their validity is not necessary to decide this case, we have no occasion to consider what deference they are due, if any."). Rebecca Hanner White has proposed that although the *Sutton* opinion is "not clear" as to whether the Court applied *Chevron* to the EEOC disability regulations, the "most defensible reading of the *Sutton* opinion" suggests that the Court resolved the question presented at *Chevron*'s step one, holding that the statutory language provided an unambiguous answer. *See* White, *supra* note 75, at 564-65.

106. *Sutton*, 527 U.S. at 480.

107. *Id.* at 479. This doubt has not gone unnoticed by lower courts. *See, e.g.*,

for several reasons. First, it flies in the face of the Court's earlier position, articulated in *Bragdon v. Abbott*,[108] that agency interpretations of the ADA's disability definition should receive the highest deference. *Bragdon* focused specifically on DOJ regulations implementing Title III of the ADA. Like the EEOC, the DOJ had issued regulations elaborating upon the statutory disability definition,[109] even though the Department's legislative charge was limited to a specific title of the statute.[110] The *Bragdon* Court turned to these regulations, among other authorities, in its analysis of whether the plaintiff's asymptomatic HIV was a disability. Citing *Chevron*, the Court explained that because Congress directed the DOJ to issue regulations implementing Title III, the DOJ's "views are entitled to deference."[111] In the very next sentence, the Court noted that "[t]he Justice Department's interpretation of the definition of disability is consistent with our analysis."[112] Thus, the "views" that the Court thought deserving of *Chevron* deference must have included the DOJ regulations interpreting the disability definition. Because the DOJ's charge to implement Title III is no broader than the EEOC's charge to implement Title I,[113] the same *Chevron* deference should apply to the EEOC's disability regulations, under the *Bragdon* Court's reasoning.[114] Thus, when the *Sutton* majority questioned the validity of the EEOC's disability regulations only one year after *Bragdon*, it created a glaring inconsistency regarding its treatment of similarly-authorized administrative provisions under the ADA.

In addition, the *Sutton* majority's pronouncement ignores the nature of the power Congress delegated to the EEOC. Under Title I of the ADA, the agency has the specific power to set policy through legislative regulations.[115] Given the threshold requirement that an ADA plaintiff prove a disability, and given the statute's ambiguous definition of that term, the EEOC could not possibly carry out its

---

EEOC v. R.J. Gallagher Co., 181 F.3d 645, 654 n.5 (5th Cir. 1999) (observing that *Sutton* "casts a shadow of doubt over the validity and authority of the EEOC's regulations").

108. 524 U.S. 624 (1998).

109. *See* 28 C.F.R. § 36.104 (2003).

110. *See* 42 U.S.C. § 12186(b) (2000) (authorizing the DOJ, through the Attorney General, to issue regulations to implement the non-transportation provisions of Title III of the ADA).

111. 524 U.S. at 646 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844.

112. *Id.*

113. *Compare* 42 U.S.C. § 12116 (2000), *with* § 12186.

114. *See* Colker, *supra* note 3, at 152 (stating that *Bragdon* "provides a strong foundation for judicial deference to EEOC regulations").

115. *See* 42 U.S.C. § 12116.

assigned powers under Title I without developing substantive policies regarding the precise scope of the statutory disability definition. Thus, it is natural to assume that if Congress chose the EEOC as the appropriate agency to make binding policy choices with respect to Title I, it must also have entrusted the EEOC with authority to articulate exactly what "disability" means for purposes of that Title.[116] In addition, because Congress passed the ADA six years after *Chevron* clarified the high level of deference that administrative regulations are due, it follows that Congress did not make any of these choices lightly. The *Sutton* majority ignored these circumstances, however, when it questioned the EEOC's power to elaborate upon the disability definition. In so doing, the majority perpetuated a view of the EEOC as a second-class agency that lacks real power.[117] While the EEOC indeed has only minimal rulemaking power under Title VII of the Civil Rights Act of 1964,[118] its substantive authority under the ADA far exceeds its limited powers under that older statute. Despite this fact, several scholars have speculated that courts may reflexively strike down EEOC guidance under the ADA because those courts have grown accustomed, under Title VII, to viewing the EEOC as a weak agency.[119]

---

116. As the Supreme Court explained recently,

> Congress . . . may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute . . . .

United States v. Mead, 533 U.S. 218, 229 (2001); *see also* Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2093 (1990) ("[I]t is plausible to think that the legislative grant of rulemaking power implicitly carries with it the grant of authority to interpret ambiguities in the law that the agency is entrusted with administering."); White, *supra* note 89, at 83 (noting that "an agency to whom Congress delegated broad lawmaking powers is the likely candidate for resolving the policy choices implicated in statutory interpretation").

117. For discussions of the disrespect historically accorded to the EEOC, see Colker, *supra* note 3, at 135-44; White, *supra* note 89, at 56-57; Theodore W. Wern, Note, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency?*, 60 OHIO ST. L.J. 1533, 1578-80 (1999). A recent empirical study has determined that the EEOC receives a "considerably low level of deference" as compared to other administrative agencies. Wern, *supra*, at 1549-50.

118. *See* 42 U.S.C. § 2000e-12(a) (2000) (authorizing the EEOC to promulgate only "procedural regulations"); *see also* White, *supra* note 86, at 56 (discussing the EEOC's limited powers under Title VII).

119. *See* Colker, *supra* note 3, at 139, 144; Wern, *supra* note 117, at 1578; *see also* White, *supra* note 75, at 570-72 (discussing the Supreme Court's

Despite these problems, the *Sutton* majority's pronouncement that the EEOC lacks authority to interpret the ADA's disability definition—even if dictum—is a reality that cannot be ignored. The pronouncement, which explicitly suggests that the EEOC disability regulations may nevertheless be valid, can be interpreted in either of two ways. First, the *Sutton* majority may have meant that while the EEOC lacks *express* administrative authority from Congress with respect to the disability definition, the agency did receive *implied* authority, and the EEOC thus engaged in valid legislative rulemaking when it issued the disability regulations. Alternatively, the majority may have meant that Congress granted the EEOC neither express nor implied authority to issue legislative rules regarding the disability definition, but the agency's disability provisions are nevertheless valid as interpretive regulations.

The first interpretation is unlikely. When Justice O'Connor declared in *Sutton* that "no agency has been delegated authority to interpret the term 'disability,'"[120] she presumably meant that no agency had expressly or impliedly been delegated such authority.[121] Had she meant to leave open the possibility of implied delegation, she would likely have inserted the word "expressly" into her sentence. Further, the *Sutton* majority flatly rejected Justice Breyer's position, which asserts that Congress granted the EEOC authority to elaborate upon the disability definition for purposes of Title I by repeating the word "disability" in the text of Title I. If Justice Breyer's reasoning suggested an *implied* grant of authority, then the majority dismissed this suggestion as an "imaginative interpretation of the Act's delegation provisions."[122]

Nevertheless, the possibility remains that Breyer was mustering evidence of an *express* grant of authority, in which case the majority did not necessarily dismiss the possibility of implied authority when it rejected his position. If an implied grant exists, then the disability regulations are valid legislative rules to which *Chevron* deference should apply. Like the EEOC's other legislative regulations implementing Title I of the ADA, the disability regulations issued from the notice and comment rulemaking process and were thus properly promulgated in accordance with the APA.[123]

"unwillingness to give meaningful deference to the EEOC under Title VII").

120. *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 479 (1999).

121. *But see* White, *supra* note 75, at 578 & n.278 (interpreting Justice O'Connor's sentence as referring only to express delegation).

122. *Sutton*, 527 U.S. at 479.

123. The EEOC issued an advance notice of proposed rulemaking in 1990 in which it sought comment on various topics, including the definition of disability. *See* 55 Fed. Reg. 31,192 (Aug. 1, 1990). This advance notice was followed by the publication of a second notice, which included both the proposed Title I

Therefore, the *Chevron* two-step would dictate that the disability regulations deserve controlling weight in judicial decisions, provided that the statutory definition of "disability" is ambiguous and that the EEOC's elaboration upon that definition is reasonable.[124] In applying *Chevron*'s step one, a court could hardly conclude that the ADA's "disability" definition is unambiguous; numerous federal courts have reached different conclusions regarding the definition's scope,[125] and the Supreme Court justices themselves have disagreed as to the application of the definition's "major life activity" element.[126]

In addition, in applying *Chevron*'s step two, a court would have to find that the EEOC's disability regulations represent a reasonable construction of the statutory definition. Most of the disability regulations simply mirror those that the HEW issued under the Rehabilitation Act,[127] and Congress has explicitly instructed courts to construe the ADA's provisions consistently with that earlier statute and its accompanying regulations.[128] Only the EEOC's "substantially limits" regulation expands upon those predecessors, and it, too, is a reasonable construction of the ADA. That regulation characterizes a "substantially limit[ing]" impairment as one that either renders a person "[u]nable to perform" major life activities that most people can perform, or leaves the person "significantly restricted" in performing such activities with respect to "condition, manner, or duration."[129] The first notion—that of inability to perform—was certainly contemplated by Congress when it chose to define disability in terms of substantial limitation. The ADA was surely meant to cover, for example, blind people (who have an inability to see), and people with paraplegia (who have an inability to walk).[130] In addition, the second notion—

---

regulations and the proposed Interpretive Guidance. 56 Fed. Reg. 8578 (Feb. 28, 1991). On July 26, 1991, the EEOC published its final regulations and Interpretive Guidance. 56 Fed. Reg. 35,726.

124. *See supra* notes 97-101 and accompanying text.

125. *See* Crossley, *supra* note 35, at 626 (noting, in 1999, that "the torrent of decisions on defining disability are all over the board").

126. In *Bragdon v. Abbott*, the Court faced the question of whether reproduction was a "major life activity" for purposes of the ADA's disability definition. 524 U.S. 624, 638-39 (1998). A five-justice majority concluded that it was. *See id.* Justices Rehnquist, Scalia, and Thomas, however, reached the opposite conclusion, *see id.* at 659, as did Justice O'Connor, *see id.* at 664-65.

127. *See supra* note 54 and accompanying text.

128. *See* 42 U.S.C. § 12201(a) (2000).

129. 29 C.F.R. § 1630.2(j)(1) (2003); *see supra* note 55 and accompanying text.

130. *See* H.R. REP. NO. 101-485, pt. 3, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 451 ("For example, a paraplegic is substantially limited in the

that of significant restriction with respect to condition, manner, or duration of performance—has direct roots in the ADA's legislative history; the Report of the Senate Committee on Labor and Human Resources referred to substantially limited activities as being "restricted as to the condition, manner, or duration under which they can be performed" by the disabled individual.[131] Therefore, both parts of the EEOC regulation defining "substantially limits" pass *Chevron*'s step two because they are reasonable reflections of congressional intent. Thus, if a court accepts the first interpretation of the *Sutton* majority's pronouncement and takes the disability regulations as legislative rules, that court would have to give controlling weight to the regulations under *Chevron*.

Overall, however, the second interpretation of the *Sutton* majority's pronouncement is more likely: The EEOC lacked any authority to issue substantive regulations regarding the disability definition, but the agency's disability provisions are potentially valid interpretive regulations. Agencies always retain the ability to issue interpretive regulations, even in the absence of congressional directives.[132] Thus, if a lack of authority precludes the EEOC disability provisions from qualifying as legislative regulations, then they are presumably interpretive regulations that deserve at least some deference. Such regulations, while not meriting *Chevron* deference,[133] still "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," in accordance with *Skidmore*.[134] A court applying *Skidmore* deference will assess the regulations' persuasive weight in terms of the level of consideration the issuing agency gave to them, and the validity of their underlying reasoning, and their consistency with other agency pronouncements, among other factors.[135] In the case of the EEOC disability regulations, these factors indicate a high degree of persuasive force. First, unlike most interpretive regulations, the EEOC disability regulations were issued through the notice and comment rulemaking process and thus received a great deal of agency consideration. In addition, the reasoning underlying the regulations—apart from the "substantially limits"

---

major life activity of walking, [and] a person who is blind is substantially limited in the major life activity of seeing . . . .").

131. S. REP. NO. 101-116, at 622 (1989).

132. *See* PIERCE, *supra* note 87, at 325 ("[A]n agency has the power to issue binding legislative rules only if . . . Congress has authorized it to do so. By contrast, any agency has the inherent power to issue interpretative rules." (citations omitted)).

133. *See supra* note 102 and accompanying text.

134. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

135. *See id.*

regulation—is unquestionably valid because it echoes the reasoning of the HEW regulations under section 504 of the Rehabilitation Act, which Congress specifically incorporated into the ADA. The reasoning underlying the "substantially limits" regulation is also valid, for the reasons cited in the *Chevron* step two analysis above. Lastly, the disability regulations represent the EEOC's only interpretation of the term "disability" for purposes of the ADA and therefore do not contradict any other agency pronouncements.

In the end, despite the doubts cast by the *Sutton* majority's dictum, the EEOC's disability regulations deserve deference, either because they pass muster under the *Chevron* two-step or because they are extremely persuasive under *Skidmore*. Indeed, in the months and years following the *Sutton* decision, the lower federal courts continued to accept the EEOC's disability regulations as valid and persuasive.[136] It was against this backdrop that the Supreme Court next spoke about the regulations in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.[137]

IV. THE *TOYOTA* SIDESTEP

In *Toyota*, the Court addressed the proper standard for determining whether a person is substantially limited in the major life activity of performing manual tasks and thus disabled for ADA purposes. The Court decided this issue only in terms of actual disability under the first prong of the statutory disability definition;[138] the appeal did not address the "record of" or "regarded as" prongs. The plaintiff, Ella Williams, was an assembly line worker at a Toyota plant. Over time, her work with pneumatic tools caused her to develop tendinitis and carpal tunnel syndrome.[139] After extended negotiations with her employer, she was reassigned to a quality control team where her primary duties involved visual inspections and she had to perform only limited manual tasks.[140] After a few years, however, Toyota added a new duty to her workload that involved using a sponge to apply oil to cars coming

136. *See, e.g.*, Muller v. Costello, 187 F.3d 298, 312 (2d Cir. 1999) (stating that the "EEOC's [disability] regulations are entitled to 'great deference'") (citing Reeves v. Johnson Controls World Servs., 140 F.3d 144, 150 n.3 (2d Cir. 1998)); Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, 955 (8th Cir. 1999) (relying on the EEOC's "substantially limits" regulation); Tatum v. Hosp. of the Univ. of Penn., No. CIV.A. 98-6198, 1999 WL 482320, at *4 (E.D. Pa. 1999) (according "substantial deference" to the disability regulations); *see also* Hoffman, *supra* note 76, at 278-80 (reviewing post-*Sutton* cases through 2000).

137. 534 U.S. 184 (2002).

138. *Id.* at 192-93.

139. *Id.* at 187.

140. *Id.* at 188-89.

down the assembly line so as to highlight any imperfections in their paint jobs. In applying the oil, Ms. Williams would have to "hold her hands and arms up around shoulder height for several hours at a time."[141] Shortly after assuming this new duty, she suffered pain in her neck and shoulders and was diagnosed with myotendinitis and "thoracic outlet compression, a condition that causes pain in the nerves that lead to the upper extremities."[142] At that point, she asked Toyota to accommodate her by eliminating the oil-application task from her job duties. The record before the Court was unclear as to whether Toyota actually denied this request, or whether Ms. Williams simply began missing work at that point.[143] At any rate, Ms. Williams's physician eventually recommended that she not work at all because of her physical problems, and Toyota terminated her employment approximately seven weeks afterward.[144]

Ms. Williams filed suit under the ADA, claiming that the termination and Toyota's failure to accommodate her condition violated Title I's anti-discrimination provision.[145] Although Title I indeed requires employers to accommodate an employee's disabilities under certain circumstances,[146] the District Court for the Eastern District of Kentucky did not reach that issue. Instead, it granted Toyota summary judgment on the theory that Ms. Williams was not disabled and thus not entitled to the statute's protections.[147] The district court held that Ms. Williams's evidence indicated that her physical problems limited her in working, lifting, and performing manual tasks, all of which the court accepted as "major life activities" for purposes of the ADA's disability definition.[148] However, the court also held that her evidence fell short of showing a "substantial" limitation in any of these activities as a matter of law.[149] The Sixth Circuit reversed that ruling, holding that Ms. Williams's evidence could support a finding that she was substantially limited in a major life activity. The court based this holding on evidence showing that Ms. Williams was unable to perform a "broad range or class of manual activities" requiring the

141. *Id.* at 189.
142. *Id.*
143. *Id.*
144. *Id.* at 189-90.
145. *Id.* at 190.
146. *See* 42 U.S.C. § 12112(b)(5)(A) (2000) (stating that a failure to make reasonable accommodations to an employee's disability amounts to prohibited discrimination, unless the accommodation would cause the employer "undue hardship").
147. *See Toyota*, 534 U.S. at 190-91.
148. *Id.* at 191.
149. *Id.*

gripping of tools and the elevation of one's arms for long periods.[150]

The Supreme Court disagreed with this analysis of the "substantially limits" element of the statutory disability definition. After noting that the HEW disability regulations accompanying the Rehabilitation Act fail to define "substantially limits," a unanimous Court turned to the EEOC's disability regulations. In doing so, it repeated the *Sutton* Court's pronouncement that "no agency has been given authority to issue regulations interpreting the term 'disability' in the ADA."[151] However, because the parties in *Toyota* had agreed that the EEOC's disability regulations were "reasonable," the Court assumed they were valid and once again declined to decide "what level of deference, if any," they were due.[152] In focusing on whether Ms. Williams's condition imposed a substantial limitation on her ability to perform manual tasks, the Court recited the EEOC's definition of "substantially limit[ed]," which speaks in terms of a person being either "[u]nable to perform" a major life activity or "[s]ignificantly restricted" in performing the activity with respect to "condition, manner, or duration."[153] The Court also noted that the EEOC regulations instruct courts to consider the impairment's "nature and severity," its "expected duration," and its "permanent or long-term impact."[154]

Most significantly, however, when the Court turned to the assessment of whether Ms. Williams was substantially limited in manual tasks, it claimed that the EEOC regulations were "silent" as to the meaning of "substantial limitation" in that specific context.[155] This claim, of course, conveniently sidestepped the fact that the regulatory definition of "substantially limits," which the Court had just recited, is meant to apply to all major life activities. Thus, the Court's finding of regulatory silence in *Toyota* is a bit like a declaration that a dictionary is silent regarding the meaning of "sit" in the context of chairs, because it contains only a generic definition of the verb that could also apply to benches, stools, or ottomans.

Nonetheless, having taken the EEOC regulations as silent on the issue of substantial limitations for purposes of the question before it, the *Toyota* Court resorted to an increasingly popular source of judicial guidance: dictionaries.[156] Using a plain meaning

150. 224 F.3d 840, 844 (6th Cir. 2000).

151. *Toyota*, 534 U.S. at 194.

152. *Id.*

153. *Id.* at 195 (quoting 29 C.F.R. § 1630.2(j) (2001)) (alterations in original).

154. *Id.* at 196 (quoting 29 C.F.R. § 1630.2(j)(2)(i)-(iii)).

155. *Id.*

156. *See, e.g.*, A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 71, 71-72 (1994) (noting that since 1989, "more and more disputes about the meaning of statutes

approach, the Court noted that dictionaries equated "substantial" with "considerable" or "to a large degree."[157] It therefore went on to interpret "substantial limitation" in terms of utter prevention or severe restriction.[158] Because the Court also held that to qualify as major life activities, the "manual tasks in question must be central to daily life," it concluded overall that "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."[159]

To buttress its holding, the Court noted that both the substantially limits element and the major life activity element of the ADA's disability definition require strict interpretation "to create a demanding standard" for statutory coverage.[160] This conclusion rested on an explicit congressional finding in the ADA that "some 43,000,000 Americans have one or more physical or mental disabilities."[161] The Court reasoned that a broader interpretation of the ADA's disability definition would yield a much higher number of disabled people who could potentially seek statutory protection.[162] The *Sutton* Court had also cited the 43 million figure to reinforce its holding that people who use mitigating measures to alleviate the effects of their impairments should not come within the statute's protective sweep.[163] Unfortunately, upon close examination, the figure is a questionable source of guidance because it is based upon agency reports that define disability differently than do the Rehabilitation Act and the ADA.[164] Indeed, in his dissent in *Sutton*, Justice Stevens noted an "inability to make the 43 million figure fit any consistent method of interpreting the word 'disabled.'"[165]

In the end, the *Toyota* majority held that Ms. Williams would have to show that her impairments affected more than her performance of occupation-specific tasks in order to prove a disability.[166] The Court's procedural disposition of the case is

---

are greeted with citations to dictionaries").

157. *Toyota*, 534 U.S. at 196-97 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (1976); 17 OXFORD ENGLISH DICTIONARY 66-67 (2d ed. 1989)).

158. *See id.* at 198.

159. *Id.* at 197-98.

160. *Id.* at 197.

161. *Id.* (quoting 42 U.S.C. § 12101(a)(1)).

162. *Id.*

163. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, at 484-87 (1999).

164. *See* Eichhorn, *Mitigating Measures*, *supra* note 26, at 1113.

165. 527 U.S. at 512.

166. *See* 534 U.S. at 200–201.

somewhat confused, however. While the Sixth Circuit had spoken in terms of Ms. Williams having mustered sufficient evidence to *survive* summary judgment on the issue of disability,[167] the Supreme Court interpreted the Sixth Circuit's opinion as *granting* summary judgment in her favor on this issue.[168] As a result, the Supreme Court assessed the record in terms of whether Ms. Williams had demonstrated an actual disability as a matter of law, and not whether she had failed to do so as a matter of law. Thus, because the record indicated that Ms. Williams "could still brush her teeth, wash her face, bathe," and perform some other routine tasks, the Court held that the evidence failed to show "such severe restrictions in the activities that are of central importance to most people's daily lives that they establish a manual task disability as a matter of law."[169]

On its face, the unanimous *Toyota* opinion, like the *Sutton* majority opinion, leaves open the continuing question of the deference due the EEOC disability regulations. On a more insidious level, however, the *Toyota* opinion accords no deference at all to the "substantially limits" regulation. By taking the regulation as silent on the issue before it, the Court simply acted as if the regulation never existed. In doing so, the Court gave itself license to ignore applicable regulatory language and to substitute its own language to reflect the so-called plain meaning of statutory terms. For example, the Court recited EEOC language calling for analysis of "condition, manner, or duration" of the performance of a major life activity,[170] but it never analyzed these aspects of Ms. Williams's performance of various manual tasks. Similarly, the Court recited EEOC language indicating that an impairment's "permanent or long-term impact" is one of several factors relevant to substantial limitation,[171] but its opinion then morphed this factor into an absolute requirement, stating flatly that the "impairment's impact must . . . be permanent or long term."[172] Finally, the Court recited EEOC language equating substantial limitation with "[s]ignificant[]" restriction,[173] but the Justices—after winding their way through dictionary definitions of "substantial" that do not contain the word "severe"[174]—somehow

167. *See id.* at 200-03.

168. *Id.* at 202.

169. *Id.* The Court refrained from deciding whether to reinstate the district court's grant of summary judgment to Toyota on the issue of disability because Toyota had failed to seek summary judgment in its petition for certiorari. *Id.*

170. *Id.* at 196.

171. *Id.*

172. *Id.* at 198.

173. *Id.* at 195 (first brackets in original).

174. *See id.* at 196-97.

ratcheted this element upward to a "severe" restriction.[175] Conveniently, the Court never cited HEW guidance stating that an impairment need not be "severe, permanent, or progressive" to be substantially limiting for purposes of the Rehabilitation Act's disability definition.[176] The express language of the ADA instructs courts to interpret that statute as broadly as HEW had interpreted the Rehabilitation Act,[177] but the plain meaning of this bit of ADA text apparently did not interest the *Toyota* Court.

Thus, without invoking *Chevron* or *Skidmore*—either of which would have indicated that the EEOC "substantially limits" regulation merits great deference, as explained in Part III.C. above—the Court in *Toyota* implicitly decided to show no deference at all to a reasonable regulatory definition that had passed through the entire notice-and-comment process. Indeed, the Court replaced the *Chevron* two-step with a move that one could label "the *Toyota* sidestep."

V. WATCHING THE SIDESTEP CATCH ON: LOWER COURT APPLICATIONS OF *TOYOTA*

Actions speak louder than words. While the *Toyota* court explicitly refused to decide the level of deference due the EEOC's disability regulations, its complete disregard of the agency's "substantially limits" regulation has not gone unnoticed by the lower federal courts in the last year. Indeed, several federal circuits, relying on the *Toyota* Court's apparent replacement of the EEOC's "condition, manner, or duration" standard with the Court's own dictionary-derived "severe restriction" standard, immediately viewed *Toyota* as creating a new "substantially limits" analysis. The Seventh Circuit, for example, was quick to observe that *Toyota* had effectively enunciated a new definition of "substantially limits" and thereby "established a higher threshold for the statute than some had believed it contained."[178] Similarly, the Eighth Circuit explained in a 2003 decision that it would henceforth apply the more demanding Supreme Court standard to its "substantially limits" analysis, rather than "the less-restrictive EEOC definition."[179] The United States District Court for the Northern District of Alabama

175. *Id.* at 202.

176. 42 Fed. Reg. 22,676, 22,685-86 (May 4, 1977) (codified at 45 C.F.R. § 84 app. A, at 350 (2003)).

177. *See supra* note 36 and accompanying text.

178. Dvorak v. Mostardi Platt Assocs., Inc., 289 F.3d 479, 484 (7th Cir. 2002).

179. Fenney v. Dakota, Minn. & E. R.R. Co., 327 F.3d 707, 715 (8th Cir. 2003).

has also noted this recent change, declaring that "[o]n January 8, 2002, . . . the Supreme Court significantly altered the definition of 'substantially limits a major life activity.'"[180] The court went on to add that *Toyota*'s interpretation of this language "creates additional obstacles" for plaintiffs alleging workplace discrimination.[181]

In several circuits, a retreat from the EEOC's "condition, manner or duration" standard, in favor of *Toyota*'s "severe restriction" standard, is making it noticeably harder for plaintiffs to seek coverage under the ADA in employment discrimination cases. For example, in *EEOC v. United Parcel Service, Inc.*,[182] the Ninth Circuit reversed a district court's holding that two of three job applicants were disabled under the first prong of the ADA's disability definition because they had actual impairments that substantially limited their ability to see. Both applicants had no vision in the right eye, and both therefore failed to pass the vision protocol that United Parcel Service ["UPS"] administered to candidates for driving jobs.[183] The United States District Court for the Northern District of California held that the two applicants' vision impairments constituted actual disabilities under the first prong of the disability definition.[184] The court also held that all three applicants satisfied the second ("regarded as") prong because UPS had regarded all people who failed the protocol as substantially limited in seeing, even though some of them could see well enough to drive safely.[185]

On appeal, the Ninth Circuit revisited the issue of whether the first two applicants had an actual disability under the first prong of the statutory definition. Applying *Toyota,* the court held that for monocularity to qualify as a disability, it "must prevent or severely restrict use of [an individual's] eyesight compared with how unimpaired individuals normally use their eyesight in daily life."[186] One of the two applicants, James Francis, had produced evidence that he lacked stereopsis, the ability to combine two retinal images into one, and therefore had difficulty judging depth perception within a few feet. Although he could engage in many daily activities without difficulty, the lack of stereopsis forced him to rely on his sense of touch and on other cues when performing tasks such as putting a screwdriver on a screw, putting a pot on a stove burner, or

180. Stedman v. Bizmart, Inc., 219 F. Supp. 2d 1212, 1220 (N.D. Ala. 2002).

181. *Id.* at 1221.

182. 306 F.3d 794, 797 (9th Cir. 2002).

183. *Id.* at 799.

184. 149 F. Supp. 2d 1115, 1157 (N.D. Cal. 2000), *aff'd in part and reversed in part*, 306 F.3d 794 (9th Cir. 2002).

185. *Id.* at 1157-58.

186. 306 F.3d at 802.

hammering a nail.[187] The other applicant, Stephen Ligas, had similar problems with depth perception and had trained himself to "focus[] in" when tying shoes, climbing stairs, and putting keys in locks.[188] In the district court, the fact that Ligas and Francis perceived near-field objects in a different manner than people without visual impairments weighed in favor of a finding of disability under the EEOC's "substantially limits" standard, even though both men could perform many day-to-day tasks without difficulty. Indeed, the district court emphasized that "a touch-and-feel substitute for stereopsis does *not* improve vision itself any more than braille would cure blindness. Accordingly, the fact that claimants lead normal lives proves little."[189] While the district court never cited the EEOC's "condition, manner, or duration" test in holding that Ligas and Francis were substantially limited in seeing, the court's emphasis on the unusual methods the men had developed to perceive near-field objects coincided with the EEOC's prescribed analysis.

Applying *Toyota*, however, the Ninth Circuit held that neither Francis nor Ligas had an actual disability under the ADA definition. The appellate court reasoned that because both men could still perform tasks not requiring near-field perception and because they used various compensating strategies when performing near-field work, they used their "eyesight as most people do for daily life" and were thus not substantially limited in seeing.[190] As for the definition's "regarded as" prong, the Ninth Circuit remanded the case to the district court, declaring that the district court's findings on that issue had been unclear because that court had performed its analysis "without benefit of *Toyota*."[191] The appellate court stated that under *Toyota*, the proper inquiry on remand would concern whether UPS incorrectly regarded the applicants' impairments as "substantially and significantly limit[ing] their overall seeing for purposes of daily life."[192] The court also noted that the company's belief that the applicants could not drive its trucks safely, standing alone, would not satisfy this standard, and that the accuracy of that belief was not relevant. Therefore, on remand, the district court's original emphasis of UPS's unsupported assumptions regarding the driving abilities of people with monocular vision would be largely irrelevant, even though the district court had noted that such

187. *Id.* at 799.
188. *Id.*
189. 149 F. Supp. 2d at 1156 (citation omitted) (emphasis in original).
190. 306 F.3d at 803.
191. *Id.* at 806.
192. *Id.*

assumptions "constitute[] the type of stereotypical prejudice the ADA sought to end."[193]

Because the district court in *UPS* had also held that Ligas and Francis were not qualified for the driving jobs for which they had applied,[194] the issue of their status as individuals with disabilities may seem at first blush to have little consequence. However, because it directly governs coverage under the ADA, the disability issue is always critical; if a plaintiff is held not to be disabled, the defendant will not have to defend its policies, which may well have discriminatory effects. The district court in *UPS*, for example, carefully analyzed the possible discriminatory effects of the company's vision protocol after finding all three applicants disabled for ADA purposes. In doing so, the court found that the protocol "swept too broadly and was not significantly correlated with the ability to drive safely" and that "less discriminatory alternatives exist[ed] that would serve UPS's needs without diluting safety."[195] The court also analyzed the basic qualifications of each applicant, taking into account the fact that the drafter of UPS's own protocol believed that "individuals without stereopsis could operate commercial vehicles without danger" under certain circumstances.[196] While the district court found Francis and Ligas unqualified for driving jobs, it ordered UPS to move the third applicant, who had failed the protocol because he had impaired vision in one eye, to the company's advanced level of training and testing.[197] Thus, when the Ninth Circuit ruled on appeal that Francis and Ligas were not actually disabled and then imposed a more stringent "regarded as" test, the court shifted the focus of the case from the propriety of UPS's policies to the applicants' right to question those policies. In this regard, the effect of the court's ruling on the third applicant is particularly unfortunate; the Ninth Circuit made it highly unlikely that he would ever be able to present evidence of the overbreadth of UPS's vision protocol on remand, even though the district court had found him potentially qualified for a driving job with UPS. Indeed, the Ninth Circuit never addressed any issues regarding the applicants' qualifications or the necessity of the vision protocol, even though the parties had raised such issues on appeal. Apparently, the court had such confidence that all three applicants would be found not "regarded as disabled" on remand that it viewed any further analysis of the case as a wasteful exercise.

193. 149 F. Supp. 2d at 1158 (citing S. REP. NO. 101–116, at 37 (1989)).
194. *Id.* at 1159.
195. 306 F.3d at 800.
196. *Id.*
197. *See* 149 F. Supp. 2d at 1174.

The restricting effects of the *Toyota* standard are also apparent in the Eighth Circuit case of *Fenney v. Dakota, Minnesota & Eastern Railroad Company*.[198] In *Fenney*, the court faced the question of whether the plaintiff, who had limited use of his right arm and was missing his right thumb and half his right middle finger,[199] had mustered enough evidence of a disability to defeat summary judgment. The *Toyota* standard required this plaintiff to show that his impairments *"prevent[ed] or severely restrict[ed]"* him in the major life activity at issue: caring for oneself.[200] Under the EEOC's "condition, manner, or duration" standard, evidence relating to the manner in which the right-handed plaintiff managed to perform tasks such as dressing, preparing meals, and shaving would have been highly relevant, as would evidence regarding the amount of time he required for these tasks. Indeed, the plaintiff's evidence showed that he went about these acts in a very different manner than do people who have the full use of both arms and hands, and that he required significantly more time to perform them.[201] Thus, under the EEOC standard, the plaintiff would have presented an easy case for ADA coverage. Under the more restrictive *Toyota* standard, however, the plaintiff just barely escaped summary judgment on the issue of disability. The Eighth Circuit concluded that the evidence of disability was "thin," but that it managed to raise a factual issue as to whether his restrictions were sufficiently severe.[202]

The Fifth Circuit, in *Waldrip v. General Electric Co.*,[203] has also registered the restrictive effects of *Toyota* on the ADA's disability definition. The case concerned a plaintiff with chronic pancreatitis, who claimed that the disease substantially limited his major life activities of eating and digesting.[204] In holding that the disease satisfied the "impairment" element of the statutory definition, the Fifth Circuit cited the EEOC disability regulations but was careful to note that it did not accord them *Chevron* deference. The court took its cue on this point from *Toyota* and other "recent decisions of the Supreme Court [that] strongly suggest that the regulations are not entitled to such deference."[205] Apparently, this lack of deference

198. 327 F.3d 707, 714 (8th Cir. 2003).

199. *Id.* at 710.

200. *Id.* at 714 (quoting Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002)) (italics added in *Fenney*).

201. *Id.* at 715-16.

202. *Id.* at 716.

203. 325 F.3d 652, 654 (5th Cir. 2003).

204. *Id.* at 655.

205. *Id.* at 655 n.1 (citing *Toyota*, 534 U.S. at 194; Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 563 n.10 (1999); Sutton v. United Air Lines, Inc.,

led the Fifth Circuit to ignore completely the EEOC's "substantially limits" regulation. The court never cited the regulation and never analyzed the plaintiff's activities in terms of condition, manner, or duration. Instead, in analyzing whether the plaintiff's disease was substantially limiting, the court cited *Toyota* for the proposition that "[t]he effects of an impairment must be severe to qualify as a disability under the ADA."[206] Applying this standard, the court held that the plaintiff was not disabled because the effects of his disease were not always severe enough to cause him to miss work. According to the Fifth Circuit, the plaintiff's occasional flare-ups were merely temporary effects that did not meet the Supreme Court's "exacting standard."[207] In so holding, the Fifth Circuit was apparently lumping chronic pancreatitis in with "the countless aches and pains from which most of us unhappily suffer."[208]

In addition to demonstrating a retreat from the EEOC's "condition, manner, or duration" standard, all of the opinions described above have applied the *Toyota* "prevents or severely restricts" standard to cases involving major life activities other than manual tasks, even though the *Toyota* Court stated explicitly that its analysis applied only to that particular activity.[209] Indeed, all of the federal circuits explicitly addressing the issue have decided that the *Toyota* "substantially limits" standard applies to all major life activities across the board.[210] These holdings have a certain logic: Nothing in the ADA suggests that the meaning of the word "substantially" would depend upon which major life activity is being analyzed. Nevertheless, the application of the *Toyota* standard to all major life activities simply highlights the perverse manner in which the standard came about in the first place. The Supreme Court in *Toyota* sidestepped the original EEOC definition of "substantially limits" because that definition was generally

---

527 U.S. 471, 478-80 (1999)).

206. *Id.* at 655.

207. *Id.* at 656-57.

208. *Id.* at 654.

209. *See Toyota*, 534 U.S. at 192-93 ("We granted certiorari to consider the proper standard for assessing whether an individual is substantially limited in performing manual tasks .... We express no opinion on the working, lifting, or other arguments for disability status that ... were not ruled upon by the Court of Appeals.") (internal citation omitted).

210. *See, e.g.*, Mack v. Great Dane Trailers, 308 F.3d 776, 781 (7th Cir. 2002) ("We see no basis for confining *Toyota*'s analysis to only those cases involving the specific life activity asserted by the plaintiff in that case."); EEOC v. United Parcel Serv., Inc., 306 F.3d 794, 802-03 (9th Cir. 2002) (applying the *Toyota* standard to the major life activity of seeing); Mulholland v. Pharmacia & Upjohn, Inc, 52 Fed. Appx. 641, 644-45 (6th Cir. 2002) (applying the *Toyota* analysis to the major life activity of learning).

applicable to all activities and thus supposedly "silent" as to the specific major life activity of performing manual tasks.[211] Thus, for no apparent reason, the *Toyota* Court implied that each major life activity might require its own specific interpretation of "substantially limits." Ironically, however, now that the circuit courts are applying *Toyota*'s new "substantially limits" definition across the board, that definition has become nothing more than a new general standard, applicable to all major life activities.

VI. SAVING THE LAST DANCE: SALVAGING WHAT'S LEFT OF THE EEOC'S DISABILITY REGULATIONS

Despite the retreat from the EEOC's "condition, manner, or duration" standard described above, hope remains, even after *Toyota*, for ADA plaintiffs who have learned to live with their impairments by developing new and different ways of performing major life activities. In this post-*Toyota* world, however, advocates representing such plaintiffs may need to reassess or re-emphasize certain strategies for demonstrating that their clients experience substantial limitations and are thus disabled. The strategies below represent the best course of action for such advocates at this point.

A. Continuing to Assert the Validity of the EEOC Regulations Defining Disability

Once presented with the issue squarely, a federal appellate court will most likely rule that the EEOC's disability regulations are either valid legislative rules, entitled to *Chevron* deference, or that they are interpretive rules that deserve a high degree of deference under *Skidmore*.[212] Indeed, as yet, the issue has not been presented squarely to a federal appellate court primarily because litigants have so often agreed, reasonably, to take the regulations as valid.[213] Now that *Toyota* has interpreted the term "substantially limits" in sharp contrast to the EEOC's standard, however, much more is riding on the continued applicability of the EEOC standard than ever before. As a result, litigants may have a new interest in disputing or supporting the standard's validity. Once disability rights advocates are pressed on this issue, their arguments are likely to lead to the establishment of helpful precedent that both reinvigorates the "condition, manner or duration" standard and, simultaneously, limits the application of *Toyota*'s narrower "prevents or severely restricts" standard.

---

211. *See supra* note 155 and accompanying text.

212. *See supra* notes 120-36 and accompanying text.

213. *See, e.g., Toyota*, 534 U.S. at 194; Sutton v. United Air Lines, Inc., 527 U.S. 471, 480 (1999).

B. *Arguing that the* Toyota *Standard Should be Limited to Cases Concerning the Major Life Activity of Performing Manual Tasks*

Despite some circuits' extension of *Toyota*'s "prevents or severely restricts" standard to a variety of major life activities,[214] the opinion by its own terms was limited to cases involving the performance of manual tasks, as opposed to working, lifting, or other activities.[215] While no circuit has explicitly refused to apply *Toyota* to cases involving other activities,[216] at least one has done so implicitly, and has thereby resuscitated the EEOC's "condition, manner, or duration" standard.

In *Gillen v. Fallon Ambulance Service, Inc.*,[217] the First Circuit addressed a claim of employment discrimination asserted by a woman who had applied for a position as an emergency medical technician ["EMT"]. The plaintiff, Kelly Gillen, was a "genetic amputee" whose left arm ended a few inches below her elbow.[218] Despite her impairment, Ms. Gillen completed the necessary

---

214. *See supra* notes 178-210 and accompanying text.

215. *Toyota*, 534 U.S. at 192-93.

216. A few have continued to apply the EEOC standard, however. The Tenth Circuit, for example, has expressly adopted the "substantially limits" regulation as binding precedent and has invoked it, along with the *Toyota* standard, in a recent case. *See* Velarde v. Associated Reg'l & Univ. Pathologists, 61 Fed. Appx. 627, 629-30 (10th Cir. 2003). However, because the plaintiff in that case presented no evidence indicating how his impairment made him less able than the average person to perform specific activities, *id.* at 630, the court did not have occasion to apply the EEOC's "condition, manner, or duration" test or to explain how it might relate to the *Toyota* standard.

Similarly, the Third Circuit, in explaining the "substantially limits" element of the disability definition, has cited both the *Toyota* "prevents or severely restricts" standard and the EEOC "condition, manner, or duration" language back to back in the same paragraph. Gagliardo v. Connaught Labs., Inc., 311 F.3d 565, 569 (3d Cir. 2002).

Unfortunately, this opinion, too, fails to synthesize the two standards, perhaps because the plaintiff's permanent and incurable multiple sclerosis presented a fairly easy case on the disability issue that did not require long and detailed analysis. The court devoted only a paragraph to the analysis of whether the plaintiff's disease substantially limited her ability to concentrate and remember. *See id.* at 569-70. In that paragraph, the court referred neither to the EEOC's "condition, manner, or duration" language nor to *Toyota*'s "prevents or severely restricts" language. *See id.* In addition to the plaintiff's strong medical evidence, the procedural posture of the case on appeal obviated the need for a more detailed analysis of this issue. The appeal followed a jury verdict for the plaintiff and a dismissal of the defendant's motion for judgment as a matter of law, so the appellate court needed to decide only whether the evidence, viewed in the light most favorable to the plaintiff, could support a finding in the plaintiff's favor. *See id.* at 568.

217. 283 F.3d 11 (1st Cir. 2002).

218. *Id.* at 17.

training and passed both the written and practical portions of her certification examination. She applied to Fallon Ambulance Service for an EMT position, and the company offered her a job, contingent upon her passing its physical exam.[219] The examining physician certified Ms. Gillen's health but told her that because of her impairment, she would have to come back and take a strength test, which would measure her ability to perform the lifting tasks necessary to the job.[220] Before she could return, however, the physician's supervisor disqualified Ms. Gillen upon hearing of her impairment and declared that the strength test would therefore be unnecessary.[221] Ms. Gillen filed a discrimination suit against Fallon under the ADA. The United States District Court for the District of Massachusetts granted summary judgment to Fallon on the grounds that Ms. Gillen was not disabled, and, at any rate, not qualified for the EMT position.[222] (Interestingly, while waiting for the First Circuit to hear her appeal, Ms. Gillen found an EMT position with another company, where she worked successfully for years with no special accommodations.[223])

On appeal, the First Circuit reversed the district court's grant of summary judgment and put its own gloss on the Supreme Court's recent questioning of the EEOC's authority to interpret the ADA's disability definition. Leaving open the possibility of an implicit delegation of authority, the First Circuit cited both *Toyota* and *Sutton* for the proposition that "Congress did not *explicitly* delegate authority to refine the meaning of [disability]" to any agency.[224] The court then spoke approvingly of the EEOC's rulemaking on this topic, noting that the agency had "seized the initiative and promulgated regulations aimed at clarifying the statutory terminology."[225] Thus, the court proceeded to apply the EEOC "substantially limits" standard to Ms. Gillen, who was able to perform many physical tasks despite her missing hand and forearm. In setting forth its analysis, the court explained that a plaintiff's

219. *Id.* at 17-18.
220. *Id.* at 18.
221. *Id.* at 18-19.
222. *Id.* at 20.
223. *Id.* at 19.
224. *Id.* at 21 (emphasis added) (citing Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 194 (2002); Sutton v. United Air Lines, Inc., 527 U.S. 471, 479 (1999)). The word "explicitly" is the First Circuit's own gloss on the Supreme Court's comment; it does not appear in the text of the pronouncement in *Toyota*, *see* 534 U.S. at 194, or *Sutton*, *see* 527 U.S. at 479. Nevertheless, this gloss represents one reasonable interpretation of the Court's language. *See supra* Part III.C.
225. *Gillen*, 283 F.3d at 21.

sheer ability to accomplish a given task is not dispositive of whether she is disabled:

> The focus is not on whether the individual has the courage to participate in the major life activity despite her impairment, but, rather, on whether she faces significant obstacles when she does so. The EEOC's emphasis on "condition, manner, or duration" in contrasting how a disabled person performs an activity and how a member of the general public performs that same activity dovetails with this formulation.[226]

Thus, even though Ms. Gillen had trained herself to lift up to ninety pounds with her one hand, the First Circuit still found that the record could support a finding that she was substantially limited in lifting and thus disabled. The court reasoned that even if she could lift as much weight as some non-disabled individuals, her ability to do so depended on "an array of techniques" she had developed to compensate for her impairment.[227] As a result, "the manner in which she lifts and the conditions under which she can lift will be significantly restricted because she only has one available limb."[228]

Overall, in analyzing Ms. Gillen's impairment, the First Circuit downplayed the effects of *Toyota, Sutton*, and other Supreme Court precedent: "When all is said and done . . . these decisions do not alter the usual standard," which requires a plaintiff to "'proffer evidence from which a reasonable inference can be drawn that [a major life] activity is substantially or materially limited.'"[229] In elaborating on this standard, the First Circuit explained that a plaintiff would need to provide evidence of personal limitation, but that such evidence "need not necessarily be composed of excruciating details."[230] As a result, Ms. Gillen's general diagnosis, coupled with some evidence regarding her limited ability to use her left arm, sufficed to allow her to avoid summary judgment on the issue of disability.[231]

Significantly, the *Gillen* opinion never quotes *Toyota*'s characterization of a substantially limiting impairment as one that "prevents or severely restricts" a major life activity. The First

---

226. *Id.* at 22.

227. *Id.* at 23.

228. *Id.*

229. *Id.* at 24 (alterations in original) (quoting Snow v. Ridgeview Med. Ctr., 128 F.3d 1201, 1207 (8th Cir. 1997)).

230. *Id.*

231. *Id.* The First Circuit also noted that Ms. Gillen had introduced sufficient evidence to raise jury questions regarding her qualification for the Fallon EMT job and Fallon's motivation for disqualifying her. *See id.* at 33.

Circuit presumably ignored this language because it viewed the *Toyota* standard as applicable only to the major life activity of performing manual tasks. If so, then the *Gillen* court correctly recognized that the EEOC's definition of "substantially limits"—including its "condition, manner, or duration" language—should apply generally to all other major life activities. Indeed, had the *Gillen* court applied *Toyota*'s "severe restriction" standard and ignored the EEOC's focus on the condition and manner of the plaintiff's ability of lift, it may well have affirmed summary judgment for Fallon on the disability issue; a woman who can lift ninety pounds is arguably not severely restricted in lifting, even if she is missing her left forearm and hand. In addition, even the second and third prongs of the disability definition may not have applied to Ms. Gillen, if the First Circuit had interpreted those prongs in light of *Toyota*. Under the second prong, *Toyota* would have required Ms. Gillen to demonstrate a record of substantial limitation—i.e., a severe restriction—in lifting for purposes of daily life. Given her remarkable ability to compensate for her impairment throughout her lifetime, this showing would have been difficult to make. Similarly, under the definition's third prong, *Toyota* would have required Ms. Gillen show that Fallon regarded her as being severely restricted in lifting tasks for purposes of her daily life.[232] Although the company regarded her as unable to perform the heavy lifting tasks required of an EMT, it apparently did not view her as severely restricted with respect to everyday lifting tasks that most people perform around the house. Thus, had the First Circuit in *Gillen* filtered its analysis through the *Toyota* standard and de-emphasized the EEOC's "condition, manner, or duration" analysis, it likely would have concluded that a person with a missing hand and forearm did not have a disability for purposes of the ADA. This result would surely have contravened legislative intent regarding the scope of the statute's coverage, even if it followed the literal language of *Toyota*.[233] *Gillen* thus demonstrates that, in many cases,

232. The Supreme Court has determined that the "regarded as" prong of the definition should be read literally; under this literal reading, plaintiffs must prove that some person regarded them as being unable to perform a major life activity or severely restricted in performing it. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999).

233. While the ADA's legislative history does not specifically state that a missing limb should ordinarily qualify as a disability, Congress clearly intended an "anatomical loss" to qualify as an "impairment" for ADA purposes. *See* H.R. REP. NO. 101-485, pt. 3, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 450. Surely the lack of a hand and forearm is one of the most limiting types of anatomical loss. It is therefore difficult to imagine that Congress did not intend such a loss to qualify as a disability.

it may be not only possible[234] but critical for disabled plaintiffs to persuade courts to favor the EEOC standard over the *Toyota* standard in cases involving activities other than the performance of manual tasks.

C. *To the Extent that* Toyota*'s "Prevents or Severely Restricts" Standard Has Already Supplanted the EEOC Standard, Focusing upon the "Record of" Prong of the ADA's Disability Definition*

In federal circuits where *Toyota*'s "prevents or severely restricts" standard has already supplanted the EEOC's "condition, manner or duration" standard, disabled plaintiffs will of course have more difficulty proving that they have impairments that substantially limit major life activities. In such a circuit, an ADA plaintiff would have to prove under the first prong of the ADA's disability definition the existence of an actual impairment that prevented or severely restricted some specific major life activity. The definition's third prong, which concerns perceived disabilities, would not offer much help to such a plaintiff, because he or she would still have to demonstrate that someone believed that the plaintiff had an impairment that prevented or severely restricted some specific major life activity.[235]

The definition's second prong, however, might offer some hope to a plaintiff in a circuit applying the strict *Toyota* standard. Under the second prong, a plaintiff can prove a disability by demonstrating that he or she has a record of an impairment that substantially limited a major life activity.[236] Even if *Toyota* would require a plaintiff, under the "record of" prong, to show that the impairment at one time prevented or severely restricted a major life activity, many litigants might be able to overcome this obstacle. For example, the plaintiff in *Gillen*[237] may have been able to show that her lack of a hand and forearm severely restricted her ability to lift (and, perhaps, to perform other activities) before she trained herself to lift and carry heavy loads with one hand. Similarly, the two job

234. Mark C. Weber has traced a pattern of repeated "retrenchment and expansion" of disability rights among courts in recent decades, noting that lower courts have often found ways to avoid the harsh repercussions of restrictive Supreme Court holdings. *See The Americans with Disabilities Act and Employment: A Non-Restrospective*, 52 ALA. L. REV. 375, 386 (2000). If Professor Weber's observation continues to hold true, other courts may well join the First Circuit in declining to apply *Toyota*'s "prevents or severely restricts" standard to cases involving major life activities other than the performance of manual tasks.

235. *See supra* note 232.

236. 42 U.S.C. § 12102(2) (2000).

237. *See supra* notes 217-31 and accompanying text.

applicants in *UPS*,[238] who suffered from monocularity, presumably experienced severe restrictions in performing a wide variety of activities before they trained themselves to make adjustments for this vision impairment. Therefore, in circuits where the *Toyota* standard reigns supreme, the "record of" prong may represent a plaintiff's best hope of proving a disability.[239]

VII. CONCLUSION

A close examination of the EEOC's regulations defining disability for purposes of Title I of the ADA, in light of applicable administrative law principles, reveals that the regulations are not only valid but also deserving of a high degree of deference. The Supreme Court therefore acted inappropriately in *Toyota* when it supplanted the regulations' "condition, manner or duration" standard with the Court's own "prevents or severely restricts" test. Fortunately, however, the *Toyota* holding leaves disability rights advocates free to argue for the continued application of the broader EEOC standard in a wide variety of distinguishable cases. Because the EEOC standard, like all of its disability regulations, is the product of a valid administrative rulemaking process, and because it coincides with the broad remedial purpose of the ADA, disability advocates would be foolish to abandon it as a mechanism for proving disabled status.

238. *See supra* notes 182-97 and accompanying text.

239. Professor Bonnie Tucker has similarly suggested that the "record of" prong may be the best means of proving a disability for a plaintiff who uses mitigating measures to overcome the limiting effects of an impairment, now that the Supreme Court in *Sutton* has held that courts must take the effects of such measures into account when assessing substantial limitation. Tucker, *supra* note 26, at 372.

***