

## Accommodating Disabilities Under the WFEA & ADA

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## Presentation Overview

- Discussion of Key Differences Between WFEA & ADA
- Accommodation Obligations
- Analyzing Requests For Accommodation
- Tips For Accommodating Disabilities
- Questions & Answers

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## About you

- How many are only in Wisconsin?
- How many in other states?
- How many have struggled with accommodation issues?
- What types of issues are the hardest?

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### Summary Of Differences Between ADA and WFEA: Coverage

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| <p>WFEA</p> <ul style="list-style-type: none"> <li>■ Virtually every employer</li> </ul> | <p>ADA</p> <ul style="list-style-type: none"> <li>■ Only employers with over 15 employees</li> </ul> |
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### Summary Of Differences Between ADA and WFEA: Definition of Disability

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|--|---|
| <p>WFEA</p> <ul style="list-style-type: none"> <li>■ A physical or mental impairment that makes achievement unusually difficult or limits the capacity to work.</li> </ul> | <p>ADA</p> <ul style="list-style-type: none"> <li>■ Physical or mental impairment that substantially limits one or more major life activity.</li> </ul> |
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### Summary Of Differences Between ADA and WFEA: Definition of Disability (cont'd)

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|---|--|
| <ul style="list-style-type: none"> <li>■ WFEA</li> <li>1. Is disabled</li> <li>2. Has a record of such impairment</li> <li>3. Is perceived as having such impairment</li> </ul> | <ul style="list-style-type: none"> <li>■ ADA</li> <li>1. Is disabled</li> <li>2. Has a record of such impairment</li> <li>3. Is perceived as having such impairment</li> </ul> |
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### Summary of Differences – Scope of Protection

- Both WFEA and ADA protect persons with disabilities against discrimination in:
  - Recruitment and hiring
  - Job Assignments
  - Pay
  - Leave or benefits
  - Promotion
  - Licensing or union membership
  - Training
  - Lay-off and firing
  - Other employment related decisions

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### Summary of Differences: Duty to Accommodate

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| <ul style="list-style-type: none"> <li>■ WFEA           <ul style="list-style-type: none"> <li>- Must reasonably accommodate an individual's disability unless it would impose a hardship</li> <li>- Wis. Stats. 111.35(1)(b)</li> </ul> </li> </ul> | <ul style="list-style-type: none"> <li>■ ADA           <ul style="list-style-type: none"> <li>■ Must provide a reasonable accommodation to allow a disabled individual to perform the essential functions of the job unless doing so creates an undue hardship</li> </ul> </li> </ul> |
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### Similar sounding requirements are interpreted differently

- ADA Duty to Accommodate
  - Statute, regulations and case law define and limit this duty
  - Generally an employer need not:
    - create a new position
    - change essential functions of the job
    - accept poor performance
    - accept attendance that violates policies
    - allow an employee to work from home
    - allow an employee an indefinite leave

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### Similar sounding requirements are interpreted differently

- WFEA
  - Almost any accommodation needs to be considered
  - No per se unreasonable accommodation
  - Employer does not need to grant an accommodation if it can factually prove it will create a hardship on business

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### WFEA Accommodation Analysis

- Two steps:
  - 1. Does accommodation effectively allow person to perform the job related responsibilities of the job
  - 2. Does proposed accommodation impose a hardship
- Result:
  - WFEA may require any modification or adjustment to a job, the work environment or how things are done unless a hardship to the business occurs.

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12

### WFEA Accommodation Analysis

- Result:
  - Very case-specific
  - Few good guidelines

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### How did we end up like this?

- Crystal Lake Cheese  
2003 Wisconsin Supreme Court
- Results:
  - Expands reasonable accommodation obligation
  - Rejects ADA "essential function" analysis



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### Crystal Lake Cheese Factory

- Background of case:
  - Employee: lead worker in four person cheese packaging department becomes quadriplegic
  - Employees cross trained in all duties
- Bad fact: an obvious and serious disability



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### Crystal Lake Cheese Factory

- Background Cont.
  - After 10 months' leave employee wants to return
  - Employer never calls her back
  - Employer consults expert who decides that accommodation is not possible
  - Employee's own expert agrees that she could not perform all the duties of old job



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### Crystal Lake Cheese Factory

- Supreme Court of Wisconsin says:
- Employer did not reasonably accommodate employee
- The WFEA may require an employer to change or modify a disabled employee's job.



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### What Does This Mean?

- Potential Burden On Employer's Business

"The court produced an alarming ruling that says the state can take away the right of an employer to define a job's duties. That's a wrongheaded policy, and lawmakers ought to correct this error before it threatens Wisconsin's economy."

Wisconsin State Journal



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### What is a hardship under WFEA?

- Substantial
- Not hypothetical
  - Must prove increased cost, decreased production
  - Reduced morale or others wanting the same thing isn't sufficient



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**Applying Crystal Lake  
Cheese: Does the  
employer need to  
provide the  
accommodation?**

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**Case Study: Hutchinson  
Technologies**

**Issue: 8 HOUR SHIFT RESTRICTION**

- Production employees work 12-hour shifts
- Presents 8-hour per day work restriction due to back condition
- Employer accommodates for 8 mos.
- Restriction becomes permanent, employer refused to continue to accommodate

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**Does the employer  
need to continue the  
accommodation?**

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**ANSWER: YES**

- Employee is disabled under WFEA because the impairment limited her ability to work a specific job.
- Different from ADA due to WFEA “disability” definition
- Accommodation was reasonable:
  - she had been working 8 hours, and
  - employer did not show undue hardship
    - Rejects as “speculative”
      - morale argument
      - argument that other employees would seek reduced hours
      - That accommodation would harm production
- *Hutchinson Technology, Inc. v. LIRC*, (Wisconsin Supreme Court 2004)




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**ANSWER: YES**

- Decision differs from older WFEA cases and ADA case law
  - WFEA: Not a reasonable accommodation to provide 40 hour week to personnel director suffering from stress. Reasoning: Job could not be accomplished in 40 hours.
  - *Staats v. LIRC*, (Cir. Ct. 1998)




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**ANSWER: YES**

- Decision differs from older WFEA cases and ADA case law
  - ADA
    - 40 hour per week/8 hour day restriction does not show a substantial limitation of a major life activity
    - Don't have to modify essential functions. Employee is not “qualified” if can't perform.
      - Must prove that work hours are essential function




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**Applying Crystal Lake Cheese: Does the employer need to provide the accommodation?**

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**Case Study: Target Stores v. LIRC**

**Issue: SLEEPING ON THE JOB**

- Employee is caught “napping” on the job and is given a warning after each offense.
- After third offense and final written warning, employer suggests that employee needs to either (1) take a leave of absence, (2) get up from her desk during the day, or (3) apply for another position where she is not sitting all day
- Employee informs employer that she has sleep apnea which was being treated.
- Employee is discharged after being found sleeping on job the next week.
- Is the termination OK?

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**ANSWER: NO**

- Employer should have accommodated by offering “clemency and forbearance”
- Temporary forbearance of enforcement of no sleeping rule while employee was undergoing medical treatment was a reasonable accommodation.
- *Target Stores v. LIRC*, 217 Wis. 2d 1 (Wis. Ct. App. 1998)

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**Case Study: Stoughton Trailers v. LIRC (Ct. App. 2006), review granted**

**Issue: APPLICATION OF NO FAULT ATTENDANCE POLICY**

- Employee absent for migraines, exceeds maximum occurrences
- Told to apply for FMLA
- Brings back some paperwork that is vague, doesn't cover one day of absence and states employee still be evaluated
- Employee terminated for absences



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**WFEA Analysis**

- Analysis to be used:
- Does employee prove he has a “disability”
- Does employee prove he was terminated *because of* the disability
- Can company prove the disability is reasonably related to his ability to do the job, and
- Either he was reasonably accommodated, or
- Any accommodation would pose a hardship on its business



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**WFEA Analysis Results**

- Court findings:
- Agreed employee had a “disability”
- Employee was terminated *because of* disability because some of the absences used to terminate were because of the migraines
- Agreed that the disability is reasonably related to his ability to do the job, and
- Was not reasonably accommodated
- Agreed that hardship was not the issue



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### WFEA Analysis Results

- Reasonable Accommodation
- Absences due to migraines should have been excused under policy of “clemency and forbearance”
- Employee was undergoing treatment
- Court refused to address whether company violated FMLA by not giving employee 15 days to return medical certification.
- Court refused to decide whether FMLA leave would have been reasonable accommodation



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### So where are we now?

- Inability to do job means the employee is disabled
- Employee need not be able to perform essential functions, just some functions
- Neutral policies (no sleeping, no fault attendance) must be modified under policy of clemency and forbearance for employees seeking to address disability
- Work schedules may need to be altered
- Providing an accommodation initially may be used against you
- Hardship can only be shown when accommodation alters the business in a proven way



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### Is there anything an employer can do?

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### Accommodation Case Study

**Issue: HIRING ADDITIONAL EMPLOYEE**

- Legally blind applicant applies for position which required travel by car to numerous locations. Requests hiring of a driver (at \$20K a year cost) as an accommodation. Employer refuses.




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### Do you have to accommodate?

- Analysis:
  1. Does employee have a “disability”
  2. Is the disability is reasonably related to his ability to do the job, and
  3. Is an adverse action taken *because of* the disability
  4. Has the employee been reasonably accommodated, or
  5. Would any accommodation would pose a hardship on the business




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### ANSWER: No

- LIRC finds this is not an unreasonable request per se and therefore needs to be considered. In this case, the employer found that \$20K cost would have been a hardship where school districts were already complaining about costs.
- *Waldera v. Cooperative Educ. Service Agency #11* (LIRC 10/31/02)
- *Also, Walsh v. Tom A. Rothe* (LIRC 11/19/04)




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### Lesson learned

- Must have proof of hardship
- Documented threat of loss of business, financial harm needed
- Hiring an additional person is not favored
- Sense that LIRC is sympathetic to government budget constraints




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### Accommodation Case Study

#### Issue: MODIFYING JOB DUTIES

- Facts: Maintenance group leader with heart problems restricted to 20 pounds lifting and sedentary work.
  - Granted 27 month LOA
  - 80% of duties were not sedentary




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### Do you have to accommodate?

- No. Job did not have to modified to this extent, nor did new job have to be created.
- *Kasuboski v. Fonda Group Inc. (LIRC 4/30/04)*




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### Accommodation Case Study

Issue: MODIFYING JOB DUTIES

- Facts: Nursing home assistant with asthma unable to work at facility after “Edenization” project introduced cats and dogs. Requested accommodation of no animals.



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### Do you have to accommodate?

- No. Given the legitimate therapeutic goals and potential positive results, it would have been an undue hardship to be unable to implement a key component of project.
- *Wodack v. Evangelical Lutheran Good Samaritan Society (LIRC 8/5/05)*



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### Accommodation Case Study

Issue: MODIFYING JOB DUTIES

- Facts: Employee’s doctor states employee must sit or rest her arthritic foot 20 minutes per hour. Employee suggests reorganizing work station or moving her to light duty job offered for WC injuries.



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### Do you have to accommodate?

- No.
- Employee didn't show her proposed accommodations would allow her to perform the job.
- Fact that jobs are created for those with WC injuries does not mean a job must be created for her.
- *Rauls-Hepp v. J.L. French Corp.* (LIRC 9/30/05)



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### Accommodation Case Study

Issue: INDEFINITE LEAVE

- Facts: Diabetic employee with many diabetes related absences requested eight more weeks off for surgery after being off four months. Employee did not tell employer that surgery would allow employee to return to work.



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### Do you have to accommodate?

- No. Employee had duty to put employer on notice if employee regarding when employee would be back at work. No reason to believe that further extending leave was a reasonable accommodation.
- *Stroik v. Worzalla Publishing Co.* (LIRC 7/16/04)
- Also *Greenwood v. Ross Furniture* (LIRC 12/30/04); *Kinion v. Portage Community Schools* (LIRC 9/19/03)



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## Process for providing reasonable accommodation

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## Examples of Accommodations

- Modifying how exams or training are given
- Installing a ramp for building access
- Making restrooms accessible
- Raising a desk for a wheelchair
- Offering part-time or flexible work schedules
- Restructuring a job or redistributing job functions
- Reassigning an employee to a vacant position
- Providing reserved parking

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## Reasonable Accommodation

- Consider all reassignment options
  - Same position
  - Equivalent position
  - Lower level position
  - No bumping
  - No job creation
  - No “full duty” requirement

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### Reasonable Accommodation

- In order to satisfy our reasonable accommodation obligation, you should not jump to early conclusions. This is a process that takes hours and days, not a few minutes
- Talk to the employee, the employee's doctor, our doctor, operations people, internal and external experts



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### Reasonable Accommodation

- Consider the employee for his/her own job and, if that fails, other open jobs at the facility for which the employee is qualified
- Document your efforts
  - But don't refer the employee as "disabled" or the impairment as a "disability"



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### How Does an Employer Provide a Reasonable Accommodation?

- Analyze the particular job to determine its purpose and functions.
- Talk with your employee
  - Identify job-related limitations
  - How to overcome the limitations
- Talk with the doc



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**How Does an Employer Provide a Reasonable Accommodation?**

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- With the employee, identify potential accommodations and assess their effectiveness
- Consult experts
  - vocational rehabilitation counselors
  - ergonomic experts
  - engineers
- Listen to the employee’s preferences
  - select the most appropriate accommodation



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**How Does an Employer Provide a Reasonable Accommodation?**

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- If there is no reasonable accommodation to allow the employee to remain in her current job, look for other available positions at the Company repeating the above steps
- If there are no available positions that the employee can perform, place the employee on leave for up to one year



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**How Does an Employer Provide a Reasonable Accommodation?**

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- Ask the employee to contact the company while on leave to determine whether jobs have become available or if the employee’s restrictions have changed
- Before terminating go through the accommodation process once again



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## How Does an Employer Provide a Reasonable Accommodation?

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- Document all discussions concerning accommodation and all discussions with experts
- Record all accommodation attempts made
- Maintain confidentiality



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## Accommodation Practical Tips

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- Follow reasonable accommodation process
- Make an individualized determination
- Provide medical professionals with information
- Rely on medical information
- Document the accommodation efforts
- Document actual business effects of accommodation



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## Accommodation/Disability Resources

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- Job Accommodation Network (JAN)  
West Virginia University – 809 Allen Hall  
P.O. Box 6123  
Morgantown, WV 26506-6123  
800-526-7234  
<http://janweb.icdi.wvu.edu>  
Technical assistance in making reasonable accommodations.
- Great Lakes ADA Center  
University of Illinois-Chicago UAP  
1640 West Roosevelt Road  
Chicago, IL 60608  
800-949-4232  
<http://www.adagreatlakes.org>
- Technical Assistance and ADA compliance



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**QUESTIONS?**

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