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CERTIFIED MAIL
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December 20, 1996

Kyu Chong Rowing
99 1/2 Princeton Ave.
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Wheeling Pittsburgh Steel Corp.
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Mary C. Buchmelter
Deputy Attorney General
Civil Rights Division
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812 Quarrier St.
Charleston, WV 25301

Re: Rowing v. Wheeling Pittsburgh Steel Corp.
ENO-178-91A

Dear Parties:

Enclosed, please find the final decision of the undersigned administrative law judge in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective July 1, 1990, sets forth the appeal procedure governing a final decision as follows:

"§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the administrative law judge's final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the judge, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

10.2. The filing of an appeal to the commission from the administrative law judge shall not operate as a stay of the decision of the administrative law judge unless a stay is specifically requested by the appellant in a separate application for the same and approved by the commission or its executive director.

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the administrative law judge, or an order remanding the matter for further proceedings before a administrative law judge, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before a administrative law judge, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the judge on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the administrative law judge's decision is:

10.8.1. In conformity with the Constitution and laws of the state and the United States;

10.8.2. Within the commission's statutory jurisdiction or authority;

10.8.3. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

10.8.4. Supported by substantial evidence on the whole record; or

10.8.5. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

10.9. In the event that a notice of appeal from a administrative law judge's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the judge's final decision; provided, that the commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the commission. The final order of the commission shall be served in accordance with Rule 9.5."

If you have any questions, you are advised to contact the executive director of the commission at the above address.

Yours truly,

Gail Ferguson
Administrative Law Judge

GF/mst

Enclosure

cc: Herman H. Jones, Executive Director

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

KYU CHONG ROWING,

Complainant,

v. DOCKET NUMBER: ENO-178-91A

WHEELING PITTSBURGH STEEL CORP.,

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on June 15, 1995, in Wellsburg, Brooke County, West Virginia, before Gail Ferguson, Administrative Law Judge. Briefs were received through September 8, 1995.

The complainant, Kyu Chong (Gina) Rowing, appeared in person. Her case was presented by Mary C. Buchmelter, Deputy Attorney General, counsel for the West Virginia Human Rights Commission. The respondent, Wheeling Pittsburgh Steel Corp., was represented by Kathy Gatrell, Supervisor of Human Resources, and by its in-house counsel, James B. Hecht.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to

applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the administrative law judge and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

A.

FINDINGS OF FACT

1. The complainant, Kyu Chong Rowing, was born in South Korea. After graduating from high school, she worked for ten years in various clerical positions in South Korea. The complainant is 5 ft. tall and weights 105 lbs.

2. In 1987, the complainant married an American Serviceman and came to the United States. In June 1995, the complainant became a citizen of the United States.

3. The respondent, Wheeling Pittsburgh Steel Corp., is an employer within the State of West Virginia.

4. On May 11, 1990, complainant was hired as a probationary employee by respondent, as part of the on-the-job (OTJ) program

through the Job Training Partnership Act (JTPA) administered by the Northern Panhandle Private Industry Council (NPPIC).

5. The complainant was hired by Burla Williams, respondent's superintendent of human resources. According to Ms. Williams, she hired the complainant because she met the qualifications for a utility entry level position. Moreover, on complainant's application, Ms. Williams noted her impression that complainant had a "good attitude" and would do any work we gave her."

6. As a probationary employee complainant was expected to work 520 hours. During that period of time such an employee would be rotated to various departments so as to learn the entire process of steel making.

7. As a utility worker, complainant's duties included general heavy labor such as: shoveling coke; sweeping floors; loading and transporting bricks, stone and other materials; hooking the overhead coke crane; and cleaning carbon from coke oven battery doors "chuck doors" which were 9.75 feet in height.

8. Initially, the complainant worked in the Coke Plant in Follensbee, West Virginia shoveling coke onto a conveyer belt. Later, she was sent to Mingo Junction to work at the Basic Oxygen Furnace facility where she performed standard labor work. When the complainant returned to the Coke Plant, in addition to shoveling coke, she was asked to clean a chuck door.

9. Complainant's supervisor, Andrew Tokas, arranged for a co-worker to demonstrate the technique for complainant. Complainant was shown the process one time.

10. Monte Smith, respondent's employee who previously worked that job, testified that a chuck door is a small door through which a leveling bar pushes coal that drops out excess coal. After the process is completed, the chuck door must be closed. Sometimes the door is easily opened; sometimes it takes two bars, one in each hand, to close it.

11. Although it may have taken the complainant longer, as an inexperienced laborer with ten minutes of instructions, to operate the chuck door than seasoned coworkers, complainant did finish her task at the chuck door. She was not given another opportunity to become more proficient.

12. The complainant credibly testified that in her entire time as a laborer, she never refused to do a job. When she worked the midnight shift, she routinely arrived at 10:00 p.m. to begin work on time.

13. Three evaluation forms were completed on the complainant by three different supervisors--the aforementioned Andrew Tokas, Jim Clark and William Thompson.

14. In all her evaluations, the complainant received excellent marks for cooperation and attendance.

15. Mr. Tokas' evaluation of complainant pointed out that complainant was "small, not very strong for any heavy work" and her ratings were in the good and fair categories for knowledge, quality of work and quantity of work.

16. Mr. Clark's evaluation of the complainant indicated the complainant "could not work groundman or ladle liner helper because she could not lift the hook or flip over boxes of clay, had to call

out other people to do her job." Mr. Clark's ratings of the complainant was fair for job knowledge and in the poor category for quality of work, quantity of work and physical adaptability.

17. Mr. Thompson's evaluation of the complainant indicated the complainant was "physically too small--may have a language problem with English--she is too short to clean jambs or open chuck doors on the old block." Mr. Thompson rated the complainant fair in quality of work, but poor in the categories of job knowledge, quantity of work and physical adaptability.

18. The complainant was never shown her evaluations nor was she given an opportunity to respond to them.

19. Although respondent's evaluation forms indicated that complainant was physically "too small" and "had language problems," there is credible testimony that complainant did every job she was assigned and that no one ever spoke to her about her work performance.

20. On the morning of July 5, 1990, complainant was called into the personnel office. At that time she was told by Brian Morrow that he was terminating her employment.

21. On July 6, 1990, the complainant was terminated from her employment by respondent after working only 280 hours of the 520 hours which the JTPA contract required. The complainant's termination notice is not signed.

22. Burla Williams, respondent's human resources supervisor, testified that it was routine practice to give probationary employees "every chance possible" during their probationary period; and that very few probationary employees were terminated during the years 1978 to 1989. Ms. Williams, who was responsible for terminating

employees, remembered terminating only three, and moreover, that when it did occur, the usual reasons were drugs, disciplinary problems and inability to perform any of the assigned duties after many rotations and chances.

23. Complainant was terminated by Brian Morrow, Burla Williams' assistant, while Ms. Williams was on vacation. Ms. Williams testified that based upon complainant's evaluations, she would not have terminated her.

24. Linda Carter, who is American born and has worked for respondent for 17 years, testified for complainant. Ms. Carter stands 4'8" tall. According to Ms. Carter when she was a probationary employee in the Coke Plant, she was asked to clean the chuck doors on the coke oven. When she could not clean the doors because of here inability to reach them, she was "disqualified" and sent to another job. She was transferred to the machine shop.

25. Kathryn Woods, who is American born, has worked for respondent since 1979. Ms. Woods testified that when she began work with the respondent, she started in the Mesh Department, where she was put to work lifting heavy sheets of steel. According to Ms. Woods when she could not do the job, she was transferred to shipping. At that time, she was a probationary employee, like complainant. Ms. Woods also testified that the respondent "moved everyone around until they could find a job they could do good."

26. The complainant testified that she was questioned by respondent's employees about her oriental heritage and was asked whether or not she was Vietnamese.

27. Monte Smith, Co-Chair of the Civil Rights Committee for the Union testified that he had heard employees refer to individuals of Oriental or Asian nationalities by slang terms.

28. Another witness, Edward Stein, testified that he heard the complainant referred to as "that little Korean girl."

29. Inexplicably, one of the complainant's supervisors noted on complainant's evaluation that she "may have language problems with English," yet no one ever spoke to the complainant about this "problem."

30. The complainant suffered lost wages and benefits because of respondent's actions in the amount of $102,752.60 through December 1985 as well as interest earnings of $35,372.33 in the aggregate amount of $138,125.93 as set forth in complainant's Exhibit A.

31. The complainant suffered humiliation, embarrassment and emotional distress as a result of respondent's termination.

32. The West Virginia Human Rights Commission and the Civil Rights Division of the West Virginia Attorney General's Office expended costs in the amounts of $443.17 and $574.70 as supported by post hearing submissions.

33. Complainant reasonably mitigated her damages by securing other employment. Complainant's interim wages were $46,070.44 as set forth in complainant's Exhibit A.

B.

DISCUSSION

The West Virginia Human Rights Act, WV Code §5-11 et seq. prohibits discrimination in "terms, conditions or privileges of employment." WV Code §5-11-3(h), as amended, defines the terms "discriminate" or "discrimination" to mean, in relevant part, "to exclude from, or fail or refuse to extend to, a person equal opportunities because of...national origin...."

The seminal case for addressing claims of employment discrimination based on national origin under the West Virginia Human Rights Act is **WV Institute of Technology v. WV Human Rights Commission and Zavareei**, 383 S.E.2d 490 (1989). The **Institute of Technology** case adapts the Court's more general employment discrimination test set forth in **Conaway v. Eastern Associated Coal Corp.**, 358 S.E.2d 423 (1987).

In **Conaway**, as well as subsequent cases, the Court has stated that the prima facie burden is not meant to be onerous, and when discussing the "but for" burden, the Court has consistently stated that this may be shown in a variety of ways.

In a recent West Virginia Supreme Court decision, the **Conaway** analysis of the prima facie burden was substantially clarified. Justice Cleckley, writing for the Court in **Barefoot v. Sundale Nursing Home**, No. 22165 (WV Sup. Ct. Apr. 13, 1995), stated that "[t]he 'but for' test of discriminatory motive in **Conaway**, which has resulted in some confusion, is merely a threshold inquiry,

requiring only that a plaintiff show an inference of discrimination." **Barefoot**, Syl. Pt. 2.

Justice Cleckley then reiterated that **Conaway** and subsequent cases disavowed any desire to require more and that the majority in **Conaway** expressly noted it was not overruling earlier decisions.

> What is required of the plaintiff is to show some evidence which would sufficiently like the employer's decision and the plaintiff's status as a member of a protected class so as to give rise to an inference that the employment decision was based on an illegal discriminatory criterion. **Barefoot**, slip op. at 12, citing **Conaway**, 358 S.E.2d 423, 429-30.

Adjudicating a national origin employment discrimination claim is essentially a three step process. First, the complainant must establish a prima facie case of national origin discrimination by demonstrating (1) that the complainant is a member of a protected class; (2) that the employer made an adverse decision concerning the plaintiff; and (3) but for the plaintiff's protected status, the adverse decision would not have been made. Syllabus Point 1 **Institute of Technology**; and Syllabus Point 3, **Conaway**.

A complainant's prima facie case of national origin employment discrimination can be rebutted by the respondent's presentation of evidence showing a legitimate and nondiscriminatory reason for the employment-related decision in question which is sufficient to overcome the inference of discriminatory intent. Syllabus Point 2 **Institute of Technology**. If the respondent satisfies the requirement of demonstrating a legitimate and nondiscriminatory reason for the employment decision, then the complainant has the ultimate burden of proving by a preponderance of the evidence that the legitimate reason

given by the employer for the employment related decision is merely a pretext for a discriminatory motive. **Institute of Technology** at 496.

Examples of circumstantial evidence may include an admission by the employer, a case of unequal or disparate treatment between members of the protected class and others by the elimination of the apparent legitimate reasons for the decision, or statistics in a large operation which show that members of the protected class received substantially worse treatment than others. **Conaway**, at 430.

Clearly, the complainant has established all three elements of her prima facie burden. Complainant's national origin is South Korea.

It is undisputed that the respondent employer made an adverse decision concerning the complainant in that she was terminated from her position with the respondent on July 6, 1990. Notwithstanding complainant's evidence that she was qualified for the position, the complainant also testified the third prong of the **Conaway** prima facie requirement by establishing that similarly situated persons not of the protected class were treated differently.

The complainant also established that people would ask her what her nationality was. She stated that people would ask her if she was Vietnamese. Also, other testimony provides the complainant's "link" to her protected status of national origin. Monte Smith, a crane operator for respondent, also testified for the complainant. Mr. Smith, who has been co-chair of the Civil Rights Committee of Local 1190, stated that in that capacity he had been approached about or heard about derogatory terms used about Asians. Mr. Smith stated: "Yes, I've heard that. I've heard them called 'chinks' and "Chinamans' [sic], all different slang words that they use right

in the mill." Also, Ed Stein, a witness for the complainant, worked for respondent for 43 years. Mr. Stein testified that he heard complainant referred to as "that little Korean girl." Finally, respondent's employee evaluation sheet states that it discerned a problem with her accent.

Once the complainant has presented her prima facie case, it is incumbent upon the respondent to meet its burden of production by producing a legitimate and nondiscriminatory reason for the discharge. **Mingo Co. Equal Opportunity Council v. WV Human Rights Commission**, 376 S.E.2d 134 (1988). The complainant then has an opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were merely a pretext for the unlawful discrimination. **O.J. White Transfer & Storage Co. v. WV Human Rights Commission**, 383 S.E.2d 323, 326 (1989); **Barefoot v. Sundale Nursing Home**, No. 22165 (WV Sup. Ct. Apr. 13, 1995). In other words, where the link is established between the protected class at issue and the act of discrimination, the case turns upon an examination of the respondent's production of evidence. Should the respondent fail to rebut the presumption of discrimination by failing to articulate a legitimate and nondiscriminatory reason for its adverse action, then the complainant must prevail as a matter of law. **St. Mary's Honor Center v. Hicks**, 113 S.Ct. 2742 (1993); see **Texas Dept. of Community Affairs v. Burdine**, 450 U.S. 248 (1981).

To be sure, although the burden on the respondent is only one of production, not persuasion, to accomplish it a respondent "must clearly set forth through the introduction of admissible evidence, the reason for the [complainant's] rejection." **Id**. The

explanation provided "must be clearly and reasonably specific," Id, at 258, "legally sufficient to justify a judgment for the defendant," and both legitimate and nondiscriminatory. Id. at 254.

At the hearing, the respondent failed to clearly and specifically set forth the reason for complainant's discharge from employment. In fact, it did not even address this issue or offer any articulated reason for her termination.

It is important to note that the respondent's burden of production must be accomplished through the introduction of "admissible evidence." Id. at 254. In the case at bar, the respondent articulated a reason for complainant's termination in its answer to amended complaint, answers to interrogatories and response to requests for production of documents propounded by the commission Investigator, and prehearing memorandum. Such pleadings and documents, however, do not constitute admissible evidence. Not only did the respondent fail to examine any witness who could testify as to the reasons for the complainant's termination from employment, it did not even cross-examine the complainant or any of the complainant's witnesses whose testimonies established a prima facie case that the respondent discrimination against the complainant.

Moreover, the complainant and the complainant's witnesses offered evidence which completely discredits any inference that complainant was terminated as a result of the comments contained on the evaluations. For example, Burla Williams, former Superintendent of Human Resources at Wheeling-Pittsburgh Steel Corp., testified for the complainant. Ms. Williams was the person in charge of terminating probationary employees. Ms. Williams testified that

complainant's evaluations and the comments contained therein alone would not have given her reason to terminate the complainant. When asked whether she would have terminated complainant when Brian Morrow terminated her, Ms. Williams stated: "No, because I only had two evaluations that were in my file prior to going on vacation...and it wasn't anything that would have given me reason to terminated her. I would have given her more chances to prove herself."

The Commission brought on several other witnesses who testified about the complainant's ability to perform her job. Ms. Woods, for example, testified that she had observed complainant working on the job. When asked how she (Ms. Woods) would characterize the complainant as a worker "she stated" "She was as good a worker as I would be. She was a good worker, I felt. She was better than me even." Monte Smith stated that he also had an opportunity to observe complainant working on the job. When Mr. Smith was asked how he would characterize complainant as a worker, he stated that "she was a good worker. She works all the time."

Assuming arguendo that the respondent has met its burden of articulating a clearly and reasonably specific, legitimate and nondiscriminatory reason for complainant's termination; that being that complainant could not perform the duties of her job, the issue then becomes whether the proffered reason was in fact the true reason for the adverse action. "[t]he complainant [or the Commission] has the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were merely a pretext for unlawful discrimination." **Shepherdstown V.F.D. v. WV Human Rights Commission**, 309 S.E.2d 342 (1983). The commission "may

succeed in this either directly by persuading the Court that a discriminatory reason morelikely motivated the employer or indirectly by showing the employer's proffered explanation is unworthy of credence." **Texas Dept. of Community Affairs v. Burdine**, supra. In the case at bar, even if the respondent had clearly and specifically alleged that the complainant was unable to physically perform her job because she lacked the physical size, witness testimony that other similarly situated American-born employees were not terminated for the same reason, convincingly establishes that the respondent's explanation for complainant's termination to be a pretext.

Burla Williams testified that no one had ever been terminated by the respondent because they were too short or did not weigh enough. Supporting this fact, both Kathy Woods, 5'0", and Linda Carter, 4'8", testified that they were physically unable to perform certain jobs as probationary employes and that, as a result, they were transferred around to other jobs which they could more easily perform. Both women are American-born. Ms. Williams distinguished the complainant's termination from that of two other probationary employees who were terminated after a series of warnings about their workplace deficiencies. In response to a query as to what the typical reasons were for termination of probationary employees or union employees, Ms. Williams stated: "drugs, not working, not reporting for work. Drugs is about the one [sic] I remember." Burla Williams also stated that it was the normal procedure at Wheeling Pittsburgh Steel Corp. to give employees "every chance possible during the probationary period" to prove that they could

preform a job and that they were always given more than one or two chances to prove that they could do a job.

In contrast, complainant's unrebutted testimony was that she could perform any job to which she was assigned. Her testimony is replete with descriptions of the jobs she performed. When asked if she had ever refused a job, she stated: "No, ma'am. I did best I can. The best I can." She also testified that the respondent gave her only five to ten minutes on one occasion at the Coke Plant to learn how to open and clean the chuck oven doors which were 9 ft. high. Monte Smith testified that it would take much longer than ten or twenty minutes to learn the chuck door job. Complainant completed the job, nevertheless, despite her size.

On one of complainant's evaluation forms, a manager for the respondent stated that she (Ms. Rowing) was too short to perform the chuck door job. Linda Carter testified that, as a probationary employee, she was too short to clean and open the chuck doors, but that the respondent simply transferred her to another job when it determined that she couldn't do the job. Since there is unrebutted testimony that complainant could physically perform every job to which she was assigned; that other probationary employees who were unable to perform certain jobs were simply transferred to other jobs rather than terminated; and that other probationary employees were only terminated after many warnings, it is clear that any defense that complainant could not perform her job is pretextual.

Other American-born employees were permitted to move to other, easier jobs or warned repeatedly about serious infractions, such as sleeping on the job or gross insubordination. Complainant was given

a 9 ft high door to clean, given no gloves for the heat and removed from the assignment after only five or ten minutes. Her supervisor "wrote her up" for her failure to do this chore in a "timely manner" and then chastised her on the evaluation form for having an accent.

By a preponderance of the evidence, the Commission and complainant have shown that because of complainant's accent and oriental ancestry, which was manifested in her physical characteristics and accent, she was treated differently than native born, similarly situated employees. Complainant has met her ultimate burden in showing that her termination was a violation of the West Virginia Human Rights Act.

C.

JURISDICTION

In its answer to the Commission's amended complaint and in its prehearing memorandum, the respondent argues that the complainant's claim of national origin discrimination is barred in that there has been an adjudication of the grievance she filed with the Northern Panhandle Private Industry Council [hereinafter NPPIC] on October 4, 1990. A hearing was held on March 14, 1991, before Gary A. Sacco, hearing examiner. That hearing consisted of the testimonies of Kathy Woods, Charles Stock, Monte Smith, and Kyu Chong Rowing for the complainant and Eugene Shirra, for the respondent. On October 23, 1990 and on May 23, 1991, Mr. Sacco found that Wheeling Pittsburgh Steel Corp. had not adversely acted against the complainant. It is the position of the complainant and the commission that the

complainant's participation in a grievance procedure does not bar her claim of national origin discrimination before the commission.

An administrative complaint filed with the commission is not precluded by the filing of a private grievance or a decision made by a grievance board with regard to such a grievance. In **Vest**, the Court cited WV Code §5-11-1 et seq. and held that the West Virginia Education and State Employees Grievance Board does not have authority to determine liability under the Human Rights Act. The Court based its decision on the fact that grievance boards and the commission provide enforcement mechanisms to accomplish different legislative purposes. Neither, therefore, preempts the other.

In **Vest**, the Court makes no distinction between decisions made by the West Virginia Education and State Employees Grievance Board and other grievance boards. In fact, it extends its holding to include all "Grievance Board" decisions which fail to meet certain criteria as laid out in the **Vest** decision. Clearly, the Court's goal in deciding **Vest** was to provide legal justification for the use of the "overlapping remedies" of Grievance Board decisions and claims under the Human Rights Act. Such remedies effect "issues...where we must reconcile the goals of various statutory schemes with the policies supporting the doctrines of claim and issue preclusion...." **Vest**, 455 S.E.2d at 784 (Footnote omitted).

The complainant in this case grieved her complaint through the NPPIC with whom she signed an agreement as part of the Job Training Partnership Act. The Court, in **Vest**, **citing Liller v. WV Human Rights Commission**, 440, 376 S.E.2d 639, 646 (1988), held that "for claim preclusion to attached to quasi-judicial determinations of

administrative agencies, a least where there is no statutory authority directing otherwise, the prior 'decision must be rendered pursuant to the agency's adjudicatory authority and the procedures employed by the agency must be substantially similar to those used in a court[.]" **Vest**, 455 S.E.2d at 785.

Clearly, the grievance procedures employed by the NPPIC in this case were not substantially similar to those used in a proceeding involving the Commission before an administrative law judge. According to **Vest**, if in the grievance proceeding the plaintiff was not "'afforded a full an fair opportunity to litigate the matter in dispute,'" then any decision reached as a result of such proceeding would not bar a subsequent Human Rights Act claim. See **Mellon-Stuart Co. v. Hall**, 359 S.E.2d 124 (1987).

Second, the Court in **Vest** is also concerned that even "a grievant with a lawyer would have an unfairly difficult task trying to prove illicit motive or disparate impact without access to the full panoply of discovery." **Id**. Furthermore, "the employer ordinarily possesses the crucial evidence." **Id**. In this case, the grievance hearing lacked the findings of a proper investigation. For instance, only one of complainant's supervisors was contacted during the investigation. Therefore, the evidence supporting complainant's contentions, which was subsequently presented before the administrative law judge pursuant to a Human Rights Act claim, was never presented before the Grievance Committee. Such a grievance proceeding was, therefore, not an "adjudication on the merits" of the case, and as such, does not bar the institution of a cause of action

under the Human Rights Act. **Wilfong v. Chenoweth Ford**, ___WV___, 451 S.E.2d 773, 777 (1994).

Finally, in contrast to the Human Rights Act, the West Virginia grievance statute, WV Code §18-29-1 et seq., does not afford a complainant an opportunity for review of the Grievance Board's decision, not "does it give employees the option of skipping the administrative process and pursuing their claims **de novo** in circuit court where jury trials and the full array of legal and equitable remedies are obtainable." **Vest**, 455 S.E.2d at 786. Likewise, in this case, if the decision of the NPPIC's Grievance Board was the final decision of that board with respect to complainant's national origin discrimination claim, she would have no opportunity to appeal the grievance decision. In contrast, final decisions of commission administrative law judges are appealable to the West Virginia Human Rights Commission. Commission final orders may be appealed to the West Virginia Supreme Court of Appeals, and in some instances, to the Kanawha County Circuit Court. See **WV Code §5-11-11.**

In summary, the complainant's cause of action before the Human Rights Commission should not be barred by res judicata and collateral estoppel. The grievance hearing initiated by the complainant through the NPPIC and held on March 14, 1991, was not an "adjudication on the merits" of the case. Thus, it did not afford the complainant a full and fair opportunity to litigate the matters in dispute. The decision reached, therefore, as a result of that proceeding should not bar a subsequent Human Rights Act claim.

In conclusion, Kyu Chong (Gina) Rowing met her prima facie and ultimate burden by proving by a preponderance of the evidence that

she was terminated from her position with the respondent, Wheeling Pittsburgh Steel Corp., because of her national origin.

D.

CONCLUSIONS OF LAW

1. The complainant, Kyu Chong Rowing, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the Virginia Human Rights Act, WV Code §5-11-10.

2. The respondent, Wheeling Pittsburgh Steel Corp., is an employer as defined by WV Code §5-11-1 et seq., and is subject to the provisions of the West Virginia Human Rights Act,

3. The complaint in this matter was properly and timely filed in accordance with WV Code §5-11-10.

4. The Human Rights Commission has proper jurisdiction over the parties and the subject matter of this action pursuant to WV Code §5-11-9 et seq.

5. Complainant has established a prima facie case of national origin discrimination.

6. The respondent has articulated a legitimate nondiscriminatory reason for its action toward the complainant, which the complainant has established, by a preponderance of the evidence, to be pretext for unlawful national origin discrimination.

7. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to backpay plus statutory interest in the amount of $138,125.93.

8. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to an award of incidental damages in the amount of $2,950.00 for the humiliation, embarrassment and emotional and mental distress and loss of personal dignity.

9. As a result of the unlawful discriminatory action of the respondent, the commission and the Attorney General's office are entitled to recompensation for attorneys fees and cost. The Attorney General's office has expended $443.17. The commission has expended $574.70 in expenses.

E.

RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The respondent shall cease and desist from engaging in unlawful discriminatory practices.

2. The respondent shall reinstate the complainant with full seniority.

3. Within 31 days of receipt of this decision, the respondent shall pay to the complainant backpay in the amount of $138,125.93.

4. Within 31 days of receipt of this decision, the respondent shall pay to complainant incidental damages in the amount of $2,950.00 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination.

5. Within 31 days of receipt of this decision, the respondent shall pay to the commission $574.70 and to the Attorney General's office $443.17 for reimbursement of witness fees, hearing transcript costs and travel expenses associated with the prosecution of this claim.

6. The respondent shall pay ten percent per annum interest on all monetary relief.

7. In the event of failure of respondent to perform any of the obligations hereinbefore set forth, complainant is directed to immediately so advise the West Virginia Human Rights Commission, Norman Lindell, Deputy Director, Room 108A, 1321 Plaza East, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so **ORDERED.**

Entered this 24 day of December, 1996.

WV HUMAN RIGHTS COMMISSION

BY: _____
GAIL FERGUSON
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I, Gail Ferguson, Administrative Law Judge for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing *FINAL DECISION* by depositing a true copy thereof in the U.S. Mail, postage prepaid, this *20th day of December, 1996*, to the following:

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GAIL FERGUSON
ADMINISTRATIVE LAW JUDGE