How the Supreme Court's Toyota Decision Impacted the View of EEOC'S Regulatory Authority

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I. INTRODUCTION

This Article contains an analytical review of two points of major significance involving employment discrimination claims filed under the Americans with Disabilities Act (ADA). In 1991, the Equal Employment Opportunity Commission (EEOC) issued regulations regarding the ADA, triggering a large debate about their significance. This Article discusses the level of deference that courts should afford these EEOC regulations. In addition, this Article discusses the most recent Supreme Court decision involving the EEOC's regulations regarding the ADA.

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While the EEOC was granted authority by Congress to issue regulations to carry out Title I of the Americans with Disabilities Act, the EEOC was never granted authority to issue regulations defining or interpreting the term “disability” as listed in the ADA.\(^1\) Despite this fact, the EEOC has issued disability regulations that interpret the ADA with respect to the meaning of the term disability.\(^2\) This action has caused debate over the scope of the regulatory authority granted to the EEOC. Moreover, the Supreme Court has “muddied the waters” in noting that claims under the ADA should be processed consistently with the analytical approach developed in processing claims of discrimination filed under the Rehabilitation Act of 1973.\(^3\) However, since the EEOC was not authorized to define the term disability, there has been a great deal of speculation as to the appropriate level of deference to afford any EEOC regulation regarding disability discrimination claims.

In order to more clearly ascertain what Congress intended when it granted the EEOC regulatory authority and how that intention affects the level of deference afforded to the EEOC’s regulations, Part I of this Article provides a detailed analysis of the legislative history of the ADA and its implementing regulations. Congress, in enacting the ADA, closely followed a practice utilized during the enactment of Title VII of the Civil Rights Act of 1964. This is evidenced by the fact that both pieces of legislation use broad language regarding coverage under their respective provisions. In Part II, the Article discusses the historical and political context in which the ADA was created, thereby providing better insight into how the EEOC regulations evolved and how they should be applied. Part III of this Article briefly addresses certain aspects of administrative law dealing with the various levels of deference afforded to the regulations issued by an executive agency interpreting an Act of Congress. While parties have debated these issues since the passage of the ADA, the debate reached a crescendo in 2002.

On January 8, 2002, the Supreme Court issued its most recent decision on this subject in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.\(^4\) Part IV of this Article discusses the questions generated by *Toyota* that continue to confound the legal community and disturb disability advocates. In *Toyota*, the Court was asked to determine whether a worker at a car manufacturing plant was disabled under the ADA based on certain limitations the employee suffered as a result of a physical impairment. The Court addressed the specific limitations of the employee’s major life activities and assessed whether those limitations were substantial. The

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2. *See infra* notes 84-85.
employee alleged that, among other things, her impairment substantially limited her major life activity of performing manual tasks. The Court concluded 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. This conclusion is inconsistent with the interpretation contained within the EEOC disability regulations. The EEOC had previously determined that a disabled person under the ADA was one who, among other things, suffered from a physical or mental impairment that substantially limited one or more of his or her major life activities. Therefore, many have formulated opinions regarding the legal significance of EEOC's regulatory authority based upon the Supreme Court's rationale in *Toyota*.

There is very little information available regarding the deference afforded to executive agencies and how such deference was considered by the Supreme Court in *Toyota*. Despite the extensive debate that transpires in the legal community on this issue, there has been little scholarly work addressing the arguments raised in the debate. In an effort to assist those who teach or practice in the area of disability discrimination, this Article argues that the EEOC was never granted regulatory authority to issue regulations defining disability, but that the regulations are still very important for the purpose of assisting courts to determine whether a litigant has a disability covered by the ADA. In fact, as discussed in Part IV of this Article, in their current state, the EEOC regulations regarding the definition of a disability should be granted *Skidmore* deference. In order to understand this conclusion, one must delve into the legislative history of the ADA to identify what Congress intended when it granted the EEOC regulatory authority over Title I of the ADA. A review of the history points out that Congress rejected a detailed draft of the ADA that specifically defined the sorts of impairments to be covered under the ADA. Congress instead passed a version of the ADA that mirrored previously enacted disability law. Congress chose to allow three different executive agencies to issue regulations that would provide the details necessary to implement the will of Congress regarding the ADA. Unbeknownst to most, this political decision has fueled the entire debate over the application of the EEOC's disability regulations to ADA claims. This Article also responds to critics of the *Toyota* decision regarding whether the decision is limiting the ability of plaintiffs to prove ADA claims. Finally, Part V of this Article provides future recommendations regarding ADA claims that will assist judges, litigants, and scholars.
II.
HISTORY OF THE AMERICANS WITH DISABILITIES ACT

Statutes and cases should be placed into their proper historical, social, economical, political, and legal context in order to facilitate a detailed understanding of the same. Consistent with this belief, it is important that any discussion of the meaning of the term "disability" as listed in the ADA must involve a detailed discussion of the history of the Act itself.

When President George Herbert Walker Bush signed the ADA into law, he did so in front of approximately 3,000 people. The size of the crowd at the signing of this law provides some insight into the significance of the legislation. In fact, President Bush proclaimed that the passage of the Act would "open up all aspects of American life to individuals with disabilities." The ADA is the most recent major piece of legislation passed by Congress to address the concerns of disabled individuals in their fight for fair treatment. One legal scholar placed the ADA among one of several pieces of federal legislation prohibiting discrimination on the basis of one's status. During the Civil Rights Movement many American citizens fought against the unfair treatment of persons based upon the color of their skin. This resulted in the enactment of the Civil Rights Act of 1964. This legislation prohibited discriminatory treatment against certain individuals based upon their membership in a certain racial, ethnic, gender, or religious classification. More specifically, Title VII of the Civil Rights Act of 1964 prohibited discrimination on the basis of race, color, religion, sex, or national origin; however, it did not prohibit discrimination on the basis of disability. Congress extended similar protections to disabled individuals when it passed the Rehabilitation Act of 1973.
A. Creation of the Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973 provides an explicit anti-discrimination provision which states that: "no otherwise qualified handicapped individual in the United States . . . shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." The language of Section 504 of the Rehabilitation Act is specifically patterned after Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. In fact, members of the Senate Labor and Public Welfare Committee simply borrowed the language for the Rehabilitation Act from Title VI (of the Civil Rights Act) and Title IX (of the Education Amendments). One unfortunate result of the use of this language is that the prohibition on discrimination contained in the Rehabilitation Act is limited to programs or activities receiving federal financial assistance. As a result, there were disabled employees working in the private sector left unprotected by the Act. In response to finding that disabled individuals had little recourse against discrimination in the workplace of private-sector employers, Congress sought to close the gap between the private and public sector by enacting the ADA. The ADA extended the protections of the Rehabilitation Act to employees in the private sector.

B. Rehabilitation Act—Development of Regulatory Terminology

In order to gain a better perspective on how the enactment and evolution of the ADA has affected the legal community’s understanding of its terms, we must look at the historical significance of those terms. Since the ADA’s language was taken from the Rehabilitation Act, we must first examine the meaning of the terms contained within the Rehabilitation Act. While the Rehabilitation Act’s language was largely borrowed from other federal legislation, thereby creating ease in passage of the Act, there was a great deal of meaning that was lost in the transition. For example, while the Rehabilitation Act contained the term “handicap,” the Act provided little explanation of the term’s meaning. The meaning of discrimination based on a handicap therefore developed through the interpretations of the agency charged with implementing the Rehabilitation Act, the Department of

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14. Id. at 99.
15. See id. at 98-99.
16. Hoffman, supra note 8, at 256.
17. Eichhorn, supra note 7, at 178.
Health, Education, and Welfare (HEW). This interpretive work of the agency in elaborating the meaning of a statutory term was very evident in the regulations drafted to implement Section 504 of the Rehabilitation Act by the HEW. The HEW was the predecessor to the current Department of Health and Human Services. According to Professor Chai Feldblum, those who drafted the HEW regulations "did not believe people with disabilities should be seen as objects of pity, charity, or rehabilitation." Professor Feldblum has also surmised that the drafters of the HEW regulations assumed that people with disabilities or handicaps "included the same range of people with strong abilities and weak abilities as any other group of people." As a result disabled or handicapped individuals "deserved the same right to participate in the mainstream of society, and the same respect, as did any other individual in society." The regulations also evidence a belief that handicapped individuals "were better able to function in society, including in the employment arena, than was often presumed by members of society, including employers." This belief led to the conclusion that individuals who suffer from physical or mental impairments are not necessarily unable to be productive members of the workforce. Since the impairments of the disabled may not necessarily prevent him or her from working, an individual with a disability might opt to work as opposed to receiving financial support from the government. In essence, it was not that individuals with disabilities could not work; instead, it was the stereotypes, myths, and fears about individuals with disabilities that often hampered their ability to be involved and advance in society. Moreover, the drafters of the HEW regulations recognized that the limitations resulting from an individual's disability to interact fully in society are often based upon the manner in which society is structured and not on the disability itself. As such, the drafters of the HEW regulations placed an affirmative obligation on employers who were recipients of federal financial assistance in order to compensate for some of the limitations created by society. These obligations "included making reasonable accommodations in employment, providing auxiliary aids and services, modifying policies and procedures in benefit programs, and creating physical access to

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18. Feldblum, supra note 13, at 99 (citing Richard K. Scotch, From Good Will to Civil Rights: Transforming Federal Disability Policy 20, 61-80 (1984)).
19. Id.
20. Id.
21. Id.
22. Id.
23. See id. at 99-100.
24. Id.
25. Id.
26. Id. at 100.
buildings."27 While the HEW regulations placed this obligation upon the recipient of federal funds, the obligations were not absolute. If the performance of the affirmative obligation placed an undue hardship or burden on the recipient and/or required the recipient to fundamentally alter the nature of its program, then the obligation was not required.28

Congress did not provide a specific or precise definition of the term "handicap" when it passed the Rehabilitation Act. Instead, Congress provided a broad definition of a "handicapped individual." A review of the definition of the term handicapped individual provided in the Rehabilitation Act provides a better understanding as to the confusion presented under the ADA. The Act defines a handicapped individual as "any individual who has a physical or mental disability which for such an individual constitutes or results in a substantial handicap to employment and can reasonably be expected to benefit in terms of employability from vocational rehabilitation services . . . ."29 As stated earlier, the ADA merely extended the protections of the Rehabilitation Act to employees in the private-sector.30 Therefore, the similarities between the legislative language and the language contained within the interpretive regulations is illuminating. In addition, it appears that Congress may have intended to omit specific definitions from the Rehabilitation Act and the ADA.

The Rehabilitation Act was patterned, in part, after the Civil Rights Act of 1964.31 A cursory review of the Civil Rights Act clearly evidences one glaring fact—Congress never defined the protected classes in the Act. There is no definition of race, color, national origin, sex, or religion contained within the Civil Rights Act of 1964. It is reasonable to conclude that Congress may have determined that definitions were not necessary since society would clearly be able to deduce the meaning of these terms. The status of disability law might have developed with very little confusion had Congress not instructed federal agencies to clarify the definition of a handicapped individual. In order to bring a successful claim under Title VII of the Civil Rights Act an individual must prove, for the most part, that their race, color, national origin, sex, or religion played a role in the decision-making process of their employer. They must prove that the employer's decision was based on their membership in one of the protected classes. It therefore seems to follow logically that claims under the Rehabilitation Act could proceed under the same methodology. In other words, an individual with a handicap simply would have to prove that the decision by the recipient of federal funds was motivated by the physical or

27. Id. at 100 n.56.
28. Id.
30. Eichhorn, supra note 7, at 178.
31. See Feldblum, supra note 13, at 98.
mental impairment of the program participant. It seems unnecessary that Congress placed a qualifier on the term handicap by describing an individual with a handicap as opposed to defining the term handicap.

C. Impact of Amendments to Rehabilitation Act

Within one year of passing the Rehabilitation Act, Congress considered a series of amendments to the Act. The purpose of these amendments was to attempt to clarify, among other things, the definition of the term “handicapped individual.” The 1974 Amendments added a more specific definition of a handicapped individual that was designed to apply solely to Titles IV and V of the Rehabilitation Act (which included Sections 501, 503, and 504). Thus, the amended definitional section of the Rehabilitation Act included a new subparagraph for a handicapped individual. This new subparagraph states that a handicapped individual is “any person who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.” A review of the Report of the Senate Labor and Public Welfare Committee provides very little explanation of the meaning or application of this new definition. In fact, only a few paragraphs are listed in the report explaining the application of this new definition.

As a result of the 1974 Amendments, HEW reworked their regulations, as did the other federal agencies that were granted authority to do so. There were three federal agencies granted authority to draft and implement regulations regarding the Rehabilitation Act. The EEOC was granted authority to issue regulations under Section 501 of the Act. Section 501 requires an affirmative action plan to be developed by every department in the executive branch. These plans would facilitate the hiring, placement, and advancement of handicapped individuals. The Department of Labor was granted authority to implement regulations under Section 503 of the

33. Feldblum, supra note 13, at 102-03.
34. Id. at 103.
37. Feldblum, supra note 13, at 103.
38. Id.
39. Id. at 97-98.
41. Id.
Act. Section 503 of the Act requires that any federal agency entering into certain procurement contracts are to include a provision that requires the party contracting with the United States to take affirmative steps to employ and advance qualified handicapped individuals. The HEW was granted authority to implement regulations under Section 504 of the Act. Section 504 of the Act prohibits discrimination in that it provides that qualified handicapped individuals shall not, based on their handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. The HEW regulations formed the basis of the coordination regulations issued by the Department of Justice (DOJ) several years later for use by all federal agencies.

The HEW regulations provided a definition of a “physical or mental impairment.” The definition states that a physical or mental impairment is:

(i) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genitor-urinary; hemic and lymphatic; skin and endocrine; (ii) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

This was not an exhaustive list of diseases and/or conditions. Rather, HEW provided examples of conditions that might satisfy the aforementioned definition. HEW explained in an appendix to the regulations that no such list was provided because they could not ensure that a comprehensive list could be produced. As stated earlier, the new

44. See Feldblum, supra note 13, at 103.
46. See Feldblum, supra note 13, at 103 & n.66 (indicating that in 1978, Congress amended Section 504 of the Rehabilitation Act to bring within that section’s anti-discrimination mandate any “program or activity conducted by any Executive agency”). The author points out that in 1978, Congress amended Section 504 of the Rehabilitation Act to bring within that section’s anti-discrimination mandate any “program or activity conducted by any Executive agency,” Pub. L. No. 95-602, § 119, 92 Stat. 2955, 2982 (1978), and in 1980, the Department of Justice was given authority to issue coordination regulations for all other federal agencies, see Exec. Order No. 12,250, 28 C.F.R. pt. 41, app. A. (1980).
47. 45 C.F.R. § 84.3(j)(2)(i) (2005).
48. See Feldblum, supra note 13, at 103.
49. Id.
50. Id. at 104.
statutory definition of a handicapped individual under the Rehabilitation Act required the impairment to substantially limit one or more major life activities before an individual would be considered handicapped. However, since HEW felt a precise definition of “substantially limits” could not be developed, they chose not to define the term and instead relied on a common-sense interpretation. In addition, HEW chose not to define the term “major life activities” and instead opted to provide an illustrative list of activities that would be covered under the term. In response to these regulations, many commentators challenged HEW to limit the definition to more traditional and serious impairments. In rebuttal HEW stated that it had “no flexibility within the statutory definition to limit the term to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps.”

The HEW response to the commentators was accurate and just. Congress did not place any additional limits on the class of individuals who were handicapped beyond the definition that it provided. Had HEW limited the term to those with traditional and serious handicaps, then HEW would have placed an even more limiting restriction on the scope of the Rehabilitation Act than the one already established by Congress. The equivalent of such an action would have been present if under Title VII of the Civil Rights Act of 1964 only African-Americans were able to bring claims based upon national origin. While there is much dissent to this point, it is not far-fetched to understand such an argument. The major thrust of the Civil Rights Movement was as a result of the treatment of African-Americans primarily in the South. Thus, it would seem reasonable to conclude that Congress merely intended for those victimized by that discrimination to be able to take benefit of the law. However, “as a society, we have not passed laws that prohibit discrimination solely against those individuals [who] have historically been the object of stigma and discrimination. Rather, our civil rights laws prohibit the use of a characteristic that the legislature has decided should ordinarily be irrelevant in decision-making.” With respect to the definition of a handicapped individual, Congress placed the only applicable limit on that definition when it amended the Act to require the impairment to “substantially limit” at least one “major life activity.”

51. Id.; see 45 C.F.R. § 84.3(j) (2005).
52. Feldblum, supra note 13, at 104; see 45 C.F.R. § 84.3(j)(2)(ii) (2005).
53. Feldblum, supra note 13, at 104.
55. Feldblum, supra note 13, at 101.
D. Consideration of the Americans with Disabilities Act

Due to the fact that the analysis of an ADA claim is based, in large part, on the analysis of claims under the Rehabilitation Act, it is important to understand the relationship between the development of corresponding sections of the ADA and the Rehabilitation Act.

On April 28, 1988, the Americans with Disabilities Act of 1988 was introduced in the United States Senate and one day later an identical bill was introduced in the United States House of Representatives. The Senate’s version of the bill was introduced by Senator Lowell Wicker (R-Conn.) and co-sponsored by thirteen other senators. This earlier version of the ADA was drafted by Robert Burgdorf of the National Council on the Handicapped. The legislation received some consideration, including a joint hearing before the Senate Labor and Human Resources Committee and the Subcommittee on Select Education of the House Committee on Education and Labor. However, efforts to pass the legislation were unsuccessful and no action was taken on the bill prior to the recess of the 100th Congress.

One year later, a second version of this legislation was introduced in both the Senate and the House. The second version of the bill had more support. It was introduced in the Senate by Senators Tom Harkin (D-Iowa), Edward Kennedy (D-Mass.), and Robert Dole (R-Kansas) with thirty-nine other members of the Senate. The differences between the two pieces of legislation are very significant. The 1988 version of the ADA drafted by Robert Burgdorf was considered in Congress during the same time in which many civil rights and disability advocates were busy working on the Fair Housing Amendments Act (FHAA). The FHAA was one of the first pieces of legislation that extended protections from discrimination to disabled individuals in the private sector. Individuals knowledgeable about the legislative process know of the difficulty of getting just one significant and controversial legislative item through Congress. It simply was not an appropriate time politically to simultaneously push two anti-

58. Feldblum, supra note 13, at 126.
59. Id.
60. Id.
61. Id.
62. Id. at 127.
63. Id. at 126-127.
64. A member of Senator Harkin’s staff, Robert Silverstein, drafted this bill. Id. at 127.
65. Id.
66. See id. at 126.
67. Id.
discrimination bills through Congress. Moreover, the language contained in Senator Wicker’s bill went much farther than previous prohibitions against disability discrimination. Specifically, Senator Wicker defined disability in a manner that included referencing specific impairments that would be covered under the legislation. Such an introduction of new language into legislation will usually meet with resistance when the matter is considered for passage. Typically, members of Congress are resistant to the new and unknown as it relates to new legislative items.

By contrast, a review of Senator Harkin’s version of the ADA indicates that he utilized the language of Section 504 of the Rehabilitation Act as a guide in drafting the definition of a disability in the bill. In addition, there was no other anti-discrimination legislation competing with Senator Harkin’s version of the ADA. As a result, Senator Harkin’s version of the ADA, as opposed to Senator Wicker’s version, was prepared with a keen eye towards the political realities present in Congress at the time. According to Professor Feldblum, “advocates preferred Silverstein’s approach because, as a strategic matter, it seemed smarter to use a definition of disability that had fifteen years of experience behind it, rather than to attempt to convince Congress to adopt a new, untested definition.”

The final version of the ADA was passed in July of 1990 and required three federal agencies to issue regulations implementing the ADA. The EEOC was granted authority to issue regulations implementing Title I of the ADA, which prohibits employment discrimination against a qualified individual with a disability. DOJ was given authority to issue regulations implementing Title II as well as certain aspects of Title III of the ADA. Title II prohibits discrimination against a qualified individual with a disability with respect to services, programs, or activities provided by public entities. The Department of Transportation (DOT) was given authority to issue regulations implementing certain aspects of Title II and Title III. Title III prohibits discrimination with respect to public accommodations. While both DOJ and DOT have authority to implement regulations under Title III of the ADA, DOJ’s responsibility is limited to

68. Id.
71. Feldblum, supra note 13, at 128.
74. The DOJ was granted authority for Title II under 42 U.S.C. § 12134 (2000), and also was granted authority for Title III under 42 U.S.C. § 12186(b) (2000).
the non-transportation provisions of Title III. The thrust of this Article deals with the evaluation of the regulations issued by the EEOC interpreting the ADA and the level of deference afforded these regulations by the Supreme Court.

In analyzing ADA claims, the Supreme Court has often referenced the HEW regulations interpreting the Rehabilitation Act as opposed to the EEOC regulations interpreting the ADA. As stated earlier, Congress authorized the HEW to implement regulations regarding the term handicapped individual under the Rehabilitation Act. The term handicap, as used in the Rehabilitation Act, is identical to the term disability, as used in the ADA. Thus, the authority given to the HEW regarding the term handicap is important in understanding the intent of Congress regarding the term disability. In fact, it appears that the Court has afforded *Chevron*-like deference to the HEW regulations with respect to ADA claims. The Court’s reliance on the HEW regulations has been focused on the Court’s efforts to understand the intent of Congress with regard to the meaning of the term disability. It is important to note that the definitional section of the ADA containing the term disability is not found within Title I, Title II, or Title III of the ADA, and thus no agency was given explicit authority to promulgate regulations regarding the definitions. Moreover, Justice Sandra Day O’Connor has often stated that no federal agency, including the EEOC, was granted authority to issue regulations interpreting the term disability under the ADA. Thus, it appears important to note the development of the regulations issued by the EEOC concerning the ADA to determine why the Court has not relied on the EEOC regulations in their ADA analyses.

III. ORIGINS OF EEOC’S DISABILITY REGULATIONS

In the ADA, Congress instructed the EEOC to issue implementing regulations for Title I. Specifically, the EEOC was instructed, within one year after passage of the ADA, to issue regulations, in accordance with the Administrative Procedure Act, to carry out Title I. On July 26, 1991, the

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78. 42 U.S.C. § 12186(b).
80. Eichhorn, supra note 7, at 187.
EEOC issued its regulations\(^{84}\) as well as its interpretative guidance\(^{85}\) on Title I. In issuing these regulations and the interpretative guidance, the EEOC complied with the notice and comment requirements of the Administrative Procedure Act as mandated by Congress in the ADA.\(^{86}\) According to Professor Rebecca Hanner White, when an "agency issues its interpretation through an interpretive guideline that follows from informal rulemaking procedures, it has similarly expressed an intent to exercise its delegated authority to interpret the statute."\(^{87}\) The regulations issued by the EEOC "introduced, for the first time in disability jurisprudence, the concept that an individualized assessment would be required, in most cases, to determine whether a person had a disability under the ADA."\(^{88}\) While the HEW regulations implementing the Rehabilitation Act did not define a substantial limitation, the EEOC's regulations included a definition of the concept "substantially limits." Specifically, the regulations stated 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 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.\(^{89}\)

The regulations also provide a list of factors that were to be considered when determining whether an individual is substantially limited in a major life activity. These factors were as follows:

(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment.\(^{90}\)

The EEOC regulations also provided an illustrative list of major life activities to be considered when determining whether an individual was disabled under the ADA. The EEOC regulations indicate that major life activities may include functions "such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and

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86. Hoffman, supra note 8, at 259.
88. Feldblum, supra note 13, at 135.
In describing major life activities, the EEOC’s regulations incorporated the same language listed in the HEW regulations. In contrast to the scope of the EEOC regulations, we should note that Congress only delegated regulatory rulemaking authority to EEOC with respect to Title I of the ADA. In other words, Congress authorized EEOC to issue regulations to carry out the intent of Congress with respect to Title I of the ADA. Title I defines a qualified individual with a disability as “an individual with a disability who, with or without reasonable accommodation, can perform the essential job functions of the employment position that such an individual holds or desires.” However it is important to note that the statutory definition of disability is not found in Title I. Instead, the definition of disability is found in the general definition section of the ADA. The definition section indicates that, with respect to an individual, the term disability means: (A) a physical or mental impairment which substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. While the HEW was authorized to issue regulation to implement identical language with respect to the Rehabilitation Act, Congress granted no such authority with respect to the ADA. As the Supreme Court alluded to in Bragdon v. Abbott and Sutton v. United Air Lines, Inc., since Congress failed to grant any federal agency rulemaking authority to define the term individual with a disability, then no agency regulation defining the term deserves deference.

IV. DEFERENCE TO EXECUTIVE AGENCY’S RULEMAKING AUTHORITY

When Congress passed the ADA it recognized that the implementation of the Act “would require administrative agencies to flesh out its terms.” The significance of the passage of Senator Harkin’s bill on the ADA is amplified by the fact that had Senator Wicker’s draft been enacted, the administrative agency would have had far less to flesh out. As stated earlier, Senator Harkin’s draft mirrored the Rehabilitation Act with respect to its language. Thus, there was apparently a feeling in Congress that the ADA would not require a great deal of fleshing out in light of the existing

91. 29 C.F.R. § 1630.2(i) (2001).
92. See 45 C.F.R. § 84.3(i)(2)(ii); 29 C.F.R. § 1630.2(i) (2001).
94. White, supra note 73, at 578. See also 42 U.S.C. § 12102(2) (1994).
98. See Bragdon, 524 U.S. at 642; and Sutton, 527 U.S. at 479.
99. White, supra note 73, at 535.
regulations implementing the Rehabilitation Act. Nonetheless, the EEOC was granted substantive rulemaking authority and used that authority to issue regulations as well as its interpretative guidance regarding the ADA.

When a federal agency is authorized to issue regulations to implement an Act of Congress, the agency is granted substantive rulemaking authority. Such regulations are intended to have the force of law, and agencies must enact these regulations in accordance with the Administrative Procedure Act (APA). On the other hand interpretive regulations, simply explain statutory and/or regulatory language, are not meant to bind the public, and need not be issued pursuant to the process outlined in the APA. While an agency can only issue substantive rulemaking regulations upon authorization from Congress, an agency can always issue interpretive regulations of any statute it is charged with administering.

A number of lower courts as well as the Supreme Court have been confronted by the question of whether the courts should defer to EEOC with respect to agency regulations and interpretative guidance. Therefore, it is important to understand the “various permutations of deference” afforded to agency regulations in general.

There are three forms of deference that a court may, under the appropriate circumstances, apply to an agency’s regulations. The three forms of deference are known as Seminole Rock deference, Skidmore deference, and Chevron deference. Each form of deference will be discussed herein to ascertain when it is applicable.

102. White, supra note 73, at 581.
104. Id. at 324-34.
105. Eichhorn, supra note 7, at 190. See also Pierce Jr., supra note 103, at 325.
106. See Washington v. HCA Health Servs. of Tx., Inc., 152 F.3d 464 (5th Cir. 1998), vacated, 527 U.S. 1032 (1999) (mitigating measures do not have to be necessarily taken into account); Arnold v. United Parcel Servs., Inc., 136 F.3d 854 (1st Cir. 1998) (mitigating measures generally do not have to be taken into account); Sutton v. United Air Lines, Inc., 130 F.3d 893 (10th Cir. 1997), aff’d, 527 U.S. 471 (1999) (mitigating measures should be taken into account); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933 (3d Cir. 1997) (assess impairment in unmitigated state); Gilday v. Mecosta County, 124 F.3d 760 (6th Cir. 1997) (take mitigating measures into account in some cases); Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997) cert. denied, 522 U.S. 1048 (1998) (assess impairment in unmitigated state); Harris v. H&W Contracting Co., 102 F.3d 516 (11th Cir. 1996) (assess impairment in unmitigated state); see also White, supra note 73, at 535 & n.15.
107. See Sutton, 527 U.S. at 487 (refusing to view an impairment in its mitigated state); See also Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 519 (1999); and Albertson’s, Inc. v. Kirkingburg, 527 U.S. 555, 565 (1999).
108. White, supra note 73, at 539.
109. This form of deference was derived from Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).
110. This form of deference was derived from Skidmore v. Swift & Co., 323 U.S. 134 (1944).
Seminole Rock deference has been used by our legal system since the 1940s and is viewed as attributing the “greatest weight to agency determinations.” The form of deference was derived from the Supreme Court’s rationale in Bowles v. Seminole Rock & Sand Co. In Seminole Rock, the Court was asked to determine whether an agency’s interpretation of its own regulations were controlling. This case involved the federal government’s efforts to enforce price controls in an attempt to combat wartime inflation. The Court concluded that when determining the impact of an agency’s interpretation of its own regulation, the “ultimate criterion was the administrative interpretation, which became controlling weight unless it was plainly erroneous or inconsistent with the regulation.” Thus, as long as an agency’s interpretations of its regulations are “neither arbitrary nor capricious” then those interpretations are binding on the courts.

Similar to Seminole Rock deference, Skidmore deference has been an accepted “component of administrative law since the 1940s.” Skidmore deference was derived from the Supreme Court’s rationale in Skidmore v. Swift & Co. In Skidmore, the Court was faced with determining what weight to give the interpretations of an agency that lacked rulemaking authority. Specifically, the case dealt with interpretations of the Fair Labor Standards Act (FLSA) provided by the Department of Labor through interpretive guidance bulletins. The Court noted: “Congress did not utilize the services of an administrative agency [to develop substantive implementing regulations]. Instead, it put this responsibility on the courts.” However, the Court noted that Congress granted an administrative agency certain duties that allowed for the accumulation of considerable experience in interpreting the statute. As a result, the agency would often issue interpretive notices and bulletins regarding the FLSA. The Court further noted that the aforementioned notices and bulletins did not “constitute an interpretation of the [FLSA] or a standard

112. See White, supra note 73, at 541.
113. 325 U.S. 410.
115. Id. at 413.
116. Id. at 414.
117. White, supra note 73, at 541.
118. Id.
119. 323 U.S. 134 (1944).
120. Id. at 137-139.
121. Id. at 137.
122. Id.
123. Id. at 138.
for judging factual situations which [would bind] a district court's processes . . . But the [agency's] policies are . . . based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case." 124 As a result, the Court concluded that the interpretations of the agency lacking rulemaking authority simply had the power to persuade and were not controlling upon any court. 125

The latest and most controversial form of deference is Chevron deference. 126 This form of deference was derived from the Supreme Court's rationale in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. 127 This case dealt with an evaluation of the regulatory interpretations of a statute, promulgated through the notice and comment rulemaking process of the APA, by a federal agency that had been delegated interpretative power by Congress. 128 This form of deference is a two-step process. In Chevron the Court stated that "[w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions." 129 First the court must determine "whether Congress has directly spoken to the precise question at issue." 130 If Congress has spoken to the precise question at issue then the intent of Congress is clear and should be followed. 131 If Congress has not spoken to the precise question at issue, "the court does not simply impose its own construction on the statute." 132 Such an action is only taken "in the absence of an administrative interpretation." 133 When an agency has provided an administrative interpretation under these circumstances, "the question for the court is whether the agency's [interpretation] is based on a permissible construction of the statute." 134

When determining whether an agency's interpretation evidences a permissible construction of the statute, the court must ascertain whether Congress granted rulemaking authority to the agency implicitly or explicitly. 135 As the Court has previously noted, "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill

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124. Id. at 139.
125. Id. at 140.
126. White, supra note 73, at 541.
129. Chevron, 467 U.S. at 842.
130. Id.
131. Id. at 842-43.
132. Id. at 843.
133. Id.
134. Id.
135. White, supra note 73, at 541-42.
any gap left, implicitly or explicitly, by Congress." In circumstances
where Congress has provided "an express delegation of authority for an
agency to elucidate a specific provision of the statute by regulation . . .
[s]uch legislative regulations are given controlling weight unless they are
arbitrary, capricious, or manifestly contrary to the statute." In cases
where the legislative delegation was implicit, "a court may not substitute its
own construction of a statutory provision for a reasonable interpretation"
made by the agency, but rather, the court defers to the agency interpretation.

As evidenced by the above discussion, when considering the level of
devance to be afforded to the regulations and interpretive guidance issued
by the EEOC, courts must consider each on its own merit in light of the
authority delegated to the EEOC by Congress. It is clear that the EEOC
was granted substantive rulemaking authority with respect to Title I of the
ADA. In Toyota, the Supreme Court had an opportunity to articulate the
level of deference to be afforded to several regulations issued by the
EEOC. In order to fully understand the impact of the Toyota decision, it
is important to assess: (1) the level of deference afforded to the EEOC
regulations by the Supreme Court, and (2) what level of deference is
appropriate based upon the Congressional delegation of authority to issue
the regulations.

V.
THE TOYOTA DECISION AND ITS IMPACT

A. Factual and Procedural History

In Toyota, the plaintiff, Ms. Ella Williams, began working at her
employer's automobile manufacturing plant in 1990. She worked on an
engine fabrication assembly line, where her duties included work with
pneumatic tools. The use of these tools caused pain in the hands, wrists,
and arms of Ms. Williams and she was subsequently diagnosed with
bilateral carpal tunnel syndrome and tendinitis. She was placed on
permanent work restrictions that prevented her from lifting and/or carrying
objects above certain weights. In addition, the work restrictions

138. Chevron, 467 U.S. at 844.
141. Id. at 187.
142. Id.
143. Id.
144. Id. at 187-88.
prevented her from engaging in constant repetitive movements, performing overhead work, or using vibratory or pneumatic tools.\textsuperscript{145} For the two years following the implementation of these work restrictions, Ms. Williams was assigned to various modified-duty jobs at the manufacturing plant.\textsuperscript{146} As a result of the failure of her condition to improve, Ms. Williams filed a claim under her state’s workers compensation laws.\textsuperscript{147} Ms. Williams and her employer settled this claim and she returned to work.\textsuperscript{148} Unsatisfied by her employer’s efforts to accommodate her impairments, Ms. Williams filed a federal lawsuit alleging that her employer had violated the ADA.\textsuperscript{149} This suit was also settled and Ms. Williams returned to work.\textsuperscript{150} Upon her return to work, in December 1993, she was placed on a QCIO (Quality Control Inspection Operations) team that performed four tasks.\textsuperscript{151} Initially, she was only required to perform two of the four tasks and for a two-year period she rotated on a weekly basis between these two tasks.\textsuperscript{152} During the fall of 1996, the manufacturing plant announced that all employees working on QCIO teams would be required to rotate through all four tasks.\textsuperscript{153} Some of her new duties required Ms. Williams to hold her hands and arms at shoulder height for several hours at a time.\textsuperscript{154} Shortly after commencing these new job functions, she began to experience pain in her neck and shoulders.\textsuperscript{155} After consulting with her employer’s in-house medical service, Ms. Williams was diagnosed with conditions that caused (1) an inflammation of the muscles and tendons around her shoulder blades; (2) nerve compression and irritation; and (3) pain in the nerves that led to her upper extremities.\textsuperscript{156} She requested an accommodation from her employer that would have allowed her to only perform the two job tasks she performed before the implementation of the new policy.\textsuperscript{157} While there was some dispute over whether the employer ever responded to the accommodation request, Ms. Williams was ultimately placed under a “no work of any kind” restriction.\textsuperscript{158} Less than two months later, the

\begin{footnotes}
\footnote{\textsuperscript{145} \textit{Toyota}, 534 U.S. at 188.}
\footnote{\textsuperscript{146} \textit{Id.}}
\footnote{\textsuperscript{147} \textit{Id.}}
\footnote{\textsuperscript{148} \textit{Id.}}
\footnote{\textsuperscript{149} \textit{Id.}}
\footnote{\textsuperscript{150} \textit{Id.}}
\footnote{\textsuperscript{151} The QCIO teams were each responsible for four tasks. These tasks were: (1) assembly painting; (2) painting – second inspection; (3) audit of shell body work; and (4) “ED surface repair.” See \textit{id.}}
\footnote{\textsuperscript{152} \textit{Toyota}, 534 U.S. at 188.}
\footnote{\textsuperscript{153} \textit{Id.} at 189.}
\footnote{\textsuperscript{154} Williams v. Toyota Motor Mfg., Ky., Inc., 224 F.3d 840, 842 (6th Cir. 2000).}
\footnote{\textsuperscript{155} \textit{Id.}}
\footnote{\textsuperscript{156} \textit{Id.}}
\footnote{\textsuperscript{157} \textit{Id.} at 842.}
\footnote{\textsuperscript{158} \textit{Toyota}, 534 U.S. at 190.}
\end{footnotes}
manufacturing plant terminated Ms. Williams, citing her poor attendance record as justification for the termination.\textsuperscript{159} 

Ms. Williams filed a charge of disability discrimination with the EEOC and ultimately received a right to sue letter.\textsuperscript{160} Subsequently, she filed suit in a federal district court in Kentucky, alleging that Toyota violated the ADA and other state anti-discrimination provisions when it failed to accommodate her disability and terminated her employment.\textsuperscript{161} Both Toyota and Ms. Williams filed summary judgment motions. The District Court granted Toyota’s motion finding that Ms. Williams was not disabled under the ADA.\textsuperscript{162} The District Court found that while Ms. Williams suffered from an impairment, the impairment did not substantially limit any major life activity.\textsuperscript{163} Specifically, the District Court rejected her arguments that gardening, doing housework, and playing with children were major life activities.\textsuperscript{164} While the District Court agreed that performing manual tasks, lifting, and working were major life activities, it found a lack of evidence to support that the plaintiff had been substantially limited in lifting or working.\textsuperscript{165} With respect to performing manual tasks, the District Court found the claim of Ms. Williams to be “irretrievably contradicted by [the plaintiff’s] continual insistence that she could perform” certain tasks at the Toyota plant without difficulty.\textsuperscript{166} The District Court also concluded that Ms. Williams had produced insufficient evidence to support her claim that she had a record of a substantially limiting impairment or that her employer regarded her as having such an impairment.\textsuperscript{167} In addition, the District Court rejected the plaintiff’s claim that her termination violated the ADA and the other state anti-discrimination laws. In reaching this conclusion, the District Court found that even if it assumed that Ms. Williams was disabled at the time of her termination, she was not a qualified individual with a disability “because, at that time, her physicians had restricted her from performing work of any kind.”\textsuperscript{168}

Ms. Williams filed an appeal with the Court of Appeals for the Sixth Circuit.\textsuperscript{169} While appealing the District Court’s ruling with respect to the major life activities of performing manual tasks, lifting, and working, Ms. Williams did not appeal the gardening, housework, and playing-with-
Thus, the only ADA related question before the appellate court was whether Ms. Williams’ employer unlawfully terminated or denied her an accommodation in light of a physical impairment that substantially limited her major life activities of performing manual tasks, lifting, and working. In reaching its decision, the Sixth Circuit never addressed whether Ms. Williams was substantially limited in the major life activities of lifting or working or whether Ms. Williams had a record of or was regarded as being disabled. The Sixth Circuit concluded that the aforementioned determinations were unnecessary since they determined Ms. Williams was disabled because she was substantially limited in the major life activity of performing manual tasks. As such she should have, at a minimum, been granted a partial summary judgment by the District Court.

The Sixth Circuit developed and applied a test to determine whether Ms. Williams was substantially limited in the major life activity of performing manual tasks. This test required one who claimed to be substantially limited in her ability to perform manual tasks to show that her disability involved a class of manual activities affecting their ability to perform tasks at work. According to the Sixth Circuit, Ms. Williams satisfied this test because her ailments prevented her from “doing the tasks associated with certain types of manual assembly line jobs, manual product handling jobs and manual building trade jobs (painting, plumbing, roofing, etc.) that require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time.”

While there was evidence indicating that Ms. Williams could tend to her personal chores and hygiene needs, as well as perform household chores, the Sixth Circuit concluded that such evidence did not preclude a determination that her impairment substantially limited Ms. Williams from performing a range of manual tasks in her job.

The Supreme Court granted certiorari for the purpose of considering the proper standard for assessing whether an individual was substantially limited in the major life activity of performing manual tasks. The parties did not dispute that the medical conditions of Ms. Williams amounted to a physical impairment under the ADA. As such, the relevant question

170. Toyota, 534 U.S. at 192.
171. Id. at 191-93.
172. Williams, 224 F.3d at 843.
173. Id. at 843-44.
174. Id.
175. Toyota, 534 U.S. at 192.
176. Id.
177. Id.
178. See 532 U.S. 970 (2001); Toyota, 534 U.S. at 192.
179. Toyota, 534 U.S. at 196.
before the Court was "whether the Sixth Circuit correctly analyzed whether [Ms. Williams's] impairments substantially limited [her] in the major life activity of performing manual tasks." The Supreme Court determined that the Sixth Circuit was in error in reaching its decision to grant partial summary judgment to Ms. Williams because it applied the wrong standard in assessing a disability. However, the Court expressed no opinion on the arguments raised earlier in the case regarding the major life activities of working, lifting, or other arguments for disability status that were preserved in the lower courts but not ruled on by the Sixth Circuit. In order to understand the debate that has raged over the Toyota ruling and its impact on the EEOC regulations, we must analyze the rationale of the Supreme Court in reaching its decision.

The Court commenced its analysis by referencing the applicable definition of a qualified individual with a disability in Title I of the ADA. The court noted that the Act defines a qualified individual with a disability under 42 U.S.C. § 12111(8). This provision defines a qualified individual with a disability as "an individual with a disability who, with or without reasonable accommodation[s], can perform the essential functions of the employment position that such individual holds or desires." The Court also noted that the Act defines a disability as "a physical impairment that substantially limits one or more of the major life activities of such an individual." Recognizing the need for guidance in how these provisions should be interpreted, the Court noted that Congress desired that the terms of the ADA be construed consistently with the terms of the Rehabilitation Act and its applicable regulations. Specifically, Congress instructed that:

\[E\]xcept as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. § 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

In furtherance of this directive, the Court pointed out that there were two potential sources of guidance for interpreting the definition of the terms "qualified individual with a disability" and "disability." This guidance could be obtained from "the regulations interpreting the Rehabilitation Act"

\begin{enumerate}
\item \textit{Id.}
\item \textit{Id. at 200-01.}
\item \textit{Id. at 193.}
\item \textit{See 42 U.S.C. § 12111(8) (2001); see also Toyota, 534 U.S. at 193.}
\item \textit{See 42 U.S.C. § 12102(2)(A) (2001); see also Toyota, 534 U.S. at 193 (noting that having a record of such an impairment or being regarded as having such an impairment are also included in the definition of disability).}
\item \textit{Toyota, 534 U.S. at 194.}
\item \textit{See 42 U.S.C. § 12201(a) (1994).}
\item \textit{Toyota, 534 U.S. at 193.}
\end{enumerate}
and "the EEOC regulations interpreting the ADA." The Court determined that since Congress drafted the ADA's definition of disability, in almost verbatim form, from the definition of handicapped individual listed in the Rehabilitation Act, it was appropriate to look to the implementing regulations of the Rehabilitation Act. These regulations were issued by HEW in 1977 and appear without change in the current regulations issued by the Department of Health and Human Services. The Court also noted that when Congress uses a well-established term in subsequent legislation, that such action "implies that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations." In light of the number of judicial determinations involving the implementing regulations of the Rehabilitation Act, the Court was very comfortable being guided by the HEW regulations.

The persuasive impact and the level of guidance to be derived from the EEOC regulations were not readily apparent to the Court. As Justice O'Connor pointed out in her decision, "[t]he persuasive authority of the EEOC regulations is less clear." This was especially true since "no agency [had] been given authority to issue regulations interpreting the term 'disability' in the ADA." This would have apparently limited the Court to an evaluation of the HEW regulations with regard to the meaning of the term disability. However, since the EEOC had issued regulations defining the term disability and the parties had relied on these regulations, the Court was faced with the question of the appropriate level of weight or deference to be afforded the EEOC regulations. The Court failed to resolve the question that had confounded disability advocates—the level of deference to be afforded to EEOC's regulations defining disability. Specifically, the Court concluded that because the parties had accepted the EEOC regulations as being reasonable, the Court "assumed without deciding that [the regulations were reasonable]." The Court also concluded that it had "no occasion to decide what level of deference, if any, to [afford the regulations]." However, the Court has provided an indication, albeit implicit, into what level of deference should be afforded these regulations. Despite the Court's questions regarding the reasonableness of the regulations and the amount of deference to be afforded to the EEOC
regulations, the Court referenced the regulations in their analysis. The Court took a similar position in *Sutton v. United Air Lines, Inc.*, stating that since the parties had accepted the "regulations as valid, and determining their validity is not necessary to decide [the] case, [then the Court had] no occasion to consider what deference" to afford the regulations. It is my opinion that the Court afforded *Skidmore* deference to the EEOC regulations regarding the definition of a disability.

An evaluation of the Court’s consideration of the EEOC regulations in *Toyota* is instructive with respect to the level of deference to be afforded to the EEOC’s regulatory authority, although the Court declined to answer the question directly. While the Court, in *Toyota*, considered several EEOC regulations, the extent to which this consideration impacted the Court’s decision is not very clear. The Court noted that resolving the issue in *Toyota* required them to address an issue about which the EEOC regulations were silent—"what a plaintiff must demonstrate to establish a substantial limitation in the specific major life activity of performing manual tasks." This statement indicates that the EEOC regulations, while referenced, did not serve as the sole basis for the Court’s decision. However the Court did not, as Professor Lisa Eichhorn proclaimed, commit a "*Toyota* sidestep."

In her article, *The Chevron Two-Step and the Toyota Sidestep: Dancing around the EEOC’s “Disability” Regulations Under the ADA*, Professor Eichhorn indicates that the Court missed an opportunity to resolve the questions regarding the deference to be afforded the EEOC’s disability regulations. She asserts that the EEOC’s disability regulations are the product of a valid rulemaking process and entitled to a high degree of deference. Professor Eichhorn believes that the Court failed to consider the regulations of the EEOC and instead applied its own interpretation of the ADA’s terminology. She correctly points out that Congress never granted the EEOC express authority to issue regulations regarding the term disability as contained in the ADA. Moreover, Professor Eichhorn

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197. *Id.*
198. *Id.* at 195-96.
200. *Id.* at 480; see also *Toyota*, 534 U.S. at 194.
201. Under consideration were 29 C.F.R. § 1630.2 (g), 29 C.F.R. § 1630.2 (j)(2)(i), 29 C.F.R. § 1630.2 (j)(2)(ii), 29 C.F.R. § 1630.2 (j)(2)(iii), and 29 C.F.R. § 1630.2 (j)(3). See *Toyota*, 534 U.S. at 195-96.
202. *Id.* at 196.
203. See Eichhorn, *supra* note 7, at 203.
204. *Id.*
205. *Id.* at 177.
206. *Id.*
207. *Id.* at 195.
concludes that Congress also did not implicitly grant the EEOC authority to issue regulations regarding the term disability contained in the ADA.  

Unfortunately most of these assertions are based on Professor Eichhorn’s argument that the Court should afford Chevron deference to EEOC’s disability regulations. While not agreeing that the Court sidestepped the deference question, I do agree that the Court in essence “punted” (avoided the controversy) by failing to proclaim any level of deference being afforded to the EEOC disability regulations. However, a review of the Court’s analysis supports a conclusion that the Court granted Skidmore deference to EEOC’s disability regulations. Interestingly, Professor Eichhorn states that the aforementioned regulations “constitute a body of experience and informed judgment” and as such are deserving of Skidmore deference. While the Court’s analysis is consistent with Skidmore deference, the Court never proclaimed any specific level of deference to be afforded the regulations.

The Court stated that its analysis was based on a very narrow issue to which the EEOC regulations were silent. The Court noted that (1) no agency, including the EEOC, had been given authority to implement regulations regarding the definition of disability, and (2) that the EEOC regulations did not address the specific issue before the Court. Thus initially it would appear, in accordance with Professor Eichhorn’s position, that the Court was engaged in a Chevron deference review. Yet, a closer review of Toyota indicates that the Court referenced and considered the EEOC regulations in a manner inconsistent with Chevron deference.

In Toyota, the Court utilized normal methods of statutory analysis in reaching its decision. The Court noted that its decision was guided “first and foremost by the words of the disability definition” contained in the ADA. The Court used Webster’s Dictionary to define two of the primary words contained within the ADA’s disability definition—“substantially” and “major.” The Court took this position because the EEOC regulations were silent with respect to the meaning of substantially limited in cases involving manual tasks. Professor Eichhorn said that this proclamation was “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.” While

208. Id.
209. Id. at 195-97.
210. Id.
211. Id. at 197.
213. Id. at 194
214. Id. at 196.
215. Id.
216. Eichhorn, supra note 7, at 200.
somewhat amusing, this point fails to recognize that not all major life activities are created equally. As such, it was imperative that the Court first determine the plain meaning of the terms contained within the ADA.

In Toyota, the Court pointed out that substantially in the “phrase ‘substantially limits’ suggests ‘considerable’ or ‘to a large degree.’”\textsuperscript{217} The Court concluded that, based upon this definition, impairments that interfere in only a minor way with the performance of manual tasks were clearly precluded from qualifying as disabilities.\textsuperscript{218} In addition, the Court pointed out that major “in the phrase ‘major life activities’ means important.”\textsuperscript{219} The Court concluded that major life activities were limited to those activities that were of central importance to an individual’s daily life.\textsuperscript{220} The Court went on to note that in order for “performing manual tasks to fit into this category . . . the manual tasks must be central to daily life.”\textsuperscript{221} The Court then created a new test for resolving whether someone is substantially limited in the major life activity of performing manual tasks. The Court held 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.”\textsuperscript{222} The Court then cited to the EEOC’s regulations defining a disability in holding that “[t]he impairment’s impact must also be permanent or long term.”\textsuperscript{223} This reference to the EEOC’s regulations indicates that the Court considered portions of, if not all, the EEOC regulations defining disability. Next the Court pointed out the importance of conducting ADA evaluations on an individualized basis. Specifically the Court stated, “[a]n individualized assessment of the effect of an impairment is particularly necessary when the impairment is one whose symptoms vary widely from person to person.”\textsuperscript{224} The Court found this to be particularly true with regard to the impairment (carpal tunnel) suffered by Ms. Williams.\textsuperscript{225}

The Court then attacked the appropriateness of the Sixth Circuit’s “class”-based analysis with respect to the major life activity of performing manual tasks.\textsuperscript{226} The Sixth Circuit had held that a plaintiff must show that their manual disability involved a class of activities that affected the

\begin{itemize}
  \item \textsuperscript{217} Toyota, 534 U.S. at 196.
  \item \textsuperscript{218} Id. at 197 (citing Albertson’s, Inc. v. Kirkingburg, 527 U.S. 555, 565 (1999)).
  \item \textsuperscript{219} Id.
  \item \textsuperscript{220} Id.
  \item \textsuperscript{221} Id. (noting that such basic abilities as walking, seeing, and hearing were included in this category).
  \item \textsuperscript{222} Id. at 198.
  \item \textsuperscript{223} Id. (citing 29 C.F.R. §§ 1630.2(j)(2)(ii)-(iii) (2001)).
  \item \textsuperscript{224} Id. at 199.
  \item \textsuperscript{225} Id.
  \item \textsuperscript{226} Id. at 199-202.
\end{itemize}
plaintiff's ability to work.\textsuperscript{227} The Supreme Court found that the Sixth Circuit had committed error in reaching this holding.\textsuperscript{228} In order to support this conclusion, the Court relied, in part, on the EEOC regulations.\textsuperscript{229} The Court stated that in defining the term substantially limits, "the EEOC regulations only mention the 'class' concept in the context of the major life activity of working."\textsuperscript{230} Finally, the Court stated, "[n]othing in the text of the Act, [the Court's] previous opinions, or the regulations suggests that a class-based framework should apply outside the context of the major life activity of working."\textsuperscript{231} It is important to note that there was no reference to the HEW regulations in this part of the Court's decision, bolstering the argument that the Court gave \textit{Skidmore} deference, as opposed to \textit{Chevron} deference, to the EEOC regulations defining disability. It appears that the Court exclusively considered the EEOC regulations and was not persuaded by the EEOC's opinion of how the statutory terms should be considered. This conclusion is based on the fact that the Court did not believe that the EEOC was given Congressional authority to issue regulations defining the term "disability" contained within the ADA.\textsuperscript{232} In such situations, "the court treats the [regulations] as it would the opinion of an expert witness."\textsuperscript{233} Therefore, the EEOC regulations, while lacking the power to control, nonetheless possessed the power to persuade.\textsuperscript{234} However, in this instance the Court was not persuaded by the opinion of the EEOC with respect to how the term disability should be interpreted.

The Court completed its analysis by finding that the manual tasks involved in this case—repetitive work with hands and arms extended at or above shoulder level—were not important to most people's daily lives.\textsuperscript{235} The underlying record in the case contained evidence that Ms. Williams could tend to her personal chores, care for her personal hygiene, and carry out household chores.\textsuperscript{236} The Court concluded that these manual tasks should have been considered by the Sixth Circuit since they were of central

\textsuperscript{227} Williams v. Toyota Motor Mfg., Ky., Inc., 224 F.3d 840, 843 (6th Cir. 2000).
\textsuperscript{228} Toyota, 534 U.S. at 200.
\textsuperscript{229} The Court also cited to its analysis in \textit{Sutton v. United Air Lines, Inc.}, 527 U.S. 471, 491 (1999) (When the major life activity under consideration is that of working, the statutory phrase substantially limits requires . . . that plaintiffs allege they are unable to work a broad class of jobs); see also \textit{Toyota}, 534 U.S. at 200.
\textsuperscript{230} \textit{Toyota}, 534 U.S. at 200 (referring to 29 C.F.R. § 1630.2(j)(3) (2001)).
\textsuperscript{231} \textit{Id.}
\textsuperscript{232} \textit{Id.} at 194.
\textsuperscript{234} White, supra note 73, at 540; see also \textit{Skidmore v. Swift & Co.}, 323 U.S. 134, 140 (1944).
\textsuperscript{235} \textit{Toyota}, 534 U.S. at 201.
\textsuperscript{236} \textit{Id.} at 202.
importance to people’s daily lives. The facts of the case also indicated that Ms. Williams could brush her teeth, wash her face, bathe, tend her flower garden, fix breakfast, do laundry, and pick up around the house. The facts also indicated that when her condition would worsen, Ms. Williams had to avoid sweeping, quit dancing, occasionally seek help dressing, and to reduce how often she played with her children, tended to her garden, or drove for long distances. The Court found these “changes in her life did not amount to such severe restrictions in the activities that are of central importance to most peoples daily lives that they establish a manual tasks disability as a matter of law.” Thus when reviewing all of the facts in the case, it is clear that Ms. Williams did not suffer from a disability covered by the ADA.

The Court’s holding in Toyota has resulted in a number of discussions in the legal community regarding the impact of Toyota on other disability claims. The Toyota ruling appears to have, contrary to the Court’s own words, invoked Skidmore deference with respect to the EEOC disability definition regulations. As such, the Court considered the views of the EEOC to determine if it was persuaded by those views. It appears that the Court was persuaded by certain regulations. Specifically, the Court favorably referenced the EEOC regulations dealing with the length of an impairment and the class concept embodied within the evaluation of the major life activity of work.

The Toyota holding does not limit judicial access to persons who would have otherwise been able to pursue a disability claim. The Court simply clarified the appropriate analysis for determining when an individual has been substantially limited in the major life activity of performing manual tasks. It does not appear that Toyota has set a precedent for disability claims based on a major life activity other than performing manual tasks. In fact, the Court stated that their decision was limited to the consideration of “the proper standard for assessing whether an individual is limited in performing manual tasks.” The Court stated that it expressed no opinion, in Toyota, with regard to other major life activities such as working or lifting.

Moreover, the Court’s Toyota analysis does not appear applicable to other major life activities such as, walking, seeing, hearing, breathing, or

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237. Id.
238. Id.
239. Id.
240. Id.
241. Id. at 198 (citing 29 C.F.R. § 1630.2(j)(2)(ii)-(iii) (2001)); see also id. at 200 (citing 29 C.F.R. § 1630.2(j)(3) (2001)).
242. Id. at 192 (emphasis added).
243. Id. at 193.
learning. Each of the aforementioned activities and any similar activities, are of central importance to people’s daily lives. Therefore, it does not appear that future ADA claims asserting limitations in activities other than performing manual tasks will be impacted by the Toyota ruling.

B. Impact of Toyota’s Ruling

The level of deference owed to the EEOC regulations has the possibility of affecting actual claims in that someone who gets favorable consideration before the EEOC will nonetheless be unsuccessful in the federal courts. Professor Eichhorn asserts that Toyota is adversely affecting the claims of disabled employees in cases involving the major life activities other than the performance of manual tasks. Specifically, she states “[i]n 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.”244 However, Professor Eichhorn cites only three cases in support of her position.245 A closer review of these cases indicates that Professor Eichhorn may have overstated her premise. In Waldrip v. General Electric Co.,246 the Fifth Circuit considered an ADA claim filed by an employee who suffered from chronic pancreatitis and claimed that his employer terminated him because of the disability.247 In evaluating the evidence in the case, the Fifth Circuit noted that the plaintiff failed to submit any evidence of how his impairment limited his major life activities of eating and digesting.248 The Fifth Circuit pointed out that the plaintiff simply asserted that his impairment was a serious condition that limited his major life functions but submitted no evidence to support that conclusion.249 The plaintiff’s doctor testified that when the plaintiff’s condition flared up he would miss, at most, a couple of days at work.250 As a result, the Fifth Circuit concluded that the plaintiff’s impairment did not substantially limit his major life activities as he had claimed.

Professor Eichhorn took issue with this case because the Fifth Circuit agreed with the Supreme Court with respect to the level of deference to afford the EEOC disability regulations. Specifically, Professor Eichhorn states “... the Fifth Circuit cited the EEOC disability regulations but was careful to note that it did not accord them Chevron deference.”251 She

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244. Eichhorn, supra note 7, at 204.
245. Id. at 204-08.
246. 325 F.3d 652 (5th Cir. 2003).
247. Id.
248. Id. at 655.
249. Id. at 656-57.
250. Id. at 657.
251. Eichhorn, supra note 7, at 207.
continued by saying that “this lack of deference led the Fifth Circuit to ignore completely the EEOC’s ‘substantially limits’ regulations.” Finally, she concluded that in using the Toyota rationale, the Fifth Circuit concluded that the plaintiff was not disabled because the effects of his impairment were not always severe enough to cause him to miss work.

The Fifth Circuit reached the correct conclusion, in Waldrip, irrespective of the level of deference it afforded the EEOC regulations. In Waldrip the plaintiff failed to submit any evidence to support his contention that his impairment substantially limited his ability to eat or digest. Instead the only evidence in the record established that the plaintiff might have to miss a couple of days at work if his condition flared up. Many employees miss days from work for hundreds of illnesses. The inability to work for a couple of days is simply not sufficient evidence to establish that an impairment substantially limits one in the major life activities of eating and digesting. The facts of this case would have resulted in the same conclusion by the court irrespective of whether the Toyota rationale was applicable. Any plaintiff that fails to submit evidence of how their impairment substantially limits a major life activity will be unsuccessful in his or her claim.

Professor Eichhorn also references the Eighth Circuit case of Fenney v. Dakota, Minnesota & Eastern Railroad, Co. in support of her position that the Toyota rationale is adversely affected the ability of claimants to bring a viable claim under the ADA. In Fenney, a railroad employee who was limited in the use of his right hand and arm sued his employer asserting that the employer had failed to provide a reasonable accommodation. While it is true that the Eighth Circuit determined that Toyota should be applied in cases beyond those involving limitations to the major life activity of performing manual tasks, the holding of the Eighth Circuit allowed the plaintiff to proceed to trial. With respect to whether the plaintiff was disabled the Eighth Circuit held that “[plaintiff] has proffered evidence that his impairment ‘severely restricted’ his ability to care for himself compared with how an unimpaired individual would normally care for himself or herself in daily life.” This holding does not evidence an adverse impact to the plaintiff’s claim based on the Toyota rationale.

252. Id. at 207-08.
253. Eichhorn, supra note 7, at 208.
254. Waldrip, 325 F.3d at 655.
255. Id.
256. 327 F.3d 707 (8th Cir. 2003).
257. Eichhorn, supra note 7, at 207.
258. Fenney, 327 F.3d at 707.
259. Id. at 719.
260. Id. at 716.
Finally, Professor Eichhorn asserts her most compelling argument for the adverse affect experienced by plaintiffs asserting ADA claims when she referenced the decision in *EEOC v. United Parcel Service, Inc.*,\(^{261}\) by the Ninth Circuit. In *United Parcel Service* three employees asserted ADA claims against their employer alleging that they were discriminated against because they suffered from monocular vision.\(^{262}\) The Ninth Circuit held that in order to succeed in an ADA claim, a monocular individual is required to show that his impairment must prevent or severely restrict the use of his eyesight compared with how unimpaired individuals use their eyesight in daily life.\(^{263}\) However, the Ninth Circuit concluded that "some visual impairment does not necessarily mean that the individual is substantially limited in seeing overall."\(^{264}\) In addition, the Ninth Circuit pointed out that "the critical inquiry is whether seeing as a whole is substantially limited for purposes of daily living."\(^{265}\) The Ninth Circuit considered several facts in reaching its decision. Specifically, it was noted that two of the three plaintiffs drove (personally and for their employer), read, used tools, and played sports.\(^{266}\) In determining that these two employees were not disabled under the ADA, the Ninth Circuit said "[d]espite not having fully compensated for loss of near-field vision, that impairment does not keep either one of [the employees] from using his eyesight as most people do for daily life."\(^{267}\) Thus, the Ninth Circuit concluded that their impairments did not substantially limit the major life activity of seeing.\(^{268}\)

There is nothing inconsistent with ADA rulings prior to *Toyota*. In fact, in *United Parcel Service* the employer had a requirement that its drivers have a certain vision acuity in order to drive its package trucks.\(^{269}\) This standard and the analysis of the Ninth Circuit is more akin to the Supreme Courts analysis in *Sutton* that also involved a requirement regarding vision acuity. As such, this case does not appear to have been adversely affected by the *Toyota* rationale. Contrary to the assertions of Professor Eichhorn, there is no evidence that the *Toyota* rationale is adversely affecting the claims of plaintiffs filing suit under the ADA. Nonetheless, there are some matters that future claimants should be prepared to address when considering whether to file an ADA claim.

\(^{261}\) 306 F.3d 794 (9th Cir. 2002).
\(^{262}\) *Id.*
\(^{263}\) *Id.* at 802.
\(^{264}\) *Id.* at 803.
\(^{265}\) *Id.*
\(^{266}\) *Id.*
\(^{267}\) *Id.*
\(^{268}\) *Id.*
\(^{269}\) *Id.* at 805-06.
VI.
FUTURE RECOMMENDATIONS

Plaintiffs and their attorneys should be aware that the Court, in both Toyota and Sutton, has been very clear that the ADA was not designed for everyone who suffered from an impairment to be able to seek refuge within its provisions. In fact, the Court has warned that the terms of the ADA will be interpreted strictly to create a demanding standard for qualifying as disabled under Title I. This demanding standard is something that disability advocates have feared would limit access to the courts for many victims of discrimination.

Despite the concerns of disability advocates, Toyota did not indicate that the Court harbors any lack of respect for the EEOC and its regulatory authority. Clearly, the Court favorably referenced the EEOC regulations in support of its decision in Toyota. It would be inappropriate to equate respect and blind allegiance. The fact that the Court did not agree or was not persuaded by the EEOC’s definition of disability has no bearing on the level of respect that the Court has for the EEOC’s regulatory authority. In my opinion, most disability advocates have failed to recognize the fact that not all major life activities are created equally, at least not when considering whether an activity is substantially limited. There would be no debate regarding whether an individual who is completely limited in a major life activity would be considered disabled by the Court. For example, if an individual could not walk, the Court would conclude that such an individual is substantially limited in that major life activity and therefore disabled under Title I. However, when there is not a complete limitation of an activity the analysis becomes much more difficult. How much of a limitation is sufficient before one will be determined disabled? What if one individual was fifty percent limited in their ability to walk compared to another individual who is fifty percent limited in their ability to perform manual tasks? While most would conclude that the individual with the fifty percent limitation in his ability to walk would more likely than not be disabled, it is unlikely that a similar conclusion would be readily reached with respect to the other individual. There would be questions raised as it relates to which manual tasks are limited and to what degree. As a result of the major life activity at issue, there may be a more strenuous evaluation of whether the individual is substantially limited. While the Court recognized this difference, the EEOC was unauthorized to do so. The EEOC regulations dealing with whether an individual is substantially limited in a

271. Toyota, 534 U.S. at 197.
272. See id. at 198 (citing 29 C.F.R. § 1630.2(j)(2)(ii)-(iii) (2001)); see also id. at 200 (citing 29 C.F.R. § 1630.2(j)(3) (2001)).
major life activity does not differentiate between major life activities. An individual demonstrates that an impairment substantially limits a major life activity by proving that he or she is:

(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 the same major life activity.273

This regulation treats all major life activities as equals because it does not compare one activity to another. Instead, the regulation requires a comparison of how an activity is limited for an individual as compared to other individuals. The Court was not persuaded that this approach was sound with respect to the major life activity of performing manual tasks. Therefore the Court, in Toyota, created its own test for determining whether an individual is substantially limited in the major life activity of performing manual tasks.274 The Court explained that this new test was necessitated given the “large potential differences in the severity and duration of the effects” of certain impairments on the major life activity of performing manual tasks.275 The fact that the Court was not persuaded by the EEOC’s regulation is based entirely on the fact that the EEOC failed to consider this potential analytical difficulty. In fact, the Court pointed out that their analysis in Toyota required them to “address an issue about which the EEOC regulations [were] silent.”276 The Court noted that the EEOC regulations did not address what a plaintiff must demonstrate to establish a substantial limitation in the specific major life activity of performing manual tasks.277 The Court’s action does not establish a lack of respect. It simply indicates that the Court felt the EEOC’s regulation was lacking and could not adequately address the issue before the Court in Toyota.

In response to the Court’s action, I feel strongly that the EEOC should reevaluate their regulations. It is clear from the Court’s recent rulings on this point that the Court did not feel that the EEOC was operating within its regulatory authority when it issued regulations defining a disability.278 Thus, the EEOC should rescind those regulations and issue new regulations under the Administrative Procedure Act that would be limited to Title I.

274. Toyota, 534 U.S. at 198 (holding that “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”).
275. Id. at 199 (referencing the wide range of differences in the severity and duration of the effects of carpal tunnel syndrome—the impairment of the plaintiff in Toyota.).
276. Id. at 196.
277. Id.
278. See 29 C.F.R. §§ 1630.2 (g)-(j) (2001); see also Toyota, 534 U.S. at 194.
These new regulations could define what is necessary for an individual to bring a claim under Title I. Under Title I a covered individual is a qualified individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of their job or the job they desire to obtain. Therefore, the EEOC could issue new regulations that would indicate what must be present in order for an individual to establish a claim under the aforementioned provision. Such newly issued regulations would focus on the relationship between an individual's impairment and the individual's ability to perform the essential functions of the job. By focusing on this relationship, the EEOC could develop regulations that would address the level of limitation of a major life activity necessary to obtain coverage under Title I. These newly issued regulations would also receive *Chevron* deference from the Court because the EEOC has authority to draft regulations relating to Title I. Since the EEOC was expressly authorized to issue regulations and these regulations would address an issue to which Congress did not directly speak, the regulations would most likely be viewed more favorably by the Court. As long as the regulations are reasonable, the Court would be forced to defer to the EEOC interpretation unless the Court departs from the standard it established in *Chevron*. Without the newly issued regulations, the Court will never grant anything more than *Skidmore* deference to EEOC regulations regarding non-Title I terms, such as the definition of a qualified individual with a disability.

Those advocates who hold out hope that Congress could step in and resolve this matter should consider the absence of Congressional action to date as a strong indication that Congress will not come to the aid of disability advocates. Congress could have amended the ADA in such a manner as to expressly authorize the EEOC to issue implementing regulations regarding the term disability. However, as Professor Feldblum pointed out, "it is difficult to ask Congress to fix an existing law, even when Congress might clearly agree the Courts have misinterpreted Congressional intent." This difficulty is amplified by the fact that the Supreme Court decided *Sutton* in 1999 and there has been no legislation passed in Congress to clarify Congressional intent with respect to EEOC's authority to issue regulations defining disability.

Finally, if the EEOC fails to issue these newly proposed regulations, then members of the legal community should began to view major life activities in two separate tiers. The first tier would include activities such as walking, seeing, hearing, and talking. These activities are clearly of central importance to the daily lives of most people such that an evaluation

280. Feldblum, *supra* note 13, at 164.
of whether an impairment substantially limits the activity will be clear and precise. A determination of whether an impairment considerably limits a tier-one major life activity will be readily apparent. As a result, the evidence necessary to establish a disability discrimination claim involving a tier-one activity will be very straightforward. On the other hand, other major life activities would be considered tier-two activities. This tier would include activities such as working, performing manual tasks, and caring for oneself. The nature of these activities requires an assessment that is much more involved than the tier-one activities. While the Court has provided legal tests to determine whether the major life activities of working and performing manual tasks have been satisfied, we must remember that the regulations simply provide an illustrative list of activities that would be covered by the ADA. As such, other activities may arise and the plaintiffs and their attorneys should be prepared to present evidence that their impairments considerably limit their ability to perform a tier-two activity and that the activities being used as evidence of the limitation are of central importance to their daily lives. While it is unlikely that the Toyota standard will be applicable to all tier-two activities, the development of such detailed evidence would make a stronger and more probative case for disability discrimination than that currently required under the EEOC regulations.

VII.
CONCLUSION

As a result of Toyota, practitioners now have a clear standard upon which to bring disability claims alleging a substantial limitation in the major life activity of performing manual tasks. This newly minted standard will afford plaintiff attorneys a greater chance for success in claims of disability discrimination and limit the glut of claims without merit from the EEOC process. This is especially true in the federal-sector complaint process. An appropriate reading of Toyota evidences that the Court gave a considerable level of respect to the EEOC regulations and was persuaded by some of those regulations in reaching the Court’s decision. Thus, any claims of EEOC’s death as it relates to its regulatory authority have been greatly exaggerated. Assuming that EEOC desires to stake a more definitive claim to its right to interpret Title I of the ADA, then the concept of the new regulations proposed in this Article should be considered. Otherwise, the legal community should not anticipate the Court granting EEOC anything more than Skidmore deference with respect to its regulations defining disability.