MIKE KELLY
ATTORNEY AT LAW
POST OFFICE BOX 246
CHARLESTON, WEST VIRGINIA 25321

122 CAPITOL STREET
SUITE 200

(304) 344-3293
FAX (304) 344-3516

SANDRA K. MOLES
LEGAL ASSISTANT

TO: Nathan D. Roush
Box 108B, Rt. 1
Letart, WV 25253

Cindy L. Fairbanks, Personnel Manager
Ravenswood Aluminum, Inc.
P. O. Box 98
Ravenswood, WV 26164

Paul R. Sheridan, Esq.
Senior Assistant Attorney General
812 Quarrier Street
L&S Building - 5th Floor
Charleston, WV 25301
Counsel to the Commission

Ricklin Brown, Esq.
Lynn A. Davenport, Esq.
P. O. Box 1386
Charleston, WV 25325-1386
Counsel for Respondents

NOTICE OF FINAL DECISION

PLEASE TAKE NOTICE that pursuant to W.Va. Code §5-11-8(d) and 6 WVCSR §77-2-10, any party aggrieved by the attached final decision shall file with the executive director of the West Virginia Human Rights Commission, WITHIN THIRTY (30) DAYS OF RECEIPT OF THE DECISION, a petition of appeal setting forth such facts showing that the party is aggrieved, stating all matters alleged to have been erroneously decided herein, the relief to which the party believes they are entitled and any argument in support thereof.

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

All documents shall be directed to:

Herman Jones, Executive Director
West Virginia Human Rights Commission
1321 Plaza East, Room 104-106
Charleston, WV 25301

Dated this 4th day of September, 1996.

WV HUMAN RIGHTS COMMISSION

BY: Mike Kelly

MIKE KELLY
Administrative Law Judge
Post Office Box 246
Charleston, West Virginia 25321
(304) 344-3293

cc: Herman Jones, Executive Director
West Virginia Human Rights Commission

BEFORE THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION

NATHAN D. ROUSH,

Complainant,

v. **Docket No. EH-248-94**

RAVENSWOOD ALUMINUM CORP.,

Respondent.

FINAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

THIS MATTER matured for public hearing on 12 June 1995. The hearing was held at City Hall, Ripley, Jackson County, West Virginia. The complainant appeared in person and his case was presented by the West Virginia Human Rights Commission and its counsel, Senior Assistant Attorney General Paul R. Sheridan. The respondent appeared by its representative, Allen Toothman, and by its counsel, Ricklin Brown and Bowles, Rice, McDavid, Graff & Love. Post hearing evidentiary depositions were taken and submitted by each side. The parties also submitted recommended findings of fact and conclusions of law, as well as briefs replying to the other's initial submission. Ms. Lynn A. Davenport, Esq. assisted Mr. Brown on the briefs.

I. ISSUE TO BE DECIDED

Whether respondent violated W.Va. Code §5-11-9(1) and the regulations promulgated pursuant thereto when it terminated complainant from its employ on or about 21 October 1993 because complainant had been off work due to a disability since August 1992.[1]

II. FINDINGS OF FACT

Based upon the credibility of the witnesses, as determined by the Administrative Law Judge, taking into account each witness' motive and state of mind, strength of memory, and demeanor and manner while on the witness stand; and considering whether a witness' testimony was consistent, and the bias, prejudice and interest, if any, of each witness, and the extent to which, if at all, each witness was either supported or contradicted by other evidence; and upon thorough examination of the exhibits introduced into evidence and the written recommendations and argument of counsel, the Administrative Law Judge finds the following facts to be true:[2]

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[1] The complaint filed with the Commission in or about February 1994 challenges the October 1993 discharge. It does not allege that respondent subsequently discriminated against Mr. Roush by not considering him for reemployment upon being released to return to work by his physician in mid-1994. For purposes of determining the issue of liability, therefore, I will focus exclusively on the events leading up to and including the discharge and the time period immediately thereafter. *McJunkin Corp. v. WVHRC*, 179 W.Va. 417, 369 S.E. 2d 720 (1988).

[2] To the extent that the findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and discussion as stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed finding and conclusions have been omitted as not relevant or as not necessary to a

A. Preliminary Facts

1. Complainant Nathan D. Roush is a white male under the age of 40 who filed a complaint in a proceeding under the West Virginia Human Rights Act, W.Va. Code §5-11-1 et seq. (HRA) invoking the Act's protection for the disabled. He resides in Letart, Mason County, West Virginia. He was born in 1966.

2. Respondent Ravenswood Aluminum Corporation (RAC) is a person and employer as those terms are defined by W.Va. Code §§5-11-3(a) and (d), respectively. RAC employees over 1700 persons at its aluminum-making facility in Jackson County, West Virginia. For a brief period of time one of RAC's employees was Nathan D. Roush.

3. On 21 October 1993, RAC terminated the employment of complainant. The discharge letter mailed to complainant states that "The reason for termination is for failure to complete the 60 work day probationary period." Mr. Roush was not working at the RAC plant on the day of his discharge. Because of illness, he had been of work since August 1992.

4. In or about February 1994, Mr. Roush filed a complaint with the West Virginia Human Rights Commission (HRC) charging RAC with disability discrimination. Mr. Roush alleged that RAC

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proper determination of the material issue as presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

acted unlawfully when it discharged him "before my doctor released me to return to work." (Complaint, paragraph 2(c)).

B. Mr. Roush's Employment History with RAC Prior to His Illness

5. Mr. Roush first became employed at RAC on 15 October 1990. He was hired into the entry level position of utility sweeper. A utility sweeper is a "labor gang" type position which entails numerous jobs, many of which involve exposure to excessive heat in the potrooms. The potrooms are where the aluminum is "cooked."

6. On 31 October 1990, while Mr. Roush was still a probationary employee, RAC and the collective bargaining agent for its hourly employees, the United Steelworkers (USW), became involved in a labor dispute. The labor dispute was not resolved until June 1992, some twenty months later. Though not a union member, Mr. Roush did not go to work at RAC during the dispute, but chose to honor the USW's picket line.

7. Mr. Roush returned to work on 29 June 1992. Pursuant to a memorandum of understanding between RAC and the USW, Mr. Roush returned as a probationary employee subject to a new 60-day probationary period.

8. Upon his return, Mr. Roush was again assigned to the position of utility sweeper in the potrooms. Some of the jobs a utility sweeper may be assigned to do include anode setting, tapper and cell operator. Anode setters removed used carbon anodes and set new ones, in addition to cleaning carbon and gutters. Heavy physical exertion is required to set anodes, which involves exposure to considerable heat for extended lengths of time. Tappers handle molten metal and are also exposed to considerable heat. Operators handle molten metal, in addition to heavy hand tools, requiring moderate physical exertion in extreme heat.

C. The History of Mr. Roush's Illness

9. On 22 August 1992, Mr. Roush was working as an anode setter in the potrooms. Pursuant to RAC policy, when the temperature and humidity in the potrooms reached a certain level the workers were issued an "ice vest" or "cool vest", which is a canvas garment worn under a work shirt designed to prevent the worker's body from overheating. The vest has slots to hold six blocks of frozen gel, three in front and three in back. The temperature in the potrooms on 22 August 1992 could have reached 130° F. and ice vests were issued.

10. After 2 to 4 hours of work wearing the cool vest, Mr. Roush felt a tightness in his chest and began suffering severe chest pain. He became disoriented, dizzy and nauseous. He felt like he couldn't breathe. Aided by two fellow workers, Mr. Roush was removed from the potroom. His

foreman allowed him to sit, catch his breath and drink water. When the pain did not subside, he was sent to a medical station and then sent home.

11. The next day Mr. Roush returned to work in the potrooms. While he did not want to wear a cool vest, he was directed to do so. Approximately one hour into the shift, Mr. Roush began to again experience severe chest pain and shortness of breath. He was once again sent to a medical station and then allowed to go home.

12. On 24 August 1992 Mr. Roush saw his family physician, Dr. Daniel Trent. Dr. Trent's initial diagnosis was heat exhaustion. He later suspected pleurisy, which is an inflammation of the lungs. Dr. Trent made a referral to another physician and then in May 1993 referred him to Dr. Prathap G. Chandran, a cardiologist. During the period of Fall 1992 through Spring 1993, Mr. Roush suffered severe limitations on his activities and was in constant pain.

13. Mr. Roush saw Dr. Chandran in June 1993. A catheterization procedure revealed blockages in the arteries leading to complainant's heart. On 9 July 1993 Mr. Roush underwent triple by-pass heart surgery.

14. Mr Roush did not work after 23 August 1992. For income, he applied for and received sickness and accident benefits through RAC and workers' compensation. It was later determined that his illness, heart disease, was not work related and Workers' Compensation ceased payments for his treatment.

15. On 14 October 1993, Dr. Chandran wrote a letter to Dr. Trent outlining complainant's ability to return to work:

> I am writing this letter with regards to Nathan Roush.
>
> As you recall, he had a Stress thallium done recently and this was normal. He continues to have questions regarding working, especially in an environment , where the heat is around 120 to 130 degrees. As far as I know there are not contraindications in working in those surroundings. I also checked with Dr. J. O. Harrah, Cardiac Surgeon, who concurred with my view.
>
> I would therefore, allow Mr. Nathan Roush to return to wok, including areas where the temperature is higher than usual.

It appears that RAC was not aware of Dr. Chandran's letter until after the hearing in this case.

16. Despite Dr. Chandran's general release for Mr. Roush to return to work, Dr. Trent, complainant's family physician, did not communicate a release to RAC until 14 April 1994, six months after he received Dr. Chandran's letter. Moreover, Dr. Trent's release contained a significant restriction, as evidenced in his letter to RAC:

> I have recently examined Nathan Roush in my office. I feel Nathan has reached maximum improvement following his triple by-pass heart surgery. As of April 15, 1994, I release Nathan Roush to return back to his employment for regular duty with the restriction of his working in extreme heat or cold conditions.

17. Dr. Trent explained that he did not release Mr. Roush immediately upon receipt of Dr. Chandran's letter because complainant was still experiencing pain from the surgery and had subjective concerns about returning to the potrooms and wearing a cool vest.

D. The Termination

18. In October 1993, during a determination of Mr. Roush's eligibility for benefits, it was brought to the attention of Allen Toothman, RAC's manager of labor relations, that Mr. Roush had never completed his sixty-day probationary period. He had completed only 32 actual work days between his return to work from the labor dispute on 29 June 1992 and 23 August 1992, which was his last day on the job.

19. Harold E. Rose is a supervisor at RAC. Prior to his joining management, Mr. Rose was chairman of the union's grievance committee. Mr. Rose testified credibly that in early October 1993 Mr. Toothman told him that the company intended to fire Mr. Roush because he had not completed his probationary period and had "not been released from his doctor yet and the company felt that he probably wasn't fit for industrial employment. And due to his condition, there was no way that they could put him back into the potrooms. So, therefore, they thought that the best thing for them to do is send him a letter of termination." (Testimony of Mr. Rose).

20. Mr. Rose did not agree with Mr. Toothman's decision and informed him that the union would not object if Mr. Roush was placed in a job out of the potrooms, despite his lack of seniority to bid into such a job. His suggestion was rejected.

21. Mr. Roush was terminated on 21 October 1993, the stated reason being failure to complete the probationary period.

22. I find as fact that at the time he terminated complainant, Mr. Toothman knew or should have known that it was likely that Mr. Roush could return to work at RAC, in some capacity, sometime in the future. I base this finding on the following:

(a) On or about 15 October 1993, Dr. Trent completed and mailed to RAC a Statement of Attending Physician form indicating an "estimated" return to work date for Mr. Roush of 1 January 1994, and further indicating that he should not be subjected to extreme exertion;

(b) RAC's in-house physician, Dr. Marianne B. Lindroth, testified that as many as 23 RAC employees have returned to work after heart bypass surgery, some with restrictions and some without;

(c) The testimonies of Dr. Lindroth and Dr. Trent that the average bypass patient is fully recovered within six months after surgery; and

(d) Mr. Toothman's personal knowledge that other employees had returned to RAC after heart bypass surgery.

E. Other People and Other Jobs

23. The parties agreed that RAC and the USW have in the past made special arrangements for as many as 25 to 30 employees to transfer jobs in order to accommodate a physical capacity

restriction. None of those employees, however, were still on probation at the time of such accommodation.

24. Mr. Rose testified credibly that he was aware of a janitor's position that was available that he believed would accommodate the restrictions placed on Mr. Roush's return to work by Dr. Trent. Mr. Toothman made no effort to explore the possibility of transferring Mr. Roush to the janitor position prior to discharging complainant. Of course, as of the date of his discharge Dr. Trent had not released Mr. Roush to return to work in any capacity.

III. DISCUSSION OF EVIDENCE AND APPLICABLE LAW

A. The General Law on Reasonable Recommendation

The West Virginia Human Rights Act requires that an employer make reasonable accommodations for known disabilities that will permit the employee to perform the essential functions of the job. *Skaggs v. Elk Run Coal Co., Inc.*, ____ W.Va. ____, ____ S.E. 2d ____ (Slip Opinion filed 11 July 1996); *Morris Mem. Convalescent Nursing Home, Inc. v. WVHRC*, 189 W.Va. 314, 431 S.E. 2d 353 (1993).

In *Skaggs*, the West Virginia Supreme Court of Appeals outlined the essential elements of a claim for breach of the duty to make reasonable accommodation:

(1) The complainant is a qualified person with a disability;

(2) The employer was aware of the disability;

(3) The disabled employee required an accommodation in order to perform the essential functions of the job;

(4) A reasonable accommodation existed that would meet the employee's needs;

(5) The employer knew or should have known of the employee's needs and of the accommodation; and

(6) The employer failed to provide the accommodation.

Skaggs also instructs that an employer "may defend against a claim of reasonable accommodation by disputing any of the above elements or by proving that making such accommodation would impose an undue hardship on the employer."

Here, there are three key elements of the six-part *Skaggs* test which RAC disputes and on which it rests its defense. First, RAC argues that Mr. Roush was not a qualified person with a disability at the time of his discharge since he was still under the care of his family physician and had not been released to return to work. Indeed, Mr. Roush himself did not believe that he was capable or returning to work as of the day he was fired.

Second, RAC argues that the Commission has not shown the existence of a reasonable accommodation that would have allowed Mr. Roush to return to work. Implicit in this argument, of course, is that to require an employer to grant an indefinite leave of absence until such time as a

worker is release by his or her physician, whether the leave encompasses months or years, is per se not reasonable.

Third is the obvious argument that RAC, in fact, accommodated complainant for fourteen months, from the date of illness to the date of discharge, and that further accommodation was not required.

Since a qualified person with a disability is one who can perform the essential functions of the job with or without reasonable accommodations, *Ranger Fuel Corp. v. WVHRC*, 180 W.Va. 260, 376 S.E. 2d 154 (1988), and, arguably, Mr. Roush could have recovered from his disability and performed the essential functions of the job if given the accommodation of a leave of absence of almost two years, RAC's first and second defenses, and the merits of this case, merge into one simple question: does the HRA's requirement of reasonable accommodation include an indefinite leave of absence for a worker to recover from a non-work related illness?

B. General Law on Leaves of Absence as a Reasonable Accommodation

Whether with or without accommodation, an allegedly disabled employee must be able to perform the essential functions of his or her position. The essential function of the job that is placed at issue in this case is attendance. Of course, attendance is the bedrock essential function upon which all others are dependent. It is axiomatic that an essential function of nearly every job in the economy

is "a regular and reliable level of attendance".[3] *Tyndall v. National Educ. Centers*, 31 F. 3d 209, 213 (4th Cir. 1994); *Carr v. Reno*, 23 F. 3d 535 (D.C. Cir. 1994); *Jackson v. Veterans Administration*, 22 F. 2d 277 (11th Cir. 1994).

It is likewise manifest that a perfect record of attendance is seldom demanded by any employer and a leave of absence can be required as a reasonable accommodation that allows a disabled employee an opportunity to recover from an illness and return to his job. *Kimbro v. Atlantic Richfield Co.*, 889 F. 2d 869 (9th Cir. 1989), cert. denied 498 U.S. 814 (1990).[4]

Whether an indefinite leave of absence qualifies as the type of reasonable accommodation mandated by the antidiscrimination laws was recently addressed in three cases from the federal circuit courts of appeal. In *Myers v. Hose*, 50 F. 3d 278 (4th Cir. 1995), the leading case on point, the court narrowly defined reasonable accommodation as "that which presently, or in the immediate future, enables the employee to perform the essential functions of the job in question." 50 F.3d at 283 (Emphasis added). "Reasonable accommodation" said the court "does not require the [employer] to wait indefinitely for Myer's medical condition to be corrected . . .". Id.

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[3] Complainant does not contend that he fits within the unusual category of persons who can perform the essential duties of their job from their home or some location other than the employer designated work premises.

[4] "[A]dditional unpaid leave for necessary treatment" is specifically identified as a reasonable accommodation in the EEOC's Interpretive Guidance to Title I of the Americans with Disabilities Act, 29 C.F.R. Pt. 1630, Appendix.

The Tenth Circuit reached a similar conclusion in *Hudson v. MCI Telecommunications Corp.*, (Filed 1 July 1996). In affirming the award of summary judgment to defendant, the court said:

> This court agrees with plaintiff that a reasonable allowance of time for medical care and treatment may, in appropriate circumstances, constitute a reasonable accommodation. In this case, however, plaintiff has failed to present any evidence of the expected duration of her impairment as of the date of her termination . . . MCI was not required to wait indefinitely for her recovery, whether it maintained her on its payroll or elected to pay the cost of her disability benefits. Accordingly, Hudson has failed to present evidence from which a reasonable jury could find that the accommodation she urges, unpaid leave of indefinite duration, was reasonable.

Finally, in *Rogers v. International Marine Terminals, Inc.*, 87 F. 3d 755 (5th Cir. 1996) the court specifically adopted the narrow definition of reasonable accommodation articulated by the Fourth Circuit in *Myers*, and affirmed summary judgment for the employer. Of interest here, the plaintiff in *Rogers*, like Mr. Roush, was recuperating from surgery on the date of his discharge and was not released to return to work until eleven months after he had been fired.

The Commission cites no cases in which an indefinite leave of absence of possible sizeable duration was explicitly sanctioned as a reasonable accommodation. In *Kimbro, supra*, on which the Commission heavily relies, the employer discharged the employee while he still carried an employer granted benefit of unexhausted sick leave equivalent to ten weeks of full salary and 36 weeks of half salary. When discussing an unpaid leave of absence as a possible accommodation that could have been tried by the employer, the court specifically noted that Kimbro would have needed to be off "no longer than a few months." 889 F.2d at 878. Significantly, the court suggested that the employer

might not "have been obligated to grant a second leave if the [disabling] condition recurred after return from the initial leave," at 879, indicating that a leave of "a few months" was perhaps the outer limit of a reasonable accommodation.

Unlike here, Kimbro was not fired after being off work for fourteen months with no concrete date of return in sight. Rather, Kimbro was fired before any accommodation was offered or tried. Clearly, *Kimbro* does not stand as authority for requiring an employer to extend indefinitely an accommodation that has already gone on for fourteen months.

Similarly, in *Cain v. Hyatt*, 734 F. Supp. 671 (E.D. Pa. 1990), a case also cited by the Commission, the plaintiff was fired while in his hospital bed immediately after the discovery that he had AIDS. That the defendants "made absolutely no effort to accommodate" Cain's disability, said the court, "is patently obvious." As in *Kimbro*, the discussion of a leave of absence in *Cain* is somewhat theoretical since the employee was fired prior to any leave being granted.

In *Schmidt v. Safeway, Inc.*, 864 F. Supp. 991, 6 ADD 1223 (D. Or. 1994), the court concluded that a leave of absence to obtain medical treatment is a reasonable accommodation. However, the court indicated, "the fact that an accommodation has been attempted and was unsuccessful may prove dispositive in determining whether failure to permit subsequent leave constituted failure to make a reasonable accommodation." 6 ADD at 1233. As in *Kimbro* and *Cain*, the employer in *Schmidt* apparently refused to offer the plaintiff any amount of time on unpaid leave of absence as a reasonable accommodation.

Arguably, the holding in *Schmidt* favors RAC since respondent in this case allowed a period of time for Mr. Roush to recover, without success, before denying the subsequent requested leave.

To summarize, an employer may be required, as part of the duty to make reasonable accommodation, to grant a leave of absence so that an employee may seek or recover from medical treatment of a disability. *Kimbro, supra.* However, an employer's obligation is not open ended and it is not required to grant or tolerate an indefinite leave that has "no temporal limit on the advocated grace period." *Myers*, 60 F. 3d at 282. At some point, a leave of absence in progress may cross the line from a reasonable to an unreasonable accommodation.[5]

C. Application of Law to the Facts at Bar

In applying the law reviewed supra, I begin with the general principals articulated in *Skaggs*:

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[5] I decline to adopt the *Myers* definition of "reasonable" as encompassing only those accommodations "which presently, or in the immediate future, enable . . . the employee to perform the essential functions of the job." 50 F. 3d at 283. Such a narrow interpretation of "reasonable" is unduly restrictive and violates the statutory and case law mandates that the HRA be liberally construed to accomplish its purpose, *Skaggs, supra*, W.Va. Code §5-11-15, and the requirement of *Skaggs* that "Determinations about the reasonableness of an accommodation . . . must be done on a case-by-case basis, with careful attention to the particular circumstances . . .". I have no doubt, for instance, that while the *Myers* holding might reject as unreasonable a six month leave of absence for a twenty-year employee recovering from back surgery, our state courts, applying *Skaggs*, would be inclined to find such a requested accommodation reasonable. The employer, of course, would still have the opportunity to prove undue hardship.

(1) The HRA is a remedial law that is to be liberally construed to advance its purposes of preventing unnecessary denials of job opportunities to persons with disabilities, making victims of discrimination whole, and deterring other acts of discrimination;

(2) In making decisions regarding accommodation of the disabled, the parties, and the factfinder, must be guided by common sense, flexibility, courtesy and cooperation; and

(3) "Determinations about the reasonableness of an accommodation . . . must be done on a case-by-case basis, with careful attention to the particular circumstances and guided by the Human Rights Act's policy of enhancing employment opportunities for those with disabilities through workplace adjustments."

Even given the progressive principles of *Skaggs* as the base from which my analysis must begin, I cannot conclude from the particular circumstances of this case that RAC violated the HRA when it discharged Nathan Roush in October 1993. My finding of nondiscrimination is based on the following reasoning:

(1) Nathan Roush, perhaps due to circumstances not fully under his control, was still a probationary employee in October 1993. Probationary employment is a method by which an employer can determine whether a person, be he disabled or fully abled, can meet the needs of the job. *Jackson v. Veterans Administration*, 22 F. 3d 277 (11th Cir. 1994). A wait of fourteen months is a reasonable accommodation to allow a probationary employee to recover from an illness so he can return to work and it can be determined if he meets the needs of a job. I cannot conclude as a matter of law that a probationary employee is entitled to an accommodation that goes beyond the fourteen months afforded Mr. Roush in this case; and

(2) By October 1993, Mr. Roush's requested accommodation had evolved into one for indefinite leave with no temporal limit. Even though, just a week prior to his discharge, he had been released to return to work with no restrictions by his cardiologist, Mr. Roush did not communicate that fact to RAC and he continued to remain unavailable for work for the next seven months, primarily due to understandable subjective concerns about returning to the potrooms. As of his date of discharge, neither RAC nor Mr. Roush had any firm idea as to whether he would ever be returning to work.[6] After waiting fourteen months for a probationary employee to return to work, an employer does not violate the HRA by refusing to agree to an additional leave for an indefinite period. Under the circumstances of this case, such a request is not a reasonable accommodation. *Myers, supra.*

By finding that RAC reasonably accommodated complainant for fourteen months and that it had no obligation to extend that accommodation indefinitely given that Mr. Roush was a probationary employee, it is not necessary to address whether RAC was required to transfer Mr. Roush to another position upon his release to return to work in April 1994. Having been lawfully terminated in October 1993, Mr. Roush did not have any transfer rights in April 1994.[7]

Similarly, since I find that the Commission failed to show that there existed a reasonable accommodation that RAC failed to provide it is not necessary to reach the issue of undue hardship.

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[6] That Mr. Toothman and RAC knew or should have known that Mr. Roush might be physically able to return to work sometime in the future (Finding of Fact 22, supra) does not mean that they are under a legal obligation to keep a probationary employee on leave of absence until that date, regardless of when it is.

[7] This case does not involve the issue of whether Mr. Roush reapplied with RAC in April 1994 and, if so, whether he was hired with or without accommodation or rejected.

IV. FINDINGS OF ULTIMATE FACT

1. I find as fact that complainant was at all times relevant herein a person with a disability.

2. I find as fact that respondent reasonably accommodated complainant's disability by granting him a fourteen month leave of absence, at the end of which complainant was not yet ready to return to work with or without an accommodation.

3. I find as fact that the requested additional accommodation of an indefinite leave of absence was not reasonable.

4. I find as fact that respondent did not unlawfully discriminate against Mr. Roush by discharging him from employment in October 1993.

V. CONCLUSIONS OF LAW

1. The complainant, Nathan Roush, is an individual aggrieved by an allegedly unlawful discriminatory practice, and is a proper complainant under the West Virginia Human Rights Act.

W.Va. Code §5-11-10. The complainant is a person within the meaning of W.Va. Code §5-11-3(a), and was an employee (or former employee) of the respondent, as defined by W.Va. Code §5-11-3(e).

2. The respondent, Ravenswood Aluminum Corporation, employs the requisite number of employees, and as such is an employer as defined by W.Va. Code §5-11-3(d), and is therefore subject to the provisions of the West Virginia Human Rights Act. The respondent, Ravenswood Aluminum Corporation, is also a person within the meaning of W.Va. Code §5-11-3(a).

3. The complaint in this matter was timely filed in accordance with W.Va. Code §5-11-10.

4. The Commission proved by a preponderance of the evidence that at the time of his termination from employment, Mr. Roush was a handicapped person as defined by W.Va. Code §5-11-3(m) in that he had a physical impairment which substantially limited one or more of his major life activities or was perceived as having such impairment by respondent.

5. The Commission failed to prove that at the time of Mr. Roush's discharge the respondent had failed to accommodate his disability by refusing to grant him a leave of absence for a reasonable period of time in order to recover from his illness.

6. The Commission failed to prove that there existed a reasonable accommodation beyond that already afforded Mr. Roush by respondent as of October 1993.

7. The requirement of reasonable accommodation does not mandate that an employer grant a probationary employee an indefinite leave of absence in order to treat and recover from an illness.

8. Respondent did not discriminate against complainant, a probationary employee, by discharging him fourteen months after he had last worked for respondent and with no definite return to work date having been set by complainant or his physician.

9. Respondent did not discriminate against complainant because of his disability in violation of W.Va. Code §5-11-9(1).

10. The complaint in Docket No. EH-248-94 is hereby ordered DISMISSED.

WV HUMAN RIGHTS COMMISSION

ENTER this 4th day of September 1996.

BY: Mike Kelly

MIKE KELLY
Administrative Law Judge
Post Office Box 246
Charleston, West Virginia 25321
(304) 344-3293