Some "Hardship": Defending a Disability Discrimination Suit Under the Wisconsin Fair Employment Act

Alexander W. Hansch

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SOME "HARDSHIP": DEFENDING A DISABILITY DISCRIMINATION SUIT UNDER THE WISCONSIN FAIR EMPLOYMENT ACT

I. INTRODUCTION

The situation is likely not unfamiliar to an attorney practicing employment law: an employer-client doing business in Wisconsin calls and says that one of its employees has become sick or injured. The employee is disabled, but wants to continue working. Careful to fulfill its legal obligations, the employer is calling to confirm whether the disabled employee is entitled to some workplace accommodations. While the attorney undoubtedly appreciates the employer’s vigilant watch over its potential legal responsibilities, the attorney also appreciates that the employer is watching the bottom line.

The Wisconsin Fair Employment Act1 ("WFEA") governs the extent to which an employer may be legally obligated to accommodate an individual’s disability for the purpose of integrating that individual into the workforce.2 These obligations have their costs. Surely the employer is concerned about the price that accommodating the employee would pose, and rightfully so; the potential costs for accommodating an employee are considerable.3

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3. The Job Accommodation Network found that eight percent of accommodations made cost employers $2,001 to $5,000, while another four percent cost employers greater than $5,000. Job Accommodation Network, Accommodation Benefit/Cost Data, http://www.jan.wvu.edu/media/Stats-/BenCosts0799.html (last visited Jan. 25, 2006). The Job Accommodation Network is a service provided by the Office of Disability Employment Policy of the U.S. Department of Labor that monitors expenditures made under the WFEA’s federal counterpart, the Americans with Disabilities Act ("ADA"). 42 U.S.C. § 12101(a)(1) (2004). According to the Job Accommodation Network’s figures through 1999, twenty percent of employers provided accommodation at no cost, fifty-one percent provided accommodation at a cost between $1 and $500, eleven percent between $501 and $1,000, and three percent between $1,001 and $1,500, with a mean cost of $943. Job Accommodation Network, Accommodation Benefit/Cost Data, http://www.jan.wvu.edu/media/Stats-/BenCosts0799.html (last visited Jan. 25, 2006). When considering Congress’s finding that forty-three million Americans were physically or mentally disabled when the Americans with Disabilities Act of 1990 was passed, one can appreciate estimates that nation-wide accommodation requirements could cost employers over ten billion dollars annually. Steven B. Epstein, In Search of a Bright Line:
Despite the costs to accommodate an employee, an employer is not without some legislative protection. Specifically, an employer does not need to provide an accommodation if it would pose a "hardship." On its face, this term is an employer's key to alleviating the costly effects of the WFEA.

Unfortunately, the term is vacuous; it is undefined. A quarter of a century after they were enacted, many of the WFEA's key provisions remain unclear. "Reasonable accommodation" and "hardship" are the two most significant examples. To complicate this lack of definition, the courts interpreting the WFEA have done little to enflesh the statutes' bare bones. The result, then, is a statutory morass through which effective navigation is usually tedious, and sometimes unworkable. The WFEA thus does not have enough structure by which employers can evaluate their legal responsibilities, let alone advocate for their protection.

This Comment highlights ways in which the WFEA can be clarified to provide employers a leg on which to stand when defending a WFEA disability discrimination claim. In Part II, this Comment outlines the prominent provisions of the WFEA to provide context for understanding a disability discrimination claim. Then, Part III describes a dramatic change in Wisconsin's disability discrimination law that has made hardship the focus of a claim. This Part also contains an analysis of decisions interpreting the hardship standard. Given the importance of the hardship standard in Wisconsin, Part IV provides some guidance for further defining this standard, which currently lacks a well-formed definition. Finally, Part V asks the courts to develop a hardship standard that gives employers a chance to effectively defend a disability discrimination action.

II. THE WISCONSIN FAIR EMPLOYMENT ACT

In 1981, the Wisconsin Legislature formally recognized the adverse effects on "the general welfare of the state" when "[e]mployers . . . deny employment opportunities and discriminate in employment against properly qualified individuals solely because of their . . . disability." The WFEA defines an "individual with a disability" as one who "[h]as a physical or mental impairment which makes achievement unusually difficult or limits the

Determining When an Employer’s Financial Hardship Becomes “Undue” Under the Americans with Disabilities Act, 48 Vand. L. Rev. 391, 396 (1995) (discussing the extent to which the ADA’s “undue hardship” standard is vague). Indeed, the consequences should be even more severe for small businesses in Wisconsin; while the ADA covers only businesses with fifteen or more employees, the WFEA covers any employer. Wis. Stat. § 111.32(6)(a) (2003–2004).

4. § 111.32.
5. § 111.31(1).
6. Id.
To protect this class of individuals, the legislature enacted the WFEA "to encourage and foster to the fullest extent practicable the employment of all properly qualified individuals regardless . . . of disability." This is the WFEA's main statement of policy—to equalize the hiring opportunities for all individuals in the workforce. To this end, the legislature made unlawful the refusal to "hire, employ . . . any individual . . . or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment or labor organization membership because of [disability]."

A prohibition on discrimination is only the first step; to truly equalize hiring opportunities for disabled individuals, employers must also accommodate them. Accommodation is the WFEA's goal, and the statute outlines an employer's duties to achieve that goal. The primary provisions that establish the substantive rights and duties between parties to a WFEA action are contained in section 111.34 of the Wisconsin Statutes. Specifically, the rights and duties applicable to parties in a WFEA disability discrimination suit stem from the interplay between two provisions, which are as follows:

Disability; exceptions and special cases.
(1) Employment discrimination because of disability includes, but is not limited to:

(b) Refusing to reasonably accommodate an employee's or prospective employee's disability unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise or business.

(2)(a) . . . [I]t is not employment discrimination because of disability to refuse to hire, employ, admit or license any individual, to bar or terminate from employment, membership or licensure any individual, or to discriminate against any individual in promotion, compensation or in

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7. § 111.32(8)(a).
8. § 111.31(3). Under the WFEA, "disability" means "a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work." § 111.32(8).
9. § 111.322(1).
10. See §§ 111.31-.395. In addition to the WFEA, the Wisconsin Administrative Code, Chapter DWD 218 contains various procedural statutes applicable to WFEA disability discrimination claims. WIS. ADMIN. CODE D.W.D. §§ 218.01-218.24 (2003–2004).
11. See §§ 111.31-.395.
terms, conditions or privileges of employment if the disability is reasonably related to the individual’s ability to adequately undertake the job-related responsibilities of that individual’s employment, membership, or licensure.\(^\text{12}\)

As these provisions indicate, the reasonable accommodations standard requires mandatory expenditures by employers to help disabled individuals assimilate into the workforce, provided those accommodations would not work a hardship on the employer.\(^\text{13}\)

Once the substantive provisions that determine the rights and duties applicable to a WFEA disability discrimination claim have been identified, the parties must be allocated the burden of proving certain facts that trigger the legal relationship.\(^\text{14}\) While “[t]he WFEA does not establish any specific procedures for a complainant to follow in order to prove a case of employment discrimination,”\(^\text{15}\) the courts have interpreted the WFEA to involve a four-part system of burden shifting. The burdens are allocated as follows:\(^\text{16}\)

A complainant employee must make a prima facie case that she is disabled within the meaning of the WFEA, meaning the individual “[h]as a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work”\(^\text{17}\) and that an employer refused to, \textit{inter alia}, hire or employ the individual\(^\text{18}\) on the basis of the individual’s disability\(^\text{19,20}\)

\(^\text{12}\). § 111.34.
\(^\text{13}\). \textit{Id.}
\(^\text{14}\). \textit{See generally} Currie v. Dept’t of Indus., Labor & Human Relations, 565 N.W.2d 253, 259 (Wis. 1997) (“[A] prima facie case triggers an intermediate burden of production for the employer, rather than completely shifting the burden of persuasion on the ultimate issue of discrimination to the employer.”).
\(^\text{15}\). \textit{Id.} at 258.
\(^\text{16}\). The way in which the courts have characterized the relationship between sections 111.34(1)(b) and (2)(a) has evolved throughout the last twenty years. \textit{Compare} Crystal Lake Cheese Factory v. Labor & Indus. Rev. Comm’n, 2003 WI 106, ¶ 32, 264 Wis. 2d 200, ¶ 32, 664 N.W.2d 651, ¶ 32 (“Taken together, § 111.34(1)(b) and (2)(a) require an employer to prove that even with reasonable accommodations, the employee would not be able to perform his or her job responsibilities adequately or that, where reasonable accommodations would enable the employee to do the job, hardship would be placed on the employer.”) (citing Target Stores v. Labor & Indus. Rev. Comm’n, 576 N.W.2d 545 (Wis. Ct. App. 1998)) \textit{with} McMullen v. Labor & Indus. Rev. Comm’n, 434 N.W.2d 830, 834 (Wis. Ct. App. 1988) (Cane, J., concurring) (“[S]ec. 111.34 imposes a three-part test . . . . whether the employer has failed to accommodate the employee to a job-related responsibility; whether the accommodation would be reasonable; and whether the accommodation would pose a hardship on the employer’s program, enterprise, or business.”).
\(^\text{17}\). WIS. STAT. § 111.32(8) (2003-2004).
\(^\text{18}\). § 111.322.
\(^\text{19}\). § 111.321.
If the employee makes her prima facie case, the burden then shifts to the employer to prove that "the disability is reasonably related to the individual’s ability to adequately undertake the job-related responsibilities of that individual’s employment."21 The burden then shifts to the employee to prove that there was a reasonable accommodation that the employer refused to provide.22

Finally, the burden shifts to the employer to prove one of two defenses: “[E]ven with reasonable accommodations, the employee would not be able to perform his or her job responsibilities adequately;”23 or the accommodation would impose “hardship on . . . [its] program, enterprise, or business.”24 These burdens establish that the complainant generally must come forth with the majority of evidence in a disability discrimination case.25

While the terms reasonable accommodation and hardship are crucial to the employer-employee relationship in the context of disability discrimination, parties are left without clear meanings for those words—unlike the ADA,26

20. § 111.322; Crystal Lake, 2003 WI 106, ¶ 42, 264 Wis. 2d 200, ¶ 42, 664 N.W.2d 651, ¶ 42; Racine Unified Sch. Dist. v. Labor & Indus. Rev. Comm’n, 476 N.W.2d 707 (Wis. Ct. App. 1991). “Individual with a disability” is defined, in pertinent part, as someone with “a physical or mental impairment which . . . limits the capacity to work.” § 111.32(8)(a). An adverse employment action includes “refus[ing] to hire, employ, admit or license any individual . . . or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment or labor organization membership because of [disability].” § 111.322(1).

21. § 111.34(2)(a); see Racine Unified Sch. Dist., 476 N.W.2d 707; Crystal Lake, 2003 WI 106, ¶ 42, 264 Wis. 2d 200, ¶ 42, 664 N.W.2d 651, ¶ 42 (allocating the burden for proving whether an employee’s disability is reasonably related to the individual’s ability to undertake the job-related responsibilities of the individual’s employment, as required in section 111.34(2)(a) of the Wisconsin Statutes).

22. 111.34(1)(b); see also Hutchinson Tech., 2004 WI 90, ¶ 35, 273 Wis. 2d 394, ¶ 35, 682 N.W.2d 343, ¶ 35 ("[T]he initial burden is on the employee to prove that a reasonable accommodation is available. . . .").


24. § 111.34(1)(b).

25. See Currie, 565 N.W.2d at 258.

26. Equal Employment Opportunity Commission regulations have defined “reasonable accommodation” under the ADA as a modification or adjustment to a job, the work environment, or the way things usually are done that enables a qualified individual with a disability to enjoy an equal employment opportunity. 29 C.F.R. § 1630.2(o). Examples of reasonable accommodation listed in the ADA include the following:

(a) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (b) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9) (2004). The Wisconsin Legislature has not undertaken efforts to similarly
the WFEA does not define them. To understand the terms, one must turn to the case law interpreting them.

III. A DRAMATIC CHANGE IN WISCONSIN DISABILITY DISCRIMINATION LAW: CRYSTAL LAKE, HUTCHINSON TECHNOLOGY, AND THE HARDSHIP STANDARD

A. The Decisions

The reasonable accommodation and hardship standards have received a significant amount of judicial attention in the past few years, beginning with the Wisconsin Supreme Court decision, Crystal Lake Cheese Factory v. Labor & Industry Review Commission. At issue in Crystal Lake was whether an employer could be obligated to accommodate a disabled employee by modifying the employee’s job functions—in other words, by tailoring a job to fit the employee’s abilities. In a decision that surprised many employers, the court held that an employer may be required to change an employee’s job duties in a given circumstance.

Nearly one year after its Crystal Lake decision, the Wisconsin Supreme Court again examined whether an employer reasonably accommodated a disabled employee in Hutchinson Technology, Inc. v. Labor & Industry Review Commission. In June 1998, Susan Roytek, the plaintiff, began working twelve-hour shifts in the “photoetch department” of defendant Hutchinson Technology, Inc., which produces suspension assemblies for

29. Id., 2003 WI 106, ¶ 22, 264 Wis. 2d 200, ¶ 22, 664 N.W.2d 651, ¶ 22.
30. Id., 2003 WI 106, ¶ 52, 264 Wis. 2d 200, ¶ 52, 664 N.W.2d 651, ¶ 52; see Tracy L. Haas, Note, Crystal Lake Cheese Factory v. Labor and Industry Review Commission: A Reasonable Turn Under the Wisconsin Fair Employment Act?, 2004 Wis. L. REV. 1535, 1572 (2004) (“[T]here will undoubtedly be much more litigation regarding the extent of the new duty to accommodate announced by the Wisconsin Supreme Court in Crystal Lake.”). I take a different view of the effect of the Crystal Lake decision than does Ms. Haas. Because the Crystal Lake decision so significantly increased an employer’s duty to accommodate, that issue likely will be less litigated, not more. Instead, most post-Crystal Lake litigation likely will center around whether the expansive (but now permitted) accommodation will work a hardship—not on whether it is reasonable.
31. Hutchinson Tech., 2004 WI 90, 273 Wis. 2d 394, 682 N.W.2d 343.
computer hard disk drives. Over the span of two weeks, Roytek and her coworkers would work seven twelve-hour shifts. Hutchinson had determined that the twelve-hour shifts maximized use of its equipment.

In September 1998, Roytek’s personal physician diagnosed her with lower back pain and advised her to take temporary leave from work. In November 1998, Roytek returned to work, but with restrictions; she was limited to working six-hour days and prohibited from certain physical tasks, which were among her job duties before her diagnosis. Hutchinson temporarily accommodated her shortened shifts. Roytek continued her six-hour shifts until January 1999, when she increased her shifts to eight hours. She never resumed her twelve-hour shifts. In contrast, Roytek went on short-term disability leave in August of 1999; Hutchinson terminated her in September 1999, when her short-term disability pay was depleted.

Shortly thereafter, Roytek filed a disability discrimination complaint with the Equal Rights Division of the Workforce Development. Roytek and Hutchinson focused their arguments before the Administrative Law Judge on whether the eight-hour day would be a reasonable accommodation.

Hutchinson argued hardship on several fronts. Hutchinson first argued for deference towards its business judgments, asserting that a mandatory eight-hour shift for Roytek strips it of its ability to manage its shift schedules. Hutchinson also highlighted concerns that Roytek would have to work under two different supervisors, making her supervision difficult. Further, Hutchinson claimed that accommodating Roytek’s eight-hour schedules would reduce the plant’s efficiency. While these arguments may have been

32. Id. ¶ 3-4, 273 Wis. 2d 394, ¶¶ 3-4, 682 N.W.2d 343, ¶ 3-4.
33. Id. ¶ 3, 273 Wis. 2d 394, ¶ 3, 682 N.W.2d 343, ¶ 3.
34. Id. ¶ 46, 273 Wis. 2d 394, ¶ 46, 682 N.W.2d 343, ¶ 46 (Roggensack, J., dissenting).
35. Id. ¶ 5, 273 Wis. 2d 394, ¶ 5, 682 N.W.2d 343, ¶ 5 (majority opinion).
36. Id., 273 Wis. 2d 394, ¶ 5, 682 N.W.2d 343, ¶ 5.
37. Id., 273 Wis. 2d 394, ¶ 5, 682 N.W.2d 343, ¶ 5.
38. Id., 273 Wis. 2d 394, ¶ 5, 682 N.W.2d 343, ¶ 5.
39. Id., 273 Wis. 2d 394, ¶ 5, 682 N.W.2d 343, ¶ 5.
40. Id. ¶ 6, 273 Wis. 2d 394, ¶ 6, 682 N.W.2d 343, ¶ 6.
41. Id., 273 Wis. 2d 394, ¶ 6, 682 N.W.2d 343, ¶ 6.
42. Id. ¶ 25, 273 Wis. 2d 394, ¶ 25, 682 N.W.2d 343, ¶ 25. For a discussion on the right of businesses to exercise their business judgment after the recent Wisconsin disability discrimination decisions, see Haas, supra note 30, at 1565-66 (Crystal Lake “takes away ‘the responsibility for deciding how to structure the workforce to meet business needs from each employer and place[s] it squarely within a state agency that neither employs the individual in question nor produces the products or provides the services necessary to do so.’”).
43. Hutchinson Tech., 2004 WI 90, ¶ 25, 273 Wis. 2d 394, ¶ 25, 682 N.W.2d 343, ¶ 25. Hutchinson never explained the difficulties that this situation would impose. Id. ¶ 36 n.18, 273 Wis. 2d 394, ¶ 36 n.18, 682 N.W.2d 343, ¶ 36 n.18.
compelling in the abstract, the majority noted that Hutchinson did not offer sufficient statistical data regarding lost profits, production losses, and morale problems. In fact, the Labor and Industry Review Commission ("LIRC") concluded that "the asserted production declines, morale problems, and profit reduction had not yet evidenced themselves." This lack of hard data proved fatal to Hutchinson's defense. The majority saw little more in Hutchinson's arguments than speculation and conjecture. For example, the majority faulted Hutchinson for not providing "evidence that other employees sought to work reduced shifts, that morale problems had arisen among its other employees, or that production had decreased as a result of Roytek's" part-time status. Hutchinson had ten months to assemble evidence that Roytek's shorter shift caused losses, but it did not. Based on these shortcomings, the court concluded that Hutchinson failed to establish that it would experience hardship in permanently accommodating Roytek's eight-hour shifts.

B. How Crystal Lake and Hutchinson Reformed the Analysis of a Disability Discrimination Claim

Despite gestures to the contrary, the WFEA has always stacked the deck in favor of the disabled employee—its principle purpose, after all, is "to
encourage and foster to the fullest extent practicable the employment of all properly qualified individuals regardless of . . . disability." After Crystal Lake, disabled employees are further advantaged at employers’ expense. The court all but dropped the modifier “reasonable” from the reasonable accommodation standard when it concluded that an employer seeking to comply with the WFEA might need to modify an existing job to accommodate a disabled employee. Because Crystal Lake potentially strips employers of the right to define job duties, proving that an accommodation is not “reasonable” is a feat that many employers may find impossible. Hardship is the new battleground.

Although the rights for disabled individuals are strong, they are far from immutable. The courts have apparently sought to protect the interests of employers as well. The Hutchinson court repeatedly asserted that, while it was “mindful that a business must have the right to set its own employment rules to encourage maximum productivity[,] such rules do not exist in a vacuum, but must bend to the requirements of the WFEA.” The dissent in Hutchinson, on the other hand, argued that the majority’s assurances ring hollow.

As of 2004, the Hutchinson case represents the most significant development in the analysis of hardship. Even so, its significance is circumspect. The Hutchinson court did not reveal a useful test or synthesize precedent; indeed, Wisconsin case law continues to lack a framework for defining hardship. This Comment strives to provide that framework by

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52. See Haas, supra note 30, at 1565-66 (questioning whether the Crystal Lake decision represented a reasonable interpretation of the WFEA).
53. Crystal Lake, 2003 WI 106, ¶ 86, 264 Wis. 2d 200, ¶ 86, 664 N.W.2d 651, ¶ 86 (Prosser, J., dissenting) (“[T]he court has taken from Wisconsin employers the ability to define the required job duties of their employees.”).
54. Hutchinson Tech., 2004 WI 90, ¶ 29, 273 Wis. 2d 394, ¶ 29, 682 N.W.2d 343, ¶ 29.
55. Id., 273 Wis. 2d 394, ¶ 29, 682 N.W.2d 343, ¶ 29.
56. Id., ¶ 71, 273 Wis. 2d 394, ¶ 71, 682 N.W.2d 343, ¶ 71 (Roggensack, J., dissenting). Justice Roggensack argued that the majority decision in Hutchinson failed to recognize the right employers should have to manage business to achieve maximum productivity. Id. Relating her criticism to the specific facts of the case, Justice Roggensack maintained that employers such as Hutchinson would now be unable to make universally mandatory a requirement that employees work twelve-hour shifts when a disabled employee cannot work those hours. Id. While her criticism is valid, it is circumspect—the ability to always set mandatory hours requirements is not all employers lost after Hutchinson.
57. The Wisconsin Supreme Court has not offered a more detailed examination of “hardship” since this case. Hutchinson Tech., 2004 WI 90, ¶¶ 20-36, 273 Wis. 2d 394, ¶¶ 20-36, 682 N.W.2d 343, ¶¶ 20-36 (“hardship” analysis).
58. Brief for Wis. Cheese Makers Ass’n, and Wis. Mfr. & Commerce, Inc. as Amici Curiae
setting forth analysis of LIRC decisions and providing principles that can be derived from them. The analysis starts with LIRC decisions pre-*Hutchinson*.

C. Pre-*Hutchinson* LIRC Decisions


In *Gartner v. Hilldale, Inc.*, Gartner worked as an office manager for a corporation that managed the Hilldale shopping center in Madison. Her job duties included bookkeeping and managing office records. Shortly after being involved in a car accident, Gartner was advised to work half time, but it was unclear how long this condition would last. To accommodate Gartner’s disability, Hilldale allowed her to work half time, and it hired another person to work half time to cover Gartner’s duties. When Hilldale discovered that Gartner’s condition was indefinite, however, it terminated her; Gartner filed a complaint for disability discrimination.

LIRC considered whether Hilldale had proven that the proposed accommodation—two half-time positions—posed a hardship. Hilldale argued that the accommodation would create communications problems, payroll costs, and other inefficiencies when two part-time employees would accomplish the duties associated with one full-time employee. However, Hilldale offered no persuasive evidence of any problems or inefficiencies caused by the use of two part-time employees, and it did not offer evidence concerning the payroll cost differences between the two situations—it merely offered speculation. Based on this lack of proof, LIRC concluded that “speculation that [hardship] might occur is inadequate.”

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60. Id.
61. Id.
62. Id.
63. Id.
64. Id.
65. Id.

2. Janocik v. Heiser Chevrolet

Janocik v. Heiser represents an instance where an employer failed to show hardship because the evidence offered was too speculative. Janocik had diabetes and received a kidney transplant, after which he took leave from work. He was rehired in his former position as a service advisor two years after taking leave, but he told his employer that there was a chance his body would reject the kidney. Complications eventually arose, and Janocik underwent further surgery. While in the hospital, Heiser terminated his employment because it believed his absences had an adverse effect on its business. Thereafter, Janocik filed a complaint for disability discrimination.

LIRC focused on whether a leave of absence, which Heiser did not provide, would pose a hardship on Heiser’s business. Heiser argued that a prolonged leave of absence would pose a hardship, since going without a service advisor would adversely affect its sales and its ability to provide customer service. However, LIRC was not convinced that this accommodation would pose a hardship for several reasons. First, to the extent the proposed accommodation would pose a hardship, Heiser did not offer any less costly alternatives, such as filling the position on a short-term basis. Second, another Heiser service advisor had been filling in for Janocik, and Heiser did not provide any costs associated with this arrangement. Ultimately, LIRC concluded that Heiser’s arguments were too speculative: “while the law does not require an employer to consider and reject every conceivable means of accommodating an employe’s [sic] handicap, an employer cannot avoid liability under the [WFEA] merely by explaining that being short-staffed adversely affects its business, a proposition which generally goes without saying.”

67. Id.
68. Id.
69. Id.
70. Id.
71. Id.
72. Id.
73. Id.
74. Id.
75. Id.
76. Id.

In *Fields v. Cardinal T.G. Co.*, LIRC was not satisfied with the employer’s showing of hardship. Fields began working for Cardinal in the glass tempering plant. The job had many physical tasks, including loading and unloading glass, but the job (for Fields as well as all similarly situated employees) also included rotation among less physically demanding tasks. After Fields injured his back in a car accident, his doctor recommended that he alter his job duties every two hours, limit lifting to thirty-five pounds, and avoid frequent twisting. After limited discussions regarding potential accommodations, Cardinal placed Fields on paid leave, from which he was not rehired. Fields filed a disability discrimination complaint.

Fields proposed the following accommodations: 1) an exemption from glass loading and unloading duties; or 2) a transfer to another plant, which had positions better-suited to Fields’ abilities. Cardinal countered, arguing that the reassignment of loading and unloading duties would have increased the risk of repetitive motion injuries for other workers, harmed morale, reduced flexibility, and lowered productivity.

None of these alleged hardships persuaded LIRC. Cardinal failed to prove that reassigning physically demanding duties would significantly increase risks for other employees; while Cardinal described that it formed its rotation policy based on two “ergonomic reports,” it did not offer any site-specific evidence on whether the reassignment of tasks would endanger other workers. LIRC implored Cardinal to offer some expert evidence, because “the effect of removing a single person from a large-scale rotation is not something that a lay person has the expertise to evaluate.”

Cardinal also failed to prove that reassigning Fields would harm plant morale; in fact, quite the opposite was the case. While Cardinal argued that workers would question Fields’ special rotation, LIRC found that workers

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77. *Id.*
79. *Id.*
80. In fact, Cardinal had eliminated its positions that involved solely light-duty work. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
generally disliked the tasks to which Fields was reassigned, even if they were less physically demanding. Cardinal offered no direct testimony from an employee to the contrary.

Turning to the issue of flexibility, Cardinal had argued that it relied on cross-trained workers to increase flexibility; relegating Fields to the quench facility would have arguably decreased the opportunity for its workers to be cross-trained. However, Cardinal specifically admitted that this opportunity still existed. For these reasons, LIRC found that Cardinal had not proven hardship.

4. **Kinion v. Portage Community Schools**

In *Kinion v. Portage Community Schools*, the employer uniquely was successful in proving hardship. Kinion worked with Portage schools as one of two secretaries for the exceptional education needs program. Three years after starting work, Kinion began a series of medical leaves for severe depression associated with panic disorder, which she claimed arose from her relationship with her supervisor, Cummings. The disorder was diagnosed as being incapacitating, and her doctor estimated that it would last for six to eight weeks. After an extended period of medical leave with no reliable indication that she would be able to return, Portage Schools terminated Kinion.

Kinion argued that Portage Schools should have accommodated her in the following ways: 1) by assigning Kinion and Cummings to different locations; 2) by allowing Kinion to work from home; 3) by assigning Kinion’s position to a different supervisor; and 4) by transferring Kinion to a different position.

LIRC concluded that separating Kinion and Cummings would have imposed a hardship on Portage Schools. Their resources were in the same

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89. According to LIRC, very few people were “interested in working the quench furnace because it is boring and hot.” *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
place; Portage Schools showed that Kinion and Cummings needed to work where the special education files were located in order to do their jobs effectively. Further, the work files that Kinion needed were confidential and were not permitted to be removed from the work site. Similarly, with specialized training she had received, Cummings was the only supervisor qualified to supervise Kinion in the exceptional educational needs program. As a result, Portage Schools had put forth sufficient evidence that it would have posed a hardship on Portage Schools for Kinion to work in a different location, to work at home, or to work under a different supervisor.

5. Parker v. Dane County

In Parker v. Dane County, LIRC again found that an employer was unable to prove hardship. Parker was employed as an Account Clerk in the County Clerk’s Office, where contact with the general public is a primary job duty. Parker also suffered from a severe (and progressively worsening) hearing loss in both ears.

As an accommodation, Parker sought removal of phone duties from the clerk position, either alone or in combination with the use of voice mail, email, and a voice recognition technology. Dane County argued that eliminating the phone duties from Parker’s position would be a hardship because the other two clerks would need to field all calls. In support of this argument, Dane County offered statistics showing the number of calls per week, the number to which each staff member had traditionally responded, and the number that each staff member would receive if Parker’s job duties were reassigned. LIRC did not believe that the increase in calls—an average of 1.5 per hour—would be significant, because most calls required the employee to redirect the caller, not a substantive response.

Dane County also maintained that reassigning the phone duties would cause a morale problem. This argument failed for two reasons. First, Dane County offered hearsay to support this point, and LIRC properly called this

100. Id.
101. Id.
102. Id.
104. Id.
105. Id.
106. Id.
107. Id.
108. Id.
109. Id.
evidence incompetent. Second, and perhaps more importantly, LIRC questioned whether morale is a prescient concern: “although office harmony is a laudable management goal and a legitimate consideration here, the goals of the WFEA would not be served if disgruntled co-workers could block reasonable accommodations simply by expressing objection.”

D. Post-Hutchinson LIRC Decisions

1. Walsh v. Tom A. Rothe S.C.

LIRC is capable of finding hardship post-Hutchinson. Rothe S.C.’s financial situation required that it reduce its workforce. Walsh was a staff accountant for Rothe and had a disability that Rothe had accommodated for several months. Specifically, Rothe made physical modifications to the worksite and delegated Walsh’s data entry tasks to another accountant. Together, these accommodations allowed Walsh “to work to the best of his ability.”

Despite these accommodations, however, Walsh was by far the least productive staff accountant. Rothe was struggling financially and was required to reduce its workforce; therefore, efficiency was a paramount concern in its decisions about whom to terminate. The only accommodation that Rothe could have provided, given its financial situation, would have been to fire a more productive accountant and retain Walsh.

LIRC found that this business decision would work a hardship on Rothe. Unlike in Hutchinson, where the employer failed to articulate the costs that the accommodations would have on the business’s productivity, Rothe successfully demonstrated: 1) Walsh’s inefficiency, 2) the business’s precarious financial situation, and 3) the significant costs the proposed accommodation would have on the business.

The Roytek dispute\textsuperscript{119} did not represent Hutchinson's last appearance before LIRC. In \textit{Wickstrom v. Hutchinson Technology, Inc.},\textsuperscript{120} Hutchinson again encountered an employee, Wickstrom, who sought an eight-hour workday while other similarly situated employees worked twelve-hour shifts.\textsuperscript{121} Hutchinson argued that it would be expensive to train a new employee to work the remainder of Wickstrom's shift.\textsuperscript{122} Hutchinson also argued that using two employees for one shift would cause problems of communications between shifts.\textsuperscript{123} Finally, Hutchinson argued that the accommodation would cause morale problems.\textsuperscript{124} Like in its previous decisions, LIRC was not persuaded by these arguments.\textsuperscript{125}

\textbf{E. Observations from the Hardship Decisions: Employers Must Present More Than Mere Speculation}

The \textit{Hutchinson} decision, other cases, and LIRC decisions interpreting the WFEA's hardship standard teach a few lessons for employers. First, employers have the burden of proving hardship if it is looking not to accommodate a disabled employee. Second, to prove hardship, an employer must walk a fine line—it must accommodate the employee and gather evidence of costs. However, this strategy has its risks: the longer the employer accommodates the employee, the more likely a court is to conclude the accommodation does not pose a hardship. Each of these lessons is discussed in further detail below.

The employer has the burden of showing that it cannot accommodate the employee’s disability without hardship.\textsuperscript{126} The question of whether an

\textsuperscript{119} Roytek v. Hutchinson Tech., Inc., E.R.D. Case No. 199903917 (L.I.R.C. Jan. 28, 2002); \textit{see also} Hutchinson Tech., Inc. v. Labor & Indus. Rev. Comm’n, 2004 WI 90, 273 Wis. 2d 394, 682 N.W.2d 343.


\textsuperscript{121} \textit{Id.}

\textsuperscript{122} \textit{Id.}

\textsuperscript{123} \textit{Id.}

\textsuperscript{124} \textit{Id.}

\textsuperscript{125} \textit{Id.}

\textsuperscript{126} The court noted the following:

Once the employee meets the initial burden of proving that he or she has a disability, \ldots the employer then has the burden of proving a defense under Wis. Stat. § 111.34. We stated that § 111.34(1)(b) and (2)(a) require an employer to
accommodation works a hardship on the employer is a factual determination that must be addressed on a case-by-case basis.\textsuperscript{127}

One stark pattern emerges from the case-by-case analysis: employers must be aware that the accommodations that they provide can be held against them. In \textit{Target Stores v. Labor \\& Industry Review Commission}, the Wisconsin Court of Appeals held that the employer violated the WFEA by terminating an employee while she was seeking treatment for a temporary, but disabling, condition—temporary forbearance was the reasonable accommodation.\textsuperscript{128} The \textit{Hutchinson} court took the \textit{Target} holding one step farther; not only must an employer temporarily accommodate an employee, the reasonableness of a temporary accommodation is evidence of the reasonableness of the accommodation on a permanent basis.\textsuperscript{129}

Given this development, an employer might conclude that it is safer to refuse to accommodate the employee in the first instance—if an employer does not temporarily accommodate, no accommodation can be held against it if the employee seeks a permanent accommodation.\textsuperscript{130} However, the \textit{Hutchinson} opinion should advise against this approach. Because an employer is hard pressed to effectively argue hardship without documenting the costs that an employer actually incurs in providing an accommodation, and because hardship is the new battleground in a disability discrimination

\begin{footnotesize}
\begin{enumerate}
\itemprove that even with reasonable accommodations, the employee would not be able to perform his or her job responsibilities adequately or that, where reasonable accommodations would enable the employee to do the job, hardship would be placed on the employer.
\itemHutchinson Tech., Inc. v. Labor \\& Indus. Rev. Comm’n, 2004 WI 90, ¶ 32, 273 Wis. 2d 394, ¶ 32, 682 N.W.2d 343, ¶ 32 (citations omitted).
\item576 N.W.2d 545, 553 (Wis. Ct. App. 1998).
\itemJustice Roggensack identified this dilemma in her dissent:
\begin{quote}
[T]he majority uses HTI’s forbearance from termination . . . against HTI. This puts employers between the proverbial rock and a hard place: \textit{Target} requires an employer to wait a reasonable time when an employee is being treated to resolve a medical condition and the majority opinion herein concludes that an employer who waits to see if a medical condition will resolve, will have that used against it, if the condition becomes permanent and the employee is fired.
\end{quote}
\itemLIRC has imposed limits on whether an employer must accommodate an employee by allowing leave from work. For example, in \textit{Janocik v. Heiser Chevrolet}, E.R.D. Case No. 9350310 (L.I.R.C. Nov. 21, 1994), LIRC held that a reasonable accommodation does not include keeping a job open for an employee who has been away from work with no foreseeable return date. Similarly, in \textit{Lewankdowski v. Galland Henning Nopak, Inc.}, E.R.D. Case No. 199603884 (L.I.R.C. Jan. 28, 1999), LIRC held that an employer cannot reasonably be expected to hold a job open indefinitely when there is no indication that an employee will return to work.
\end{enumerate}
\end{footnotesize}
suit, an employer must accommodate to build its defense. After *Hutchinson*,
disability discrimination cases will turn on whether the employer can quantify
hardship, and convince a court that it is undue.

Employers should also recognize another pattern in the hardship
decisions: courts will vigorously scrutinize an employer’s evidence. Courts
have required employers to show hardship through documentary evidence and
non-hearsay testimony. Speculation and conjecture are insufficient. Because
*Hutchinson* failed to offer “statistical data regarding lost profits, production
losses, and morale problems,” the court concluded that “[t]he hypothetical
difficulties associated with permanent part-time status for the complainant are
simply too speculative to meet the respondent’s burden of proof in the
matter.” The natural inference from this conclusion is that such non-
speculative, hard evidence may be required to show hardship.

The LIRC decisions illustrate this point well. Among the seven decisions
cited above, five—*Gartner*, *Janocik*, *Fields*, *Parker*, and *Wickstrom*—turned
in large measure on the employer’s failure sufficiently to prove hardship. One
lesson that these decisions teach is that, to prove hardship, an employer must
develop site-specific evidence that the proposed accommodation not only *will*
work a hardship on the business, but already *has* worked a hardship on the
business.

For example, in *Walsh*, the employer provided evidence that its business
was in a “tenuous financial situation.” The employer also provided specific
evidence that Walsh, the disabled employee, was by far its least productive
employee—a cost that the business could not have absorbed, given its
situation. In this context, LIRC was not prepared to require the employer
to fire a more productive employee and retain Walsh, the disabled
employee.

Contrast this decision with those decisions where the employer did not
translate the proposed accommodation into a cognizable hardship. To make a
successful showing of hardship, the employer should provide site-specific
evidence, and that evidence must be persuasive. Some employers have a
difficulty providing site-specific evidence. The employer in *Hutchinson* had
this shortcoming, as did other employers.

Site-specific evidence might not always satisfy an employer’s burden,
however. Even if an employer provides site-specific evidence, the employer
must make sure that evidence is persuasive. For example, in *Parker*, the

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132. *Id.* ¶ 36, 273 Wis. 2d 394, ¶ 36, 682 N.W.2d 343, ¶ 36.
134. *Id.*
135. *Id.*
136. *Hutchinson Tech.*, 2004 WI 90, ¶ 36, 273 Wis. 2d 394, ¶ 36, 682 N.W.2d 343, ¶ 36.
employer offered statistical evidence showing how the proposed accommodation in that case would increase the workload for the other employees.\textsuperscript{137} However, the increase would have been slight—only 1.5 telephone calls per day per employee.\textsuperscript{138} Although statistical evidence is something a court tends to value,\textsuperscript{139} even the best statistical evidence could not have made this employer's case compelling. Similarly, the employer in \textit{Janocik} argued that being short-staffed would adversely affect its business—a conclusion that, according to LIRC, "goes without saying."\textsuperscript{140} This was another situation where an employer failed to produce compelling evidence.

The decisions also teach that the morale of other employees is of minimal concern when determining whether a proposed accommodation would work a hardship on the employer. This argument has surfaced in most of the decisions cited above, and it has been dispensed with in different ways. For example, some decisions pay tribute to the effect that employee moral would have, but criticize the way in which the evidence is presented. Regardless of how the court dispenses with the argument, it remains apparent that morale is not a persuasive concern in determining whether an accommodation would work a hardship on the employer.

For these reasons, it is clear that if an employer waits until the eve of trial to build its defense to a disability discrimination case, it will have waited far too long.

\section*{IV. The Battle Over Hardship: Guidance for Further Developing the Hardship Standard in Wisconsin}

In addition to preparing employers for their evidentiary burden, this Comment seeks to provide ways in which employers can advocate favorable interpretations of the hardship standard. Analyzing whether an accommodation would work a hardship on an employer in Wisconsin has been difficult. As the totality-of-the-circumstances LIRC decisions cited above demonstrate, the courts have been reluctant to develop a test for evaluating whether an accommodation would present a hardship. Without a test, the definition of hardship lacks clarity. Also, employers have been required to undergo hardship in order to prove it. This phenomenon runs counter to the WFEA's language and should be remedied.

\textsuperscript{137} Parker v. Dane County, E.R.D. Case No. 199902779 (L.I.R.C. Nov. 10, 2003).
\textsuperscript{138} Id.
\textsuperscript{139} See, e.g., Hutchinson Tech., 2004 WI 90, ¶ 36, 273 Wis. 2d 394, ¶ 36, 682 N.W.2d 343, ¶ 36 (faulting the employer for not providing specific evidence of hardship).
\textsuperscript{140} Janocik v. Heiser Chevrolet, E.R.D. Case No. 9350310 (L.I.R.C. Nov. 21, 1994).
A. Discontinuing "Case-by-Case" Analysis in Favor of Increased Clarity

Since the McMullen v. Labor & Industry Review Commission decision, the question of whether a particular accommodation works a hardship on a specific employer has been a factual determination to be addressed on a case-by-case basis. Contrary to the court's belief that disability discrimination cases should be decided in nearly every respect on a case-by-case basis, however, the courts should strive to develop generally applicable rules of law in making its decisions. Admittedly, much of the virtue of the WFEA is its flexibility, with its provisions "liberally construed" to encourage "to the fullest extent practicable the employment of all properly qualified individuals regardless of . . . disability." But courts should take strides to prevent flexibility from becoming the handmaiden of vagueness; flexibility is hardly commendable if it means imposing unpredictable obligations on employers and employees. Case-by-case analysis is dangerous for litigants and non-litigants alike; not only does limiting decisions "to the facts of that case" allow courts to engage in ad hoc judgments, the practice also muddies law in acute need of clarification.

While the provisions in the WFEA have been open to interpretation for nearly a quarter of a century, the courts continually refuse to add analytic depth to the WFEA. This behavior is regrettable in at least two respects.

141. 434 N.W.2d 830, 834 (Wis. Ct. App. 1988) ("Although a requested accommodation is reasonable, it may nonetheless work a hardship on a specific employer for various reasons. This, too, is a factual determination that must be addressed on a case-by-case basis.").
142. WIS. STAT. § 111.31(3) (2003-2004).
143. See, e.g., Crystal Lake Cheese Factory v. Labor & Indus. Rev. Comm'n, 2003 WI 106, ¶ 52 n.19, 264 Wis. 2d 200, ¶ 52 n.19, 664 N.W.2d 651, ¶ 52 n.19 (interpreting the adequate undertaking requirements of section 111.34(2)(a) of the Wisconsin Statutes, the Crystal Lake majority wrote, "[t]he dissent attempts to lead us into a trap" to conclude whether the statute requires an employee "to perform 'some' as opposed to 'most' or 'all' job responsibilities. The proper emphasis is on the employee's ability to perform her or his job responsibilities adequately, rather than on terms such as 'some' or 'most' or 'all.'") (citations omitted); Crystal Lake Cheese Factory v. Labor & Indus. Rev. Comm'n, 2002 WI App 290, ¶ 28 n.5, 258 Wis. 2d 414, ¶ 28 n.5, 654 N.W.2d 286, ¶ 28 n.5 ("LIRC makes its determination of what constitutes a 'reasonable accommodation' on the facts of each case. Therefore, the result in this case does not necessarily create a broad rule for subsequent cases.") (citations omitted), aff'd, Crystal Lake, 2003 WI 106, 264 Wis. 2d 200, 664 N.W.2d 651. The court noted the following:

[T]he specific considerations as to what composes a reasonable accommodation will have to be addressed on a case-by-case basis. [W]e are unwilling to adopt a rule of law that [the proposed accommodation in the case] is always unreasonable. This determination is fact sensitive and is not subject to sweeping propositions of law.

McMullen, 434 N.W.2d at 833. Similarly, LIRC noted:
First, from an analytic perspective, no provision in the text requires the courts to insist on ad hoc terminations—the limitation of decisions to a case’s unique facts is a court-created preference. Second, and as a corollary to the first, the vague reasonable accommodation and hardship standards harm the very individuals they were designed to protect—namely, disabled workers—by hampering negotiation, increasing the likelihood for litigation, and ultimately straining relationships between employers and disabled employees. In short, the prevalent interpretations of the WFEA disability discrimination provisions are both erroneous and counterproductive.

To this end, the courts should break the habit of confining decisions to the particular facts in a given case. Many arguments compel this change. For example, to the extent that case-by-case analysis prevents the court from developing the undeniably vague provisions of the WFEA, the risk of ad hoc judgments is readily apparent.144 Also, the court’s adherence to case-by-case analysis is neither strict nor pure; the courts continue to distinguish and analogize cases to ground, somewhat, in precedent the decision at bar. Thus, case-by-case analysis is, at best, a loose principle to which the courts adhere in only the most superficial way, and at worst, a mechanism by which the court can escape the implications of each prior decision it has made. Either way, the doctrine demands serious reconsideration.

To the extent courts have defined hardship through decisions where hardship was in issue, cases have been confined to their facts, thereby stripping the decisions of much of their precedential value. Thus, without a definite test, and without a court system that is committed to its precedent, each court considering a hardship case is potentially able to work on a blank slate. This is troubling methodology. The courts should take responsibility to decide cases in light of precedent—not despite it.

145. See, e.g., Crystal Lake, 2003 WI 106, ¶¶ 48-50, 264 Wis. 2d 200, ¶¶ 48-50, 664 N.W.2d 651, ¶¶ 48-50 (analogizing the disabled employee’s case with the disabled employees in Target, 576 N.W.2d 545, McMullen, 434 N.W.2d 830, and the pre-“reasonable accommodation” case, Frito-Lay, Inc. v. Wis. Labor & Indus. Rev. Comm’n, 290 N.W.2d 551 (Wis. Ct. App. 1980)).
B. Employers Should Not Have to Undergo Hardship to Prove It

As the *Hutchinson* decision indicates, employers will find proving hardship very difficult without having undergone hardship. The employer there failed to prove hardship because it did not track the costs incurred in providing an accommodation. The necessary implication from this holding is that Hutchinson should have undergone and documented its hardship before it could prove its case.146

However, the language of the WFEA does not require employers to endure such expenses. Quite to the contrary, the WFEA contemplates the type of "hypothetical" arguments that the *Hutchinson* court abhorred. Specifically, the statute does not require employers to provide an accommodation if it "would pose a hardship on the employer's program, enterprise or business."147 "Would" has the following definitions: "Used in the main clause of a conditional statement to express a possibility or likelihood . . . . Used to express presumption or expectation . . . . Used to indicate uncertainty."148 The use of the word "would" implies that a hypothetical inquiry is contemplated, but such an inquiry is exactly what the courts have prohibited.

Thus, by interpretation of the plain language of the statute, employers should not have to undergo hardship to prove it as a defense.

V. CONCLUSION

The WFEA was created to strike a healthy balance between employer and employee interests in accommodating disabled employees into the workforce. The act set forth general principles of law under which the relationship between employer and disabled employee would be governed. However, the relationship set out in the act is incomplete—it is good on ideas but lacking in specifics.

Since the *Crystal Lake* decision, which expanded those accommodations that could be considered "reasonable," more emphasis is placed on whether such accommodations would work a hardship on the employer. Hardship is

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146. There is an exception to this trend, identified in *Walsh v. Tom A. Rothe S.C.*, E.R.D. Case No. 200000848 (L.I.R.C. Nov. 19, 2004). If an employer provides an accommodation, but its tenuous financial position requires a change in its workforce, a court may find that the accommodation would pose a hardship on the employer. *Id.*


the new battleground.

However, this term is insufficiently defined. This lack of specificity hurts employers most directly, because it makes crafting an effective defense to a discrimination claim difficult. Employees suffer as well. Specifics—cogent definitions, established duties, and clear rights—are crucial to facilitating negotiation and allowing disabilities to be accommodated without subjecting the parties to high litigation costs and uncertain results. Wisconsin courts and agencies continue to apply the WFEA’s provisions without developing the necessary underlying standards, and LIRC decisions provide only limited guidance—they are not substantially controlling in the court system. Until the courts define hardship in a meaningful way, defending a disability discrimination claim will continue to truly be some hardship.

ALEXANDER W. HANSCH