SUPREME COURT OF WISCONSIN

CRYSTAL LAKE CHEESE
FACTORY,

Petitioner-Appellant-Petitioner,

v. Case No. 02-0815

Circuit Court Case
No. 01-CV-289

LABOR AND INDUSTRY
REVIEW COMMISSION AND
SUSAN CATLIN,

Respondents-Respondents.

AN APPEAL FROM A DECISION OF
THE COURT OF APPEALS, DISTRICT III
APPEAL NO. 02-0815

BRIEF OF CRYSTAL LAKE CHEESE FACTORY

Robert H. Duffy
State Bar No. 1010996
Sean M. Scullen
State Bar No. 1034221
QUARLES & BRADY LLP
411 East Wisconsin Avenue
Milwaukee, WI 53202
(414) 277-5000
Attorneys for Crystal Lake
Cheese Factory

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INTRODUCTION

The Labor and Industry Review Commission ("LIRC") issued the following unprecedented and unreasonable rule for Wisconsin employers: if an employee's disability prevents her from doing her job, the employer must create a new job for the disabled employee and find someone else to perform the existing job. Nothing within the Wisconsin Fair Employment Act ("WFEA"), Wis. Stat. § 111.31, *et. seq.*, the facts of this case, or any reasonable understanding of fair employment practices could or should allow for such an amazing demand on Wisconsin employers.

Prior to an non-work related automobile accident that left her a quadriplegic, Susan Catlin ("Catlin") was employed as the lead worker in the four person wholesale packaging department of Crystal Lake Cheese Factory ("Crystal Lake"). Catlin's condition following the accident permanently confined her to a wheelchair and rendered her unable to perform many of the job-related tasks she had previously performed, including lifting heavy blocks of cheese, shrink-

wrapping the cheese, cutting the cheese, and hauling the cheese. There was no accommodation that Crystal Lake could have provided Catlin that would have allowed her to perform the job-related responsibilities of her position as lead worker. Moreover, just to allow Catlin access to the workplace, extensive and costly physical modifications would have been necessary -- none of which would have actually enabled her to perform her former job.

After conducting a hearing, and carefully reviewing all evidence presented, Equal Rights Division ("ERD") Administrative Law Judge Gary Olstad concluded that Crystal Lake did not violate the WFEA when it failed to bring Catlin back to work after she became a quadriplegic. In particular, Judge Olstad found, that there was no reasonable accommodation Crystal Lake could have provided Catlin that would have allowed her to perform her job-related responsibilities.

In reversing Judge Olstad's decision, LIRC erroneously held that the duty of reasonable accommodation

under the WFEA requires an employer to eliminate or reassign those job-related duties of a position that a disabled employee or applicant is unable to perform, thus creating a new job for the disabled individual. That holding, affirmed by the court of appeals, is unsupported by the language of the WFEA, directly conflicts with the great weight of persuasive authority construing similar language to the contrary, and is ultimately entirely unreasonable as a rule regarding the obligation of employers throughout Wisconsin. Further, LIRC's decision is based on findings that lack substantial record support and that were reached in a manner which denied Crystal Lake's right to due process

Because the WFEA neither wrests from employers the right to make fundamental decisions concerning in what positions they will employ individuals to meet business needs nor allows LIRC to ignore record evidence, Crystal Lake respectfully requests that LIRC's decision be reversed.

STATEMENT OF THE ISSUES

1. Whether LIRC reasonably interpreted §§ 111.34(1)(b) and 111.34(2)(a) of the WFEA when it found that there was a reasonable accommodation Crystal Lake could have provided Catlin without hardship, thus finding that the WFEA required Crystal Lake as a reasonable accommodation to create a new job because Catlin could not perform the one she had previously performed? The court of appeals answered: yes.

2. Whether there is substantial and credible record evidence to supporting the factual findings made by LIRC upon which it based its decision that there was a reasonable accommodation Crystal Lake could have provided Catlin without hardship within the meaning of the WFEA? The court of appeals answered: yes.

3. Whether Crystal Lake was denied due process by LIRC's failure to consult with the ERD Administrative Law Judge regarding credibility issues before reversing his factual findings or its rejection of evidence he admitted

without objection and relied upon in his decision? The court of appeals answered: no.

The foregoing issues were raised in the court of appeals through briefing and without oral argument.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Crystal Lake requests both oral argument and publication of the Court's decision as the issues presented in this appeal involve significant questions of law and public policy that will have a profound statewide impact on employers, employees and commerce.

STATEMENT OF THE CASE

I. Nature of the Case

The case arises out of Catlin's claim that Crystal Lake violated the WFEA's disability discrimination provisions. The case is before the Court pursuant to Wis. Stats. §§ 111.395 and 227.57, which provide for judicial review of the decisions of LIRC under the WFEA.

II. Procedural History

In March of 1998, Catlin filed a charge of disability discrimination with the Equal Employment Opportunity Commission ("EEOC"), which was cross-filed with the ERD. (A-App. at 158). By letter dated March 18, 1998, the ERD informed Crystal Lake that, pursuant to the agency's working sharing agreement, the EEOC would initially process the complaint. (Id.).

Following its investigation, on April 27, 1998, the EEOC issued a "Dismissal and Notice of Rights," finding that it was "unable to conclude that the information obtained establishe[d] a violation of the statutes [governing disability discrimination]. (A-App. at 159). Although the ERD had earlier issued a dismissal of Catlin's complaint, on June 15, 1998, it reversed that decision without explanation. (A-App. at 160-61, 154). The ERD then instituted an investigation that resulted in a finding of probable cause, and Catlin's complaint was certified for hearing. (A-App. at 35).

A. Disposition Before the ERD Administrative Law Judge.

A hearing on the merits of Catlin's complaint was held before ERD Administrative Law Judge Gary Olstad on January 25, 2000. (Id.). Following the hearing and his review of the parties' post-hearing briefs, Judge Olstad issued a Decision and Order dated October 20, 2000. (A-App. at 29-32). Judge Olstad concluded that Crystal Lake had not discriminated against Catlin because of her disability when it failed to bring her back to work following her disabling automobile accident in 1996. (A-App. at 31, ¶¶ 3-5). Judge Olstad further concluded that Crystal Lake did not unreasonably refuse to accommodate Catlin's disability because there was no reasonable accommodation, within the meaning of the WFEA, that would have allowed Catlin to adequately undertake her job-related responsibilities. (Id.).

B. Disposition Before the Labor and Industry Review Commission.

Catlin filed a timely appeal of Judge Olstad's decision to LIRC. (A-App. at 18). By decision dated July 20, 2001,

LIRC reversed Judge Olstad's Decision. (A-App. at 18-27). LIRC concluded that although there was "no question" it had satisfied the defense provided under Wis. Stat. § 111.34(2)(a) (establishing that Catlin's disability was related to her ability to perform the job-related responsibilities of her employment), Crystal Lake nevertheless discriminated against Catlin by refusing her a "reasonable accommodation" that it could have provided without hardship within the meaning of Wis. Stat. § 111.34(1)(b). (A-App. at 25). Specifically, LIRC held that the duty of reasonable accommodation obligated Crystal Lake to create a new job for Catlin (one that did not involve the job responsibilities, such as heavy lifting, she could no longer perform) and to renovate its aged facility to make it wheelchair accessible. LIRC thus ordered, *inter alia*, that Crystal Lake provide back pay to Catlin and offer her reinstatement to a "substantially equivalent" position that she was able to perform.[1] (A-App. at 22-23).

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[1] LIRC noted that since there was evidence that Crystal Lake had shut

C. Disposition in Circuit Court.

On August 16, 2001, Crystal Lake filed a timely Petition for Judicial Review of LIRC's decision with the Barron County Circuit Court. (A-App. at 16). By order dated February 7, 2002, Barron County Circuit Judge James C. Eaton affirmed LIRC's decision, finding that LIRC's decision was supported by substantial record evidence and that LIRC had reasonably interpreted the WFEA. (A-App. at 16-17). Following entry of the Circuit Court's order, Crystal Lake filed a timely Notice of Appeal of LIRC's decision.

D. Disposition in the Court of Appeals.

By decision dated October 8, 2002, the District III court of appeals affirmed LIRC's decision. (A-App. at 15). Stating that Wis. Stat. § 111.34(2)(a) does not indicate whether the individual's disability must be related to her ability to undertake "some," "most," or "all" of the job-related duties, the court held that it was reasonable under Wis. Stat. § 111.34(1)(b) to require an employer to create a new

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down the entire department in which Catlin worked in 1999, its reinstatement order was contingent on whether it was possible to place her in the job LIRC envisioned. (A-App. at 22 n.2).

job for a disabled employee who can perform "some" of the duties of the employee's previous job. (A-App. at 11, ¶¶ 28-29) The court also held that LIRC's findings where supported by substantial evidence and that LIRC had not violated Crystal Lake's due process rights in overturning Judge Olstad's factual findings despite failing to confer with him regarding credibility issues and rejecting evidence that was admitted without objection. (A-App. at 6-9).

III. Statement of Facts

1. The Cheese Factory

Crystal Lake operates a cheese factory in rural Comstock, Wisconsin. (A-App. at 129). It daily processes raw milk into several cheeses which it then packages in various sizes under its own as well and several other labels. (A-App. at 128). At all relevant times, the Comstock factory was Crystal Lake's sole facility and the site of its workforce of approximately fifty people. (A-App. at 129-130).

The Comstock factory is comprised of buildings originally erected in the late 1800's and early 1900's, to

which several additions have been made. (Id.). For example, Crystal Lake's primary factory utilizes the original cheese factory built in 1897 and its business offices are located in what was the original cheese maker's residence, circa 1907, the second floor of which is accessible only by stairs. (Id.). The wholesale packing department, where Catlin worked, was housed in an addition that was constructed in approximately 1940.[2] (A-App. at 129).

2. Catlin's Job Duties

Catlin was initially hired by Crystal Lake in August 1995 and became the wholesale department head (i.e., lead worker) shortly thereafter. (A-App. at 118). When she worked at Crystal Lake, the entire wholesale packing department consisted of Catlin and three other people. One worked primarily as a cutter, one as a cryovac operator, and one as a labeler. (A-App. at 44-45). At the time she worked there, the cutter and cryovacer were Catlin's mother and sister. (A-App. at 66-67).

[2] By October of 1999, the wholesale packing department where Catlin had worked was eliminated as a result of the transfer of operations and employee attrition. (A-App. at 164).

A typical day in the wholesale packing department began with the receipts of retail and grocery stores orders which dictated the type, size, quantity and labeling of the cheese to be processed that day. (A-App. at 141). The unpackaged cheese was stored in a large cooler in blocks that vary in size up to and exceeding forty pounds. The blocks were removed from the cooler's shelves, the highest of which is seven feet, and moved into the department on two wheelcarts or palletized jacks. (A-App. at 142). The cheese was then unwrapped and cut on one of two cutting machines into blocks weighing anywhere from ten pounds to eight ounces, depending on the orders to be filled. (A-App. at 141-142).

After cutting, the cheese was vacuum-bagged in a cryovac machine. (Id.). The packages were then stacked in a basket that was lifted off the table, lowered into a hot-water tank to shrink the plastic wrap, and quickly lifted out. (Id.). After removal, the individual packages were placed on a table, dried off, weighed, labeled, boxed and then placed on a

pallet and moved back to a cooler by electric forklift or hand truck. (A-App. at 142-143). Cleanup of the department involved washing the equipment, spraying the floors with a steam hose and scrubbing them down if necessary. (A-App. at 146-147).

As lead worker/department head, Catlin's duties included collecting and prioritizing the cutting orders and passing that information on to the cutter at the beginning of the day. (A-App. at 141-142). She also regularly removed the cheese from the cooler, including the forty pound blocks, for cutting and to fill orders. (A-App. at 61-62, 71). Except for the paperwork and general administrative duties, which Catlin testified occupied no more than approximately one hour of her day, Catlin's position required her to weigh and label the cheese, price and box the packages, place them on the pallets, and move them into the cooler for pickup the following day. (A-App. at 44-46, 61, 143). Catlin also was required to load the boxes on pickup trucks to take to the retail store when necessary -- most often at Christmas time.

(A-App. at 148). At times of lower volume, she and others in the department were required to load a four-wheel cart and pull the carts to the retail store themselves. (A-App. at 100, 149).

In addition to their individual duties, each of the packing department's employees, including Catlin, was trained and regularly required to perform all the other duties in the department. (A-App. at 44-46, 92, 143). It was essential that others, especially the lead worker, step into the other roles in the department to keep production going when someone was unavailable due to illness, vacation or, more regularly, breaks or ancillary tasks that took someone out of the department or away from their duties (e.g., stepping out for phone calls, going up to the office, attending meetings or leaving to take cheese to the retail shop). (Id.). To keep work flowing, the department functioned as a unit (as opposed to four individuals with separate tasks) where the employees -- including Catlin -- were all required on a daily basis to jump

in and perform the tasks of whatever stage of packaging was getting behind. (A-App. at 62-63, 92).

3. Catlin's Accident

In November of 1996, Catlin was in a serious automobile accident in which she suffered a severe spinal-cord injury that left her a quadriplegic. (A-App. at 48, 172-173). Catlin has some (although not full) movement in her upper extremities, but is paralyzed from the waist down. (Id.). Due to her condition, Catlin is confined to a wheelchair. (Id.).

Soon after the accident, Catlin's mother and sister approached Tom Messicci, Crystal Lake's Office Manager, and requested that Catlin receive disability payments under Crystal Lake's long-term disability policy. (A-App. at 154-155). An application was prepared and on that application, the only section Catlin left blank was the section that inquired what date, if any, she expected to be able to return to work in either a full- or part-time capacity. (A-App. at 171: Sec. II,

3). Catlin received full disability and ultimately did not return to work at the cheese factory. (A-App. at 57).

Following her accident, Catlin's sister took over the duties that Catlin had performed as the department head. (A-App. at 105-106). This included both the clerical and physical aspects of the job. (A-App. at 109). In time, another employee was also added to the wholesale packing department. (Id.). Notably, even with the assumption of Catlin's duties, Catlin's sister testified that she sat only approximately 15 minutes per day. (A-App. at 108-109).

4. Crystal Lake's Efforts to Determine The Availability of Reasonable Accommodations

In September of 1997, ten months after having been on full disability and after having correspondingly been found unable to obtain gainful employment, Catlin first attempted to contact Crystal Lake regarding the possibility of returning to her job. (A-App. at 52). Although Catlin called and asked to speak to Crystal Lake's President, Tony Curella, there is no evidence that Curella knew what Catlin was calling about.

Shortly thereafter, Curella was contacted by a representative of Rice Lake Vocational Rehabilitation, who inquired about Catlin potential for returning to work at the factory. (A-App. at 130-131). The call was a surprise to Curella given that Crystal Lake's insurer had provided Catlin with a full disability award. (A-App. at 131). In response, Curella contacted Crystal Lake's disability carrier, Fortis Insurance Group, whose agent suggested an analysis for the workplace to determine whether reasonable accommodations could be made. (A-App. at 131-132).

Acting on that recommendation and responding to Catlin's request, Curella, in conjunction with Messicci, arranged for Genex Services, Inc. to conduct an on-site job analysis. (A-App. at 132-133). David Johnson, MS, CRC, CCM, of Genex surveyed Crystal Lake on September 26, 1997 to determine whether any person in a wheelchair could perform the essential functions of Catlin's job. (A-App. at 132-133, 174-179). Johnson personally visited and surveyed the wholesale packing department and was informed that

Catlin's job entailed filling in on each of the positions within the department as well as providing stock, pulling inventory, making and labeling boxes, assisting with the loading of trucks, monitoring inventory and preparing the daily count. (Id.).

Ultimately, Johnson concluded that there were no reasonable accommodations that would allow Catlin to perform her job-related responsibilities. (Id.). Specifically, in his September 30, 1997 report to Crystal Lake, Johnson stated:

> Based on the review of the work area as well as the discussion with Curella regarding the duties of the Supervisor and their [sic] ability to have to fill in on all positions within the wholesale packing department, that it would not be a position which they could make reasonable accommodations for a person in a wheelchair. The major factors in limiting a person in a wheelchair would be the ability to do all of the positions which is an essential function of the supervisory position.

(A-App. at 175).

At Catlin's request, in October of 1999 -- more than two years after Crystal Lake was first asked to consider re-employing Catlin and more than two years after Johnson had concluded no reasonable accommodation existed that would have allowed Catlin to perform her job -- a Rehabilitation Engineering Technologist at the University of Wisconsin-Stout, Jeffrey Annis, conducted an assessment of Catlin's ability to return to work at Crystal Lake. (A-App. at 163-164). Annis indicated he had reviewed the job analysis Johnson had performed and noted that, at the time he (Annis) conducted his analysis, Catlin's job was no longer available as the department had been eliminated. (A-App. at 164). Like Johnson, Annis was taken through the employment site by Curella and shown all the areas in which Catlin had worked, as well as the duties she had performed. (Id.).

Annis's report addressed the difficulties Catlin would have had working in the physical plant and the extensive modifications that would be necessary to allow Catlin to even get in and around the building. (A-App. at 165). These

included the parking area (which he noted was gravel and contained many potholes) and the entrance area (which he noted was narrow, typically cluttered with various hoses and had a threshold with a lip preventing wheelchair access). (Id.). Annis' report also noted that modifications of those areas, as well as the changing area/locker area (which is only four feet wide and would not permit Catlin to turn around) and the sanitation area, would have been required. (Id. at p. 2). Annis further noted that the bathroom area was inaccessible to a wheelchair.[3] (Id.). The cost for all these building modifications would have been significant; indeed, Crystal Lake's estimate for the bathroom modification alone, which was based on a bid it received from a contractor, was a minimum of $47,000. (A-App. at 146).

With regard to Catlin's primary work area, Annis found it obvious that she could not have retrieved all of the cheese from the warehouse, where rolling ladders are used to

[3] Although Catlin used a leg bag at the time of Annis' visit, by the hearing date she required a wheelchair accessible bathroom facility. (A-App. at 87).

climb and retrieve those packages stored on the higher shelves. (A-App. at 165). He also noted that Catlin could not perform the cutting, packaging, shrink-wrapping, sealing and labeling on the tables in the department which were designed for use in a standing position. (Id.). Catlin's expert also found that Catlin would have had difficulty performing many responsibilities in the cooler, including pulling into it, reaching the racks, utilizing the handtrucks, and utilizing the palletized jacks. (Id.).

In the same way that he was unable to identify any accommodation that would allowed Catlin to perform her responsibilities of navigating the cooler, reaching the racks, and using the hand trucks and palletized jacks, Annis was unable to identify any accommodation that would have overcome Catlin's inability to operate the cutting and the cryovac machines. (A-App. at 165). Indeed, Annis conceded that "[m]ost of these are areas in which there may be difficulty in accommodation." (Id.). Further, recognizing that even those accommodations he was able to identify were

"numerous," Annis stated the "easier option" would have been for Crystal Lake to modify the job description to make Catlin's job largely clerical by eliminating many of its physical aspects. (Id.). Even though "paperwork" or administrative duties had occupied only one hour of Catlin's day, Annis suggested that Catlin's "job description [could have been modified] so she would be required, as a lead person, to only do the paperwork, final packaging, and filling out invoices, receipts, and packing lists." (Id.).

Crystal Lake was unwilling and unable effectively to create a new job for Catlin by eliminating a substantial amount of Catlin's previous job responsibilities as Annis had suggested. (A-App. at 166). Crystal Lake not only required, but its daily practice confirmed, that each of its three "working department leads" (one of whom was Catlin) had to be able to perform all aspects of the departments they supervised. (A-App. at 133-134, 143, 166). This was necessary to ensure that it met the daily workload and production demands in the departments even when fully

staffed. (Id.). Further, such responsibilities were also critical when one of the workers in its small departments was sick, on vacation or, more commonly in the wholesale department, temporarily away from the department for reasons such as phone calls, going to the business office, hauling cheese to the retail store, etc. (Id.).

STANDARD OF REVIEW

The scope of review applicable to LIRC findings and orders issued pursuant to the WFEA is prescribed by § 227.57, Wis. Stats. A reviewing court may uphold LIRC's findings only if they are supported by substantial and credible evidence. (Id.). Further, a reviewing court may affirm LIRC's legal conclusions only if they are reasonable and not contrary to the clear meaning of the law. (Id.). Accordingly, the Court must set aside or modify LIRC's action where "the agency has erroneously interpreted a provision of law" or "the agency's action depends on any finding of fact that is not supported by substantial evidence in the record." Wis. Stats. §§ 227.57(5), (6).

Whether, as LIRC and the court of appeals found, Wis. Stat. § 111.34(1)(b) requires as "reasonable accommodation" that an employer create a new job for a disabled employee whose work restrictions prevent the employee from performing the employer's existing job, as well as what constitutes "hardship" within the meaning of § 111.34(1)(b), are questions of law that, as the court of appeals acknowledged, involve the interpretation of an ambiguous statute. See UFE Inc. v. LIRC, 201 Wis. 2d 274, 284, 548 N.W.2d 57, 61 (1996). See also Keeler v. LIRC, 154 Wis. 2d 626, 632, 453 N.W.2d 902, 904 (Ct. App. 1990), review denied, 454 N.W.2d 807 (1990) (the determination of whether a set of facts fulfills a statutory standard is a legal conclusion). As questions of law, this court is not bound by LIRC's conclusion. See UFE, 201 Wis. 2d at 284, 548 N.W.2d 57 at 61 (1996); West Bend Educ. Ass'n v. WERC, 121 Wis. 2d 1, 11, 357 N.W.2d 534, 539 (1984).

Although LIRC is often afforded deference with regard to its interpretation of the WFEA, a de novo standard of

review is appropriate where the issue before the agency is one of first impression or the agency's position is inconsistent with other decisions on the matter. See Kannenberg v. LIRC, 213 Wis. 2d 373, 385-86, 571 N.W.2d 165, 172 (Ct. App. 1997), review denied, 576 N.W.2d 681 (1997) (citing UFE, 201 Wis. 2d. at 285, 548 N.W.2d at 62). The issue of whether reasonable accommodation under the WFEA includes a duty to create a new job for a disabled employee is an issue of first impression for LIRC.[4] Further, LIRC's interpretation here is in direct conflict with decisions from the Wisconsin Personnel Commission (LIRC's sister agency) and federal courts (interpreting analogous federal anti-discrimination laws).[5]

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[4] In Fields v. Cardinal TG Co., (LIRC, 2/16/01), a case LIRC decided while Judge Olstad's was on appeal to it, LIRC first addressed the issue of whether reasonable accommodation within the meaning of the WFEA might include restructuring essential job functions, but did so on significantly different facts. Specifically, Fields did not involve creation of a new job; rather, the employee there was able for more than 18 months to perform all the functions of an existing job that the employer, which was aware of the employee's limitations, then changed.

[5] Although the court of appeals stated it was "not convinced LIRC's interpretation of the statute was inconsistent with previous decisions," it provided no citation or reasoning supporting that conclusion. (A-App. at 6, ¶ 13).

Because de novo review is proper, LIRC's holding is entitled to no weight. See id. Even if LIRC's decision were entitled to "great weight," however, it should be reversed because its interpretation of the WFEA is unreasonable. See Harnischfeger Corp. v. LIRC, 196 Wis. 2d 650, 661, 539 N.W.2d 98 (1995) (even under "great weight" standard, LIRC's interpretation will not be upheld if it is unreasonable)

ARGUMENT

I. LIRC's Determination That Crystal Lake Refused Catlin Reasonable Accommodation That It Could Have Provided Without Hardship Is Based On An Erroneous and Unreasonable Interpretation of The WFEA.

A. The Statutory Framework Applicable To Disability Discrimination Claims Under The WFEA.

To meet her initial burden in a disability discrimination case under the WFEA, a complainant must establish that she is disabled within the meaning of the WFEA and was subject to an adverse employment action on the basis of that disability. See § 111.322, Wis. Stats.[6] Even

[6] Section 111.322(1), Wis. Stats., provides, in relevant part, as follows:

if the complainant meets that *prima facie* showing, § 111.34(2)(a) provides that there is no violation of the WFEA if the employer establishes that "the disability is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment . . ." An employer who establishes this defense is not liable unless it is further established that there was a "reasonable accommodation" that the employer refused to provide the complainant that the employer could have provided without "hardship" to its "program, enterprise or business." See § 111.34(1)(b), Wis. Stats.

There is no dispute that Catlin was disabled as a result of the automobile accident that left her a quadriplegic, or that Crystal Lake did not return Catlin to her position as the lead person in the wholesale department of its cheese factory on

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> Subject to ss. 111.33 to 111.36, it is an act of employment discrimination to do any of the following:
> (1) To refuse to hire, employ, admit or license any individual, to bar or terminate from employment . . . any individual . . . because of any basis enumerated in s. 111.321 [which includes "disability"].

the basis of that disability. Nor is there a dispute as to whether Crystal Lake irrefutably satisfied its burden under § 111.34(2)(a); as LIRC found, "[T]here is no question but that the complainant's disability, which resulted in her permanent use of a wheelchair, was related to her ability to perform the job-related responsibilities of her employment." (A-App. at 25). Thus, an issue before this Court is whether there was a "reasonable accommodation" that Crystal Lake could have provided Catlin without "hardship" within the meaning of § 111.34(1)(b). As demonstrated below, there was not.

B. The WFEA's Duty Of Reasonable Accommodation Does Not Require Employers To Employ Someone Else To Perform The Job-Related Responsibilities Of A Position That A Disabled Applicant Or Employee Cannot Perform, And LIRC's Conclusion That It Does Is Unreasonable.

The WFEA does not define "reasonable accommodation," nor does it specify the extent to which accommodation may be required for a disabled employee. Additionally, there is a scarcity of guidance from Wisconsin's

appellate courts regarding the contours of reasonable accommodation under the WFEA. See Target v. LIRC, 217 Wis. 2d 17, n.10, 576 N.W.2d 552, n.10 (Ct. App. 1998) (noting the lack of any precedence regarding the scope of the duty of reasonable accommodation in light of the relationship between §§ 111.34(1)(b) and (2)(a)). In Target, the only prior case addressing the accommodation duty when considered in light of an employer's defense under § 111.34(2)(a), the court of appeals held that:

> When read together, the only reasonable construction of these two provisions is that the purpose of reasonable accommodation is to enable employees to adequately undertake job-related responsibilities.

Id. at 17, 576 N.W.2d at 552.

Consistent with this holding, and Wis. Stat. § 111.34(2)(a), as a matter of logic eliminating the duties of an employee's position is not an accommodation that enables the disabled employee to "adequately undertake the job-related responsibilities of [her] employment." Although the use of assistive technology or modified work schedules may

allow a disabled employee to perform the required job duties, neither LIRC nor Catlin's expert even suggested there is any such accommodation that would have allowed Catlin to do her job. Rather, in requiring Crystal Lake to simply excuse Catlin from those duties she was no longer capable of performing, LIRC effectively forced it to create a new job (as well as employ others to do that work, even in ways that additionally burden non-disabled employees) -- a consequence nowhere contemplated nor in any way appropriate under the WFEA.

Addressing § 111.34(2)(a)'s impact on the scope of reasonable accommodation under § 111.34(1)(b), the court of appeals here found that as long as the employee could perform "some" of the job-related responsibilities, the employer is obligated as reasonable accommodation to eliminate the others. (A-App. at 11-12, ¶¶ 26, 28-29). As its basis for that holding, the court stated that § 111.34(2)(a) does not indicate whether an individual's disability must be

related to her ability to undertake "some," "most," or "all" of her job-related responsibilities. (Id.).

The WFEA's statutory language provides no support for that erroneous holding. To the contrary, it requires an employee to be able to "adequately undertake the job-related responsibilities of [the] individual's employment." See Wis. Stat. §§ 111.34(2)(a) and (b) (emphasis added). The Court must assume that the legislature meant the ordinary meaning of the words it used. The use of the definite article, without modification, can only be reasonably interpreted to mean all of the functions that make up the job.[7] Further, a "some or most" standard -- suggesting somewhere between one and more than half -- is simply too vague to provide any reasonable guidance of an employer's obligations under the WFEA.

[7] Compare the WFEA's federal counter-part, the Americans With Disabilities Act ("ADA"), which frames the test of an employee's qualifications in terms of the employee's ability to perform "the essential functions of the employment position." 42 U.S.C. § 12111(8) (emphasis added). This means that the employee must be able to perform all the essential functions of the job, not just some of them. See Cochrum v. Old Ben Coal Co., 102 F.3d 908, 912 (7th Cir. 1996).

For the same reason, LIRC erred when it found that Crystal Lake was required to substantially modify its plant. None of the extensive physical modification necessary to make the cheese factory wheelchair accessible would have enabled Catlin to undertake her former duties as lead worker. Rather, they would only have provided her access to perform a job that did not exist.

C. LIRC's Interpretation Of Reasonable Accommodation Directly Conflicts With The Decisions Of Numerous Federal Courts Construing Analogous Federal Statutes And LIRC's Sister Agency Construing The WFEA.

Numerous federal decisions construing the phrase "reasonable accommodation" under analogous federal law also confirm that LIRC's interpretation of the WFEA was unreasonable. Accord Target, 217 Wis. 2d at 18-19, 576 N.W.2d at 554 (looking to decisions from federal courts in deciding what constitutes reasonable accommodation and noting that, although neither the court nor LIRC is bound by such cases in interpreting § 111.34(1)(b), they are persuasive indications of whether LIRC's interpretation is reasonable).

See also Kannenberg v. LIRC, 213 Wis. 2d 373, 387, 571 N.W.2d 165, 172 (Ct. App. 1997) (noting that it is appropriate to look to federal anti-discrimination laws for guidance in interpreting the WFEA given the identical purposes of those statutes) (citing Marten Transport, Ltd. v. DILHR, 176 Wis. 2d 1012, 1020, 501 N.W.2d 391, 394 (1993)).

Contrary to interpretation of LIRC and the court of appeals here, federal courts have routinely held that "reasonable accommodation" does not require an employer to eliminate required job duties, create a new job or employ others to perform functions which a disabled employee cannot perform. See Peters v. City of Mauston, 311 F.3d 835, 845-846 (7th Cir. 2002) (holding that request to exempt employee from heaviest lifting due to medical restrictions was, as a matter of law, an unreasonable accommodation); Watson v. Lithonia Lighting, 304 F.3d 749, 752 (7th Cir. 2002), cert denied, __ U.S. __, 2003 WL 397596 (2003) (holding that an employer is not required to create new, permanent light-duty positions for employees who become

disabled); Hansen v. Henderson, 233 F.3d 521, 523-24 (7th Cir. 2000) (stating that an employer need not create a new job or provide a helper as an accommodation to a disabled employee); Stubbs v. Marc Ctr., 950 F. Supp. 889, 895 (C.D. Ill. 1997) (holding that an accommodation that consists of shifting an employee's duties to co-workers is unreasonable as a matter of law); Gilbert v. Frank, 949 F.2d 637, 644 (2d Cir. 1991) (rejecting plaintiff's suggestion that co-workers could assist with heavy lifting as a reasonable accommodation and noting such task reallocation would slow down and reduce the productivity of the operation); Biggs v. Winpak Portion Packaging, Inc., 1997 WL 457503 at *2 (N.D. Ill. 1997) (unpublished) (holding reasonable accommodation does not require reallocation of job duties that results in other employees having to work harder or longer); Smith v. Blue Cross Blue Shield of Kan, Inc., 102 F.3d 1075, 1076 (10th Cir. 1996), cert. denied, 522 U.S. 811 (1997) (holding it is not a reasonable accommodation to require the employer to eliminate an essential function of the

job, in effect creating a new job for a plaintiff); McCollough v. Atlanta Beverage Co., 929 F. Supp. 1489, 101 (N.D. Ga. 1996) (holding that shifting lifting duties from the plaintiff, a route assistant, to his accompanying driver/salesperson is not a reasonable accommodation). In concluding that "reasonable accommodation" does not mean eliminating required duties or creating a new job, federal courts have noted that reasonable accommodation involves modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that permit the individual with the disability to perform the functions of that position -- not rearrangements of the job related functions themselves. See Thoms v. ABF Freight System, Inc., 31 F. Supp. 2d 1119, 1129 (E.D. Wis. 1998).

Although the ADA requires a plaintiff to be able to perform the "essential functions" rather than "the job-related responsibilities" of the job at issue, the similarity in these

terms make the ADA decisions particularly instructive.[8] Indeed, as the court of appeals noted in Target, "The requirement of being able to perform the essential functions of the job under the ADA operates similarly to the provision in § 111.34(2)(a), Stats., that it is not discrimination based on [disability] 'if the [disability] is reasonably related to the individual's ability to adequately undertake the job responsibilities.'" Target Stores, 217 Wis. 2d at 16 n.9, 576 N.W.2d at 552 n.9.

Neither LIRC nor the court of appeals offered any justification for their divergence from a federal statute with similar language and an identical purpose. There simply is no reason to ignore the significant weight of persuasive federal authority that directly conflicts with LIRC's interpretation of "reasonable accommodation" in this case. This is especially

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[8] Under the ADA, discrimination is defined as not making a reasonable accommodation to the known physical or mental limitations of an "otherwise qualified individual with a disability," unless the employer can demonstrate that the accommodation would impose an undue hardship. 42 U.S.C. § 12112(b)(5)(A). A "qualified individual with a disability" is an individual who can, with or without reasonable accommodation, perform the "essential functions" of his or her position. 42 U.S.C. § 12112(8).

so given that nothing within the WFEA's legislative history suggests an intent to construe the duty of "reasonable accommodation" differently than under the ADA, or its predecessor, the Rehabilitation Act of 1973.[9]

LIRC's reasonable accommodation interpretation is also contrary to that reached by one of LIRC's sister agencies, the Wisconsin Personnel Commission ("Commission"), which adjudicates discrimination complaints by employees of the State of Wisconsin. See Harris v. DHSS, Wis. Pers. Comm., No. 84-0109 (2/11/88) (A-App. at 180-202). In Harris, the Commission held that the duty of reasonable accommodation under the WFEA does not include restructuring an employee's position by eliminating or transferring job-related responsibilities or creating a new job for the employee. Addressing the accommodation prong in

[9] The ADA is based largely on the Rehabilitation Act of 1973, in part at 29 U.S.C. § 793, which incorporated the duty of "reasonable accommodation" under its implementing regulations prior to the Wisconsin legislature's amendment of the WFEA to include the duty in 1981. See 41 C.F.R. § 60-741.2 (1979); Wisconsin Laws of 1981, Chapter 332, § 111.34 (1)(b).

the analytical structure of a WFEA discrimination case, the Commission stated:

> It would be anomalous . . . to construe "accommodation" in a way that would result in consideration of a far broader type of inquiry -- not whether there is a reasonable accommodation that would permit the complainant to perform the particular duties of the job which it had just been determined he or she could not adequately expect to undertake because of his or her handicapping condition [pursuant to § 111.34(1)(b)], but rather whether there was some reasonable accommodation that would permit the complainant to obtain or retain some form of employment with the employer through such means as job restructuring, transfer, or even creation of a new job. Such construction would be inconsistent with the rest of the [WFEA].

(A-App. at 193). The Commission further noted that its analysis was consistent with the holdings of numerous cases (construing federal law, the WFEA and local anti-discrimination ordinances) that an employer is not required to assign some of a disabled individual's work to other staff, materially rewrite job descriptions, or create a new position as

an accommodation. (A-App. at 194-196) (citing McFayden v. Madison EOC, Dane Co. Cir. Ct., No. 81CV3744 (11/15/82); Bento v. ITO Corp., 36 FEP Cases 1031, 1041 (D.R.I. 1984); Jasany v. U.S. Postal Service, 33 FEP Cases 1115, 1117 (N.D. Ohio 1983), aff'd 755 F.2d 1244 (6th Cir. 1985); Rau v. UW-Milwaukee, Wis. Pers. Comm., 85-0050 (2/5/87)).

Catlin was employed for and performed a specific position -- wholesale department lead worker -- that required her to perform all the duties of the positions within her department of four employees. Because Catlin could not perform those duties, LIRC required Crystal Lake to "modify" her job in a way that would have alleviated many of its physical aspects. The WFEA's accommodation provision, however, simply does not and cannot require an employer to assign a disabled person's work to other employees, nor create a new job for the disabled employee. See Harris, supra, (citations omitted).

Similarly, LIRC erred as a matter of law when it concluded that the physical modifications that would have been necessary to make the cheese factory wheelchair accessible were reasonable accommodations that Crystal Lake could have provided without hardship. None of those modifications (to the parking lot, entrance and sanitizer, bathroom, etc.) would have actually enabled Catlin to undertake her duties as lead worker; i.e., handle large blocks of cheese, operate the cutting machines, shrink-wrap the cheese, move the stacked cheese in and out of the cooler using hand jacks or palletizers, haul the cheese to the retail store or perform any of the other job-duties she was unable to perform. Rather, the costly physical modifications would only have provided Catlin access to perform a new job -- one that existed only in the imaginations of LIRC and Catlin, not in reality, and one which eliminated many of the physical tasks of the actual job that existed at Crystal Lake.[10]

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[10] Although Crystal Lake did not ascertain the cost of all the modifications that would have been necessary simply to allow Catlin to be present at its aged facility, the undisputed evidence established that modifying its bathroom alone would have cost Crystal Lake at least

In reaching the conclusion that Crystal Lake refused Catlin reasonable accommodation, LIRC also improperly relied on the testimony of Catlin's mother and sister that they would have had "no objection to stepping in and helping with those tasks that she was unable to perform, even if this meant performing a disproportionate amount of the heavy work." (A-App. at 25-26). This testimony was inherently biased (which LIRC also failed to properly address by conferring with the ALJ regarding credibility as discussed in section III, infra), and thus unworthy of significant weight. Further, as they were no longer working in the wholesale department (which had been eliminated by then), their testimony was suspect because it was purely speculative.

LIRC also ignored the fact that if Catlin's mother or sister had to cease their cutting and cryovacing duties to perform the physical duties Catlin was required to but could

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$47,000 -- which evidence was improperly rejected as discussed in section III, infra. As further discussed in section II.B, infra, LIRC should have found as a matter of law that for a small employer to bear such a significant expense for a single employee (whose yearly salary was a fraction of that amount) was both unreasonable and constituted a hardship.

not perform, production in those areas would stop or slow because Catlin could not perform the physical duties of her relatives' positions (e.g., cutting, shrink-wrapping). Thus, contrary to the conclusion reached by LIRC (See A-App. at 22), there is every reason to believe that exempting Catlin from performing the physical tasks which she was unable to perform and requiring others in the department to do them instead was not a reasonable accommodation that could have been provided without hardship as it would have impaired production in Crystal Lake's wholesale packaging operations. See Dey v. Milwaukee Forge, 957 F. Supp. 1043, 1052 (E.D. Wis. 1996) ("Requiring fellow workers to assist the plaintiff would involve a reallocation of some job duties . . . [and] would impact on the ability of other employees to perform their duties and on the ability of the defendant to operate its business . . . Such accommodation would impose an undue hardship on the defendant . . . .").

In sum, the record evidence confirms that reassigning Catlin's duties was, as a matter of law, not a reasonable accommodation.

D. LIRC's Interpretation That Reasonable Accommodation Requires An Employer To Create A Job For A Disabled Individual Is Inconsistent With The Stated Purpose Of the WFEA.

Ultimately, the WFEA, like its federal counterpart, the ADA, is a remedial statute that is construed broadly to effectuate its purpose. The WFEA's purpose, as announced by the legislature, is to "encourage and foster to the fullest extent practicable the employment of all properly qualified individuals regardless of any [disability]." Wis. Stats. § 111.31(3) (emphasis added). Accord Ray-O-Vac v. DILHR, 70 Wis. 2d 919, 931, 236 N.W.2d 209, 214-215 (1975). Its purpose is not to guarantee employment to all individuals with disabilities regardless of whether they are properly qualified for (i.e., are "adequately able to undertake the job responsibilities of") the positions they seek.

Here, LIRC, to which the court of appeals deferred, did not interpret the WFEA in a manner designed to effectuate the intent of the legislature, but went beyond its authority and the reasonable accommodation limitations within Wis. Stat. § 111.34(2)(a), to impermissibly engaged in legislating. Rather than protect qualified individuals, LIRC made the WFEA into an affirmative action statute -- and LIRC into a super-personnel committee -- that requires Wisconsin employers to create new jobs for those who are unable to perform the job-related responsibilities of the positions the employer has determined are necessary for its operations, and to employ others to perform the functions the disabled individual cannot perform.

If left unchanged, the policy implications of LIRC's decision would have a profound effect on both the state agencies enforcing the WFEA and every employer in Wisconsin. Indeed, LIRC's decision would take the responsibility for deciding how to structure the workforce to meet business needs from each employer and place 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. This is an area that far exceeds the purview of LIRC or the courts and one that has and must remain within the exclusive province of the employer. Accord Peters, 311 F.3d at 845 (noting that the federal courts do not second-guess an employer's judgment as to what the employer considers an essential function of the jobs in its workforce) (citing DePaoli v. Abbott Labs., 140 F.3d 668, 674 (7th Cir. 1998)).

E. This Case Should Be Remanded To LIRC If The WFEA Is Now Found To Require That An Employer Create A Job For A Disabled Employee As Reasonable Accommodation.

If this Court holds that the WFEA requires an employer to remove important functions from a disabled employee's job -- an obligation that certainly was not clear at the time of the hearing in this matter -- and that such an obligation does not always create a hardship for an employer, it should remand this case to allow Crystal Lake an

opportunity to present additional evidence regarding the hardship such an accommodation would have imposed on its business. As previously noted, LIRC's novel decision in Fields, supra, was decided on February 16, 2001, well after the hearing and Judge Olstad's October 20, 2000 decision. (See A-App. at 32). While the evidence already in the record demonstrates hardship as a matter of law, Crystal Lake would have presented further evidence of hardship had the law been so construed at the time of hearing.

II. LIRC's Findings Upon Which It Concluded Crystal Lake Could Reasonably Accommodate Catlin Without Hardship Lack Substantial Evidentiary Support.

A. LIRC's Findings That Catlin Could Perform Most Of Her Former Duties And Was Not Frequently Required To Perform All The Duties In The Department Are Not Supported By The Record.

In order to determine the availability, need for, and reasonableness of a requested accommodation, it is necessary *a priori* to accurately determine the job-related responsibilities of the position at issue and the impact of the

complainant's disability on her ability to carry out those responsibilities. LIRC acknowledged some of the job-related responsibilities that Catlin could not perform as a result of her disability. In concluding that Crystal Lake could have reasonably accommodated Catlin without hardship, however, LIRC not only ignored that acknowledgement, it disregarded additional job-related responsibilities that Catlin was indisputably precluded from performing.

For example, LIRC found that Catlin "was able to perform most of her usual job duties, with the exception of reaching boxes on high shelves and loading the hand cart and semi truck." (A-App. at 25). That finding not only lacks any basis in the record, it directly contradicts LIRC's other findings. Specifically, Catlin was unable to handle numerous tasks she was required to and did regularly perform, such as lifting 40-pound blocks of cheese and reaching other cheese stored at high levels in the cooler. (A-App. at 21 (¶ 15)). In fact, Catlin testified that she handled the large blocks of cheese "daily" and sometimes multiple times a day. (A-App.

at 61-62). Catlin's duties also included moving the stacked inventory utilizing handtrucks and palletized jacks which were functions of her former position that her own expert noted she could not perform. (A-App. at 165). Thus, LIRC finding -- that the tasks Catlin could not perform were not part of her "usual" job duties – is simply wrong.

Nor is there any dispute that Catlin was required to perform the duties of the other positions she supervised (cutter, cryovacer and labeler). (A-App. at 19 (¶ 5), 44, 63). As LIRC correctly found, Catlin's disability precluded her from performing a number of the primary duties of those positions. In particular, Catlin could not retrieve larger blocks of cheese from the cooler when acting as a cutter, could not operate the machines in the wholesale department that were used to cut the cheese, and could not stack the cheese and place it in hot water after it was cryovaced (shrink-wrapped). (A-App. at 21 (¶ 15), 77-80). All were

integral parts of the production process carried out in the wholesale department.[11] (Id.).

Although LIRC acknowledged that each of the above described tasks were job duties Catlin was required previously to perform, but could no longer do, LIRC incredibly found such tasks were "small" ones which Catlin performed "minimally" or "infrequently." (A-App. at 21 (¶ 15), 25-26). Separate and apart from LIRC's questionable use of these adverbs, LIRC's conclusion that the tasks Catlin could not perform were "unimportant" with regard to her position finds no substantial credible evidentiary support and is contradicted by both parties' witnesses, including Catlin.

Specifically, Catlin testified work assignments in the wholesale department were such that, "Everybody jumped in and helped any job that was behind or got ahead." (A-App. at 44). She further stated:

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[11] That Catlin could neither operate the cutting machines nor seal the cheese after it was cryovaced, both significant functions in the department, is also entirely inconsistent with LIRC's finding that Catlin was "physically able to train people" -- another of Catlin's admitted duties as lead worker. (A-App. at 21 (¶ 14)).

> The duties never changed. We just -- everybody jumped in where needed. That's like if somebody was done on cutting, she'd go help cut, say or if the labeler gets behind, we'd jump in and help the labeler.

(A-App. at 46).

Beyond the need for wholesale department members to step in on a daily basis and perform the other department tasks to keep the work flow going, it was essential that they be able to assume the responsibilities of every position in the four person department in the event of illness, vacation or any number of even more common reasons that took one of its members out of the department (e.g., phone calls, taking product to the retail store, attending company meetings, or getting called to the business office). (A-App. at 143). Accordingly, when questioned about what occurred when one of her co-workers was not present Caitlin noted that, "Everyone was cross-trained . . . we just jumped in and got the work done."[12] (A-App. at 63).

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[12] Catlin further acknowledged that when someone was absent, she was required to do even more of the physical aspects of her job. (A-App. at

Finally, LIRC's finding that Catlin only occasionally performed these tasks (cutting, shrink-wrapping, etc.) apparently rests on Catlin's statement that she "rarely" used the cutting machines. (A-App. at 91-92). Under cross-examination on this point, however, Catlin was evasive and was unable to affirmatively state that she did not perform that function at least once a week. (Id.). In fact, Catlin ultimately admitted that she was "always performing [the functions of the cutter and cryovacer]" and "filling in" whenever the department was busy. (Id.). Thus, there is no support for a finding that Catlin did not regularly perform the duties of the other positions in the department.

B. The Record Evidence Does Not Support LIRC's Finding That The Necessary Modifications To The Plant And To Catlin's Job Were Reasonable Accommodations That Would Not Have Created A Hardship.

LIRC's finding that the necessary plant modifications and reassignment of Catlin's duties would not create a hardship was also contrary to the substantial record evidence

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82).

and inconsistent with any reasonable interpretation of the WFEA. With regard to physical modifications, the $47,000 cost estimate merely to provide Catlin a bathroom was, as Judge Olstad implicitly found, sufficient to support a finding that accommodating Catlin would have been both unreasonable and a hardship to Crystal Lake. Yet both LIRC and the court of appeals somehow found that it was impossible to determine whether a cost of $47,000 -- which did not include the cost of the other physical renovations that would have been necessary (i.e., changes to the parking lot, changes to the building entrance, modification to the sanitizing area, changes to the table heights, etc.) -- would pose a hardship. This Court should find as a matter of law under the WFEA, however, that it is both unreasonable and a hardship to require an employer with fewer than fifty employees to bear an expense for a single employee that is more than three times the employee's yearly salary. (See A-App. at 169: noting Catlin was earning an average of $1,373

per month, or $16,476 per year, at the time she last worked Crystal Lake in 1996).

There is also every reason to believe that exempting Catlin from performing the physical tasks which she was unable to perform and requiring others in the department to do them instead was not a reasonable accommodation that could have been provided without hardship. As the court of appeals implicitly acknowledged, requiring others to help Catlin would necessarily have resulted in a slow down of the production process. (A-App. at 13, ¶ 34). Nonetheless, the court of appeals found that the slowdown would neither cause the accommodation to be unreasonable nor create a hardship under the WFEA:

> But Crystal Lake does not explain the consequences of a slowdown in this instance. Conceivably, the slowdown could result in incomplete orders, decreased output, or a loss of revenue or clients. But Crystal Lake does not argue, much less demonstrate, that these would be the results of modifying Catlin's job.

(Id.). Yet, in establishing the production slow down that would have resulted had Caitlin returned to work. (as the court of appeals acknowledged it had), Crystal Lake established its logical consequence: slowing the production process results in decreased output which results in loss of revenues. Thus, that Crystal Lake would have been required to take others out of the production process in order to relieve Catlin in and of itself demonstrates it was neither a reasonable accommodation nor one Crystal Lake could have provided without hardship. See Dey, 957 F. Supp. at 1052 (holding that requiring fellow workers to assist the plaintiff would involve a reallocation of some job duties, which would necessarily impact the ability of others to perform their duties and the ability of the defendant to operate its business, constitutes undue hardship as a matter of law).

III. LIRC Denied Crystal Lake Due Process By Failing To Confer With The ALJ On Issues Of Credibility And Rejecting Evidence That Was Admitted Without Objection At The Hearing.

Despite LIRC's statement that it did not reverse Judge Olstad on credibility grounds, which the court of appeals affirmed, LIRC's reversal of his findings did involve credibility determinations. For instance, LIRC's finding that Catlin did not perform the functions of the other positions in her department "very frequently" was a reversal of Judge Olstad's finding that Catlin "regularly" had to perform these functions "to keep work flowing smoothly and cover for each other when temporary absences occurred." (A-App. at 30 (¶ 10)). LIRC thus credited a portion of Catlin's testimony that the ALJ properly found unworthy of reliance. Its failure to confer with the ALJ regarding credibility constituted a denial of Crystal Lake's right to due process. See Hermax v. Carpet Mart v. LIRC, 220 Wis. 2d 611, 617, 583 N.W.2d 662, 665 (Ct. App. 1998), review denied, 221 Wis. 2d 654, 588 N.W.2d 632 (1998). "Where credibility of witnesses is at

issue, it is a denial of due process if the administrative agency making a fact determination does not have the benefit of the findings, conclusions, and impressions of the testimony of each hearing officer who conducted any part of the hearing." Id. See also Hoell v. LIRC, 186 Wis. 2d 603, 614, 522 N.W.2d 234, 239 (Ct. App. 1994) (LIRC "is expressly empowered to reject the ALJ's recommendation in rendering a final decision, provided that it consults the ALJ to determine his or her impressions of the credibility of witnesses and explains in a memorandum opinion why it disagreed with the ALJ").

Crystal Lake was similarly denied due process by LIRC's unwarranted rejection of the testimony of its operations manager who had determined that it would cost a minimum of $47,000 just to make a wheelchair accessible bathroom. (A-App. at 27). That testimony was not refuted nor objected to in any way by Catlin, and LIRC failed to identify any evidence in the record to contradict it. Since LIRC is unable to take judicial notice of the cost involved in

remodeling Crystal Lake's factory, the only permissible basis for LIRC to overturn the ALJ, who found the testimony compelling (A-App. at 31 (¶ 13)), was to find Robertson's testimony incredible. As LIRC itself has noted in previous decisions, where hearsay evidence is not objected to "it may be used as a basis for findings to whatever extent it is viewed as having probative value." Schanandore v. Roddiscraft, Inc., (LIRC, 6/19/92) (citing Maline v. Wisconsin Bell, (LIRC, 9/30/98) and Schlichting v. Schlichting, 15 Wis. 2d 147, 160, 112 N.W.2d 149, 156 (1961)). Because LIRC was in no position to evaluate Robertson's credibility, it should not have rejected his testimony without conferring with Judge Olstad. Moreover, Crystal Lake had a right to rely on the evidence admitted without objection in determining what, if any, additional evidence it needed to introduce to establish hardship.

As previously noted, LIRC also impermissibly rejected Judge Olstad's other credibility determinations, including the quality of Catlin's testimony about the job functions she

believed she could perform and the accommodations she needed.[13] For example, only Judge Olstad observed the demonstration at the hearing in which Catlin, who admittedly could not handle the heaviest (40-pound) blocks of cheese, tried to lift even an 18-pound block of cheese. Judge Olstad's observations, which no written transcript could convey, would have confirmed Catlin's difficulty in performing this simple task. In merely relying on the transcript, LIRC neglected to even consider the best evidence, i.e., the judge's eyewitness observation.

Finally, the court of appeals' statement in support of LIRC's findings with regard Catlin's limitations is instructive:

> Catlin testified about what she thought she could do and what she knew she could not. There is no testimony that refutes this, <u>other than</u> [the reports of two vocational

[13] That Crystal Lake was denied due process is demonstrated by the fact that both LIRC and the court of appeals, neither of which had any opportunity to observe the witnesses nor conferred the ALJ who did, appeared to accept all of Catlin's unsupported assertions regarding her own abilities -- which were contradicted - but discounted or ignored Crystal Lake's uncontradicted evidence concerning its business practices.

> experts, one of whom was hired by Catlin.]"

(A-App. at 12, ¶ 31) (emphasis added).

One wonders what more compelling evidence could exist to refute a complainant's self-interested testimony than two independent experts (one her own) -- both of whom found that there was no accommodation that would have allowed Catlin to perform her job related responsibilities. At the very least, this sentence from the court of appeals' decision points out exactly why a credibility conference was required in this case.

LIRC's failure to confer with the ALJ denied Crystal Lake due process and ultimately lead to an erroneous finding that there was a reasonable accommodation Crystal Lake could have provided without hardship.

CONCLUSION

For all the reasons identified above, LIRC's determination that Crystal Lake discriminated against Catlin in violation of § 111.322(2m) and § 111.34(1)(b) Wis. Stats., by refusing her a reasonable accommodation it could have

provided without hardship, is erroneous. Accordingly, Crystal Lake respectfully requests that the Court reverse LIRC's decision and enter an order dismissing Catlin's complaint in its entirety. Alternatively, if the Court concludes that the WFEA requires an employer to create a new job where an employee cannot perform an existing job and, if it concludes that such an obligation does not always create a hardship for an employer as a matter of law, Crystal Lake requests that the Court remand the matter to LIRC for additional proceedings on the issue of hardship in this case.

Dated this 21st day of March, 2003.

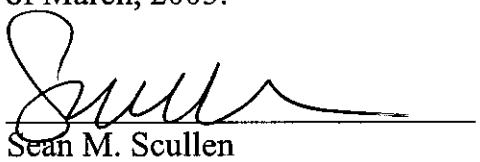
ROBERT H. DUFFY
State Bar No. 1010996
SEAN M. SCULLEN
State Bar No. 1034221

QUARLES & BRADY LLP
411 East Wisconsin Avenue
Suite 2040
Milwaukee, WI 53202-4497
Attorneys for Petitioner-
Appellant-Petitioner
Crystal Lake Cheese Factory

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,150 words.

Dated this 21st day of March, 2003.



Sean M. Scullen

SUPREME COURT OF WISCONSIN

CRYSTAL LAKE CHEESE
FACTORY,

Petitioner-Appellant-Petitioner,

v. Case No. 02-0815

Circuit Court Case
No. 01-CV-289

LABOR AND INDUSTRY REVIEW
COMMISSION AND SUSAN
CATLIN,

Respondents-Respondents.

AN APPEAL FROM A DECISION OF
THE COURT OF APPEALS, DISTRICT III
APPEAL NO. 02-0815

CRYSTAL LAKE CHEESE FACTORY'S
APPENDIX TO ITS BRIEF

Robert H. Duffy
State Bar No. 1010996
Sean M. Scullen
State Bar No. 1034221
QUARLES & BRADY LLP
411 East Wisconsin Avenue
Milwaukee, WI 53202
(414) 277-5000
Attorneys for Crystal Lake
Cheese Factory

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COURT OF APPEALS
DECISION
DATED AND FILED

October 8, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-0815

Cir. Ct. No. 01-CV-289

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

CRYSTAL LAKE CHEESE FACTORY,

PETITIONER-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION AND SUSAN CATLIN,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Barron County: JAMES C. EATON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Crystal Lake Cheese Factory appeals a circuit court order affirming a Labor and Industry Review Commission (LIRC) decision that reversed a Department of Workforce Development Equal Rights Division administrative law judge's (ALJ) findings. LIRC found that Crystal Lake violated

the Wisconsin Fair Employment Act (WFEA). WIS. STAT. § 111.31 through 111.395.[1] Specifically, LIRC determined that Crystal Lake had discriminated against Susan Catlin by refusing to modify her job duties and make physical modifications to the workplace after an automobile accident left Catlin a quadriplegic confined to a wheelchair. LIRC ordered Crystal Lake to offer Catlin reinstatement and pay back wages. Crystal Lake petitioned the circuit court for judicial review, and the court affirmed LIRC's decision. Crystal Lake now appeals, arguing that LIRC erred by holding there were reasonable accommodations the factory could make for Catlin without creating a hardship for itself. We reject Crystal Lake's arguments and uphold the circuit court order affirming LIRC's decision.

Facts

¶2 Crystal Lake operates a cheese factory in Comstock. It processes milk into several varieties of cheese, which it packs and markets under its own and several other brand labels. Catlin began working there in August of 1995 as a cheese cutter but was promoted to department head/lead worker shortly after starting. Catlin worked in the wholesale department, which consisted of four positions: department head, cheese cutter, cryovacer (packager), and labeler.

¶3 As department head, Catlin's primary duties were to gather store orders and make a direction sheet for the cutter containing a list of sizes and types of cheese to be cut that day, although she would also assist with assembling and labeling boxes and weighing, pricing, and boxing cheese. The cutter would take

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

the instruction sheet, remove the cheese from the cooler, cut it, and set the pieces on a table. The cryovacer would then bag the pieces and place them in the cryovac machine to remove the air from the packages. After removing the air, the cryovacer gave the packages a quick hot water bath to shrink the wrapper around the cheese. The pieces were then labeled, weighed, priced, boxed and loaded onto a palette for storage. The wholesale department workers would also occasionally take a load of cheese to the factory store or help load semi-trucks, although truck loading primarily occurred around Christmas. All four workers in the department were trained for all four positions and would assist each other as necessary if any person fell behind or if the department was busier than usual.

¶4 In November 1996, Catlin was in an automobile accident that left her a quadriplegic. Catlin's co-workers called her during her hospitalization. In one of these calls, company president Tony Curella told Catlin her job would be available "no matter what." After treatment, recovery, and rehabilitation, Catlin believed she was ready to return to work in September 1997 and contacted Crystal Lake. She asked to speak to Curella, although he never returned her calls.

¶5 Curella then received a phone call from the Rice Lake Vocational Rehabilitation Center to discuss Catlin's return to work. Curella was surprised by the call and contacted his insurance company, which suggested he have an analysis of the workplace completed to see if there were any accommodations that could be made. The insurer sent information on a company called "Job Accommodation Network."

¶6 Curella instead hired David Johnson from Genex Services. Johnson surveyed Crystal Lake to determine whether a person in a wheelchair could perform Catlin's job. The only information Johnson had about Catlin was that she

was in a wheelchair. Johnson concluded that no accommodations could be made to the job site because Catlin would be unable to perform all of the functions of all four positions in the wholesale department. Curella had informed Johnson that the ability to perform all of the functions was a necessary component of Catlin's position. Johnson also noted Catlin would have difficulty pulling and stocking inventory because of its weight and storage up to seven feet above the floor.

¶7 On the basis of Johnson's report, Crystal Lake concluded that it could make no accommodations for Catlin. Crystal Lake never contacted Catlin, however, and she only realized her employment had been terminated when she received instructions for withdrawing funds from her retirement plan.

¶8 When Catlin sought reinstatement she was capable of performing most of her job-related duties.[2] She could not, however, lift forty-pound blocks of cheese, load or unload the hand cart or truck for transporting the cheese, reach boxes or cheese stored at high levels, operate the cheese-cutting machine or give the packages the water bath.

¶9 To facilitate performance of her duties, some physical modifications to the plant would be required. The main entrance had a three-inch lip on the threshold that would have to be altered, or a ramp would have to be provided. The sanitizer area, through which employees normally walked, would have to be modified for the wheelchair to pass through. At the time Catlin sought reinstatement, she did not need a restroom because she was using a catheter, but by the time of the hearing, Catlin required an accessible restroom.

---

[2] Crystal Lake disputes this. However, as explained in this opinion, we uphold LIRC's factual findings if supported by the record. *See* ¶¶11 and 30, *infra*.

¶10 LIRC found that Crystal Lake's refusal to alter Catlin's job responsibilities to exempt her from certain tasks constituted a denial of a reasonable accommodation. LIRC also determined that the refusal to make physical alterations was a denial of a reasonable accommodation. The trial court affirmed, and Crystal Lake appeals.

Standard of Review

¶11 We review the decision of LIRC, not the subsequent decision of a trial court. ***Target Stores v. LIRC***, 217 Wis. 2d 1, 11, 576 N.W.2d 545 (Ct. App. 1998). We will affirm LIRC's findings of fact if they are supported by substantial evidence. ***Id.*** We give LIRC's interpretation of a statute varying degrees of deference depending on LIRC's obligations in administering the statute, its experience in doing so, and the nature of the determination it made. ***Id.*** at 13.

¶12 In ***Target***, we determined that we would give great weight to LIRC's interpretation of "reasonable accommodation" under WIS. STAT. § 111.34(1)(b).[3] ***Target***, 217 Wis. 2d at 13. This is because LIRC was charged with adjudicating appeals from the hearing examiner under the WFEA; LIRC has developed experience in interpretation of the WFEA since it was enacted in 1981; our

---

[3] WISCONSIN STAT. § 111.34(1)(b) states:

> (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.

deference will promote greater uniformity and consistency than if we did not defer; the interpretation of "reasonable accommodation" is mixed with fact-finding; and the interpretation involves value and policy judgments about the employers and employees when an employee is handicapped. ***Id.*** Under the great weight standard of review, we will uphold LIRC's interpretation of the statute if it is reasonable and not contrary to the clear meaning of the statute, even if we conclude that another interpretation is more reasonable. ***Id.*** at 13-14.

¶13 ***Target*** notwithstanding, Crystal Lake urges us to adopt a de novo standard of review because it claims the issue before LIRC was one of first impression or, in the alternative, because LIRC's interpretation of the WFEA is inconsistent with prior interpretations. *See* ***UFE, Inc. v. LIRC***, 201 Wis. 2d 274, 285, 548 N.W.2d 57 (1996). However, LIRC has interpreted "reasonable accommodation" many times before; the unique facts here do not necessarily make the question one of first impression. *See* ***McMullen v. LIRC***, 148 Wis. 2d 270, 276, 434 N.W.2d 830 (Ct. App. 1988) (what is reasonable depends on the specific facts in each case). Further, we are not convinced LIRC's interpretation of the statute is inconsistent with previous decisions.

LIRC's Rejection of the ALJ's Findings

¶14 We address this issue first because Crystal Lake claims its due process rights were violated when LIRC rejected some of the ALJ's factual findings. If LIRC improperly rejected the ALJ's findings, the factual underpinnings of this case would change and could require a different result.

¶15 Crystal Lake claims LIRC erred in three ways. First, it argues that LIRC improperly changed the ALJ's finding that Catlin "regularly" performed certain functions to a finding that she performed them "not ... very frequently."

Second, Crystal Lake claims LIRC erred when it rejected other determinations of the ALJ, "including the quality of Catlin's testimony concerning the job functions she believed she was able to perform." Finally, it argues that LIRC erred when it rejected the testimony of the operations manager regarding a $47,000 estimate for creating a wheelchair accessible restroom.

¶16 Even if LIRC chooses to substitute its credibility determination for that of the ALJ, this does not always constitute a due process violation. ***Hoell v. LIRC***, 186 Wis. 2d 603, 613, 522 N.W.2d 234 (Ct. App. 1994). LIRC may reject the ALJ's recommendation in making its final decision, provided it consults the ALJ to determine his or her impressions of the credibility of witnesses and explains in a memorandum opinion why it disagreed with the ALJ. ***Id.*** However, as explained below, none of LIRC's "reversals" in this case was based on credibility of witnesses; we therefore decline to say LIRC was required to consult with the ALJ to make its factual determinations and we conclude that there was no error.

¶17 The ALJ found Catlin's duties were to prioritize orders and pass them on to the cutter; help label, weigh, price, and pack the cheese; and help load and move pallets. Also, the workers in the wholesale department regularly assisted each other. The ALJ then found that Catlin could perform some, but not all, of the duties for each position. The ALJ did not, however, make specific findings regarding which of the duties of her own position she could or could not perform, except to note only that Catlin could no longer retrieve cheese stored at high levels. The ALJ concluded that to accommodate Catlin, her duties would have to be modified so that even when she was acting as the cutter, she would not be required to retrieve the cheese. The ALJ concluded that this was not a reasonable accommodation.

¶18 Crystal Lake suggested at the hearing, and continues to maintain, that Catlin's inability to perform all the functions of all the positions "is reasonably related to [her] ability to adequately undertake the job-related responsibilities ...." *See* WIS. STAT. § 111.34 (2)(a). In other words, Crystal Lake contended that a "reasonable accommodation" is one that permits a disabled employee to perform all job responsibilities. It does not include creating a new job by modifying or eliminating pre-disability job responsibilities. Thus, Crystal Lake argued that it had a statutory defense to the duty to reasonably accommodate. The ALJ apparently agreed with this interpretation.

¶19 LIRC, contrary to Crystal Lake's proffered interpretation, considered "reasonable accommodation" under WIS. STAT. § 111.34(1)(b) to include some modification to the job responsibilities of a handicapped employee unless the employer could show the modification would cause hardship. LIRC's rejection of the ALJ's conclusion goes to statutory interpretation, not credibility of witnesses. LIRC is not required to consult the ALJ before it overturns the ALJ's legal conclusions.

¶20 Additionally, LIRC found that Catlin could perform most of the duties in the department. However, the tasks LIRC specifically mentioned Catlin could *not* perform—lifting and cutting blocks of cheese and giving the packages a water bath—were duties assigned to the cutter and the cryovacer respectively. Despite the fact that Catlin filled in for these positions when needed, LIRC's statement that Catlin performed these duties infrequently does not directly contradict the ALJ, who specified no shared tasks.

¶21 LIRC's rejection of the $47,000 restroom estimate was appropriate as well.[4] LIRC concluded first that, when Catlin sought reinstatement, she did not require a bathroom because she was using a catheter. Thus, the $47,000 could not have been an issue at the time Catlin asked to return to work. However, by the time of the administrative hearing, Catlin no longer needed the catheter and could use an accessible restroom. The only testimony regarding the amount was from an operations manager who testified that a contractor gave him that estimate. There is no written estimate for modifications in the record.

¶22 Administrative bodies are not bound by the same formal rules of evidence as the courts. *See* WIS. STAT. § 227.45. Neither side disputes that the manager's testimony about the estimate is uncorroborated hearsay. Crystal Lake argues that because Catlin did not object, the evidence became part of the record. *See* ***Schlichting v. Schlichting***, 15 Wis. 2d 147, 160, 112 N.W.2d 149 (1961) (hearsay evidence received without objection becomes part of the evidence of the case and may be used as proof).

¶23 The ALJ's sole finding based on the estimate was, "[t]o accommodate Catlin's disability would require ... the addition of a bathroom at an approximate cost of $47,000.00." LIRC accepted the amount of the estimate, but had to further consider the estimate in the context of hardship to the employer, something the ALJ never explicitly addressed. It is the function of the commission to weigh and draw inferences from the evidence. *See* ***William Wrigley, Jr. Co. v. DOR***, 153 Wis. 2d 559, 571, 451 N.W.2d 444 (Ct. App. 1989).

[4] The ALJ apparently thought this constituted a hardship for Crystal Lake, but he did not make a formal factual finding that the cost was prohibitive.

LIRC explained in its opinion that it ultimately discounted the estimate because the bathroom was irrelevant at the time Catlin sought reinstatement and because the record as a whole did not support a finding of hardship to Crystal Lake. LIRC did not improperly reject or overrule any of the ALJ's findings relating to the estimate, because the ALJ never made a finding beyond the actual dollar figure.

Reasonable Accommodation and the Job

A. Statutory Requirements

¶24 In a handicap discrimination suit under the WFEA, the complainant must show (1) that he or she is handicapped within the meaning of the WFEA and (2) that the employer took one of the enumerated actions based on that handicap. ***Target***, 217 Wis. 2d at 9. In this case, no party disputes that Catlin is handicapped or that Crystal Lake took an action based on her handicap.

¶25 Once the complainant makes those two showings, the employer then has a burden of proving a defense under WIS. STAT. § 111.34. Section 111.34(1)(b) does not require an employer to make even a reasonable accommodation if the accommodation will impose a hardship on the employer. However, if an employer refuses to reasonably accommodate and is *not* able to demonstrate that the accommodation would pose a hardship, the employer violates the WFEA. ***Target***, 217 Wis. 2d at 9-10. Under § 111.34(2)(a), it is not a violation of the WFEA to take a specified employment action such as firing an employee if "the disability is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment ...."

¶26 WISCONSIN STAT. § 111.34(2)(a), however, does not indicate whether an individual's disability must be related to his or her ability to undertake "some," "most," or "all" of the job-related responsibilities. This leaves § 111.34 as a whole open to multiple interpretations, and LIRC and Crystal Lake suggest conflicting interpretations.

¶27 Crystal Lake's interpretation is that under WIS. STAT. § 111.34(2)(a), there is no job discrimination when an employer fires a disabled employee if the employee is no longer able to undertake *all* of the former job-related functions. Thus, Crystal Lake argues, a modification of job duties eliminating some of the employee's prior duties is per se an unreasonable accommodation under § 111.34(1)(b).

¶28 LIRC interprets WIS. STAT. § 111.34(2)(a) as not necessarily requiring an employee be able to perform all of the job-related functions, only some or most. As long as the employee can perform some of the job responsibilities, modification of the duties may be a reasonable accommodation that the employer should make.[5] The burden therefore shifts back to the employer to demonstrate that the accommodation of modifying the job would create a hardship for the employer.

¶29 We are required to give great weight to LIRC's interpretation of the statute unless the interpretation clearly contradicts the plain meaning of the statute. *See* ¶12, *infra*. Because LIRC's reading of WIS. STAT. § 111.34 is not inherently

[5] We reiterate that LIRC makes its determination of what constitutes a "reasonable accommodation" on the facts of each case. *See* ¶13, *infra*. Therefore, the result in this case does not necessarily create a broad rule for subsequent cases.

contradictory to the statute's plain meaning, we accept its interpretation and reject the meaning advanced by Crystal Lake.

B. Discussion

¶30 LIRC accepted Catlin's testimony that she could perform nearly all the functions she did prior to her accident and found that Crystal Lake's refusal to modify Catlin's duties to exempt her from the heaviest physical tasks constituted a denial of a reasonable accommodation, which we conclude is an acceptable interpretation of WIS. STAT. § 111.34(1)(b). Crystal Lake nonetheless maintains (1) that a finding Catlin could perform nearly all of her former tasks is unsupported by the record and (2) that, even so, a modification to her position amounts to creating a new job and is an unreasonable accommodation. Crystal Lake also suggests that this "new job" would create a hardship for the factory. However, the evidence supports a finding that Catlin could perform most of her duties, and we are unconvinced that the accommodation LIRC suggests is unreasonable or likely to create a hardship for Crystal Lake.

¶31 Catlin testified about what she thought she could do and what she knew she could not. There is no testimony that refutes this, other than Johnson's report and a report prepared by Jeffrey Annis, a vocational rehabilitation specialist. Johnson's report, see ¶6 *infra*, was based only on the information that Catlin was in a wheelchair. Annis' report, slightly more illuminating, concentrated primarily on physical modifications that would be necessary, although it did note some limitations Catlin would have. Annis noted that Catlin would be unable to lift the forty-pound blocks of cheese and that she would be unable to operate the cutter. He indicated that the cryovac might be difficult to reach, and that the tables seemed too high for Catlin to work comfortably. Catlin

only disputed that the tables would be too high, stating she had done her own measurements at home and felt comfortable working at the table height. Because Catlin's testimony as to her ability is primarily uncontroverted, it is substantial enough for LIRC to have relied upon it.

¶32 Catlin testified, and Crystal Lake never disputed, that when she started there was little or no cross-training. This suggests that performance of all tasks in all positions by all workers was not previously a requirement. Thus, if Catlin, as supervisor or department leader was unable to perform the functions of, for example, the cutter, exempting her from the cutter's function is not a novel idea.

¶33 Moreover, the testimony suggests that when things were busy or backed up, each of the workers did whatever they could to get the department back on track. In other words, the position-specific job functions were pooled and no longer attributable to any one individual or position. Given this pooling, we see no reason why, as LIRC suggests under WIS. STAT. § 111.34 (1)(b), Crystal Lake could not implement a new arrangement that required the other workers to cover the tasks Catlin could not, rather than allowing the random coverage that repeatedly occurred.

¶34 Although Crystal Lake hints that a modification like the one LIRC suggested would create a hardship thus exempting it from any accommodation, we see nothing in the record to support this contention. Crystal Lake merely asserts that the production process would have been slowed down when the cutter and cryovacer would have to help Catlin with the physical tasks. But Crystal Lake does not explain the consequences of a slowdown in this instance. Conceivably, the slowdown could result in incomplete orders, decreased output, or a loss of

revenue and clients. But Crystal Lake does not argue, much less demonstrate, that these would be the results of modifying Catlin's job.

¶35 Moreover, testimony indicated that each worker helped out "whenever needed." We see no reason why the help Catlin would need with some tasks would be any different from another worker requiring assistance when production became backed up or the worker needed to step out for a moment. Because Crystal Lake has not proven hardship, it established no defense under WIS. STAT. § 111.34(1)(b).

Reasonable Accommodation and the Physical Plant

¶36 The Crystal Lake plant would need modifications to make the buildings accessible, such as altering a three-inch lip at the main entrance, redesigning the walk-through sanitizer to allow the wheelchair through, widening the halls and changing room, and installing an accessible restroom.

¶37 While we acknowledge that costs of changing the physical plant may sometimes constitute a hardship, Crystal Lake has provided no evidence that the required alterations would create a hardship. The evidence submitted—the $47,000 estimate for the bathroom—was properly rejected by LIRC as hearsay. Even assuming this estimate were allowed, Crystal Lake made no showing of revenue and costs that would give us a context in which to consider whether $47,000 would create a hardship. Because Crystal Lake offered no evidence to show that modifications to the physical plant would create a hardship, we affirm LIRC's conclusion that failure to modify the building violated the WFEA.

¶38 We decline to remand this case to give Crystal Lake the opportunity to show hardship. It chose to proceed on the legal theory that LIRC required it to

create a new job and that this was unreasonable under the statute. It could have opted to present alternative evidence regarding hardship, but it did not. We will not remand merely because a party's trial strategy backfires. *See* ***State v. McDonald***, 50 Wis. 2d 534, 538, 184 N.W.2d 886 (1971). The order of the circuit court upholding LIRC's decision is affirmed.

By the Court.—Order affirmed.

Recommended for publication in the official reports.

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 1 | BARRON COUNTY

CRYSTAL LAKE CHEESE FACTORY,

Petitioner,

v.

Case No. 01-CV-0289

Administrative Agency Review: 30607

LABOR AND INDUSTRY REVIEW COMMISSION and SUSAN CATLIN,

Respondents.

FILED
FEB - 7 2002
Circuit Court, Barron Co., WI
BONITA K. GAGNER, CLERK

ORDER

This proceeding having been commenced on August 16, 2001, under Wis. Stat. §§ 111.395 and 227.52-227.57, to review a decision of the Labor and Industry Review Commission under the Wisconsin Fair Employment Act (WFEA), *see* Wis. Stat. §§ 111.31-111.395; and

The petitioner, Crystal Lake Cheese Factory, having appeared by Robert H. Duffy and Sean M. Scullen, Quarles & Brady LLP, Susan Catlin having appeared by Monica Murphy, Wisconsin Coalition for Advocacy, and the Labor and Industry Review Commission having appeared by David C. Rice, Assistant Attorney General; and

The court having reviewed the record and having considered the written and oral arguments of the parties; and

The court having orally ruled on January 29, 2002, that the Commission reasonably interpreted the WFEA and that the Commission's findings are supported by substantial evidence in the record,

Now Therefore, IT IS ORDERED that the Commission's decision is affirmed.

Dated at Barron, Wisconsin, this 7 day of February, 2002.

BY THE COURT:

/s/ James C. Eaton

Honorable James C. Eaton
Circuit Judge, Branch 1

STATE OF WISCONSIN
LABOR AND INDUSTRY REVIEW COMMISSION
P O BOX 8126, MADISON, WI 53708-8126 (608/266-9850)

SUSAN C CATLIN, Complainant
P O BOX 515
TURTLE LAKE WI 54889

CRYSTAL LAKE CHEESE FACTORY, Respondent
1858 HWY 63
COMSTOCK WI 54826

FAIR EMPLOYMENT DECISION

ERD Case No. 199800991
EEOC Case No. 26G980562

SEE ENCLOSURE AS TO TIME LIMIT AND PROCEDURES ON FURTHER APPEAL

An administrative law judge for the Equal Rights Division of the Department of Workforce Development issued a decision in this matter. A timely petition for review was filed.

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted to the administrative law judge. Based on its review, the commission makes the following:

FINDINGS OF FACT

1. The respondent, Crystal Lake Cheese Factory (hereinafter "respondent"), operates a factory at which it processes raw milk into cheese and packages it for distribution to other companies, as well as under its own label. The respondent also runs a small retail shop. During the relevant time period it employed between 45 and 48 people.

2. The complainant, Susan Catlin (hereinafter "complainant"), began working for the respondent in August of 1995 as a cheese cutter. Shortly thereafter she was promoted to the position of department head/lead worker in the wholesale department.

3. The wholesale department was the part of the respondent's operation responsible for getting cheese ready to be shipped out to grocery stores. There were four workers in the department: the department head, the cutter, the cryovacer, and the labeler. During the complainant's employment her sister was the cheese cutter and her mother the cryovacer.

4. As department head, the complainant was responsible for preparing the paperwork, which included gathering up all the grocery store orders and making up a sheet showing the cutter what types and sizes of cheese

various grocery stores wanted. The cutter would then bring in the different kinds of cheese from the cooler, cut them to the appropriate sizes, and set them on a table. While this was occurring the complainant would get boxes from the storeroom, put them together, and affix labels to them. Once the cheese was cut, it was placed in individual plastic bags, then put into a machine called a cryovac, which sealed the bags and removed the air from them. The cheese was then loaded into a basket and put into a pot of hot water, in order to shrink it and make the bag tight. These tasks were performed by the cryovacer. Thereafter the cheese was labeled, then weighed, priced, boxed, and put on a pallet. Once on the pallet the cheese was put in the cooler to await shipment to the grocery store. The complainant was responsible for weighing, pricing, boxing, and placing the cheese on pallets. In addition, workers in the wholesale department were responsible for transporting cheese to the respondent's store about once a week using a hand cart and, on occasion, for loading cheese into a semi truck. This latter task was generally a seasonal responsibility performed around Christmas time.

5. Everyone in the wholesale department was cross-trained and could help out on any job as needed. The complainant had no formal written job description. She received a single performance evaluation during her employment, and was given primarily above-average ratings. The respondent regarded her as an excellent employee.

6. In November of 1996 the complainant was involved in an automobile accident, which left her confined to a wheelchair. The complainant was hospitalized for about three months, then underwent further rehabilitation at home.

7. In December of 1996, while the complainant was still in the hospital, she spoke on the telephone with the employer's owner, Tony Curella, who told her her job was there no matter what. The complainant attended an employee picnic in July of 1997, at which point she still regarded herself as an employee of the respondent.

8. The complainant believed she was ready to go back to work in September of 1997. She called the respondent and asked to speak with Mr. Curella, but was told he was busy. The complainant left a message for Mr. Curella to call her back, but he failed to do so. The complainant waited a few weeks, then called Mr. Curella again. Mr. Curella deliberately instructed the receptionist to tell the complainant he was too busy to talk to her. The complainant was told Mr. Curella would call her back, but again he failed to do so.

9. Shortly thereafter Mr. Curella received a telephone call from the Rice Lake Vocational Rehabilitation Center to discuss the complainant's return to work. Mr. Curella was shocked to receive the call and immediately

contacted his insurance company to ask how he should proceed. The insurance company representative suggested that Mr. Curella have an analysis done of the cheese factory to see if the complainant could be accommodated. The insurance company also sent the respondent information from the Job Accommodation Network (hereinafter "JAN").

10. The respondent arranged for an ergonomic job analysis to be conducted by David Johnson, a case management consultant for a company called Genex Services. The respondent did not provide Mr. Johnson with any information about the complainant other than that she uses a wheelchair. Mr. Johnson observed the wholesale department and on September 30, 1997, prepared a report in which he concluded that the complainant could not be accommodated.

11. Mr. Johnson's report identified some specific jobs which the complainant would be unable to perform: reaching cheese at high levels in the coolers, pushing and pulling pallets of cheese, operating a "bag back sealer" at a high work table, and moving product from the store room to the store. He then made the following conclusions:

> "Based on the review of the work area as well as the discussion with Mr. Curella regarding the duties of the Supervisor[1] and their ability to have to fill in on all positions within the wholesale pack department, that it would not be a position which they could make reasonable accommodations for a person in a wheelchair. The major factors in limiting a person in a wheelchair would be the ability to do all of the positions which is an essential function of the supervisory position. This is not to say a person in a wheelchair could not do a particular job within the department but would not be able to do all of the positions as is required of a Supervisor. This is a small department with a total of 4 people. Each person is required to do a particular task and the Supervisor needs to know all those tasks and able to fill in if someone does not come in. They do not have the ability to have people on standby due to the size of the company. According to Mr. Curella the size of the company is under 50 people at this time. In reviewing the position, I saw no permanent modifications that could be provided in the job to accommodate a person in a wheelchair for the supervisory position.
>
> "Therefore, the essential function which would most hamper a person in a wheelchair would be that the Supervisor is required to know all aspects of the job and is able to fill in when people

[1] At the hearing the respondent insisted that the complainant's job title was either head of the wholesale department or lead worker, and that she was not a supervisor.

are unable to. It would also be difficult for the wheelchair person to pull stock and inventory due to the weights and heights of their storage containers and cooling unit."

12. After reviewing Mr. Johnson's report, the respondent concluded that the complainant could not be accommodated. The respondent based this conclusion exclusively on Mr. Johnson's report, without talking to the complainant, requesting information from her doctor, or contacting the JAN.

13. The respondent mailed a copy of Mr. Johnson's job analysis to the Rice Lake Vocational Rehabilitation Center, but never contacted the complainant to discuss the fact that it was not offering her her job back. On August 5, 1998, the complainant received notice that she had to remove her money from her 401(k) retirement plan and realized that the respondent considered her employment to be terminated.

14. As of the date she sought reinstatement the complainant was physically able to perform most of the jobs in the wholesale department, including training people, making boxes, making labels, baking cheese, labeling cheese (using a "reacher" to get at the labels), weighing it, pricing it, boxing it, putting it on a pallet, and doing inventory and other paper work. She was also able to clean up and wash equipment.

15. The complainant could not perform some of the heaviest physical tasks, including lifting 40-pound blocks of cheese, loading and unloading the hand cart and semi truck, and reaching boxes stacked high in the storeroom or cheese stored at high levels in the cooler. She was also unable to cut cheese or place it into the pot of hot water. However, these functions belonged primarily to the cheese cutter and the cryovacer, and were not tasks which the complainant performed very frequently. In addition, at least two of the other three employees in the department expressed a willingness to perform a disproportionate share of the physical tasks which the complainant was unable to perform.

16. The respondent's refusal to modify the complainant's job duties to exempt her from performing those heavy physical tasks which were beyond her capabilities constituted the denial of a reasonable accommodation which the respondent could have provided without hardship.

17. In order to perform her job duties the complainant required some physical modifications to the work place. The main entrance to the plant contained a 3" lip on the threshold which would have had to be altered so that she could enter the plant in her wheelchair. In the alternative, a ramp could have been provided. In addition, the respondent has a sanitizer area which employees walk through on their way to the main plant, and some modification would have been needed to enable the complainant to pass through the sanitizing bath with her wheelchair. The complainant did not

need the respondent to lower work tables for her, as she was comfortable working at a 33" high table.

18. As of the time the complainant requested reinstatement she used a catheter bag and did not require the respondent to provide a wheelchair accessible bathroom. However, as of the date of the hearing the complainant's needs had changed and an accessible bathroom would be required.

19. The respondent's refusal to make the physical modifications to the workplace required by the complainant constituted the denial of a reasonable accommodation which the respondent could have provided without hardship.

Based on the FINDINGS OF FACT made above, the commission makes the following:

CONCLUSIONS OF LAW

1. That the complainant is an individual with a disability, within the meaning of the Wisconsin Fair Employment Act.

2. That the respondent discriminated against the complainant based on her disability, within the meaning of the Wisconsin Fair Employment Act.

Based on the FINDINGS OF FACT and CONCLUSIONS OF LAW made above, the commission issues the following:

ORDER

1. That the respondent shall cease and desist from discriminating against the complainant because of her disability.

2. That the respondent shall offer the complainant reinstatement to a position substantially equivalent to her former position, provided such a position is currently available and that the complainant is able to perform it with reasonable accommodations based upon her current needs.[2] This offer shall be tendered by the respondent or an authorized agent and shall allow the complainant a reasonable time to respond. Upon the complainant's acceptance of such position, the respondent shall afford her all seniority and

[2] The evidence in the record indicates that, at some point prior to October of 1999, the wholesale department was eliminated. However, the record is silent with respect to when this occurred, where the workers in the wholesale department went after their department was eliminated, or whether there would have continued to be work available for the complainant had she been permitted to return. Consequently, the commission is unable to find with certainty that reinstatement is appropriate.

benefits, if any, to which she would be entitled but for the respondent's unlawful discrimination, including sick leave and vacation credits.

3. That the respondent shall make the complainant whole for all losses in pay the complainant suffered by reason of its unlawful conduct by paying the complainant the sum she would have earned as an employee from the date she sought reinstatement until such time as the complainant resumes employment with the respondent or would resume such employment but for her refusal of a valid offer of a substantially equivalent position or on which it is shown that reinstatement was no longer feasible.[3] The back pay for the period shall be computed on a calendar quarterly basis with an offset for any interim earnings during each calendar quarter. Any unemployment compensation or welfare benefits received by the complainant shall not reduce the amount of back pay otherwise allowable, but shall be withheld by the respondent and paid to the Unemployment Insurance Reserve Fund or the applicable welfare agency. Additionally, the amount payable to the complainant after all statutory set-offs have been deducted shall be increased by interest at the rate of 12 percent simple. For each calendar quarter, interest on the net amount of back pay due (i.e., the amount of back pay due after set-off) shall be computed from the last day of each such calendar quarter to the day of payment. Pending any and all appeals from this Order, the total back pay will be the total of all such amounts.

4. That the respondent shall pay the complainant's reasonable attorney's fees and costs associated with this matter.

5. Within 30 days of the expiration of time within which an appeal may be taken herein, the respondent shall submit a compliance report detailing the specific action taken to comply with the commission's Order. The compliance report shall be directed to the attention of Kendra DePrey, Labor and Industry Review Commission, P. O. Box 8126, Madison, Wisconsin. The statutes provide that every day during which an employer fails to observe and comply with any order of the commission shall constitute a separate and distinct violation of the order and that, for each such violation, the employer shall forfeit not less than $10 nor more than $100 for each offense. See Wis. Stat. § § 111.395, 103.005(11) and (12).

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[3] For the same reasons discussed in footnote 2, above, the commission is unable to find whether or when it is appropriate to cut off the complainant's back pay. If and when the commission's decision becomes final, and if the parties have difficulty resolving any issues that may arise with respect to the appropriateness of reinstatement and back pay, further proceedings may be ordered.

Dated and mailed
JUL 20 2001
catlisu.rrr:164:9

David B. Falstad, Chairman

James A. Rutkowski, Commissioner

MEMORANDUM OPINION

Procedural Issue

Prior to beginning its investigation of this case, the Equal Rights Division (hereinafter "Division") attempted to dismiss the matter based upon a final action by the United States Equal Employment Opportunity Commission (hereinafter "EEOC"), from which the complainant had not filed an appeal. Although the Division subsequently acknowledged that it did so erroneously and rescinded its dismissal, the respondent now seeks to resolve this entire matter on that basis. The respondent's efforts are unavailing. The Division was correct in rescinding its dismissal of the case, as such dismissal was not authorized by rule or by statute. To the contrary, the Division is required to investigate all complaints of discrimination unless one or more of the four criteria specifically enumerated in the Division's rules are not met. *See* Wis. Admin. Code §§ DWD 218.05 and 218.06. A dismissal by the EEOC is not among those criteria and is not a circumstance that warrants dismissal of a complaint before an investigation has been conducted. Consequently, the complainant's failure to take action pursuant to the EEOC's dismissal of her complaint had no bearing on her right to proceedings before the Division.

The respondent asserts an alternative basis for dismissing the complainant's complaint: her failure to file a timely appeal of the Division's erroneous dismissal. Again, this argument fails. To begin with, a party's failure to appeal a dismissal that the Division was not authorized to issue cannot reasonably serve as a basis to deny her her right to proceed with her case. Further, even if the Division had been authorized to dismiss the matter, its decision was defective in that it did not include any notice of appeal rights or of the time allowed for filing an appeal, as required under Wis. Stat. § 227.48(2). Thus, a dismissal of the complaint on the basis sought by the respondent would have resulted in a denial of due process to the complainant. For these reasons, the commission finds that dismissal of this case on procedural grounds would be improper.

Merits

The complainant's burden in a disability discrimination case under the Wisconsin Fair Employment Act (hereinafter "Act") is to show that she is disabled within the meaning of the Act and that there was an adverse employment action based upon that disability. The complainant's evidence that she lost her job because she is confined to a wheelchair clearly satisfies that burden. The burden then shifts to the respondent to demonstrate both that the disability was reasonably related to the complainant's ability to adequately perform the job-related responsibilities of her employment and that accommodation of her disability would pose a hardship on its business. *See* Wis. Stat. § 111.34. Here, there is no question but that the complainant's disability, which resulted in her permanent use of a wheelchair, was related to her ability to perform the job-related responsibilities of her employment. The question presented in this case is whether there was a reasonable accommodation which the respondent could have provided without hardship.

The complainant contends that she could have continued working for the respondent if it had been willing to excuse her from the heavy physical tasks which she was unable to perform. The complainant maintains that she could perform most of her job responsibilities, and her mother and sister, the respondent's cheese cutter and cryovacer, appeared at the hearing and testified that they had no objection to stepping in and helping with those tasks she was unable to perform, even if this meant performing a disproportionate amount of the heavy work.

The commission has previously found that it is reasonable to require an employer to restructure the physical demands of the job in order to accommodate a disabled employee, provided this can be achieved without hardship to the employer. *Fields v. Cardinal TG Co.* (LIRC, February 6, 2001). Here, the respondent has argued that relieving the complainant from having to perform some of the tasks in the wholesale department would pose a hardship for it because it needs everyone in the department to be able to perform every duty in order to fill in when workers are absent or on vacation or when someone otherwise needs assistance. However, while the employer might find it easiest to employ only those workers who can perform every job function, the Act requires employers to make accommodations for disabled workers so long as they can reasonably do so without hardship to the business. In this case, the employer has failed to demonstrate the existence of such a hardship.

The complainant was able to perform most of her usual job duties, with the exception of reaching boxes on high shelves and loading the hand cart and semi truck. However, the evidence indicates that loading the hand cart and semi truck were tasks that were not done very often and, further, that there was a person available to help with the boxes. Indeed, the complainant testified that, even before becoming disabled, she had received assistance in retrieving the boxes. Under the circumstances, the commission is unable to conclude that her inability

to perform these few functions interfered with her overall ability to carry out the duties of the lead worker position.

The commission recognizes that were a number of additional small tasks in the wholesale department which the complainant's use of a wheelchair rendered her unable to perform. These, however, were primarily job responsibilities belonging to the cutter or cryovacer, with which the complainant helped out only occasionally. The respondent failed to present any evidence to show what percentage of the complainant's time was spent on those tasks, and offered nothing to contradict the complainant's testimony that it was minimal. While the respondent also contended that the complainant needed to be available to fill in when other workers in the department were absent, it failed to present any evidence to show how often this occurred, and the commission is unable to conclude that this exigency was sufficiently compelling so as to justify denying the complainant an opportunity for reemployment. It appears that there was a great deal of flexibility in the assignment of tasks in the wholesale department. Thus, even if one worker was absent, there is no reason to believe that the other two workers could not cover the heaviest physical tasks, while the complainant focused on the remaining tasks. Given these factors, and considering that at least two of the other three workers in the wholesale department indicated a willingness to cover more of the physically demanding tasks and to perform a disproportionate share of the heavy labor, the commission sees no reason to conclude that exempting the complainant from those physical tasks which she was unable to perform would have had an adverse effect on the respondent's operation or otherwise posed a hardship for it.

It appears that some of the respondent's unwillingness to accommodate the complainant in this case may stem from its having underestimated her abilities to perform the job and having made an incorrect assumption that she was not capable of handling any physical tasks. The respondent's operations manager testified that he did not believe it would be practical or possible to remove one person entirely from physical work and that to do so would have required additional help. However, the operations manager indicated that he would consider taking the grocery store cheese out of the cooler, wrapping it, bringing it to the cryovac, labeling it, weighing it and packaging it--all jobs which the complainant was capable of doing--to be physical work if done with any frequency. The respondent failed to establish that it would have had to hire additional help if it had permitted the complainant to perform only those tasks of which she was capable, some of which were clearly considered physical work. While it is certainly possible that the respondent would not be able to accommodate an individual who could perform only paperwork and non-physical tasks, it erred in assuming that the complainant was such an individual.

The respondent also relied on incorrect assumptions with respect to the complainant's need for modifications to the physical workplace. For example, the respondent assumed it would need to build a wheelchair accessible bathroom, which it stated would cost it $47,000. However, the complainant testified that, as of the time she attempted to request reinstatement, she did not require a

bathroom because she used a bag which was emptied at home. Consequently, the cost of installing an accessible bathroom was not a basis upon which the complainant could lawfully be denied reinstatement. Moreover, even assuming a wheelchair accessible bathroom would have been necessary--and the evidence indicates that as of the date of the hearing the complainant's needs had changed and she would require the use of a bathroom[4]--the respondent did not demonstrate that to build one would pose a hardship for it. The operations manager testified that he had a contractor come and received an estimate of $47,000 to build a wheelchair accessible bathroom. However, there is no copy of this estimate in the record, nor any other nonhearsay evidence to establish that it would really be necessary to spend $47,000 to build an accessible restroom facility or that it would not have been feasible to alter an existing bathroom so that it would be accessible to the complainant.

The evidence suggests that there are two minor physical alterations which the complainant would have required: a modification to the sanitizer bath through which employees walk on their way into the plant and a modification to the 3" threshold to the plant. The respondent neither asserted nor established that either of these modifications would pose any difficulty for it. While there was also some dispute about the complainant's ability to work at the 33" high work tables in use in the wholesale department, the complainant testified that she took her own measurement and tried it at home, finding it to be perfect at that height. The complainant also testified that in her current position she works at different levels without any difficulty. Even assuming that the complainant's understanding of her own capabilities is incorrect and that she would not be able to work at a 33" table, the respondent has nonetheless failed to demonstrate that lowering the tables would pose a hardship for it. While the respondent asserted that to lower table levels would have an adverse impact on other employees, since the height of the table is set so the average employee can work comfortably, no competent evidence was presented in support of this assertion, and the commission sees no basis to conclude that other employees would have difficulty working at slightly lower tables. Further, although the respondent stated that employees work on all five tables, rotating around them, it failed to explain why a single table could not be lowered to accommodate the complainant.

NOTE: The commission did not confer with the administrative law judge regarding witness credibility and demeanor. The commission's reversal is not based upon any differing assessment of witness credibility.

cc: Attorney Monica Murphy
Attorney Sean M. Scullen

---

[4] The complainant's accommodation needs which arose subsequent to her initial request for reinstatement do not have any bearing on the respondent's liability in the case. However, if the respondent had demonstrated that providing an accessible bathroom would have posed a hardship for it, this would have had an impact upon the remedy ordered.

	WORKSHEET FOR COMPUTING BACK PAY AND INTEREST ON BACK PAY Beginning: Ending:	Calendar Quarter	Calendar Quarter	Calendar Quarter	Calendar Quarter	Calendar Quarter	Calendar Quarter
1	GROSS BACK PAY: Enter gross wages which would have been paid to complainant in this quarter had discrimination not occurred.						
2	STATUTORY SET-OFFS: Enter gross wages complainant actually received in this quarter from other employment, unemployment compensation or welfare benefits.						
3	NET BACK PAY: Subtract line 2 from line 1 and enter difference. (If line 2 is more than line 1, enter zero here and on line 9-- no payment is due this quarter).						
4	ENDING DATE: Enter the date the respondent is expected to make payment to complainant. (Use the same date for each quarter.)						
5	TERM: Enter the number of days from the end of each quarter to the date payment is expected on line 4.						
6	INTEREST FACTOR: Divide line 5 by 365 days and enter here. Round **up** two decimal places.						
7	INTEREST RATE: Multiply the factor on line 6 by 12% and enter the result here.						
8	INTEREST DUE THIS QUARTER: Multiply the amount on line 3 by the percent on line 7 and enter the result here.						
9	TOTAL DUE THIS QUARTER: Add lines 3 and 8 and enter here. This is the total back pay and interest due this quarter.						
10	TOTAL PAYMENT DUE: Sum of all calendar quarters on line 9----------						

Notes: 1. Excesses in statutory set-offs in one quarter may not be carried over to another quarter.
2. Interest is not payable for the quarter in which the ending date falls (the last quarter).
3. Worksheet reflects provisions of ch. DWD 218.20(4), Wisconsin Administrative Code.

STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT
EQUAL RIGHTS DIVISION

Susan C. Catlin
P.O. Box 515
Turtle Lake, WI 54889

Complainant,

v.

DECISION AND ORDER

ERD CASE NO. 199800991
EEOC CASE NO. 26G980562

Crystal Lake Cheese Factory
1858 Hwy 63
Comstock, WI 54826

Respondent,

In a complaint filed with the Equal Rights Division of the Department of Workforce Development on March 17, 1998 the Complainant (Catlin) alleged that the Respondent (Crystal Lake) discriminated against her, in violation of the Wisconsin Fair Employment Act, when it terminated her employment and refused to hire her because of her disability and when it refused to accommodate her disability. In an Initial Determination issued on November 25, 1998 an investigator for the Division concluded there was probable cause to believe the Act was violated as alleged. Conciliation was either unsuccessful or waived and the matter was certified to hearing. Pursuant to notice a hearing was held on January 25, 2000 in Barron, Wisconsin before Gary L. Olstad, an Administrative Law Judge for the Division. Catlin appeared in person and by Attorney Monica Murphy. Crystal Lake appeared by Attorney Fred G. Groiss. The hearing was concluded on January 25, 2000. A transcript of the proceedings has been prepared and the original is contained in the Division's file. The briefing schedule was concluded with the filing of Crystal Lake's reply brief on April 4, 2000.

Based upon the testimony given and the evidence received at the hearing in this matter, as well as the arguments of counsel, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Crystal Lake operates a cheese factory in Comstock, Wisconsin. Crystal Lake converts raw milk into cheese which it packages in various sizes under its own, as well as other, labels. Crystal Lake employs people in various capacities to carry out its functions.

2. Catlin began working for Crystal Lake in August, 1995 and in September, 1995 she was promoted to lead worker/supervisor in the Wholesale Department. At all times material hereto Crystal Lake considered Catlin to be an excellent employee.

3. In November, 1996 Catlin was seriously injured in an automobile accident which resulted in her being confined to a wheelchair. Catlin did not return to work at Crystal Lake after the accident.

4. A typical day in the Wholesale Department begins with the receipt of grocery store and other retail orders from the office which are used to determine the type, size, quantity and labeling of the cheese to be processed that day.

5. The cheese to be processed is stored in a large cooler and comes in various sizes up to forty pound blocks; it is stored on shelves the highest of which is seven feet. The cheese is taken off the shelves and moved into the department on either a two wheel cart or a pallet jack where it is unwrapped and cut, on one of two cutting machines, into blocks weighing as much as ten pounds and as little as eight ounces.

6. After cutting, the cheese is vacuum bagged in a cryovac machine. After being vacuum sealed the packages are placed in a basket which is lowered in to a hot water tank for several seconds to shrink the plastic wrap.

7. The individual packages are next placed on a table, dried off, labeled, boxed, weighed, placed on a pallet and moved back to a cooler by electric forklift or hand truck.

8. At all times material hereto the department consisted of Catlin and three other employees. One worked primarily as a cutter, one as a cryovac operator and one as a labeler. One of the essential functions of the cutter's job is to retrieve the blocks of cheese from the cooler at the beginning of the shift. Most of the work in the department, after cutting, is performed on tables which are approximately 33 inches high.

9. Catlin's duties, as the leadworker/supervisor, consisted, of collecting and prioritizing the cutting orders and passing that information on to the cutter at the beginning of the day, helping to label the cheese and then weighing, pricing and boxing the packages, placing them on a pallet and moving the loaded pallets into the cooler for pick up the next day.

10. In addition to their individual duties each employee in the department, including Catlin, was trained to perform all other duties in the department as they regularly had to assist each other to keep work flowing smoothly and cover for each other when temporary absences occurred.

11. Catlin, as of the date of the hearing in this matter, was able to perform some, but not all, of the duties of each position in the Wholesale Department. For example, she could not retrieve blocks of cheese from the upper shelves in the cooler because she could not climb a ladder.

12. Crystal Lake is located in a building originally erected in the early 1900's and added on to several times. The addition housing the Wholesale Department was built in the 1940's. It has narrow doorways, a small locker room and no wheelchair accessible bathrooms.

13. To accommodate Catlin's disability would require her duties to be altered so that even while acting as a cutter she would not be required to retrieve cheese from the cooler. Additionally, many physical alterations in the department and to the building itself would be required, such as the addition of a bathroom at an approximate cost of $47,000.00.

Based upon the Findings of Fact made above the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. Crystal Lake is an employer within the meaning of the Wisconsin Fair Employment Act.

2. Catlin is a person with a disability within the meaning of the Wisconsin Fair Employment Act.

3. Crystal Lake did not discriminate against Catlin because of her disability, within the meaning of the Wisconsin Fair Employment Act, when it failed to bring her back to work following her automobile accident in November, 1996.

4. Crystal Lake did not unreasonably refuse to accommodate Catlin's disability, within the meaning of the Wisconsin Fair Employment Act, when it failed to bring her back to work following her automobile accident in November, 1996.

5. There was no reasonable accommodation available to Crystal Lake, within the meaning of the Wisconsin Fair Act, which would allow Catlin to adequately undertake her job related responsibilities.

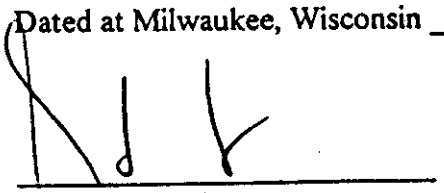
Based upon the Findings of Fact and Conclusions of Law made above the Administrative Law Judge issues the following:

Susan C. Catlin

ORDER

1. The complaint in this matter is hereby dismissed.

Dated at Milwaukee, Wisconsin OCTOBER 20, 2000



Gary L. Olstad
Administrative Law Judge

Complainant
Respondent
Monica Murphy, Attorney for the Complainant
Fred G. Groiss, Attorney for the Respondent

ERD CASE NO. 199800991
EEOC CASE NO. 26G980562

SUSAN C. CATLIN,

Complainant,

-vs-

CRYSTAL LAKE CHEESE FACTORY,

Respondent.

Tape transcription of SUSAN C. CATLIN, handicap discrimination charge taken on January 25, 2000, at Barron County Courthouse before Administrative Law Judge Gary Olstad, transcribed by JESSICA R. WAACK, Registered Professional Reporter and Notary Public in and for the State of Wisconsin, on the 12th day of February, 2000.

COPY

312 East Wisconsin Avenue
Suite 608
Milwaukee, WI 53202
PHONE: (414) 224-9533
FAX: (414) 224-9635

1 A P P E A R A N C E S

2 WISCONSIN COALITION FOR ADVOCACY, by
MS. MONICA M. MURPHY,
3 2040 West Wisconsin Avenue, Suite 678,
Milwaukee, Wisconsin 53233,
4 appeared on behalf of the Complainant.

5 QUARLES & BRADY, LLP, by
MR. FRED G. GROISS,
6 411 East Wisconsin Avenue,
Milwaukee, Wisconsin 53202-4497,
7 appeared on behalf of the Respondent.

8 * * * * *

9 I N D E X

Examination:	Direct	Cross	Redirect	Recross
Susan Catlin	7	33	64	
Carol Winger	71	75	78	
Carol Elfers	79	83		
Anthony Curella	85/96	105		
Phillip Robertson	108	118		
Thomas Messicci	122	123		

Joint Exhibits:	Marked	Received
No. 1 - Document Dated March 18, 1998 ..	5	6
No. 2 - Document Dated April 27, 1998 ..	5	6
No. 3 - Document Dated June 15, 1998 ...	5	6
No. 4 - Document Dated July 17, 1998 ...	5	6
No. 5 - Document Dated July 17, 1998 ...	6	6
No. 6 - Document Dated July 21, 1998 ...	6	6

Complainant's Exhibits:	Marked	Received
No. 1 - Ms. Catlin's Resume	8	59
No. 2 - Ms. Catlin's Review	15	59
No. 3 - Letter About Ms. Catlin's 401 ..	24	59
No. 4 - Discrimination Complaint	25	59
No. 5 - Resume	32	59
No. 6 - Report	32	59
No. 7 - Not Clearly Identified	91	--

Respondent's Exhibits:	Marked	Received
No. 1 - Form For Long-Term Disability ..	57	58
No. 2 - May 5, 1998 letter	--	104
No. 3 - Progress Report	100	105

1 TRANSCRIPT OF PROCEEDINGS

2 LAW JUDGE: We're on the record. Today's
3 date is January 25, 2000. We're convening in the
4 Barron County Courthouse in the matter of Susan
5 Catlin versus Crystal Lake Cheese Factory, PRD Case
6 No. 199800991 and EEOC Case No. 26G980562.

7 The complaint in this matter was filed on
8 March 27, 1998, and alleged discrimination on the
9 basis of disability with respect to termination of
10 employment, accomodation of the disability, and a
11 refusal to hire.

12 In an initial determination issued on
13 November 25, 1998, an investigator found probable
14 cause. Conciliation was unsuccessful, and I
15 believe the matter was certified to hearing, and
16 pursuant to notice we are here today.

17 Can I have the appearances, please,
18 beginning with the Complainant.

19 MS. MURPHY: Complainant Susan Catlin
20 appears in person and by Attorney Monica Murphy of
21 the Wisconsin Coalition for Advocacy.

22 MR. GROISS: The Respondent Crystal Lake
23 Cheese Factory appears by Fred G. Groiss from the
24 Law Firm of Quarles & Brady.

25 LAW JUDGE: Okay. Mr. Groiss, before we

went on the record, you indicated there was something you wanted to put on the record regarding your answer.

MR. GROISS: Yes, sir, as soon as I find that answer. In Paragraph 3 of the answer, the last portion stated that "~~Ms. Phonic~~ Resumed denies that Tony Curella was aware of and did not return Complainant's phone calls."

We would like to amend that answer to read, "admits that Tony Curella was aware of and did not return Complainant's phone calls."

LAW JUDGE: Anything else?

MR. GROISS: The only other preliminary matter, Judge, might be that there are a series of documents that we had and perhaps they could be marked and admitted into evidence at this point.

LAW JUDGE: Why don't we do that right now.

MR. GROISS: The first document is dated March 18, 1998, from the Department of Work Force Development in which it is entitled, Notice of Complaint, EEOC to process initially, as I think I have stated, Dated March 18, 1998. And shall that be Joint Exhibit 1?

LAW JUDGE: Yeah. You had stipulated --

1 MS. MURPHY: That's fine.
2 LAW JUDGE: Okay. We'll -- we'll label
3 these joint exhibits.
4 MR. GROISS: The next --
5 LAW JUDGE: Do you want me to mark that
6 as we go or --
7 MR. GROISS: Sure, fine. The next
8 document that I have would be dated April 27, 1998,
9 and it's from Equal Employment Opportunity
10 Commission, and it's entitled, Dismissal and Notice
11 of Rights.
12 Next I have a document dated June 15,
13 1998, from the Department of Work Force Development
14 entitled, Notice of Dismissal Investigation. And
15 the next I have is dated July 17, 1998, and it's a
16 letter from the Wisconsin Coalition for Advocacy
17 addressed to John Kimball of the Equal Rights
18 Division. And I believe the last --
19 MS. MURPHY: Is that the one you
20 (inaudible) the same date?
21 MR. GROISS: I'm sorry. I guess I
22 misplaced --
23 MS. MURPHY: Here.
24 MR. GROISS: Yeah, right, here they are.
25 I got them. The next one I have is also dated July

1 17, 1998, and it's addressed to Chester Bailey,
2 B-A-I-L-A-Y, of the Equal Employment Opportunity
3 Commission from the Wisconsin -- Wisconsin
4 Coalition for Advocacy.
5 And I think, finally I have a letter
6 dated July 21, 1998 from the Department of Work
7 Force Development addressed to Susan Catlin from
8 the Department of Work Force Development. Okay.
9 Do you have these noted?
10 MS. MURPHY: I believe so.
11 LAW JUDGE: And as far as stipulating,
12 can all six of those exhibits be received?
13 MS. MURPHY: Yes.
14 MR. GROISS: Yes, sir.
15 LAW JUDGE: They are all received. Okay.
16 Ms. Murphy, are you ready to proceed?
17 MS. MURPHY: Yes. I call Susan Catlin.
18 SUSAN CATLIN, called for examination
19 herein, having been first duly sworn, was examined
20 and testified as follows:
21 LAW JUDGE: State your full name, please,
22 and spell your last name for the record.
23 THE WITNESS: Susan Carol Catlin,
24 C-A-T-L-I-N.
25 DIRECT EXAMINATION

1 BY MS. MURPHY:
2 Q And what is your address?
3 A P.O. box 505, Turtle Lake, Wisconsin, 54889.
4 Q Ms. Catlin, you're the complainant in this case,
5 correct?
6 A Right.
7 Q And this is the complaint against the Crystal Lake
8 Cheese Factory?
9 A Yes.
10 Q And you were a former employee of the Crystal Lake
11 Cheese Factory?
12 A Yes.
13 Q When were you first hired at the Crystal Lake
14 Cheese Factory?
15 A August of '95.
16 Q And how did you become to be employed there?
17 A The very first? I'd seen an ad in the paper, um,
18 and I went and filled out an application and talked
19 with Phil Robertson afterwards. And it was the
20 position of a cutter.
21 And he told me that I wouldn't be like --
22 they were all gone down there, so he couldn't show
23 me what the process was, but it was handling 40
24 pounders, and it wasn't a position for a woman to
25 take, so I didn't proceed with that position.

1 And then I got called on a position of
2 helping the super -- I don't know, the assistant
3 supervisor, but was called back at that time.
4 Gloria -- the supervisor then wanted to cut her
5 hours. So it was helping her, being a lead
6 operator or whatever you want to call it.
7 MS. MURPHY: Can I have this marked,
8 please?
9 LAW JUDGE: Sure. Complainant's 1?
10 MS. MURPHY: Sure. Do you want to start
11 renumbering, or go with 7?
12 (Inaudible.)
13 MS. MURPHY: Right, okay.
14 LAW JUDGE: Yeah, this will be
15 Complainant's 1.
16 MS. MURPHY: Okay.
17 LAW JUDGE: Then we'll have Respondent's
18 1 to whatever. Do you have a copy of that, Mr.
19 Groiss?
20 MR. GROISS: Yeah, I have a copy.
21 BY MS. MURPHY:
22 Q I'll show you what's been marked as Complainant's
23 Exhibit 1, and ask if you can identify that for me?
24 A My resume from Dahlberg.
25 Q Okay. And that was your work experience prior to

1 coming to Crystal Lake?
2 A Yes. I was processing there.
3 Q Was that where you were working at the time you
4 came to --
5 A When I applied at Crystal Lake I was (Inaudible).
6 Q Okay. And did you give this to the people at
7 Crystal Lake?
8 A Yes.
9 Q And what was your experience at Dahlberg?
10 A Factory supervision --
11 Q Any kind of --
12 A -- security needs.
13 Q What kind of supervisor at Dahlberg -- Dahlberg?
14 A I worked there 14 years, supervisory 12 out of
15 that. I -- I was doing the -- I was a worker, I did
16 work (Inaudible).
17 Q And do you recall the time you began at Crystal
18 Lake?
19 A Pardon?
20 Q When did you begin working at Crystal Lake? You
21 said you went to meet with Mr. Robertson, and he
22 said this was a cutter job, but then he called you
23 back for a different position?
24 A Yes.
25 Q And when was that?

1 A It had to be the beginning of August, because I
2 only gave a two week notice at plastic (Phonetic)
3 and started right at Crystal Lake August 17 of '95.
4 Q Okay. And what were your initial duties at Crystal
5 Lake?
6 A Packaging department, baking cheese, labelling.
7 Q Were you working with a woman named Gloria?
8 A Uh-huh.
9 Q And what were Gloria's duties?
10 A Paperwork, putting grocery store orders together
11 was the main -- important job down there, cutting
12 the orders and doing the paperwork.
13 Q There came a time when Gloria left Crystal Lake?
14 A Yes.
15 Q And when was that in relation to when you started?
16 A Probably two weeks after I started. It happened
17 pretty fast. Because the (Inaudible) called her.
18 Q And when she left, did your duties change?
19 A Well, it was running the department.
20 Q That became your duty?
21 A Yep.
22 Q And what did that entail?
23 A Doing the paperwork, getting the cheese -- get it
24 to a sheet -- make up a sheet for the cutter to
25 bring in the cheese and cut it to the sizes that

1 all these grocery store orders wanted, which was
2 many.
3 And then the cutter would cut it, set it
4 over on the table. The cryovacer would bake it,
5 cryovaced it, and then dump it. That would seal
6 it. Then it went to a table and we labelled it.
7 And then my main duty was to -- to scale it, price
8 it, box it, and then put it on a pallet for order
9 -- of that grocery store. And then that pallet
10 went into the cooler until the van comes the next
11 morning and takes that order out to the grocery
12 store.
13 Q And when you say "paperwork", what kind of
14 paperwork did you do?
15 A Well, you -- Lala was the girl in the office that
16 basically worked with me in that the orders would
17 come in and then the stacked up orders would come
18 to me.
19 And you had to add up -- you had to put
20 all the grocery store orders together and transform
21 it on another sheet for a cutter to bring in all
22 these different kinds of cheeses, these 40 pounders
23 to cut into 1 pounder of this certain kind of
24 cheese or a 12 ounce, 8 ounce. There was a lot of
25 that.

1 And then after that order got cut that
2 the grocery store ordered, it had to be priced --
3 weighed, labelled, priced, weighed, boxed and wrote
4 on that -- every sheet of that grocery store order.
5 Q Okay. And how did you divide it up in your
6 department? You were the supervisor, correct?
7 A Yes.
8 Q And how many people did you supervise?
9 A Four.
10 Q And --
11 A Three, three, I was four.
12 Q Three of the workers, okay. And how -- did all
13 four people do the same work?
14 A Basically. But if they were caught up, they would
15 jump in. Everybody jumped in and helped any job
16 that was behind or got ahead. They were
17 cross-trained.
18 Q Okay. And then people all had one duty that they
19 did primarily, for example, the cutter or the --
20 A Yeah.
21 Q Okay. And so what -- let's start with the cutter.
22 Was there a person who was primarily assigned the
23 duty of cutting?
24 A Yes.
25 Q And who would that have been?

1 A Punky.
2 MR. GROISS: I'm sorry.
3 MS. MURPHY: Punky.
4 THE WITNESS: Carol Elfers.
5 BY MS. MURPHY:
6 Q And what did the cutter's duty entail?
7 A They had to take my sheet I made out and bring in
8 all the different kinds and cut it to that size I
9 had wrote on there and set it on a table for the
10 cryovacer to bake it.
11 Q And generally what sizes -- is there a size range
12 that these pieces were cutting to?
13 A Yeah, five pounders, ten pounders, one pound, 12
14 ounce, 8 ounce.
15 Q Was there a size that was more common than others?
16 A The one pounders was the biggest for the grocery
17 store order.
18 Q And you mentioned the cryovac. Is there somebody's
19 whose job it was primarily to operate the cryovac?
20 A Yes.
21 Q And who was that?
22 A Carol Elfers.
23 Q And you said something about labelling. Was that
24 somebody's job?
25 A Primarily.

1 Q And whose job was that?
2 A Janet Kingsbury at that time.
3 Q And your role was getting all these orders together
4 then?
5 A Yes. I labelled, scaled, that's right, then boxed.
6 Q Okay. And what did you do with the boxes once they
7 were --
8 A There was a pallet that they had to be sat on too
9 and they had to stay with that order, with that
10 sheet of paper for that grocery store order.
11 Q Did your duties change then any time after that,
12 after this situation you described with the three
13 people you worked with or that -- pretty much did
14 the same over the course of your employment there?
15 A The duties never changed. We just -- everybody
16 jumped in where needed. That's like if somebody
17 was done on cutting, she'd go help Carol, say, or
18 if the labeler got behind, we'd jump in and help
19 the labeler.
20 Q When you first came to Crystal Lake, was that how
21 things were, was everybody cross-trained in your
22 department?
23 A I'm trying to think of who was there. I can't
24 remember who -- if I -- there was Kelsey, Gloria --
25 um, no, the cutter was not. That was a gentleman.

1 Q And whose idea was it to institute this
2 cross-training?
3 A Mine.
4 MS. MURPHY: Can I have that marked?
5 LAW JUDGE: This is Complainant's 2.
6 MR. GROISS: I see.
7 LAW JUDGE: Okay.
8 BY MS. MURPHY:
9 Q I show you what's been marked as Complainant's
10 Exhibit 2, and ask if you can identify that for me,
11 please?
12 A My review from Phil Roberts -- Robertson.
13 Q Was that the only review that you have had when you
14 were at Crystal Lake?
15 A Yes.
16 Q Did you have any reason to think that anybody at
17 Crystal Lake was unhappy with your work?
18 A No.
19 Q Did they say things in praise of your work?
20 A Yes.
21 Q What sorts of things did you hear?
22 A Good job, well done.
23 Q From who?
24 A Tony.
25 Q And Tony is who?

1 A The owner of Crystal Lake Cheese Factory.
2 Q In October of 1996, who ran up the department in
3 October of 1996?
4 A October of '96?
5 Q Yes. It was prior to your accident.
6 A 1996?
7 Q Just prior to your accident, who made up the
8 department that you worked in? Who were the people
9 and what were their duties?
10 A Carol was the cutter, Carol Elfers was cryovacer;
11 and then Stephanie was there at that time, labeler.
12 Q Okay. And what did you do?
13 A Supervisor.
14 Q And your duties at that time were as you described
15 previously in terms of the grocery store orders and
16 things like that?
17 A Yeah, inventory.
18 Q And then in November of 1996 you had a car
19 accident?
20 A Yes.
21 Q How long were you hospitalized at that time?
22 A Three months.
23 Q And was there a period of rehabilitation after
24 that?
25 A After the hospital?

1 Q Yes.
2 A No.
3 Q Did you have any type of therapies or any
4 additional recovery time?
5 A I had range of motion done on my legs every day and
6 I'd work out my arms every day.
7 Q During the time that you were hospitalized, did you
8 have any contact with Crystal Lake?
9 A Yes. I had phone calls from Crystal Lake.
10 Q Okay. And who was the phone call from?
11 A Tony.
12 Q And did you and Tony talk at all about your coming
13 back to work?
14 A He commented that my job was there no matter what,
15 and then there was a conference call after that.
16 Q That was a different phone call --
17 A I can't remember if it was the same day or if it
18 was right after he said that.
19 Q Okay. And what was the conference call about?
20 A Everybody said hi, how are you doing, good luck
21 (Inaudible).
22 Q Was there any discussion of your coming back only
23 for that part of the call?
24 A No.
25 Q Did there come a time when you were notified that

1 you had to make payments to continue your health
2 insurance?
3 A Afterwards.
4 Q After -- what do you mean "afterwards"?
5 A I don't remember the month. It was way afterwards.
6 Q Okay.
7 A I had to pay for a while afterwards.
8 Q Okay. And to determine that you needed to continue
9 your health insurance, correct?
10 A At that time, yes.
11 Q Did you understand that by paying your insurance
12 premium that Crystal Lake would consider you to
13 have quit your job?
14 A No.
15 Q Did anybody tell you that?
16 A No.
17 Q Was that your intention?
18 A No.
19 Q Did you have any reason to believe that you had
20 quit your job at that point?
21 A No.
22 Q Did you ask anyone in your family to talk with
23 Crystal Lake that you were leaving your job?
24 A No.
25 Q Did you ever express to Crystal Lake in any way

1 that you had no intention of coming back there?
2 A No.
3 Q Did there come a time when you were invited to the
4 Crystal Lake employee picnic?
5 A Yes.
6 Q And when was that?
7 A The middle of July of '97.
8 Q And do you know why you were invited to that?
9 A I was still employed there.
10 Q And did you have any conversations with any of the
11 management -- did you go to the picnic?
12 A Yes.
13 Q At that picnic did you have any conversations with
14 any members of the Crystal Lake management about
15 your returning to work?
16 A Phil said hi and they asked how I was doing. Tony
17 came over and said, we'll go out to lunch and talk
18 some time, give me a call.
19 Q And what did you understand that he meant -- that
20 he meant by that?
21 A Great, that I would give him a call.
22 Q Where were you in your recovery at that point?
23 Were you still in recovery or --
24 A I was doing well then.
25 Q Okay. Did there come a time when you thought that

1 you were ready to go back to work?
2 A Yes.
3 Q And when was that?
4 A October or -- September, October.
5 Q Okay.
6 LAW JUDGE: Excuse me, can we have the
7 year?
8 THE WITNESS: Of '97.
9 BY MS. MURPHY:
10 Q And when you determined that you were ready to go
11 back to work, what did you do?
12 A I made a phone call to Crystal Lake, Barb answered,
13 and I said can I please talk to Tony. And she
14 said, he's busy. And I said, well, please tell him
15 I called and have him call me back.
16 Q Okay. Did he call you back?
17 A No.
18 MR. GROISS: For the record, do you want
19 to identify Barb
20 THE WITNESS: Barb Sieh.
21 MR. GROISS: What's her last name?
22 THE WITNESS: Sieh.
23 MR. GROISS: Can you spell it?
24 LAW JUDGE: Excuse me, can we have no
25 comments from the audience, please.

1 THE WITNESS: S-E-I-H, {SIC} yes, thank
2 you.
3 MR. GROISS: Thank you. Since we're on
4 the subject, who is she and what does she do at
5 Crystal Lake?
6 THE WITNESS: She worked in the office.
7 BY MS. MURPHY:
8 Q Did Tony call you back?
9 A No.
10 Q What happened then?
11 A I waited two weeks, and I returned another call.
12 Barb answered, and I said, can I please talk to
13 Tony. She said, he's busy. You know him, he's
14 always busy. I said, please tell him to return my
15 call. This is Sue Catlin. Yes, I will. I said,
16 thank you. There was no return call.
17 Q Did you place any additional calls to anyone at
18 Crystal Lake?
19 A No. Yes, I did, to Karen Hanson.
20 Q And who is Karen Hanson?
21 A Supervisor of the -- we called it the munster line.
22 Q The what?
23 A The packaging line there.
24 Q And what was that conversation about?
25 A I was curious. There were monthly meetings, and I

1 asked her if I was brought up in the meetings about
2 returning to work or about what was going on. She
3 said no, I haven't heard a word.
4 MR. GROISS: What was her name again?
5 I'm sorry.
6 THE WITNESS: Karen Hanson.
7 MR. GROISS: Thank you.
8 THE WITNESS: And at the time she wishes
9 I was back, we sure miss you, orders are really
10 being screwed up and we need you.
11 BY MS. MURPHY:
12 Q Did you have any additional conversations with her?
13 A Yeah. I returned her call -- I called her probably
14 another three weeks later, and she said that her
15 and Phil had talked and he had commented that I
16 wonder if Sue's coming back. And I don't know if
17 Karen had told him that I had called her or
18 whatever, but I asked her if anything else was said
19 yet. I was just really curious if I was brought up
20 in the meeting.
21 MR. GROISS: Your Honor, I'm going to
22 have to object to this recantation of what Ms.
23 Hanson said, because it is clearly hearsay.
24 LAW JUDGE: Sustained.
25 BY MS. MURPHY:

1 Q Did you hear anything further from Tony?
2 A No.
3 Q Did you hear anything further about your returning
4 to work from any of the management people at
5 Crystal Lake?
6 A No.
7 Q Did there come a time when you were -- received
8 something in the mail that appeared to be a job
9 analysis?
10 A Yes.
11 Q And do you know who you received that from?
12 A I would imagine it came from Crystal Lake, the
13 copy.
14 Q Was there a cover letter with it?
15 A I don't remember.
16 Q Was there any explanation of what it was?
17 A No. Just what you have there.
18 Q Did you ever talk to a David Johnson about your
19 abilities or limitations?
20 A Who's David Johnson?
21 Q Do you recall talking to somebody about -- employed
22 or requested or hired by Crystal Lake about your
23 abilities and limitations?
24 A I don't.
25 Q Did Crystal Lake ever ask you for any kind of

1 return to work report about your limitations or
2 abilities?
3 A No.
4 Q Did they ever ask you for any kind of medical
5 release?
6 A No.
7 Q When did you first become aware that Crystal Lake
8 had considered your employment terminated?
9 A Probably when I got the notice that I was to take
10 my 401 out.
11 Q Okay.
12 LAW JUDGE: Complainant's 3.
13 MR. GROISS: Complainant's 3?
14 LAW JUDGE: Yep. Did you get that?
15 MR. GROISS: Yes, I did.
16 BY MS. MURPHY:
17 Q I show you what has been marked as Complainant's
18 Exhibit 3, and ask if you can identify that for me,
19 please?
20 A This is my 401 that I had to sign -- there was a
21 paper that I had to sign to get out my 401 in a
22 lump sum.
23 Q And that was your notice that the company
24 considered you terminated?
25 A That was my gut feel at the time.

1 Q And when was that?
2 A August 5 of '98.
3 Q Other than correspondence regarding your health
4 insurance premiums, did you have any other
5 correspondence with the company between September
6 of 1997 and August of 1998?
7 A No.
8 MS. MURPHY: Can I have this marked,
9 please.
10 LAW JUDGE: Complainant's 4. Okay.
11 BY MS. MURPHY:
12 Q I show you what has been marked as Complainant's
13 Exhibit 4. Does that refresh your memory regarding
14 any other correspondence with Crystal Lake?
15 A Yes. Yes, I received this.
16 Q At some point did you determine to file a
17 discrimination complaint with Legal Opportunities
18 Commission?
19 A Yes.
20 Q And when was that, approximately?
21 A The end -- towards the end of '97. When this
22 started.
23 MR. GROISS: I mean, we have that date as
24 far as stipulated --
25 MS. MURPHY: Right.

1 BY MS. MURPHY:
2 Q And initially was investigated by the Equal
3 Employment Opportunity Commission, right?
4 A Yes.
5 Q The records indicate that a right to sue letter was
6 issued by the Equal Employment Opportunity
7 Commission on April 27, 1998. Did you receive such
8 a notice either at the end of April, beginning of
9 May of 1998?
10 A That I was cancelled?
11 Q That the EEOC was dismissing your complaint and
12 giving you a right to sue letter?
13 A Did I receive that?
14 Q At that time.
15 A Do you have a copy?
16 MS. MURPHY: Did you take those, or did I
17 give it to you?
18 MR. GROISS: Oh, no.
19 (Inaudible.)
20 BY MS. MURPHY:
21 Q I show you what was previously marked as Joint
22 Exhibit 2. I'll give you a chance to look at that.
23 A No, I didn't ever know I was dismissed.
24 Q You don't recall receiving that letter?
25 A No.

1 Q I'm showing you Joint Exhibit 3. Do you recall
2 receiving that letter?
3 A Not of it being dismissed, no.
4 Q When did you first become aware that the EEOC had
5 dismissed your complaint?
6 A I can't remember.
7 Q Do you recall contacting the Equal Rights Division
8 about your request?
9 A Yeah. I wrote a letter --
10 Q (Inaudible) let her look at the exhibit --
11 LAW JUDGE: Sure.
12 MS. MURPHY: -- because that may refresh
13 her memory.
14 MS. MURPHY: (Inaudible.) There will be
15 a couple.
16 THE WITNESS: This must have been when I
17 quickly wrote a letter saying, um, that -- let me
18 think how it went. That I didn't -- I wasn't going
19 to be dropped. How did I say it?
20 BY MS. MURPHY:
21 Q I can't testify.
22 A Well, I know when I got this letter from the ERD in
23 June saying the ERD was adopting the findings that
24 I be dismissed, that's when I wrote a letter
25 wanting to pursue on not being dropped.

1 Q Was that your first notice that the EEOC was
2 dismissing your case?
3 A Correct.
4 MR. GROISS: What exhibit is that? What
5 number is she referring to there? There is no
6 letter in there from her.
7 MS. MURPHY: There's not.
8 MR. GROISS: No, not to her. The one
9 from the EEOC saying that they're --
10 MS. MURPHY: This number here?
11 MR. GROISS: Right, what exhibit is that?
12 MS. MURPHY: J3.
13 BY MS. MURPHY:
14 Q Miss Catlin, did your condition change
15 substantially since September of 1997?
16 A Like since this whole ability?
17 Q Uh-huh.
18 A Oh, as time went on, yeah, I got stronger.
19 Q Okay. In September of 1997, tell me what your
20 physical abilities were?
21 A I just wanted to get back to work.
22 Q Okay. Could you lift things, could you get around
23 by yourself in your wheelchair?
24 A Oh, yes, I was independently able.
25 Q And what sorts of things can you do for yourself?

1 A Everything, my showering, my cooking, my laundry.
2 I have my van with the lift, shopping, cleaning.
3 Q Thinking back to your job at Crystal Lake, tell me
4 what your duties were and which of those duties you
5 believe you are capable of doing and which you
6 believe you're not, no longer physically capable of
7 doing?
8 A The tasks that I could have done there, you can
9 delegate from a chair, train, make boxes, make
10 labels, bake cheese, label it, price it, sorry,
11 scale it, price it, box it, put it on the pallet,
12 inventory, my paperwork.
13 Q And what do you mean by your "paperwork"?
14 A Doing the grocery store orders, the paperwork, the
15 inventory work, paper.
16 Q And what duties did you do at Crystal Lake before
17 your accident that you think you could not do now?
18 A Put 40 pounders away or bring them back or bring
19 them in to be cut.
20 Q Okay.
21 A Handle the 40 pounders.
22 Q And how often did you do that?
23 A Well, I had it where I jumped in and did it every
24 day.
25 Q And how many times a day would you do that?

1 A Some days probably none, some days a couple times a
2 day.
3 Q And is that something that's primarily the cutter's
4 job?
5 A Yes, it was.
6 Q And how often would then the cutter do that?
7 A She'd bring in her load once in the morning and a
8 few here and there throughout the day. If an odd
9 order came in, we had to pull it to cut it. It
10 varied every day on orders on 40 pounders.
11 Q Was it ever part of your job duties to load the
12 semi?
13 A No.
14 Q What was the processing situation in inventory?
15 A It would usually take two of us, one climbing
16 around and read off the weight, and the other one
17 wrote it down on paper and what kind it was.
18 Q Do you think you could do the climbing around and
19 looking at the weight?
20 A No. I did the writing down. Punky did the -- that
21 was her job.
22 Q So even before your accident, you weren't the one
23 climbing around?
24 A No. Not all of the time.
25 Q And what was the practice if someone was absent?

1 A Everybody was cross-trained. We just jumped in and
2 got the work done.
3 Q So everybody in the department knew how to do all
4 the other jobs?
5 A Yes.
6 Q Did anybody ever object to doing certain jobs?
7 A No. We always got helped in the other lines too
8 sometimes or we'd help them out too.
9 Q Do you know Jeff Annis?
10 A Yeah.
11 Q Who's Jeff Annis?
12 A He's -- he does accommodations or -- his main job
13 is to make places accessible for you to go back to
14 work and that --
15 Q Do you know where he's employed?
16 A Menominee of Wisconsin.
17 Q Do you know what office he works in or the function
18 of that office?
19 A The technology assessment building.
20 MR. GROISS: Judge, why don't we just
21 simply stipulate to his resume and report and
22 stipulate to the fact that he talked to her too, if
23 she'd like?
24 LAW JUDGE: Ms. Murphy?
25 MS. MURPHY: Sure.

1 LAW JUDGE: Okay.
2 MS. MURPHY: We'll stipulate. Can I have
3 this marked? (Inaudible.)
4 LAW JUDGE: This will be Complainant's 6.
5 MR. GROISS: Her resume is No. 5?
6 LAW JUDGE: Her resume is 5. And her
7 report is No. 6. Do you have copies of both of
8 those?
9 MR. GROISS: Yes, I do.
10 LAW JUDGE: I'm about to run out of tape,
11 so before you start --
12 (Tape changed.)
13 LAW JUDGE: Ready.
14 BY MS. MURPHY:
15 Q Do you know who worked in the department in
16 September of 1997 when you were inquiring about
17 coming back to work?
18 A Who was there?
19 Q Yes.
20 A Carol Elfers, Carol Winger and Stephanie.
21 Q So the same people that were there when you left?
22 A Yes.
23 Q And is Carol Winger related to you?
24 A Yes.
25 Q How is she related to you?

1 A Sister.
2 Q Is Carol Elfers related to you?
3 A Yes.
4 Q How is she related to you?
5 A My mother.
6 MS. MURPHY: I don't think I have any
7 other questions of this witness.
8 LAW JUDGE: Cross-examine?
9 MR. GROISS: Yes.
10 CROSS-EXAMINATION
11 BY MR. GROISS:
12 Q Miss Catlin, I'm going to ask you a few questions
13 about these documents that have been marked as
14 joint exhibits. The first document we have, Miss
15 Catlin, is marked Joint Exhibit 1. And it's
16 entitled, notice of complaint, EEOC to process
17 initially, and it was dated back on March 19, 1998,
18 and it was addressed to Crystal Lake Cheese
19 Factory. And then you'll notice down here that a
20 copy was sent to you and to the EEOC. Did you
21 receive that document?
22 A Yes, this one.
23 Q You did receive that copy? Okay. Joint Exhibit 2
24 is the dismissal and notice of rights. And it's
25 addressed to you at P.O. box 515 Turtle Lake,

1 Wisconsin, 54889. Was that your address?
2 A Yes.
3 Q And did you receive that document?
4 A See, this one I don't remember.
5 Q You don't remember receiving it?
6 A No.
7 Q It's possible that you did?
8 MS. MURPHY: The question's been asked
9 and answered.
10 MR. GROISS: I doubt it.
11 MS. MURPHY: I can answer it myself.
12 LAW JUDGE: Well, this is cross.
13 BY MR. GROISS:
14 Q What's your answer, Miss Catlin, do you recall that
15 you actually received that or not?
16 A No, I don't remember receiving it.
17 Q Okay. Now, Joint Exhibit 3, the next document, is
18 a notice of dismissal investigation, and that's
19 from the Equal Rights Division and that's dated
20 June 15, and that's, again, addressed to you at
21 P.O. box 515. Was that your address also in June
22 of 1998?
23 A Yes.
24 Q And did you receive that document?
25 A Yes, I think I got this one.

1 Q Okay. And then the next one, July 17, of course,
2 that's not a letter that would have been addressed
3 to you, that was just simply a copy to you, that
4 was a letter from your attorney?
5 A Right, yeah.
6 Q And the same thing with respect to Joint 5. And
7 then we have a Joint 6 which is July 21, 1998 from
8 the Department of Workforce Development. And again
9 that's addressed to Susan Catlin, P.O. box 515.
10 Did you get that?
11 A Yes.
12 Q Okay, thank you. Now, Miss Catlin, the jobs -- by
13 the way, in terms of what you submitted earlier or
14 your attorney had submitted earlier, there was a --
15 a document which consisted of your resume at
16 Dahlberg prior to coming to work at Catlin, I think
17 it was Complainant's Exhibit No. 1. And you were
18 listed there as a supervisor/team leader, right?
19 A Yes.
20 Q You recall that? And I think you indicated that as
21 a supervisor/team leader, you pitched in and did
22 work with the others as well as the supervision; is
23 that correct?
24 A Yes.
25 Q Have you ever heard the ~~contents~~ concept of a lead person?

1 A Yes.
2 Q Would that have been what you were?
3 A At Crystal Lake?
4 Q At Dahlberg.
5 A Yes.
6 Q Yeah. You were helping out making assignments, but
7 you were doing the work right together with
8 everybody else?
9 A Yeah.
10 Q And at Crystal Lake, your title -- you were called
11 a director; is that right, or manager? What was
12 your title?
13 A Supervisor.
14 Q Do you recall anybody at Crystal Lake ever
15 designating you as a supervisor? Do you have
16 anything at all that would support the
17 foundation --
18 A No. There was never a job description.
19 Q Right.
20 A I just took over -- Gloria was the supervisor there
21 prior to me, and I fell in her position.
22 Q Right. You worked -- you were an hourly paid
23 employee; is that correct?
24 A Yes.
25 Q And I think you indicated previously that while you

1 worked in this wholesale department, everybody
2 pitched in and that included you; is that correct?
3 A Yes.
4 Q So this wholesale department at Crystal Lake Cheese
5 Company, am I correct that this was the department
6 which was primarily responsible for getting the
7 cheese ready to be shipped out to grocery stores
8 and things of that sort?
9 A Yes.
10 Q And when you were working there, there was usually
11 four people --
12 A Yes.
13 Q -- in the department? Would you do me a favor and
14 kind of wait until I get done with my question,
15 because otherwise we're going to wind up with a
16 mess on the tape? Thank you.
17 Now, the first thing that had to be done
18 in order to get that wholesale department
19 functioning on a normal work day would be to get
20 the cheese out of the cooler; is that correct?
21 A Paperwork first.
22 Q Okay. And what kind of paperwork are you talking
23 about?
24 A I had -- I had to gather all the grocery store
25 order paperwork and add up -- there was 30, 40

1 different types of cheeses.
2 Q Right.
3 A Every grocery store order wanted a different type
4 and a different size.
5 Q Uh-huh.
6 A So I had to calculate that over on another sheet
7 for the cutter --
8 Q Okay.
9 A -- to put all these different 40 pounders and the
10 size that had to be cut on the right.
11 Q All right.
12 A And how many.
13 Q And how long would that take you?
14 A On different days, sometimes an hour or more.
15 Q Now, you're telling me for an hour nobody's doing
16 anything in the wholesale department when you're
17 doing the paperwork?
18 A No.
19 Q What are the other people doing?
20 A Making boxes, making labels, getting bags out,
21 getting the equipment out.
22 Q But no cheese is being taken out of that cooler
23 while you're doing your paperwork; is that correct?
24 A Some days.
25 Q Well, some days was it being taken out earlier than

1 an hour?
2 A Yeah. She could come over and look at my sheet and
3 go grab some prior.
4 Q And sometimes you, yourself would go into that
5 cooler and get the cheese; is that correct?
6 A Yes.
7 Q And when you talked about 40 pound blocks of cheese
8 being in this cooler, there were other sizes of
9 cheese that were in that cooler as well; is that
10 correct?
11 A Yes.
12 Q In fact, you could have 20 pounds, you could have
13 18 pounds, you could have one pound boxes of
14 cheese, perhaps put into a container with other one
15 pound boxes; is that correct, other packages?
16 A Yes.
17 Q Okay. And how were these stored? Where were these
18 located in the cooler?
19 A On a shelf.
20 Q Okay. And in order to get those off the shelves,
21 were some of the shelves high up that required
22 utilization of a ladder?
23 A Yes.
24 Q And was this a rolling ladder that would go down?
25 A Yes.

1 Q And were there instructions as to how many people
2 should be used to remove from those shelves a
3 40-pound block of cheese?
4 A No.
5 Q Was it sometimes done by a single person?
6 A Yes.
7 Q Did you, yourself on occasions go up there and pull
8 down a 40-pound block of cheese by yourself? Could
9 you do that now?
10 A No.
11 Q You mentioned before that you are stronger than you
12 were at that particular point in time. I know you
13 can't climb the ladder. Could you -- could you
14 lift a 40-pound block of cheese now?
15 A No.
16 Q What would be the maximum weight you could lift?
17 A Fifteen to twenty.
18 Q If I had an 18 pound block of cheese in that white
19 container over there, could you lift that for me
20 right now?
21 A If it was at my level.
22 Q And when you say at your level --
23 A If like right here I could.
24 Q And how high up could you lift that block of
25 cheese?

1 A I don't think I could lift it very high.
2 Q Do you want to try it?
3 MS. MURPHY: I'm going to object.
4 MR. GROISS: On what basis?
5 MS. MURPHY: This is not a demonstration.
6 MR. GROISS: Well, she says she can do
7 certain things. I want to find out what she can
8 do.
9 MS. MURPHY: Mark it as an exhibit. This
10 is ridiculous.
11 LAW JUDGE: Well, it's a legitimate
12 inquiry. That's part of the -- assuming that's an
13 essential element of this job.
14 MS. MURPHY: But it totally would be
15 (Inaudible) on accommodation as one.
16 MR. GROISS: How do we know what we have
17 to do to accommodate unless we know what she can
18 do?
19 MS. MURPHY: (Inaudible) ask that.
20 LAW JUDGE: I'm not going to mark it as
21 an exhibit, though. Is it -- how can we -- how can
22 we get on the record that -- what it actually is?
23 (Inaudible.)
24 MS. MURPHY: Somebody bring a
25 (inaudible.) Counsel couldn't carry it either.

1 MR. GROISS: Exactly, I agree. It's not
2 light. Pardon me? It's 18 pounds. 18.46-pound
3 block of cheese. It's got the weight of it marked
4 on it.
5 BY MR. GROISS:
6 Q Would you agree, Miss Catlin it's 18.46
7 pounds?
8 A Yes.
9 Q Can you lift it? How many times do you think you
10 could do that in the course of a day?
11 MS. MURPHY: Let the record reflect that
12 Ms. Catlin did, in fact, lift the 18 pound block of
13 cheese.
14 MR. GROISS: Let the record reflect that
15 the witness -- (Inaudible).
16 LAW JUDGE: Let the record reflect that
17 you're not going to get a job at Crystal Lake
18 Cheese Factory. Let the record show that you're
19 not going to get a job at Crystal Lake Cheese --
20 BY MR. GROISS:
21 Q After you've done your hour paperwork, what did you
22 do then on a typical workday?
23 A We had to make up labels for grocery store orders.
24 Q When you say "make up labels," what are you
25 referring to at that point in time, labels? Are

1 these address labels or are these labels that say
2 Blazer Cheese on it?
3 A The pounds.
4 Q Pardon me?
5 A We had to write the type and put it on the side box
6 that that grocery store orders wanted.
7 Q Okay. Now, this wholesale department where you
8 worked, my recollection of looking at it is that
9 there's a rack with a series of bars that go across
10 them and then maybe 50 different kinds of labels
11 are on those bars. And those labels are pulled off
12 and put on the cheese. Is that what you're talking
13 about when you're referring to labels?
14 A No.
15 Q Making labels? No. Okay. What are you referring
16 to?
17 A These were the larger labels that go on the box.
18 Q Okay.
19 A And then we had to pull the boxes out from the back
20 and tape them and put on that label.
21 Q And when you say "pull the boxes out from the
22 back," you would go physically into where?
23 A The storeroom.
24 Q The storeroom. And you'd get the boxes out of the
25 storeroom. And were they also on shelves?

1 A They were stacked.
2 Q And were they sometimes stacked reasonably high?
3 A Yes.
4 Q So if there were no changes made, you could not
5 have gotten the cheese down from the shelves the
6 way it was set up at that particular point in time;
7 is that correct?
8 A No.
9 Q And you could not have gotten these boxes out of
10 the storeroom when they were stacked at a high
11 level; is that correct?
12 A No.
13 Q You couldn't have done that?
14 A No.
15 Q Okay. Now, when these boxes were put together,
16 taped and you put the labels on them, where did you
17 do that?
18 A Right in the wholesale department.
19 Q And were those -- were there tables available in
20 the wholesale department where this work would be
21 performed?
22 A Yeah.
23 Q And would you have been able to have worked without
24 any adjustments in the height of those tables and
25 putting those boxes together and putting the labels

1 on them, or how high were the tables?
2 A The tables would have been fine.
3 Q They would have been okay --
4 A Yeah.
5 Q -- the way they were?
6 A Yeah.
7 Q Okay. Now, after you got done with your -- by the
8 way, how long would this take you, making the boxes
9 and labels?
10 A Depending on how many were helping doing it.
11 Q It's hard to tell because you're all working
12 together; is that right?
13 A Right. And different orders for different days.
14 Q Okay. So other people were also labelling and
15 making boxes?
16 A And -- yeah.
17 Q Now, once you got the cheese in from the cooler,
18 what would be the next step with processing the
19 cheese?
20 A The cutter would have to put that 40-pound block
21 on, cut it, and then she'd set it over on the
22 table.
23 Q What would you -- what would you put that cheese on
24 to cut it?
25 A A cutter.

1 Q All right. That's a machine that's purchased from
2 some manufacturer outside; is that correct?
3 A Yes.
4 Q And approximately how high would that cutter be to
5 lift that 40-pound block on?
6 A The cutter is about this height.
7 Q Wouldn't it be closer to about three and a half
8 feet?
9 A Well, they got a new cutter, so I -- I don't know.
10 Q When you put the 40-pound block on the top of the
11 cutter, is the next process to raise some sort of a
12 cutting -- blades up, you have to raise blades up
13 to cut the cheese or what?
14 A It was done by a button.
15 Q Okay. And would you have to look on the top to
16 make sure that it was properly aligned when you're
17 cutting the cheese?
18 A At times, yeah.
19 Q So you have to be able to be high enough to look
20 over the top of the cheese cutter to see that it
21 was properly aligned; is that correct?
22 A Yes.
23 Q Could you have done that at that point in time
24 previously?
25 A No.

1 Q You couldn't have done it, it would be too high?
2 A Correct.
3 Q Now, after you got the -- after the cheese was cut,
4 what happened to it next?
5 A It was placed on a table to be bagged and then
6 cryovaced.
7 Q When you say to be bagged, does that mean that
8 individual pieces were put in little plastic bags;
9 is that correct?
10 A Yes.
11 Q All right. And after these are put in the plastic
12 bags, you mentioned they need to be cryovaced,
13 C-R-Y-O-V-A-C, something like that, that's what a
14 cryovac is --
15 A Yes.
16 Q -- it's a machine? And, again, you have to place
17 those bags into the machine; is that correct?
18 A Yes.
19 Q Now, you did that yourself, right?
20 A Yes.
21 Q And after the -- the bags have been cryovaced,
22 which I gather means something like taking the air
23 out of them or something of that sort? What does
24 that mean? What is the cryovac process?
25 A Sealing them.

1 Q Sealing them. And then you'd have to load the
2 cheese into a basket; is that right?
3 A Yes.
4 Q And then you'd have to lift the basket and put it
5 in a pot of water, tub to seal it; is that right?
6 A Yes.
7 Q Could you have done that?
8 A Could I have done that? No, not in a chair, no.
9 Q And after you remove -- then you have to remove the
10 cheese from the cryovac device, the water, sealing
11 process, and what would happen to it next?
12 A Go on the next table to be labelled.
13 Q And when we talk about labelling now, we're talking
14 about labelling the cheese --
15 A The cheese --
16 Q I meant that you would take these labels that I
17 described previously which are on rolls, rolls of
18 labels on bars at a fairly high level some of them;
19 is that correct?
20 A Yes.
21 Q And you'd have to take those labels off and then
22 put them individually on the containers of cheese,
23 the packages of cheese; is that right?
24 A Yes.
25 Q You couldn't have gotten those labels from where

1 they were located at that time in your condition,
2 could you?
3 A Yeah.
4 Q How could you reach them?
5 A Because they -- they roll down. We kept them in a
6 string.
7 Q Okay. And so if they were all pulled down --
8 A Yes.
9 Q If they're not pulled down, you'd have to get
10 somebody to pull them down for you, right?
11 A Yes.
12 Q Okay. And then after that, after the label, what
13 happens to those -- those cheeses?
14 A Weighed and priced and boxed.
15 Q And how do they get weighed?
16 A A scale.
17 Q And would you then have to put them in a box and
18 then take the box over to a scale and place it on
19 the scale?
20 A If it were labelled, I put it on the scale and
21 weigh it, put the price on the boxes right next to
22 the scale, put it in the box.
23 Q What would you estimate in the course of a normal
24 workday, how much of your time would you say you
25 had spent sitting down?

1 A In jobs you could sit at those jobs. We had one
2 stool there. Periodically one would use it.
3 Q My question to you is, during the course of a
4 normal eight hour workday, approximately how many
5 of those eight hours would you be sitting down in
6 performing your function?
7 A We never really sat.
8 Q And that's because the job required you to be
9 flexible and do a lot of these various aspects of
10 the operation?
11 A Yes.
12 Q And you were asked previously about what happened
13 when somebody doesn't -- didn't show up. And you,
14 of course, would then be doing even more of the
15 physical aspects of the job than you had done
16 previously; is that correct?
17 A Yes.
18 Q There was a question asked you by your counsel with
19 respect to loading semi trucks. Were there
20 occasions when you loaded a pickup truck to take
21 the product from the wholesale department to the
22 retail store in the front?
23 A Yes.
24 Q And you, in fact, assisted in loading the pickup
25 trucks as part of your job, didn't you?

1 A Yes.
2 Q You referred earlier in your testimony to what you,
3 I think, characterized as a conference call with
4 Tony Curella. Do you recall that testimony?
5 A Yes.
6 Q When did this conference call take place?
7 A About the month of December of '97.
8 Q And --
9 LAW JUDGE: I'm sorry, did you say
10 December?
11 THE WITNESS: Yes.
12 BY MR. GROISS:
13 Q December 1997?
14 A Yes.
15 Q And who initiated this conference call?
16 A It had to be someone back at the office.
17 Q Well, when you say a conference call, were
18 arrangements made in advance? Did somebody say
19 Susan, we're going to call you at such and such a
20 time and be available or anything like that?
21 A No.
22 Q It was just a telephone call that you received from
23 the office; is that correct?
24 A Yes.
25 Q And this was in December of 1997?

1 A Yes.
2 Q Was that at a Christmas party or anything like
3 that?
4 A No.
5 Q And who was it that actually made the call to you?
6 A Tony.
7 Q And what did he say to you in that telephone
8 conversation?
9 A At first we spoke, he asked how I was doing. And
10 he told me that my job was there no matter what.
11 And then there was a conference call, there was a
12 group in that meeting.
13 Q Who else was on the call?
14 A Phil, Tommy, Punky.
15 Q Now, when you say Phil, we're talking about Phil
16 Robertson, the operations manager; is that correct?
17 When we say Punky, we're talking about Carol your
18 sister; is that correct? And when we say Tommy,
19 we're talking about Tom Messicci who is an officer
20 of the corporation; is that correct?
21 A Yes.
22 Q Anybody else?
23 A Yes. There was Mike Bates and Freida {Phonetic},
24 Barb Sieh and Lala.
25 Q It sounds to me, Miss Catlin, like this was kind of

1 a call that's kind of cheering up from the people
2 at work; is that -- was that a correct
3 characterization?
4 A Yes.
5 Q Okay.
6 LAW JUDGE: Do you have a ways to go?
7 MR. GROISS: Yeah.
8 LAW JUDGE: In that case, why don't we
9 take a short break right here.
10 MR. GROISS: I can also arrange my papers
11 a little bit.
12 LAW JUDGE: Okay. We're off the record.
13 (Break taken.)
14 LAW JUDGE: Okay. We're back on the
15 record. Go ahead.
16 BY MR. GROISS:
17 Q Miss Catlin, we've had some reference previously to
18 a report that had been prepared by a Mr. Annis, and
19 I think that's been marked as an exhibit in this
20 matter, Complainant's Exhibit 6?
21 LAW JUDGE: Five.
22 MR. GROISS: Five is a --
23 MS. MURPHY: Six.
24 LAW JUDGE: Six is the report, okay.
25 BY MR. GROISS:

1 Q I'd like you to take a look at this. Have you seen
2 this report previously?
3 MS. MURPHY: Object, asked and answered.
4 BY MR. GROISS:
5 Q You have to say yes. You can't say with your head,
6 because the microphone can't get a shake of the
7 head.
8 A Yes, I've seen this report.
9 Q Thank you. I'd like to ask you a few questions
10 about it. First of all, do you agree with this
11 report?
12 A No.
13 Q And in what respects don't you agree with it.
14 We're just waiting for you to tell us --
15 A What I don't agree with me?
16 Q -- which part you don't agree with.
17 A Okay. On changing the locker room area, I wouldn't
18 need that area.
19 Q And why is that?
20 A Because it was just going into a locker to get a
21 brush or something like that.
22 Q Well, how would you -- don't you have to go through
23 the locker room area to reach the wholesale
24 department from the door entrance?
25 A Yes.

1 Q So you'd have to go through the locker room area in
2 order to reach your workstation, wouldn't you?
3 A Yes.
4 Q So then that aspect of the report is correct,
5 right?
6 A Yes.
7 Q What else did you disagree with?
8 A I wasn't needing the bathroom.
9 Q And why is that?
10 A Because I would have wore a leg bag and my bowel
11 program is done at home in the morning.
12 Q And is that -- would you need a bathroom now?
13 A Right now?
14 Q Right.
15 A Yes.
16 Q Okay. So if, in fact, there were any kind of
17 return to work at this particular point in time,
18 you would require a bathroom; is that correct?
19 A Yes.
20 Q Okay. What else would you disagree -- disagree
21 with?
22 A I could go through the san -- the sanitation room,
23 the sanitizer room with water. I can wheel through
24 them.
25 Q Now, what is in that sanitizer basin that you have

1 to pass -- that people would have to walk through
2 with their shoes?
3 A What was in there?
4 Q What is in there? Yeah. Is there some chemical in
5 there?
6 A I don't know that.
7 Q If it's a sanitizer, it must be something in there
8 that's to kill germs, correct?
9 A Yes.
10 Q Would you wheel through that with your wheelchair
11 through this sanitizing solution?
12 A I don't see why not.
13 Q And would that chemical then be on your hands?
14 A Yes.
15 Q Anything else you'd like to disagree with?
16 A The tables would be fine.
17 Q You think the tables are fine despite the fact that
18 your expert concluded they are too high; is that
19 correct?
20 A Yes.
21 Q Anything else?
22 A That's about it.
23 Q Okay. You don't disagree with the fact that he
24 indicated -- that Tony Curella indicated that
25 you're a very good employee? You'd accept that

1 conclusion, wouldn't you?
2 A Yes.
3 Q Okay. Now, at some point in time you applied to
4 work -- disability payments; is that correct?
5 A Yes.
6 MR. GROISS: Could I have that marked as
7 Exhibit No. 1?
8 LAW JUDGE: Yeah, that's fine. Let's
9 mark it. Miss Murphy, do you have that?
10 MS. MURPHY: Yes.
11 BY MR. GROISS:
12 Q Miss Catlin, I'm going to show you a document which
13 has been marked for identification as Respondent's
14 Exhibit No. 1, and is entitled under the heading of
15 Fortis benefits insurance company group long-term
16 disability claims statement, and I'd like you to
17 take a look at that for me, please. Have you seen
18 that previously?
19 A Yes.
20 Q And this was a document that was filled out in
21 1996. I'm looking at the first -- the second page.
22 There's a -- a date at the bottom on line 25. And
23 that particular date at least was November 27,
24 1996; is that correct?
25 A Yes, that's the date.

1 Q Okay. Now, you didn't fill out all of this
2 disability form, did you?
3 A No.
4 Q And there were parts of this disability form which
5 indicated what the physical requirements of the
6 physician were {SIC}. That on the -- I think
7 that's on the third page in. Can you take a look
8 at that? Okay? Do you see that?
9 A Yes.
10 Q And when you reviewed this particular aspect of the
11 form, was there anything you disagreed with as to
12 the physical requirements of the job?
13 A No.
14 Q You agree with it? Thank you.
15 MR. GROISS: I'm going to offer the
16 Respondent's Exhibit No. 1.
17 (Inaudible.)
18 LAW JUDGE: Any objection?
19 MS. MURPHY: I have no objection.
20 LAW JUDGE: Received.
21 MS. MURPHY: I'd just like to move the
22 admission of Complainant's Exhibit 1 through 6. I
23 don't think I did that.
24 LAW JUDGE: No objection?
25 MR. GROISS: No.

1 LAW JUDGE: Complainant's 1, 2, 3, 4, 5
2 and 6 are received.
3 (Inaudible.)
4 MR. GROISS: Thank you.
5 LAW JUDGE: Do you have a copy of that?
6 MS. MURPHY: Yes.
7 BY MR. GROISS:
8 Q Now, Miss Catlin, I'm going to show you a one-page
9 document which appears to be a letter dated May 5,
10 1998, written from you to your attorney; is that
11 correct? The question is --
12 A Yeah.
13 Q -- is that a letter that you wrote --
14 A Yeah.
15 Q -- from you to your attorney? Thank you. Now, you
16 indicated in the third paragraph that the cutting
17 of the cheese was a cutter's responsibility, and
18 you say you didn't -- you rarely had to cut cheese,
19 but you took it upon yourself to do that; is that
20 correct?
21 A Yes.
22 Q And when you're talking about this -- this -- this
23 cutting of the cheese, when you say "rarely," you
24 would be cutting cheese several times during the
25 course of a week, would you not, as a normal course

1 of your job function?
2 A Not several, no.
3 Q What, once a week? You have no answer?
4 A It's a hard question to answer.
5 Q And that's because you're always doing these
6 various functions; is that correct?
7 A If we get busy, yeah.
8 Q You're always being asked to fill in in this
9 instance and do these various jobs; is that
10 correct?
11 A Yeah.
12 Q Okay. You mentioned in this particular letter, the
13 third paragraph up from the bottom, and you say
14 clean up and washing of equipment which wasn't
15 mentioned which I could feel I could do as I do it
16 in my home on a daily basis, now, how was the
17 equipment cleaned in that department?
18 A We washed them in like two sinks.
19 Q Didn't you occasionally use hoses and things of
20 that sort?
21 A For the floor.
22 Q And could you have used hoses to clean up?
23 A I could have handled the hose.
24 Q You could have?
25 A Yes.

1 Q In the last paragraph you talked about throwing a
2 block of 40, 45 pound block of cheese upon a shelf.
3 You didn't throw cheese up on the shelf, did you?
4 A No.
5 Q You lifted it, right?
6 A Yes.
7 Q And you used a ladder to get it up there, correct?
8 A No ladder to get it up there.
9 Q How did you get it up there then?
10 A Just lifted it this far and pushed it on.
11 Q Okay. I thought some of those shelves were fairly
12 high?
13 A Yes.
14 Q And you just indicated something like shoulder
15 height. Wouldn't that be up like over your head,
16 those shelves?
17 A Yes. The ones --
18 Q You couldn't -- you couldn't lift -- put a 40-pound
19 block of cheese up there that way, could you?
20 A No, not one person.
21 Q Okay. I'm going to ask you to think again about
22 this conference call about I -- that I had a
23 question about earlier. I thought you told me that
24 that conference call took place in December of
25 1997. Was that correct?

1 A No. That was '96, I'm sorry.
2 Q I thought it was December of 1996?
3 A Yes.
4 Q And that was shortly after your accident, correct?
5 A Yes.
6 Q Okay. And you were in a hospital --
7 A Yes.
8 Q -- when this conference -- thank you. Now, who
9 took over your job, if you know, after your
10 accident?
11 A Carol Winger.
12 Q And Carol Winger is your sister; is that correct?
13 A Yes.
14 Q Also known as Punky?
15 A Yes.
16 Q And you did not have a good relationship with her;
17 is that correct?
18 A Yes.
19 Q You did have a good relationship?
20 A Yes.
21 Q Or didn't you write her a letter at one point in
22 time indicating how disappointed you were with her?
23 MS. MURPHY: Objection, relevancy.
24 MR. GROISS: She said she had a good
25 relationship.

1 LAW JUDGE: Overruled. Well, what is the
2 relevance of her relationship with her sister?
3 MR. GROISS: Well, I'm trying to find
4 out, again, what the circumstances were with
5 respect to her claiming that she desired to come
6 back to work. I think there was certain personal
7 animosity between herself and her sister which led
8 to some of this problem which we're facing here
9 today.
10 MS. MURPHY: Not at all.
11 LAW JUDGE: Well, go ahead a little ways
12 and we'll see where it goes.
13 BY MR. GROISS:
14 Q Did you -- did you write a letter to her indicating
15 how disappointed you were with her?
16 A Yes.
17 Q And you -- you accused her in that letter, did you
18 not, of forcing your mother to do all the heavy
19 work?
20 A Yes.
21 Q And you accused her of being on drugs, did you not?
22 A Yes.
23 Q Now, it's my understanding, Miss Catlin, that you
24 are currently employed; is that correct?
25 A Right now, yes.

1 Q And where are you employed?
2 A Seesaw 11 {Phonetic}.
3 Q And what is your job there?
4 A I'm a secretary for many departments.
5 MR. GROISS: I have no further questions,
6 your Honor.
7 LAW JUDGE: Before you jump right in, I'm
8 going to ask them right now, or I'll forget. How
9 long have you been employed by Seesaw 11?
10 THE WITNESS: I've started part time
11 since July of '98 -- '99, I'm sorry, '99.
12 LAW JUDGE: Since July of '99?
13 THE WITNESS: Yeah.
14 LAW JUDGE: And you work part time? You
15 have since then.
16 THE WITNESS: Yes. Now it's full days,
17 seven and a half hours a day for three months.
18 LAW JUDGE: Okay. Okay. Redirect.
19 REDIRECT EXAMINATION
20 BY MS. MURPHY:
21 Q Now, Mr. Groiss asked you a series of questions
22 about various duties and jobs in the cheese
23 factory. He asked you about getting cheese down
24 from the upper levels of the cooler, correct?
25 A Yes.

1 Q Do you recall that? When you went into the cooler
2 to get cheese, where were you usually getting it
3 from?
4 A My grocery store orders were at the lower level of
5 the floor.
6 Q And would that primarily be the cheese you'd be
7 getting out of the cooler?
8 A That was my most basic function was doing the
9 grocery store order, filling and pulling out.
10 Q And how high up -- up did the grocery store cheese
11 go?
12 A Well, from the floor to here, and then it was the
13 next level. There were like four levels of shelves
14 in the cooler.
15 Q Okay. And where were you primarily drawing the
16 cheese from that you needed?
17 A My grocery store orders on the floor.
18 Q Just so I'm clear, so the grocery store orders are
19 on the lowest level?
20 A Yeah.
21 Q They're not on a higher level?
22 A No.
23 Q He also asked you about the boxes you used for the
24 cheese, correct, you recall that?
25 A Yeah.

1 Q And they are stored in another part of the
2 building?
3 A Yes.
4 Q And is there someone who is responsible for the
5 boxes?
6 A There was a gentleman in there at the time.
7 Q Okay. And did he assist you with getting boxes?
8 A At times, many times, yes.
9 Q So if the boxes were stacked high, that gentleman
10 could have assisted you to get the boxes?
11 A Yes.
12 Q And then we talked about the bagging and the
13 cryovac process. Is there any part of that process
14 other than the lifting the basket into the hot
15 water bath that you believe you could not do?
16 A I could have bagged and cryovaced, yes.
17 Q Any part of that that you don't think you could
18 have done other than the lifting the basket --
19 (Tape changed.)
20 BY MS. MURPHY:
21 Q Now, Mr. Groiss asked you about labeling. And you
22 mentioned that the roll of labels are on a shelf
23 above you, and you said that you could reach them
24 because they'd be hanging down, correct?
25 A Yeah.

1 Q Okay. But if they were rolled up tight, you
2 couldn't reach them without any assistance,
3 correct?
4 A Correct.
5 Q Could you use them -- could you reach them using a
6 reacher?
7 A Yes.
8 Q Can you tell us what a reacher is?
9 A It's something about this long with pinchers, two
10 fingers, and then you can set the handle on it and
11 it clasps on things that you reach.
12 Q Do you routinely use a reacher?
13 A Sometimes at home, yes.
14 Q If you had a reacher, would you be able to reach
15 those labels --
16 A Yes.
17 Q -- without assistance from anyone else?
18 A Yes.
19 Q Okay. He also asked you about loading the pickup
20 truck. How often does that occur?
21 A Christmas time. It was a big load.
22 Q So it really was only at Christmas time that there
23 was a need to load the pickup truck?
24 A Basically, yes.
25 Q And that was to take cheese to the cheese store?

1 A Yes.
2 Q What about other times when there was a need for
3 cheese at the cheese store?
4 A It was on a cart.
5 Q What is the cart like?
6 A A four-wheel cart with a handle.
7 Q Kind of like a wagon?
8 A Yes.
9 Q Is that something that you would be able to do?
10 A No.
11 Q How often does that happen?
12 A It was once a week or sometimes they'd need a
13 special order and somebody would run it up.
14 Q Now, you said when you looked at Jeff Annis's
15 report that you disagreed with his proposal that
16 the tables be -- the height of the tables be
17 adjusted? And you said you thought the tables were
18 fine. Why do you think that?
19 A Because I took that measurement and did it at home
20 and it was perfect at 33 inches high. The higher,
21 the better.
22 Q And in your current position do you work at
23 different levels?
24 A Yes.
25 Q And can you do your job just fine?

1 A Yes.
2 Q You were also asked about lifting 40-pound blocks
3 to the higher shelf. Even before your accident was
4 that something that you would have done by
5 yourself?
6 A Say that again.
7 Q Okay. Mr. Groiss asked you some questions about
8 lifting the 40-pound blocks to the higher shelf in
9 the cooler?
10 A Yes.
11 Q Is that something you would do by yourself even
12 before your accident?
13 A Yes.
14 Q But you sometimes had a second person help you
15 lifting those blocks?
16 A Yes.
17 Q And you kind of demonstrated for us the process of
18 labelling where the cheese is weighed and labelled
19 and then put into a box, correct?
20 A Yes.
21 Q And one person does that themself?
22 A Yes.
23 Q -- sort of a one-person assembly line?
24 A Yes.
25 Q And are these the boxes that go to the grocery

1 store?
2 A Yes.
3 Q And what is the usual size of those boxes?
4 A Ten pounds.
5 Q Okay. So you really would generally be only using
6 -- putting up to ten pounds of cheese in a box for
7 a grocery store?
8 A For most of the day, yes.
9 Q You were also asked about how much of the day was
10 spent sitting as opposed to standing. Is there any
11 reason that any of those tasks that you did stand
12 could not have been done sitting?
13 A No. They could have been done sitting.
14 Q You just chose to stand?
15 A Yeah.
16 Q Now, Mr. Groiss asked you a number of questions
17 about the various duties that you had, and maybe --
18 they were yes and no questions. Was there anything
19 you'd like to say additionally about your ability
20 to do some of those duties?
21 A Of what more I could have done or --
22 Q When he asked you about certain duties, and I
23 guess, sometimes you wanted to elaborate and
24 weren't allowed to. Is there anything that you
25 would like to say at this point about your ability

1 to do some of the duties that he asked you about?
2 A Just I know that I could have done most of the
3 duties and plus you can delegate from a chair,
4 inventory, train, communication, quality, plus all
5 the other little tasks other than moving the 40
6 pounders on a higher level, no, I couldn't have
7 done that. We were all a team, we all jumped in,
8 got the job done. There was always help from other
9 lines.
10 MS. MURPHY: I have nothing further.
11 MR. GROISS: I have no further questions.
12 LAW JUDGE: Okay. Thank you. You're
13 excused. Call your next witness.
14 MS. MURPHY: I'd like Carol Winger.
15 CAROL WINGER, called for examination
16 herein, having been first duly sworn, was examined
17 and testified as follows:
18 LAW JUDGE: State your full name, please,
19 and spell your last name for the record.
20 THE WITNESS: Carol Lee Winger,
21 W-I-N-G-E-R.
22 LAW JUDGE: Thank you.
23 DIRECT EXAMINATION
24 BY MS. MURPHY:
25 Q Miss Winger, are you related to Susan Catlin?

1 A Yes.
2 Q How are you related to her?
3 A Sister.
4 Q Did there come a time when you began employment at
5 the Crystal Lake Cheese Factory?
6 A Yes.
7 Q And when was that?
8 A February 27, 1996.
9 Q And what position were you hired into?
10 A Cutter.
11 Q And what were your duties as cutter?
12 A To put cheese away, bring cheese out and cut. I'd
13 help in making boxes if it was needed.
14 Q And that was a job in the wholesale department?
15 A Yes.
16 Q And were you cross-trained on the other jobs in the
17 wholesale department?
18 A Yes. I did labelling, cryovac machine, she had me
19 do pulling orders, pricing and paperwork.
20 Q Okay. Was Susan your supervisor?
21 A Yes.
22 Q Were you often asked to do duties that weren't
23 necessarily the duties of the cutter?
24 A That's kind of hard to answer, because there really
25 wasn't a job description that you were -- your set

1 duties were this. I just did what I was asked to
2 do.
3 Q Did you ever object to doing any of the things that
4 you were asked to do?
5 A No.
6 Q Did you sometimes take on duties that weren't part
7 of the wholesale department duties?
8 A Yes, on occasion.
9 Q Okay. And would that include loading semis?
10 A Yes.
11 Q Were you working in the wholesale department at the
12 time of Susan's accident?
13 A Yes.
14 Q And you continued to work there after that?
15 A Yes.
16 Q At any time did you tell Tony or anyone else in
17 management at Crystal Lake that Susan did not want
18 to come back to Crystal Lake?
19 A No.
20 Q Were you working in the wholesale department in
21 September of 1997?
22 A Yes.
23 Q And after Susan's accident, did you take over some
24 of the duties that she had?
25 A Yes.

1 Q And what duties did you take on that had been
2 Susan's?
3 A The pulling -- pulling the orders, the pricing,
4 pretty much all of Susan's job I stepped into.
5 Q And that -- why don't you describe for me what that
6 is? You said pulling the orders, the pricing?
7 A Making up the pull sheet for the cutter and then
8 pulling the grocery store orders, pricing, making
9 boxes.
10 Q Did anyone from Crystal Lake management ever talk
11 to you about Susan coming back to work?
12 A I was -- I was questioned whether or not I thought
13 Sue could come back to her position.
14 Q Did anyone ever ask if she wanted to come back to
15 work?
16 A Not that I recall.
17 Q If a proposal had been made to have Susan come back
18 to work, that meant that you would have more of the
19 physical duties of the position, the lifting the
20 40-pound blocks of cheese, would you have been
21 upset by that?
22 A No.
23 Q Would you have objected to doing all those duties?
24 A No.
25 Q Did anyone in your time there within the wholesale

1 department object to rotating duties among the
2 other employees in the wholesale department?
3 A No.
4 Q Was it generally everybody helped out wherever
5 needed?
6 A Yeah.
7 MS. MURPHY: I have nothing further.
8 LAW JUDGE: Cross-examine.
9 CROSS-EXAMINATION
10 BY MR. GROISS:
11 Q Miss Winger, you're also known as Punk or Punky; is
12 that correct?
13 A Yes.
14 Q And you indicated that there was at one point in
15 time where this was an inquiry as to your opinion
16 as to whether or not she was capable of coming back
17 doing her job; is that right?
18 A Yes.
19 Q Do you recall a telephone conversation that you had
20 with Barbara Sieh being there and, I think, Tony
21 Curella and a telephone conversation was with a
22 gentleman by the name of Drake Mancio {Phonetic}
23 from the Equal Employment Opportunities Commission?
24 A Yes.
25 Q And that would have been in April of 1998; is that

1 correct?
2 A I thought it was in March, but yeah, it could have
3 been April.
4 Q But it was --
5 A In that --
6 Q Okay.
7 A -- area.
8 Q And you were asked at that point in time whether or
9 not she would be able to function in the job as a
10 supervisor in the wholesale department; were you
11 not, you were asked that question?
12 A Yes.
13 Q And you answered no; isn't that correct?
14 A Yes.
15 Q And then you were asked, do you think there are any
16 accommodations that could be made to allow her to
17 do her job, and you answered no; is that correct?
18 A I guess I don't recall there being the word
19 accommodations made.
20 Q But you did -- you do recall being asked whether or
21 not she could do the job, and you said no?
22 A Yes.
23 Q And do you recall telling Mr. Mancio that the only
24 time I sit is at meetings, lunch and breaks,
25 otherwise I stand. Out of a week maybe 15 minutes

1 -- I stand. Out of a week maybe 15 minutes a day I
2 sit; do you recall that?
3 A Yes.
4 Q And when you would have taken over the job that
5 Susan had been performing previously, you were
6 doing the paperwork that she had done before her --
7 her accident, and you were doing all the other
8 physical aspects of the job; is that correct?
9 A Yes.
10 Q Was there a time when another employee was added to
11 your department by the name of Susan Custer?
12 A Yes.
13 Q And did she work with you?
14 A Yes.
15 Q And do you recall whether she was vision impaired?
16 A Yes, she was.
17 Q And nonetheless, she still worked at Crystal Lake
18 Cheese Company, did she not?
19 A Yes. But not where she was hired to work. We did
20 have to transfer her to the cryovac position due to
21 eyesight labor.
22 Q So the company was able to accommodate her problem
23 with the visual impairment and they did so; is that
24 correct?
25 A Yes.

1 MR. GROISS: I have no further questions.
2 LAW JUDGE: Do you have anything further?
3 MS. MURPHY: I have a couple questions.
4 REDIRECT EXAMINATION
5 BY MS. MURPHY:
6 Q So do you have any particular expertise in
7 accommodating disable -- people with disabilities?
8 A No.
9 Q Do you know any -- what assistive technology is?
10 A No.
11 Q Were you in a position to say what accommodations
12 would or would not have been appropriate for your
13 sister in April of 1998?
14 A No.
15 MS. MURPHY: Okay.
16 LAW JUDGE: Mr. Groiss?
17 MR. GROISS: I have no further questions.
18 LAW JUDGE: Thank you. You're excused.
19 You are free to stay and listen, or you can leave.
20 THE WITNESS: Thank you.
21 MS. MURPHY: Carol Elfers.
22 CAROL ELFERS, called for examination
23 herein, having been first duly sworn, was examined
24 and testified as follows:
25 LAW JUDGE: State your full name, please,

1 and spell your last name for the record.
2 THE WITNESS: Carol Charlotte Elfers,
3 E-L-F-E-R-S.
4 LAW JUDGE: E-L -- what was it?
5 THE WITNESS: E-L-F.
6 LAW JUDGE: F as in Frank?
7 THE WITNESS: Yes.
8 LAW JUDGE: Okay.
9 THE WITNESS: E-R-S.
10 LAW JUDGE: Thank you. Go ahead.
11 DIRECT EXAMINATION
12 BY MS. MURPHY:
13 Q Miss Elfers, are you related to the claimant Susan
14 Catlin?
15 A Yes.
16 Q How are you related to her?
17 A Her mother.
18 Q Did there come a time when you were employed at the
19 Crystal Lake Cheese Factory?
20 A Yes.
21 Q And in what capacity?
22 A What my job was?
23 Q Yeah.
24 A I started out as labeler.
25 Q Okay. And is that a job in the wholesale

1 department?
2 A Yes.
3 Q When did you start working at Crystal Lake?
4 A April or May of '96.
5 Q And was Susan your supervisor?
6 A Yes.
7 Q And what were your duties as labeler?
8 A Labelling each piece of cheese, what kind of a --
9 Q Would that be the job that Susan was talking about
10 earlier where you put on the price, weigh it, label
11 it and put it in a box?
12 A It was labelled before it was priced and weighed.
13 Q Okay. And the only aspect of that you did was put
14 the labels on?
15 A Yeah. I would do other things too, but that was
16 mainly what I done.
17 Q Okay. And what were the other jobs in the
18 wholesale department?
19 A I'd cryovac. When ever I got the chance I would
20 use a cutter. I wanted to learn how.
21 Q Were there other people whose duties were primarily
22 doing the cryovac or primarily doing the cutter?
23 A Pardon?
24 Q Were there other people in the department whose job
25 was primarily to do the cutting or just primarily

1 operate the cryovac?
2 A Yes.
3 Q And who held those positions?
4 A Carol Winger was cutter, I can't remember that gal
5 when I first started what her name was.
6 Q But someone who did the cryovac?
7 A Yes. She primarily was that. She didn't carry
8 duty as --
9 Q Okay. And what did Susan do primarily?
10 A All the store orders and the paperwork and the pull
11 sheets.
12 Q But each of the individuals in the wholesale
13 department was cross-trained on the other jobs,
14 right?
15 A Yes.
16 Q And the point of this was to fill in where needed,
17 correct?
18 A Yes.
19 Q Did you have any objection to having to do some of
20 these other duties?
21 A No.
22 Q Did anyone else in the department object to having
23 to do some of these other duties?
24 A No.
25 Q Was the labelling your primary duties throughout

1 your employment at Crystal Lake?
2 A No.
3 Q At some point your duties changed?
4 A After Sue's accident.
5 Q And after Sue's accident, what were your duties?
6 A Cutter.
7 Q You began to cut? And that was something you were
8 able to do?
9 A Yes.
10 Q Do you use ladders in your work at Crystal Lake?
11 A Yes, sometimes you had to.
12 Q And for what purpose?
13 A To get cheese off of the very top shelf and put it
14 up there.
15 Q Now, just related I'm imagining the answer here,
16 were you working at Crystal Lake in November of '96
17 at the time of Susan's accident?
18 A Yes.
19 Q And were you working there in September of '97 when
20 Susan wanted to come back to work?
21 A Yes.
22 Q Did you ever tell Tony or anyone including the Lake
23 management that Susan didn't want to come back to
24 work?
25 A No.

1 Q Did anyone ever ask you if she wanted to come back
2 to work?
3 A No.
4 Q Did anyone ever ask you what you knew about her
5 abilities or limitations?
6 A No.
7 Q If a determination had been made to allow Susan to
8 come back to work in the wholesale department and
9 given her physical duty to other employees
10 including yourself, would you have objected to
11 that?
12 A No.
13 Q Would you have felt that that was unfair?
14 A No.
15 Q Did anyone ever suggest that as a possibility to
16 you?
17 A No.
18 MS. MURPHY: I have nothing further.
19 CROSS-EXAMINATION
20 BY MR. GROISS:
21 Q Yeah, Miss Elfers, both you and your daughter Carol
22 were asked a question as to whether or not you'd
23 ever asked or told Tony or anybody else in
24 management that Susan didn't want to come back to
25 work, and I think one of you said no; is that

1 correct?
2 A Correct.
3 Q But you both did approach management and requested
4 that she be placed on disability, did you not?
5 A I never did.
6 Q You never talked to anybody about trying to get her
7 on permanent, total disability?
8 A No.
9 Q And that would include Mr. Curella and Miss Sieh or
10 anybody else?
11 A Correct.
12 Q And Thomas Messicci?
13 A Correct.
14 MR. GROISS: I have no further questions.
15 LAW JUDGE: Miss Murphy, anything else?
16 MS. MURPHY: No. Other than I do -- if
17 we can do -- like maybe I'd like you to call
18 Mr. Curella adversely or we can do it as part of
19 your -- having your client under direct and doing
20 it --
21 MR. GROISS: Whatever you'd like.
22 MS. MURPHY: I think it would be just
23 quicker if we would do it under cross.
24 MR. GROISS: You can call him adversely,
25 sure.

1 LAW JUDGE: It's up to you. Either way
2 it works for me.
3 MS. MURPHY: Okay. Well, then I'll
4 call --
5 LAW JUDGE: You're excused. Thank you.
6 ANTHONY CURELLA, called for examination
7 herein, having been first duly sworn, was examined
8 and testified as follows:
9 LAW JUDGE: State your full name, please,
10 and spell your last name for the record.
11 THE WITNESS: Anthony Lawrence Curella,
12 C-U-R-E-L-L-A. P.O. box 1225, Cumberland,
13 Wisconsin, 54829.
14 LAW JUDGE: Thank you, go ahead.
15 DIRECT EXAMINATION
16 BY MS. MURPHY:
17 Q Mr. Curella, what's your position with Crystal Lake
18 Cheese?
19 A President, owner.
20 Q Okay. And have you been in that position since
21 1995?
22 A Yes.
23 Q And you continue in that position to today?
24 A Yes.
25 Q And you're acquainted with Susan Catlin, are you

1 not?
2 A Yes.
3 Q And she worked for you starting in approximately
4 August of 1995?
5 A Yes, whatever is on the record.
6 Q And you had no complaints about her work, do you?
7 A No.
8 Q And her duties were in the wholesale department,
9 correct?
10 A Yes.
11 Q But are you taking the position now that her job
12 title was not supervisor?
13 A Yes.
14 Q So you're saying there is no supervisor position in
15 the wholesale department?
16 A In our company we have department heads. They're
17 not titled as supervisors.
18 Q Does that mean that you do not have a position
19 entitled supervisor wholesale department?
20 A Not that I'm aware of.
21 Q Have you ever had a position called supervisor
22 wholesale department?
23 A Not that I'm aware of.
24 Q Now, there's been some discussion earlier about the
25 conference call or call that was made to Susan when

1 she was still in the hospital. Do you recall that?
2 A Yes.
3 Q Did you place that call?
4 A Yes, I did.
5 Q Do you recall telling Susan that her job would be
6 there for her?
7 A I don't recall that.
8 Q Might you have said that?
9 A I might have.
10 Q Do you recall Susan being invited to a company
11 picnic?
12 A Yes.
13 Q And she was -- that was the employee picnic, right?
14 A Yes.
15 Q Do you recall talking to her at that picnic?
16 A Yes.
17 Q And you were impressed with the strides that she
18 had made in terms of her gaining physical
19 abilities, weren't you?
20 A I was -- repeat the question again?
21 Q This is where I miss court reporters. I'm sorry.
22 You were impressed, were you not, with the strides
23 that she'd made in regaining her physical abilities
24 at the picnic?
25 A "Impressed" meaning? I don't know what you're

1 looking for there.
2 Q What were you --
3 A We were pleased that she was at our picnic and
4 doing well.
5 Q Okay. Were you happy to see the physical strengths
6 she had regained?
7 A Yes.
8 Q And did you talk to her about her working at
9 Crystal Lake?
10 A Not that I'm aware of.
11 Q Did you tell her, just give me a call?
12 A Possibly.
13 Q And, in fact, she did try to call you, isn't that
14 right?
15 A Yes.
16 Q She tried to call you on more than one occasion;
17 isn't that right?
18 A Yes.
19 Q But you did not return any of those calls, did you?
20 A Yes -- no.
21 Q And in fact, in one of those calls when Barb Sieh
22 was on the phone with her, you were telling Barb
23 Sieh in the background, tell her I'm too busy;
24 isn't that right?
25 A Yes.

1 Q You were afraid to talk to her, weren't you?
2 A No.
3 Q Why didn't you talk to her?
4 A No reason.
5 LAW JUDGE: No reason to talk to her, or
6 you don't have a reason?
7 THE WITNESS: I don't have a reason.
8 BY MS. MURPHY:
9 Q You never called Susan at all, did you?
10 A No.
11 Q You said you called your insurance company; isn't
12 that right?
13 A I'm not sure of the dates, but I believe we got a
14 call from -- or contact from Rice Lake Vocational
15 Rehabilitation.
16 Q Do you recall calling your insurance company on
17 September 18, 1997?
18 A That sounds like some date there, yes.
19 Q And do you recall talking to a Julie Burtnik?
20 A Yes.
21 Q And what did you tell Miss Burtnik?
22 A I believe I said that Sue Catlin is on full
23 disability. Julie was with Fortis Insurance Group
24 which handles our insurance -- our disability for
25 our employees, and that I have heard that Sue -- or

1 she mentioned that she wanted to come back to work,
2 and how should we proceed with this.
3 Q In her response letter to you, Miss Burtnik, refers
4 to the current situation. Do you know what she
5 meant by that?
6 A No.
7 Q She said she sent you some information about the
8 job accommodation network, Jan. Did you contact
9 Jan?
10 A I don't remember if I did or not.
11 Q In fact, you didn't make any effort whatsoever for
12 what might be appropriate accommodations for Susan
13 to return to work, did you?
14 A No.
15 Q And at some point a David Johnson was hired to do
16 an ergonomic job analysis; is that correct?
17 A Yes.
18 Q And presumably he did that job analysis for a
19 position known as supervisor, correct?
20 A I don't remember what the report says, if that's
21 what it says, supervisor. But it is a department
22 head.
23 Q Where would he have gotten the information about
24 the job from?
25 A He did a survey of our cheese factory.

1 Q And who gave him any information about the job?
2 A Myself and Thomas Messicci, Phil Robertson. I
3 would like to add something, if I may.
4 Q Can't do that.
5 LAW JUDGE: Your attorney can.
6 THE WITNESS: Okay.
7 LAW JUDGE: Are you going to mark that?
8 MS. MURPHY: No.
9 LAW JUDGE: Okay.
10 BY MS. MURPHY:
11 Q Did you personally give any -- give Mr. Johnson any
12 information about Susan Catlin other than she uses
13 a wheelchair?
14 A I don't believe so. I don't know.
15 Q Did anyone else, to your knowledge, give
16 Mr. Johnson any information about Susan Catlin's
17 abilities or limitations?
18 A Not that I'm aware of other than possibly the job
19 description.
20 Q And when you say "job description," --
21 LAW JUDGE: Claimant's 7. Do you have
22 that, Mr. Groiss?
23 MR. GROISS: Yes, I do.
24 BY MS. MURPHY:
25 Q I'm showing you what has been marked as Claimant's

1 Exhibit 7. Is that what you're referring to when
2 you say "job description"?
3 A Job description was also done for income, job
4 income.
5 Q Can you explain what you mean by that?
6 A These are basic skill levels. Each department has
7 a format like this depending on what department
8 you're in. And you have to conquer skills one
9 through four or one through whatever depending on
10 the department that you work in. And your paid
11 rate scale is based on one through four. And you
12 have to master the skills to move forward.
13 Q Would this be the job description that you're
14 referring to that you shared with Mr. Johnson?
15 A I believe so.
16 Q Now, Mr. Johnson gave you a report; is that
17 correct?
18 A Yes.
19 Q And you sent that to Susan Catlin (Inaudible)?
20 A I believe it was sent to Rice Lake Vocational.
21 Q Okay. So you didn't send anything to Susan about
22 it?
23 A I don't believe so.
24 Q And you never discussed it with Susan, did you?
25 Did you ever look at Susan performing any other

1 jobs at Crystal Lake other than the job that she
2 had had?
3 A No.
4 Q And when that idea had come up, you had turned it
5 down; isn't that right?
6 A Excuse me, I'm not clear on the question. When --
7 Q The idea of working at other jobs for Susan within
8 Crystal Lake, you turned that idea down, correct?
9 A I don't remember the idea coming up.
10 Q Okay. Do you recall Barb Sieh asking and telling
11 you that she would be willing to work with Susan
12 and train her in the office, and your response was,
13 absolutely not?
14 A I do not recall that.
15 Q And you never considered Susan as a possibility of
16 working in the layoff, correct?
17 A No.
18 Q Or working in the office or working in the cheese
19 house?
20 A No.
21 Q And when Mr. Annis came through -- you called
22 Mr. Annis?
23 A Yes, I did.
24 Q Okay. When he came through, he suggested to you
25 that rather than make some accommodations for Susan

1 to work in that workplace, the easiest solution was
2 simply to modify the job duties, isn't that what he
3 advised you?
4 A He did not advise me.
5 Q Did he discuss that with you?
6 A No, not to my recollection. He said it would be on
7 the report. And he said he would read the report.
8 And it would not be privy to us until he saw it.
9 Q So you don't recall telling him that there was no
10 way you were going to modify this job description?
11 A I didn't know what job description he was talking
12 about at the time. I did not see a report.
13 Q Mr. Annis didn't do a job description?
14 A Please restate the question.
15 Q In Mr. Annis's report, he says -- I'll rephrase it.
16 The easier option would be to make modifications to
17 a job description so she would be required as a
18 lead person to do -- to only do the paperwork,
19 final packaging, filling out invoices received in
20 packing lists. This appears to be a viable
21 solution and one that's strongly recommended.
22 However, the president as well as Mr. Messicci,
23 they were unable to modify those job descriptions
24 to accommodate Susan Catlin. Do you recall having
25 that discussion with him?

1 A Possibly.
2 Q And was that an accurate statement of your
3 position?
4 A Yes.
5 Q And after Susan made these phone calls inquiring
6 about the position and you were certainly aware
7 that she wanted to come back to Crystal Lake, you
8 never had any contact with her again, did you?
9 A No.
10 Q And you didn't direct anyone else to have any
11 contact with her, did you?
12 A No.
13 MS. MURPHY: I'm finished.
14 LAW JUDGE: You're finished? Now, you've
15 been having the (Inaudible.)
16 MR. GROISS: Well, I'm going to assume
17 that this is her last witness; is that correct?
18 MS. MURPHY: Yes.
19 LAW JUDGE: Let's go off the record.
20 MR. GROISS: Why doesn't she simply rest
21 and then I'll call him as part of my case.
22 LAW JUDGE: Okay. Let's go off the
23 record for a second.
24 (Discussion held off the record.)
25 LAW JUDGE: Okay. We're back on the

1 record. First of all, Miss Murphy, the
2 Complainant's 7, do you want to move that?
3 MS. MURPHY: I do. I would like to move
4 the admission of Complainant's Exhibit 7.
5 MR. GROISS: Objection. No good.
6 LAW JUDGE: (Inaudible) And I also take
7 it the complainant rests?
8 MS. MURPHY: Yes. Subject to the issue
9 about the --
10 LAW JUDGE: Right, the expert's
11 (Inaudible.) Okay. Mr. Groiss, are you ready to
12 proceed?
13 MR. GROISS: Yeah.
14 DIRECT EXAMINATION
15 BY MR. GROISS:
16 Q Mr. Curella, would you tell us a little bit, what
17 does Crystal Lake Cheese Company do?
18 A Crystal Lake Cheese Factory brings in raw milk on a
19 daily basis, processes it into several different
20 kinds of cheese that we package -- that we cold
21 pack for companies like Biafish Craft, Land O'
22 Lakes and our own brand of label under the Blazer
23 line. We also run a small retail shop and that's
24 it.
25 Q All right. (Inaudible) and where are your offices

1 located?
2 A At Crystal Lake, Highway 63, Comstock, Wisconsin.
3 Q And that's your only facility; is that correct?
4 A That's correct.
5 Q And approximately how many people would have been
6 employed there in 1996 at the time of Miss Catlin's
7 accident?
8 A Between 45 and 48.
9 Q And what would be the approximate number of
10 employees that you've got now?
11 A 50 to 52.
12 Q And in that mix of employees, in terms of the
13 facility, when was the plant first built?
14 A The original cheese factory was built in 1897.
15 Q And is that still utilized?
16 A Yes, it is.
17 Q Was the wholesale department located in that old
18 building?
19 A No.
20 Q What part of the building was it located in?
21 A I believe it was in the second addition that was
22 probably built in about 1940.
23 Q Okay. And was there a third addition?
24 A There would have been three, four and five.
25 Q Okay. But this part would have been in the second

1 addition which was built in approximately the
2 1940s; is that correct?
3 A Correct.
4 Q And you mentioned that there are offices as well;
5 is that correct?
6 A Yes.
7 Q Is that in a separate building?
8 A Yes, it is.
9 Q And what kind of a building is it where the offices
10 and the laboratory are located?
11 A The building was the cheese maker's house, personal
12 residence. It was built in about 1907.
13 Q And where is your office located?
14 A On the second floor.
15 Q What is the access to the second floor? What kind
16 of access do you have, stairs?
17 A Stairs.
18 Q Are there any elevators?
19 A No.
20 Q Is it accessible by means of wheelchair?
21 A No.
22 Q Now, you mentioned in your testimony previously
23 that you had some contact with somebody from, I
24 believe, a state agency with respect to Susan
25 Catlin?

1 A It was the Rice Lake Vocational Rehabilitation
2 Center.
3 Q Okay. And that person called you, and was that --
4 what was the gist of the conversation that you had
5 with her?
6 A She was inquiring about Susan's availability for
7 returning to work at the cheese factory.
8 Q What was your reaction to that?
9 A Shocked.
10 Q And why was that?
11 A Well, because I didn't realize -- I didn't know how
12 Susan would return to work at that moment in time.
13 Q Okay. And what did you do subsequent to that
14 conversation?
15 A I believe I contacted Fortis Insurance Group.
16 Q And what was the purpose of contacting Fortis?
17 A To get our disability carrier for our employee
18 disability and wanted to know what the status would
19 have been or if they had been contacted knowing
20 that she was on disability at this time.
21 Q And did they make any recommendations?
22 A They recommended -- the gal I talked to said the
23 package, it was mentioned earlier, they made
24 reference that maybe we want to have an analysis
25 done of the cheese factory to see if we can

1 accommodate Susan.
2 Q And did you do that?
3 A Yes, we did.
4 Q And who was the gentleman that performed that
5 analysis?
6 A David Johnson with the Genex.
7 LAW JUDGE: Respondent's 3. Do you have
8 it?
9 MS. MURPHY: I have a copy.
10 LAW JUDGE: I'm sorry.
11 BY MR. GROISS:
12 Q Mr. Curella, I'm going to show you what's been
13 marked as Respondent's Exhibit 3, which is entitled
14 progress report, and it's got a date of September
15 30, 1997, and it's got several pages including a
16 job analysis at the end of it. And it appears to
17 have been prepared by David Johnson. Is that the
18 report that you referred to in the testimony?
19 A Yes, it is.
20 Q And in that particular report that you provided to
21 -- he has in the next to last paragraph --
22 paragraph, the conclusion that the essential
23 function that would most hamper a person in the
24 wheelchair would be that the supervisor is required
25 to know all aspects of the job and to stay

1 (Inaudible).

2 It would also be difficult for the

3 wheelchair person to pull stock, inventory due to

4 the weights and heights of the storage containers

5 in the cooler area. Did you have discussions with

6 him about the nature of the job?

7 A I actually (Inaudible) him myself and Tom Messicci.

8 I don't believe Phil was involved at the time. I

9 actually showed him the facility.

10 Q Okay. And did you apprise that ability to be able

11 to do all aspects of the job and fill in for people

12 when they weren't there as an essential function?

13 A Yes.

14 Q And why was that?

15 A As department heads in our company, which we have

16 three, they are working department heads. And we

17 have one in the makeroom, master cheese maker, does

18 the scheduling, some paperwork and also works as a

19 cheese maker.

20 In the packaging room, the munster line,

21 we have a department head that is a working

22 department head that does packing slips or

23 scheduling, computer runs and also fills in as a

24 function. We have another job that does warehouse

25 work that actually orders, receives and does some

1 paperwork as does the department head in the
2 wholesale department.
3 Q Now, how does that (Inaudible), that department
4 head, if you know, function today as opposed to
5 when it was when Miss Catlin was there?
6 MS. MURPHY: I object to the relevancy.
7 MR. GROISS: All right.
8 (Inaudible.)
9 BY MR. GROISS:
10 Q Now, Mr. Curella, that particular report that was
11 provided by Mr. Johnson, did you get that to
12 Mr. Annis when he was out there looking
13 (Inaudible)?
14 A Yes, I did.
15 Q All right. At any point in time, Mr. Curella, did
16 you receive from Ms. Catlin a request for any
17 accommodations?
18 A No, I did not.
19 Q Are you aware of anybody else in management that
20 received a request from Miss Catlin for
21 accommodations?
22 A No, I'm not aware of it.
23 Q Now, I believe you -- I'm sorry, but let me see if
24 I can ask you a question. I believe you indicated
25 that you hadn't considered Miss Catlin for any

1 other jobs other than the one she filled previously
2 at Crystal Lake Cheese Company; is that correct?
3 A Can you rephrase that.
4 Q I thought your testimony was earlier that you
5 hadn't considered Miss Catlin for any other jobs at
6 Crystal Lake Cheese Company such as working in the
7 office or the lab or things of that sort; is that
8 correct?
9 A Yes.
10 Q Why was that?
11 A I didn't know of any accommodations that would have
12 to be done to accommodate her in other areas with
13 the exception of maybe going back to the reports
14 that Mr. Johnson and Mr. Annis had referred to.
15 Q Well, did you have any office work that she could
16 have done?
17 A Not that I'm aware of.
18 Q Would she have had the qualifications to do any of
19 the work in a lab?
20 A She would have had to have been trained.
21 Q Did she request an opportunity to work -- work in
22 any other position than the one she'd left?
23 A No.
24 Q Did you have any indication that she had any
25 willingness to work on a different --

1 (Tape change.)
2 BY MR. GROISS:
3 Q Okay. Did you ever have any indication that --
4 from her that she was going to do either part-time
5 work or (Inaudible) type of position?
6 A (Nonverbal response.)
7 MR. GROISS: I don't think I have any
8 further questions, but I would like to bring into
9 evidence Complainant's -- Respondent's Exhibit No.
10 3 --
11 LAW JUDGE: 2 is also not received.
12 MR. GROISS: 2 and 3.
13 LAW JUDGE: Any objection?
14 MS. MURPHY: I have an objection to 3. I
15 don't know what 2 is.
16 LAW JUDGE: 2 is the May 5, '98 letter
17 from the complainant --
18 MS. MURPHY: Oh, I have no objection to
19 2. I object to 3 on grounds of hearsay.
20 MR. GROISS: Well, it's not being
21 offered, your Honor, on the basis of it being a
22 conclusion of the expert that you're -- (Inaudible)
23 it's rather a document that we received and acted
24 upon.
25 Whether or not the underlying conclusion

1 of the expert witness can be tested or not isn't
2 the question here. The issue is, did he ask for a
3 report, did he receive the report. Yes, he did.
4 That's the report that he received.
5 LAW JUDGE: Well, with that limitation
6 I'll receive it.
7 MS. MURPHY: Just so I'm clear, it's
8 being offered only to show that he received the
9 report?
10 MR. GROISS: That he received the report.
11 That he received it from the expert and he reviewed
12 and acted upon it.
13 MS. MURPHY: And not -- nothing offered
14 for the validity of the report?
15 MR. GROISS: I guess I can't do that
16 without having Mr. Johnson here to testify.
17 LAW JUDGE: Okay. It's been received.
18 Now, keeping in mind, he is here as a witness, you
19 are going to cross him on the subjects that Mr.
20 Groiss has touched on?
21 MS. MURPHY: I just need to make a note.
22 LAW JUDGE: All right.
23 CROSS-EXAMINATION
24 BY MS. MURPHY:
25 Q Do you recall an individual that you received this

1 phone call from, the person from the Division of
2 Vocational Rehabilitation --
3 A (Inaudible.)
4 Q Was it before or after Susan had been calling and
5 leaving messages for you?
6 A I can't recall.
7 Q Did you discuss with the individual from the
8 Division of Vocational Rehabilitation
9 accommodations for Susan at her job?
10 A I believe that the lady asked if we had or could
11 make any accommodations.
12 Q And what was your response to that?
13 A I said I didn't know.
14 Q And what effort did you make to determine whether
15 or not you could offer accommodations on her job?
16 A I did not recall (Inaudible) disability.
17 Q Are you prepared to testify that you never received
18 a request from Susan Catlin for accommodations or
19 for other positions with the company? Perhaps if
20 you would have called her back you would have had
21 this request; isn't that true?
22 MR. GROISS: Objection, that's
23 argumentative.
24 LAW JUDGE: Sustained.
25 BY MS. MURPHY:

1 Q And you said the reason that you didn't consider
2 any other positions for Miss Catlin was because you
3 didn't know what accommodations were needed to do
4 those jobs; is that correct, but you made no effort
5 to determine what accommodations might be
6 appropriate in those jobs, correct?
7 A Repeat the question.
8 Q You made no effort to determine what accommodations
9 might be appropriate on the job at Crystal Lake,
10 did you?
11 A The only job I was assuming she would be working
12 at, I guess, one that everybody was talking about,
13 her old job.
14 Q And your only, um, test to determine what
15 accommodations might be appropriate in that job was
16 the ergonomical report from Mr. Johnson; is that
17 correct?
18 A Yes.
19 MS. MURPHY: I have nothing further.
20 LAW JUDGE: Mr. Groiss?
21 MR. GROISS: I have nothing further.
22 LAW JUDGE: Thank you. You can have a
23 seat back over there. Call your next witness.
24 MR. GROISS: Phillip Robertson.
25 MR. GROISS: Would you state your name,

1 please?

2 LAW JUDGE: Just a second.

3 MR. GROISS: Okay.

4 PHILLIP ROBERTSON, called for examination

5 herein, having been first duly sworn, was examined

6 and testified as follows:

7 LAW JUDGE: State your full name, please,

8 and spell your last name for the record.

9 THE WITNESS: Phillip John Robertson,

10 R-O-B-E-R-T-S-O-N.

11 LAW JUDGE: Thank you. Go ahead,

12 Mr. Groiss.

13 DIRECT EXAMINATION

14 BY MR. GROISS:

15 Q And what is your -- where are you employed,

16 Mr. Robertson?

17 A I'm employed at Crystal Lake Cheese Factory.

18 Q And what is your occupation?

19 A My occupation is operations manager.

20 Q How long have you held that position?

21 A For 15 years.

22 Q As operations manager, are you responsible or have

23 you been responsible for the work that's performed

24 in the wholesale department at Crystal Lake Cheese

25 Company?

1 A That is a branch subsidiary, yes.
2 Q And were you familiar with the work that Ms. Catlin
3 and others in the wholesale department had been
4 performing?
5 A Yes, I am.
6 Q All right. Now, would you describe for us
7 basically what the wholesale department does?
8 A Changes have been made over the time that Sue was
9 there. They would receive the orders through the
10 office. She'd have the paperwork that she'd put in
11 a basket. They'd start up in the morning by
12 looking through the paperwork, pulling cheese,
13 sometimes changes were made partly through the day,
14 but if she received all her paperwork on time it
15 went pretty smooth.
16 The cheese was brought out of the -- out
17 of the warehouse either on a two-wheel cart or
18 baby's pallet jack, like a jack, placed in the
19 wholesale division. And the cutter would unwrap
20 the box of cheese.
21 We have two cutters there, machines, not
22 people. They would determine on what side that it
23 was going to be put into, and they would determine
24 which pieces of equipment it would be taken over
25 to.

1 And sometimes parts had to be changed or
2 other pieces had to be put on to make sure it's the
3 right type. After that the cheese is put on a
4 table and then they bagged it off the table. It
5 would be 10 pounds, 5 pounds, one pounds, 12 ounce,
6 8 ounce, it all sat on the table.
7 Then it would go to a cryovac machine
8 which is a vacuum machine that would place a seal
9 on it. The bag is also a special bag that when it
10 gets dipped into hot water it shrinks and makes the
11 bag tight.
12 They would take that out of the machine
13 -- or back -- the product out of the machine,
14 cryovac, they would stack the pieces into a basket
15 which would be lifted up off the table and set into
16 a dip tank or a shrink tank. Only in there for a
17 few seconds, lifted up, put it on the table.
18 They usually dump it out, dry off the
19 product, put labels on it, flip it over, put labels
20 on the other side. Then it was taken over to the
21 scale and weighed and the weight was put on the box
22 and then they put the cheese in the box. They
23 either hand taped it or there's an automatic taper
24 there.
25 The boxes are taken off the counter and

1 put on a pallet. Then that pallet is -- they use
2 the electric forklift or hand truck or a -- we do
3 also have a hand hand truck. We'll take it back
4 into the warehouse and start (Inaudible) truck.
5 Q In that answer, Mr. Robertson, you said "they do
6 this." Who did you mean by "they"?
7 A There were four people in that area. They were
8 cross-trained. And the reason for that is is
9 basically everyone had their duty, although there
10 were times when people would step out of their
11 position either phone calls, have to go up to the
12 cheese house, had to go up to the office, meetings.
13 I would call them away. The person alongsides
14 would have to pick up that task and carry on.
15 Q Well, do you think it would have been practical or
16 possible to take of those four persons and have one
17 person to do none of the physical work?
18 A No, I don't believe so.
19 Q Would it have required you to have hired additional
20 help?
21 A That is correct, yes.
22 Q In terms of -- you refer to the warehouse. Is that
23 the cooler?
24 A Yes. The one that we talked about previously.
25 Q In terms of the warehouse and the cooler, there are

1 a number of shelves that are fairly high up; is
2 that correct?
3 A That's correct.
4 Q And is cheese stored there?
5 A That is correct.
6 Q Could you -- could you possibly as an accommodation
7 lower all those shelves?
8 A It wouldn't be practical -- practical for the
9 reason I would lose about 80 percent of my capacity
10 in doing so.
11 Q Okay. Now, in respect to -- we had some testimony
12 here during the course of this hearing with respect
13 to the height of the tables. With your knowledge
14 of the operations out there aside from the heights
15 of the table, would there be any other problems in
16 terms of a person being able to perform some of
17 these functions in a wheelchair?
18 A The way the tables are designed, they have a
19 storage shelf underneath of them, so there is no
20 kick space underneath. It comes about maybe one
21 inch set in from the rim of the table, maybe two
22 inches on some of them. That's also the support
23 for the table legs.
24 Q So what would that mean in terms of a person with a
25 wheelchair?

1 A You'd have to come up to it sideways or you'd be
2 sitting so far away that maybe you could work off
3 the edge of that table, from there about 32 to 36
4 inches deep.
5 Q Now, these tables we're referring to, are these
6 individual workstations?
7 A Yes. We have five tables there.
8 Q All right. But do all employees work on all five
9 work tables or are they just assigned to one?
10 A No. They're rotated around depending on what task
11 they have at that time. The product is placed --
12 it's in a package (Inaudible) after it's cut, after
13 it's wrapped and being labelled and scaled. They're
14 all working at different tables.
15 Q Well, if you lowered the level of those tables,
16 would that have any impact on the other employees
17 being able to perform their jobs?
18 A The height of the table is about standard from the
19 company. And that's figured to be the height that
20 the average employee can work over comfortably
21 without having a problem.
22 Q Would you be concerned about any ergonomic problem
23 if you were to lower the heights of the table?
24 A Yes. From the fellow -- the other employees in
25 that area.

1 Q All right. Have you gone and gotten any estimates
2 as to what would be the cost of installing a
3 bathroom facility?
4 A You'd have to start with one of the issues that was
5 brought up to my attention. And I had a contractor
6 come and also include some electrical, get an
7 estimate of about 47,000.
8 Q $47,000, would that have been a minimum or a
9 maximum?
10 A That would be minimum, because they'd have to
11 replace some doorways to widen it up to get in
12 there and have a proper turn space. It's not a
13 matter of just opening up once you start. You have
14 to go to state specs.
15 Q What's involved in cleaning up in the wholesale
16 department? What kind of hoses and equipment are
17 utilized?
18 A When they first start out, they'll take off the --
19 they'll take the bigger pieces of the cheese off
20 the weighting tables. Then they'll scrub them
21 down. And the last -- they also have smaller
22 equipment that they can take over to the sink and
23 wash. And then the last thing they'll do is spray
24 the floors down and scrub them if needed.
25 Q With what?

1 A A steam hose, a water hose. You regulate it by a
2 mixation and temperatures on that range of 200
3 degrees if you don't adjust it correctly.
4 Q Okay. Now, with respect to -- is there some sort
5 of wash solution that persons have to go through in
6 order to enter the factory; is that correct?
7 A Yes. It's called a quick bath. There's a number
8 of containers that we have of probably a foot and a
9 half by two and a half feet -- no, two feet by
10 three feet. We've got a little bit bigger one.
11 Q All right. And what is contained? What kind of a
12 solvent is contained --
13 A It's a solution. It's a 200 parts chlorine
14 solution.
15 Q Is that --
16 A It's corrosive. It will eat up rubber. The rubber
17 that's on the mats is specially made so they won't
18 dissolve with the chlorine. They will attack
19 aluminum. You'll get stains.
20 Q Okay. What department do you come from from the
21 employee locker room when you leave the employee
22 locker room to get to the wholesale department?
23 A You go through the packaging department.
24 Q And is that -- is that suitable for the -- for a
25 wheelchair to get through?

1 A The package room is actually a hallway. That part
2 of the building was built back in the '40s. The
3 size of the equipment that's in there now, you can
4 walk through there.
5 At times when they're actually running
6 it, when they have pallets sitting down in there
7 and they're packaging product, the walk space
8 narrows. If a person's going to take anything like
9 a two-wheel cart or anything like that, they have
10 to stop and move stuff out of the way to get
11 through.
12 Q Now, there's been some testimony with respect to
13 loading of -- not semi trucks but pickup trucks
14 with cheese to take to the retail store. Were you
15 here during that testimony?
16 A Yes.
17 Q And I believe the testimony was that this took
18 place usually around Christmas time or most often;
19 is that correct?
20 A That's correct.
21 Q What was your observation with how frequently this
22 might take place?
23 A Christmas time, yes, was the major time on that.
24 It depends on what the cheese house ordered and
25 what had to be moved up in that department.

1 Sometimes the product was also received and vaced
2 and had to go up to the cheese house. The moral of
3 the company was as the wholesale company grew, more
4 product usually went out on trucks. The four-wheel
5 cart was the most common.
6 Q And any of the four persons that were employed in
7 the wholesale department be expected to push and
8 pull the four-wheel cart?
9 A Sometimes if they go -- you'd have three of the
10 people holding on to the -- so at any given time it
11 was anyone that was able to do it.
12 Q Who did the hiring and firing for the facility?
13 A That was my responsibility.
14 Q Had you ever received a request from Catlin to come
15 back to work?
16 A I never received anything, no.
17 Q Was she aware of the fact that was company policy
18 (Inaudible)?
19 A Um --
20 Q Did you ever fire her? Did you ever do anything to
21 terminate her?
22 A I did this (Inaudible) that she was ever discharge
23 but was not, done by me.
24 MR. GROISS: I have no further questions.
25 LAW JUDGE: Cross-examine?

1 MS. MURPHY: (Inaudible.)
2 CROSS-EXAMINATION
3 BY MS. MURPHY:
4 Q Mr. Groiss asked you a question about whether it
5 would be practical to have a job position where the
6 person did none of the physical work in the
7 wholesale department; do you recall that question?
8 A Yes.
9 Q When you responded to that question, what were you
10 including in the term "physical work"?
11 A Maybe paperwork or light duty if I had somebody
12 that would be there -- had a workman's comp or
13 something like that when they asked, can they do
14 light duty. That's what I consider not as
15 physical.
16 Q Okay. What about labelling, the weighing and
17 packaging? Is that physical work?
18 A Physical in the sense if you do it for five minutes
19 or physical in the sense that you do it for an
20 eight-hour shift makes a difference.
21 Q Well, what if you do it all day long?
22 A I consider that a physical job, yes.
23 Q Okay. And what about wrapping the cheese and
24 putting it in the cryovac; is that physical work?
25 A That's physical work, correct.

1 Q And what about taking the grocery store cheese out
2 of the cooler and bringing it out for wrapping; is
3 that physical work?
4 A That's physical work.
5 Q Correct. You're including all of that in your
6 terms -- in your definition of physical work,
7 correct?
8 MR. GROISS: Mr. Robertson, you have to
9 say yes or no.
10 THE WITNESS: Yes.
11 LAW JUDGE: Thank you.
12 MR. GROISS: I'm sorry.
13 LAW JUDGE: No, I missed it. Thank you.
14 BY MS. MURPHY:
15 Q (Inaudible) than different size work tables in the
16 wholesale department; isn't that correct?
17 A That's correct.
18 Q And of the those tables, only two of them have
19 under shelves -- under -- underneath storage
20 shelves, correct?
21 A Yes, that's correct.
22 Q And there's three of them that don't have storage
23 underneath, correct?
24 A One is the narrow one up against the wall, and two
25 of the other ones don't, that's correct.

1 Q And some of those tables actually have been even
2 lowered at some point, have they not?
3 A Yeah.
4 Q Now, you talked about an estimate you got in terms
5 of installing a bathroom. Is that installing a
6 totally new bathroom or remodeling an existing
7 bathroom?
8 A You can't remodel an existing bathroom because once
9 you open it up, you have to go to the codes, the
10 turn around spaces.
11 Q Do you know what it would take to make a bathroom
12 accessible for Miss Catlin?
13 A Without looking at what's recommended and what
14 codes are, no.
15 Q You don't know what her particular needs are as far
16 as accessibility for a bathroom are?
17 A At this time I was told to have some bathrooms made
18 up.
19 Q Do you have any (Inaudible) in the cheese store?
20 A No.
21 Q What is the gross revenue of Crystal Lake?
22 A I can't answer that.
23 Q You talk about this bath that (Inaudible). And it
24 has a solution in it?
25 A That's correct.

1 Q People put their feet in that every day, do they
2 not?
3 A Yeah, their boots are.
4 Q And what are those boots made out of?
5 A They're made out of Neoprene, a special blend of
6 rubber that doesn't break down as fast after the
7 chemicals.
8 Q Do you know what the wheels of Miss Catlin's
9 wheelchair has?
10 A It could be the same stuff.
11 Q All right.
12 MS. MURPHY: Nothing further.
13 LAW JUDGE: Mr. Groiss, anything else?
14 MR. GROISS: I don't think so, no.
15 LAW JUDGE: Thank you, you're excused.
16 Any other witnesses?
17 MR. GROISS: We -- I think I'll just call
18 one -- I hate to call him shortly. It sounds
19 insulting.
20 LAW JUDGE: He won't be long on.
21 MR. GROISS: Thomas Messicci. Tom, would
22 you state your --
23 THOMAS MESSICCI, called for examination
24 herein, having been first duly sworn, was examined
25 and testified as follows:

1 LAW JUDGE: State your full name, please,
2 and spell your last name for the record.
3 THE WITNESS: Thomas Ross Messicci,
4 M-E-S-S-I-C-C-I.
5 LAW JUDGE: Thank you. Mr. Groiss.
6 DIRECT EXAMINATION
7 BY MR. GROISS:
8 Q Please tell me what your job is, Tom?
9 A I'm the office manager controller.
10 Q At where?
11 A Crystal Lake Cheese Factory.
12 Q And how long have you held that position?
13 A I've been employed there since 1979 basically.
14 Q Your responsibilities include administering some of
15 the employee benefit programs?
16 A Yes.
17 Q Was there ever a time when you were approached by
18 Carol Winger with respect to disability payments
19 for Ms. Catlin?
20 A Yes.
21 Q Approximately when did that take place?
22 A I guess shortly after her accident.
23 Q And tell us about how this came about? What
24 occurred?
25 A They made a request --

1 Q When you say "they"?
2 A Punky did and I believe Carol Elfers did as well.
3 Q What did they make? They made a request to who and
4 how?
5 A Well, they didn't understand because she didn't
6 have work and she needed income. And so we had a
7 disability, a long-term disability policy in place.
8 So we made an application for that.
9 Q Okay. And who did you have your discussion with
10 concerning that disability insurance policy?
11 A Again, that was Punky. And she had more access to
12 the office, so.
13 MR. GROISS: I have no further questions.
14 LAW JUDGE: Any cross?
15 CROSS-EXAMINATION
16 BY MS. MURPHY:
17 Q Mr. Messicci, do you make it a policy to discuss
18 confidential medical matters with employees who are
19 not directly involved?
20 A She was directed by her sister.
21 Q How did you know that?
22 A Because it was confirmed by her mother.
23 Q Did she sign any kind of release?
24 A Nothing that I'm aware of.
25 MS. MURPHY: Nothing further.

1 MR. GROISS: I have nothing further.
2 LAW JUDGE: That's it? Oh, okay. Thank
3 you.
4 MR. GROISS: We have no further
5 witnesses, your Honor.
6 MS. MURPHY: (Inaudible.)
7 LAW JUDGE: Okay. Let's go off the
8 record for that.
9 (Discussion held off the record.)
10 LAW JUDGE: Okay. Neither party has
11 anything else?
12 MR. GROISS: No, sir.
13 MS. MURPHY: I have nothing.
14 LAW JUDGE: Okay. This hearing is
15 closed.
16
17
18
19
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24
25

1 STATE OF WISCONSIN)
2) SS:
3 COUNTY OF MILWAUKEE)
4
5
6 I, JESSICA R. WAACK, a Registered
7 Professional Reporter and Notary Public in and for the
8 State of Wisconsin, do hereby state that the above
9 transcription of the audio cassette from the hearing
10 held on the 25th day of January, 2000, and reduced to
11 writing under my personal direction to the best of my
12 ability.
13 In witness whereof I have hereunder set
14 my hand this 14th of February, 2000.
15
16
17 _____
Notary Public
18 In and for the State of Wisconsin
19 My Commission Expires: October 21, 2001.
20
21
22
23
24
25

Tommy G. Thompson
Governor

Linda Stewart
Secretary

J. Sheehan Donoghue
Division Administrator

EQUAL RIGHTS DIVISION
Equal Rights - Milwaukee Office
819 No Sixth St Rm 255
Milwaukee WI 53203-1687
Telephone: (414) 227-4384
FAX: (414) 227-4084
TDD: (414) 227-4081
(TDD-Hearing Impaired Callers)

State of Wisconsin
Department of Workforce Development

NOTICE OF COMPLAINT - EEOC TO PROCESS INITIALLY

March 18, 1998

CRYSTAL LAKE CHEESE FACTORY
1858 HWY 63
COMSTOCK WI 54826
Respondent

RE: ERD Case No. 199800991
EEOC Case No. 260980562

To Whom It May Concern:

The enclosed charge of discrimination filed with the Federal Equal Employment Opportunity Commission (EEOC) has also been filed with the State of Wisconsin Equal Rights Division (ERD). The ERD and EEOC have a work sharing agreement which covers the processing of complaints of discrimination that are prohibited under both federal law and the Wisconsin Fair Employment Law. The work sharing agreement specifies that the agency which originally receives the complaint will process it first. Therefore, the ERD will take no action pending EEOC's processing of this complaint.

If either party disagrees with EEOC's final decision, you may within 30 days of the date of their disposition request in writing that an independent investigation of the complaint be done by ERD. Failure to file this request in a timely manner will cause the ERD to dismiss the complaint.

The Department of Workforce Development does not discriminate on the basis of disability in the provision of services or in employment. If you need this printed material interpreted or in a different form, or if you need assistance in using this service, please contact us.

cc: Complainant
EEOC

Enclosure

ERD-7087-MLD-E (R. 07/96)

EXHIBIT
Jt. Ex. 1

E d Employment Opportunity Commissi

DISMISSAL AND NOTICE OF RIGHTS

To:	From:
Ms. Susan C. Catlin	US EEOC - Milwaukee District Office
P.O. Box 515	310 W. Wisconsin Avenue, Suite 800
Turtle Lake, WI 54889	Milwaukee, WI 53203-2292

[ ] *On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 CFR § 1601.7(a))*

Charge No. 260-98-0562 FEPA No. 0000	EEOC Representative Sherald Washington, Enforcement Manager	Telephone No. (414) 297-1111

(See the additional information attached to this form.)

YOUR CHARGE IS DISMISSED FOR THE FOLLOWING REASON:

[ ] The facts you allege fail to state a claim under any of the statutes enforced by the Commission.

[ ] Respondent employs less than the required number of employees.

[ ] Your charge was not timely filed with the Commission, *i.e.*, you waited too long after the date(s) of the discrimination you alleged to file your charge. Because it was filed outside the time limit prescribed by law, the Commission cannot investigate your allegations.

[ ] You failed to provide requested information, failed or refused to appear or to be available for necessary interviews/conferences, or otherwise refused to cooperate to the extent that the Commission has been unable to resolve your charge. You have had more than 30 days in which to respond to our final written request.

[ ] The Commission has made reasonable efforts to locate you and has been unable to do so. You have had at least 30 days in which to respond to a notice sent to your last know address.

[ ] The respondent has made a reasonable settlement offer which affords full relief for the harm you alleged. At least 30 days have expired since you received actual notice of this settlement offer.

[x] The Commission issues the following determination: Based upon the Commission's investigation, the Commission is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

[ ] Other *(briefly state)* _____

– NOTICE OF SUIT RIGHTS –

[x] **Title VII and/or the Americans with Disabilities Act:** This will be your only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit must be filed **WITHIN 90 DAYS** of your receipt of this Notice; otherwise, your right to sue based on this charge will be lost. (The time limit for filing suit based on a state claim may be different.)

[ ] **Age Discrimination in Employment Act:** This will be your only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit must be filed **WITHIN 90 DAYS** of your receipt of this Notice; otherwise, your right to sue based on this charge will be lost. (The time limit for filing suit based on a state claim may be different.)

[ ] **Equal Pay Act (EPA):** EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that back pay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.

If you file suit based on this charge, please send a copy of your court complaint to this office.

I certify that this notice was mailed on the date set out below.

APR 27 1998
(Date Mailed)

On behalf of the Commission

Chester V. Bailey, District Director

Enclosures
Information Sheet
Copy of Charge

cc: Respondent

EXHIBIT
Jt. Ex. 2

EEOC Form 161 (Rev 01/97)

Tommy Thompson
Governor

Linda Stewart
Secretary

J. Sheehan Donoghue
Division Administrator

EQUAL RIGHTS DIVISION
Equal Rights - Milwaukee
819 No Sixth Street Rm 255
Milwaukee WI 53203-1687
Telephone: (414) 227-4384
FAX: (414) 227-4084
TDD: (414) 227-4081
(TDD-Hearing Impaired Callers)

State of Wisconsin
Department of Workforce Development

JUN 15 1998

NOTICE OF DISMISSAL - INVESTIGATION

SUSAN C CATLIN
P O BOX 515
TURTLE LAKE WI 54889
Complainant

vs.

CRYSTAL LAKE CHEESE FACTORY
1858 HWY 63
COMSTOCK WI 54826
Respondent

APPROVED
JUN 17 1998
PER

Re: ERD Case No. 199800991

This complaint has been dismissed because we have accepted the U.S. Equal Employment Opportunity Commission's final action.

Section Chief
Civil Rights Investigation Unit

ERD-7087-MLD-E (R. 07/96)

EXHIBIT
Jt. Ex. 3

Tommy G. Thompson
Governor

Linda Stewart
Secretary

J. Sheehan Donoghue
Division Administrator

State of Wisconsin

EQUAL RIGHTS DIVISION
819 N. Sixth Street, Rm. 255
Milwaukee, WI 53203-1687
Telephone: (414) 227-4384
Fax: (414) 227-4084
TTY: (414) 227-4081
http://www.dwd.state.wi.us/

Department of Workforce Development

July 21, 1998

Susan C Catlin
PO Box 515
Turtle Lake WI 54889

RE: ERD Case No. 199800991

Dear MS. Catlin:

Your charge of discrimination was dismissed on June 15,1998. The dismissal was an error. The dismissal is here by rescinded. Your charge of discrimination will be processed in accordance with the Wisconsin Fair Employment law. You will receive a notice from the Department informing you of the riame of the investigator assigned to the investigation of your charge.

Sincerely,

Johnny Kimble Jr.
Section Chief of Investigation,
Civil Rights Bureau

cc: Respondent
Monica Murphy, Atty for Complainant

ERD-7067-MLD-E (R. 10/97)

EXHIBIT
Jt. Ex. 6

EXHIBIT

Comp. 2

Employee Evaluation Form

	1 Unsatisfactory	2 Below Ave	3 Average	4 Above Average
ATTITUDE				✓
PRODUCTIVITY work performance				✓
APPEARANCE personal hygiene			✓	
RELIABILITY attendance			✓	
ENTHUSIASM				✓
RELATIONS WITH OTHERS				✓

General Comments Has done a good job with taking over a full dept. with little or no training. Good leader qualities Good communication skills. A real asset to our team!!!

Areas for Improvement Come to management with suggestions and or problems. Don't listen to other employee's comments that can effect your position.

Goals To over see all whole sale dept. needs including setting up orders, cheese production, delegate tasks and cross train staff

Date 9-15-95

Score 20½ / 24 possible

% Score 82 / 100% possible

Employee Name Sue Catlin

Review Type: Performance Appraisal _____ Merit Appraisal ✓ 30 day .50

Reviewer(s): PhO

Employee Signature Susan Catlin **Reviewer Signature** PhiO Robertson

JEFFREY A. ANNIS
Client Services Coordinator
Rehabilitation Engineering Technologist
Assistive Technology and Assessment Center
Menomonie, Wisconsin

EDUCATION

B.S.	**University of Wisconsin-Stout**
Major	Vocational Rehabilitation
M.S.	**University of Wisconsin-Stout**
Major	Vocational Evaluation

PROFESSIONAL EXPERIENCE

1986 to Present	**Rehabilitation Engineering Technologist** **Coordinator of Client Services** Center for Rehabilitation Technology University of Wisconsin-Stout Menomonie, Wisconsin
1975 to 1986	**Vocational Evaluator** Vocational Development Center University of Wisconsin-Stout Menomonie, Wisconsin

ESSENTIAL JOB FUNCTIONS

- Client Services Assessment
- Accommodation Recommendations
- Job Restructuring/Modification
- Design, Prototype, and Fabrication of Adaptive Equipment
- Ergonomics/Human Factors Design
- Vocational Evaluation
- Supervision of Student Plan "B"
- Guest Lecture University Classes

PRESENTATIONS

- Rehabilitation Technology
- Avoiding Repetitive Trauma
- Body Dynamics/Mechanics
- Adaptive Equipment Design and Fabrication

PUBLICATIONS AND PENDING PATENTS

"A Strategy for Assessing the Effectiveness of Job Modification", International Conference on Rehabilitation Engineering, 1984.

Seat insert, prototype developed to assist individuals with lower back disabilities, formal patent application pending.

Elevating chair, prototype developed to assist individuals with accessing workstations, assist in transfers, and assist individuals to attain a standing position. Patent application pending.

Voice activated linear motion workstation.

EXHIBIT
Comp. 5

University of Wisconsin-Stout
Menomonie, Wisconsin 54751-0790

Assistive Technology and Assessment Center
Stout Vocational Rehabilitation Institute
College of Human Development
(715) 232-2248 voice/TTY (715) 232-5008 fax

October 28, 1999

Ms. Monica Murphy
Wisconsin Coalition for Advocacy
2040 West Wisconsin Avenue, Suite 678
Milwaukee, WI 53233

Re: Susan Catlin

Dear Ms. Murphy:

This assessment was requested in regards to Susan Catlin, who was a previous employee of Crystal Lake Cheese Factory, Box 36, Comstock, Wisconsin 54826. She was employed from August 15, 1995 to November 2, 1996. She was involved in a car accident and they indicated that she was not able to return to work because she was in a wheelchair. Susan, at this point, indicated she felt she could return to work. We had done some prior assessments with Susan and she was looking forward to returning to this position.

Wisconsin Coalition of Advocacy called me to do a quick assessment of the job site and make an indication as to whether or not she could have been able to return to this employment site. It should be noted that an assessment of this site was already completed by the insurance company, who made an indication, through a job analysis, that employment in this area may not have been appropriate.

One of the issues that arises now is that the position Susan was in is no longer available. All the people in that position have left, taken different jobs, or transferred to a different plant. They currently now do smaller packaging out of a different plant, while there are still two people who handle some of the overload.

My initial contact person was Tony Curella, who is the president of the company. Tom Messicci, who is the office manager, was also involved in the final meeting. Tony Curella was the one who took me through the plant and showed me all the different job areas that were required of Susan's old position.

EXHIBIT
Comp. 6

It was noted Susan was a lead person in that position and he had nothing but high regards and respect for Susan in terms of her overall job skill, her attendance, personality, and her ability to work with people and do the job effectively. This was all prior to her accident.

The parking area is gravel and has many pot holes. This is primarily due to the large milk trucks that travel that area. She would have to look at some alternative parking and see if she could come in the front doors. Possibly there was a door in the back that I wasn't aware of that might be more appropriate. If she does use the parking lot where most of the other employees park, she needs to go up a slight grade, get onto a paved sidewalk area, and then in front of some bulk tanks where the area is fairly narrow and typically cluttered with hoses. The entrance area threshold has a three-inch lip, which would have to be modified. The door measures 25-1/2 inches, which is very narrow. She'll be able to get through, but it is going to be very tight. In entering the plant, the first area we looked at was the changing area/locker area. The locker room was about four feet wide in between the lockers so there would be no possibility of doing a turn around. She would have to go straight in and be able to back out. The bathroom was also inaccessible, however, this is not an apparent need of Susan's at this point. There is also a sanitizer area to go through before going into the main plant. It is a cupped area in a plastic frame which you step into to sanitize your feet. This would have to be changed to allow her to roll over this with her wheelchair, as well as making sure she gets full sanitation of her wheels.

The primary work area required working with 5-pound loafs, 10-pound slabs, and 40-pound blocks of cheese. This cheese is repackaged for wholesale. These packages are placed on shelves and some of these are 7-feet high. There are rolling ladders to climb and retrieve the packages. Obviously, Susan is not going to be able to retrieve these 40-pound blocks of cheese from that area. In the actual work area, most of the cutting, packaging, shrink wrapping, sealing, and marking are done on tables that are 33-1/2 inches high. These tables are too high for Susan and will need to be accommodated. These tables are typically set up to work in a standing position. Susan would also need to do some activity in the cooler. She'll have difficulty pulling into the cooler, reaching the racks, utilizing the hand trucks, and utilizing the palletized jacks. Most of these are areas in which there may be difficulty in accommodation.

In regards to wholesale packaging, we would need to change the table height. We would also have to look at different ways of operating the cutter, as well as lifting 40-pound blocks. On the cryovac machine, the handles to reach are approximately 47 inches high. Susan would be able to reach these but would have difficulty maneuvering through that area in her wheelchair and loading.

As far as I can see, the only opportunity Susan would have had to return to that position is if there would have been numerous accommodations put in place. The easier option would be to make modifications to her job description so she would be required, as a lead person, to only do the paper work, final packaging, and filling out invoices, receipts, and packing lists. This appeared to be a viable solution and one that was strongly recommended. However, the president, as well as Mr. Messicci, indicated that they were unable to modify those job descriptions to accommodate Susan's needs. It was also noted that Susan's mother and sister worked in that department. When talking with Susan, she indicated that in most cases there

would be someone around to do the heavier things that she wouldn't be able to accomplish. Again, however, it was this company's decision that their lead persons are required, in all cases, to be able to handle all aspects of the job. The primary purpose of this is to handle overloads, help when people are either sick or on vacation, and be able to handle these emergencies when necessary. Therefore, they were not at all interested in the possibility of modifying this job description to better fit Susan's needs.

The president indicated Susan was a very good employee. Her attendance was always good and appropriate and he has written her a positive letter of reference.

Again, at this point, I was just looking at this job position as a quick means to identify whether or not accommodations would have been necessary. As indicated, there are accommodations. They could have been put in place, however, the big thing was to look at modifying the job description to place her in a position that was less physical and more of a clerical nature, which was not acceptable.

Sincerely,

Jeffrey Annis/tw

Jeffrey Annis
Rehabilitation Technologist

JA:tw

Crystal Lake Cheese Factory
Box 36
Comstock, WI 54826

Wholesale Pack Department

1 General & Basic Skills

2 Mastery of Above
Mastery of one or more special areas

3 Mastery of Above
Cross training in all areas
One or more area(s) responsibility
Ordering
Inventory
Some maintenance
Some People Skills
Some Problem Solving

4 Mastery of above
Mastery & Proficiency in all areas
Scheduling
Ordering
Problem Solving
Strong People skills
QA
HACCP
Maintenance
Lead Person

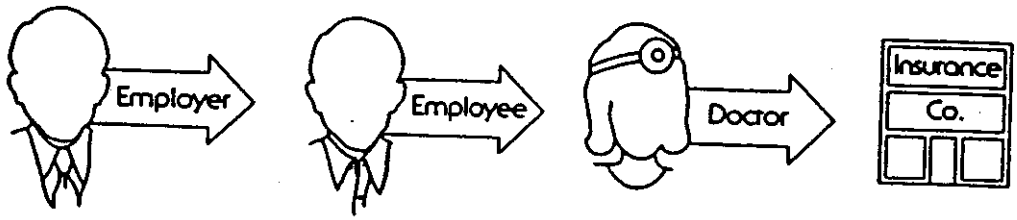
** Competancies are not limited to the specific class, i.e. common sense, doing the right thing, doing what is reasonable in a given situation is the expectation.

INTERNAL OFFICE USE ONLY

EXHIBIT
Comp. 7

Fortis Benefits
Insurance Company

Group
Long Term Disability
CLAIM STATEMENT



Please read the following instructions carefully for proper completion of the attached Long Term Disability Claim Statement. If this statement is not fully completed, the Claim Statement will be returned for completion.

Do not separate the pages of this Claim Statement. Additional physician's statements may be obtained from your Regional Benefit Center, or by copying the physician's statement included in this statement. Attach any additional physician's statements to the Claim Statement.

After the Employer Section has been fully completed, forward the entire statement to the claimant for completion of the Claimant Statement. If the claimant has returned to work, or if the claim is for pregnancy, Part 2 of the Claimant's Statement does not need to be completed. After the Employer and Claimant Statements are fully completed, forward the entire statement to the attending physician(s) for completion of the Physician's Statement. This must be the physician(s) who rendered treatment at the onset of this disability.

To avoid unnecessary delays, be sure all parts of the Claim Statement are completed according to the instructions, and DO NOT SEPARATE the pages.

EXHIBIT
Resp. 1

Fortis Benefits

Long Term Disability Claim Statement

Employer Claim Statement—Part 1
Please Print or Type

New Claim ☒ Yes ☐ No

1. Name of Employer: Clara Belle, INC.
2. Group Policy/Participation #: 74883 #3
3. Account #:
4. Full Name of Claimant: Susan C. Catlin
5. Social Security #: 388-72-0563
6. Date Employed: 8-14-95
7. Effective Date: 10-1-95
8. Date Last Worked: 11-2-96
   Number of Hours Worked That Day: 9.75
9. Work schedule of claimant at time of Disability: 5 Days per week 8 Hours per day
10. Was claimant a member of a union at the time of disability? ☐ Yes ☒ No
11. Was plan effective when disability began? ☒ Yes ☐ No
    If "No", please indicate date of termination.
12. Was claimant covered under your prior LTD plan? ☐ Yes ☐ No N/A
    Effective date under prior plan _____
    Termination date under prior plan _____
13. Does claimant have any other coverage(s) with Fortis Benefits? ☐ Yes ☒ No If "Yes", please advise of the type of coverage(s).
14. Has Claimant Returned to Work? ☐ Yes ☒ No If "Yes", on what date:
    _____ With Restrictions _____ Full Capacity
15. Current Work Schedule of Claimant?
    _____ Day per week _____ Hours per day
16. Have you and the claimant discussed reasonable accommodations which would allow a return to work? ☐ Yes ☒ No
    If "Yes", please explain.
17. Basic Monthly Earnings (as defined in Policy)
    1996 YTD MONTHLY AVERAGE 1373/mo
    October 1996 payroll (2) 1429
18. How is Claimant Paid?
    ☒ Hourly ☐ Salaried ☐ Salary + Bonus ☐ Salary + Commission ☐ Commission Only ☐ Other _____
19. Does claimant contribute towards the cost of this LTD insurance? ☐ Yes ☒ No
    If "Yes", what is the % paid by: _____ % Claimant 100% Employer
20. Are claimant premium contributions made under Section 125 of the Internal Revenue Code? (i.e. a Cafeteria Plan paid with pre-tax dollars)
    ☐ Yes ☒ No
21. Is there any reason why FICA should not be withheld from the claimant's benefits? ☐ Yes ☒ No If "Yes", please explain.
22. Did this disability occur as a result of the claimant's employment? ☐ Yes ☒ No ☐ Currently disputed
    If "Yes" or under dispute, please provide us with the policy #, name, address and phone # of worker's compensation administrator.
23. To the best of your knowledge, is the claimant receiving, or entitled to receive benefits from any of the following sources?
    ☐ Salary Continuance — Amount: _____ per _____ — From _____ To _____
    ☐ Workers Compensation — Weekly Benefit _____
    ☐ Retirement or Pension — Benefit Amount _____ — Effective Date _____
    ☐ Other _____ — Lump Sum Distribution? ☐ Yes ☐ No — Effective Date _____
24. Remarks:
25. Date 11-27-96
    By O. Thomas Messicci
    Authorized Signature/Title
    Fax No. (715) 822-8479
    Phone No. (715) 822-2437

DO NOT DETACH

Employer Claim Statement—Part 2
Physical/Non Physical Aspects o' b

Please complete this section of the claim statement to provide us with information concerning the physical/non physical demands of claimant's job.
Claimant's Occupation WD Packaging Dept Head
Signature/Title O Thomas Massieri cmk
Date 11-27-96

STAPLE YOUR OWN JOB DESCRIPTION HERE

Physical Requirements

1. In a typical work day, give the number of hours the claimant spends in each of these positions and if claimant may alternate positions:

Position	Total # of Hours	May Alternate Positions: At Will	15-30 mins.	Hourly	Never
Sitting	1	☒	☐	☐	☐
Standing	4	☒	☐	☐	☐
Walking	3	☒	☐	☐	☐
Driving		☐	☐	☐	☐

2.

Claimant Must	Never	Occasionally	Frequently	Continuously
A. Bend/Stoop	☐	☐	☒	☐
B. Climb	☐	☒	☐	☐
C. Reach above shoulder level	☐	☒	☐	☐
D. Kneel	☐	☒	☐	☐
E. Balance	☐	☒	☐	☐
F. Push/Pull	☐	☐	☒	☐
G. Squat	☐	☒	☐	☐
H. Crawl	☒	☐	☐	☐
I. Crouch	☐	☒	☐	☐

3.

Claimant Must	Never	Occasionally	Frequently	Continuously
Lift: Usual Amt. 10 lbs.	☐	☐	☒	☐
Maximum Amt. 45 lbs.	☐	☒	☐	☐
Carry: Usual Amt. 10 lbs.	☐	☐	☒	☐
Maximum Amt. 45 lbs.	☐	☒	☐	☐

4. On the job, claimant uses feet for repetitive movements as in operating foot controls.
Right ☐ Yes ☒ No Left ☐ Yes ☒ No Both ☐ Yes ☒ No

5. On the job, claimant uses hands for repetitive action such as

	Simple Grasping	Firm Grasping	Fine Manipulation
A. Right	☒	☒	☒
B. Left	☒	☒	☒

6. Does job require
A. Working at heights? ☒ Yes ☐ No
B. Exposure to marked changes in temperature and humidity or extremes thereof? ☒ Yes ☐ No
C. Exposure to dust, fumes, gases, chemicals? ☒ Yes ☐ No

Stress/Non Physical

1. Percentage of time claimant spends answering customer complaints. 0 %
2. Percentage of claimant's work primarily judged on production. 50 %
3. Does this claimant depend upon the assistance of others in order to accomplish his/her daily tasks?
☒ Yes ☐ No 80 % of time
4. How many employees does this claimant supervise? 3
5. Is this claimant routinely subject to close supervision? ☒ Yes ☐ No
6. Percentage of time spent by the claimant working with his/her co-workers. 80 %
7. Percentage of claimant's time is spent on: 90 % Prescheduled Activities
10 % Random Activities
8. Percentage of time claimant spends meeting deadlines set by others. 90 %
9. Percentage of responsibility the claimant has for the performance of his/her particular department. 90 %

DO NOT DETACH

Claimant Statement—Part 1 Please Print or Type

Section I

1. Full Name	2. Social Security No.	3. Date of Birth
Susan Catlin	388-72-0563	3/4/59

4. Address (city, state, zip code)	5. Home Phone No.
P.O. 515 261 17th Ave Turtle Lake	(715) 357-3831

6. Sex ☐ Male ☒ Female

7. Marital Status ☐ Single ☐ Married ☐ Separated ☐ Widowed ☒ Divorced

8. Names and birthdates of spouse and all dependent children under age 18.	9. Occupation
Devin Catlin 11/12/84	Supervisor

Section II

1. Nature of illness and when symptoms first appeared, or describe how and where accident occurred.
Auto accident

2. Date first unable to work because of this disability.
11/5/96

3. Have you returned to work? ☐ Yes ☒ No If "Yes", on what date: _____ Part-time _____ Full-time

If you have not returned to work, on what date do you expect to return to work: _____ Part-time _____ Full-time

X 4. Please provide the names and addresses of all physicians who have been consulted for this condition. Please include dates of consultation.

Name	Address	Dates of consultation: First Visit	Last Visit
Cassius Ellis, MD	North Memorial Health Care 3300 Oakdale Ave N. Robbinsdale, MN 55422	11-3-1996	unable
James Burdick, MD			
Charles Horowitz, MD			
Gregory Lyste, M.D			
Amit Chandra, M.D			
AIAN BEAL, MD			
MARK AHRENDT, MD			

5. If you have been hospital confined for this disability, please provide name and address of hospital and confinement dates.

Name of Hospital	Address	From	To

Section III

1. Check if you are receiving or entitled to receive benefits from any of the following sources:
- ☐ Salary, Wages, or Commissions
- ☐ State Disability
- ☐ Worker's Compensation
- ☐ Retirement or pension plan
- ☐ Social Security Disability
- ☐ Social Security Retirement
- ☐ Railroad Retirement Act
- ☐ Other sources

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For each source marked above, please provide us with the following information:

Source	Amount of Income: Amount	Amount of Income: Frequency	Date Application Filed	Benefit Effective Date

Provide documentation of any source indicated above; i.e. award notices, denial notices, or applications

2. Do you have medical insurance? ☒ Yes ☐ No Policy #, name, address and phone # of medical plan administrator.
Plan number - N 5360-756
Principal Mutual Life Ins. Co. Regional Claim Center Lincoln Center I Ste 340 2448 So. 102 ND St. / West Allis, WI. 53227 phone No. 800-247-4695

Please indicate type of coverage provided (check all that apply):
☒ Employer Group ☐ COBRA ☐ Conversion ☐ Individual ☐ Spouse ☐ Government ☐ Other (specify) _____

Section IV

I authorize any provider of medical services, insurance company, consumer reporting agency, Social Security Administration, governmental agency, educational institute, law enforcement agency, or employer having medical information with respect to any physical or mental condition, rehabilitation and other non-medical information of me to give to Fortis Benefits Insurance Company, or its representative, any and all such information. I **UNDERSTAND** the information obtained by use of this Authorization will be used by Fortis Benefits Insurance Company to determine the eligibility for benefits. I know that a photographic copy of this authorization shall be as valid as the original. I agree this Authorization shall be valid for the duration of the claim.

If I receive a disability benefit greater than that which I should have been paid, I understand this insurance Company has the right to recover such overpayments from me, including the rights to reduce or adjust future benefits, if any.

Any person who knowingly and with intent to defraud any insurance company or other person files an application for insurance or statement of claim containing any materially false information or conceals for the purpose of misleading, information concerning any fact material thereto commits a fraudulent insurance act, which is a crime and subjects such person to criminal and civil penalties.

Signature of Claimant Susan Catlin Date 11-27-

DO NOT DETACH

Fortis Benefits

Attending Physician's I ial Statement of Disability

The patient must pay any costs for completion of this form.

To the Attending Physician
Please read the following instructions before completing this form.

Do not separate the pages of this claim statement. An authorization to release information can be found in Part 1 of the Claimant's Statement.

Clearly print or type this form. Fully complete each applicable section of this form. Review the attached Job Description and Training, Education and Experience sections before completing the reverse side of this form. The Job Description is Part 2 of the Employer's Claim Statement, and the Training, Education, and Experience section is Part 2 of the Claimant's Statement.

Sign and date this form after completion. Also, clearly print or type your name, address, and phone number in the spaces provided. If applicable, include your fax number.

After you have completed this form, return the entire claim statement to the patient.

Name of Patient	Date of Birth	Social Security #
Susan Catlin	3/4/59	388-72-0563

History

Patient's symptoms result from *(check all that apply)* ☐ Employment ☐ Illness

☒ Auto accident *(state in which accident occurred)* _____ ☐ Other accident

☐ Pregnancy *(expected/actual delivery date)* __/__/__ Type of delivery _____

Date symptoms first appeared 11/3/96 Patient's height _____ Weight _____

First visit for this condition 11/3/96 Most recent visit __/__/__ Most recent comprehensive exam seeing patient daily in hospital __/__/__

Frequency: ☐ Weekly ☐ Monthly ☐ Other *(specify)* Daily in hospital

Name(s) and address(es) of other treating or referring physician(s)
North Memorial Health Care
3300 Oakdale Ave North
Robbinsdale, MN 55422

James Burdine MARKAHRENDT
Charles Henowitz
Gregory Dyste
Amit Chandra
ALAN BEAL

Hospital name North Memorial HealthCARE Confinement dates 11/3/96 thru undetermined __/__/__

Diagnoses

Diagnoses *(including any complications)*
MVA-hypothermia/C6-7 Quadrapelegia
pancreatitis
ARDS
acalculus cholecystitis
resp. failure
DIC

Subjective symptoms

Objective findings *(include results/copies of x-rays, lab tests, EKGs, MRIs, and scans)*

Attach medical records as appropriate.

Treatment

Describe treatment program, including any surgery, medications, *(give dates)* physical therapy, or psychotherapy.
p̄ rewarming with CPB - she was evaluated a found to have a C6-7 fracture with quadrapelegia - Experienced multiple complications as a result of the hypothermia and C-fracture. Multiple Bronchoscopy - Surgical spinal stabilization - Cholecystectomy - Transfer to Rehab 11/29

Psychiatric Impairment

Complete only if applicable.
☐ Class 1—Patient is able to function under stress and engage in interpersonal relations *(no limitations)*.
☐ Class 2—Patient is able to function in most stress situations and engage in only limited interpersonal relations *(slight limitations)*.
☐ Class 3—Patient is able to engage in only limited stress situations and engage in only limited interpersonal relations *(moderate limitations)*.
☐ Class 4—Patient is unable to engage in stress situations or engage in interpersonal relations *(marked limitations)*.
☐ Class 5—Patient has significant loss of psychologic, physiological, personal, and social adjustment *(severe limitations)*.
☐ Remarks

What stress and problems in interpersonal relations has patient had on the job?

Do you believe a legal guardian or conservator should be appointed for this patient? ☐ Yes ☐ No

DO NOT DETACH

Physical Impairment

☐ Class 1—No limitation; capable [illegible] heavy work*—exert 50–100# occasionally and/or 25–50# force frequently . . . . . No restrictions (0-10%)
☐ Class 2—Medium activity*—exert occasional 20–50# force and/or 10 to 25# force frequently . . . . . (15-30%)
☐ Class 3—Slight limitation; capable of light work*—exert occasional 20# force and/or up to 10# force frequently . . . . . (35-55%)
☐ Class 4—Moderate limitation; capable of sedentary*, clerical or administrative work—occasional 10# of force, mostly sitting . . . . . (60-70%)
☒ Class 5—Severe limitation; incapable of minimal activity or sedentary* work . . . . . (75-100%)
☐ bed confined ☐ house confined
☐ Remarks

*As defined in the Federal Dictionary of Occupational Titles

C-6-7 quadraplegic - Gross movement upper extremities - no movement lower extremities

Cardiac

Functional Capacity (American Heart Association) **Complete only if applicable.**
☐ Class 1 *(No limitation)* ☐ Class 2 *(Slight limitation)* ☐ Class 3 *(Marked limitation)* ☐ Class 4 *(Complete limitation)*

Blood pressure *(latest reading)* ____/____ as of *(date)* ____/____/____
Is patient in a cardiac rehabilitation program? ☐ Yes ☐ No

Work Capabilities

DOCTOR: Check if you have reviewed the: ☐ Job Description ☐ Training, Education & Experience

Please describe fully how patient's symptoms/limitations affect ability to work, e.g. how are work schedule or duties restricted and why?

This is yet to be determined - Will have a better idea p rehabilitation

When did these limitations apply? Began 11/13/96 Ended undetermined

When would you anticipate a reduction of symptoms? undetermined / / . Will more than likely not regain movement of legs

Prognosis

Prognosis ☐ Terminal ☐ Poor ☐ Good ☐ Excellent

Would any further therapy be reasonably expected to result in full or partial recovery?
☒ Yes *(Describe below)* When after inpatient Rehab ☐ No ☐ Unknown
outpatient PT, OT

Has patient reached maximum medical improvement? ☐ Yes ☒ No If "No" when _____ ☒ Unknown

Rehab

Is patient a candidate for rehabilitation services? ☒ Yes *(describe)* ☐ No *(explain)*

Would job modification enable patient to work with impairment? ☒ Yes *(describe)* ☐ No

Would vocational counseling and/or retraining be recommended? ☒ Yes *(suggestions)* ☐ No

Name

Physician's name J. Kevin Croston
Street address 3300 Oakdale Ave. N. Robbinsdale, MN 55422
CITY STATE ZIP CODE
Degree/Specialty M.D.
Telephone no. (612) 520-7647 Fax no. (612) 520-1022
Signature Kevin Croston MD Date 11-30-96
DO NOT PRE-DATE
PHYSICIAN'S EIN OR SSN

DO NOT DETACH

KC3283A (6/95)

DATE: 9/30/97
CLAIMANT: JOB ANALYSIS

PROGRESS REPORT

[redacted]

I received a request from Mr. Messicci, Office Manager of Crystal Lakes Cheese, to arrange for a Job Analysis to be completed at the plant in Comstock, WI. There was a question in regard to if a person in a wheelchair would be able to do the essential functions of the supervisor position for a wholesale pack department. I met with Mr. Curella on September 26, 1997, and had the opportunity to walk through the plant at that time. I was able to observe the wholesale packing department as well as the areas this person would be required to operate within.

Upon reviewing the position as well as my discussion with Mr. Curella and the current wholesale packing department manager, it was indicated that the supervisor is responsible for the people in the department as well as being able to work in all of the positions as well as providing stock, pulling inventory, making boxes, assist in loading product on to a semi truck on a weekly basis, monitoring inventory, and preparing the daily count.

[redacted]

In reviewing the position as Supervisor, it is a fast paced position in which a person would need to have the ability to pull inventory from the cooler and provide it into their wholesale packing area. The inventory of cheese weighs approximately 40 pounds which needs to be brought from the cooler area into the working area. This is approximately 50 to 75 feet, depending on which area. The cheese is put on shelving which ranges up to 8 feet in height. In order to reach the cheese, you would need to climb a ladder to get the different inventory. In discussing the possibility of keeping all the cheese at a low level, it is not practical due to the amount of inventory they need to keep on hand.

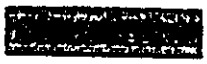
In reviewing the job description for the wholesale pack department, the Supervisor needs to know all the positions in her department, as well as scheduling, ordering, problem solving, quality assurance, as well as being cross trained in another area. It is the Supervisor's role to make sure that all aspects of the area are able to be done. They currently supervisor 4 people on this shift. Each person has a particular job they are doing and should they not come in, the Supervisor would be required to do that particular position. This may include cutting various sizes, stocking, sealing the cheese in vacuum bags, moving the fork lift full of product, as well as moving the racks of cheese. These racks of cheese are on wheels and two people typically need to move them due to the weight involved. The pallets also weigh 2000 pounds and it needs to be pushed and pulled into the storage room and then are wrapped and ready for shipping.

In regard to the heights of the working areas, there are tables with 36 inches with room under them while the bag back sealer machine is at 40 inches. It will be difficult for a wheelchair to sit straight on and operate this particular machine as they would have to reach in to put the inventory

EXHIBIT
Resp. 3

in, seal the bag, then close it and remove the inventory upon the bags being sealed. This is a task the Supervisor may have to do at a given time. There is also two times a week the Supervisor assists in moving product from the store room to the store which is connected to the plant. This entails moving it by semi to the front and assisting with the process of getting it into the store.

The Supervisor also monitors inventory as well as actually making up boxes for the product to be put into. They are located approximately 50 feet from the work area.



Based on the review of the work area as well as the discussion with Mr. Curella regarding the duties of the Supervisor and their ability to have to fill in on all positions within the wholesale pack department, that it would not be a position which they could make reasonable accommodations for a person in a wheelchair. The major factors in limiting a person in a wheelchair would be the ability to do all of the positions which is an essential function of the supervisory position. This is not to say a person in a wheelchair could not do a particular job within the department but would not be able to do all of the positions as is required of a Supervisor. This is a small department with a total of 4 people. Each person is required to do a particular task and the Supervisor needs to know all those tasks and able to fill in if someone does not come in. They do not have the ability to have people on standby due to the size of the company. According to Mr. Curella the size of the company is under 50 people at this time. In reviewing the position, I saw no permanent modifications that could be provided on the job to accommodate a person in a wheelchair for the supervisory position.

Therefore, the essential function which would most hamper a person in a wheelchair would be that the Supervisor is required to know all aspects of the job and is able to fill in when people are unable to. It would also be difficult for the wheelchair person to pull stock and inventory due to the weights and heights of their storage containers and cooling unit.

I am basing this on the information that was provided to me by Mr. Curella as well as my review of the position on September 26, 1997. If you have any questions or need any additional information, please do not hesitate to contact me.

David Johnson, MS, CRC, CCM
Case Management Consultant

DJ:el

GENEX Services, Inc.
1711 County Road B Suite 112S
Roseville, MN 55113
612-631-0235 fax: 612-631-1215

GENEX

JOB ANALYSIS

N: Never = 0%
R: Rarely = less than 1%
O: Occasional = 1-33% of workday
F: Frequent = 34-66% of workday
C: Constant = 67-100% of workday

Job Title: Wholesale Pack Department Supervisor
Company Name: Crystal Lake Cheese
Address: PO Box 36 Cornstock WI 54826
Evaluator: David Johnson MS CRC CCM
Title: Case Management Consultant

EE Name:
Claim #:
Date of Hire:
Performed With: Anthony Turella
Company Representative
Title: President

Job Summary General Description:
Supervising staff of 4 in wholesale pack Dept. Has to have ability to work all positions, obtain inventory, set up work area, monitor and maintain production level and assist as needed.

Training Requirements: On-the-job

Types of Machines, Tools, Vehicles or Moving Equipment as Part of the Job: Vacuum-packed Bag Sealer and Fork Truck

Materials and Products Handled: Blocks of cheese

Physical Demands:
Note: The following activities were rated for frequency based upon the following:

(In an average 8 hour day, first shift, and breaks _____ with estimated OT that varies)

	N	R	O	F	C	Comments:
Standing				X		Surface Concrete floor
Walking				X		Distance up to @ 100 yards
Sitting			X			Type of chair/seat Breaks/Lunch

Lifting	N	R	O	F	C	Comments:
Up to 10 lbs.					X	
Up to 20 lbs.			X			
Up to 30 lbs.			X			
Up to 50 lbs.			X			Max wgt 35 to 42 lbs Block of Cheese. Most frequent wgt under 5 lbs.
Up to 75 lbs.						
Up to 100 + lbs.						
Bulky objects						

Carrying	N	R	O	F	C	Comments:
Up to 10 lbs.					X	
Up to 20 lbs.			X			
Up to 30 lbs.			X			
Up to 50 lbs.			X			Max wgt carried again 35 to 42 lb Block of Cheese
Up to 75 lbs.						Most wgt carried less than 5 ft. occas distance
Up to 100 + lbs.						up to @ 50 ft.
Bulky objects						

Work aids available to assist with lifting/carrying: Fork truck

N: Never = 0%
R: Rarely = less than 1%
O: Occasional = 1-33% of workday
F: Frequent = 34-66% of workday
C: Constant = 67-100% of workday

Pushing/Pulling	N	R	O	F	C	Comments:
Up to 10 lbs.						(Activities, objects,
Up to 20 lbs.						distances, etc.)
Up to 30 lbs.						
Up to 50 lbs.						
Up to 75 lbs.						
Up to 100 + lbs.			X			Fork truck with Boxed cheese, distance @ 10ft

Climbing	N	R	O	F	C	Comments:
Ladders			X			(Heights, etc.) 1. up to 8ft (Roll ladder used to
Stairs			X			obtain cheese from shelves)
Other						2. to attend meetings in office

	N	R	O	F	C	Comments:
Balancing		X				when climbing
Bending/stooping			X			

Twisting/Turning	N	R	O	F	C	Static	Flexed	Rotating	Comments:
Of head/neck			X			X	X		
Of back			X			X	X	X	

	N	R	O	F	C	Comments:
Kneeling		X				
Crouching			X			
Crawling	X					

Reaching	N	R	O	F	C	Comments:
Above shoulder/ overhead			X			
At shoulder level			X			
At waist level				X		
Below waist level			X			

Extremity Use	N	R	O	F	C	Right	Left	Both	Comments: Hand dominance L R (circle one)
Gross handling					X			X	
Fingering/fine manipulation				X					
Pinching		X							
Grasping (forceful/repetitive)			X						
Hi-speed work					X				
Use of pneumatic/ power tools			X						Vacuum bag sealer

N: Never = 0%
R: Rarely = less than 1%
O: Occasional = 1-33% of workday
F: Frequent = 34-66% of workday
C: Constant = 67-100% of workday

Hand dominance: Right Left

Hand/wrist Positions	N	R	O	F	C	Comments:
Neutral				X		
Flexion				X		
Radial deviation			X			
Ulnar deviation			X			
Rotation				X		

Coordination	N	R	O	F	C	Comments:
Foot/pedal			X			Fork Truck
Driving	X					
Hand controls			X			Fork Truck

Environmental Conditions	Check those that apply		Comments:
Indoors	X	95 %	
Outdoors	X	5 %	make 2 loads of cheese deliveries to Store area

Temperatures	Check those that apply	Comments:
Cold	X	
Hot	X	
Humidity	X	
Dampness	X	

	Check those that apply	Comments:
Work on or with complex or moving machinery	X	
Work at unprotected heights NA		
Uneven surfaces	X	
Slippery surfaces	X	
Exposure to dust, fumes, gases NA		
Noise	X	
Vibration	X	
Chemcial exposure NA		
Other hazards NA		

Sensory/ Perceptual	N	R	O	F	C	Comments:
Tasting			X			
Smelling			X			
Hearing						
Vision					X	
- Near vision					X	
- Distant vision					X	
- Accommodation					X	
- Depth perception					X	
- Color vision					X	
- Field of vision					X	

N: Never = 0%
R: Rarely = less than 1%
O: Occasional = 1-33% of workday
F: Frequent = 34-66% of workday
C: Constant = 67-100% of workday

Cognition/ Communication/ Social	N	R	O	F	C	Comments:
Reading			X			
Writing			X			
Measuring			X			
Calculating			X			
Problem-solving			X			
Planning			X			
Supervision			X			
- Receive			X			
- Provide				X		
Speaking				X		
- In person				X		
- Phone						NA
- Public						NA
Work with others					X	
Work alone			X			

Safety Equipment Required:

Temporary Alternative Duty (TAD):
Options/Possibilities:

Can job be modified permanently:_____

Comments:

David C Johnson / 9-26-97 Comments:
Employee Signature Date

_____ / _____ Comments:
Employer Signature Date

_____ / _____ Comments:

Physician Signature Date

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * * * * * * * * * * * * *

CECIL HARRIS,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case Nos. 84-0109-PC-ER
85-0115-PC-ER

* * * * * * * * * * * * * * * *

DECISION
AND
ORDER

NATURE OF THE CASE

These charges of discrimination on the basis of age, handicap, and retaliation were consolidated for hearing. Complainant charges that respondent harassed him in an attempt to pressure him to retire before age 65 and that respondent denied him accommodation for his handicap (back problem). He also asserts that he was harassed in retaliation for having filed his first charge with the Commission.

An initial determination entered April 23, 1986, made the following determinations as to probable cause:

> 4. There is probable cause to believe that complainant was discriminated against on the basis of age and handicap in regard to respondent's failure to accommodate him in the course of his employment resulting in complainant's constructive discharge.
>
> 5. There is no probable cause to believe that complainant was discriminated against on the basis of retaliation in regard to the terms and conditions of his employment or his resulting termination.

A hearing was held on May 19-21, 1987, on the following stipulated issues:

85-0115-PC-ER
Whether there is probable cause to believe respondent discriminated against complainant on the basis of retaliation with respect to harassment resulting in a forced resignation/constructive discharge.

84-0109-PC-ER
Whether respondent discriminated against complainant on the basis of age and handicap with respect to failure to accommodate, and whether there was any resulting forced resignation/constructive discharge.

Following the hearing, a briefing schedule was established. Briefing was interrupted by respondent's filing on July 17, 1987, of a motion for a stay of proceedings. This motion was grounded on complainant having filed a complaint in federal court under the Age Discrimination in Employment Act (ADEA) (29 USC 3621 et. seq.) and the provision at 29 USC 633 that "upon commencement of action under this chapter such action shall supercede any state action." On August 18, 1987, the examiner entered an order granting the motion in part and staying so much of No. 84-0109-PC-ER "as involves a claim of age discrimination under §§111.325, 11.33, Stats." during the pendency of the federal proceeding, and resuming the posthearing briefing process on the matters remaining before the Commission. Accordingly, this decision does not address the age discrimination portion of this matter. The briefing schedule was completed on October 6, 1987.

FINDINGS OF FACT

1. Complainant at all relevant times was employed by respondent in the classified civil service at Lincoln Hills School (LHS), a juvenile correctional facility in the Division of Corrections (DOC), until his retirement effective January 3, 1985.

2. Complainant was employed as a Youth Counselor 5 (YC 5) shift supervisor. As a YC 5, he supervised employes classified at the YC 1, 2 and 3 levels. He was required to respond to emergencies that occurred

during his shift and frequently had to get physically involved in breaking up fights and subduing violent students. Complainant suffered many back injuries over the years as a result of his involvement in these occurrences, most recently approximately six times between January 1984 and his retirement.

3. Complainant had a back condition consisting of mild to moderate arthritis in the lumbar spine which was aggravated by the intense physical activity typically associated with his involvement in restraining students. This pattern gradually became worse in the last few years of complainant's employment at LHS, and his back problems were frequently associated with bouts of myositis and muscle spasms of moderately severe nature in the lumbo-dorsal muscle of the low back. Complainant's back problems would usually respond positively to a few days of rest and sometimes physiotherapy. As a result of complainant's condition and his relatively frequent involvement in violent incidents with students, he frequently had to take sick leave during the last few years of his employment at LHS.

4. In March, 1984, the YC 5 who had been handling the scheduling duties moved to the night shift. This assignment (scheduling duties) primarily involved administrative tasks and there was much less involvement in subduing confrontative students than with regular shift supervisor work. Complainant and several other YC 5's expressed an interest in this assignment to Kenneth Miller, the Residential Care Director, who had the authority to decide who would get these duties. Management considered this a reassignment of duties as opposed to a transfer of employes between positions. No formal civil service process was used to effect the transaction.

5. Mr. Miller explained the position to complainant and also had him discuss the nature of the job with Ms. Smick in the LHS personnel office.

Both stressed the point that the job involved a lot of "detail work" and impending computerization. They did so because they believed that complainant was neither particularly good at nor particularly liked this kind of work, and they wanted to be sure he was aware of what was involved with this position.

6. Complainant had a second conversation with Mr. Miller, who offered complainant the assignment. After giving the matter further consideration, complainant subsequently declined the offer, and YC 5 Jack Swope was given it. This occurred in March or April, 1984.

7. Approximately contemporaneously with the foregoing transactions, complainant remarked to certain rank and file YC's that he was disappointed he did not get the assignment, and also remarked to Ms. Ellenbecker, the LHS personnel manager, and Mr. Swope, that he was not interested in the assignment.

8. There was a greater likelihood of disturbances and risk of injury on the second shift than on the first shift. Notwithstanding this, complainant preferred to work the second shift and frequently would arrange to switch to the second shift when he had been assigned to the first shift. This preference was based at least in part on the greater independence of the second shift due to the fact that most of the higher level administrators were not at the institution during the second shift.

9. On June 15, 1984, Ms. Meier, then security director, wrote the following letter to complainant:

> It has been brought to my attention that since the beginning of this year, you have been absent 26 days due to illness. This causes considerable hardship with other supervisors in that they must replace you during those days off. It is my feeling that at this time we will need from your physician a statement indicating whether or not you are physically able to perform the duties of a Youth Counselor 5. In particular, I am asking that your doctor address the following concerns.

YOUTH COUNSELOR 5 DUTIES OF CONCERN

Youth Counselor 5's must be prepared to intervene in combative situations.

May at times be required to do a considerable amount of walking.

Must be capable of handling heavy objects.

Is expected to respond to emergencies such as first aid, CPR, lifting a body, and getting students in and out of buildings.

Must have the ability to quickly retreat or physically restrain an assault by a student.

We cannot provide a Youth Counselor 5 with a safe (free from attack) environment and, in fact, the Youth Counselor 5 is responsible for responding to unsafe situations that arise. We are concerned about Mr. Harris' safety, the safety of students and other staff.

I hope this is not perceived by you as a reflection on your past performance as a Youth Counselor 5. However, we have a responsibility to be concerned for your welfare and the welfare of others.

Please have your physician forward this information to us by June 28, 1984. A copy of your position description is attached for your physician's review. Exhibit 21.

10. In a letter dated June 29, 1984, to Ms. Meier, Dr. Bigalow reported that in recent years complainant had been experiencing low back pain and discomfort after involvement in restraining students, but that it seemed that a day or two of rest and physiotherapy was sufficient for him to recover and return to work, and such arrangements were recommended whenever such low back pain should arise. Another possible alternative mentioned was early retirement. The concluding diagnosis was as follows:

> My impression of this man's illness is mild to moderate arthritis in the lumbar spine with intermittent bouts of myositis and muscle spasm of moderate severe nature involving the lumbo-dorsal muscle of the low back... Exhibit 62.

11. Dr. Bigalow referred complainant to Dr. Kranendonk, an orthopedic specialist. He prepared a report dated June 21, 1984, which was sent to LHS, and which included the following:

> He is not a surgical candidate. His x-rays look better than the average 63-year-old man. However, at age 63, as he describes his employment, it seems rather unrealistic that he would be able to fight and restrain young teenagers. He is a supervisor, and most of the time this does not have to be done. He does not describe his work as being heavy, otherwise.
>
> I feel that functioning in a supervisory capacity without the risk of physical violence is most appropriate for him. If he has to be put into a situation where physical restraint of young people is necessary, I can understand the reasons for his back pain. He does have what I would describe as mild-to-moderate arthritis in his lumbar spine.

12. Complainant returned to work and on June 25, 1984, wrenched his back while he was involved in subduing a student. He then took sick leave and returned to work on June 28 and 29, 1984. Complainant then took sick leave from July 1 to July 20, 1984, and vacation to July 28, 1984, when he returned to work.

13. In a July 19, 1984, report Dr. Kranendonk stated, in part, as follows:

> My dictation of June 21, 1984, is still pretty much my present feeling. He is not a surgical candidate. He does have arthritis in his back. However, his necessity to intermittently enforce physical restraints on young people is the reason for his present back problems. I am sure that it aggravated his pre-existing condition of mild to moderate arthritis. He is presently in a remission and would do well if he would not get into aggravative situations again. Exhibit 29.

14. Complainant subsequently returned to work on July 28, 1984 and continued at work through the date of his retirement. During this period he had one back injury which necessitated the use of about two days of sick leave.

15. During July 1984, complainant requested a temporary reassignment of about 30 days to a vacant represented YC 2 communications officer

position. Complainant felt that since this position was much less likely to be involved in restraining students than the shift supervisor position, it would enable him to recuperate from his back injury while continuing to work.

16. Respondent denied this request because such a reassignment would have violated the collective bargaining agreement. Respondent made no attempt to approach the union concerning a possible waiver of objection to such an action. Respondent noted that complainant could have voluntarily demoted into this position, but complainant declined this course of action.

17. Complainant filed his first charge of discrimination (Case No. 84-0109-PC-ER) with this Commission on August 22, 1984. Shortly therefore a copy of this document was served on respondent and was circulated among LHS management staff, including Ms. Ellenbecker.

18. In October 1984, complainant left his state retirement papers at the LHS personnel office to be filled out. It had been the policy in the LHS personnel office, for several years, pursuant to departmental directive, not to fill out retirement papers or to answer specific questions about retirement, but rather to refer them to the Department of Employe Trust Funds. However, through inadvertence nothing was said to complainant and the papers remained in the office without any action being taken. Twelve days after dropping off the papers, complainant picked them up and filled them out himself.

19. Complainant also requested of the LHS personnel office information concerning his health insurance after he retired. In response he was given information concerning his current health insurance program, which information was not responsive to his inquiry. This was due to inadvertence or miscommunication.

20. Complainant had made arrangements approximately a year previously to have Christmas Eve off as a vacation day. By memo of December 10, 1984 (Exhibit 26), Ms. Meier informed complainant that because he had exhausted all his vacation, holiday, and sick leave, he would not be able to take December 24, 1984, as a vacation day but would have to work.

21. After complainant objected to this, he was allowed to remain off on December 24, 1984, and this was recorded as leave without pay.

22. Respondent has provided a number of LHS employes with accommodations for handicaps. In 1984, YC 5 Warmke was severely injured on the job and had to take leave. At the request of his doctor and DVR counselor, LHS provided a back-up for Mr. Warmke when he returned to work as a shift supervisor. This arrangement lasted for two days before Mr. Warmke left and did not return.

23. During the last 2 or 3 years of his employment at LHS, complainant was frequently outspoken in criticism of LHS management with respect to staffing policies and other management policies.

CONCLUSIONS OF LAW

1. These matters are properly before the Commission pursuant to §230.45(1)(b), Stats.

2. Complainant has the burden of proof as to all matters except that respondent has the burden of proof as to the issue of whether there was a reasonable accommodation available with respect to complainant's handicap.

3. Complainant was a handicapped individual under §111.22(8), Stats.

4. The reassignment of scheduling duties to complainant was a reasonable accommodation under §111.34(1)(b), Stats.

5. Respondent did not refuse to reasonably accommodate complainant's handicap, and there was no resulting forced resignation or constructive discharge.

6. There is no probable cause to believe respondent retaliated against complainant for having filed his first charge of discrimination by harassing him, resulting in a forced resignation or constructive discharge.

DISCUSSION

84-0109-PC-ER

In light of the interim decision of August 18, 1987, staying the age discrimination part of this matter, the remaining part of the issue is as follows:

> Whether respondent discriminated against complainant on the basis of handicap with respect to failure to accommodate, and whether there was any resulting forced resignation/constructive discharge.

In a case involving an alleged failure to accommodate, the first question is whether the complainant was handicapped. The definition of handicap is set forth at §111.21(8), Stats., as follows:

> (8) "Handicapped individual" means an individual who:
> (a) Has a Physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;
> (b) Has a record of such an impairment; or
> (c) Is perceived as having such an impairment.

Respondent argues that complainant does not meet this definition because he "was handicapped only when injured. It was after he suffered an injury that his capacity to work was limited...." Respondent's brief, p. 20. Respondent cites particularly Dr. Kranendonk's statement in his June 21, 1984, report, Exhibit 29, that:

> His x-rays look better than the average 63-year-old man. However, at age 63, as he describes his employment, it seems rather unrealistic that he would be able to fight and restrain young teenagers....

If complainant had a normal back and were simply more prone to back muscle injury when involved in restraining students due to his age, as is implied in this letter, the Commission might agree with respondent that he was not handicapped under the FEA definition. However, this is not the entire medical evaluation. In his July 19, 1984, report, Dr. Kranendonk stated:

> ...his necessity to intermittently enforce physical restraints on young people is the reason for his present back problems. I am sure it aggravated his pre-existing condition of mild-to-moderate arthritis.... (emphasis added)

In his June 29, 1984, letter, Dr. Bigalow stated:

> ...x-ray studies reveal no unusual bony changes in this man's low back. The suggestion was however that it would appear to be a mild to moderate arthrities [sic] in the lumbar spine. In view of these observations, it is again quite understandable that this man should have occasional low-back discomfort following involvements in restraining actions with teenagers.... (Exhibit 62).

Therefore, it can be concluded that complainant's lumbar spine arthritis was a causal factor with respect to his back problems which frequently occurred after physical exertion restraining students.

Turning to the definition set forth at §111.21(8)(a), Stats., it may be said that complainant has a "physical... impairment" -- i.e., lumbar spine arthritis -- which "limits the capacity to work" -- i.e., the impairment is a causal factor with respect to his back injuries and his resultant inability to be at work.

These facts also fit within the analytical framework provided by La Crosse Police Comm. v. LIRC, 139 Wis. 2d 740, 741 (1987). The Court held that to establish that a particular physical condition constitutes a handicap, complainant must first show there is an impairment by showing there is "a real or perceived lessening or deterioration of damage to a normal bodily function or bodily condition...." This element is satisfied

by complainant's showing he has arthritis of the lumbar spine. The second element (as applicable here) requires that complainant establish that the impairment "limits the capacity to work" at the particular job in question. This is satisfied here because of the causative role complainant's lumbar spine arthritis plays in his back injuries and subsequent absences from work.

Section 111.34(1)(b), Stats., provides that employment discrimination because of handicap includes:

> Refusing to reasonably accommodate an employe's or prospective employe's handicap unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise or business.

The only accommodations suggested by complainant's physicians involved either changes in his job requirements that would eliminate the necessity to physically restrain students, or the allowance of time for recuperation:

> I feel that functioning in a supervisory capacity without the risk of physical violence is most appropriate for him.... June 21, 1984, report by Dr. Kranendonk, Exhibit 29.
>
> * * *
>
> ...following these occurrences, if his complaint of low-back discomfort should arise, arrangements should be available whereby Mr. Harris can obtain a day or two of rest with physiotherapy prior to returning to work... a possibility would be consideration of early retirement.... Letter of June 29, 1984, by Dr. Bigalow, Exhibit 62.
>
> * * *
>
> He is presently in a remission and would do well if he would not get into aggravative situations again. Report dated July 19, 1984, by Dr. Kranendonk, Exhibit 28.

In his posthearing brief, complainant contends that respondent could and should have accommodated him by giving him the YC 5 Scheduling Officer position, which would have substantially reduced the risk of getting physically involved with combative students. In its posthearing brief, respondent argues that the duty of accommodation under the FEA does not

require an employer to reassign job duties or transfer employes, and thus there was no obligation to have offered him the scheduling job.

Resolution of this question is not without difficulty. The FEA does not define accommodation. Section 11.34(1)(b), Stats., merely provides that handicap discrimination in employment includes:

> Refusing to reasonably accommodate an employe's or prospective employe's handicap unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, business or enterprise.

Given the lack of definition and ambiguity as to the meaning of "accommodate" in §111.34(1)(b), Stats., it is appropriate to resort to extrinsic aids to statutory construction.

Therefore, it is appropriate to consider statutory provisions which are <u>in pari materia</u>:

> Sections and acts in pari materia, and all parts thereof, should be construed together and compared to each other. Because the object of the rule is to ascertain and carry into effect the legislative intent, it proceeds upon the supposition that the several statutes were governed by one spirit and policy, and were intended to be consistent and harmonious in their several parts and provisions. Under this rule, each statute or section is construed in the light of, with reference to, or in connection with, other statutes or sections.... 73 Am Jur 2d STATUTES §188.

Section 111.34(2)(a), Stats., provides that it is not unlawful to discriminate on the basis of handicap if:

> ...the handicap is reasonably related to the individual's ability to adequately undertake the <u>job-related responsibilities of that individual's</u> employment, membership or licensure. (emphasis added)

In other words, if an employe's capability to perform his or her job-related responsibilities are sufficiently impaired by the handicap, the employer will not be liable for its discrimination. The following subsection, §111.34(2)(b), Stats., requires that the employe's capabilities be

evaluated on a case-by-case basis, and refers specifically to the employe's capability to perform his or her job:

> In evaluating whether a handicapped individual can adequately undertake the job-related responsibilities of a particular job, membership or licensed activity, the present and future safety of the individual, of the individual's co-workers, and, if applicable, of the general public may be considered.... (emphasis added)

Therefore, a typical discrimination case will involve the following analysis:

1) Whether the complainant is a handicapped individual;

2) Whether the employer discriminated against complainant because of the handicap;

3) Whether the employer can avail itself of the exception to the proscription against handicap discrimination in employment set forth at §111.34(2)(a), Stats., -- i.e., whether the handicap is sufficiently related to the complainant's ability to adequately undertake the job-related responsibilities of his or her employment (this determination must be made in accordance with §111.34(2)(b), Stats., which requires a case-by-case evaluation of whether the complainant "can adequately undertake the job-related responsibilities of a particular job");

4) If the employer has succeeded in establishing its discrimination is covered by this exception, the final issue is whether the employer failed to reasonably accommodate the complainant's handicap. Now, it seems obvious that in the usual case[1] it never will be

---

[1] The instant case is different from the more usual case because here the employer did not discharge, refuse to hire, etc., complainant, who could perform the duties of his job when he was not on sick leave. The only theory of handicap discrimination operative here is failure of accommodation.

necessary to address the issue of handicap unless it has first been established that the exception set forth at §111.34(2)(a), Stats., is available. If the employer can not show that there was a reasonable relationship between the handicap and the duties of the complainant's job, it should not have discriminated against the complainant in the first instance. For example, in a hire case, it should have hired the complainant. Therefore, in such a case there would be no need to consider whether there was some accommodation that would have permitted the employment of the complainant notwithstanding his or her handicap. Again, at this third step that precedes consideration of accommodation, the focus according to §111.34(2), Stats., is on whether this particular complainant has the capability to perform the duties of the particular job held or sought. It would be anomalous at the fourth step to construe "accommodation" in a way that would result in consideration of a far broader type of inquiry -- not whether there is a reasonable accommodation that would permit the complainant to perform the particular duties of the job which it had just been determined he or she could not adequately expect to undertake because of his or her handicapping condition, but rather whether there was some reasonable accommodation that would permit the complainant to obtain or retain some form of employment with the employer through such means as job restructuring, transfer, or even creation of a new job. Such a construction would be inconsistent with the rest of the section.

A construction of accommodation in §111.34(1)(b), Stats., consistent with the remainder of §111.34, Stats., so that the employer's obligation is limited to the job-related responsibilities of the handicapped individual's employment vis-a-vis the particular job he or she occupies or for which he

or she is applying is also consistent with the rather limited case law that is available on the subject.

In Mc Fayden v. Madison EOC, Dane Co. Cir. Ct., No. 81CV3744 (11/15/82), the Court in construing the Madison ordinance on handicap discrimination which contains basically the same language as the state FEA held as follows:

> The EOC adopted the examiner's reasoning that with respect to a discharged handicapped employee, an employer must show that "the employee cannot with reasonable accommodation adequately undertake the job-related responsibilities of that individual's employment" -- but that "[t]he key phrase... is 'of that individual's employment.'" Id. at p. 12. The examiner concluded, and the EOC agreed, that this key phrase means that the employer's duty of reasonable accommodation applies only to the job in which the handicapped employee is actually employed. Id.
>
> I find this analysis of the language of the ordinance fair and reasonable. Further, I can find no reason in the relevant case law for disturbing it. As the examiner observed, the typical accommodation case involves assistance designed to enable an employee to carry out the duties of his or her particular position. The cases do not contemplate an employer developing a new position for the employee. The EOC's conclusions that no such duty exists under the ordinance and that UBS did not discriminate against plaintiff by failing to transfer him to a new job [for which he was not qualified] are therefore affirmed. (footnote omitted)

Federal cases under the Rehabilitation Act of 1973, 29 USC 701-796, must be read with some care because this law contains a requirement for affirmative action not found in the Wisconsin FEA. Furthermore, federal regulations issued under the act includes a more specific definition of reasonable accommodation which includes the following language, 29 C.F.R. §1613.704 (1982):

> (b) Reasonable accommodation may include, but shall not be limited to: (1) Making facilities readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified equipment or devices, appropriate adjustment or modification of

> examinations, the provision of readers and interpreters, and other similar actions.

However, the consensus of the federal court cases is that the requirement of accommodation is limited t the parameters of the employe's job.

For example, Bento v. ITO Corp., 36 FEP Cases 1031, 1041 (D.R.I. 1984), involved a longshoreman whose heart condition made heavy labor unsafe. The decision contained the following discussion:

> Plaintiff has also argued that ITO could have employed Bento, availing itself of his job skills and accommodating his disability, by hiring him in a light duty position. While the imperatives of the Rehabilitation Act require employers to make reasonable accommodations for an employee's disability... they do not obligate companies materially to rewrite job descriptions....
>
> The nub of the Rehabilitation Act in this wise is that the employer must make a reasonable good-faith effort to adjust its legitimate needs to a handicapping condition which does not fairly viewed, debar the putative employee from doing the job. It does not demand that an employer settle for a worker who cannot effectively perform essential functions of the position....

Also see Jasany v. U.S. Postal Service, 33 FEP Cases 1115, 1117 (N.D. Ohio 1983):

> The requirement of 'accommodation' refers to adjustments within the job for which the handicapped individual was hired. Accommodation does not include the requirement that the hiring agency create a new position or that other workers to perform [sic] the handicapped individual's duties....

Finally, in Rau v. UW-Milwaukee, Wis. Pers. Commn., No. 85-0050-PC-ER (2/5/87), the Commission held that the employer was not required to permanently assign some of the handicapped individual's work to other staff as an accommodation.

While the employer is not required to create a new job or transfer an employe to a completely different position as an accommodation, there is another line of cases which suggests that where the employer normally

exercises a degree of flexibility in assigning duties to employes, and in a particular case can do so without hardship, it may be required to do so as an accommodation.

In See v. Vollrath, Labor and Industry Review Commission (LIRC) (1979), the complainant was employed in the general labor group. Workers in this group were "assigned to work in various departments depending upon the availability of the work." He was discharged for refusing a permanent assignment to the Draw-Cote department because the work there involved bending and lifting which he was unable to perform due to a back problem. LIRC found the employer violated its duty of accommodation based in substantial part on the following finding:

> As a member of the general labor group, complainant had been assigned to various departments including shipping, the warehouse, and he had also been assigned to work with ground crew. These assignments all involved physical labor with which complainant had no difficulty. Respondent could have moved complainant to any job at its discretion. Respondent presented no evidence to show that no work was available for complainant besides work in the Draw-Cote department or that it could not have continued to utilize him as a member of the general labor group with the exception that he not be assigned to the Draw-Cote department.

In Cappell v. Consolidated Papers, Inc., LIRC No. 8301304 (12/18/84), affirmed, Consolidated Papers, Inc. v. LIRC, Court of Appeals, Dist. IV, No. 85-1384 (April 17, 1986) (unpublished decision), the employer declined to rehire into its labor pool an employe laid off when its Appleton division was closed down. The employe was a handicapped individual with a 60 pound lifting restriction due to a hernia. The employer had a requirement for rehiring of no physical restrictions. LIRC's conclusion that the employer had violated its duty of accommodation rested in large part on the following findings:

> The actual entry level position for a new hire without divisional seniority (which is what the rehired Appleton employes were deemed to be) is laborer in the labor pool. There is no particular job description for this position since what it involves is assignment on an as needed basis to any number of the many entry level positions in the respondent's many lines of occupational progression... Respondent could have rehired the complainant into a labor pool position and had him perform job functions within his physical capabilities without any significant disruption of the work assignment process.

This line of cases is also consistent with Jasany v. U.S. Postal Service, 33 FEP Cases 1115, 117 (N.D. Ohio 1983), cited above. Although the Court held that the employer was not required to create a new position or assign other employes to do the handicapped employe's work, the decision also included the following:

> Jasany asserts he could have been accommodated easily by being transferred to another position within the post office. Jasany's argument would be well-taken if he had been hired as a general postal employe to serve various functions within the post office. If that were the case, the USPS could easily accommodate Jasany by assigning him to duties other than operation of the LSM-ZMT machine. However, Jasany was employed specifically as a Distribution Clerk, Machine Trainee. Jasany was aware when he was hired permanently by the USPS that one of his primary duties would be the operation of the LSM-ZMT machine.

With respect to the instant case, the record establishes that one of the YC 5's was required to perform scheduling duties, and that management did not consider this transaction to be a transfer of an employe from one position to another, as defined at §ER-Pers 15.01, Wis. Adm. Code, but rather a reassignment of duties, Tr. 52. In other words, this duty could be assigned to any of the YC 5's, so long of course as the individual assigned had the capability of performing this task. Respondent did not contest that complainant had this capability. Furthermore, respondent did not contend there would have been any hardship involved in giving

complainant this job. At the time complainant pursued this assignment the employe who had been doing this work had moved to another assignment, and somebody had to pick up these duties. It was not a question of respondent having to "restructure" existing jobs or reshuffle employes' assignments. These circumstances bring this case much closer to the latter line of cases cited above, where employers were required to exercise flexibility that was readily available and that could be exercised without hardship in their personnel management. Therefore, the Commission concludes, based on the facts in this case, that respondent's duty of accommodation required it to offer complainant the scheduling assignment.

The record contains a sharp conflict between complainant and his supervisor (Mr. Miller) as to whether complainant was offered the scheduling assignment. It is the Commission's view that a preponderance of the evidence supports respondent's position -- i.e., that complainant was offered, but declined, this assignment. This conclusion is based primarily on the following factors:

1) Both Mr. Swope and Ms. Ellenbecker testified that complainant told them more or less contemporaneously with the event that he was not interested in being the scheduling officer. These would have been statements against his interest which support respondent's contention that complainant declined the job offer. While complainant has by no means acceded to these statements having been made, he did not deny that he made the statement to Mr. Swope.

2) When complainant filed his first charge of discrimination on August 22, 1984, which was shortly after this transaction, he never mentioned it. His second charge, filed July 23, 1985, does mention

the transaction but never specifically alleges that he was actually denied the job:

> During 1984 the position of Scheduling Officer became vacant. This would have been a good position for me as it would reduce my shift work to one week end a month. I applied for the position and was interviewed by Ken Miller. Miller did his best to discourage me and then set me up for an appointment with Rita Smick in the personnel dept. who continued to discourage me by pointing out the bad aspects of the position. According to Miller & Smick there were no good features of the position. I returned to Miller and said "You want to give this job to John Swope, don't you?" His reply was "yes". Swope was appointed to the job the next day. I possessed several years more of seniority than Swope.

3) While it can be argued that it would be unlikely that complainant would decline the job because of his need and desire for an accommodation, it must be remembered that complainant preferred to work the second shift and when assigned the first shift frequently would arrange to switch to the second shift, notwithstanding that there were more disturbances and risk of injury on the second shift than on the first shift. Complainant preferred to work more independently and with less interference from the higher level administrators who were not around on the second shift.

4) Even if complainant made the remarks to the rank and file YC's that he was disappointed at not getting the scheduling assignment, this is consistent with his feeling that respondent was trying to discourage him from taking the job and would have preferred to have given it to Mr. Swope -- i.e., he may have viewed management's actions as a constructive denial. Also, being generally at odds with management during this period, it is likely that he would be reluctant to characterize management in other than a negative manner.

Since the Commission finds that respondent did offer the scheduling assignment to complainant, it follows that there was no violation of the

FEA with respect to handicap accommodation, and no constructive discharge or forced resignation.

85-0115-PC-ER

The issue for hearing is:

> Whether there is probable cause to believe respondent discriminated against complainant on the basis of retaliation with respect to harassment resulting in a forced resignation/constructive discharge.

Complainant in his post-hearing brief cites the following matters:

1) The continuing failure to have reassigned complainant to the scheduling officer position;

2) The failure of the LHS personnel office to have processed his retirement papers after having held them for an extended period;

3) The fact that the LHS personnel office gave him information about his current health insurance benefits rather than what they would be after retirement, as he had requested;

4) The fact that he "lost the chance to have Christmas Eve scheduled as a day off even though he had asked for it one year previously."

In order to establish a prima facie case, complainant must establish that 1) he engaged in a protected activity, 2) his employer was aware of this, 3) he suffered an adverse employment action, and 4) there was some indication (such as a close proximity in time between 2) and 3)) of a causal connection between the protected activity and the adverse action.

Complainant has established a prima facie case as to each instance cited above except the last one. In point of fact, there was no adverse employment action because he was given that day off after he complained about the notice from management advising him that he would have to work

that date due to having used up all of his leave. While he was in leave without pay status on that date, this was inevitable given the prior exhaustion of his leave.[2]

As to the other matters, respondent has, articulated a legitimate, non-discriminatory rationale for each one, and there is no evidence of pretext.

As to the continuing failure to reassign complainant to scheduling officer, this is resolved by the finding that complainant had previously been offered the job but turned it down. There was no reason for respondent to have continued to pursue this with complainant over the next several months.

With respect to the retirement papers, respondent asserted that departmental policy precluded LHS from filling out these papers, and that the delay in informing complainant of this was due to inadvertence. There is no reason to think that this was not the case.

Finally, respondent contends that the health insurance information given complainant was the result of either miscommunication or inadvertence. There is nothing to suggest that this was not the case and that complainant was deliberately given the wrong information.

---

[2] Even if it were considered there was an adverse action against complainant, there is nothing to suggest that respondent's explanation for its action was pretextual.

ORDER

These charges of discrimination are dismissed except as to the allegation of age discrimination in Case No. 84-0109-PC-ER.

Dated: February 11, 1988

STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

AJT:jmf
JMF02/3

Parties:

Cecil O. Harris
904 West Street
Merrill, WI 54452

Tim Cullen
Secretary, DHSS
P. O. Box 7850
Madison, WI 53707

STATE OF WISCONSIN

IN SUPREME COURT

No. 02-0815

CRYSTAL LAKE CHEESE FACTORY,

Petitioner-Appellant-Petitioner,

v.

LABOR AND INDUSTRY REVIEW COMMISSION and SUSAN CATLIN,

Respondents-Respondents.

APPEAL FROM A DECISION OF THE COURT OF APPEALS, DISTRICT III, AFFIRMING AN ORDER OF THE CIRCUIT COURT FOR BARRON COUNTY, THE HONORABLE JAMES C. EATON, PRESIDING

BRIEF AND APPENDIX OF THE LABOR AND INDUSTRY REVIEW COMMISSION

PEGGY A. LAUTENSCHLAGER
Attorney General

DAVID C. RICE
Assistant Attorney General
State Bar #1014323

Attorneys for the Labor and Industry Review Commission

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-6823

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STATE OF WISCONSIN

IN SUPREME COURT

No. 02-0815

CRYSTAL LAKE CHEESE FACTORY,

Petitioner-Appellant-Petitioner,

v.

LABOR AND INDUSTRY REVIEW COMMISSION and SUSAN CATLIN,

Respondents-Respondents.

APPEAL FROM A DECISION OF THE COURT OF APPEALS, DISTRICT III, AFFIRMING AN ORDER OF THE CIRCUIT COURT FOR BARRON COUNTY, THE HONORABLE JAMES C. EATON, PRESIDING

BRIEF AND APPENDIX OF THE LABOR AND INDUSTRY REVIEW COMMISSION

ISSUES PRESENTED

(1) Could the Commission reasonably determine that Crystal Lake failed to reasonably accommodate Catlin's disability, and failed to prove that such a reasonable accommodation would impose a hardship on its business?

The court of appeals and the circuit court answered in the affirmative.

(2) Did the Commission deny Crystal Lake due process by failing to confer with the hearing examiner?

The court of appeals answered in the negative. The circuit court did not decide the issue.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Labor and Industry Review Commission believes that oral argument and publication of the court's opinion are warranted. The opinion will clarify an existing rule of law and it will decide a case of substantial and continuing public interest. *See* Wis. Stat. § 809.23(1)(a).

STATEMENT OF THE CASE

A. Nature of the case and disposition in the court of appeals and in the circuit court.

This is an appeal from a decision of the Court of Appeals, District III, dated October 8, 2002, *see Crystal Lake Cheese Factory v. Labor & Ind. Rev. Com'n*, 2002 WI App 290, 258 Wis. 2d 414, 654 N.W.2d 286 (A-App. 1-15), that affirmed an order of the circuit court for Barron County, the Honorable James C. Eaton, presiding, which was entered on February 7, 2002 (R. 15; A-App. 16-17), and which in turn affirmed a decision of the Commission under the Wisconsin Fair Employment Act (WFEA), *see* Wis. Stat. §§ 111.31-111.395 (R. 2; A-App. 18-28). The Commission decided that Crystal Lake Cheese Factory unlawfully discriminated against Susan Catlin because it failed to reasonably accommodate her disability and terminated her employment (R. 2; A-App. 18-28). The Commission ordered Crystal Lake to reinstate Catlin, provided that a position was currently available and that she was able to perform it with reasonable accommodations based upon her current needs (R. 2;

A-App. 22). The Commission also ordered Crystal Lake to pay her back pay plus interest and attorney's fees (R. 2; A-App. 23).

B. Procedural history of the case and statement of facts.

Susan Catlin was employed by Crystal Lake in August 1995 (Tr. 7, 86).[1] She worked as a lead worker/supervisor (or "department head") in the wholesale packing department, and she supervised three other workers (Tr. 10, 12, 16, 35-37, 86, 90). One of the other workers was Catlin's mother and one was her sister (Tr. 32-33).

Catlin would receive grocery store orders from the office, she would instruct the cutter to cut cheese into certain sizes, the "cryovacer" would bake and "cryovac" the cheese (seal the cheese in plastic bags using a machine), and Catlin then would weigh or scale the cheese, label and price the cheese, box the cheese, and place the cheese on a pallet that went into the cooler until it would be transported to a grocery store (Tr. 10-12, 14, 37, 42-47, 73-74, 109-111). Catlin also assisted in loading pickup trucks as part of her job, but that basically occurred only at Christmas time (Tr. 50-51, 67, 116).

Each of the other workers had a primary duty: cutting, cryovacing, or labeling (Tr. 12-13, 80-81). They were cross-trained, however, and would jump in and help if another worker got behind or was away from the department (Tr. 12, 14, 30-31, 50, 71-72, 74-75, 81, 111). The cutter took larger pieces of cheese from the cooler and cut it into smaller size pieces (Tr. 13, 45, 109).

[1] References are to the transcript of testimony and to the exhibits received at the hearing on Catlin's discrimination complaint that was conducted on January 25, 2000. The transcript and exhibits are identified as part 2 of the circuit court record and are appended to Crystal Lake's brief (R. 2; A-App. 33-179).

In November 1996, Catlin had a car accident and she was hospitalized for three months (Tr. 16). She was diagnosed as being a quadriplegic (Ex. R-1). Tony Curella, the owner of Crystal Lake, told Catlin that her "job was there no matter what" (Tr. 15-17, 51-52, 85, 87). In September of 1997, Catlin thought she was ready to return to work and she sought to speak with Curella by telephone (Tr. 20-21, 88). Curella never returned her telephone calls (Tr. 21-23, 88-89, 95).

In September 1997, Catlin was able to get around independently in a wheel chair and could lift things (Tr. 28). She was physically able to perform most of her duties: she could delegate, train, make boxes, make labels, bake cheese, scale, label and price cheese, box cheese and place it on the pallet, and do her inventory and paperwork (Tr. 29-30, 48-49, 71). She would have been able to work at the existing tables without any adjustments to the height of those tables (Tr. 44-45, 56). She would have been able to reach labels, if they were rolled up, with a reacher (Tr. 67). She no longer could bring 40 pound pieces of cheese from the cooler to be cut, or cut the cheese because the cheese cutter would have been to high on the table (Tr. 29, 39-40, 46-47). Although that was primarily the cutter's responsibility, in the past she had done it regularly and sometimes a couple of times a day (Tr. 29-30, 59-60). Catlin also could not climb a ladder to get cheese stored on higher shelves in the cooler, or to get boxes in the storeroom if they were stacked too high (Tr. 39-40, 43-44, 61, 82). Most of the cheese that Catlin worked with, however, was stored on the lower shelves of the cooler, and she could have received help in getting boxes because another employee was responsible for the boxes (Tr. 65-66). Catlin also could not have done the part of cryovacing that involved lifting a basket of bagged cheese into hot water (Tr. 48, 66).[2]

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[2] Catlin testified that it was never part ofCatlin's duties to load semi-trucks (Tr. 30). Carol Winger, Catlin's sister, testified that she sometimes did the work of departments other than the wholesale packing department, including loading semis (Tr. 73).

In September 1997, Catlin would not have needed a bathroom because she wore a leg bag and her bowel program was done at home (Tr. 55). In January 2000, however, when her discrimination complaint was heard, she would have required a bathroom if she were to return to work (Tr. 55). Catlin would have had to go through the sanitation room to get to the wholesale packing department, she would have had to wheel through a sanitizing solution, and she would have gotten the corrosive, chlorine solution on her hands (Tr. 56, 115). The threshold of the entrance area at Crystal Lake has a three-inch lip that would have to have been modified for Catlin to enter the plant in her wheelchair (Ex. C-6). The bathroom area was inaccessible to a person in a wheelchair (Ex. C-6). The sanitation area would also have to be modified (Ex. C-6).

Crystal Lake hired David Johnson, a case management consultant, to do an ergonomic analysis of Catlin's job (Tr. 90, 100; Ex. R-3). On September 30, 1997, Johnson reported to Crystal Lake, in writing, that it would not be possible to make reasonable accommodations for a person in a wheelchair to perform the department head position in the wholesale packaging department, primarily because it is an essential function of the department head position to be able to perform all aspects of the other three positions in the department, and to fill in for other workers (Tr. 92, 100-01; Ex. R-3).

Johnson never spoke to Catlin about her abilities or limitations (Tr. 23). No one from Crystal Lake ever gave Johnson any information about Catlin other than that she uses a wheelchair (Tr. 91). Crystal Lake never asked her for any kind of return-to-work report about her abilities or limitations, or for any kind of medical release (Tr. 23-24).

Jeffrey Annis, a rehabilitation technologist at the University of Wisconsin-Stout, analyzed Catlin's position and, on October 12, 1999, reported that **Catlin could have been accommodated if certain physical changes had**

been made in the workplace and if her job was modified so that she would not have been required to perform those physical aspects of her job that she no longer was able to perform (Ex. C-6). Crystal Lake was unwilling to make such accommodations, however, because it was Crystal Lake's position that department heads are required in all cases to be able to handle all aspects of the work in the department, in order to handle overloads or to help when other workers in the department are sick or absent (Tr. 94-95; Ex. C-6).

Phillip Robertson, Crystal Lake's operations manager, testified that it would not have been practical or possible if one of the four workers in the wholesale packaging department did none of the "physical" work, and Crystal Lake would have had to hire additional help (Tr. 111, 118). By "physical" work, Robertson meant to include labeling, weighing, packaging, wrapping cheese, placing cheese in the cryovac, and bringing grocery store cheese out of the cooler for wrapping (Tr. 118-119). Robertson also testified that the cheese could not be stored only on the lower shelves of the cooler because it would result in about an 80 percent reduction in capacity (Tr. 112). Robertson also testified that a person sitting in a wheelchair could not slide the wheelchair under the some of the tables, and would have to work sitting sideways (Tr. 112-13, 119-20). Robertson testified that a contractor gave him an estimate that it would cost a minimum of $47,000 to install a bathroom facility that would accommodate a wheelchair (Tr. 114, 120).

Catlin never requested that Crystal Lake make any accommodations, including work in a different position (Tr. 102-03). Curella testified that he "didn't make any effort whatsoever for what might be appropriate accommodations for [Catlin] to return to work" (Tr. 90). Crystal Lake did not consider her for any other positions than her former position because it believed that she could not have been accommodated in those other positions (Tr. 103).

In August 1998, when she received correspondence from Crystal Lake about her 401K retirement plan, Catlin first realized that Crystal Lake considered her employment terminated (Tr. 24-25; Ex. C-3). As of October 1999, Catlin's position no longer was available because the wholesale packing department was disbanded and the work was transferred to a different plant (Ex. C-6).

On March 12, 1998, Catlin filed a complaint alleging that Crystal Lake violated the WFEA by terminating her employment and by refusing to permit her to return to work because of her disability. On January 25, 2001, a hearing was conducted on Catlin's complaint by an examiner.[3]

On October 20, 2000, the examiner issued his decision (R. 2; A-App. 29-32). The examiner decided that Crystal Lake did not unlawfully discriminate against Catlin because of her disability and did not unreasonably refuse to accommodate her disability. The examiner concluded that there was no reasonable accommodation available which would have allowed Catlin to adequately undertake her job-related responsibilities. The examiner found that the employees in the wholesale packing department regularly had to assist each other to keep the work flowing smoothly and to cover for each other when temporary absences occurred (Finding No. 10), that Catlin was able to perform some, but not all, of the duties of each position in the wholesale packing department (Finding No. 11) and that to accommodate Catlin's disability would have required alteration of her duties and physical alterations of the department and the building, including the addition of a bathroom at a cost of $47,000 (Finding No. 13).

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[3] The WFEA refers to persons who hear and decide WFEA complaints as hearing "examiners" and not as "administrative law judges." *See* Wis. Stat. § 111.39(4); *Motola v. LIRC*, 219 Wis. 2d 588, 597 n. 8, 580 N.W.2d 297 (1998). Consistent with the statute, this brief will use the term "examiner."

On November 7, 2000, Catlin petitioned for review of the examiner's decision by the Labor and Industry Review Commission. On July 20, 2001, the Commission reversed the examiner's decision (R. 2; A-App. 18-28). The Commission did not consult with the examiner regarding the credibility of the witnesses because the Commission believed that its reversal of the examiner's decision was not based upon any differing assessment of witness credibility (R. 2; A-App. 27). The Commission decided Crystal Lake unlawfully discriminated against Catlin because of her disability.

The Commission found that when Catlin sought reinstatement, she was physically able to perform most of the jobs in the wholesale packing department (Finding No. 14), and she could not perform some of the heaviest physical tasks (Finding No. 15). The Commission determined that the refusal to modify Catlin's job duties to exempt her from performing the heavy physical tasks which were beyond her capabilities constituted the denial of reasonable accommodation which Crystal Lake could have provided without undue hardship (Finding No. 16).

The Commission also found that in order to perform her job duties, Catlin needed some physical modifications to the workplace (Findings Nos. 17-18). The Commission determined that Crystal Lake's refusal to make physical modifications constituted the denial of reasonable accommodation that Crystal Lake could have provided without under hardship (Finding No. 19).

In a memorandum opinion explaining its findings, the Commission stated in part:

> The commission has previously found that **it is reasonable to require an employer to restructure the physical demands of the job in order to accommodate a disabled employee, provided that this can be done without hardship to the employer.** *Fields v. Cardinal TG Co.*(LIRC, February 6, 2001). Here [Crystal Lake] has argued that relieving [Catlin] from having to perform some

of the tasks in the wholesale department would pose a hardship for it because it needs everyone in the department to be able to perform every duty in order to fill in when workers are absent or on vacation or when someone otherwise needs assistance. However, **while [Crystal Lake] might find it easiest to employ only workers who can perform every job function, the [WFEA] requires employers to make accommodations for disabled workers so long as they can reasonably do so without hardship to the business.** In this case, [Crystal Lake] has failed to demonstrate the existence of such a hardship.

[Catlin] was able to perform most of her usual job duties . . . .

The commission recognizes that there were . . . tasks . . . that [Catlin's] use of a wheelchair rendered her unable to perform. These, however, were primarily job responsibilities belonging to the cutter or cryovacer, with which [Catlin] helped out only occasionally. [Crystal Lake] failed to present any evidence to show what percentage of [Catlin's] time was spent on those tasks, and offered nothing to contradict [Catlin's] testimony that it was minimal. While [Crystal Lake] also contended that [Catlin] was needed to fill in when other workers in the department were absent, it failed to present any evidence to show how often this occurred, and the commission is unable to conclude that this exigency was sufficiently compelling so as to justify denying [Catlin] an opportunity for reemployment. It appears that there was a great deal of flexibility in the assignment of tasks in the wholesale department. . . . Given these factors, and considering that at least two of the other three works in the wholesale department indicated a willingness to cover more of the heavy physically demanding tasks and to perform a disproportionate share of the heavy labor, **the commission sees no reason to conclude that exempting [Catlin] from those physical tasks which she was unable to perform would have had an adverse effect on [Crystal Lake's] operation or otherwise posed a hardship on it.**

It appears that some of [Crystal Lake's] unwillingness to accommodate [Catlin] in this case may stem from its having underestimated her

> abilities to perform the job and having made an incorrect assumption that she was not capable of handling any physical tasks. . . . [Crystal Lake] failed to establish that it would have had to hire additional help if it had permitted [Catlin] to perform only those tasks of which she was capable, some of which were clearly considered physical work. **While it certainly is possible that [Crystal Lake] would not be able to accommodate an individual who could perform only paperwork and non-physical tasks, it erred in assuming that [Catlin] was such an individual.**
>
> [Crystal Lake] also relied on incorrect assumptions with respect to [Catlin's] need for physical modifications to the physical workplace. . . . [E]ven assuming that a wheelchair access bathroom would have been necessary . . . [Crystal Lake] did not demonstrate that to build one would pose a hardship for it. The operations manager testified that he had a contractor come and received an estimate of $47,000 to build a wheelchair accessible bathroom. However, **there is no copy of this estimate in the record, nor any other nonhearsay evidence to establish that it really would be necessary to spend $47,000 to build an accessible restroom facility or that it would not have been feasible to alter an existing bathroom so that it would be accessible to [Catlin].**

(Commission's Decision, pp. 8-10; R. 2; A-App. 25-27)(bold added).

On August 15, 2001, Crystal Lake commenced this proceeding for judicial review of the Commission's decision (R. 1). On January 29, 2001, the circuit court orally affirmed the Commission's decision, concluding that the Commission had reasonably interpreted the WFEA and that the Commission's findings were supported by substantial evidence in the record (R. 14; R-App. 204-12). The circuit court stated in part:

> The problem is not that this case is going to run amuck. The problem isn't that it's going to be the starting gun for small corporations in Wisconsin to bend over until their fiscal vertebrae creek to

> accommodate. That is not the problem here. The problem is the record.
>
> The problem is going to be, in my view, in the future anticipating better, perhaps, what proofs are going to be needed to demonstrate, in this case for example, hardship. The difficulty is going to be for counsel at the hearing level to be able to look at the case and be perspicuous enough to be ready and prepared for its weakest points. The problem is going to be, I think, making your record.
>
> Now, there is no point in this Court wasting breath on philosophical debate, because unreasonable demands, whether they're made by commissions or divisions or trial courts or even appellate courts, are . . . not going to stand the test of time or flexibility or any other pressurized test. . . . It doesn't matter what this Court thinks about the philosophy underpinning this decision from the Commission.
>
> What does matter is whether the facts demonstrate that this lady qualified for analysis under the statute and she qualified for attention being paid under the law and whether she got it.
>
> There is no doubt she qualified for the attention. And the conclusion that the Commission made is that she didn't get it. And this record supports the Commission's finding. There is on this record substantial evidence.

(R-App. 4-6).

On February 7, 2002, the circuit court entered an order affirming the Commission's decision (R. 15; A-App. 16-17). On March 19, 2002, Crystal Lake appealed to the court of appeals from the order of the circuit court (R. 17). On October 8, 2002, the court of appeals affirmed the order of the circuit court. *See Crystal Lake Cheese Factory*, 2002 WI App 290, 258 Wis. 2d 414, 654 N.W.2d 286 (A-App. 1-15).

Affording "great weight" to the Commission's interpretation of the WFEA, the court of appeals concluded

that the Commission reasonably interpreted the "reasonable accommodation" provision of the WFEA, *see* Wis. Stat. § 111.34(1)(b), to mean that an employer may be required to modify some job responsibilities of a disabled employee who can perform some or most (but not all) job-related functions, unless the employer can show that the modification would cause hardship. *See Crystal Lake Cheese Factory*, 2002 WI App 290, ¶¶ 19, 28-29, 258 Wis. 2d at 425, 428-29 (A-App. 8, 11-12). The court of appeals specifically rejected Crystal Lake's contention that the "reasonable accommodation" provision of the WFEA can only be interpreted to mean that an employer is not required to accommodate a disabled employee unless employee is able to perform **all** job-related or "essential" functions with accommodation. *See id.* at 2002 WI App 290, ¶¶ 18, 27, 29, 258 Wis. 2d at 425, 428-29 (A-App. 8, 11-12).

The court of appeals concluded that the evidence supported the Commission's finding that Crystal Lake could reasonably have accommodated Catlin's disability, and that Crystal Lake had failed to prove any hardship. *See id.*, 2002 WI App 290, ¶¶ 30-37, 258 Wis. 2d at 429-32 (A-App. 12-14). While acknowledging that costs of changing the physical plant may sometimes constitute a hardship, the court of appeals concluded that Crystal Lake had presented no evidence that the required alterations would create a hardship. *See id*, at 2002 WI App 290, ¶ 37, 258 Wis. 2d at 431 (A-App. 14). The court of appeals commented:

> The evidence submitted -- the $47,000 estimate for the bathroom -- was properly rejected by LIRC. Even assuming this estimate were allowed, Crystal Lake made no showing of revenue and costs that would give us a context in which to consider whether $47,000 would create a hardship. Because Crystal Lake offered no evidence to show that modifications to the physical plant would create a hardship, we affirm LIRC's conclusion that failure to modify the building violated the WFEA.

See id., 2002 WI App 290, ¶ 37, 258 Wis. 2d at 431-32 (A-App. 14).[4]

The court of appeals also concluded that the Commission did not deny Crystal Lake due process by rejecting the examiner's findings, by failing to consult with the examiner, or by rejecting evidence (the $47,000 estimate) relied upon by the examiner. *See id.*, 2002 WI App 290, ¶¶ 14-23, 258 Wis. 2d at 423-26 (A-App. 6-10). Finally, the court of appeals declined to remand the case to give Crystal Lake the opportunity to show hardship. *See id.*, 2002 WI App 290, ¶ 38, 258 Wis. 2d at 432 (A-App. 14-15). The court explained:

> [Crystal Lake] chose to proceed on the legal theory that LIRC required it to create a new job and that this was unreasonable under the statute. It could have opted to present alternative evidence regarding hardship, but it did not. We will not remand merely because a party's trial strategy backfired [citation omitted] . . . .

See id., 2002 WI App 290, ¶ 38, 258 Wis. 2d at 432 (A-App. 14-15).

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[4] In its original decision dated October 8, 2002, the court of appeals properly affirmed the Commission's rejection of the $47,000 estimate as hearsay because, while hearsay evidence received without objection becomes part of the evidence of the case and may be used a proof, *see Schlichting v. Schlichting*, 15 Wis. 2d 147, 160, 112 N.W.2d 149 (1961), an administrative agency like the Commission cannot base findings on uncorroborated hearsay, *see Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579, 610, 412 N.W.2d 505 (Ct. App. 1987). *See Crystal Lake Cheese Factory v. Labor & Ind. Rev. Com'n.*, Slip Opinion, ¶ 22, p. 9)(R-App. 201). On October 23, 2002, the court of appeals filed an errata sheet (R-App. 202-03), inexplicably deleting the reference to *Village of Menomonee Falls* and instead substituting language affirming the Commission for "ultimately discount[ing] the estimate because the bathroom was irrelevant at the time Catlin sought reinstatement and because the record as a whole did not support a finding of hardship to Crystal Lake." *See Crystal Lake Cheese Factory*, 2002 WI App 290, ¶ 23, 258 Wis. 2d at 426-27 (A-App. 9-10).

On November 7, 2002, Crystal Lake petitioned for review of the decision of the court of appeals by the Wisconsin Supreme Court. On February 19, 2003, the Supreme Court granted the petition for review.

STATUTES INVOLVED

Wis. Stat. § 111.321 provides:

> Subject to ss. 111.33 to 111.36, no employer . . . may engage in any act of employment discrimination as specified in s. 111.322 against any individual on the basis of . . . disability . . . .

Wis. Stat. § 111.322(1) provides:

> Subject to ss. 111.33 to 111.36, it is an act of employment discrimination to do any of the following:
>
> (1) To . . . terminate from employment . . . any individual, or to discriminate against any individual . . . in terms, conditions or privileges of employment . . . because of any basis enumerated in s. 111.321.

Wis. Stat. § 111.34 provides in pertinent part:

> (1) Employment discrimination because of disability includes, but is not limited to:
>
> (a) . . .
>
> (b) Refusing to reasonably accommodate an 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) Notwithstanding s. 111.322, it is not employment discrimination because of disability . . . to terminate from employment . . . any individual, or to discriminate against any individual . . . in 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 . . . .

ARGUMENT

I. THE COMMISSION REASONABLY COULD DETERMINE THAT CRYSTAL LAKE FAILED TO REASONABLY ACCOMMODATE CATLIN'S DISABILITY, AND FAILED TO PROVE THAT SUCH A REASONABLE ACCOMMODATION WOULD IMPOSE A HARDSHIP ON ITS BUSINESS.

A. The Commission's interpretation of the reasonable accommodation provision of the WFEA must be affirmed if it is reasonable.

The Commission's interpretation of the reasonable accommodation provision of the WFEA is entitled to "great weight" and must be affirmed if it is reasonable and not contrary to the clear meaning of the statute. *See Target Stores v. LIRC*, 217 Wis. 2d 1, 13-14, 576 N.W.2d 545 (Ct. App. 1998). This is true even if the court were to conclude that another interpretation was more reasonable. *See id.* at 13-14.

In *Target Stores*, the court explained why the Commission's interpretation of the reasonable accommodation provision of the WFEA is entitled to great weight, as follows:

> We conclude that we should give great weight to LIRC's interpretation of reasonable

> accommodation under the statute. First, LIRC is charged with adjudicating appeals from the hearing examiner's decisions on complaints under the WFEA . . ., which includes complaints . . . for handicap discrimination. Second, § 111.34(1), Stats., was enacted in 1981 and LIRC has developed experience and expertise in interpreting this section. *See, e.g., Janocik v. Herser Chevrolet* (LIRC, November 21, 1994); *Copus v. Village of Viola* (LIRC, December 10, 1987); *Owen v. Am Packaging Co.* (LIRC, February 1, 1991). Third, by according great deference to these determinations, we will promote greater uniformity and consistency than if we did not do so. Fourth, this determination is intertwined with factual determinations, *see McMullen v. LIRC*, 148 Wis. 2d 270, 276, 434 N.W.2d 830, 833 (Ct. App. 1988)(what is reasonable depends on the facts in each case). Fifth, this determination involves value and policy judgments about the obligations of employers and employees when an employee . . . has a handicap. *See Kannenberg*, 213 Wis. 2d at 385, 571 N.W.2d at 171.

See Target Stores, 217 Wis. 2d at 13.[5]

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[5] The Commission has considered the general issue of reasonably accommodating an employee who no longer can perform all of his or her job duties, because of a disability, in other cases. *See See v. Vollrath* (LIRC, 9-11-79)(employer failed to show that employee could not have continued as a general laborer but be exempted from assignment to a particular department); *Cappell v. Consolidated Papers, Inc.* (LIRC, 12/18/84)(employer failed to show that employee could not be assigned only to laborer duties within his physical capabilities); *Fischer v. Alma Center United School District* (DILHR, 11-1-76)(employer failed to show that it could not accommodate blind teacher by hiring aides at a *de minimus* cost); *Radloff v. H.F. Dushek Co.* (LIRC, 8/18/88)(employer failed to show that it could not assign truck driver only to work not subject to federal regulations that prohibit epileptics from interstate truck driving); *Fields v. Cardinal TG Co.* (LIRC, 2/16/01)(employer failed to show that it could not restructure the employee's job to exempt the employee from glass loading and unloading functions).

B. The Commission's interpretation of the reasonable accommodation provision of the WFEA in this case is neither unprecedented nor unreasonable.

In a disability discrimination case under the WFEA, the complainant must show that he or she is an "individual with a disability" within the meaning of the WFEA, *see* Wis. Stat. § 111.32(8), and that the employer took one of the employment actions enumerated in Wis. Stat. § 111.322, *e.g.*, "termination of an individual's employment," on the basis of disability, *see* Wis. Stat. § 111.321. *See Target Stores*, 217 Wis. 2d at 9. The employer then has the burden of proving under Wis. Stat. § 111.34(2)(a) that it is not a violation of the WFEA to take the employment action on the basis of the individual's disability because the disability is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment. *See id.* at 9-10. Additionally, the employer has the burden of proving under Wis. Stat. § 111.34(1)(b) that it did not refuse to reasonably accommodate the individual's disability in a manner that would enable the individual to adequately undertake his or her job-related responsibilities, absent any hardship on the employer's business. *See id.* at 10, 17.

In this case there is no dispute that Catlin was "disabled" within the meaning of the WFEA, or that she was not permitted to return to work (and effectively terminated) because of her disability. There also is no dispute that Catlin's disability was reasonably related to her ability to adequately undertake the job-related responsibilities of her employment. Thus, the sole issue presented to the Commission was whether Crystal Lake met its burden of proving that it could not reasonably have accommodated Catlin's disability without imposing a hardship on Crystal Lake's business. The Commission answered the issue in the negative, concluding that Crystal

Lake could have accommodated Catlin without undue hardship by exempting her from performing the heavy physical tasks of her position that were beyond her capabilities, and by making some physical modifications to the workplace (Findings Nos. 16, 19).

Crystal Lake suggests that the Commission's interpretation of the WFEA in this case is both "unprecedented and unreasonable" (Crystal Lake's brief, p. 1). Such suggestion is unfounded. As will be explained in this brief, the Commission's interpretation is both consistent with controlling past court cases, *see McMullen* and *Target Stores*, and is entirely reasonable.

Crystal Lake argues that because the WFEA permits an employer to terminate an employee whose disability is reasonably related to the employee's ability to adequately undertake his or her job-related responsibilities, an employer's duty to reasonably accommodate under the WFEA is limited to assisting an employee who can perform all of the employee's duties. Concomitantly, if the employee cannot perform all of his or her duties even with accommodation, the employer is not required to modify the employee's duties, or to exempt the employee from performing any duties. Crystal Lake relies upon federal court decisions under the Americans with Disabilities Act (ADA), *see* 42 U.S.C. §§ 12101, *et seq.*, in support of its argument.

Crystal Lake's interpretation of the WFEA effectively has been rejected by Wisconsin courts as the proper interpretation of the WFEA. In *McMullen v. LIRC*, 148 Wis. 2d 270, 274-76, 434 N.W.2d 830 (Ct. App. 1988), the court of appeals rejected the argument that an employer could terminate an employee who, because of a disability, could not perform the job-related responsibilities of his or her employment, even with accommodation. The court held that in such a case, the employer's duty of reasonable accommodation under the WFEA could include transferring the employee to another position that the employee could adequately undertake,

unless the transfer would pose a hardship on the employer's business. *See McMullen*, 148 Wis. 2d at 274-76. The court emphasized that the WFEA was a remedial statute that should be broadly and liberally construed to fulfill the legislative intent, *i.e.*, "to encourage and foster to the fullest extent practicable the employment of all properly qualified individuals regardless of any handicap." *See id.* at 275; Wis. Stat. § 111.31(3). The court also expressly refused to consider federal and state case law interpreting statutes on the same subject as the one at issue in the *McMullen* case, because the statutory language and scheme differed, sometimes significantly, from that found in the WFEA. *See id.* at 275. The court emphasized that it was interpreting the WFEA in accordance with "our legislature's intention rather than with the intention of other jurisdictions." *See id*, at 275-76.[6]

The court went on to explain:

> Having determined that "accommodate" should be broadly interpreted to include a transfer so as to effectuate the legislative intent, we examine the qualifications on the duty to accommodate. Our conclusion that the duty to accommodate may involve the transfer of an individual from one job to another does not mean that the employer must do so in every case. **The statute only requires a reasonable accommodation. What is reasonable will depend on the specific facts in each individual case**. . . .
>
> Owens-Illinois urges that a transfer from one division to another is unreasonable as a matter of law. We disagree. An interdivisional transfer may under some circumstances be an unreasonable accommodation. However, we are unwilling to adopt a rule of law that says such a transfer is always

[6] Wisconsin courts have not been hesitant to construe the WFEA more liberally than courts interpreting comparable provisions of federal law, *see Goodyear Tire & Rubber Co. v. DILHR*, 87 Wis. 2d 56, 60-64, 273 N.W.2d 786 (Ct. App. 1978), including the disability discrimination provision of the WFEA, *see La Crosse Police Comm. v. LIRC*, 139 Wis. 2d 740, 761-62, 407 N.W.2d 510 (1987).

> unreasonable. **This determination is fact sensitive and is not subject to sweeping propositions of law. . . .**
>
> In addition to the statutory requirement that the accommodation be reasonable, no accommodation is required if it would impose a hardship on the employer. Sec. 111.34(1)(b), Stats. . . .
>
> We do note that while there may be some overlap regarding the factors to be considered in determining whether an accommodation is reasonable and whether it would impose a hardship on a particular employer, the two are separate and distinct considerations that are to be addressed independently. **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. . . .**

See *id.*, 148 Wis. 2d at 276-77 (emphasis added)..

In *Target Stores*, the court affirmed the Commission's decision that an employer must accommodate an employee whose disability caused her to sleep on the job by exercising "clemency and forbearance," *i.e.*, by refraining from terminating her for sleeping on the job, even though the Commission and the court found that the employee's disability was reasonably related to the employee's ability to adequately undertake her job-related responsibilities. *See Target Stores*, 217 Wis. 2d at 15-16. The court did state that read together, the only reasonable construction of Wis. Stat. § 111.34(1)(b), which requires an employer to reasonably accommodate an employee absent hardship on the employer's business, and Wis. Stat. § 111.34(2)(a), which permits an employer to terminate an employee whose disability is reasonably related to the employee's ability to adequately undertake the job-related responsibilities of his or her employment, "is that the purpose of reasonable accommodation is to enable employees to adequately undertake job-related responsibilities." *See* 217 Wis. 2d at

17. The court in *Target*, however, did not overrule *McMullen* or in any way indicate that the reasonable accommodation provision of the WFEA could not reasonably be interpreted to require an employer to modify an employee's duties or to exempt an employee from performing particular duties. In addition, as the court of appeals noted in this case, the court in *Target* did not state that the employee must be able to undertake **all** job-related functions, as opposed to some or most of the job-related functions. Consequently, the Commission respectfully submits that it could reasonably require an employer to modify an employee's duties or to exempt an employee from performing particular duties, unless such accommodation would be unreasonable or would impose a hardship on the employer's business as a factual matter in any particular case. *See McMullen*, 148 Wis. 2d at 276-77.

Crystal Lake's reliance on federal court decisions under the ADA is misplaced. Although the ADA does not require an employer to modify or to restructure the "essential" duties of an employee who cannot perform such job duties even with reasonable accommodation, *see* 42 U.S.C. § 12111(8) and (9); 29 C.F.R. 1630, App., p. 355; *Benson v. Northwest Airlines, Inc*, 62 F.3d 1108, 1112-13 (8th Cir. 1995), there are significant differences in statutory language between the WFEA and the ADA, *see McMullen v. LIRC*, 148 Wis. 2d at 275. The ADA requires an employer to make reasonable accommodations only to the disability of a "qualified individual with a disability" and a "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation can perform the **essential functions** of the employment position that such individual holds. . . . " *See* 42 U.S.C. §§ 12111(8) and 12112(5)(A)(bold added). The WFEA, on the other hand, requires an employer to reasonably accommodate an employee's disability, but an "individual with a disability" is not limited to an individual who can perform the "essential functions" of the employment position with or without accommodation. *See* Wis. Stat. §§ 111.32(8) and 111.34(1)(b).

In addition, as noted above, the WFEA has been construed more liberally than the ADA by the Wisconsin Supreme Court. *See La Crosse Police Comm.*, 139 Wis. 2d at 761-62. The WFEA is to be interpreted in accordance with "our legislature's intention rather than with the intention of other jurisdictions." *See McMullen,* 148 Wis. 2d at 275-76.

C. The Commission's findings of fact must be affirmed if they are supported by substantial evidence in the record.

The Commission's findings of fact must be affirmed if they are supported by substantial evidence. *See Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B.,* 35 Wis. 2d 540, 562, 151 N.W.2d 617 (1967); *Chicago, M., St. P. & P. R.R. Co. v. ILHR Dept.*, 62 Wis.2d 392, 396, 215 N.W.2d 443 (1974). Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Gateway City Transfer Co. v. Public Service Comm.*, 253 Wis. 397, 405-06, 34 N.W.2d 238 (1948), *quoting, Consolidated Edison Co. v. National L.R. Board,* 305 U.S. 197, 229 (1938).

It is not required that the evidence be subject to no other reasonable, equally plausible interpretations. *Hamilton v. ILHR Dept.*, 94 Wis. 2d 611, 617, 288 N.W.2d 857 (1980). Where two conflicting views of the evidence each may be sustained by substantial evidence, it is for the agency to determine which view of the evidence it wishes to accept. *See Robertson Transport. Co. v. Public Service Comm.,* 39 Wis. 2d 653, 658, 159 N.W.2d 636 (1968).

The weight and credibility of the evidence are matters for the agency, and not for the reviewing court, to evaluate. *See Bucyrus-Erie Co. v. ILHR Dept.,* 90 Wis.2d 408, 418, 280 N.W.2d 142 (1979); Wis. Stat. § 227.57(6).

When more than one inference reasonably can be drawn, the finding of the agency is conclusive. *See Vocation. Tech. & Adult Ed. Dist. 13 v. ILHR Dept.*, 76 Wis. 2d 230, 240, 251 N.W.2d 41 (1977).

On review, a court may not make an independent determination of the facts. *See Hixon v. Public Serv. Comm.*, 32 Wis. 2d 608, 629, 146 N.W.2d 577 (1966). The court is "confined to the determination of whether there was . . . [substantial evidence] to sustain the findings that were in fact made." *E.F. Brewer Co. v. ILHR Department,* 82 Wis. 2d 634, 636, 264 N.W.2d 222 (1978).

A court may not "second guess" the proper exercise of the agency's fact-finding function even though, if viewing the case *ab initio*, it would come to another result. *See Briggs & Stratton Corp. v. ILHR Department*, 43 Wis. 2d 398, 409, 168 N.W.2d 817 (1969). The court must search the record to locate substantial evidence which supports the agency's decision. *See Vande Zande v. ILHR Department*, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255 (1975).

In summary, as the court stated in *Hamilton*, 94 Wis. 2d at 618:

> [T]he agency's decision may be set aside by a reviewing court only when, upon an examination of the entire record, the evidence, including inferences therefrom, is found to be such that a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences.

D. The Commission's reasonably could find that Crystal Lake failed to prove that it could not reasonably accommodate Catlin without hardship.

Apart from its contention that the reasonable accommodation provision of the WFEA cannot be reasonably interpreted to require an employer to modify an employee's duties or to exempt an employee from performing particular duties, Crystal Lake argues that substantial evidence in the record does not support the Commission's factual findings[7] in this case that Crystal Lake could have accommodated Catlin without hardship by exempting her from performing the heavy physical tasks of her position that were beyond her capabilities, and by making some physical modifications to the workplace (Findings Nos. 16, 19). Crystal Lake also argues that the Commission improperly failed to consult with the examiner regarding the credibility of the witnesses. Neither argument is ultimately persuasive.

The examiner found that Catlin's duties consisted of "collecting and prioritizing the cutting orders and passing that information on to the cutter at the beginning of the day, helping to able the cheese and then weighing, pricing and boxing the packages, placing them on a pallet and moving the pallets into the cooler for pick up the next day" Examiner's Finding No. 9). The examiner also found that in addition to her individual duties, Catlin and the other employees in the whole packing department "were trained to perform all other duties in the department as they **regularly had to assist each other** to keep work flowing smoothly and cover for each other when temporary absences occurred" (Examiner's Finding No. 10)(bold added). In addition, the examiner found that Catlin could perform some, but not all, of the duties of each position in the wholesale packing department, and,

[7] What is a "reasonable accommodation" and what is a "hardship" in a particular case is a factual question and depends upon the specific facts in that case. *See McMullen*, 148 Wis. 2d at 276.

that, "for example," she could not retrieve blocks of cheese from the upper shelves in the cooler because she could not climb a ladder (Finding No. 11). The examiner did not make any specific findings as to which of her individual duties Catlin no longer was able to perform, or as to which duties of the other employees, other than retrieving blocks of cheese from the cooler, Catlin no longer could perform (Finding No. 13).

In summary, the examiner found that "[t]o accommodate Catlin's disability would require her duties to be altered so that even while acting as a cutter she would not be required to retrieve cheese from the cooler. Additionally, many physical alterations in the department and to the building itself would be required, such as the addition of a bathroom at an approximate most of $47,000" (Finding No. 13). Accordingly, the examiner concluded that there was no reasonable accommodation available for Crystal Lake to make that would have allowed Catlin to adequately undertake her job-related responsibilities (Conclusion of Law No. 5).

It is clear that the examiner premised his decision on the interpretation of the advanced by Crystal Lake in this case, *i.e.*, that the reasonable accommodation provision of the WFEA does not require an employer to modify an employee's duties or to exempt an employee from performing particular duties. In other words, because Catlin was regularly required to perform the work of other employees in the wholesale packing department, in addition to her individual duties, and because she could not retrieve cheese from the cooler, Crystal Lake was not required to accommodate her disability. Since, for the reasons discussed earlier in this brief, the Commission reasonably could have interpreted the WFEA differently than Crystal Lake and the examiner, the Commission properly could reject the examiner's reasoning insofar as it was based upon a faulty premise.

In addition, the examiner made no specific findings as to the cost of the various physical alterations that the

examiner found were necessary to accommodate Catlin's physical disability, except for his finding that a bathroom would need to be added at the approximate cost of $47,000 (Examiner's Finding No. 13). The finding of the approximate cost of the bathroom addition was based upon Robertson's testimony that Crystal Lake had received an estimate from a contractor that it would cost a minimum of $47,000 (Tr. 114). No written estimate of the cost was offered in evidence. Insofar as Robertson was testifying that the contractor had told him or someone else at Crystal Lake that the cost would be $47,000, where such testimony is offered to prove that the bathroom addition would cost approximately $47,000, the testimony was uncorroborated hearsay and therefore could not form the basis of essential agency findings on the reasonableness of a particular accommodation or of the hardship on Crystal Lake. *See Village of Menomonee* Falls, 140 Wis. 2d at 610; Folding *Furniture Works v. Wisconsin L.R. Board*, 232 Wis. 170, 188-89, 285 N.W. 851, 286 N.W. 875 (1939); *Outagamie County v. Brooklyn*, 18 Wis.2d 303, 312, 118 N.W.2d 201 (1962); *State v. McFarren*, 62 Wis. 2d 492, 506, 215 N.W.2d 459 (1974); Hoyt, *The Wisconsin Administrative Procedure Act*, 1944 Wis. L. Rev. 214, 223 (1944). In this regard, Crystal Lake had to prove that an accommodation would impose a hardship, not merely that it believed that it would impose a hardship.[8]

The Commission found that as of the date she sought reinstatement, Catlin was physically able to perform "most" of the jobs in the wholesale packing department, including training, making boxes, making

[8] In addition, because Robertson could not specify Crystal Lake's gross revenue (Tr. 120), it is impossible to determine on this record whether even a cost of $47,000 would constitute a hardship. The record only discloses that Crystal Lake employed between 45 and 48 employees (Tr. 97). Although what is a hardship for a small "mom and pop" business may not be a hardship for a large employer like Microsoft or Wal-Mart, the record in this case makes it impossible to determine where Crystal Lake falls on that continuum for purposes of determining hardship.

labels, backing cheese, labeling cheese, weighing and pricing cheese, boxing and placing cheese on a pallet, doing inventory and other paperwork, and cleaning up and washing equipment (Finding No. 14). The Commission also found that Catlin would not perform "some" of the heaviest physical tasks including lifting 40-pound blocks of cheese, loading and unloading the hand cart and semi-truck, reaching boxes stacked high in the storeroom or cheese stored at high levels in the cooler, and cutting cheese or placing cheese in the pot of hot water (Finding No. 15). Although Crystal Lake may quibble with the use of the words "most" or "some" in these findings, there really is no dispute that the findings accurately reflect the evidence in the record as to what Catlin was able and was not able to physically perform.

What the Commission also found is that the duties that Catlin no longer was able to perform were duties that belonged primarily to the cutter and to the cryovacer (Finding No. 15). Such finding is unassailable and is supported by the evidence in the record. Finally, the Commission found that at least two of the other employees in the wholesale packing department expressed a willingness to perform a disproportionate share of the physical tasks that Catlin was not able to perform (Finding No. 15). This finding also is supported by substantial evidence in the record, even if, as Crystal Lake contends, the testimony of the two other workers was influenced by the fact that they were Catlin's mother and sister.

Regarding physical modifications of the workplace, the Commission found that the threshold at the main entrance of the plant and the sanitizing area of the plant would have to be modified for Catlin to access the wholesale packing department in her wheelchair (Finding No. 17). The Commission also found that the tables in the department would not have to be lowered (Finding No. 17). This finding was supported by Catlin's testimony, although there was some contrary evidence in the record. Finally, the Commission found Catlin did not require a wheelchair-accessible bathroom when she initially sought

reinstatement, but that she would have required one as of the date of the hearing on her complaint (Finding No. 18). Again, this finding is supported by the evidence in the record.

Based upon these evidentiary findings, the Commission determined that Crystal Lake could have accommodated Catlin without undue hardship by exempting her from performing the heavy physical tasks of her position that were beyond her capabilities, and by making some physical modifications to the workplace (Findings Nos. 16, 19). Such ultimate finding is supported by substantial evidence in the record and is reasonable.

The Commission also reasonably rejected Crystal Lake's contention that modifying the physical workplace would have imposed a hardship. The Commission noted in its memorandum opinion that Catlin would not have required a wheel-chair accessible bathroom when she initially sought reinstatement, that there was no non-hearsay evidence establishing the cost of a bathroom addition, and that Crystal Lake had failed to establish that modifying the threshold, the sanitizer bath, or the work tables (if necessary) would have posed any difficulty for it (Commission's Memo. Opn., pp. 9-10) (A-App. 26-27).

In summary, the Commission submits that it reasonably could determine that Crystal Lake failed to reasonably accommodate Catlin's disability.

II. THE COMMISSION DID NOT DENY CRYSTAL LAKE DUE PROCESS BY FAILING TO CONFER WITH THE HEARING EXAMINER.

The Commission noted that it did not confer with the examiner in this case regarding witness credibility and demeanor because its reversal of the examiner's decision

was not based upon any differing assessment of witness credibility (Commission's Memo. Opn., p. 10)(A-App. 27). The requirement of consultation between the Commission and an examiner is not triggered except where the Commission's decision differs from the examiner's decision concerning issues of witness demeanor and credibility. *See Carley Ford, Lincoln, Mercury v. Bosquette*, 72 Wis. 2d 569, 576, 241 N.W.2d 596 (1976). Despite Crystal Lake's protestations to the contrary, the Commission did not reject the examiner's findings based upon credibility considerations. The Commission did not reject the examiner's finding that Catlin "regularly" assisted other workers in the wholesale packing department when the Commission noted that the record does not indicate the "frequency" with which she assisted the other workers. In addition, the Commission did not reject any findings of the examiner as to which tasks Catlin could and could not perform. Finally, the Commission's rejection of the examiner's finding on the cost of a bathroom addition was not a rejection of Robertson's credibility as a witness, but rather, the legal effect of grounding a finding on uncorroborated hearsay.

Consequently, the Commission did not deny Crystal Lake due process when it failed to consult with the hearing examiner.

CONCLUSION

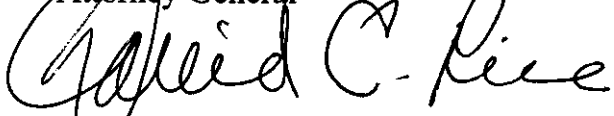
Crystal Lake seeks a black-letter rule that an employer may terminate an employee with a disability who cannot perform all (or at least all "essential") job-related functions with or without accommodation. If an employer can may such a showing, it is otherwise freed from the statutory responsibility of proving that a particular accommodation is not reasonable or, if reasonable, would impose an undue hardship on the employer.

The Commission respectfully submits that this is neither required by the WFEA nor is it good public policy.

There may well be cases where it will be less burdensome for an employer to modify job duties and to exempt an employee with a disability from performing an "essential" function than it would be to make an accommodation that would enable an employee with a disability to perform the essential functions of a job. The additional potential burden of litigating what is a "reasonable" accommodation or what is a "hardship" is outweighed by the declared public policy of the state "to encourage and foster to the fullest extent practicable the employment of all properly qualified individuals regardless of . . . disability . . . ." *See* Wis. Stat. § 111.31(3). Finally, as the learned circuit court judge in this case observed, requiring employers to make reasonable accommodations by modifying job functions is not going to break the "fiscal vertebrae" of employers in this state, is simply going to require employers to prepare and to present appropriate proof at hearing, and is limited to what is reasonable (R-App. 4-6).

The Commission respectfully requests that the court affirm the decision of the court of appeals that affirmed the order of the circuit court and the Commission's decision in its entirety.

PEGGY A. LAUTENSCHLAGER
Attorney General



DAVID C. RICE
Assistant Attorney General
State Bar #1014323

Attorneys for the Labor and
Industry Review Commission

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-6823

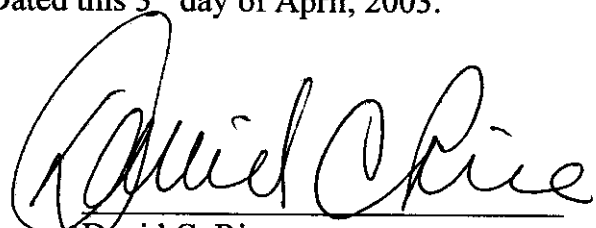
CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced using the following font:

- ☐ Monospaced font: 10 characters per inch; doubled spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is _____ pages.

- ☑ Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 8,918 words.

Dated this 3rd day of April, 2003.



David C. Rice
Assistant Attorney General

INDEX TO APPENDIX

Pursuant to Rule 809.19(2) and (3)(b), Rules of Appellate Procedure, the following items are set forth:

	Record	Appendix Pages
Court of Appeals' original Decision, ¶ 22		201
Court of Appeals' Errata Sheet		202-203
Circuit Court's oral ruling	R.14	204-212

¶21 LIRC's rejection of the $47,000 restroom estimate was appropriate as well.[4] LIRC concluded first that, when Catlin sought reinstatement, she did not require a bathroom because she was using a catheter. Thus, the $47,000 could not have been an issue at the time Catlin asked to return to work. However, by the time of the administrative hearing, Catlin no longer needed the catheter and could use an accessible restroom. The only testimony regarding the amount was from an operations manager who testified that a contractor gave him that estimate. There is no written estimate for modifications in the record.

¶22 Administrative bodies are not bound by the same formal rules of evidence as the courts. *See* WIS. STAT. § 227.45. Neither side disputes that the manager's testimony about the estimate is uncorroborated hearsay. Crystal Lake argues that because Catlin did not object, the evidence became part of the record. *See* ***Schlichting v. Schlichting***, 15 Wis. 2d 147, 160, 112 N.W.2d 149 (1961) (hearsay evidence received without objection becomes part of the evidence of the case and may be used as proof). Subsequent case law, however, prohibits administrative bodies from basing findings on uncorroborated hearsay. ***Village of Menomonee Falls v. DNR***, 140 Wis. 2d 579, 610, 412 N.W.2d 505 (Ct. App. 1987). Because there is no other evidence regarding the estimate or the cost of installing an accessible restroom, LIRC was entitled to reject the manager's testimony and the ALJ's finding based on it.

[4] Although it is unclear from the record, the ALJ apparently thought this constituted a hardship for Crystal Lake.

Appeal No. 02-0815

Cir. Ct. No. 01-CV-289

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

CRYSTAL LAKE CHEESE FACTORY,

PETITIONER-APPELLANT,

v.

LABOR AND INDUSTRY REVIEW COMMISSION AND SUSAN CATLIN,

RESPONDENTS-RESPONDENTS.

FILED

Oct. 23, 2002

Cornelia G. Clark
Clerk of Court of Appeals

ERRATA SHEET

Cornelia G. Clark
Clerk of Court of Appeals
P.O. Box 1688
Madison, WI 53701-1688

Court of Appeals District I
633 W. Wisconsin Ave., Suite 1400
Milwaukee, WI 53203-1918

Peg Carlson , Jennifer Krapf
Court of Appeals
Ten East Doty Street, Suite 700
Madison, WI 53703

Court of Appeals District II
2727 N. Grandview Blvd.
Waukesha, WI 53188-1672

Court of Appeals District IV
Ten East Doty Street, Suite 700
Madison, WI 53703

Hon. James C. Eaton, Circuit Judge
330 E. LaSalle Ave.
Barron, WI 54812

Robert H. Duffy
Quarles & Brady
411 E. Wisconsin Ave.
Milwaukee, WI 53202

Sean M. Scullen
Quarles & Brady
411 E. Wisconsin Ave.
Milwaukee, WI 53202

David C. Rice
Asst. Attorney General
P.O. Box 7857
Madison, WI 53707

Monica M. Murphy
WI Coalition for Advocacy
2040 W. Wis. Ave. #678
Milwaukee, WI 53233

PLEASE TAKE NOTICE that corrections were made to paragraphs 22 and 23 and note 4 in the above-captioned opinion which was released on October 8, 2002. A corrected electronic version in its entirety is available on the court's website at www.courts.state.wi.us.

1 STATE OF WISCONSIN CIRCUIT COURT BARRON COUNTY

2 CRYSTAL LAKE CHEESE FACTORY,
Petitioner,

3 Case No. 01 CV 289

vs.

4

LABOR AND INDUSTRY REVIEW COMMISSION,
5 and SUSAN CATLIN,
Respondents.

COPY

6

7 P A R T I A L T R A N S C R I P T

8 The following **ORAL ARGUMENTS**
came on for hearing before

9

THE HONORABLE JAMES C. EATON
10 Circuit Judge for Barron County

11 Barron County Courthouse
Barron, Wisconsin,
12 **Tuesday, January 29, 2002**
8:30 a.m.

13

14 APPEARANCES

15 MR. ROBERT DUFFY, Attorney at Law
Quarles & Brady
16 411 East Wisconsin Avenue
Milwaukee, WI 53202-4497
17 Appeared on behalf of Crystal Lake Cheese Factory.

18 MR. DAVID C. RICE, Asst. Attorney General
Wisconsin Department of Justice
19 123 West Washington Avenue, P.O. Box 7857
Madison, WI 53707-7857
20 Appeared on behalf of Labor and
Industry Review Commission.

21

MS. MONICA M. MURPHY, Attorney at Law
22 Wisconsin Coalition for Advocacy
2040 West Wisconsin Avenue, Suite 678
23 Milwaukee, WI 53233
Appeared with Susan Catlin.

24

Reported by: Laura J. Ahlin, R.P.R.
25 W-7182 Rappy Lake Rd., Trego, WI

1 INDEX

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3 No Witnesses Sworn.
No Exhibits marked.

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1 Barron County Courthouse
Tuesday, January 29, 2002
2 8:30 a.m.

3 P A R T I A L T R A N S C R I P T

4 PROCEEDINGS IN OPEN COURT, HON. JAMES C. EATON PRESIDING

5 (Preceding arguments not transcribed)

6 THE COURT: Well, I hardly know where to begun.
7 This is, to put it gently, a treasure trove of briefing
8 materials. I have to tell you, and I don't want to be taken as
9 condescending or patronizing, I would -- and if I didn't
10 believe this I wouldn't say it; I would be very discrete and
11 avoid the topic -- but I'd hire any of you three. The briefing
12 materials I think were very, very good. I think you have all
13 put a gloss on the case as best could be done from your vantage
14 point.

15 I'm frustrated -- and I'll just get this on the
16 table and be done with it -- that nothing this Court does is
17 going to be of any moment in this case. And that troubles me.
18 Troubles me because you people put so much effort into this and
19 because you put so much time into this and, you know, that
20 you're anxious about it. And it is the job of Courts to
21 alleviate anxiety, and nothing I'm going to do for you is going
22 to in the slightest help you with that. And as I said before,
23 my observations are not even going to be of precedential value.

24 But I will tell you, for me, for this Court, this
25 case distills down to three or four sentences. The precedent

1 can be argued both ways with respect to the *Target* decision.
2 There was consideration there of a short-term accommodation.
3 In the *McMullen* decision, there was the point that the Court
4 made that there should have been an alternative considered.
5 We're all stuck with the record. And the salient
6 part of this record is found at page 90. And it consists of a
7 question put to Mr. Curella:
8 "In fact, you didn't make any effort whatsoever
9 for what might be appropriate accommodation for Susan to return
10 to work, did you?
11 "Answer: No."
12 On page 120 at line 11, Mr. Robertson was asked:
13 "Do you know what it would take to make a
14 bathroom accessible for Ms. Catlin?
15 "Answer: Without looking at what's recommended
16 and what codes are, no."
17 At line 15:
18 "Question: You don't know what her particular
19 needs are as far as accessibility for a bathroom are?
20 "Answer: At this time I was told to have some
21 bathrooms made up."
22 THE COURT: The problem is not that this case is
23 going to run amuck. The problem isn't that it's going to be
24 the starting gun for small corporations in Wisconsin to bend
25 over until their fiscal vertebrae creek to accommodate. That

1 is not the problem here. The problem is this record.
2 The problem is going to be, in my view, in the
3 future anticipating better, perhaps, what proofs are going to
4 be needed to demonstrate, in this case for example, hardship.
5 The difficulty is going to be for counsel at the hearing level
6 to be able to look at the case and be perspicuous enough to be
7 ready and prepared for its weakest parts. The problem is going
8 to be, I think, making your record.
9 And that's probably the way it ought to be,
10 because that's the problem for every trial lawyer in every
11 civil or criminal court in Wisconsin.
12 Now, there is no point in this Court wasting
13 breath on philosophical debate, because unreasonable demands,
14 whether they're made by commissions or divisions or trial
15 courts or even appellate courts, are just -- well, appellate
16 courts I'm not so sure; but everybody else -- they're not going
17 to stand the test of time or flexibility or any other
18 pressurized test. So there is no point in me debating the
19 philosophy that's flowing throughout these briefs and these
20 arguments. It doesn't matter what this Court thinks about the
21 philosophy underpinning this decision from the Commission.
22 What does matter is whether the facts demonstrate
23 that this lady qualified for analysis under the statute and she
24 qualified for attention being paid under the law and whether
25 she got it.

1 There is no doubt she qualified for the
2 attention. And the conclusion that the Commission made is that
3 she didn't get it. And this record supports the Commission's
4 finding. There is on this record substantial evidence.
5 And you all know what the definition of
6 "substantial" means. I don't have to believe it. I don't have
7 to accept it myself. But I have to be able to say could a
8 reasonable person accept it. And they could.
9 The lines that I quoted, in my view, supply the
10 linchpin undergirding their decision.
11 This isn't or shouldn't be a case about hurt
12 feelings, although I think that's wended its way in here.
13 Simply a question of fact and attempt, duty to accommodate, the
14 duty to look, the duty to exercise.
15 In any case, what's missing with respect to the
16 little flotsam and jetsam in the case, such as whether hearsay
17 can be used? Is it of record? Sure. Was there an objection
18 made? No. Is it hearsay? Indisputably.
19 I think Mr. Rice borrowed from Chapter 799, the
20 small claims statute, a little bit. And maybe he should have.
21 And maybe the Legislature did when they told trial judges we
22 can admit hearsay but we cannot underpin any essential finding
23 with unreliable evidence. Merely because it's on the record
24 don't necessarily make it so, to coin a phrase.
25 I don't think the precedents do violence to this

1 analysis. I see again that I think *McMullen* stands for the one
2 salient proposition that the employer should, quote, should
3 have considered, close quote.
4 And with the record that was developed, my
5 reading of the law and the Commission's reading of the law is
6 that it supported an evidentiary analysis. The evidentiary
7 analysis in the Commission's view does not work to the
8 petitioner's favor, and they had a right to find as they did.
9 Did you hear any of that, Mr. Rice?
10 MR. RICE: I heard it all, Your Honor.
11 THE COURT: Okay. Any findings that either of --
12 any side would like me to make that I've overlooked?
13 MR. RICE: Not from me, Your Honor.
14 THE COURT: Petitioner?
15 MR. DUFFY: None. But will you ask -- can I ask,
16 will you confirm it in written decision, or what will your
17 procedure be on this?
18 THE COURT: That's why I invited any additional
19 findings, because Counsel is going to prepare the order.
20 MR. DUFFY: Okay.
21 THE COURT: I don't want to create any more
22 needless paper than I need to.
23 MR. DUFFY: (Nods affirmatively).
24 THE COURT: If the Court of Appeals looks at this
25 case and are interested in my observations, they'll have them

1 because the reporter will type them up. They don't need
2 anything more from me, literally and figuratively.
3 Any additional findings you want me to make?
4 MR. DUFFY: Not at this time.
5 THE COURT: Ma'am?
6 MS. MURPHY: I have none.
7 THE COURT: Okay. The Commission's decision is,
8 per force, affirmed.
9 Before you go, if you want to stop in, that's
10 fine. I really do appreciate the work. I've seen good work
11 before. I've seen a lot of bad work. This was very good work.
12 Okay.
13 Good-bye, Mr. Rice.
14 MR. RICE: All right, Your Honor. I'll prepare
15 the order --
16 THE COURT: Oh, you're going to prepare it.
17 MR. DUFFY: -- if you would like.
18 THE COURT: Suits me.
19 MR. RICE: And could the reporter please send me
20 the decision portion of the transcript.
21 COURT REPORTER: (Nods affirmatively).
22 THE COURT: She wants to know if you're going to
23 pay for it.
24 MR. RICE: I think the procedure is they bill our
25 office, and the credit is good.

1 THE COURT: Well, I've been reading the papers.
2 That's what you say.
3 (Laughter)
4 THE COURT: Okay. She'll do it.
5 MR. RICE: All right. Thank you.
6 (PROCEEDING CONCLUDED, 9:46 A.M.)
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STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 02-0815

CRYSTAL LAKE CHEESE FACTORY,

Petitioner-Appellant-Petitioner,

v.

LABOR AND INDUSTRY REVIEW COMMISSION, and SUSAN CATLIN,

Respondents-Respondents.

APPEAL FROM A DECISION OF THE
COURT OF APPEALS, DISTRICT III,
AFFIRMING AN ORDER OF THE
CIRCUIT COURT FOR BARRON COUNTY,
THE HONORABLE JAMES C. EATON, PRESIDING

BRIEF ON BEHALF OF RESPONDENT SUSAN CATLIN

Monica Murphy
State Bar # 1005145
Attorney for Susan Catlin

Wisconsin Coalition for Advocacy
2040 W. Wisconsin Ave. Suite 678
Milwaukee, WI 53202
(414) 342-8700

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STATE OF WISCONSIN

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APPEAL FROM A DECISION OF THE
COURT OF APPEALS, DISTRICT III,
AFFIRMING AN ORDER OF THE
CIRCUIT COURT FOR BARRON COUNTY,
THE HONORABLE JAMES C. EATON, PRESIDING

BRIEF ON BEHALF OF RESPONDENT
SUSAN CATLIN

I. STATEMENT OF ISSUES

1. Whether LIRC reasonably interpreted §§

111.34(l)(b) and 111.34(2)(a) of the WFEA when it found that there was a reasonable accommodation Crystal Lake could have provided Susan Catlin without hardship after she became disabled?

The Court of Appeals and the Circuit Court answered : yes.

2 Whether Crystal Lake was denied due process by LIRC's failure to consult with the Equal Right Division (ERD) Administrative Law Judge regarding credibility issues proper to reversing his decision or its rejection of hearsay evidence relied upon in his decision?

The Court of Appeals answered: no. The Circuit Court did not decide the issue.

II. STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Respondent Susan Catlin believes that oral argument and publication of the Court's opinion are

warranted.

The Court's opinion should be published because it will clarify an existing rule of law and it will apply an established rule of law to a factual situation significantly different from that in published opinions.

III STATEMENT OF THE CASE

A. Nature of the case and disposition at the Labor and Industry Review Commission, the Circuit Court and the Court of Appeals

This is an appeal from a decision of the Court of Appeals, District III, dated October 8, 2002, see Crystal Lake Cheese Factory v. Labor and Ind. Rev. Com'n, 2002 WI App 290, 258 Wis. 2d 414, 654 N.W. 2d 286 (A-App. 1-15), that affirmed an order of the Circuit Court of Barron County, the Honorable James C. Eaton presiding dated February 7, 2002. (A-App. 16-17). The Circuit Court affirmed a decision of the State of Wisconsin Labor and Industry Review Commission, dated July 20,

2001, that reversed an order of Administrative Law Judge Gary Olstad of the Equal Rights Division. (A-App. 18-28). The Labor and Industry Review Commission (LIRC) determined that Susan Catlin was an individual with a disability, within the meaning of the Wisconsin Fair Employment Act, Wis. Stat.§ 111.31 et. seq. (1999-2000) and that the Crystal Lake Cheese Factory had discriminated against her based on her disability within the meaning of that act. The LIRC found that Crystal Lake Cheese Factory's refusal to modify Ms. Catlin's job duties to exempt her from performing the heaviest physical tasks and to make physical modifications to the work place constituted the denial of a reasonable accommodation which it could have provided without hardship. (A-App.18-28).

B. Procedural History of the Case and Statement of Facts.

Complainant Susan Catlin was initially hired by Crystal Lake Cheese Factory in August of 1995. When

she first applied with Crystal Lake Cheese Factory she was told that the position open was for a cutter, that it required lifting forty pounds of cheese, and it was not a position for a woman. (TR. P.7, A-App.39) Shortly after that she was hired for work in the packaging department. Initially her duties included packing cheese and labeling. A short time later her supervisor left and Ms. Catlin took over her duties running the department. Her main duties were getting the grocery store orders from the office, putting together the orders based on the types of cheese ordered, preparing an order sheet and transferring the information to another a sheet to let the cutter know what cheese to get and what sizes to cut it for grocery store orders, weighing the cheese, pricing it, boxing it, and putting it on a pallet to be shipped out. (TR. P.10-11, A-App.42-43) Ms. Catlin worked in a department with three other people. One person, the cutter was primarily responsible for getting the large blocks of cheese out of

the cooler and cutting the cheese, primarily into one-pound blocks.(TR.P. 12-13, A-App. 44-45). Another person, the cryovacer was primarily responsible for bagging and sealing the cheese. (TR.P. 13, A-App. 45). A third person, was primarily responsible for labeling the cheese. (TR. P.13-14, A-App.45-46).

A typical day for Catlin started with her calculating the different cheeses and weights that had to be cut based on the grocery store orders. This took about an hour. (TR. P. 37-38, A-App. 69-70). Next she made up labels and put them on the boxes that the grocery store orders went into. (TR.P. 42-43, A-App. 74-75).Then they would pull the boxes from the back, make the boxes and put the labels on them.(TR.P. 43, A-App.75). Meanwhile the cutter would be cutting the cheese and placing it on the table. (TR.P. 45, A-App.77). After it was placed on the table it was bagged and cryovaced. (TR. P. 47, A-App.79). The cheese is put in a bag, sealed and put in a

basket. (TR.P. 47-48, A-App. 79-80). The basket then had to be dipped in a pot of hot water. (TR. P. 48, A-App. 80). The packages of cheese were then dried off and labeled, weighed on a scale, priced and boxed. (TR.P. 49, A-App. 81).

Each of these people in the department was crossed trained on the other jobs and regularly jumped in and helped out as needed. (TR. P. 14-15. A-App.46-47). When Catlin first came to Crystal Lake in 1995, the cutter was not cross trained in the other duties. It was Catlin's idea to have everybody in the department cross trained on all the tasks. (TR. P. 14-15. A-App.46-47).

The owner of the Crystal Lake Cheese Factory was happy with Susan Catlin's work and had no complaint about it. (TR. P. 15, 86, A-App.47,118). The only review she ever had from her supervisor was favorable. (Complainant's Ex. 2, A-App. 162).

In November of 1996, Susan Catlin was injured in

a car accident and underwent a lengthy rehabilitation period . As a result of a back injury she now uses a wheelchair. During that time she had a phone call from Crystal Lake's owner Tony Curella assuring her that her job was there for her. (TR. P. 16-17, A-App. 48-49). At no point did Susan Catlin quit her job or tell her employer that she had no intention of coming back to work. (TR. P. 18-19, A-App. 50-51).

Both before Ms. Catlin's accident and at the time she attempted to return to work, both her mother and her sister were employed in the wholesale department as part of the same team that Ms. Catlin led. (TR. P.72-74 & 80-82, A-App. 104-106 & 113-114).

As an employee, Susan Catlin was invited to the Crystal Lake Cheese Factory Company picnic in July 1997. Tony Curella saw her at the picnic. He told her to give him a call.(TR.P. 19, A-App.51) In September of 1997, Susan Catlin felt she was ready to go back to work

and she called Tony Curella. Barb Seih in the office answered and told her that Tony was busy. Ms. Catlin asked that he call her back. He did not. She called again a couple weeks later and again talked to Barb Seih. Again she was told that Tony was busy and again Ms. Catlin asked that he call her back. (Tr. P. 20-21, A-App.53-54). Tony Curella knew that Ms. Catlin was trying to talk to him and on one of those occasions he was in the background telling Barb Seih to say he was busy. He did not call Ms. Catlin back at that time or ever. (TR.P.88-89, A-App.120-121). Additionally, Ms. Catlin called another supervisor from Crystal Lake, Karen Hanson, on at least two occasions to see if there had been any discussion about her returning to work. Nothing ever came of these calls either. (TR.P.21-23, A-App.53-54).

Mr. Curella knew why Ms. Catlin was calling him. He knew she wanted to come back to work. He had spoken with her counselor from the Division of

Vocational Rehabilitation. (TR.P. 89-90, A-App.121-122). Curella made no effort whatsoever to determine what might be appropriate accommodations to allow Ms. Catlin to return to work. (TR. P. 90, A-App 122). Additionally, Curella did not consider the possibility of Ms. Catlin performing any other jobs at Crystal Lake Cheese Factory. (TR. P. 93, A-App. 125). Despite Ms. Catlin's calls and the call from her vocational rehabilitation counselor Tony Curella, the owner of Crystal Lake Cheese Factory, never contacted Ms. Catlin, nor did he direct any member of his staff to contact her. (TR.P. 95.A-App 127). Crystal Lake never so much as gave Catlin the courtesy of telling her they had no intention of taking her back or that they felt they could not accommodate her disability.

Crystal Lake did hire a person named David Johnson to do an ergonomic job analysis. He was not told anything about Susan Catlin's abilities or limitations.

He was only told she used a wheelchair.(TR. P. 90-91, A-App. 123). He never met her or saw any medical information on her. (TR.P. 23-24, A-App. 55-56).

At the time Catlin sought to return to work she could perform the following tasks: do the grocery store orders and related paperwork, make boxes, make labels, bake cheese, label it, scale it, price it, box it , put it on the pallet, do inventory paperwork, delegate, and train. (TR. P. 29, A-App. 61). Although she could lift blocks of cheese weighing over 18 pounds, (TR.P. 42, A-App. 74), she did not think she could still put 40 pound blocks of cheese away or bring them out to be cut. (TR. P. 29, A-App. 61). She also did not think she could dip the wrapped cheese in the hot water bath. (TR. P. 48, A-App. 80). And she could not see over the top of the cutting machine to align the cheese cutter. (TR. P. 46, A-App.78). Nor could she retrieve cheese from shelves in the cooler that required one to climb a ladder but most of

the cheese for processing the grocery store orders, which was her most basis function, was stored at lower levels on the shelves of the cooler. (TR.P. 65, A-App. 97)

In the fall of 1999, in preparation for the hearing in this matter, Jeff Annis, a rehabilitation technologist from the Assistive Technology and Assessment Center at the Stout Vocational Rehabilitation Institute reviewed Ms. Catlin's job site and based on his previous evaluation of her disability made recommendations for job accommodations. He determined that there were job accommodations available that would allow her to do the job, but additionally, that it would be simpler to modify Ms. Catlin's job duties. He recommended that her job duties be modified so that as a lead person she need do only the paperwork, the final packaging, filling out invoices, receipts, and packing lists but the company president, Tony Curella, and the office manager, Tom Messicci would not hear of it. He also noted that despite

the fact that the bathroom was inaccessible, that was not a problem for Ms. Catlin at that time. He prepared a written report of his findings. (Complainant's Ex. 6, A-App. 164-166).

Ms. Catlin filed a discrimination complaint with the Equal Employment Opportunities Commission in March of 1998. (Jt. Ex. 1, A-App.158) which was cross filed with the Equal Rights Division. An initial determination finding probable cause was issued on November 25, 1998.

An Equal Rights Division hearing was held before Administrative Law Judge Gary Olstad on January 25, 2000. At the hearing in this matter, Phillip Robertson, Crystal Lake's operations manager, testified that he got an estimate for installing a bathroom facility and some electrical work . The estimate was for $47,000. (TR.P. 114, A-App. 146). He said he could not answer what Crystal Lakes revenues were. Additionally, he testified

that he did not know what it would take to make a bathroom accessible for Catlin and he did not know what her particular needs were as far as bathroom accessibility. He simply said "At this time I was told to have some bathrooms made up."(TR.P. 120, A-App. 152). Additionally, he testified that it would not have been practical to have one of the four people on the wholesale department team do no physical work. (TR.P. 111, A-App. 143.) However, when questioned about this he included in physical work labeling, weighing, packaging, wrapping the cheese, putting it in the cryocacer, taking the grocery store cheese out of the cooler and bringing it for wrapping. (Tr. P. 119, A-App 151). All of these were tasks that Catlin was able to do. (TR.P.29, A-App. 61).

A decision was issued on October 20, 2000 finding that accommodating Ms. Catlin's disability would require her duties to be altered so that even while acting as a cutter she would not be required to retrieve cheese

from the cooler. Additionally, he found, many physical alterations to the building would be required such as the addition of a bathroom at an approximate cost of $47,000. He held that Crystal Lake did not unreasonably refuse to accommodate Ms. Catlin. (ERD decision p.3, A-App.31).

Ms. Catlin appealed that decision to the Labor and Industry Review Commission (LIRC). LIRC reversed the decision of the Administrative Law Judge finding that it would not pose a hardship on Crystal Lake to modify Ms. Catlin's job duties so that she was exempt from performing the heaviest physical tasks in the department. At least two of the other three employees in the department expressed a willingness to perform a disproportionate share of the physical task that Ms. Catlin was unable to perform. Additionally, LIRC found that as of the day Ms. Catlin sought reinstatement she was physically able to perform most of the jobs in the wholesale department, including training people, making

boxes, making labels, baking cheese, labeling cheese using a reacher to get at the labels, weighing it, pricing it, boxing it, putting it on a pallet, doing inventory and other paperwork. She was also able to clean up and wash equipment. Furthermore, LIRC found that at the time Ms. Catlin sought to return to work she did not need an accessible bathroom so the cost of putting in an accessible bathroom, even if it was $47,000 as the employer claimed, was not a basis upon which Ms. Catlin could lawfully be denied reinstatement. LIRC ordered Crystal Lake to reinstate Ms. Catlin, provide make whole remedies to her and pay reasonable attorney's fees and costs. (A-App.18-28)

On August 16, 2001 Crystal Lake filed an appeal seeking review of the LIRC decision in Circuit Court for Barron County. By order signed February 7, 2002 the Circuit Court affirmed the LIRC decision. Judge Eaton found that LIRC had reasonably interpreted the WFEA

and that there was substantial evidence in the record to support the LIRC's findings. (A-App. 16-17).

The decision of the Circuit Court was appealed by Crystal Lake to the Court of Appeals District III, and the Court of Appeals in a decision dated October 8, 2002 affirmed the Circuit Court decision upholding the LIRC decision. (A-App. 1-15). The Court of Appeals concluded that LIRC's interpretation of Wis. Stats, § 111.34(1)(b) was acceptable when it found that Crystal Lake's refusal to modify Catlin's duties to exempt her from the heaviest physical tasks constituted a denial of reasonable accommodation. Additionally, the Court of Appeals found that Crystal Lake failed to prove that accommodating Catlin's disability in this way was a hardship. Finally, the Court of Appeals ruled that Crystal Lake's due process rights were not violated when LIRC rejected some of the administrative law judge's factual findings.

IV. ARGUMENT

A. LIRC REASONABLY DETERMINED THAT CRYSTAL LAKE DISCRIMINATED AGAINST CATLIN BY FAILING TO REASONABLY ACCOMMODATE HER DISABILITY AND BY FAILING TO SHOW THAT SUCH AN ACCOMMODATION WOULD BE AN UNDUE HARDSHIP.

1. The Decision of the Labor and Industry Review Commission Should be Accorded "Great Weight".

This case involves court review of an administrative agency decision under Chapter 227 Wis. Stats. Those statutes set out the appropriate scope of review for courts in this type of proceeding. The specific section, Wis. Stat. § 227.57 (1999-2000), limits the scope of such reviews. If the agency's decision depends on any fact found by the agency, the court shall not substitute its judgement for that of the agency as to the weight of the evidence of any finding of fact. Wis. Stat. § 227.57(6). Additionally, due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved. Wis. Stat. §

227.57(10). Decisions of the commission (LIRC) shall have the same force as orders of the department under ch. 103 to 106 in terms of judicial review. § 111.395 Wis. Stats. (1999-2000).

The appropriate level of deference due an agency decision has further been defined by the Supreme Court of Wisconsin. The court has outlined three levels of deference to conclusions of law and statutory interpretations in agency decisions. The three levels of deference are "great weight", "due weight" and "no weight". Under the "great weight" standard the highest amount of deference is given and under this standard it is only when the interpretation by the administrative agency is an irrational one that a reviewing court does not defer to it. Beloit Education Ass'n v. WERC. 73 Wis 2d 43,67, 242 N.W. 2d 231 (1976) cited approvingly in Sauk County v. WERC, 165 Wis. 2d 406, 413, 477 N.W. 2d 267 (1991). The "great weight standard" is the general

rule in this state. *Id.*

> Where a legal question is intertwined with factual determinations or with value or policy determinations or where the agency's interpretation and application of the law is long standing, a court should defer to the agency which has primary responsibility for determination of fact and policy.
>
> West Bend Education Association v. WERC, 121 Wis. 2d 1, 357 N.W. 2d 534, 539-540 (1984)

This position was recently reaffirmed by the Wisconsin Supreme Court in Kitten v. State of Wisconsin, Department of Workforce Development, No. 00-3562,p.12, 2002 WI 54, decided May 24, 2002. In that case, the Court found that the agency decision under the Wisconsin Open Housing Act was entitled to "great weight," relying on the agency's expertise and experience in deciding cases of housing discrimination under that law.

Similarly, LIRC has substantial experience and expertise in deciding cases of employment discrimination and whether a party's actions constitute discrimination under the Wisconsin Fair Employment Act, therefore,

great weight should be accorded its decision here.

LIRC's interpretation of the requirement of reasonable accommodation has been found to be deserving of great weight for five reasons. First, LIRC is responsible for adjudicating appeals from hearing examiners decisions on complaints under the WFEA. Second, the section of the WFEA that deals with reasonably accommodating disabilities since it was enacted in 1981 and as a consequence LIRC has developed experience and expertise in interpreting this section. Third, by giving deference to LIRC's determinations the courts will promote greater uniformity and consistency. Fourth, the reasonable accommodations determination is intertwined with factual determinations. Fifth, the determination of reasonable accommodations involves values and policy judgements about the obligations of employers and employees when an employee or prospective employee has a disability. Target

Stores v. Labor and Industry Review Commission, 217 Wis. 2d 1, 13, 576 N.W. 2d 545, 550 (Ct. App. 1998).

The second level of review is the "due weight" standard which is to be used when the agency decision is "very nearly" one of first impression. Sauk County v. WERC, 165 Wis.2d 406, 413, 477 N.W. 2d 267 (1991). The lowest level of review is the "no weight" standard which is applied when the issue is clearly one of first impression and the agency has no special expertise or experience in determining the issue in question. *Id.*

Contrary to the Petitioner's assertions, the position taken by LIRC here are not unprecedented nor are they unsupported by substantial evidence. There is nothing new or astounding in LIRC's decision. As outlined below, there is a significant history of the Wisconsin Fair Employment Act being found to require an employer to restructure the physical demands of the job in order to accommodate a disabled employee provided this can be

achieved without hardship to the employer, just as LIRC found here. In the instant case there was substantial evidence that such a restructuring was possible and reasonable, and could have been done without any hardship to the employer. That evidence is discussed in detail later.

2. Susan Catlin Was Not Allowed to Return to Work Because of Her Disability.

A complainant's burden under the disability provisions of the Wisconsin Fair Employment Act (Act) is to show first that she is disabled within the meaning of the act and second that there was an adverse employment action based on that disability. Target Stores v. LIRC, 217 Wis. 2d 1, 9, 576 N.W. 2d 545, 549 (Ct. App. 1998) Susan Catlin has met that burden. The first element of this has been agreed to by the parties. There is no dispute that Ms. Catlin is disabled as a result of a car accident. She now relies on a wheelchair for mobility. Crystal Lake does not contest that Ms. Catlin is disabled.

Likewise, the second element is not really in dispute. Ms. Catlin was not allowed to return to work at the Crystal Lake Cheese Factory because of her disability. Prior to her accident she was considered a good worker and there were no complaints about her work. Crystal Lake Cheese Factory has never contended that Ms. Catlin was being denied employment for any reason other than their contention that she was no longer physically able to do her job. The decision to not allow her to return to work was based solely on Crystal Lake's view of her disability. Her attempts to return to work were ignored. Crystal Lake's owner knowingly refused to return Ms. Catlin's phone calls and that of her DVR counselor, and failed to communicate at all with her regarding her attempts to return to work. The adverse employment decision was based on Ms. Catlin's disability and Crystal Lake's uninformed and mistaken assumptions about the limitations imposed by that disability.

LIRC in its decision recognized that Crystal Lake underestimated Ms. Catlin's abilities assuming she could do no physical tasks and could do only paperwork. Their decision referred to the testimony of Crystal Lake's operations manager who testified that he did not believe it practical or possible to remove one member of the team entirely from physical work. The implication was that he could not return Ms. Catlin to work because he thought she could not do any physical work. In his testimony he included in physical work many tasks that Ms. Catlin could indeed do. LIRC found that Crystal Lake had erred in its assumptions that Ms. Catlin could do no physical work.

> As of the date she sought reinstatement the complainant was physically able to perform most of the jobs in the wholesale department including training people, making boxes, making labels, baking cheese, labeling cheese (using a "reacher" to get at the labels), weighing it, pricing it, boxing it, putting it on a pallet, doing inventory and other paper work. She was also able to clean up and wash equipment.

(Finding of Fact ¶ 14, A-App 8)

Crystal Lake simply did not know what Ms. Catlin could

do because they never asked her.

3. Reasonable Accommodations Were Available that Would Have Allowed Ms. Catlin to Maintain her Employment Status at Crystal Lake Cheese Factory.

Ms. Catlin's disability could have been accommodated in her job at the Crystal Lake Cheese Factory. Jeff Annis, Rehabilitation Technologist from the Assistive Technology and Assessment Center at the University of Wisconsin Stout did an on-site review of the wholesale department at Crystal Lake Cheese Factory. He knew Ms. Catlin from prior assessments he had done for her. He made recommendations for accommodating Ms. Catlin on the job.(Complainant's Ex. 6, A-App 154-156). He indicated that the threshold had a three inch lip that needed to be modified. He indicated that she would have to pull in and back out of the locker room because there was not sufficient space for her chair to turn around. He indicated that the bathroom was inaccessible but that

was not an issue for Ms. Catlin at that time. The bathroom was not an issue for Ms. Catlin because she used a catheter bag. (TR. P. 55, A-App.87). Additionally, he indicated that activity in the cooler and lifting 40 lb blocks of cheese would need to be accommodated although he did not make specific recommendations. Finally, he said that table heights needed to be adjusted. Mr. Annis concluded there were accommodations available and they could have been put in place.(Complainant's Ex. 6 P. 2, A-App 155) Crystal Lake mischaracterizes this report, alleging that Mr. Annis determined Ms. Catlin could not perform certain tasks at the tables. In actuality Annis's report says that "most of the cutting, packaging, shrink wrapping, sealing and marking are done on tables that are 33 ½ inches high. These tables are too high for Susan and will need to be accommodated". *Id.* He never said that Ms. Catlin could not do these things, only that the table should be lowered.

Ms. Catlin, the person who know best her own capabilities and limitations, as well as the demands of her job, testified that she felt that some of these accommodations would not be necessary. In her current job she works with tables at varying heights and does not have a problem. The work that she did in the cooler was primarily the grocery store orders which are located on the lower shelves. (TR. P. 65, A-App 82). She felt that she would be able to perform most tasks that were part of her job with little or no accommodations. She could train, make boxes, make labels, bake cheese, label it, scale it, price it, box it and put it on the pallet, do inventory and paperwork. (TR. P 29, A-App 46) What she felt she could no longer do was lift the 40 lb blocks of cheese which was primarily the cutter's job nor do the climbing around part of the inventory. Additionally, she testified that she could handle the entire labeling function with the use of a reacher so that she could reach the label rolls on a high

shelf. (TR. P. 67, A-App 84). With some accommodations and assistive technology, Ms. Catlin could have performed her job. Accommodation in her job as it was, was possible and reasonable.[1]

However, as Mr. Annis noted, the easiest and least expensive way to accommodate Ms. Catlin was to modify her job duties. Far simpler, and at minimal cost to the employer, the easiest accommodation would have been to rearrange the tasks among the wholesale department teams so that Ms. Catlin did not have to perform the more physically demanding ones. The only task that the Administrative Law Judge found that Ms. Catlin was unable to perform was retrieving cheese from the cooler while acting as the cutter since she could not reach cheese on the upper shelves of the cooler because she could not climb the ladder. (ERD p. 2-3, A-App 29-32) As it was,

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[1] Petitioner Appellant Petitioner Crystal Lake quotes from the report of David Johnson in support of its position. However, that report was objected to as hearsay and it contents were not allowed into evidence. (TR. 104-105, A-App.121-122).

she did these only occasionally anyway before the accident.

The heaviest work was the cutter's job, not hers. All the members of the wholesale department were cross trained. They all knew how to do all the tasks. Even if one person was absent Ms. Catlin could have taken over certain duties and the other two team members could have handle the heaviest work. The team included both her mother and her sister. They did not object to doing a disproportionate share of the more physical work and both testified to that.(TR. p. 74 & 83, A-App 91 & 100). It would have been quite simple to divide up the job duties among the four team members so that the heaviest physical tasks went to the cutter and the cryovacer who were already the ones primarily responsible for these duties any way, and give more of the less physical tasks such as labeling to Ms. Catlin. Such an arrangement has been found to be a reasonable accommodation previously

under the Act.

4. LIRC's Finding that a Restructuring of Job Duties was Reasonable is Not Unprecedented or Unreasonable.

Despite Crystal Lake's assertions to the contrary this not a new or novel interpretation of the Wisconsin Fair Employment Act. Just by calling something "unprecedented", "unreasonable" and an "amazing demand" does not make it so. (Brief of Crystal Lake Cheese Factory, p. 1) There is a line of cases under the Act that go back at least as far as 1979 that say that "where an employer normally exercises a degree of flexibility in assigning duties to employees and in a particular case can do so without hardship, it may be required to so as an accommodation." Harris v. DHSS, 84-0109-PC-ER, 85-0115-PC-ER p. 16-17. (1988).[2] The Personnel Commission in that case went on to

[2] Crystal Lake's reliance on this case ignores the actual holding of the case and its facts. The personnel commission found that where duties are shared among several people it was an reasonable accommodation to allow the Complainant to be assigned the duties he was physically capable of doing.

say:"[E]mployers were required to exercise flexibility that was readily available and that could be exercised without hardship in their personnel management." *Id.* p. 19, citing approvingly See v. Vollrath, LIRC (1979) and Cappell v. Consolidated Papers, Inc. , LIRC No. 8301304 (12/18/84) affirmed Consolidated Papers, Inc. v. LIRC, Court of Appeals, Dist. IV No. 85-1384 (April 17,1986) (unpublished decision).

Similarly, in another recent case, LIRC found that a violation of the Act occurred when an employer refused to restructure an individual with a back injury's job duties.

> [T]he commission is unpersuaded that exempting the complainant from those duties which he was physically unable to perform would not have been reasonable or that the respondent could not have done so without hardship to its business. The commission, therefore, finds that the respondent's refusal to accommodate the complainant in this manner was in violation of the act.

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It is hard to imagine a scenario where such an

accommodation could have been easier given the cross training of employees and the willingness of co-workers to assist. [3]

LIRC's position is further bolstered by the legislative intent of the WFEA. As the court in McMullen v. LIRC, 148 Wis. 2d 270, 275, 434 N.W. 2d 830, (Ct. App. 1988) recognized, the legislative intent of the Wisconsin Fair Employment Act is to "encourage and foster to the fullest extent practicable the employment of all properly qualified individuals regardless of any handicap" and it is to "be liberally construed to effectuate its polices and purposes." *Id.* p. 275 citing Ray-O-Vac v. DILHR, 70 Wis. 2d 919, 236 N.W. 2d 209, 209, 214-215 (1975). Thus LIRC did not err in interpreting the Act to

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[3] Crystal Lake contends that the testimony of Catlin's mother and sister that they would not mind stepping in and helping with the tasks Catlin was unable to perform even if this meant doing a disproportionate share of the heavy work was inherently biased and LIRC should have conferred with the ALJ.(Brief of Crystal Lake Cheese Factory, p. 41) Of course its biased. They are her family, they love her and they will do what they can to help her on the job. That does not make their testimony incredible, rather it is more credible that they should actually be willing to do the heavy physical tasks because of this relationship as opposed to similar testimony from an unrelated individual.

require Crystal Lake to accommodate Ms Catlin's disabilities by assigning the heaviest physical tasks to other members of the team. It was simply following the intent of the Wisconsin legislature as well as its own history of interpreting the Wisconsin statute. In fact LIRC did exactly what it was supposed to do in line with the policy cited in McMullen, *supra.* LIRC encouraged the employment of an individual with a disability and liberally construed the reasonable accommodation requirement to effectuate that purpose. It was reasonable to redistribute the heaviest physical tasks to others who were ready, willing, and able to take them on (and who already had responsibility for them) and allow Ms. Catlin to perform more of the tasks that were already part of her job that were less physically demanding. This was not a new job as Crystal Lake keeps loudly asserting but a reasonable modification of the old one. Susan Catlin would be doing the almost all the same old things she did

before but perhaps more often and none of a few things she did sometimes before, the heavy physical tasks that were primarily someone else's job anyway.

5. Crystal Lake Did Not Consider Any Accommodation of Catlin's Disability.

Once an employee has met her burden of showing the first two elements above, then it is up to the employer to show either that a reasonable accommodation would pose an undue hardship or, that even with a reasonable accommodation the employee cannot adequately undertake the job related responsibilities. Target Stores v. LIRC, 217 Wis. 2d 1,10, 576 N.W. 2d 545, 549 (Ct. App. 1998). Crystal Lake has not shown either.

In this case Crystal Lake did not even explore the idea of reasonable accommodations. It never looked at accommodations at all. The owner, Tony Curella admitted as much in his testimony. Under questioning by Complainant's attorney he responded as follows:

Q. "In fact, you didn't make any effort whatsoever for what might be appropriate accommodations for Susan to return to work, did you?"

A. "No."

(TR. p. 90, A-App. 107).

Crystal Lake did not discuss Ms. Catlin's abilities or limitations with her or her doctor. Crystal Lake refused to talk to Ms. Catlin at all. They had no knowledge about what she could or could not do. They never asked what accommodations she thought she might need. Who better to ask than the person who knows the job and the knows her own abilities and limitations? They did not ask for a medical release or seek out any other information about what type of accommodations she may need or may be appropriate to this work situation. Their insurance company even gave them information about the Job Accommodation Network, a toll free service that provides information about workplace accommodations for people

with disabilities, but there is no evidence Crystal Lake ever contacted them.

The Act has been found to include a duty to gather sufficient information from the employee and from qualified experts as needed to determine what accommodations are necessary. Keller v. UW-Milwaukee, Case No. 90-0140-PC-ER, 3/19/93. Crystal Lake failed in this duty. As Crystal Lakes so succinctly put it in its brief:

> In order to determine the availability, need for, and reasonableness of a requested accommodation, it is necessary *a priori* to accurately determine the job related responsibilities of the position at issue and the impact of the complainant's disability on her ability to carry out those responsibilities.

(Brief of Crystal Lake Cheese Factory, p. 46-47, emphasis added).

Furthermore, Ms. Catlin was not required to a make a specific request for accommodation, although whether she would have , had Tony Curella actually returned any of her phone calls we may never know!

When the employer is aware of the employee's

handicap and knows what type of accommodation the employee requires the employer is expected to offer an accommodation even absent a specific request from the employee. Crivello v. Target Stores, LIRC 8/14/96. While Crystal Lake may not have known exactly what Ms. Catlin needed as an accommodation, it knew she had a disability and it knew she needed accommodations and it therefore had a duty to inquire further.

Crystal Lake never even came close to asking the right questions until after Ms. Catlin's discrimination complaint was filed. At that time, in April of 1998, Crystal Lake asked Ms. Catlin's sister, who had no expertise in accommodations and did not even know what assistive technology was, if Ms. Catlin could do the job. Still, they were asking the wrong person, they did not talk to Ms. Catlin herself. This does not constitute a reasonable exploration of accommodations.

It was not even until the time of the hearing in this

matter, almost two and one half years after Ms. Catlin sought to return to work, that Crystal Lake inquired as to how much Ms. Catlin could lift. In his explanation as to why Ms. Catlin should demonstrate her ability to lift an 18.46 lb. block of cheese (which she did successfully) Crystal Lake's attorney, Fred Groiss, said "How do we know what we have to do to accommodate unless we know what she can do?" (TR. P. 41, A-App 73) Exactly! Unfortunately, its too late to be asking then![4]

6. Crystal Lake Failed is Duty to Accommodate Under Wisconsin Law.

Crystal Lake Cheese Factory failed in its duty to accommodate. The duty to accommodate under the

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[4] Crystal Lake , in its brief at page 58 bizarrely argues that LIRC should have contacted the administrative law judge regarding what they contend was Ms. Catlin's difficulty in lifting the eighteen pound block of cheese. This argument has no basis in law or fact for several reasons: Neither LIRC nor the Administrative Law Judge based their decision on her ability to lift the 18.46 pounds unassisted; Ms. Catlin did indeed lift the cheese without difficulty; although some parts of the transcript are labeled inaudible it was not Ms. Catlin but, Fred Groiss, Crystal Lake's "able bodied" attorney, who dropped the cheese lifting it out of the box and the reference about not getting a job at Crystal Lake Cheese Factory in the transcript at page 42 by the administrative law judge was directed at Mr. Groiss. (It appears the attorneys writing the brief did not consult their own colleague about the events of the hearing.) Furthermore, even if Ms. Catlin had not been able to lift the cheese that says nothing about her ability to do so with reasonable accommodations or relieve Crystal Lake's obligations to provide them.

Wisconsin Fair Employment Act has been described by Wisconsin Courts.

> The employer's duty to accommodate an employee is satisfied if it offers an accommodation which effectively eliminates the conflict between the handicapped employee's abilities and the job requirements and which reasonable preserves the employment status.
>
> Crivello v. Target Stores, LIRC 8/14/96.

No such accommodation was even considered here much less offered.

Additionally, the Respondent did not look at the possibility of transferring Ms. Catlin to another position if it felt she could not adequately perform her job. Such a transfer may be a reasonable accommodation under the Act. McMullen v. LIRC, 148 Wis. 2d 270, 434 N.W. 2d 830 (Ct. App. 1988).

7. Crystal Lakes Reliance on Federal Law is Unfounded.

Crystal Lake urges this court to adopt analysis used under the Americans with Disabilities Act (ADA) in applying the Wisconsin Fair Employment Act. Perhaps

they should be careful what they wish for. It is well settled that the ADA requires an employer to engage in an interactive process with an employee to determine a reasonable accommodation.

> An employee's request for reasonable accommodation requires a great deal of communication between the employee and employer...neither party should be able to cause a breakdown in the process for the purpose of either avoiding or inflicting liability.

Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281, 1285 (CA 7) 1996.

The implementing regulations of the ADA provide that an interactive process take place in making accommodation decisions.

> To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

29 C.F.R. § 1630.2(o)(3) 1995.

No such interactive process took place here. Crystal Lake attempts to move this case from the

protections of the Wisconsin Fair Employment Act and instead apply an analysis used under the federal law, the Americans with Disabilities Act (ADA). This attempt is misguided for several reasons. Notably, none of cases identified by Crystal Lake, that suggest looking to federal law for guidance in interpreting the WFEA are cases involving its disability provisions. (Brief of Crystal Lake Cheese Factory, p. 33) And Crystal Lakes comment that nothing in the WFEA's legislative history "suggests an intent to construe the duty of 'reasonable accommodation' differently than under the ADA" is similarly unpersuasive given that the WFEA's disability provisions predate the ADA by almost ten years! (Brief of Crystal Lake Cheese Factory, p. 37)

The ADA applies an analysis not part of the Wisconsin Fair Employment Act, that distinguishes between essential and marginal functions. The term essential functions has no particular meaning under the

Wisconsin Fair Employment Act. Target Stores v. LIRC, 217 Wis. 2d 1, 576 N.W. 2d 545 (Ct. App. 1998)., fn 9.

Under the ADA determining whether a function is essential includes determining whether removing the function would fundamentally alter that position, does the position exist to perform a particular function, are there other employees available to perform that function, and the amount of time spent performing the function. *American With Disabilities Act Handbook*, p. I-38, U.S. Equal Employment Opportunity Commission and U.S. Department of Justice (1992).

Even under this analysis it is not clear whether the few tasks Susan Catlin was no longer able to do even with accommodations qualified as essential functions or marginal functions. Her position was not the cutter position nor was it the cryovacer position. Hers was the lead person position and as such she had the primary responsibility for processing grocery store orders and

doing inventory sheets, tasks she was able to perform. She spent very little time lifting forty pound blocks of cheese and even less time hauling pallets and there were at least three others in the department who performed those functions. Yet Crystal Lake seems to be arguing that all Catlin's job functions were essential and that not only is Catlin required to perform all the functions of her position but it is also essential that she be required to perform all the functions of all the other employees in the department no matter what their primary role is. Crystal Lake has offered no case law under the ADA that says an individual must be able to perform all functions of four different positions or they will not be considered a qualified individual with a disability entitled to protections under that law.

Furthermore, the Wisconsin Court of Appeals has specifically rejected the notion of applying law from other jurisdictions to determine reasonable accommodation

under the Wisconsin Fair Employment Act.

> Both parties have urged us to examine federal and state case law interpreting statutes on the same subject as the one at issue here. However, the statutory language and scheme contained in the analogous state and federal legislation differ, sometimes significantly, from that found in sec. 111.34(1)(b). Our legislature has established its own scheme for dealing with employment discrimination based on handicap and has articulated the specific policy considerations underlying that scheme. Therefore, we will construe sec. 111.34(1)(b) in accordance with our legislature's intention rather than the intention of other jurisdictions.

McMullen v. LIRC, 148 Wis. 2d 270, 275-276,434 N.W.2d 830 (Ct. App. 1988)

Similarly, LIRC in Fields, specifically rejected the application of essential functions concepts to reasonable accommodation under the WFEA.

> [T]he instant case does not involve an interpretation of the Americans with Disabilities Act (hereinafter ADA), but of the Wisconsin Fair Employment Act, which contains no reference to "essential job functions" and no injunction against reallocating specific job functions. Indeed, the Wisconsin Court of Appeals has specifically held that the Act should be broadly construed such that even a transfer to of a worker who can no longer perform his job to another position might be a reasonable accommodation. Citing McMullen v. LIRC, 148 Wis. 2d 270, 434 N.W. 2d 830 (Ct. App. 1988). The McMullen case stands for the proposition that it is inappropriate to conclude as a matter of law that any particular kind of action is not required as an accommodation and the resolution of any case depends

> upon whether the facts show that the accommodation would be reasonable and would not a hardship on the employer. Citing Gartner v. Hilldale, Inc. (LIRC, May 12, 1992) Thus it cannot be said that a job-related responsibility, even an "essential" one, need never be restructured or removed by way of reasonable accommodation.

Fields v. Cardinal TG CO (LIRC, February 6, 2001)

The importance of such flexibility to people with disabilities cannot be emphasized enough. Every disability is different and the impact that it has on people varies greatly from individual to individual. Catlin, for example, may be labeled a quadriplegic based on the level of vertebrae of her spinal cord injury but the resulting limitations and abilities make her more like a paraplegic. Likewise, every job is different including the duties, the environment, the co-workers, and the workplace philosophy. What may be hardship in one environment may not be a hardship in another.

8. Crystal Lake Has Failed to Meet Its Burden of Showing that Accommodating Catlin Would be a Hardship.

Crystal Lake offered virtually no evidence of hardship in regards to modifying Ms. Catlin's work duties so that she would be exempt form the heaviest lifting other than its excuse that this is not the way we do it. They did not explore accommodations so they could not show any particular accommodation was indeed a hardship. On the contrary, its difficult to imagine a situation where modifying work duties in this way could have been simpler. Crystal Lake already used a team concept in the wholesale department. Everyone was cross trained on all the jobs so each person knew how to do all the tasks. Furthermore, the other team members included Ms. Catlin's sister who already had the heaviest job as cutter, and Ms. Catlin's mother. Both of them were willing to perform the heavy physical tasks that Ms. Catlin could not do and did not object even if this meant they got a disproportionate share of those duties. This was not a situation in which the employer had to worry about

other employees complaining about the situation or contending Ms. Catlin was getting "special treatment". Modifying the duties in this way was the ideal solution which could have been done at minimal expense.

There was testimony that a new accessible bathroom would cost $ 47,000 but the testimony indicated that Ms. Catlin did not need an accessible bathroom at the time she sought to return to work. Furthermore, no documentation was offered by Crystal Lake to support that $47,000 figure and the only testimony regarding it was from Phillip Robertson, the Operations Manager, and was complete hearsay:

Q: Have you gone and gotten any estimates as to what would be the cost of installing a bathroom facility?

A: You'd have to start with one of the issues that was brought to my attention. And I had a contractor come and also include some electrical, get an estimate of 47,000.

...

Q: Now, you talked about an estimate that you got in terms of installing a bathroom. Is that installing a totally new bathroom or remodeling an existing bathroom.

A: You can't remodel an existing bathroom because once you open it up, you have to go to codes, the turn around spaces.

Q: Do you know what it would take to make a bathroom

accessible for Miss Catlin?

A: Without looking at what's recommended and what codes are, no.

Q: You don't know what her particular need are as far as accessibility for a bathroom are?

A: At this time I was told to have some bathrooms made up.

(TR p. 114, , 120, A-App 146,152).

The administrative law judge apparently relied on this in his finding that Crystal Lake could not reasonably accommodate Ms. Catlin's disability presumably because the cost was prohibitive. (ERD p. 3, A-App 3). However, Hardship cannot be determined in a vacuum. There was no evidence of what Crystal Lakes financial resources were. When Robertson was questioned about this he said he could not answer. (TR. p. 120, A-App. 152).

Nor was there any indication as to what Crystal Lake's resources were in terms of the affordability of any accommodation. Crystal Lake offered no information as to what there income was or what plans they had for future remodeling, nor was there any indications that other bathroom modifications were considered. The other

suggestions made to accommodate Ms. Catlin were relatively inexpensive and included addressing the 3 inch threshold on the entry door something which is quite easily remedied with a small ramp, and changes had to be made to allow here to wheel her chair into the a sanitizing bath. Furthermore, Ms. Catlin testified that she did not believe she needed the work table height modified despite Mr. Annis's suggestion to do so. She also testified that she could perform the labeling function with the assistance of a reacher, a relative inexpensive assistive device. None of these proposed accommodations is particularly expensive or burdensome. Additionally, the eliminating of the heavy cheese retrieval from the cooler from Ms. Catlin's job tasks would have cost Crystal Lake nothing.

Furthermore, there is no legal basis for arguing as Crystal Lake does that the alleged cost of a new bathroom would be three time Catlin's wages. A bathroom could

be used by all their employees and even visitors to their retail store which was on the premises. Even after Catlin was no longer employed Crystal Lake would still have a functional bathroom for future use. The Court of Appeals found that Crystal offered no evidence to show that modifications to the physical plant would create a hardship. (A-App. 18).

The Respondent did not meet is burden of proof that an accommodation would impose a hardship. It is a Respondent's burden to prove it cannot reasonably accommodate the employee's handicap without imposing a hardship on the employer's business. Dushek & Watkins v. LIRC, (Brown Co. Cir. Ct. 5/18/ 89)

Crystal Lake realizes in hindsight that it did not meet its burden on proving hardship and is now seeking a remand to supplement the record. The Court of Appeal specifically rejected this saying as follows.

> We decline to remand this case to give Crystal Lake the opportunity to show hardship. It chose to proceed on a legal theory that LIRC required it to create a new job and that this

> was unreasonable under the statute. It could have opted to present alternative evidence regarding hardship, but it did not. We will not remand merely because a party's trial strategy backfires.
> (A-App. 18).

It appears that Crystal Lake was convinced that Catlin could not perform any physical work and there fore there was not possibility of accommodating her. If they has contacted her and had meaningful discussions about her capabilities before the time of the hearing in this matter they would not have been caught off guard. Crystal Lake has no one to blame but itself.

B. CRYSTAL LAKE WAS NOT DENIED DUE PROCESS BY LIRC'S FAILURE TO CONSULT WITH THE ADMINISTRATIVE LAW JUDGE ON ISSUES OF CREDIBILITY.

Crystal Lake complains that it was denied due process when LIRC rejected the hearsay testimony of Phillip Robertson regarding the cost of an accessible bathroom. Crystal Lake contends that LIRC should have consulted with the administrative law judge regarding his

credibility. The idea behind checking with the trier of fact is to determine if the witness's demeanor indicated lack of credibility. The issue in Mr. Robertson's case is not a matter of whether he was lying or not. It is a matter of uncorroborated hearsay. It is clear from the black and white record he did not know very much about what that estimate meant in terms of what Crystal Lake would get or in terms of what Catlin needed. He did not know what an accessible bathroom required, he did not know what Ms. Catlin needed in terms of bathroom accessibility. He was simply told to "have some bathrooms made up." (TR. 120, A-App. 152).

LIRC was correct to reject this finding of the administrative law judge. Crucial findings cannot be based on hearsay testimony alone. Village of Menomonee Falls v. DNR, 140 Wis. 2d. 579, 610, 412 N.W. 2d 505 (Ct. App. 1987).

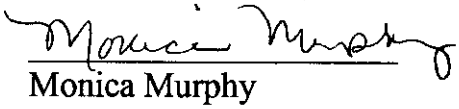
III. CONCLUSION

The decisions of the Labor and Industry Review Commission and the Court of Appeals must be upheld. The LIRC decision is entitled to great weight deference by this court. LIRC's decision reflects its expertise in this area of the law and is consistent with its precedents and the legislative policy of encouraging the full employment of people with disabilities.

Ms. Catlin met her burden of showing that she was disabled within the meaning of the act and that she suffered an adverse employment decision as a result. Crystal Lake, on the other hand, failed to meet its reasonable accommodation burden. It made no effort to explore reasonable accommodations. It ignored Ms. Catlin's attempts to return to work. It had no particular knowledge of what Ms. Catlin could do and simply assumed she could not do the job without talking to her, her doctor, or an expert on accommodations. There were

accommodations available that would have allowed Ms. Catlin to do her job. The employer failed in its burden to show that these accommodations would impose a hardship. Susan Catlin was discriminated against by Crystal Lake Cheese Factory because of her disability in violation of the Wisconsin Fair Employment Act.

Respectfully Submitted,



Monica Murphy
State Bar No.1005145
Wisconsin Coalition for Advocacy
Attorney for Respondent Susan Catlin

Certification

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8) (b) and (c) for a brief produced using the following font:

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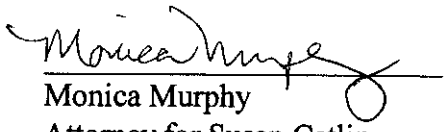
Dated this 9 day of April, 2003.



Monica Murphy
Attorney for Susan Catlin

STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 02-0815

CRYSTAL LAKE CHEESE FACTORY,
Petitioner-Appellant-Petitioner,

v.

LABOR AND INDUSTRY REVIEW COMMISSION,
and SUSAN CATLIN,

Respondents-Respondents.

APPEAL FROM A DECISION OF THE
COURT OF APPEALS, DISTRICT III,
AFFIRMING AN ORDER OF THE
CIRCUIT COURT FOR BARRON COUNTY,
THE HONORABLE JAMES C. EATON, PRESIDING

CERTIFICATION OF DELIVERY

Respondent-Respondent Susan Catlin, by Wisconsin Coalition for Advocacy, by Monica Murphy, states as follows under penalty of perjury, did cause to be delivered this day to the Badger Bus Company for delivery to the Supreme Court of Wisconsin later this same day 22 copies of the brief of Respondent-Respondent Susan Catlin in this matter.

Dated this 10th Day of April, 2003.

By: Monica Murphy

Monica Murphy
Attorney for Susan Catlin
2040 W. Wisconsin Ave. Suite 678
Milwaukee, WI 53233

SUPREME COURT OF WISCONSIN

CRYSTAL LAKE CHEESE FACTORY,

Petitioner-Appellant-Petitioner,

v.

Case No. 02-0815

Circuit Court Case No. 01-CV-289

LABOR AND INDUSTRY REVIEW COMMISSION AND SUSAN CATLIN,

Respondents-Respondents.

AN APPEAL FROM A DECISION OF THE COURT OF APPEALS, DISTRICT III
APPEAL NO. 02-0815

REPLY BRIEF OF CRYSTAL LAKE CHEESE FACTORY TO BRIEFS OF LABOR AND INDUSTRY REVIEW COMMISSION AND SUSAN CATLIN

Robert H. Duffy
State Bar No. 1010996
Sean M. Scullen
State Bar No. 1034221
QUARLES & BRADY LLP
411 East Wisconsin Avenue
Milwaukee, WI 53202
(414) 277-5000
Attorneys for Crystal Lake Cheese Factory

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INTRODUCTION

The respondents contend LIRC's interpretation is consistent with legislative intent, but offer no evidence the legislature meant to impose on employers an obligation to create a job for disabled employees unable to perform the job-related duties of their position. The respondents contend LIRC's interpretation is reasonable, but ignore the language of the WFEA, the great weight of persuasive authority to the contrary and any common sense understanding of an employer's duty of reasonable accommodation. The respondents contend Catlin needed only to be excused from the heaviest physical tasks, but ignore the numerous additional duties her job regularly entailed that she admittedly could not perform. Because neither the law nor substantial record evidence support LIRC's finding that Crystal Lake denied Catlin a reasonable accommodation that it could have provided without hardship, LIRC's decision should be reversed.

ARGUMENT

I. LIRC'S INTERPRETATION OF THE WFEA IS UNPRECEDENTED, UNSUPPORTED AND UNREASONABLE, AND SHOULD BE REVERSED

Both LIRC and Catlin urge this court to find that LIRC's interpretation of the reasonable accommodation provision of the WFEA in this case is entitled to "great weight" and should be upheld. In support, they argue that LIRC's interpretation of "reasonable accommodation" under the facts in this case is not novel, is consistent with and supported by prior court and agency decisions and is "entirely" reasonable. Those contentions are wrong.

A. The Few Appellate Cases Discussing What Is Required As "Reasonable Accommodation" Neither Compel Nor Support LIRC's Decision

In their briefs, both LIRC and Catlin rely heavily on McMullen v. LIRC, 148 Wis. 2d 270, 434 N.W.2d 830 (Ct. App. 1988). LIRC and Catlin suggest that McMullen supports a finding that the WFEA requires an employer to reassign essential job-related responsibilities that a disabled employee cannot perform to others, thus creating a new position for the person. The respondents reliance on McMullen is misplaced.

To begin with, McMullen is factually inapposite. McMullen involved a request by a disabled employee to transfer to an open, existing position -- all the essential functions of which the employee could perform. It did not, as here, involve a request that the employer create a new job by eliminating the job-duties the employee could not perform. The court of appeals thus neither reached nor even discussed whether reasonable accommodation under the WFEA could be construed to hold that an employer is obligated to create a new job.[1]

Moreover the McMullen court did not consider the proper scope of reasonable accommodation in light of the statutory defense set forth in Wis. Stat. § 111.34(2)(a) -- a defense the respondents concede Crystal Lake established. Accord Target Stores v. LIRC, 217 Wis. 2d 1, 17 n.10; 576 N.W.2d 545, 552 n.10 (Ct. App. 1998) (noting the McMullen majority did not consider § 111.34(2)(a)). McMullen is thus neither controlling nor instructive.

The respondents' reliance on Target is equally misguided. Target considered only whether the duty of

[1] Catlin never sought transfer to another position and the record is devoid of evidence there was any open position at Crystal Lake, much less a position she was qualified to perform.

reasonable accommodation obligated an employer to temporarily exercise forbearance, by refraining from terminating an employee with sleep apnea, while the employee underwent a short treatment that would have fully alleviated the symptoms of her condition. See Target 217 Wis. 2d at 19-20, 576 N.W.2d at 553.

While the court in Target did not address the accommodation requested here, unlike McMullen, it did construe the meaning of "reasonable accommodation" under the WFEA in light of the relationship between § 111.34(1)(b) and § 111.34(2)(a). Specifically, it held that, "When read together, the only reasonable construction of these two provisions is that the purpose of reasonable accommodation is to enable employees to adequately undertake job-related responsibilities." Id. at 17, 576 N.W.2d at 552 (emphasis added). Given that purpose, LIRC erred in holding that reasonable accommodation required Crystal Lake to excuse Catlin from those duties she could not perform, employ others to perform those duties and physically renovate its aged facility to make it wheelchair accessible. None of those actions would have enabled Catlin to "undertake her job-

related responsibilities." Instead, they would only have provided her access to perform a "job" that did not exist.

B. Federal Decisions Construing Analogous Federal Law Are Instructive

Relying on McMullen, the respondents argue that the appellate courts of Wisconsin have determined that federal decisions are of no value in interpreting the WFEA.[2] Since McMullen, however, this Court has said exactly the opposite. See Marten Transport, Ltd. v. DILHR, 176 Wis. 2d 1012, 1020, 501 N.W.2d 391, 394 (1993) (approving review of decisions construing federal anti-discrimination laws for guidance in interpreting the WFEA given the similar purposes of the statutes). Further, contrary to Catlin's suggestion, numerous ADA decisions confirm that an employer does not have to eliminate requirements of an individual's job because others may perform those functions, or because those functions are only performed infrequently. See, e.g., Peters v. City of Mauston, 311 F.3d 835, 845 (7th Cir. 2002).

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[2] Citing La Crosse Police Comm. v. LIRC, 139 Wis. 2d 740, 761-62, 497 N.W.2d 510 (1987), LIRC also argues that "Wisconsin courts have not been hesitant to construe the WFEA more liberally than courts interpreting comparable provisions of federal law." LIRC's reliance on La Crosse is bewildering. The sole reference to federal authority in La Crosse is this court's citation to a decision construing the ADA as providing meaning to a WFEA disability provision. See id. at 761, 407 N.W.2d at 518 (citing School Bd. of Nassau v. Arline, 107 S.Ct. 1123 (1987)).

The respondents also err when contending that federal decisions are irrelevant because the ADA distinguishes between essential and marginal functions while the WFEA does not. Target does not suggest that an essential functions analysis is necessarily improper under the WFEA. As the Target court specifically note, "The requirement of being able to perform the essential functions of the job under the ADA operates similarly to . . . § 111.34(2)(a), Wis. Stats. . . ." Target, 217 Wis. 2d 16 n.9, 576 N.W.2d at 552 n.9. Accordingly, there is no reason to ignore the significant weight of persuasive federal authority that directly conflicts with LIRC's interpretation of "reasonable accommodation" in this case -- especially when the legislature created the WFEA provision at issue in the image of existing federal law.[3]

C. LIRC's Interpretation of Reasonable Accommodation Is Both Novel And In Conflict With Prior Agency Decisions Construing the WFEA.

Citing cases like See v. Vollrath, (LIRC, 8/11/79) and Kappell v. Consolidated Papers, Inc., (LIRC, 12/18/84), respondents argue that LIRC's interpretation here is

[3] Neither respondent disputes the reasonable accommodation language in the WFEA is identical to language then existing under the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et. seq*, which was also incorporated into the ADA. See Vande Zande v. Wisc. Dep't of Admin, 44 F.3d 538, 542 (7th Cir. 1995).

reasonable and entitled to "great weight" deference because it is supported by longstanding and consistent agency interpretation of the WFEA. This is incorrect. Neither case holds reasonable accommodation includes creating a new position or eliminating required job duties and reassigning them to others. Instead, they suggest an employer cannot refuse to employ a disabled individual in a large (over 15 person), general labor pool where there is an open and existing position, the duties of which the employee can perform. See id. Moreover, Vollrath and other LIRC decisions going back to 1979 are not only factually inapposite, they, as well as subsequent LIRC decisions based on them, are irrelevant given they precede the legislature's creation of § 111.34(1)(b).

Further, Harris v. DHSS, Wis. Pers. Comm., No. 84-0109-PC-ER (2/11/88) (A-App. at 180) confirms the divergent path LIRC has taken here. In that case -- unlike any of the agency decisions relied on by the respondents -- the Wisconsin Personnel Commission undertook a thorough analysis of the impact of § 111.34(2)(a) on the duty of reasonable accommodation in § 111.34(1)(b). The Commission -- which discussed both Vollrath and Kappell --

found that the only reasonable construction of those two provisions, when read together, is that the WFEA does not require an employer to create a new job or reassign job duties to other staff as a reasonable accommodation. See id. (A-App. at 192-195).

Nor does Harris, Vollrath, Kappell, or even Fields v. Cardinal TG Co., (LIRC, 2/16/01) support the accommodation LIRC suggests here. Unlike the employee in Harris, Catlin would have required Crystal Lake to eliminate the many non-marginal job-related responsibilities she was undisputedly unable perform (e.g., pulling heavy cheese from the cooler; retrieving any size block of cheese on the shelves beyond sitting level; operating the cutter; shrink wrapping; pulling boxes; moving inventory stacked on pallets to and from the cooler; hauling the cheese to the retail store, etc.) and make other employees perform them. Crystal Lake was thus not merely confronted with excusing Catlin from performing the heaviest physical tasks she previously performed, but other tasks, such as cutting and cryovacing that LIRC concedes (at p. 4 of its brief) she regularly -- "sometimes a couple of times a day" -- performed. Accordingly, Catlin was not, unlike the disabled employees in

the above cases, a member of a large general labor pool who sought transfer to an existing and open position that she could perform.

Fields is also distinguishable because there the employer took a disabled worker who was able to do his job for years without accommodation and, knowing his physical limitations, restructured his job so he could no longer perform it. The reasonableness of requiring an employer to excuse an employee from duties the employee cannot perform under those circumstances is, as LIRC recognized, markedly different from imposing the same obligation where, as here, the "employee finds [herself], due to [her] own changing circumstances, suddenly unable to perform [her] assigned duties."[4] See Fields, supra.

[4] In decisions since Fields, LIRC has, as here, applied a standardless approach to the determination of the availability of reasonable accommodation, essentially reading the requirement that an accommodation actually be reasonable out of the statute. See Waldera v. Cooperative Educ. Service, (LIRC, 10/31/02) (holding it could not conclude it was an unreasonable accommodation to require the employer to hire a driver at a cost of $20,000 per year to drive a legally blind applicant for a job that required travel by car to numerous locations).

D. LIRC's Conclusion That There Was A Reasonable Accommodation That Crystal Lake Could Have Provided Without Hardship Is Not Supported By Substantial Evidence of Record

Crystal Lake does dispute -- contrary to LIRC's contention -- that LIRC's findings accurately reflect the evidence in the record as to what Catlin was able and not able to do. Further, LIRC's finding (No. 15) -- that the duties Catlin was no longer capable of performing were duties that belonged primarily to the cutter and cryovacer -- is neither "unassailable" nor accurate. Rather, the evidence establishes that Catlin regularly performed duties that she could no longer perform including lifting the large blocks of cheese, retrieving the cheese in the cooler that was stored on shelves out of reach from a seated position, moving stacked cheese in out of the cooler using a palletizer or hand jack, cutting the cheese, pulling boxes, and operating the cryovacer. The evidence also establishes that there was no accommodation that would have enabled her to ever perform those duties. Whether or not some of those duties were "primarily" the duty of another member of the department is ultimately irrelevant, since it is undisputed that she regularly performed

them as part of her general daily duties. (A-App. pp. 44, 46, 63, 143).

With regard to physical modifications, contrary to respondents' suggestion, Phil Robertson's testimony that just modifying the bathroom to make it wheelchair accessible would alone have cost approximately $47,000 was also sufficient, as Judge Olstad found, to support a finding that accommodating Catlin would have been both unreasonable and a hardship to Crystal Lake. Rejection of that testimony, to the extent it was based on hearsay grounds, was improper since Catlin did not raise an objection to its introduction at the hearing.

Moreover, LIRC erroneously contends it is impossible to determine on this record whether a cost of $47,000, not to mention the cost of the other physical renovations that would have been necessary (i.e., changes to the parking lot, changes to the building entrance, modification to the sanitizing area, changes to the table heights, etc.), would pose a hardship.[5]

---

[5] Concerning adjusting the table heights, LIRC ignored Catlin's own expert who concluded that they were designed for working in a standing position and would have caused ergonomic problems to the other members of the department if lowered (A-App. p. 165), and inexplicably accepted Catlin's self-serving and inherently incredible testimony that her expert was wrong, stating "the higher [the table] the better." (A-App. p. 100).

Aside from the cost of the modifications in relation to Catlin's annual compensation (approximately $16,500), it is clear Crystal Lake -- which employed fewer than fifty workers and whose entire wholesale packaging department was non-automated and consisted of only four employees -- falls on the small end of the business spectrum.

The only reasonable conclusion, based on the evidence, is that to have required Crystal Lake to reassign Catlin's duties to two other employees[6] and undertake numerous physical renovations to its plant to make it wheelchair accessible -- which still would not have enabled her to perform her job-duties -- would have required unreasonable accommodations that would have posed a hardship to Crystal Lake.

E. Crystal Lake Sought to Determine the Availability of Reasonable Accommodation That Could Be Provided Without Hardship -- An Inquiry That Was Ultimately Irrelevant Since None Existed.

Finally, Catlin attempts to argue that Crystal Lake did not even explore the idea of reasonable accommodation. This

[6] Catlin's contention that reallocation of her tasks to her mother and sister would have been gladly accepted and an easily implemented accommodation is belied by the record evidence that, during her absence, Catlin wrote a letter to her sister accusing her of drug abuse and forcing their mother to do a disproportionate share of the heavy work at Crystal Lake. (A-App. p. 95).

contention is simply not true. In particular, it completely ignores Crystal Lake's interaction with Fortis Insurance and Genex Services. Contrary to Catlin's assertion, there was no need to seek medical releases, doctors reports, information from the Job Accommodation Network or anyone else. Catlin's is not a latent disability, the primary limitations of which were not known by Crystal Lake. Rather, Crystal Lake knew that Catlin was confined to a wheelchair. Knowing that limitation, Crystal Lake sought advice from an expert, David Johnson of Genex, who reviewed the facility and concluded (as did Catlin's expert) there were no reasonable accommodations that would allow someone in a wheelchair to perform the job-related responsibilities of the position Catlin formerly held. (A-App. at pp. 174-179). Catlin's argument thus ignores Curella's testimony, following that cited in her brief, that Crystal Lake (as opposed to Curella individually) did, through Genex, act to determine the availability of reasonable accommodation that would have allowed Catlin to return to work. (A-App. 131-132). While Catlin attempts to make much of the fact she left two messages for Curella, she fails to point out she never made any contact with her supervisor, who was in charge of hiring,

nor pursued any avenue for contacting her employer other than leaving messages for the President of the company to call her -- without indicating why she was calling.[7]

Moreover, nothing in the WFEA requires that form be elevated above substance. Accord Rehling v. Chicago, 207 F.3d 1009, 1016 (7th Cir. 2000) (failure to ascertain the availability of a reasonable accommodation does not give rise to relief absent of proof that a reasonable accommodation actually existed). It is not necessary to prove a negative to meet the WFEA's purpose. Further, the fact remains that Crystal Lake sought and received an expert opinion regarding the availability of reasonable accommodations that could have been provided without hardship -- of which there were none -- thereby satisfying its duty under the WFEA.

As Catlin correctly points out, "[t]he employer's duty to accommodate an employee is satisfied if it offers an accommodation which effectively eliminates the conflict

[7] Catlin also attempts to make much of the fact that Crystal Lake inquired of her sister (Winger) as to whether Catlin was capable of performing her job. Notably, Winger was also asked that question by the investigator for the EEOC, which dismissed Catlin's charge of disability discrimination. (A-App. pp. 107-108, 159). Like Crystal Lake's management, the EEOC investigator recognized that Winger knew the job -- as she had taken it over following her sister's accident -- and that she also knew her sister's condition and limitations. Candidly, Winger told the investigator Catlin was not capable of performing her former job. (Id.). Although Winger is not an expert in assistive technology as Catlin argues, she reached the same opinion as two experts who are.

between the [disabled] employee's abilities and the job requirements . . . ." Crivello v. Target Stores, (LIRC, 8/14/96). Here, there was no reasonable accommodation Crystal Lake could have adopted, with or without hardship, that would have enabled Catlin to perform the requirements of her job. Fortunately, Catlin secured alternative employment in a job the requirements of which she was able to perform. (A-App. pp. 63-64). The WFEA therefore need not be read as the respondents contend -- requiring employers to create jobs for the disabled -- in order to ensure the employment of all "properly qualified individuals" as the legislature intended. See § 111.31(3), Wis. Stats.

CONCLUSION

Crystal Lake respectfully requests that the Court reverse LIRC's erroneous finding that Crystal Lake refused Catlin a reasonable accommodation that it could have provided without hardship and that it affirm Judge Olstad's decision in its entirety, or in the alternative, given the novel interpretation LIRC has asserted here, remand the case on the issue of hardship.

Dated this 23rd day of April, 2003.

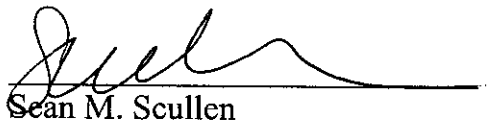
ROBERT H. DUFFY
State Bar No. 1010996
SEAN M. SCULLEN
State Bar No. 1034221

QUARLES & BRADY LLP
411 East Wisconsin Avenue
Milwaukee, WI 53202-4497
Attorneys for Crystal Lake
Cheese Factory

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Sections 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3000 words.

Dated this 23rd day of April, 2003.



Sean M. Scullen

STATE OF WISCONSIN
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AMICUS BRIEF OF THE WISCONSIN EDUCATION ASSOCIATION COUNCIL

Melissa A. Cherney
State Bar No. 1008246
Chris Galinat
State Bar No. 1000693
Wisconsin Education
Association Council
33 Nob Hill Drive
Post Office Box 8003
Madison, WI 53708-8003
Telephone: 608-276-7711

April 30, 2003

STATE OF WISCONSIN
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Melissa A. Cherney
State Bar No. 1008246
Chris Galinat
State Bar No. 1000693
Wisconsin Education
Association Council
33 Nob Hill Drive
Post Office Box 8003
Madison, WI 53708-8003
Telephone: 608-276-7711

April 30, 2003

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I. THE COURT SHOULD REJECT THE EMPLOYER'S REQUEST THAT IT CREATE AN AUTOMATIC EXCEPTION TO THE FAIR EMPLOYMENT ACT 2

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Amicus Wisconsin Education Association Council files this brief in support of the Respondent's position that this Court should affirm the decision of the agency that Crystal Lake Cheese Factory (hereinafter referred to as the Petitioner or Employer) discriminated against Susan Catlin when it refused to provide reasonable accommodations within the meaning of the Wisconsin Fair Employment Act (WFEA).

The briefs of the Respondent and the Labor and Industry Review Commission (LIRC) do an excellent job of setting forth the law as it applies to the extraordinary facts of this case. It seems very clear that the most reasonable conclusion that can be drawn from the record in this case is that this employer simply refused to even consider accommodating Catlin, because she was in a wheelchair. The Employer made the stereotypic assumption that Catlin would not be able to do any physical duties whatsoever, an assumption that we know turned out to be untrue. Thus this could be viewed as a classic discrimination case. However, based on the brief of the Employer in this matter, it is also clear that the Employer requests this Court take the radical step of declaring that a reasonable accommodation can **never** include any shift in

duties, even where the duties are minor and the employees involved do not object to this solution. Amicus writes to urge the Court not to judicially legislate by creating such a gaping hole in the obligation to reasonably accommodate.

The Employer and its amicus suggest that this Court must intervene in order to prevent employers from facing unpredictable and harsh adjudication results. What the Employer really is asking is that this Court judicially rewrite longstanding legislation in order to save it from a failed litigation strategy. This case is not about the need for clearer adjudication standards; it simply reflects the real politics of litigation. Rather than submit sufficient evidence to establish that the accommodation was unreasonable under the facts of this case, the Employer asks that, as a matter of law, it should win. As will be discussed below, specific statutory language and longstanding consistent decisions contradict the Employer's arguments.

I. THE COURT SHOULD REJECT THE EMPLOYER'S REQUEST THAT IT CREATE AN AUTOMATIC EXCEPTION TO THE WISCONSIN FAIR EMPLOYMENT ACT.

The Employer's primary arguments are two. First, it argues that, under "analogous" federal law, federal courts have held that an employer need not accommodate an employee by shifting job duties. Second, the Employer makes the

policy argument that an absolute exception must be created or there would be a "profound effect on the state agencies and every employer in the state." Neither of these arguments is persuasive.

A. Although The Wisconsin Fair Employment Act And The Americans With Disabilities Act (ADA) Deal With The Same General Subject Matter, The Wisconsin Legislation Substantially Predates The Federal Legislation, Contains Distinct Language, And Has Been Interpreted Differently By Wisconsin Courts. As A Result, It Would Be Inappropriate To Graft Federal Court Decisions Quoting The ADA On To The WFEA.

Although Wisconsin courts have at times looked to federal law when interpreting the WFEA, the courts have refused "to interpret provisions of the WFEA in accordance with analogous federal laws where the statutory language differs from that of the federal legislation." *Racine Unified School Dist. v. LIRC*, 164 Wis. 2d 567, 587, 476 N.W.2d 707 (Ct. App. 1991). *See also, American Motors Corp. v. ILHR Dept.*, 101 Wis. 2d 337, 305 N.W.2d 62 (1980). In that case, a religious accommodation case, the Court refused to incorporate federal law into the WFEA. The federal law had been adopted long after that state law and was not probative of legislature's intent.

Similarly, the WFEA was not modeled after the ADA. In fact, the WFEA and the reasonable accommodation provisions were in existence prior to the passage of the ADA.

Moreover, as set forth below, there are important differences between the laws which make it inappropriate to attempt to graft the federal law onto the reasonable accommodation provision contained in the WFEA. Indeed the Court of Appeals has expressly rejected previous arguments to adopt federal case law.

The ADA, unlike the WFEA, has specific statutory provisions that define reasonable accommodation and undue hardship. 42 U.S.C. secs. 12111(9) and (10). The ADA also defines a qualified individual as one who can perform the "essential functions" of the job, not necessarily every single aspect of the individual's current job. 42 U.S.C. sec. 12111(8). The implementing regulations further extensively define reasonable accommodation as well as undue hardship and essential functions. 29 C.F.R. secs. 1630.2(n), (o) and (p). The cases cited by the employer follow these detailed statutory and implementing regulations, which simply do not exist under Wisconsin law.

Furthermore, contrary to the implications of the employer, the federal law does state that job restructuring can constitute reasonable accommodation. 42 U.S.C. sec. 12111(9). However, federal courts have determined that "essential functions" do not need to be transferred. The federal courts **have** recognized that the transfer of

nonessential functions may constitute a reasonable accommodation. *Norris v. Allied-Sysco Food Services, Inc.*, 948 F. Supp. 1418 (N.D. Calif. 1996); *Barber v. Nabors Drilling U.S.A., Inc.*, 130 F.3d 702 (5th Cir. 1997); *Ward v. Wal-Mart Stores, Inc.* 140 F. Supp. 2d 1220 (D. N.M. 2001); and *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108 (8th Cir. 1995).

The WFEA contains a very different statutory scheme than the federal provisions relied upon by the employer. The WFEA has a simple and straightforward requirement that an employer must provide reasonable accommodation to disabled employees unless it would constitute a hardship to the employer. It also explicitly instructs that an evaluation of whether an employee can perform job-related responsibilities should be done on a case-by-case basis. Secs. 111.34(1) and (2), Wis. Stats.

Unlike the federal provisions, the Wisconsin law contains a specific instruction that the WFEA shall be liberally construed so as to accomplish its intended purpose. Sec. 111.31(3), Wis. Stats. The legislative intent is to encourage and foster to the fullest extent practicable the employment of all properly qualified individuals regardless of any disability. Sec. 111.31(3), Wis. Stats. "Wisconsin's Fair Employment Act is

specifically focused upon employment discrimination and is designed to prevent discrimination which 'tends to deprive the victims of the earnings which are necessary to maintain a just and decent standard of living' and causes 'strife and unrest.'" *Dairy Equipment Co. v. ILHR Department*, 95 Wis. 2d 319, 329, 290 N.W.2d 330 (1980), quoting *Wisconsin Telephone Co. v. ILHR Department*, 68 Wis. 2d 345, 368, 22 N.W.2d 649 (1975).

In contrast, the ADA does not contain a command that it be liberally construed.[1] However, it does recognize that states may provide greater protection and thus contains a command that it should not be construed to limit the remedies, rights and procedures of any state law. 42 U.S.C. sec. 12201(b). Nor does the ADA duplicate the WFEA's language of encouraging and fostering to the fullest extent practicable the employment of all properly qualified individuals. Because of the significant differences between the two laws, it would be inappropriate for the Court to create a judicial exception to the statutory reasonable accommodation requirement.

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[1] In fact, the U.S. Supreme Court held that the terms employed in the ADA definition of "disability" must be interpreted strictly to create a demanding standard for qualifying as disabled. *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184, 197 (2002).

Consistent with this, Wisconsin courts have repeatedly recognized the Wisconsin requirement that these cases be viewed on their particular facts, keeping in mind the important public policy statement of the WFEA. Significantly, this is the third time the Court of Appeals has rejected an employer's attempt to convince the courts to create an absolute exception to the law's requirement that employers provide reasonable accommodation.

In *McMullen v. LIRC*, 148 Wis. 2d 270, 434 N.W.2d 830 (Ct. App. 1988), the Court of Appeals held that "the specific considerations as to what composes a reasonable accommodation will have to be addressed on a case-by-case basis." *Id.* at 276. What is reasonable will depend on the specific facts in each individual case. In that case, the court held that a transfer to a vacant position could sometimes constitute a reasonable accommodation.

In *Target Stores v. LIRC*, 217 Wis. 2d 1, 576 N.W.2d 545 (Ct. App. 1998), the Court of Appeals rejected the argument that reasonable accommodation could never include temporary forbearance of a workplace rule. Once again, the Court of Appeals instructed that whether it would be a reasonable accommodation in a given case would depend on the facts and circumstances of the case. *Id.* at 19.

Consistent with the reasoning in *McMullen* and *Target*, the Court of Appeals in this case once again refused to carve out an exception to the reasonable accommodation requirement.

The Court of Appeals' decision here is also consistent with a much earlier decision in which it upheld LIRC's decision that the employer violated the WFEA when it terminated a truck driver due to his handicap. *Frito-Lay, Inc. v. Labor & Industry Review Comm.*, 95 Wis. 3d 395, 290 N.W.2d 551 (Ct. App. 1980), affirmed without opinion by divided Supreme Court, 101 Wis. 2d 169, 303 N.W.2d 668 (1981). In that case, federal regulations would not have allowed a truck driver to drive interstate routes due to his handicap. However, because the driver was not prohibited from driving intrastate routes and because the other drivers were willing to give him those routes, LIRC held that he was able to perform his job duties and thus the employer violated the WFEA by terminating him.

In summary, LIRC and Wisconsin courts have consistently recognized that a determination of reasonable accommodation should be determined on a case-by-case basis. Even if policy concerns supported a different approach, it is for the Wisconsin Legislature, not this Court, to change

the current law. Moreover, as argued below, policy concerns do not compel a different approach.

B. The Policy Concerns Raised By The Employer And Its Amici Do Not Support An Absolute Exception To The Duty To Accommodate.

For reasons not entirely clear, the Employer in this case chose not to attempt to make an adequate record as to why it could not reasonably accommodate Catlin, or why accommodation would create an undue hardship. Perhaps it simply knew that it could not sustain such an argument with evidence. More likely, judging by the Employer's actions in responding to Catlin's desire to return, it simply made up its mind from the start that a "quadriplegic" simply wasn't going to be able to do the job.[2]

However, contrary to the Employer's argument, an automatic exception is not needed to avoid the problems raised by the Employer. Under current law, if reassigning

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[2] The Employer repeatedly refers to Catlin as a quadriplegic, apparently attempting to play on the stereotypes people have about what it means to be quadriplegic. In fact, Catlin has significant use of her upper body. LIRC found that Catlin "was physically able to perform most of the jobs in the wholesale department, including training people, making boxes, making labels, baking cheese, labeling cheeses (using a "reacher" to get at the labels), weighing it, pricing it, boxing it, putting it on a pallet, and coding inventory and other paper work. She was also able to clean up and wash equipment." (LIRC's Finding of Fact No. 14) At the hearing, Catlin lifted an 18.46 pound block of cheese. (*See* Respondent's brief at 42.)

duties is a hardship for an employer, the employer is not required to provide that accommodation. Conversely, if reassigning duties does not constitute a hardship, requiring an employer to provide such an accommodation is consistent with the purposes of the Act. As the court in *McMullen* recognized, the statute requires only what is reasonable.

The Employer makes dire predictions of a world in which employers could not automatically terminate the employment of any disabled individual who was unable to perform each and every aspect of the job the individual is currently assigned to, regardless of any of the specific circumstances of the situation. Contrary to the employer's somewhat hysterical prophecy, the absence of an automatic exception to the WFEA requirement to reasonably accommodate would not wreak havoc on the workplace, nor would it turn LIRC into a "super-personnel committee." Rather, without an automatic exception, what would occur is what was intended by the Wisconsin Legislature when it passed the WFEA and the reasonable accommodations provisions and decreed that ability issues should be decided on a case-by-case basis. That is, there would be communication back and forth between the employee and the employer about what accommodation might be helpful and possible. Other

interested parties including other employees and the labor organization, if applicable, would have input. Hopefully, in many, many situations, this interactive process would result in a workable solution, which may or may not involve shifting of duties. Where there was a dispute, the employer would still be free to argue that shifting duties was unreasonable under the circumstances or that it would create a hardship. Readjusting job duties may be a very reasonable solution in some situations, as it would seem to be here, where employees have traditionally had overlap in duties anyway and where the other affected employees have no objection. It may also be an unreasonable consideration in other situations where these factors are not present or the readjusting would otherwise pose a hardship. There is simply no policy reason not to allow the process an opportunity to work where it might do so--to foreclose even considering any possibility of shifting even the most minor of duties. That is what the Employer urges this Court to do.

In their brief in support of the Petition for Review, amici Wisconsin Manufacturers and Commerce, Inc., and Wisconsin Cheesemakers Association, Inc., make the point that "although the WFEA provides for legal remedies if discrimination occurs, the public policy that underlies it

and other statutes that provide employment rights for disabled people is better served by negotiation and compromise between employers and disabled employees." (Brief of Wisconsin Manufacturers and Commerce, Inc., and Wisconsin Cheesemakers Association, Inc., page 1). On this point, amicus WEAC agrees with those amici. However, as noted above, the ruling sought by the Employer in this case would have the opposite effect. An employer would not have any obligation, or any incentive, to engage in "negotiation or compromise" regarding a solution that would involve other willing employees picking up even minor aspects of the disabled person's job.

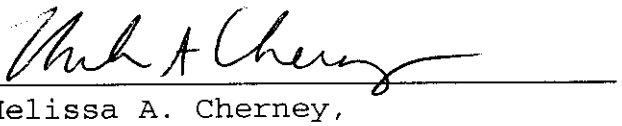
In summary, the ruling sought by the Employer and its amici would not further public policy under Wisconsin law.

CONCLUSION

The Employer and its supporting amici claim that they seek clarity in the law. In reality, however, it is not clarity they seek, but rather a significant reduction in the current rights of the disabled persons of this state. In the name of clarity, they invite this Court to create a judicial exception to the current statutory mandate of reasonable accommodation and excuse employers from even considering reassignment of duties to accommodate a

disabled person, even where that reassignment is reasonable and does not create a hardship. Such a request is contrary to Wisconsin law and public policy and should be rejected.

Respectfully submitted this 30th day of April, 2003.



Melissa A. Cherney,
State Bar No. 1008246
Chris Galinat
State Bar No. 1000693
Wisconsin Education
Association Council
33 Nob Hill Drive
Post Office Box 8003
Madison, WI 53708-8003
Telephone: 608-276-7711

FORM AND LENGTH CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief with a monospaced font. The length of this brief is 13 pages.

Dated this 30th day of April, 2003.

Melissa A. Cherney,
State Bar No. 1008246
Wisconsin Education
Association Council
33 Nob Hill Drive
Post Office Box 8003
Madison, WI 53708-8003
Telephone: 608-276-7711

SUPREME COURT OF WISCONSIN

CRYSTAL LAKE CHEESE FACTORY,

Petitioner-Appellant-Petitioner,

v.

LABOR AND INDUSTRY REVIEW
COMMISSION AND SUSAN CATLIN,

Respondents-Respondents.

Appeal from a Decision of the Court of Appeals, District III
Appeal No. 02-0815

BRIEF OF AMICI CURIAE WISCONSIN CHEESE MAKERS ASSOCIATION, INC., AND WISCONSIN MANUFACTURERS AND COMMERCE, INC.

Francis X. Sullivan
State Bar No. 1030932
William C. Williams
State Bar No. 1012002

BELL, GIERHART & MOORE, S.C.
44 E. Mifflin Street
Madison, Wisconsin 53701
(608) 257-3764

Attorneys for Amici Curiae Wisconsin Cheese Makers Association, Inc., and Wisconsin Manufacturers and Commerce, Inc.

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ARGUMENT

WIS. STAT. § 111.34 defines in general terms the rights of disabled employees and job seekers. Twenty-two years after the statute was created, the meaning of many of its key terms remains unclear, hampering the ability of employers and disabled employees to resolve disability-related issues without recourse to litigation. Amici curiae Wisconsin Cheese Makers Association, Inc., and Wisconsin Manufacturers and Commerce, Inc., urge the court to bring clarity and certainty to interpretation of WIS. STAT. § 111.34 by looking to caselaw interpreting the federal Americans With Disabilities Act (ADA).

Part I of this brief explores the policy of negotiation and compromise that underlies WIS. STAT. § 111.34. Part II establishes that key undefined terms in the statute make it difficult for employers and disabled employees to negotiate and compromise because their rights and responsibilities are not clearly defined. Part III argues that, because the two statutes are similar, Wisconsin should join other jurisdictions in looking to caselaw interpreting the ADA for clarification of

WIS. STAT. § 111.34, thus providing clearer standards for analyzing key components of the statute.

I. Policies Underlying WIS. STAT. § 111.34 and Other Statutes that Protect Persons with Disabilities Favor Negotiation Over Litigation

The Wisconsin Fair Employment Act (WFEA) encourages the employment of properly qualified individuals regardless of disability. WIS. STAT. § 111.31(3). Although the WFEA provides for legal remedies if discrimination occurs, the public policy that underlies it and other statutes protecting employment rights for disabled people is better served by negotiation and compromise between employers and disabled employees. Elizabeth A. Pendo, *Disability, Doctors and Dollars: Distinguishing the Three Faces of Reasonable Accommodation*, 35 U.C. DAVIS L. REV. 1175, 1185-86 (June 2002) (analyzing the ADA's reasonable accommodation requirement). This policy is specifically spelled out in the WFEA, which authorizes the Department of Workforce Development to "endeavor to eliminate [a discriminatory] practice by conference, conciliation or

persuasion" before issuing a notice of hearing.[1] WIS. STAT. § 111.39.

Employers and disabled employees alike benefit from policies that encourage negotiation. Through negotiation and settlement, both can avoid the expense, uncertainty, and ill-will that accompanies litigation, even at the administrative level.[2] Employers benefit because they can access a larger workforce and retain more control over their operations. Disabled employees benefit from negotiated accommodations that allow them to continue to perform their current jobs because their disabilities may limit their ability to seek other

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[1]The ADA similarly encourages alternatives to litigation. 42 USC § 12212 provides:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.

[2]Most modifications can be made at little or no cost to the employer. One study found that 68 percent of the accommodations made for disabled workers cost $500 or less. A Sears study concluded that 69 percent of the company's accommodations for disabled workers cost nothing, 28 percent cost less than $1,000, and only 3 percent cost more than $1,000. Sears' average cost of accommodating a disabled worker was under $50. Pendo, *Disability, Doctors and Dollars: Distinguishing the Three Faces of Reasonable Accommodation*, 35 U.C. DAVIS L. REV. at n.149 (collecting studies).

employment and because it may be difficult to obtain legal counsel in a WFEA action.[3] Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 19-21 (1996) (analyzing incentives for negotiation and settlement under the ADA).

II. Current Interpretations of WIS. STAT. § 111.34 Provide No Meaningful Guidance

A negotiation cannot succeed unless the parties understand the parameters under which they are operating, but key terms in WIS. STAT. § 111.34 remain vague and undefined. As a result, the statute's meaning is unclear, which increases the difficulty for employers and disabled employees trying to negotiate a compromise.

Since the statute was enacted, our courts have provided little guidance on interpreting its key terms. Interpretation of these terms has been left to the Labor and Industry Review

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[3]The WFEA does not authorize the LIRC to award attorney fees to a prevailing party, and it provides for a relatively low monetary recovery. A prevailing plaintiff may recover up to 2 years of back pay, but the recovery is offset by other earnings, including welfare and unemployment benefits the plaintiff has received. The DWD also may order a payment in lieu of reinstatement, but that payment is limited to no more than 1,000 times the prevailing party's hourly wage. WIS. STAT. § 111.39(4)(c).

Commission (LIRC), whose decisions tend to be fact-specific and offer no general principles.[4]

The resulting uncertainty damages Wisconsin employers and employees alike because they have no reliable framework for determining what these key terms mean. An employer cannot turn to any definition of a "hardship" to determine where its duty to accommodate a disabled employee ends. Similarly, a disabled employee cannot turn to any definition of a "job-related responsibility" to determine whether she is qualified for a job. In trying to determine their rights and responsibilities, the parties are left to negotiate based on their predictions of how LIRC will decide their dispute, a difficult task at best, given that LIRC has never articulated frameworks for analyzing the statute's key terms.

Amicus Wisconsin Education Association Council (WEAC) argues that Wisconsin law mandates this chaotic

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[4]The consistently fact-specific nature of LIRC's analysis of the WFEA strongly suggests that the court should not apply great weight deference to its decision in this or any other WFEA case. Catlin's brief trumpets LIRC's interpretation of the reasonable accommodation requirement but fails to address the fact that LIRC has refused to articulate a framework for determining whether a proposed accommodation is reasonable. Instead, LIRC's interpretations have been limited to passing judgment on a specific set of facts.

state of affairs,[5] noting that the court of appeals has held that what constitutes a "reasonable accommodation" under the WFEA depends on the specific facts of each case. ***McMullen v. LIRC***, 148 Wis. 2d 270, 276, 434 N.W.2d 830 (1988). There is nothing unreasonable about the court of appeals' position here: The outcome of any lawsuit depends on the specific facts of each case. However, WEAC appears to seize on this innocuous statement to suggest that it is contrary to the legislature's intent for the courts to provide any guidance at all on the interpretation of the WFEA.

This is incorrect. In the very next sentence, ***McMullen*** itself lists several factors that may be appropriate for determining whether a job transfer constitutes a reasonable accommodation under the WFEA. ***Id.*** Unfortunately, few Wisconsin cases provide any useful guidance to employers

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[5]WEAC incorrectly asserts that the WFEA "explicitly instructs that an evaluation of whether an employee can perform job-related responsibilities should be done on a case-by-case basis." [LIRC brief, p. 5.] This requirement is found only in WIS. STAT. § 111.34(2)(b) and (c), which relates to whether a person's disability may pose a safety concern.

and employees in interpreting the WFEA.[6] A large body of such guidance is available in caselaw that interprets the ADA.

III. The Supreme Court Can and Should Clarify the WFEA by Looking to Caselaw Interpreting the Americans With Disabilities Act (ADA)

A. The ADA and WIS. STAT. § 101.34 share a common purpose and employ virtually identical terminology.

The two statutes share a common purpose – ensuring that employers do not discriminate against disabled persons. Both emphasize negotiation over litigation. WIS. STAT. § 111.39; 42 USC § 12212. Furthermore, the relevant portions of the two statutes are very similar. The WFEA excuses an employer from the duty to provide reasonable accommodation on grounds of "hardship" to the employer; the ADA does so on grounds of "undue hardship." WIS. STAT. § 111.34(1)(b); 42 USC § 12112(a)(5)(A). The WFEA, for example, requires the disabled employee to be able to "adequately undertake the job responsibilities" of a particular position, while the ADA

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[6] ***Frito-Lay v. LIRC***, 95 Wis. 2d 395, 290 N.W.2d 551 (Ct. App. 1980), which WEAC cites at page 8, is not one of them. The employer's duty to provide reasonable accommodations was created in 1981 Ch. 334, § 17, which took effect well after ***Frito-Lay*** was decided.

frames its test in terms of the employee's ability to perform a job's "essential functions." WIS. STAT. § 111.34(2)(a) (emphasis added); 42 USC § 12111(8).

If anything, the ADA imposes more duties on an employer than the WFEA does. The WFEA's plain language excuses an employer from accommodating a disabled employee on grounds of "hardship," not "undue hardship," and it requires the employee to be able to "adequately undertake the job responsibilities," not just the "essential functions" that the ADA requires. Given that the two statutes have similar purposes and that WIS. STAT. § 111.34 predates the ADA, it is unreasonable for this court to construe WIS. STAT. § 111.34 more strictly than federal courts construe the ADA. However, it is very reasonable for this court to use the significant body of federal caselaw construing the ADA to construe the very similar Wisconsin statute.

B. Such an approach is consistent with some Wisconsin decisions and with decisions from other states

McMullen, a court of appeals decision, holds that Wisconsin courts will not look to other jurisdictions to

construe WIS. STAT. § 111.34(1)(b).[7] 148 Wis. 2d at 275-76. However, other Wisconsin cases have examined federal decisions interpreting the ADA and found them "persuasive indications" that a LIRC interpretition of the WFEA was reasonable. ***Target Stores v. LIRC***, 217 Wis. 2d 1, 19, 576 N.W.2d 545 (Ct. App. 1998); *see also* ***Hamilton v. DILHR***, 94 Wis. 2d 611, 621 n.4, 288 N.W.2d 857 (1980).

McMullen has prevented the development of meaningful standards for interpreting the WFEA. The court should overrule it and follow the lead of numerous other jurisdictions that look to case law interpreting the ADA for guidance. *See, e.g.*, ***Probasco v. Iowa Civil Rights Comm.***, 420 N.W.2d 432, 435 (Iowa 1988); ***Noel v. Elk Brand Mfg. Co.***, 53 S.W.2d 95, 101 (Ky. Ct. App. 2001); ***Jones v. Aluminum Shapes, Inc.***, 772 A.2d 34, 40 (N.J. Super. Ct. App. Div. 2001); ***City of Columbus Civil Svc. Comm. v. McGlone***, 697 N.E.2d 204, 206-07 (Ohio 1998); ***Imler v. Hollidaysburg American Legion Ambulance Svc.***, 731 A.2d

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[7]***McMullen*** was not appealed to the Wisconsin Supreme Court.

169, 173 (Pa. Super. Ct. 1999); ***MacSuga v. County of Spokane***, 983 P.2d 1167, 1171 (Wash. Ct. App. 1999); ***Skaggs v. Elk Run Coal Co.***, 479 S.E.2d 561, 573-74 (W. Va. 1996).

C. Interpreting WIS. STAT. § 111.34 using ADA caselaw would clarify and bring certainty to Wisconsin law

By explicitly stating that federal law construing the ADA is relevant to interpreting WIS. STAT. § 111.34, this court can foster negotiation of disability issues by defining key portions of the statute.

1. ADA caselaw would clarify the phrase "hardship on the employer's program, enterprise or business"

No Wisconsin caselaw provides a framework for defining a "hardship on the employer's program, enterprise or business" under WIS. STAT. § 111.34(1)(b). LIRC's decisions provide no useful guidance either. For example, in the decision under appeal LIRC concluded that Crystal Lake would not suffer any hardship, but it did so without defining "hardship" or listing the factors that determine whether a "hardship" exists. ***Catlin v. Crystal Lake Cheese Factory***,

LIRC 07/20/2001. The result is that employers and employees negotiating over accommodations for a disabled employee are left to guess what standards LIRC will apply in resolving the issue.

The ADA, on the other hand, substantially clarifies the term "undue hardship." The language of the ADA itself identifies four factors in defining whether an accommodation constitutes "undue hardship" for the employer : (1) the nature and cost of the accommodation; (2) the characteristics of the facility where the accommodations would be made (including its financial resources, number of employees, and the effect of the accommodation on the facility's operations and finances); (3) the covered entity's financial resources and size; and (4) the covered entity's operations. 42 USC § 12111(10)(B).

The federal courts have further clarified the definition. The Seventh Circuit, for example, has held that whether an accommodation imposes undue hardship requires evaluation of the accommodation's effect on the financial health of the employer and its benefit to the disabled worker. ***Vande Zande v. State of Wisconsin***, 44 F.3d 538, 543 (7th Cir.

1995). Other relevant factors include potential disruption to other employees, ***Williams v. Avnet, Inc.***, 910 F.Supp. 1124 (E.D.N.C. 1995), aff'd 101 F.3d 346 (4th Cir. 1996), the additional administrative burden involved, ***Gaul v. Lucent Technologies, Inc.***, 134 F.3d 576 (3d Cir. 1998), and the complexity of implementing the proposed accommodation. ***Bryant v. Better Business Bureau of Greater Maryland, Inc.***, 923 F.Supp. 720 (D.Md. 1996).

2. ADA case law would clarify the meaning of "adequately undertake...job-related responsibilities."

Similarly, little Wisconsin caselaw explains what it means for an employee to be able to "adequately undertake...job-related responsibilities" under WIS. STAT. § 111.34(2)(a). The published caselaw is limited to the Court of Appeals decision in this case, which adopted the LIRC standard that an employee must be able to perform "some or most" of the position's duties. ***Crystal Lake Cheese Factory v. LIRC***, 2002 WI App 290 ¶¶ 28-29, 258 Wis.2d 414, 654 N.W.2d 286. This definition is unworkable because it provides no standard by which the parties to a negotiation can

determine how many or which duties are enough to satisfy the standard.

LIRC's opinions provide no further guidance. It has held that bothersome, abrasive, disruptive, or obnoxious conduct is job-related, ***Walk v. Ansul Fire Protection***, LIRC 07/20/1998; ***Sampson v. S & S Distributing, Inc.***, LIRC 11/19/1999, as are coming to work, ***Janocik v. Heiser Chevrolet***, LIRC 11/21/1994, staying awake, ***Crivello v. Target Stores***, LIRC 08/14/1996, and exercising good judgment. ***Staats v. Sawyer County***, LIRC 10/27/1997. Lifting heavy objects is job-related for a glass loader. ***Fields v. Cardinal TG Co.***, LIRC 02/16/2001. Again, none of these decisions provide an analytical framework for determining whether any particular responsibility is job-related.

By contrast, the ADA frames the test of an employee's qualifications in terms of the employee's ability to perform all the essential functions of the job,[8] not just some of them.

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[8]LIRC has concluded that ***McMullen*** prevents it from incorporating the "essential functions" test because ***McMullen*** "stands for the proposition that it is inappropriate to conclude as a matter of law that any particular kind of action is not required as an accommodation and that the resolution of any case depends upon whether the facts show that the

Cochrum v. Old Ben Coal Co., 102 F.3d 908, 912 (7th Cir. 1996). "Essential functions" are those bearing more than a marginal relationship to the job at issue. *Chandler v. City of Dallas*, 2 F.3d 1385, 1393 (5th Cir. 1993). Extensive caselaw under the ADA outlines factors to be considered, which include:

> (1) the employer's judgment as to which functions are essential; (2) written job descriptions prepared before advertising or interviewing applicants for the job; (3) the amount of time spent on the job performing the function; (4) the consequences of not requiring the incumbent to perform the function; (5) the terms of a collective bargaining agreement; (6) the work experience or past incumbents in the job; and/or (7) the current work experience of incumbents in similar jobs.

Hershey v. Praxair, Inc., 969 F.Supp. 429, 434 (S.D. Tex. 1997) (citing 29 CFR § 1630.2(n)(3)). Although a determination of whether an employee is able to "adequately undertake...job-related responsibilities" still would turn on the facts of each case, incorporating the factors involved in the

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accommodation would be reasonable and would not work a hardship on the employer." *Fields v. Cardinal TG Co.*, (LIRC 02/16/2001)

LIRC consistently misreads *McMullen*, which does not mention the "essential functions" test (it was decided before the ADA was enacted). *McMullen*'s holding that "what is reasonable will depend on the specific facts in each individual case" does not prevent LIRC from applying a uniform standard to the unique facts of each case to reach a determination.

ADA analysis would bring consistency and certainty to the analysis.

3. ADA caselaw would clarify the meaning of "reasonable accommodation"

The definition of a reasonable accommodation under WIS. STAT. § 111.34(1)(b) is only slightly clearer. The plain language of the statute does not define the term. One Wisconsin case sets out an "illustrative" list of factors to consider in determining whether a job transfer is a reasonable accommodation. ***McMullen***, 148 Wis. 2d at 276. Another analyzes a potential accommodation but provides no analytical framework. ***Target Stores***, 217 Wis. 2d at 18-19. LIRC's opinions do nothing more than parrot ***McMullen***, holding

> The ***McMullen*** case stands for the proposition that it is inappropriate to conclude as a matter of law that any particular kind of action is not required as an accommodation and that the resolution of any case depends on whether the facts show that the accommodation would be reasonable and would not work a hardship on the employer.

Fields v. Cardinal TG Co., LIRC 02/16/2001. However, ***Fields*** provides no analytical framework for determining whether any particular accommodation is reasonable.

Although there is no determinative test to determine a "reasonable accommodation" under the ADA, federal courts have held that an accommodation is unreasonable if it "either imposes undue financial or administrative burdens, or requires a fundamental alteration in the nature of the program." ***DeBord v. Board of Educ.***, 126 F.3d 1102, 1106 (8th Cir.1997). An extensive body of caselaw defines "reasonable accommodation" in a wide variety of situations, including situations analogous to the facts of this case. *See* Brief of Crystal Lake at 33-37.

CONCLUSION

The WFEA specifically endorses negotiation to resolve disputes. Unfortunately, key terms in WIS. STAT. § 111.34 remain vague and undefined, and this lack of clarity hampers negotiated resolution of disputes, thereby increasing costs to employers and disabled employees alike. The Supreme Court should bring clarity to WIS. STAT. § 111.34 by adopting the ADA caselaw's standards for interpreting the key terms of the Wisconsin statute.

Dated 9 May 2003.

BELL, GIERHART & MOORE, S.C.

By:

Francis X. Sullivan
State Bar No. 1030932
William C. Williams
State Bar No. 1012002

Attorneys for Amici Curiae Wisconsin Cheese Makers Association, Inc., and Wisconsin Manufacturers and Commerce, Inc.

44 E. Mifflin Street
Madison, Wisconsin 53701
(608) 257-3764

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in WIS. STAT. § 809.19(8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,997 words.

Francis X. Sullivan

STATE OF WISCONSIN
SUPREME COURT
Appeal No. 02-0815

CRYSTAL LAKE CHEESE FACTORY,

Petitioner-Appellant-Petitioner,

v.

LABOR AND INDUSTRY REVIEW COMMISSION,
and SUSAN CATLIN,

Respondents-Respondents.

APPEAL FROM A DECISION OF THE COURT OF APPEALS, DISTRICT III, AFFIRMING AN ORDER OF THE CIRCUIT COURT FOR BARRON COUNTY, THE HONORABLE JAMES C. EATON, PRESIDING

AMICUS BRIEF OF THE SURVIVAL COALITION OF WISCONSIN

Rebecca L. Salawdeh
State Bar No. 102766
Urban Taylor & Stawski Ltd.
1105 N. Waverly Place
Milwaukee, WI 53202
(414) 276-8202
Patrick O. Patterson
State Bar No. 1014157
Law Office of
Patrick O. Patterson, S.C.
7481 North Beach Drive
Fox Point, WI 53217
(414) 351-4497
Patricia A. Lauten
State Bar No. 1030520
The Schroeder Group SC
Attorneys at Law
20800 Swenson Dr. #475
Waukesha, WI 53186-2075
(262) 798-8220

May 12, 2003

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Law Office of
Patrick O. Patterson, S.C.
7481 North Beach Drive
Fox Point, WI 53217
(414) 351-4497
Patricia A. Lauten
State Bar No. 1030520
The Schroeder Group SC
Attorneys at Law
20800 Swenson Dr. #475
Waukesha, WI 53186-2075
(262) 798-8220

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STATEMENT OF INTEREST

The Survival Coalition of Wisconsin is a statewide, cross-disability coalition comprised of 32 disability organizations. It works in concert with local organizations, local coalitions, consumers, advocates, and families throughout the State of Wisconsin to promote policies, programs, and practices that emphasize integrated, individualized, community-based support for disabled Wisconsin citizens. On behalf of those citizens, the Survival Coalition urges this Court to continue to give effect to the provisions of the Wisconsin Fair Employment Act that require an individualized, fact-based inquiry into an employer's duty to reasonably accommodate an employee's disability.

ARGUMENT

I. THE COURT SHOULD INTERPRET THE "REASONABLE ACCOMMODATION" PROVISION OF THE WISCONSIN FAIR EMPLOYMENT ACT IN ACCORDANCE WITH THE LANGUAGE, POLICY, AND INTENT OF THE WISCONSIN LEGISLATURE, AND SHOULD NOT IMPORT THE DIFFERENT LANGUAGE, POLICY, AND INTENT OF THE AMERICANS WITH DISABILITIES ACT.

The Wisconsin Fair Employment Act (WFEA) requires an employer such as Crystal Lake Cheese Factory (Crystal Lake) "to reasonably accommodate an employee's ... disability unless the employer can demonstrate that the accommodation

would pose a hardship on the employer's program, enterprise, or business." Wis. Stat. § 111.34(1)(b). This provision implements the Wisconsin Legislature's declared intent "to protect by law the rights of all individuals to obtain gainful employment and to enjoy privileges free from employment discrimination because of ... handicap ..., and to encourage the full, nondiscriminatory utilization of the productive resources of the state to the benefit of the state, the family, and all the people of the state." § 111.31(2). Because § 111.34 is a remedial statute, the Legislature has directed that it must be "liberally construed" to accomplish its purpose. § 111.31(3). The Legislature has also declared that this section, like the other provisions of the WFEA, is intended "to encourage employers to evaluate an employee ... based upon the employee's ... individual qualifications rather than upon a particular class to which the individual may belong." § 111.31(2).

The Labor and Industry Review Commission (LIRC), the Circuit Court, and the Court of Appeals all held that, on the facts presented in this case, the requirement of reasonable accommodation under § 111.34(1)(b) of the WFEA

may include the modification of an employee's job duties. This interpretation is fully consistent with the Legislature's intent to ensure that employees will be evaluated on the basis of their individual qualifications, and with the state's public policy, as declared by the Legislature, "to encourage and foster to the fullest extent practicable the employment of all properly qualified individuals regardless of ... handicap ...." Wis. Stat. § 111.31(3). See Ray-O-Vac v. DILHR, 70 Wis. 2d 919, 931, 236 N.W. 2d 209 (1975). It is also supported by Wisconsin case law interpreting WFEA's reasonable accommodation provision.

For example, the court in McMullen v. LIRC, 148 Wis. 2d 270, 275, 434 N.W.2d 839 (Ct. App. 1988), rejected the contention that a transfer from one position to another could never be a reasonable accommodation as a matter of law. The court held instead that "[w]hat is reasonable will depend on the specific facts in each individual case" - a determination that is "fact sensitive and is not subject to sweeping propositions of law." *Id.* at 276. The court therefore rejected the proposed bright-line rule and remanded the case to LIRC to make individualized factual

determinations on the issues of whether a job transfer would be a reasonable accommodation and whether it would impose a hardship on the employer. *Id.* at 276-77.

Similarly, in Target Stores v. LIRC, 217 Wis. 2d 1, 576 N.W.2d 545 (Ct. App. 1998), the employer argued that "clemency and forbearance" - temporarily refraining from enforcing a no-loafing rule against an employee who was in treatment for sleep apnea - could never be a reasonable accommodation as a matter of law under §111.34(1)(b). 217 Wis. 2d at 15. The court, observing that it "should give great weight to LIRC's interpretation of reasonable accommodation under the statute," *id.* at 13, again rejected the invitation to pronounce a sweeping, bright-line rule of law, and instead upheld LIRC's interpretation that, on the facts of this case, temporary forbearance was a reasonable accommodation. *Id.* at 18.

Disregarding the language of the WFEA's reasonable accommodation provision, the legislative intent and public policy underlying the statute, and the Wisconsin court decisions interpreting it, Crystal Lake argues that this Court should reject LIRC's fact-based determination in this case and should hold instead that, as a matter of law,

modification of any "essential functions" of a job can never be a reasonable accommodation under § 111.34(1)(b). Brief of Crystal Lake at 32-26. In support of its argument for this bright-line rule, Crystal Lake cites "the significant weight of persuasive federal authority" under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-13. *Id.* at 36. The problem with this argument is that the ADA is not the WFEA.

At the most basic level, the language of the ADA - and the legislative intent and policies underlying that language - significantly differ from the language, intent, and policies of the WFEA. The statutory phrase "essential functions" of the job, for example, is an integral part of the ADA,[1] but appears nowhere in the WFEA. Crystal Lake, apparently believing that the Wisconsin statute would be improved by the inclusion of this phrase, asks the Court to judicially insert it into the WFEA provision on reasonable

---

[1]The ADA makes it unlawful to discriminate against "a qualified individual with a disability ....." 42 U.S.C. § 12112(a). The ADA defines the term "qualified individual with a disability" to mean "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. ..." 42 U.S.C. § 12112(8). "The concept of 'essential functions' thus is critical" under the ADA. 5 B Lindemann & P. Grossman, *Employment Discrimination Law* at 281 (3d ed. 1996).

accommodation. But this is only one of many statutory "improvements" Crystal Lake and other employers undoubtedly would like the Court to make so that the WFEA would more closely resemble the ADA. For example:

· Employers with at least one employee are covered by the WFEA, Wis. Stat. § 111.32(6)(a), but only employers with 15 or more employees are covered by the ADA, 42 U.S.C. § 12111(5).

· The WFEA defines a "handicapped individual" as one who "[h]as a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work," Wis. Stat. § 111.32(8), but the ADA defines an individual with a "disability" as one who has "[a] physical or mental impairment that substantially limits one or more of the major life activities of such individual," 42 U.S.C. § 12102(2).

· An impairment that limits an employee's ability to work at a specific job may be considered a handicap under the WFEA, see City of LaCrosse Police & Fire Commission v. LIRC, 139 Wis. 2d 740, 761-62, 407 N.W.2d 510 (1987), but is not a disability under the ADA, see 29 C.F.R. § 1630.2(j)(3)(i); Toyota Manufacturing, Kentucky, Inc. v.

Williams, 122 S. Ct. 681 (2002).

· The WFEA does not expressly exclude any specific type of physical or mental condition from its protection, see Wis. Stat. § 111.32(8), but the ADA expressly states that the following are not disabilities within the meaning of that act: homosexuality and bisexuality; transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, and other sexual behavior disorders; and compulsive gambling, kleptomania, and pyromania. See 42 U.S.C. §§ 12208, 12211. Also unlike the WFEA, the ADA excludes individuals currently engaging in the illegal use of drugs from its definition of disabled individuals. See 42 U.S.C. § 12114(a).

See generally *Wisconsin Employment Law*, Vol. III, §§ 14.63-14.69 ("Differences Between WFEA's and ADA's Disability Provisions") (State Bar of Wisconsin CLE Books, 2002).

The Wisconsin courts, however, thus far have not been willing to "improve" upon the language of the WFEA's reasonable accommodation provision by importing terms from the ADA or other statutes. As the court said in McMullen

v. LIRC:

> Both parties have urged us to examine federal and state case law interpreting statutes on the same subject as the one at issue here. However, the statutory language and scheme contained in the analogous state and federal legislation differ, sometimes significantly, from that found in sec. 111.34(1)(b). Our legislature has established its own scheme for dealing with employment discrimination based on handicap and has articulated the specific policy considerations underlying that scheme. Therefore, we will construe sec. 111.34(1)(b) in accordance with our legislature's intention rather than with the intention of other jurisdictions.

148 Wis. 2d at 275-76.

The court in Target Stores v. LIRC specifically refused to adopt essentially the same judicial amendment of the language of § 111.34 as that urged by Crystal Lake in the present case. The employer there argued that temporary forbearance from enforcement of its no-loafing rule against an employee being treated for sleep apnea - an accommodation which LIRC had found to be reasonable in the circumstances of that case - was unacceptable as a matter of law because it would not have allowed the employee "to perform 'the essential functions of her job' ...." 217 Wis. 2d at 15-16. The court rejected the employer's argument, and was also critical of LIRC for even using the

phrase "essential functions of the complainant's job" in discussing in its opinion whether the accommodation would impose a hardship on the employer. *Id.* at 16 and n. 9. As the court pointed out, that phrase comes from the ADA and does not appear in the WFEA. *Id.* at n.9. However, the court went on to explain that it did "not understand LIRC to be importing the federal test of ability to perform the essential job functions into § 111.34(2)(a),"[2] *id.*, and it refused to read any "essential functions" test into the statute. See also Fields v. Cardinal TG Co., ERD Case No. 199702574, at 6 (LIRC Feb. 16, 2001) ("the instant case does not involve an interpretation of the ... ADA, but of the Wisconsin Fair Employment Act, which contains no reference to 'essential job functions' and no injunction against reallocating any specific job functions").

Crystal Lake's argument for an ADA-based, bright-line "essential functions" rule ignores the basic fact that the

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[2]Rather, the court understood LIRC to have used the phrase "without reference to the federal statute, simply as a way of describing [the complainant's] performance level in the context of deciding whether it would be a hardship on Target to permit her to continue performing at the level she was, while she was being treated." 217 Wis. 2d at 16-17, n.9. The court also noted that LIRC "did not refer to federal cases or the ADA in discussing the respective obligations of the employer and the employee in the context of reasonable accommodations." *Id.* at 20, n.13.

Wisconsin Legislature and courts have recognized: Individuals with disabilities are just that -- individuals. Persons with the same diagnosis may have different abilities, requiring the employer to enter into a dialogue with the individual employee about her ability to perform her job responsibilities. "[W]hen considering accommodations for individuals who use wheelchairs, the process must be conducted on a case-by-case basis with input from the person with the disability. Each individual who uses a wheelchair has different abilities and limitations that should be considered." *Job Accommodation Network, Office of Disability Employment Policy of the U.S. Dept. of Labor: Work-site Accommodation Ideas for Office Workers who Use Wheelchairs, Office of Disability Employment Policy of the U.S. Department of Labor, Linda Carter Batiste, M.S. and Beth Loy, Ph.D.*<*http://www.jan.wvu.edu*>.

We urge this Court to continue to interpret the reasonable accommodation provisions of the WFEA in accordance with the language of the statute, the intent and public policy declared by the Legislature, and the prior decisions of the Wisconsin courts. The Court should

therefore affirm the fact-based, individualized determinations made in this case by LIRC and the courts below.

II. THE WISCONSIN FAIR EMPLOYMENT ACT ALREADY PROVIDES EMPLOYERS WITH A "HARDSHIP" DEFENSE TO A CLAIM OF FAILURE TO MAKE A REASONABLE ACCOMMODATION. THERE IS NO JUSTIFICATION FOR IMPORTING AN ADDITIONAL "ESSENTIAL FUNCTIONS" DEFENSE FROM THE ADA.

There is no need for the Court to import a defense from the ADA into the WFEA's reasonable accommodation provision. The Wisconsin statue already provides one: An employer is not required to accommodate an employee's disability if the employer "can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise, or business." Wis. Stat. § 111.34(1)(b).

The WFEA holds an employer liable only if the employer could provide a reasonable accommodation without hardship, but failed to do so. The WFEA requires no accommodation, and imposes no liability, if the accommodation imposes a hardship on the employer.

Like the WFEA's reasonable accommodation provision, the hardship provision requires an individualized inquiry based upon the facts of each case and the needs of each

business. Relevant evidence may take the form of proof that a proposed accommodation is unduly expensive in relation to the size and resources of the business, that it would disrupt the business, or that it would fundamentally alter the nature of the business. See *Wisconsin Employment Law*, Vol. III, § 14.61 and App. 14E at 212 (Persons with Disabilities on the Job, Wisconsin's Fair Employment Law Series #4).

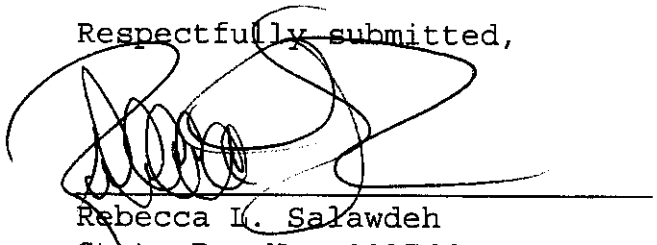
Thus, Crystal Lake needed no "essential functions" defense because the WFEA already provided it with an adequate defense. As the Court of Appeals found, however, Crystal Lake chose not to pursue that defense. "It could have opted to present alternative evidence regarding hardship, but it did not." (Court of Appeals Opinion, ¶ 38, A-App. at 15). While Crystal Lake was free to choose not to pursue the defense available to it under Wisconsin law, its choice provides no basis for importing a new defense from federal law, which is incompatible with the language, policy, and intent of the WFEA.

CONCLUSION

For the foregoing reasons, amicus curiae the Survival Coalition of Wisconsin respectfully requests that this Court affirm the judgment of the Court of Appeals.

Dated: May 12, 2003.

Respectfully submitted,



Rebecca L. Salawdeh
State Bar No. 102766
Urban Taylor & Stawski Ltd.
1105 N. Waverly Place
Milwaukee, WI 53202
(414) 276-8202

Patrick O. Patterson
State Bar No. 1014157
Law Office of
Patrick O. Patterson, S.C.
7481 North Beach Drive
Fox Point, WI 53217
(414) 351-4497

Patricia A. Lauten
State Bar No. 1030520
The Schroeder Group SC
Attorneys at Law
20800 Swenson Dr. #475
Waukesha, WI 53186-2075
(262) 798-8220

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AMICUS BRIEF OF THE WISCONSIN ACADEMY OF TRIAL LAWYERS

Paul A. Kinne
State Bar No. 1021493
Wisconsin Academy of Trial Lawyers
44 E. Mifflin Street, Suite 103
Madison, WI 53703
Telephone: 608-257-5741

May 12, 2003

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ARGUMENT

I. INTRODUCTION.

Amicus Wisconsin Academy of Trial Lawyers (WATL) files this brief in support of the Respondent's position that this Court should affirm the decision of the agency that Crystal Lake Cheese Factory (Crystal Lake) discriminated against Susan Caitlin when it refused to provide reasonable accommodations within the meaning of the Wisconsin Fair Employment Act (WFEA).

WATL will not burden the Court with a restatement of the substantive law applicable to this case. Instead, it joins and includes by reference the thorough and compelling briefs filed by Caitlin and the Labor and Industry Review Commission (LIRC). Furthermore, WATL joins in the arguments put forward by fellow amicus Wisconsin Education Association Council.

WATL dedicates itself to working for injured people of the state of Wisconsin. Included within this group are working people injured by unlawful discrimination. Disabled people, unfortunately, face prejudice and other obstacles in too many work places. Recognizing this problem, the legislature passed the WFEA. Through the WFEA, the legislature has clearly spoken on the nature and scope of the protection afforded disabled workers in Wisconsin; how best to protect disabled workers is a decision best left to the legislature. Furthermore, Wisconsin courts have had an opportunity to interpret the legislature's will, and this interpretation requires an affirmation of the agency's decision. To act otherwise would offend the precedent already created in this state. Additionally, this Court should choose to act as Illinois

courts acted when they were faced with a similar case. For all the reasons that follow, this Court should affirm the agency's decision.

II. PRINCIPLES OF SEPARATION OF POWERS COMPEL AFFIRMATION OF THE AGENCY DECISION IN THIS CASE.

As the Court must recognize from the arguments and number of amici in this case, this matter involves complex and controversial policy considerations; accordingly, the Court should defer to the legislature's decision on the issue. The Court should defer because the legislature is in a better position than the courts to gather, weigh and reconcile the competing policy proposals addressed to this sensitive area of the law. State v. Deborah J.Z., 228 Wis.2d 468, 478-479, 596 N.W.2d 490, 495 (Ct.App. 1999).

As Caitlin and LIRC explained in their respective briefs, the law of this state supports LIRC's decision. In its appeal, Crystal Lake is essentially asking this Court to amend the WFEA. Given the nature of this issue, Crystal Lake should direct its request to the legislature. Stated differently, the legislature is better suited to decide whether Wisconsin should adopt the Americans with Disabilities Act (ADA) standards. Accordingly, this Court should affirm the agency's decision.

III. OVERTURNING THE DECISION WOULD OFFEND PRINCIPLES OF *STARE DECISIS.*

Crystal Lake does more than ask this Court to substitute its judgment for that of the legislature. It has also asked this Court to overturn precedent, which was set forth in Caitlin's and LIRC's briefs. The Wisconsin Supreme Court has held that precedent is not to be lightly overturned:

> Fidelity to precedent, the doctrine of *stare decisis* 'stand by things

> decided', is fundamental to a society governed by the rule of law. . . . When legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results.

State v. City of Oak Creek, 2000 WI 9, para. 55, ft.note 27; 232 Wis.2d 612, 647 ft.note 27, 605 N.W.2d 541 (2000) (citations omitted).

Overturning the agency's decision in this case would be a direct attack on *stare decisis*. For this reason, the Court should affirm the agency's decision.

IV. WHEN CONFRONTED WITH A SIMILAR ISSUE, THE STATE OF ILLINOIS COURTS UPHELD THE AGENCY'S DETERMINATION.

In the case of Lake Point Tower, Ltd., v. Illinois Human Rights Commission, 219 Ill.App.3d 897, 684 N.E.2d 948, 225 Ill.Dec. 957 (Ill. Ct. App., 1997), the Complainant developed cancer, and she was subsequently terminated. Lake Point Tower, 291 Ill.App.3d at 900-901, 684 N.E.2d at 950-951, 225 Ill.Dec. 959-960. The Complainant brought her charge before the Illinois equivalent of the Equal Rights Division, which found that she had been terminated because of her disability, and the agency awarded her damages and other relief. Lake Point Tower, 291 Ill.App.3d at 901-902, 684 N.E.2d at 951-952, 225 Ill.Dec. 960-961. The employer appealed that decision to the Illinois equivalent of the LIRC, which upheld the original decision in the employee's favor. Lake Point Tower, 291 Ill.App.3d at 901-902, 684 N.E.2d at 951-952, 225 Ill.Dec. 960-961. The case then made its way to the Illinois Court of Appeals.

In the Court of Appeals, Lake Point (the employer), urged the Court to reverse the agency's decision by adopting the standards under the ADA and a case which predated an amendment to Illinois's Human Rights Act, the equivalent to Wisconsin's WFEA. The

Illinois Court of Appeals held:

> Lake Point urges us to apply the *Lyons* and ADA definitions in this case. Of course, we cannot. Recognizing the the definition of handicap was too restrictive, the legislature enacted the Human Rights Act in 1980.
>
> The new Act changed the definition of handicap. It eliminated the reference to limitations on major life activities. That change furthered a policy that protects handicapped persons. An employer now cannot defend a firing by saying the employee was not suffering enough from his or her disease. Handicapped employees are protected from an untenable catch 22 – a requirement that a major life function be severely limited by a handicap that is unrelated to the employee's ability to perform job duties. That approach would swallow the statute and destroy its salutary purpose.
>
> The ADA cases have no relevance here. . . . Lake Point will have to accept the definition contained in the Act, in the Commission's regulations, and in the relevant reported cases.

Lake Point Tower, 291 Ill.App.3d at 904, 684 N.E.2d at 953, 225 Ill.Dec. 963.[1]

Just as the employer in Lake Point Tower had to accept Illinois law as it stood, so must Crystal Lake accept Wisconsin law as it stands now. Cases construing the ADA have no relevance here. The agency's decision should be affirmed.

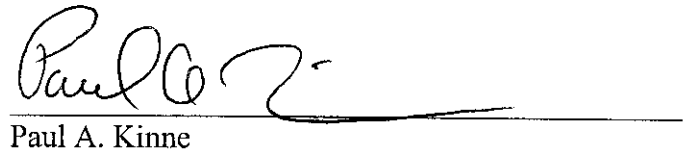
1

The Supreme Court of Minnesota made a similar holding: "When provisions of [Minnesota's anti-discrimination law] are not similar to provisions of federal anti-discrimination statutes, . . . we have departed from the federal rule in our interpretation of [Minnesota's anti-discrimination law]." Kolton v. City of Anoka, 645 N.W.2d 403, 407 (Minn. S.Ct. 2002).

V. CONCLUSION.

For the reasons set forth in this brief, the agency's decision should be affirmed.

Dated this 12th day of May, 2003.

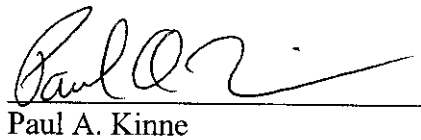


Paul A. Kinne
State Bar No. 1021493
Wisconsin Academy of Trial Lawyers
44 E. Mifflin Street, Suite 103
Madison, WI 53703
Telephone: 608-257-5741

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief with a monospaced font. The length of this brief is five (5) pages.

Dated this 12th day of May, 2003.



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