

# NCD

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The Supreme Court's ADA Decisions Regarding Substantial  
Limitation of Major Life Activities

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The Supreme Court of the United States has made several decisions that affect the interpretation of the requirement in the Americans with Disabilities Act (ADA) that, to qualify as a disability under the Act, a condition must substantially limit one or more major life activities. While a few of the Court's statements regarding that requirement may prove beneficial to certain plaintiffs in future cases, the overall effect of the Court's decisions has been to make it more difficult to establish a substantial limitation on a major life activity. At times, the Court has engaged in a wholesale rewriting of the standards for determining what constitutes a substantial limitation on a major life activity, often at odds with the actual language of the ADA and even with the Court's prior rulings. This policy brief examines the meaning and significance of the concepts of substantial limitation and major life activities, what the Supreme Court has said about them, the implications of the Court's declarations, and how the lower courts have handled questions about substantial limitation on major life activities.

## THE CONCEPT OF SUBSTANTIAL LIMITATION ON MAJOR LIFE ACTIVITIES

Closely tracking the Rehabilitation Act, the first prong of the ADA definition of disability provides that a condition constitutes a disability if it “substantially limits one or more of the major life activities of such individual” (42 U.S.C. § 12102(2)(A)). This requirement serves to weed out from ADA protection under the first prong of the definition physical or mental impairments that are too minor or insignificant to be considered disabilities. The Senate and the House Education and Labor committee reports on the ADA explained that

[p]ersons with minor, trivial impairments, such as a simple infected finger are not impaired in a major life activity. A person is considered an individual with a disability for purposes of the first prong of the definition when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people.<sup>1</sup>

## MAJOR LIFE ACTIVITIES

Regulations implementing Section 504 of the Rehabilitation Act define “major life activities” as “functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”<sup>2</sup> This definition is recited verbatim in the Senate

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<sup>1</sup> S. Rep. No. 101-116, at 22 (1989); H.R. Rep. No. 101-485, pt. 2 at 52 (1990) (Committee on Education and Labor).

<sup>2</sup> 45 C.F.R. § 84.3(j)(2)(ii).

and House committee reports on the ADA and in the EEOC's ADA regulations.<sup>3</sup> The "such as" formulation indicates that the listed activities are merely examples and are not exclusive of other potential major life activities. In the Supreme Court's decision in *Bragdon v. Abbott*, 524 U.S. 624 (1998), all nine of the Justices agreed that the list of major life activities in ADA regulations is not exhaustive.<sup>4</sup>

The majority in *Bragdon* held that major life activities under the ADA were not limited to activities that have a public, economic, or daily character. The Court declared: "Nothing in the definition suggests that activities without a public, economic, or daily dimension may somehow be regarded as so unimportant or insignificant as to fall outside the meaning of the word 'major.' The breadth of the term confounds the attempt to limit its construction in this manner" (524 U.S. at 638).

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<sup>3</sup> S. Rep. No. 101-116, at 22 (1989); H.R. Rep. No. 101-485, pt. 2 at 52 (1990) (Committee on Education and Labor); H.R. Rep. No. 101-485, pt. 3 at 28 (1990) (Committee on the Judiciary); 29 C.F.R. § 1630.2(i).

<sup>4</sup> See 524 U.S. at 639 ("As the use of the term 'such as' confirms, the list S. Rep. No. 101-116, at 22 (1989); H.R. Rep. No. 101-485, pt. 2 at 52 (1990) (Committee on Education and Labor); H.R. Rep. No. 101-485, pt. 3 at 28 (1990) (Committee on the Judiciary); 29 C.F.R. § 1630.2(i). is illustrative, not exhaustive."); *id.* at 659 (Chief Justice Rehnquist, concurring in the judgment in part and dissenting in part) ("The Court correctly recognizes that this list of major life activities 'is illustrative, not exhaustive'"); *id.* at 664-65 (Justice O'Connor, concurring in the judgment in part and dissenting in part) ("the representative major life activities ... listed in regulations relevant to the Americans with Disabilities Act").

In *Bragdon*, the majority ruled that reproduction was a “major life activity” under the ADA, reasoning that “[r]eproduction and the sexual dynamics surrounding it are central to the life process itself” (524 U.S. at 638). The Court found that Ms. Abbott’s HIV infection substantially limited her ability to reproduce by causing a significant risk that male sexual partners would be infected and a significant risk that the disease would be transmitted to her child during pregnancy and childbirth. The Court’s recognition that reproduction is a major life activity settles that issue for subsequent litigants who seek to show that they are substantially limited in regard to reproducing. It does not help, however, persons for whom reproduction is not a realistic option. In one lower court case, for example, an airline employee with AIDS premised his ADA claim solely on his assertion that his major life activity of procreation was substantially limited<sup>5</sup>. The federal district court ruled that the plaintiff was not substantially limited in a major life activity, because he had admitted that he had no interest in fathering children. Similarly, acknowledgment that reproduction is a major life activity does not advance the legal situation of people who are sterile, women beyond the age of menopause, and pre-pubescent children.<sup>6</sup>

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<sup>5</sup> *Gutwaks v. American Airlines*, 1999 WL 1611328 (N.D.Tex. 1999).

<sup>6</sup> *See, e.g., U.S. v. Happy Time Day Care Center*, 6 F.Supp.2d 1073, 1079-80 (W.D.Wis. 1998) (three-year-old with HIV infection; procreation held not a relevant activity).

The Court’s statement in *Bragdon* regarding the central importance of “[r]eproduction and the sexual dynamics surrounding it” contains some ambiguity. Does it mean that sex is itself a major life activity? The Court quoted language from a 1988 opinion of the Office of Legal Counsel (OLC) of the Department of Justice referring to “[t]he life activity of engaging in sexual relations.”<sup>7</sup> But the Court never clarified whether impact on sexual relations is sufficient to render a condition a disability in and of itself, or only because the limitation on sexual activity will interfere with opportunities for procreation. In the absence of a clear determination by the Supreme Court as to whether sexual activity is a major life activity, some lower courts have ruled that engaging in sexual relations is a major life activity,<sup>8</sup> while a few other courts have been reluctant to make such a ruling and have managed to evade such a determination.<sup>9</sup>

In its opinion in *Bragdon*, the Court observed that it appeared “legalistic to circumscribe our discussion to the activity of reproduction” considering that “major life activities of many sorts might have been relevant to our inquiry,” and recognizing arguments “about HIV’s profound impact on almost every phase of the infected person’s life” (524 U.S. at 637). Ultimately, however, the Court felt constrained to restrict its analysis to reproduction because the plaintiff had consistently asserted that she was limited in regard to this activity, and it was the ground on which the Court of Appeals had made its ruling and on which the Supreme Court had agreed to grant review.

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<sup>7</sup> *Bragdon*, 524 U.S. at 642-43, quoting Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals, 12 Op. Off. Legal Counsel 264, 264-265 (Sept. 27, 1988) (preliminary print).

<sup>8</sup> E.g., *McAlindin v. County of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999); *Anderson v. Gus Meyer Boston Store*, 924 F.Supp. 763, 775 n. 24 (E.D. Tex. 1996); *Doe v. District of Columbia*, 796 F.Supp. 559, 568 (D.D.C. 1992) (under Rehabilitation Act).

<sup>9</sup> See *Contreras v. Suncast Corp.*, 237 F.3d 756, 764 (7th Cir. 2001) (“the Supreme Court may have implied that engaging in sexual relations is a major life activity” but a condition that limits a person to having sex only twice a month does not substantially limit the activity); *Waddell v. Valley Forge Dental Associates*, 276 F.3d 1275, 1280 n. 4 (11th Cir. 2001) (because of “skeletal record on the issue” court could not determine whether the plaintiff was substantially limited in engaging in “sexual relationships,” even if it assumed that it constitutes a major life activity).

Apart from procreation and sex, the Supreme Court has made a few rulings that have some bearing on whether certain types of activities constitute major life activities. In *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 563 (1999), the Court treated “seeing” as a major life activity, after noting that there was no dispute about this issue and that the parties had not challenged the validity of EEOC ADA regulations providing that it is a major life activity. Similarly, in *Sutton v. United Airlines*, 527 U.S. 471, 490 (1999), the Court indicated that the plaintiff sisters did “not make the obvious argument that they are regarded due to their impairments as substantially limited in the major life activity of seeing.” And the majority opinion in *Sutton* illustrated that persons who use mitigating measures may nonetheless have a substantial limitation on a major life activity with the following example: “individuals who use prosthetic limbs or wheelchairs may be mobile and capable of functioning in society but still be disabled because of a substantial limitation on their ability to walk or run.” (527 U.S. at 488). In *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 121 S.Ct. 1879 (2001), the Court treated “walking” as a major life activity and declared that Casey Martin was “an individual with a disability as defined in the Americans with Disabilities Act” because of his condition that interfered with his ability to walk. 121 S.Ct. at 1885. The PGA Tour did not contest that Martin was an individual with a disability under the ADA. *Id.* at 1886. In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 122 S.Ct. 681, 691 (2002), the Court declared, consistently with ADA and Section 504 regulations, that walking, seeing, and hearing, as “basic abilities ... central to daily life,” are major life activities under the ADA. These rulings may ease the task of future litigants who allege that they have limitations on their activities of seeing, hearing, walking, or running.

In the *Williams* case, the Supreme Court reviewed the Sixth Circuit’s analysis of whether the plaintiff was substantially limited in regard to the major life activity of performing manual tasks. The Court ruled that the Court of Appeals had erroneously focused on whether Ms. Williams was able to perform manual tasks in her job. The Court declared that “occupation-specific tasks may have only limited relevance to the manual task inquiry” (122 S.Ct. at 693). The Court indicated that analysis of limitation on the activity of performing manual tasks should consider instead the person’s ability to perform personal-care tasks and household chores. The Court declared that “household chores, bathing, and brushing one’s teeth are among the types of manual tasks of central importance to people’s daily lives ....” This analysis tacitly endorses the regulations’ inclusion of caring for one’s self as a major life activity, and should assist persons whose impairments affect the performance of self-care and housekeeping tasks to establish that they have a disability under the ADA. The Court’s reasoning also provides helpful guidance that the analysis of impact on major life activities in an employment discrimination case is not limited to looking only at impact on activities relevant to the workplace.

More significantly, however, in the *Williams* case the Court dramatically rewrote the language of the ADA's major life activity criterion. The ADA refers to "the major life activities of such individual." The Court noted that the dictionary definition of the term "major" is "important" or "greater in dignity, rank, importance, or interest." After indicating that it was going to interpret the elements of the definition of disability strictly, the Court chose to interpret the term "major" as "central," thus transforming it from the dictionary equivalents of "important" or "greater in importance" to mean instead "of the greatest importance." Moreover, in place of the ADA language "of such individual," the Court substituted the words "in most people's daily lives." The Court accomplished this alteration of the statutory terminology with something of a linguistic sleight of hand. It initially interpreted the ADA's phraseology of "the major life activities of such individual" as "activities that are of central importance to daily life." Subsequently, it transformed the phrase "daily life" into "most people's daily lives."

These are not merely semantic differences; they have practical, legal repercussions. To demonstrate a limitation to a major life activity "of such individual," an ADA plaintiff needs only to present personal testimony or immediate facts to show that the activity is important in his or her life. To show that an activity is "of central importance to most people's daily lives," an ADA claimant will have to prove a more abstract, universal proposition, typically requiring the testimony of expert social science or vocational witnesses, and creating the prospect of a battle of such experts over the centrality of the activity in "most people's lives." Assuming that courts can devise some sort of standard for what size of a majority constitutes "most people," the Supreme Court's rephrasing injects a largely conjectural, potentially contentious debate into the midst of ADA proceedings.

Surprisingly, the Court's refashioning of the "major life activities" standard is directly contradictory to the recognition elsewhere in the *Williams* decision and in other ADA decisions of the Court that the determination of whether an individual is substantially limited in a major life activity must be made on an individualized, case-by-case basis. In *Sutton v. United Airlines*, 527 U.S. 471, 483 (1999), the Court stated that "whether a person has a disability under the ADA is an individualized inquiry." As precedent for this principle, the Court cited its decision in *Bragdon v. Abbott*, 524 U.S. 624, 641-642 (1998), declining to consider whether HIV infection is a *per se* disability under the ADA; and ADA Title I regulatory guidance providing that "[t]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual" (29 C.F.R. pt. 1630, App. § 1630.2(j)). An even clearer endorsement of individualization in the *Bragdon* case was in the partially concurring and partially dissenting opinion of Chief Justice Rehnquist, joined by Justices Scalia and Thomas, in which he declared:

It is important to note that whether respondent has a disability covered by the ADA is an individualized inquiry. The Act could not be clearer on this point: Section 12102(2) states explicitly that the disability determination must be made “with respect to an individual.” Were this not sufficiently clear, the Act goes on to provide that the “major life activities” allegedly limited by an impairment must be those “of such individual.” § 12102(2)(A).

524 U.S. at 657; *see also*, 524 U.S. at 664 (Justice O’Connor, concurring in the judgment in part and dissenting in part) (agreeing that Abbott’s “claim of disability should be evaluated on an individualized basis”).

In *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999), the Court stated that there was a “statutory obligation to determine the existence of disabilities on a case-by-case basis.” It added that “[t]he Act expresses that mandate clearly by defining ‘disability’ ‘with respect to an individual,’ 42 U.S.C. § 12102(2), and in terms of the impact of an impairment on ‘such individual,’ § 12102(2)(A).”

The Court in *Williams* quoted with approval from the EEOC’s ADA regulations regarding the necessity of focusing on “the effect of [an] impairment on the life of the individual.” The Court also added that “an individualized assessment of the effect of an impairment is particularly necessary when the impairment is one whose symptoms vary widely from person to person.” The Court did not explain how these principles can possibly be consistent with the change in focus from the major life activities of the individual to activities “of central importance to most people’s daily lives.”

The Supreme Court has also made some disparaging remarks concerning the assertion that working is a major life activity. Because of its importance and some unique considerations surrounding its status, the question of working as a major life activity will be addressed in a separate section below.

## THE LOWER COURTS AND MAJOR LIFE ACTIVITIES

The lower courts have made an assortment of rulings, not always consistent, about what does and does not constitute a major life activity. The line of lower court decisions holding that sexual relations is a major life activity was noted previously in this policy brief. Consistent with its inclusion as the first item in the list of examples of major life activities presented in ADA and Section 504 regulations and the ADA committee reports,<sup>10</sup> courts that have considered the issue

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<sup>10</sup> 29 C.F.R. § 1630.2(i); 45 C.F.R. § 84.3(j)(2)(ii); S. Rep. No. 101-116, at 22 (1989); H.R. Rep. No. 101-485, pt. 2 at 52 (1990) (Committee on Education and Labor); H.R. Rep. No. 101-485, pt. 3 at 28 (1990) (Committee on the Judiciary).

have consistently concluded that “caring for oneself” is a major life activity<sup>11</sup>. And the lower

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<sup>11</sup> See, e.g., *McAlindin v. County of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999); *Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867, 871 (2d Cir. 1998); *Cehrs v. Northeast Ohio Alzheimer’s Research Ctr.*, 155 F.3d 775, 781 (6th Cir.1998); *Schwertfager v. City of Boynton Beach*, 42 F.Supp.2d 1347, 1359 (S.D.Fla. 1999) (ability to “care for, dress, and cook for herself”); *U.S. v. Happy Time Day Care Center*, 6 F.Supp.2d 1073, 1081 (W.D.Wis. 1998); *Nicely v. Rice*, No. 92-1240-PFK, 1992 WL 403091, slip op. at 3 (D. Kan. Dec. 7, 1992). See also *Bragdon v. Abbott*, 118 S.Ct. 2196, 2205 (citing Rehabilitation Act regulations and noting the “inclusion of activities such as caring for one’s self”); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995) (defining caring for oneself as including everything from driving and grooming to feeding oneself and cleaning one’s home).

courts have generally recognized as major life activities most of the other activities listed in the regulations: walking,<sup>12</sup> seeing,<sup>13</sup> hearing,<sup>14</sup> speaking,<sup>15</sup> breathing,<sup>16</sup> learning<sup>17</sup>.

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<sup>12</sup> See, e.g., *Black v. Roadway Express, Inc.*, 297 F.3d 445, 451 (6th Cir. 2002); *McCoy v. USF Dugan, Inc.*, 2002 WL 1435908 at \*2 (10th Cir. 2002); *Weixel v. Board of Educ. of City of New York*, 287 F.3d 138, 147 (2nd Cir. 2002); *Stephenson v. United Airlines, Inc.*, 2001 WL 580459 at \*2-\*3 (9th Cir. 2001); *Steele v. Thiokol Corp.*, 241 F.3d 1248, 1256 (10th Cir. 2001); *E.E.O.C. v. Sears, Roebuck & Co.*, 233 F.3d 432, 438 (7th Cir. 2000); *Otting v. J.C. Penney Co.*, 223 F.3d 704, 711 (8th Cir. 2000); *Talk v. Delta Airlines, Inc.*, 165 F.3d 1021, 1025 (5th Cir. 1999).

<sup>13</sup> See, e.g., *Otting v. J.C. Penney Co.*, 223 F.3d 704, 711 (8th Cir. 2000); *Deas v. River West, L.P.*, 152 F.3d 471, 479 (5th Cir. 1998); *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 52 (5th Cir. 1997); *EEOC v. United Parcel Serv., Inc.*, 306 F.3d 794, 2002 WL 31096703, at \*7 (9th Cir.2002) (applying *Toyota* to major life activity of seeing).

<sup>14</sup> See, e.g., *Deas v. River West, L.P.*, 152 F.3d 471, 479 (5th Cir. 1998); *Santiago Clemente v. Executive Airlines, Inc.*, 213 F.3d 25, 30 (1st Cir. 2000); *Ivy v. Jones*, 192 F.3d 514, 516 (5th Cir. 1999).

<sup>15</sup> See, e.g., *Deas v. River West, L.P.*, 152 F.3d 471, 479 (5th Cir. 1998); *Santiago Clemente v. Executive Airlines, Inc.*, 213 F.3d 25, 30 (1st Cir. 2000); *Calef v. Gillette Co.*, 322 F.3d 75 (1st Cir. 2003); *Otting v. J.C. Penney Co.*, 223 F.3d 704, 711 (8th Cir. 2000); *McInnis v. Alamo Community College Dist.*, 207 F.3d 276, 281-82 (5th Cir. 2000); *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 509 (7th Cir. 1998). *But see Pack v. Kmart Corp.*, 166 F.3d 1300, 1305 (10th Cir.1999) (communication not a major life activity in itself).

<sup>16</sup> See, e.g., *White v. Honda of America Mfg., Inc.*, 2003 WL 203111, \*3-\*4 (S.D. Ohio 2003); *Reeves v. Johnson Controls World Service, Inc.*, 140 F.3d 144, 152 (2d Cir. 1998); *Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718, 723 (2d Cir. 1994); *Boone v. Reno*, 121 F.Supp.2d 109, 112 (D.D.C. 2000); *Castro v. Local 1199, Nat'l Health & Human Servs. Employees Union*, 964 F.Supp. 719, 725 (S.D.N.Y. 1997); *Emery v. Caravan of Dreams, Inc.*, 879 F.Supp. 640, 643 (N.D.Tex. 1995); *Reese v. American Food Service*, 2000 WL 1470212 at p. \*7 (E.D.Pa. 2000).

<sup>17</sup> See, e.g., *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 155 (1st Cir. 1998); *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 509 (7th Cir. 1998); *Calef v. Gillette Co.*, 322 F.3d 75 (1st Cir. 2003); *Vinson v. Thomas*, 288 F.3d 1145, 1153 (9th Cir. 2002); *Costello v. Mitchell Public School Dist.* 79, 266 F.3d 916, 923 (8th Cir. 2001).

As a result of the Supreme Court’s pronouncements, however, two of the activities included in the regulatory list—performing manual tasks and working—have received a less favorable or at least a less cut-and-dried reception in the lower courts. The nature and implications of the Supreme Court’s skeptical statements about the status of working as a major life activity are discussed below in a separate section. As discussed above, the Supreme Court’s ruling in the *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* case refocused the concept of performing manual tasks away from manual tasks performed on the job, declaring that “occupation-specific tasks may have only limited relevance to the manual task inquiry” (122 S.Ct. at 693). Instead, the Court redirected the analysis of limitation on the activity of performing manual tasks to the person’s ability to perform personal-care tasks and household chores, and stated that “household chores, bathing, and brushing one’s teeth are among the types of manual tasks of central importance to people’s daily lives ...” (*Id.*). One federal district court explained the impact of this reorientation as follows:

Curtailing previous case law defining “major life activities,” [the Court in *Toyota v. Williams*] 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.” Specifically, the Court stated that “[w]hen addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people’s daily lives, not whether the claimant is unable to perform the tasks associated with her specific job.” As a result, this decision creates additional obstacles for many plaintiffs in disability cases, particularly those alleging discrimination in the workplace.<sup>18</sup>

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<sup>18</sup> *Stedman v. Bizmart*, 219 F. Supp. 2d 1212, 1220-21 (N.D. Ala. 2002) (citations omitted).

Indeed, to some extent, the major life activity of performing manual functions appears to have been transformed by the Supreme Court into the activity of performing manual personal care and household functions. Consequently, some lower courts have rejected claims that plaintiffs had disabilities based on limitations on their ability to perform manual tasks in the workplace.<sup>19</sup>

In addition to the major life activities cited as examples in the body of EEOC's ADA regulations, the EEOC has explicitly added in regulatory commentary that "other life activities include, but are not limited to, sitting, standing, lifting, reaching" (29 C.F.R. pt. 1630, app. (commentary on § 1630.2(i))). Most lower courts have agreed that sitting and standing are major life activities.<sup>20</sup> The designation of lifting or reaching as major life activities entails some conceptual ambiguity. It is difficult to identify a boundary between lifting or reaching and performing manual tasks; indeed, reaching and lifting can be considered as components of the broader category of performing manual tasks. Reaching has been asserted as a major life activity in a relatively small number of cases; when plaintiffs have proffered it, courts have typically accepted it.<sup>21</sup>

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<sup>19</sup> See, e.g., *Rakity v. Dillon Companies, Inc.*, 302 F.3d 1152, 1159-60 (10th Cir. 2002) (plaintiff submitted evidence regarding limitations on ability to shelve groceries, but "no records or documents indicating his impairments are severe enough to prevent basic daily manual activities such as household chores, bathing himself, or brushing his teeth"); *Mack v. Great Dane Trailers*, 308 F.3d 776, 781 (7th Cir. 2002) ("evidence that plaintiff ... unable to do specific job-related duties ... insufficient proof of a disability"); *Munck v. New Haven Savings Bank*, 2003 WL 1224582, at \*3-\*4 (D.Conn. 2003) (focus on ability to "tend to personal hygiene and carry out personal or household chores").

<sup>20</sup> See, e.g., *Webner v. Titan Distribution, Inc.*, 267 F.3d 828 (8th Cir. 2001); *Dupre v. Charter Behavioral Health Sys., Inc.*, 242 F.3d 610, 614 (5th Cir.2001); *Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 616 (8th Cir.1997); *Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944, 946 (8th Cir.1999); *Mahon v. Crowell*, 295 F.3d 585, 590-91 (6th Cir. 2002); *Butt v. Greenbelt Home Care Agency*, 2003 WL 685026 (N.D.Iowa 2003); *Hines v. Chrysler Corp.*, 231 F.Supp.2d 1027, 1036-37 (D.Colo. 2002).

<sup>21</sup> See, e.g., *Rakity v. Dillon Companies, Inc.*, 302 F.3d 1152, 1160-61 (10th Cir. 2002); *Webner v. Titan Distribution, Inc.*, 267 F.3d 828, 834 (8th Cir. 2001); *Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 616 (8th Cir. 1997).

Lifting has been more widely recognized as a major life activity,<sup>22</sup> but with some important provisos. A number of courts have ruled that the fact that an impairment restricts a person from being able to lift some particular amount of weight does not, in itself, demonstrate substantial limitation of a major life activity.<sup>23</sup> Moreover, since the Supreme Court's ruling in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, some lower courts have ruled that the restrictions the Supreme Court placed on performing manual tasks are applicable to lifting as well.<sup>24</sup> Illustrative

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<sup>22</sup> See, e.g., *Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11, 16 (1st Cir. 2002); *McCoy v. USF Dugan, Inc.*, 2002 WL 1435908 at \*2 (10th Cir. 2002); *Lusk v. Ryder Integrated Logistics*, 238 F.3d 1237, 1240 (10th Cir. 2001); *Rakity v. Dillon Companies, Inc.*, 302 F.3d 1152, 1160-61 (10th Cir. 2002); *Mack v. Great Dane Trailers*, 308 F.3d 776, 780-81 (7th Cir. 2002); *Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 642-43 (2d Cir. 1998) (lifting assumed to be major life activity); *Brunko v. Mercy Hosp.*, 260 F.3d 939, 941 (8th Cir. 2001); *Webner v. Titan Distribution, Inc.*, 267 F.3d 828, 834 (8th Cir. 2001); *Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 616 (8th Cir. 1997); *Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170, 1173 (10th Cir. 1996); *Ruggles v. Keebler Co.*, 224 F.Supp.2d 1295, 1301 (D.Kan. 2002); *Smith v. Quikrete Companies, Inc.*, 204 F.Supp.2d 1003, 1008 (W.D.Ky. 2002).

<sup>23</sup> See, e.g., *McCoy v. USF Dugan, Inc.*, 2002 WL 1435908, at \*2-3 (10th Cir. 2002) (inability to lift over twenty pounds is not substantial limitation on major life activity of lifting); *Brunko v. Mercy Hosp.*, 260 F.3d 939, 941-42 (8th Cir. 2001) (40-pound lifting restriction did not demonstrate substantial limitation on lifting); *Gutridge v. Clure*, 153 F.3d 898, 901 (8th Cir. 1998), cert. denied, 526 U.S. 1113 (1999) (45-pound restriction does not substantially limit life activity of lifting); *Snow v. Ridgeview Med. Ctr.*, 128 F.3d 1201, 1207 (8th Cir. 1997) (25-pound restriction does not limit ability to perform major life activity); *Lusk v. Ryder Integrated Logistics*, 238 F.3d 1237, 1240-41 (10th Cir. 2001) (40-pound lifting restriction did not demonstrate substantial limitation on lifting); *Pryor v. Trane Co.*, 138 F.3d 1024, 1025 n. 2 (5th Cir. 1998) (upholding jury verdict that found twenty pound repetitive lifting restriction from back injury was not substantially limiting); *McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369, 373 (6th Cir. 1997) (restriction limiting frequent lifting to ten pounds due to carpal tunnel syndrome was not substantially limiting); *Ruggles v. Keebler Co.*, 224 F.Supp.2d 1295, 1301 (D.Kan. 2002) (thirty-pound lifting restriction not substantial limitation on major life activity of lifting).

<sup>24</sup> See, e.g., *Mack v. Great Dane Trailers*, 308 F.3d 776, 781 (7th Cir. 2002); *Smith v. Quikrete Companies, Inc.*, 204 F.Supp.2d 1003, 1008 (W.D.Ky. 2002).

is the decision of the Seventh Circuit Court of Appeals in *Mack v. Great Dane Trailers* (308 F.3d 776 (7th Cir. 2002)). In that case, the plaintiff argued that the standards the Supreme Court had established regarding performing manual tasks should not apply to his claim, because he had alleged that he had a substantial limitation on the major life activity of lifting, not performing manual tasks. The Seventh Circuit responded that it could “see no basis for confining *Toyota*’s analysis to only those cases involving the specific life activity asserted by the plaintiff in that case” (308 F.3d at 781). The court continued as follows:

*Toyota*’s point was that an inability to perform “occupation-specific” tasks does not necessarily show an inability to perform the central functions of daily life, and that analysis applies equally to the work-related restriction at issue here. An inability to lift heavy objects may disqualify a person from particular jobs but does not necessarily interfere with the central functions of daily life.  
(*Id.* (citation omitted))

The court did concede that in certain limited circumstances workplace limitations on lifting may be relevant to demonstrating a substantial limitation on a major life activity:

There may well be cases in which, because of the nature of the impairment, one could, from the work-restriction alone, infer a broader limitation on a major life activity. An inability to lift even a pencil on the job might suggest an inability to lift a toothbrush, for example, or to otherwise care for oneself—or at least might support an inference that the employer believed the employee was so limited.  
(*Id.*)

But the court found that the plaintiff’s inability to do lifting on the job “was not nearly of that nature, and instead fits neatly into the sort of occupation-specific limitation at issue in *Toyota*.” Accordingly the Court concluded that “[u]nder *Toyota*, evidence of such a restriction, without more, is insufficient to show a substantial limitation on a major life activity” (*Id.*). To the extent that this line of reasoning is followed, the major life activity of lifting may be transformed into the activity of lifting objects to perform personal-care tasks and household chores.

Apart from those activities mentioned as examples of major life activities in ADA regulations and regulatory guidance, the lower courts have addressed a variety of activities asserted to constitute major life activities, with a range of results. The Courts have consistently agreed that sleeping is a major life activity.<sup>25</sup> Several courts have found that interacting with others is a major life activity.<sup>26</sup> The Seventh Circuit has noted that interacting with others is an activity “that feed[s] into the major life activities of learning and working.”<sup>27</sup> One court suggested that the “ability to get along with others” was too vague to be a major life activity, but acknowledged that “a more narrowly defined concept going to essential attributes of human communication could, in a particular setting, be understood to be a major life activity.”<sup>28</sup> To the vagueness charge, the Ninth Circuit subsequently responded that “interacting with others is no more vague than ‘caring for oneself,’ which has been widely recognized as a major life activity.”<sup>29</sup> Some courts have found communication to be a major life activity,<sup>30</sup> while the Tenth Circuit ruled that communication was not a major life activity in itself.<sup>31</sup>

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<sup>25</sup> See, e.g., *McAlindin v. County of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999); *Pack v. Kmart Corp.*, 166 F.3d 1300, 1305 (10th Cir. 1999); *Colwell v. Suffolk County Police Dep’t*, 158 F.3d 635, 643 (2d Cir. 1998); *Steele v. Thiokol Corp.*, 241 F.3d 1248, 1256 (10th Cir. 2001); *Reese v. American Food Service*, 2000 WL 1470212 at \*6 (E.D.Pa. 2000).

<sup>26</sup> See, e.g., *McAlindin v. County of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999); *Sherback v. Wright Automotive Group*, 987 F.Supp. 433, 438 (W.D.Pa. 1997); *Criado v. IBM Corp.*, 145 F.3d 437, 442 (1st Cir. 1998) (plaintiff’s mental impairment “substantially limited her ability to work, sleep, and relate to others”); *Lemire v. Silva*, 104 F.Supp.2d 80, 87 (D.Mass. 2000).

<sup>27</sup> *Emerson v. Northern States Power Co.*, 256 F.3d 506, 511, 512 (7th Cir.2001).

<sup>28</sup> *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 15 (1st Cir. 1997) (court assumed that getting along with others was major life activity for purposes of decision).

<sup>29</sup> *McAlindin v. County of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999).

<sup>30</sup> See, e.g., *Lanci v. Andersen*, 2000 WL 329226, \*3 (S.D.N.Y. 2000); *Purcell v. Pennsylvania Dept. of Corrections*, 1998 WL 10236, \*8 (E.D.Pa. 1998) (“ability to communicate with others for extended periods of time is a major life activity”).

<sup>31</sup> *Pack v. Kmart Corp.*, 166 F.3d 1300, 1305 (10th Cir.1999).

Just as communication is closely related to a recognized major life activity—speaking—some courts have considered activities involved in or linked to learning, such as thinking and concentrating, to constitute major life activities. Thinking has been deemed to be a major life activity by some courts.<sup>32</sup> In one of these cases, the Third Circuit recognized “the major life activities of concentrating and remembering (more generally, cognitive function).”<sup>33</sup> The Ninth and Seventh Circuits have observed that memory and concentration “feed into” the major life activity of learning.<sup>34</sup> Similar considerations have led a few courts to conclude that concentration is an important and necessary component of other major life activities such as working, learning, and speaking, but is not an activity itself.<sup>35</sup> At least one court has declined to rule that awareness is a major life activity, reasoning that “awareness describes a state of consciousness, not a discrete life ‘activity.’”<sup>36</sup> A few courts have ruled that reading and writing are major life activities under the ADA.<sup>37</sup> And at least one court has found that attending school constitutes a major life activity for someone of school age.<sup>38</sup>

Applying restrictions on major life activities established by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Ninth Circuit ruled that handwriting and typing on a keyboard were not major life activities.<sup>39</sup> The Court declared that “[w]hile most lawyers or law office personnel would undoubtedly consider continuous keyboarding and handwriting to be activities of central importance to their lives, we cannot say that is so for ‘most people’s daily lives,’ as *Williams* requires.”

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<sup>32</sup> See, e.g., *Gagliardo v. Connaught Laboratories, Inc.*, 311 F.3d 565, 569 (3d Cir. 2002); *Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 307 (3d Cir. 1999) (“We accept that thinking is a major life activity. ... We hardly need to point

<sup>33</sup> *Gagliardo v. Connaught Laboratories, Inc.*, 311 F.3d 565, 569 (3d Cir. 2002).

<sup>34</sup> *Vinson v. Thomas*, 288 F.3d 1145, 1153 (9th Cir. 2002); *Emerson v. Northern States Power Co.*, 256 F.3d 506, 511, 512 (7th Cir.2001).

<sup>35</sup> See, e.g., *Pack v. Kmart Corp.*, 166 F.3d 1300, 1305 (10th Cir.1999); *Lemire v. Silva*, 104 F.Supp.2d 80, 87 (D.Mass. 2000).

<sup>36</sup> *Deas v. River West, L.P.*, 152 F.3d 471, 479 n. 18 (5th Cir. 1998).

<sup>37</sup> See, e.g., *Gonzales v. National Bd. of Medical Examiners*, 225 F.3d 620, 626 (6th Cir. 2000); *Bartlett v. New York State Bd. of Law Examiners*, 970 F.Supp. 1094, aff’d, 156 F.3d 321 (2d Cir.1998), vacated, 527 U.S. 1031 (1999).

<sup>38</sup> *Weixel v. Board of Educ. of City of New York*, 287 F.3d 138, 147-48 (2nd Cir. 2002).

<sup>39</sup> *Thornton v. McClatchy Newspapers, Inc.*, 292 F.3d 1045, 1046 (9th Cir. 2002).

While, as noted above, courts and regulatory agencies have consistently considered walking to be a major life activity, there has been less consistency about other forms of moving about and getting from place to place. The courts have reached varying conclusions about whether “travel” is a major life activity, largely depending upon the type of travel involved. At least one court has treated the broad concept of “travel” as a major life activity,<sup>40</sup> while other courts have recognized travel as a major life activity if defined to mean “basic mobility,” including the ability to leave one’s home and to travel short distances.<sup>41</sup> But courts have been less accepting of plaintiffs’ narrower, more tailored versions of ability to get around, such as “taking vacations ... alone,” “going to a shopping mall alone,” “taking ground transportation ... which might cross a bridge or tunnel or to travel on high roads,” “going to unfamiliar places that would involve staying overnight,” and riding “unaccompanied in trains”;<sup>42</sup> or the ability to “take public transportation

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<sup>40</sup> See *Anderson v. Gus Mayer Boston Store of Delaware*, 924 F.Supp. 763, 777 n. 37 (E.D.Tex. 1996) (reasoning that HIV substantially limits ability to travel freely).

<sup>41</sup> See, e.g., *Lemire v. Silva*, 104 F.Supp.2d 80, 87 (D.Mass. 2000) (“The ability to travel is also a major life activity, if defined ... to include basic mobility, such as leaving one’s home. The ability to leave one’s home and travel short distances is necessary in most cases to form and maintain social ties, earn a living, and purchase food and clothing. It is thus also at least as significant and as basic as learning and working.”); *Reeves v. Johnson Controls World Services, Inc.*, 140 F.3d 144, 152-53 (2d Cir. 1998) (“he has not alleged a limitation of the kind of ‘everyday mobility’ that might constitute a ‘major life activity’ within the meaning of the ADA. Plaintiff does not, for example, claim that he was so immobile as a result of his mental impairment that he was unable to leave his house or to go to work.”).

<sup>42</sup> *Reeves v. Johnson Controls World Services, Inc.*, 140 F.3d 144, 152-53 (2d Cir. 1998).

that causes a strobing effect.”<sup>43</sup> Several courts have ruled that driving a motor vehicle is not a major life activity,<sup>44</sup> but other courts have reached a contrary conclusion.<sup>45</sup>

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<sup>43</sup> *Sacay v. Research Foundation of City University of New York*, 193 F.Supp.2d 611, 627 (E.D.N.Y. 2002).

<sup>44</sup> *See, e.g., Chenoweth v. Hillsborough County*, 250 F.3d 1328, 1329-30 (11th Cir. 2001); *Colwell v. Suffolk County Police Department*, 158 F.3d 635, 643 (2d Cir. 1998), *cert. denied*, 526 U.S. 1018 (1999); *Sacay v. Research Foundation of City University of New York*, 193 F.Supp.2d 611, 627 (E.D.N.Y. 2002); *Kealy v. Consolidated Edison Co. of N.Y.*, 2002 WL 1552027 at \*5 (S.D.N.Y. 2002); *Acevedo Lopez v. Police Dept. of Puerto Rico*, 81 F.Supp.2d 293, 297 (D.P.R. 1999), *affirmed on other grounds*, 247 F.3d 26 (1st Cir. 2001); *Buskirk v. Apollo Metals*, 116 F.Supp.2d 591, 597-98 (E.D.Pa. 2000).

<sup>45</sup> *See, e.g., Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 281 F.3d 333, 345 (2d Cir. 2002) (recognizing that major life activity of caring for one's self encompasses driving); *Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867, 871-82 (2d Cir. 1998) (driving one of several activities which together constitute major life activity of "caring for oneself"); *Arnold v. County of Cook*, 220 F.Supp.2d 893, 895 n. 3 (N.D.Ill. 2002) ("there are compelling reasons to think that driving should qualify as a major life activity"). *See also Anderson v. North Dakota State Hosp.*, 232 F.3d 634, 636 (8th Cir. 2000) (noting split of authority, court assumed driving was major life activity); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir.1995) (ability to drive part of determination whether person can care for self); *Norman v. Southern Guar. Ins. Co.*, 191 F.Supp.2d 1321, 1334-35 (M.D.Ala. 2002) (plaintiff alleged substantial limitation of several major life activities, including driving; court ruled she had "presented a genuine issue of material fact as to a substantial limitation of several major life activities").

Most federal district courts that have considered the issue have ruled that running is not a major life activity.<sup>46</sup> Surprisingly, many such decisions were issued subsequent to the Supreme Court's treatment of running as a major life activity in *Sutton v. United Airlines*, 527 U.S. 471, 488 (1999) ("individuals who use prosthetic limbs or wheelchairs may be mobile and capable of functioning in society but still be disabled because of a substantial limitation on their ability to walk or run"), discussed earlier in this policy brief. Some other courts have begun to note the significance and implications of the Supreme Court's statement regarding running.<sup>47</sup> The lower courts have generally ruled various other kinds of personal movement, such as crawling,

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<sup>46</sup> See, e.g., *Ruggles v. Keebler Co.*, 224 F.Supp.2d 1295, 1301 (D.Kan. 2002); *Billings v. Taylor Royall, Inc.*, 2000 WL 490734, at \*4 (D.Md.2000); *Petty v. Freightliner Corp.*, 123 F.Supp.2d 979, 982 (W.D.N.C.2000); *Vaughnes v. United Parcel Service, Inc.*, 2000 WL 1145400, \*5 (S.D.N.Y. 2000); *Piascyk v. City of New Haven*, 64 F.Supp.2d 19, 26 (D.Conn. 1999), *aff'd*, 216 F.3d 1072, 2000 WL 804610 (2nd Cir. 2000); *Butterfield v. New York State*, 1998 WL 401533, \*9 (S.D.N.Y. 1998); *Stone v. Entergy Services, Inc.*, 1995 WL 368473, \*3 (E.D.La. 1995);

<sup>47</sup> See, e.g., *Finical v. Collections Unlimited, Inc.*, 65 F.Supp.2d 1032 (D.Ariz. 1999) ("A useful illustration is supplied by building upon the example provided by the Supreme Court [in *Sutton*]. An individual who uses a wheelchair, a prosthetic device, or even crutches in place of a missing limb may be able to conduct a great deal of "everyday activities" like an "everyday person".... A number of these activities may even extend beyond the range typically performed by "everyday people". Nonetheless, this highly-functional individual's impairment, loss of a limb, generally will continue to substantially limit the major life activity of walking or running and thus the individual, albeit highly functional, will remain a disabled individual entitled to the protections the ADA accords."); *Nawrot v. CPC Intern.*, 2000 WL 816787, \*7 (N.D.Ill. 2000), *judgment affirmed in part, reversed in part, on other grounds*, 277 F.3d 896 (7th Cir. 2002) ("The court in *Sutton* attempts to minimize the narrowing effect of its holding by suggesting that an impaired person would be disabled because she is substantially impaired, if not in her ability to work, in her ability to perform other major life activities such as walking or running in the case of the individual with prosthetic limbs.").

jumping, and climbing stairs or ladders, are not major life activities,<sup>48</sup> but a few other courts have reached different conclusions.<sup>49</sup>

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<sup>48</sup> See, e.g., *Piascyk v. City of New Haven*, 64 F.Supp.2d 19, 26 (D.Conn. 1999) (“jumping, climbing stairs and ladders, and crawling are not major life activities”), *aff’d*, 216 F.3d 1072, 2000 WL 804610 (2nd Cir. 2000); *Miller v. Airborne Express*, 1999 WL 47242, \*4, \*5 (N.D.Tex.1999) (“ability to crawl, kneel, squat, or climb ... do not constitute major life activities”); *Ruggles v. Keebler Co.*, 224 F.Supp.2d 1295, 1301 (D.Kan. 2002) (“crawling on the floor with grandchildren” not major life activity); *Robinson v. Global Marine Drilling Co.*, 101 F.3d 35, 37 (5th Cir. 1996) (climbing stairs not major life activity); *Kriskovic v. Wal-Mart Stores, Inc.*, 948 F.Supp. 1355, 1364-65 (E.D.Wis. 1996) (climbing ladders not major life activity).

<sup>49</sup> See, e.g., *Mahon v. Crowell*, 295 F.3d 585, 590-591 (6th Cir. 2002) (plaintiff alleged substantial limitation of major life activity of climbing; court ruled he had not demonstrated substantial limitation of that ability); *Kriskovic v. Wal-Mart Stores, Inc.*, 948 F.Supp. 1355, 1364-65 (E.D.Wis. 1996) (court assumed that climbing stairs is major life activity).

As noted above, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Supreme Court redirected the determination of substantial limitation in performing manual tasks to ability to do “household chores, bathing, and brushing one’s teeth” because these tasks were deemed to be “among the types of manual tasks of central importance to people’s daily lives” (122 S.Ct. at 693). In a similar vein, some lower courts have recognized that basic cleaning and housework, such as washing dishes and picking up trash, tasks that are necessary for one to live in a healthy and sanitary environment, are elements of the major life activity of caring for oneself.<sup>50</sup> Beyond that, some courts have ruled that other housework and household chores are usually not considered to be major life activities.<sup>51</sup> As one court described it, “merely ‘performing housework other than basic chores’ does not qualify as a major life activity.”<sup>52</sup> Courts have also ruled that yard and garden chores are not major life activities.<sup>53</sup> At least one court has ruled that going shopping at the mall is not a major life activity.<sup>54</sup>

The courts have consistently ruled that eating is a major life activity.<sup>55</sup> A few courts have been

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<sup>50</sup> See, e.g., *Marinelli v. City of Erie, Pa.*, 216 F.3d 354, 362-63 (3rd Cir. 2000); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995); *Lockett v. Wal-Mart Stores, Inc.*, 2000 WL 284295, at \*8 (S.D.Ala. 2000).

<sup>51</sup> See, e.g., *Marinelli v. City of Erie, Pa.*, 216 F.3d 354, 362-63 (3rd Cir. 2000) (scrubbing floors, washing walls and other chores not “necessary for one to live in a healthy or sanitary environment” not major life activities); *Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 643 (2d Cir. 1998) (moving furniture, painting, and plastering not major life activities); *Buskirk v. Apollo Metals*, 116 F.Supp.2d 591, 597-98 (E.D.Pa. 2000) (performing household chores not major life activity).

<sup>52</sup> *Marinelli v. City of Erie, Pa.*, 216 F.3d 354, 363 (3rd Cir. 2000), quoting *Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 643 (2d Cir. 1998).

<sup>53</sup> See, e.g., *Weber v. Strippit, Inc.*, 186 F.3d 907, 913 (8th Cir. 1999) (shoveling snow, gardening, and mowing lawn not major life activities); *Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 643 (2d Cir. 1998) (doing yard work, digging and planting in garden, and shoveling snow from driveway not major life activities’); *Moore v. J.B. Hunt Transp., Inc.*, 221 F.3d 944, 951 (7th Cir.2000) (mowing the lawn not major life activity); *Ruggles v. Keebler Co.*, 224 F.Supp.2d 1295, 1301 (D.Kan. 2002) (trimming trees).

<sup>54</sup> *Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 642-43 (2d Cir. 1998). See also *Reeves v. Johnson Controls World Services, Inc.*, 140 F.3d 144, 152-53 (2d Cir. 1998) (“going to a shopping mall alone” not major life activity).

asked to consider whether other kinds of basic body functions, such as eliminating waste products, are major life activities, and they have assumed, without deciding, that they are.<sup>56</sup> One court held that “liver function” could not be considered a major life activity.<sup>57</sup> As for the most basic and comprehensive of human functions—living—one federal district has ruled that it does not constitute a major life activity. The court based this surprising conclusion on the following reasoning:

[L]iving is not a major life activity within the meaning of the ADA. Notwithstanding the tautological nature of this proposition, adopting such an expansive construction of “major life activity” without any textual or judicial support would be unwise and would likely yield bizarre and unintended results not far down the road. For example, under plaintiff’s approach, one could argue that a heavy smoker at high risk for lung cancer or heart disease with an expected life-span of only ten more years is substantially limited in her major life activity of living, even if the smoker exhibits no medical or physical problems at the time.<sup>58</sup>

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<sup>55</sup> See, e.g., *Waldrip v. General Elec. Co.*, 2003 WL 1204429 at \*2 (5th Cir. 2003); *Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 923-24 (7th Cir. 2001); *Forest City Daly Hous., Inc. v. Town of N. Hempstead*, 175 F.3d 144, 151 (2d Cir. 1999); *Land v. Baptist Med. Ctr.*, 164 F.3d 423, 424 (8th Cir. 1999); *Beaulieu v. Northrop Grumman Corp.*, 2001 WL 1631470 (9th Cir. 2001); *Furnish v. SVI Systems, Inc.*, 270 F.3d 445, 449 (7th Cir. 2001); *Vailes v. Prince George’s County, Maryland*, 2002 WL 1421117 at \*1 (4th Cir. 2002).

<sup>56</sup> See, e.g., *Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867, 871 (2nd Cir. 1998) (“Assuming, without deciding, that the ability to control one’s elimination of waste is a major life activity”); *Sacay v. Research Foundation of City University of New York*, 193 F.Supp.2d 611, 627 (E.D.N.Y. 2002) (“this court will assume that the ability to control elimination of waste is a major life activity”); *Reese v. American Food Service*, 2000 WL 1470212 at \*7 (E.D.Pa. 2000) (“court will assume that urinating is such an activity”).

<sup>57</sup> *Furnish v. SVI Systems, Inc.*, 270 F.3d 445, 449-50 (7th Cir. 2001).

<sup>58</sup> *U.S. v. Happy Time Day Care Center*, 6 F.Supp.2d 1073, 1081-82 (W.D.Wis. 1998). Ironically, the court recognized that “growing” might be a major life activity, *id.* at 1081, despite the fact that the court’s example of a smoker could equally well apply to arguable “stunting” of growth.

The court's logic is flawed; the smoker in the court's example obviously had not demonstrated an "impairment" (she "exhibits no medical or physical problems"), so cannot qualify as an individual with a disability under the ADA. Moreover, the conjectural, future statistical probability of short life-span is hardly proof of the existence of a "substantial limitation" on living for a particular individual, who may in fact live for considerably more years than the statistical average.

In a case decided under Section 504 of the Rehabilitation Act, upon which the ADA's definition of disability is based, the Seventh Circuit reached quite a different conclusion when it declared that living was "the most major life activity of all," and observed that a condition that substantially imperils life "affects all major life activities—if his heart stops, he will not breathe, see, speak, walk, learn, or work."<sup>59</sup>

Regarding less organic, more optional functions, the courts have found a variety of recreational pursuits not to constitute major life activities. These have included hunting,<sup>60</sup> fishing,<sup>61</sup> playing golf,<sup>62</sup> skiing,<sup>63</sup> playing tennis,<sup>64</sup> and hiking,<sup>65</sup> and broader categories of activities such as "athletics" and "exercise."<sup>66</sup>

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<sup>59</sup> *Knapp v. Northwestern University*, 101 F.3d 473, 479 (7th Cir. 1996).

<sup>60</sup> *See, e.g., Barnard v. ADM Milling Co.*, 987 F.Supp. 1337, 1342 (D.Kan. 1997) ("bow hunting"); *Knutson v. AG Processing, Inc.*, 2002 WL 31422858 at \*10 (N.D.Iowa Oct 29, 2002).

<sup>61</sup> *See, e.g., Weber v. Strippit, Inc.*, 186 F.3d 907, 913 (8th Cir. 1999); *Barnard v. ADM Milling Co.*, 987 F.Supp. 1337, 1342 (D.Kan. 1997) ("fishing competitively").

<sup>62</sup> *See, e.g., Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 642-43 (2d Cir. 1998);

<sup>63</sup> *See, e.g., Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 643 (2d Cir. 1998);

<sup>64</sup> *See, e.g., Weber v. Strippit, Inc.*, 186 F.3d 907, 913 (8th Cir. 1999).

<sup>65</sup> *See, e.g., Weber v. Strippit, Inc.*, 186 F.3d 907, 913 (8th Cir. 1999).

<sup>66</sup> *See, e.g., Buskirk v. Apollo Metals*, 116 F.Supp.2d 591, 597-98 (E.D.Pa. 2000) ("engaging in various athletics"); *Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 643 (2d Cir. 1998) ("physical exercise in the wintertime").

The cases discussed in this section represent merely a sampling of the case law addressing the concept of major life activities under the ADA, and should not be considered authoritative or comprehensive. Overall, the Supreme Court's raising of the bar for establishing major life activities has led to increasingly restrictive, technical interpretations. At times, these have involved complex, frequently conjectural, often purely semantic distinctions, such as trying to draw lines between performing manual tasks, grabbing, holding, gripping, and lifting;<sup>67</sup> determining which personal-care tasks and household chores are of central importance to most people;<sup>68</sup> differentiating between social relationships, relating to other persons, community involvement, dating, sexual relations, and reproduction;<sup>69</sup> determining what the difference is between mobility, travel, locomotion, etc.;<sup>70</sup> speculating about the significance of procreation, sexual activity, caring for one's self, growing, and socializing in the life of a young child;<sup>71</sup> and even unraveling the philosophical and linguistic intricacies of whether living is itself a major life activity.<sup>72</sup>

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<sup>67</sup> See, e.g., *Fultz v. City of Salem*, 2002 WL 31051577, \*1 (9th Cir. 2002) (plaintiff asserted substantial limitation of ability to perform manual tasks, grabbing, holding, and grip strength).

<sup>68</sup> See, e.g., *Marinelli v. City of Erie, Pa.*, 216 F.3d 354, 363 (3rd Cir. 2000) (plaintiff asserted limitation on ability to scrub floors, wash walls, do dishes, clean counters, and do other housework).

<sup>69</sup> See, e.g., *Waddell v. Valley Forge Dental Associates*, 276 F.3d 1275, 1280 n. 4 (11th Cir. 2001) (plaintiff alleged substantial limitation of intimate and sexual relationships, and participation in societal and community life); *McAlindin v. San Diego*, 192 F.3d 1226, 1233-34 (9th Cir. 1999) (plaintiff alleged substantial limitation of ability to engage in sexual relations and interacting with others).

<sup>70</sup> See, e.g., *Lemire v. Silva*, 104 F.Supp.2d 80, 87 (D.Mass. 2000) ("The ability to travel is also a major life activity, if defined ... to include basic mobility, such as leaving one's home.).

<sup>71</sup> See, e.g., *U.S. v. Happy Time Day Care Center*, 6 F.Supp.2d 1073, 1078-79 (W.D.Wis. 1998) (three-year-old with HIV infection; court considered relevance of procreation, sexual activities, caring for self, growing, socializing, and living).

<sup>72</sup> See, e.g., *U.S. v. Happy Time Day Care Center*, 6 F.Supp.2d 1073, 1081-82 (W.D.Wis. 1998) (living not major life activity); *Knapp v. Northwestern University*, 101 F.3d 473, 479 (7th Cir. 1996) (living is "most major life activity of all").

Many of these distinctions are arbitrary and artificial, leaving room for inconsistency between different judges, and providing an incentive for plaintiffs' attorneys to be creative and encyclopedic in identifying major life activities.<sup>73</sup> Under a broader reading of major life activity as an activity that is important in a person's life, many of these complicated issues would disappear. But under the Supreme Court's restrictive interpretation of major life activity, such tortuous questions and verbal puzzles can be expected to proliferate.

## THE ISSUE OF WORKING AS A MAJOR LIFE ACTIVITY

Regulations implementing the ADA and Section 504 of the Rehabilitation Act, and the Senate and House ADA committee reports all explicitly include "working" as a major life activity.<sup>74</sup> In *Bragdon v. Abbott*, the Supreme Court recognized that "the ADA must be construed to be consistent with regulations issued to implement the Rehabilitation Act," and cited the ADA provision that requires consistency with Section 504 regulations.<sup>75</sup> The Court then recited the Section 504 list of examples of major life activities that includes "working." The Court ultimately reasoned that the activity of reproduction should be deemed a major life activity "since reproduction could not be regarded as any less important than working and learning."<sup>76</sup> The majority of the Court thus clearly accepted that working constitutes a major life activity. Indeed in separate opinions, all nine justices discussed working as a major life activity. Justices Stevens, Souter, Ginsburg, and Breyer joined in Justice Kennedy's opinion for the Court. In her concurring opinion, Justice Ginsburg cited the ADA regulation provisions that include working as a major life activity, and argued that "HIV infection should be considered a disability because

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<sup>73</sup> See, e.g., *Waddell v. Valley Forge Dental Associates*, 276 F.3d 1275, 1280, n. 4 (11th Cir. 2001) (pleadings alleged substantial limitation of plaintiff's "intimate and sexual relationships, his participation in societal and community life, his ability to plan his life and care for himself, and his ability to travel"); *Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 642-433 (2d Cir. 1998) (together, three plaintiffs asserted limitations of major life activities of standing, sitting, lifting, work, sleeping, driving, performing housework, shopping in the mall, skiing, golfing, bending over, reaching up, working on cars, moving furniture, doing yard work, painting, plastering, digging and planting in garden, shoveling snow, and engaging in physical exercise).

<sup>74</sup> 29 C.F.R. § 1630.2(i); 45 C.F.R. § 84.3(j)(2)(ii); S. Rep. No. 101-116, at 22 (1989); H.R. Rep. No. 101-485, pt. 2 at 52 (1990) (Committee on Education and Labor); H.R. Rep. No. 101-485, pt. 3 at 28 (1990) (Committee on the Judiciary).

<sup>75</sup> 524 U.S. 624, 638 (1998), citing 42 U.S.C. § 12201(a).

<sup>76</sup> *Id.* at 639.

it is ‘a physical ... impairment that substantially limits ... major life activities,’ or is so perceived, including [*inter alia*] the ... individual’s employment potential....”<sup>77</sup> Chief Justice Rehnquist, concurring in the judgment in part and dissenting in part and joined by Justices Scalia and Thomas, wrote an opinion in which he argued that the majority “makes no attempt to demonstrate that reproduction is a major life activity in the same sense that ‘caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working’ are.”<sup>78</sup> He added that “[t]here are numerous disorders of the reproductive system ... which are so painful that they limit a woman’s ability to engage in major life activities such as walking and working.”<sup>79</sup>

Such unanimous acceptance notwithstanding, the Supreme Court has subsequently called into question whether working is properly considered a major life activity. In *Sutton v. United Airlines*, 527 U.S. 471, 492 (1999), the Court indicated that it was “[a]ssuming without deciding that working is a major life activity ....” It added, however, that it had certain misgivings:

We note, however, that there may be some conceptual difficulty in defining “major life activities” to include work, for it seems “to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others] ... then that exclusion constitutes an impairment, when the question you’re asking is, whether the exclusion itself is by reason of handicap.” Tr. of Oral Arg. in *School Bd. of Nassau Co. v. Arline*, O.T. 1986, No. 85-1277, p. 15 (argument of Solicitor General).

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<sup>77</sup> 524 U.S. at 664-65 (citing 45 C.F.R. § 84.3(j)(2)(ii) (1997); 28 C.F.R. § 41.31(b)(2) (1997)), 656 (1998) (Ginsburg, J., concurring) (citations omitted).

<sup>78</sup> *Id.*, 524 U.S. at 659 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

<sup>79</sup> *Id.* at 660.

The quoted statement of the Solicitor General was erroneous and illogical when it was made in 1986, long before congressional committees and ADA enforcement agencies had included working in the list of examples of major life activities, and long before the Justices had considered working a major life activity in *Bragdon v. Abbott*. The logic is flawed because it confuses the concepts of impairment and limitation of a major life activity. ADA plaintiffs do not assert that “exclusion constitutes an impairment,” but rather that exclusion because of an impairment demonstrates either that the impairment substantially limited the person’s ability to work or that an employer considered the person’s impairment to be substantially limiting in working. Plaintiffs must demonstrate either that they actually have a physical or mental impairment or that the employer regarded them as having one. The inclusion of working as a major life activity is a simple reflection of the fact that working is a necessary and primary human endeavor. It also serves to prevent employers from firing or refusing to hire a worker because of a physical or mental impairment (or perceived impairment), and then trying to argue that the worker’s impairment is not substantial enough to constitute a disability. If an impairment was substantially limiting enough to convince an employer that it justifies excluding or terminating the individual from the job, then it is substantially limiting enough to constitute a disability under the Act.

In its decision in the *Arline* case, the Supreme Court responded to and refuted the argument raised by the Solicitor General, as follows:

The United States recognized that “working” was one of the major life activities listed in the regulations, but said that to argue that a condition that impaired *only* the ability to work was a handicapping condition was to make “a totally circular argument which lifts itself by its bootstraps.” Tr. of Oral Arg. 15-16. The argument is not circular, however, but direct. Congress plainly intended the Act to cover persons with a physical or mental impairment (whether actual, past, or perceived) that substantially limited one’s ability to work.<sup>80</sup>

In the same line of argument, the Solicitor General also “took the position that a condition such as cosmetic disfigurement could not substantially limit a major life activity within the meaning of the statute, because the only major life activity that it would affect would be the ability to work”—another contention that the Court pointed out was inconsistent with Section 504 regulations and congressional intent.<sup>81</sup>

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<sup>80</sup> *School Board of Nassau County v. Arline*, 480 U.S. 273, 283 n. 10 (1987) (emphasis in original).

<sup>81</sup> *Id.*

The issue of whether proof that one cannot perform the essential functions of a particular job (or is perceived by an employer as being unable to do so) is sufficient to establish a substantial limitation in working is the subject of another policy brief in the National Council on Disability's *Righting the ADA* series. But there was never any doubt, by Congress, by the regulatory agencies, or by the Court in the *Arline* case, that working was a major life activity. It is highly surprising that such obviously deficient and refuted legal reasoning, in oral argument in a case decided in 1987, influenced the Court in *Sutton* to doubt the validity of the widely accepted concept of a major life activity of working under the ADA. In support of its view, the Court in *Sutton* added that "even the EEOC has expressed reluctance to define 'major life activities' to include working and has suggested that working be viewed as a residual life activity, considered, as a last resort, *only* '[i]f an individual is not substantially limited with respect to *any other* major life activity.'"<sup>82</sup> The Court's references to "reluctance" on the part of EEOC and the "residual" status of working are mischaracterizations. The assumption underlying the quoted statement in the regulatory guidance was that, as a practical matter, demonstrating a substantial limitation of an activity other than working was in many cases likely to be easier than showing a limitation on working, making it unnecessary to consider the issue of working. This was particularly probable in light of the "class of jobs or a broad range of jobs" requirement (to be discussed in another policy brief in the *Righting the ADA* series) and other significant hurdles that EEOC had established for showing substantial limitation of working. There is absolutely nothing in the regulations or in the EEOC's regulatory guidance to suggest that it was reluctant to recognize working as constituting a major life activity or that it should occupy any second class status.

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<sup>82</sup> 527 U.S. at 492 (emphasis added by the Court), quoting from 29 C.F.R. pt. 1630, App. § 1630.2(j) (1998) ("If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working").

In *Murphy v. United Parcel Service*, 527 U.S. 516, 523 (1999), the Court again stated that it would assume without deciding that regulations delineating “working” as a major life activity are valid. And in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 122 S.Ct. 681 (2002), although the Court initially stated that it would “express no opinion” on the contention that working was a major life activity,<sup>83</sup> the Court again asserted its reluctance to recognize working as a major life activity. The Court declared:

Because of the conceptual difficulties inherent in the argument that working could be a major life activity, we have been hesitant to hold as much, and we need not decide this difficult question today.

*Id.* at 692.

One can hope that more carefully considered analysis will ultimately lead the Court to accept that work is a major life activity, but, in the meantime, the lower courts have been left in something of a legal limbo on this issue. Many courts have simply continued to treat working as a major life activity as if it were a settled proposition;<sup>84</sup> as the Seventh Circuit articulated it, “To be sure, working constitutes a major life activity under the ADA and the Rehab Act.”<sup>85</sup>

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<sup>83</sup> 122 S. Ct. at 689 (“We express no opinion on the working, lifting, or other arguments for disability status that were preserved below but which were not ruled upon by the Court of Appeals.”).

<sup>84</sup> See, e.g., *E.E.O.C. v. J.B. Hunt Transport, Inc.*, 321 F.3d 69, 75-77 (2d Cir. 2003); *Felix v. New York City Transit Authority*, 2003 WL 1661135, \*3 (2d Cir., 2003); *Huge v. General Motors Corp.*, 2003 WL 1795691, \*2 (6th Cir. 2003); *Peters v. City of Mauston*, 311 F.3d 835, 843 (7th Cir. 2002); *Blanks v. Southwestern Bell Communications, Inc.*, 310 F.3d 398, 401 (5th Cir. 2002); *Rakity v. Dillon Companies, Inc.*, 302 F.3d 1152, 1161 (10th Cir. 2002); *Brunko v. Mercy Hosp.*, 260 F.3d 939, 941-42 (8th Cir. 2001). See also *Henderson v. Ardcoc, Inc.*, 247 F.3d 645, 652 (6th Cir. 2001) (holding that plaintiff had shown evidence sufficient to withstand summary judgment that her employer regarded her as disabled in working); *Ross v. Campbell Soup Co.*, 237 F.3d 701, 709 (6th Cir. 2001) (“the drafters of the ADA and its subsequent interpretive regulations clearly intended that plaintiffs who are mistakenly regarded as unable to work have a cause of action under the [ADA]”).

<sup>85</sup> *Peters v. City of Mauston*, 311 F.3d 835, 843 (7th Cir. 2002).

Other courts have taken note of the Supreme Court’s misgivings, but have treated working *arguendo*, for the purpose of deciding the cases before them, as a major life activity<sup>86</sup>. The Eighth Circuit has declared that “[i]n *Sutton*, the Supreme Court assumed working is a major life activity, but questioned whether it is,” and that “[m]ore recently, [in *Toyota Motor Mfg., Ky., Inc. v. Williams*] the Supreme Court expressed skepticism as to whether working can be a major life activity, but did not decide the issue.”<sup>87</sup> It explained the Court of Appeals’ policy regarding the issue as follows: “In this circuit we have followed *Sutton* and *Toyota* in assuming, without conclusively ruling, that working constitutes a major life activity for purposes of applying the ADA.”<sup>88</sup> The Sixth Circuit has declared that after *Sutton* and *Williams*, “[a]s a major life activity, ... ‘working’ is problematic,” and, while it would “assume without deciding” that the regulatory provision declaring it to be so was valid, “[b]ecause of the problems surrounding ‘working,’” it would treat it “as a residual category resorted to only when a complainant cannot show she or he is substantially impaired in any other, more concrete major life activity.”<sup>89</sup> Accordingly, the status of working as a major life activity has gone from being a manifestly established assumption in the regulations and legislative history to being a proposition that, at least for some courts, is considered “problematic.”

## SUBSTANTIAL LIMITATION

Under the definition of disability in the ADA and in the Rehabilitation Act, to constitute a disability an impairment must be one that “substantially limits” a major life activity. The EEOC’s ADA regulations provided the first regulatory definition of the term “substantially limits.” Under the EEOC’s formulation, “substantially limits” refers either to total inability to perform an activity or to significant restriction as to the condition, manner, or duration under which an individual can perform.<sup>90</sup> The Supreme Court has added its own perspectives to the statutory and regulatory framework.

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<sup>86</sup> See, e.g., *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 1168 n. 5 (1st Cir. 2002); *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720, 725 n. 3 (8th Cir. 2000); *Mahon v. Crowell*, 295 F.3d 585, 590 (6th Cir. 2002).

<sup>87</sup> *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720, 725 n. 3 (8th Cir. 2000).

<sup>88</sup> *Id.*, citing as examples its prior decisions in *Duty v. Norton-Alcoa Proppants*, 293 F.3d 481, 491 n. 3 (8th Cir. 2002); *Kellogg v. Union Pacific R.R.*, 233 F.3d 1083, 1087 (8th Cir. 2000).

<sup>89</sup> *Mahon v. Crowell*, 295 F.3d 585, 590 (6th Cir. 2002).

<sup>90</sup> 29 C.F.R. §1630.2(j)(1).

In *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 564-65 (1999), the Court ruled that the Court of Appeals had erred in construing “a mere difference” in “an individual’s manner of performing a major life activity” as sufficient to establish that the individual’s condition “substantially limits” the performance of the activity. Consistent with the EEOC regulation, the Supreme Court ruled that there has to be a “significant restriction” on performance of a major life activity, not simply a difference in the manner in which the individual performs it. It required Mr. Kirkingburg to prove that he had a disability “by offering evidence that the extent of the limitation in terms of [his] own experience, as in loss of depth perception and visual field, is substantial.”<sup>91</sup> The Court clarified that it did not mean “to suggest that monocular individuals have an onerous burden in trying to show that they are disabled,” and, in fact, “people with monocular vision ‘ordinarily’ will meet the Act’s definition of disability.”<sup>92</sup>

The Court provided additional guidance concerning the meaning of the “substantially limits” concept, and raised the bar considerably, in its decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 122 S.Ct. 681, 691 (2002). Initially, the Court observed that the word “substantial” “precludes impairments that interfere in only a minor way with the performance of ... tasks from qualifying as disabilities.”<sup>93</sup> Then, the Court drew upon dictionary definitions and declared that “substantially” in the phrase “substantially limits” suggests “considerable” or “to a large degree.” Having identified a range of dictionary definitions for the term “substantially”—varying from “considerable” or “to a large degree” to “essential,” the Court then established as a standard for having a disability that an individual must have an impairment that “prevents or severely restricts” the individual from performing major life activities. The Court thus selected a highly restrictive interpretation. By transforming the phrase “substantially limits” into “prevents or severely restricts,” it selected “severely restricts” in preference to less extreme options such as “considerably restricts” or “in more than a minor way,” or the EEOC phrasing “significant restriction” it had adopted in *Kirkingburg*.

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<sup>91</sup> 527 U.S. at 567.

<sup>92</sup> *Id.*

<sup>93</sup> 122 S.Ct. at 691.

In its decision in *Williams*, the Court reiterated the proviso established in the EEOC ADA regulation that “[t]he impairment’s impact must also be permanent or long-term.”<sup>94</sup> In doing so, even though the Court had expressed reservations about what persuasive authority should be afforded the EEOC regulations definition provisions, the Court’s reference and citation to the duration limitation could be interpreted as some measure of support for the EEOC position. NCD has criticized the EEOC for creating such a duration limitation when there is no basis for it in the statutory language or legislative history of the ADA, nor in other federal agencies’ ADA regulations. *See, e.g., National Council on Disability, Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act 221-222 (2000).*

The *Williams* Court rejected the approach, applied by the Sixth Circuit in that case, that a class of activities comprising a major life activity must be affected for an impairment to be substantially limiting. The EEOC has applied, in the context of the major life activity of working, a requirement that an individual show inability to perform a “class” or a “broad range” of jobs. This standard will be discussed in another policy brief in the *Righting the ADA* series. In *Williams*, the Court said such a requirement should not be applied outside the context of the major life activity of working.<sup>95</sup> Accordingly, in proving substantial limitation in nonemployment contexts, ADA plaintiffs do not have to prove that they are precluded from a class or broad range of activities. The Court made it clear that ADA claimants who allege that they have been subjected to employment discrimination can nonetheless seek to establish disability by demonstrating that they are substantially limited in major life activities other than working. And, in such circumstances, the determination of limitations on other major life activities should certainly not focus only on manifestations of the activity limitation in the workplace.

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<sup>94</sup> 122 S.Ct. at 685, citing 29 C.F.R. §§ 1630.2(j)(2)(ii)-(iii) (2001).

<sup>95</sup> 122 S.Ct. at 693.

In *Williams*, the Court stated further that it is insufficient for individuals attempting to prove disability status merely to submit evidence of a medical diagnosis of an impairment; instead, they must offer evidence that the extent of the limitation caused by their impairment is substantial in terms of their own experience.<sup>96</sup> Perhaps most significant of the various commentaries on the substantial limitation standard in the *Williams* decision is the Court's announcement, directly counter to the usual rule of statutory construction for civil rights laws, that substantially limited in a major life activity must be "interpreted strictly to create a demanding standard for qualifying as disabled."<sup>97</sup> For a discussion of the traditional standard of construction for civil rights measures, and the congressional intent for the ADA to be construed broadly, go to <http://www.ncd.gov/newsroom/publications/broadnarrowconstruction.html>.

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<sup>96</sup> 122 S.Ct. at 691.

<sup>97</sup> 534 U.S. at 197-98.

Some lower courts were applying restrictive standards of substantial limitation even before the Supreme Court's ruling in *Williams*<sup>98</sup>. Under the heightened standards the Supreme Court established in that decision, plaintiffs with various physical and mental impairments are certainly not faring well<sup>99</sup>. In some of these decisions, the courts have been quite clear about the dramatic

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<sup>98</sup> See, e.g., *E.E.O.C. v. Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2001) (machine operator with epilepsy causing seizures, bedwetting on one occasion, bruises, and periods of “zoning out” was not substantially limited); *Kellogg v. Union Pac. R.R. Co.*, 233 F.3d 1083 (8th Cir. 2000) (railroad manager with major depression and anxiety not substantially limited); *Bowen v. Income Producing Mgmt. of Okla.*, 202 F.3d 1282 (10th Cir. 2000) (fast food manager who as a result of brain surgery suffered short-term memory loss, inability to concentrate, and difficulty doing simple math not substantially limited); *Schneiker v. Fortis Insurance Company*, 2000 U.S. App. LEXIS 90 (7th Cir. 2000) (benefits analyst with depression and alcoholism requiring hospitalizations, medication, outpatient care, and AA meetings not substantially limited); *Sorensen v. University of Utah*, 194 F.3d 1084 (10th Cir. 1999) (nurse with MS, forcibly reassigned immediately after five-day hospitalization, not disabled); *Spades v. City of Walnut Ridge*, 186 F.3d 897 (8th Cir. 1999) (police officer with depression who attempted suicide not substantially limited); *Weber v. Idex Corp.*, 186 F.3d 907 (8th Cir. 1999) (sales manager with heart disease, heart attack, hypertension, and multiple hospitalizations not disabled); *Scherer v. G.E. Capital Corp.*, 59 F.Supp.2d 1132 (D. Kan. 1999) (fraud investigator with bipolar disorder and obsessive compulsive disorder not disabled); *Lorubbio v. Ohio Dep't of Trans.*, 181 F.3d 102 (6th Cir. 1999) (transportation worker with spinal injury not substantially limited); *Ivy v. Jones*, 192 F.3d 514 (5th Cir. 1999) (hearing impaired clerical worker using hearing aids not substantially limited); *Tone v. U.S.P.S.*, 68 F. Supp. 2d 147 (N.D. N.Y. 1999) (tractor trailer operator who lost left eye to cancer not disabled).

<sup>99</sup> See, e.g., *Pollard v. High's of Balt., Inc.*, 281 F.3d 462, 469 (4th Cir. 2002) (employee with back injury and infection necessitating surgery and absence from work for nine months was not substantially limited); *Mahon v. Crowell*, 295 F.3d 585, 591-92 (6th Cir. 2002) (plaintiff's loss of ability to perform 47 percent of jobs in his job market not sufficient to establish substantial limitation in working); *Munck v. New Haven Savings Bank*, \_\_\_ F.Supp.2d \_\_\_, 2003 WL 1224582, at \*3-\*4 (D.Conn. 2003) (plaintiff's evidence that cervical/thoracic sprain and migraine headaches affected entire right hand side of body, preventing lifting more than 20 or 30 pounds without discomfort and interfering with performing repetitive motions on right side not sufficient to establish substantial limitation of major life activity); *Stedman v. Bizmart*, 219 F. Supp. 2d 1212 (N.D. Ala. 2002) (liver transplant recipient with diabetes had not demonstrated that diabetes substantially limited performance of any life activity outside of the workplace);

effect that the Supreme Court decisions have had in making it more difficult for plaintiffs to demonstrate a substantial limitation of a major life activity. In *Mahon v. Crowell*, for example, the Sixth Circuit referred to *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* and *Sutton v. United Air Lines Inc.* as “[r]ecent Supreme Court decisions sharply limiting the reach of the ADA ....<sup>100</sup>” The evidence in that case had shown that the plaintiff’s impairment prevented him from performing 47 percent of the jobs in his job market.<sup>101</sup> The Sixth Circuit observed:

Our Court has in the past allowed claimants to assert they were substantially limited in the major life activity of working when they showed their impairments barred them from a significant percentage of available jobs. In *Burns v. Coca-Cola Enterprises, Inc.*, we affirmed a district court’s decision that a plaintiff was disabled under the ADA “because his injury precluded him from performing at least 50 percent of the jobs he was qualified to perform given his education, background and experience.” But this was before the Supreme Court’s decision in *Williams*, which emphasized that the term “substantially limits” should be read “strictly to create a demanding standard for qualifying as disabled.” We would be using a less-than-demanding standard were we to find Mahon substantially limited in working when he is still qualified for over half the jobs he was qualified for before his injury.<sup>102</sup>

Thus influenced by the Supreme Court’s “demanding standard,” the court ruled that Mr. Mahon had not established a substantial limitation in working.

## CONCLUSION

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*Fultz v. City of Salem*, 624, 2002 WL 31051577, \*1 (9th Cir. 2002) (plaintiff’s testimony of difficulty in grabbing, holding, and gripping (40 percent loss of gripping strength in one hand) not sufficient to establish substantial limitation; “under *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, ... the evidence is insufficient. Plaintiff has shown that his ability to perform some manual tasks is diminished, but “diminished is different from ‘substantially limited,’ at least as understood by Congress and the Supreme Court.”); *Mack v. Great Dane Trailers*, 308 F.3d 776, 780-81 (7th Cir. 2002) (inability to lift items at work not substantial limitation); *Rakity v. Dillon Companies, Inc.*, 302 F.3d 1152, 1160 (10th Cir. 2002) (inability to lift ten to fifteen pounds frequently or more than forty pounds at all not substantial limitation).

<sup>100</sup> 295 F.3d 585, 590 (6th Cir. 2002).

<sup>101</sup> *Id.* at 591.

<sup>102</sup> *Id.* at 591-92 (citations omitted).

On balance, the Supreme Court’s rulings on substantial limitation of a major life activity have increasingly constricted the meaning of this concept, which had already been narrowed somewhat by certain interpretations of the EEOC and some lower courts. This policy brief has described the impact of Supreme Court rulings on the concept of major life activities, on the issue of whether working is a major life activity, and on the standards applied to determine whether an impairment causes a substantial limitation. While the decisions have not been entirely negative, on the whole they have had a seriously deleterious effect on the prospects of plaintiffs seeking to invoke ADA protection to challenge alleged discriminatory actions. Ultimately, the Court has gone a long way toward achieving its announced goal of causing the phrase “substantially limited in a major life activity” to be “interpreted strictly to create a demanding standard for qualifying as disabled.”<sup>103</sup>

Perhaps a district court judge has best summed up the impact the Supreme Court’s rulings on these issues, particularly the *Williams* ruling, have had. In *Stedman v. Bizmart*, the federal district court held that the plaintiff, a liver transplant recipient with diabetes, was not protected by the ADA because his diabetes did not substantially limit him in performing any major life activity outside of the workplace.<sup>104</sup> The court explained:

Prior to January 2002, case law made satisfaction of a *prima facie* case under the ADA, particularly meeting the “disability” prong, relatively simple. On January 8, 2002, however, the Supreme Court significantly altered the definition of “substantially limits a major life activity.” . . . Curtailing previous case law defining “major life activities,” [the Court in *Toyota v. Williams*] 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.” Specifically, the Court stated that “[w]hen addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people’s daily lives, not whether the claimant is unable to perform the tasks associated with her specific job.” As a result, *this decision creates additional obstacles for many plaintiffs in disability cases, particularly those alleging discrimination in the workplace. Under Toyota, it appears that courts now have greater discretion in determining what is a major life activity and what interference with that activity is substantial enough to constitute a disability.*<sup>105</sup>

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<sup>103</sup> 534 U.S. at 197-98.

<sup>104</sup> 219 F.Supp.2d 1212 (N.D. Ala. 2002).

<sup>105</sup> *Id.* at 1220-21 (citations omitted) (emphasis added).

By placing “additional obstacles” in the way of potential ADA plaintiffs and by giving judges greater discretion to dismiss ADA cases on the basis of technicalities and miserly standards, the Supreme Court has strayed a long way from pursuing the ADA’s express goal of establishing a clear and comprehensive prohibition of discrimination on the basis of disability.

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