IN THE SUPREME COURT OF THE UNITED STATES

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TOYOTA MOTOR MANUFACTURING, :

KENTUCKY, INC., :

Petitioner :

v. : No. 00-1089

ELLA WILLIAMS. :

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Washington, D.C.

Wednesday, November 7, 2001

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

APPEARANCES:

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

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

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

C O N T E N T S

P R O C E E D I N G S

(10:02 a.m.)

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

Mr. Roberts.

ORAL ARGUMENT OF JOHN G. ROBERTS, JR.

ON BEHALF OF THE PETITIONER

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

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

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

major life activity of performing manual tasks in general.

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

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

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

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

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

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

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

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

main reason.

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

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

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

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

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

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

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

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

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

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

QUESTION: Should we address that, or because it

was not addressed below, leave that alone?

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

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

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

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

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

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

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

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

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

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

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

MR. ROBERTS: Certainly.

QUESTION: Even though he only mentioned watchmaking.

MR. ROBERTS: Certainly.

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

MR. ROBERTS: Well --

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

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

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

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

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

MR. ROBERTS: Oh, no.

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

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

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

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

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

and then seeing if it can be accommodated.

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

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

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

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

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

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

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

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

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

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

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

MR. ROBERTS: That's right.

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

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

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

MR. ROBERTS: With respect to working --

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

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

QUESTION: Yes.

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

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

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

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

the required inquiry under -- under manual tasks?

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

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

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

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

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

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

QUESTION: Very well, Mr. Roberts.

Ms. McDowell, we'll hear from you.

ORAL ARGUMENT OF BARBARA B. McDOWELL

ON BEHALF OF THE UNITED STATES

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

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

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

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

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

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

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

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

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

MS. McDOWELL: That may be correct, Justice

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

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

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

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

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

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

(Laughter.)

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

MS. McDOWELL: That's correct.

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

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

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

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

QUESTION: Right. And had she been a roofer

before?

MS. McDOWELL: No, Your Honor.

QUESTION: I didn't think so.

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

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

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

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

QUESTION: Ms. McDowell, in looking at the

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

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

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

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

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

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

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

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

QUESTION: Yes, that wrecks it.

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

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

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

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

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

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

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

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

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

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

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

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

MS. McDOWELL: May I answer, Your Honor?

QUESTION: Yes.

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

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

Mr. Rosenbaum, we'll hear from you.

ORAL ARGUMENT OF ROBERT L. ROSENBAUM

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

QUESTION: But not the reasoning?

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

QUESTION: Well, where do you disagree?

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

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

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

(Laughter.)

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

(Laughter.)

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

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

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

MR. ROSENBAUM: Your Honor --

QUESTION: I -- I think --

MR. ROSENBAUM: I'm sorry.

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

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

QUESTION: -- come close to saving it.

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

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

MR. ROSENBAUM: That's correct.

(Laughter.)

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

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

QUESTION: It's x'ed out now.

(Laughter.)

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

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

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

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

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

And the regulations say what substantially limited means. It means that they are significantly restricted as to the condition, manner, or duration -- or -- that is disjunctive, not conjunctive -- 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 --

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

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

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

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

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

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

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

MR. ROSENBAUM: I think we are there.

QUESTION: We are there. Good.

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

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

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

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

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

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

that doesn't affect other areas of life.

MR. ROSENBAUM: Well, of course.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

handicapped that this piece of legislation was addressing? And that's really the question here.

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

(Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. ROSENBAUM: If it --

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

MR. ROSENBAUM: I -- I certainly --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. ROSENBAUM: Excuse me?

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

MR. ROSENBAUM: No.

QUESTION: -- that their work be arranged --

MR. ROSENBAUM: No, no. There are

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

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

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

MR. ROSENBAUM: You -- you inevitably --

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

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

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

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

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

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

MR. ROSENBAUM: Correct.

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

MR. ROSENBAUM: Not in total. They --

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

MR. ROSENBAUM: They want --

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

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

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

QUESTION: It goes to a jury.

MR. ROSENBAUM: It goes to the jury.

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

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

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

QUESTION: Thank you, Mr. Rosenbaum.

MR. ROSENBAUM: Thank you.

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

REBUTTAL ARGUMENT OF JOHN G. ROBERTS, JR.

ON BEHALF OF THE PETITIONER

MR. ROBERTS: Thank you, Your Honor.

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

Thank you, Your Honor.

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

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

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

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

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

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

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

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

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Roberts.

The case is submitted.

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