



2. The defendant, Commonwealth of Virginia, State Water Control Board ("SWCB"), is an agency of the Commonwealth and employs more than 15 persons.

A. Procedural Background

1. On October 31, 1985, Sandhu filed a charge of retaliation, No. 036-86-0079, with the Equal Employment Opportunity Commission ("EEOC"). Joint Stipulations of Fact, para. 8.

2. On September 21, 1989, EEOC issued a determination of reasonable cause to believe that discrimination occurred regarding Sandhu's forced transfer and the failure to interview and hire Sandhu for two vacant positions.

3. After failed attempts at conciliation, EEOC referred the case to the Department of Justice for review on March 21, 1990 and July 3, 1990. Joint Stipulations of Fact, para. 9.

4. The Department of Justice issued a right to sue letter effective May 25, 1991. Joint Stipulations of Fact, para. 10.

5. Sandhu filed the instant action on August 21, 1991. Joint Stipulations of Fact, para. 11.

6. After having languished in an administrative black hole for over five years, this case finally came before the Court for a bench trial on March 18, 1992.

B. Employment History

1. From August of 1973 to September of 1974, Sandhu was employed in the temporary position of Water Resources Planning Hydrologist B in the SWCB's Flood Plain Insurance Program. Joint Stipulations of Fact, para. 39.

2. From September of 1974 to June 1, 1985, Sandhu held the position of Pollution Control Engineer B (position Number 363) in the SWCB's Piedmont Regional Office. His job evaluations ranged from a high of 3.6 to a low of 2.8 on a 4 point scale. Joint Stipulations of Fact, para. 12.

3. On June 1, 1985, Sandhu was transferred to the position of Dam Safety Engineer, where he has remained to this day. Joint Stipulations of Fact, para. 16.

4. Effective July 1, 1986, the Dam Safety Program was transferred by the General Assembly from the SWCB to the Department of Conservation and Historic Resources. Joint Stipulations of Fact, para. 19.

C. Forced Transfer

1. On March 4, 1985, Khirod C. Das ("Das") became the Acting Director of the Piedmont Regional Office of the SWCB. Testimony of Das; Joint Stipulations of Fact, para. 5.

2. Prior to holding that position, Das worked in the same office as Sandhu but in a different department. Although there may have been some interaction between the departments, Das was not familiar with Sandhu or his work "in any significant way." Testimony of Das; Das Deposition, at 11-12.

3. On March 7, 1985, Das met with Sandhu to discuss complaints concerning Sandhu's job performance. Among other things, Das criticized Sandhu for taking too many field trips, writing too many memos, making too many phone calls, having too

many meetings, and spending too much time standing over the secretaries' shoulders. Testimony of Das.

4. On March 29, 1985, the district court found in favor of the SWCB in Sandhu's prior suit for employment discrimination. Defendant's Exhibit 4.

5. Around this time, Robert C. Gay ("Gay"), Supervisor of the Dam Safety Program, approached John C. Pignato ("Pignato"), Deputy Executive Director for Operations for the SWCB, to discuss a staffing problem in Dam Safety. Gay explained to Pignato that Dam Safety was suppose to have four engineers but was, at that point, down to a single engineer. Gay told Pignato that not enough attention was being paid to the issue of Dam Safety personnel. It was unusual for Gay to go outside of official channels with such a request. He had, however, gotten no satisfaction within those channels, and since he knew that Pignato was a personnel "expert," he decided to approach him with his personnel concerns. Testimony of Gay and Pignato.

6. Pignato related the conversation to William L. Woodfin, Jr. ("Woodfin"), Deputy Executive Director of Operations for the SWCB. According to Pignato, Woodfin ordered him to search the files and find someone appropriate to transfer into the position. Testimony of Pignato.

7. Woodfin, because of his position, would have been notified of transfers and, thus, would have been aware, at the time they occurred, that vacancies were being created in Dam Safety. He could not remember, however, how long the positions had remained

vacant. Regardless, he had not taken any steps to fill those vacancies prior to his conversation with Pignato. Testimony of Woodfin.

8. Sandhu had a number of conflicts with his supervisors over the years and had complained on a number of occasions that he had been treated unfairly. See, e.g., Defendant's Exhibits 51, 53, and 54. Woodfin would have been made aware of these conflicts and complaints as a routine part of his supervision of the regional directors. Testimony of Woodfin; see also Defendant's Exhibit 51. Woodfin and Pignato were also aware of Sandhu's suit against the SWCB. Testimony of Pignato and Woodfin.

9. After Pignato's review of the files, he and Woodfin decided that Sandhu should be transferred to Dam Safety. Testimony of Pignato and Woodfin. Gay was in no way involved in selecting the individual to be transferred. When asked if Sandhu was qualified for the position, Gay hesitantly testified that he was. Later in his testimony, Gay qualified his answer by stating that Sandhu was not immediately qualified; that he needed time for orientation and training, and that hydrology had changed substantially since 1974 when Sandhu last did work in hydrology. Testimony of Gay.

10. By a memorandum dated May 8, 1985, Woodfin notified Sandhu that he was being transferred to the position of Dam Safety Engineer B (position number 613). The transfer was to be effective May 13, 1985. Joint Stipulations of Fact, para. 14. Since this

was a lateral transfer, there was no loss in pay or benefits associated with it.

11. The memorandum of May 8, 1985, stated that Sandhu was being transferred "to assure that the agency's Dam Safety Program is appropriately staffed" and to allow him "[t]o make fuller use of [his] knowledges and skills in engineering and hydrology." Defendant's Exhibit 51.

12. Sandhu was never consulted about the transfer prior to his receipt of this memorandum. Testimony of Woodfin.

13. While nothing prevented the agency from filling the position in Dam Safety with an individual from the outside, it was never advertised, either internally or externally. Sandhu's position as Pollution Control Engineer B was filled at some point after his transfer. None of the witnesses could recall, however, whether it was filled laterally or through an external hire. Testimony of Pignato and Woodfin; Joint Stipulations of Fact, para. 18.

14. Woodfin testified that the position was not advertised because Sandhu had the qualifications needed. Sandhu, however, had not used his knowledge of hydrology since September of 1974 when he worked as a Hydrologist B in the SWCB's Flood Plain Insurance Program, and hydrology had changed substantially in the intervening decade. Sandhu was at least equally qualified for his position as a Pollution Control Engineer. Testimony of Gay and Woodfin.

15. In Woodfin's view, the transfer gave Sandhu an opportunity for "a fresh start in a new environment;" an opportunity to put behind him the conflicts and unpleasantness that surrounded his employment as a Pollution Control Engineer. Testimony of Woodfin; Defendant's Exhibits 51 and 53.

16. Sandhu objected to his transfer orally on May 9, 1985, and again in a memo dated May 30, 1985. Joint Stipulations of Fact, para. 15; Defendant's Exhibits 53 and 54.

17. Among his reasons for objecting, Sandhu stated: "One of the main reasons for not accepting the settlement was the condition relating to my transfer. Although I was offered a lateral move in the same field (area of work), still I did not want to move from an office where I had stayed for about 10 years, worked hard and gained expertise on major municipal and sludge disposal projects and had the best chances of advancement." Defendant's Exhibit 54, at 1.

18. Sandhu also questioned the motive behind his transfer, arguing that the transfer was "to a position which has been vacant for the last six months and for which I do not have the necessary experience and training." Defendant's Exhibit 54, at 2.

19. Pursuant to a request from Sandhu, the effective date of the transfer was changed to June 1, 1985. Joint Stipulations of Fact, para. 16; Defendant's Exhibits 53 and 54.

20. When Sandhu was transferred to Dam Safety, he assumed the position vacated by Leon Musselman, who had laterally transferred out of Dam Safety in the Fall of 1984. The vacant

position previously held by John Kennedy, who had been promoted out of Dam Safety at the beginning of 1985, was transferred to a separate department. The third engineer, E.B. Constantine, went on disability in August of 1984. It is unclear when he officially left his position, but Gay testified that he had effectively been without his services for an extended period prior to Sandhu's transfer. There is no indication in the record that this position was ever filled. Testimony of Gay.

21. Contrary to the conclusory statements of the various defense witnesses, it is clear that the Dam Safety Program was being neglected by the state; it had lost its federal funding and there was simply little or no inclination among state officials to give it attention or funding.

22. Upon his transfer, Sandhu was assigned exclusively to office work. All field work was performed by Gildea, the only other engineer in the department. It was not until after the Dam Safety Program was transferred to the Department of Conservation and Historic Resources in July of 1986 that Sandhu was allowed to do field work. Testimony of Gay.

D. Position 373: Permit Program Manager

1. The SWCB issued an advertisement for position 373, dated August 26, 1985. Defendant's Exhibit 70.

2. The SWCB received sixteen applications for this position, including Sandhu's. One of these applications was later withdrawn from consideration. Joint Stipulations of Fact, para. 33.



3. Pignato and Larry G. Lawson ("Lawson"), who was Director of the Office of Water Resources Management and the direct supervisor for position 373, each independently screened the application materials and recommended candidates to be interviewed. The two arrived at and used independent criteria to evaluate the candidates. A matrix was formulated that evaluated each candidate on each of the listed criteria. Woodfin reviewed the recommendations, and, together, the three arrived at a final interview list. Testimony of Lawson; Joint Stipulations of Fact, para. 34.

4. Lawson screened the application materials for the applicants' knowledge and skills in the following areas: Management (Supervisory); Planning, Coordination, and Organization Skills; Communication Skills (Oral and Written); Technical Background; Involvement in Regulations Requirements; and Experience in Regulatory Programs. Joint Stipulations of Fact, para. 35. Lawson viewed the position as being primarily concerned with managerial issues. Testimony of Lawson; Defendant's Exhibit 72, at 1.

5. Pignato screened the application materials for the applicants' knowledge and skills in the following areas: Biology, Chemistry, Engineering, or other Technical Related Field; Government/Industry Relations; Public Presentations; Supervision; Supervising Staff; Program Performance; Audit/Evaluation; Budgeting/Expenditure Monitoring; and Personnel Management. Joint Stipulations of Fact, para. 36. Pignato also viewed the position

as basically managerial in nature. He felt, however, that some technical knowledge was important to facilitate communications with the experts in the field. Deposition of Pignato, at 86.

6. Of the remaining fifteen candidates, four were eventually interviewed. The interview panel was made up of Lawson, Pignato, and Woodfin Joint Stipulations of Fact, para. 37.

7. Sandhu was neither recommended for an interview nor actually interviewed for the position. Lawson indicated that he did not recommend Sandhu because he "felt that his application indicated he was weak in the areas of management (supervisory), planning, coordination, and organization of regulatory programs. [Lawson] believed someone with a strong background in these areas was needed in this position." Defendant's Exhibit 72, at 2.

8. At the conclusion of the interview process, Martin G. Ferguson, Jr., was selected for the position. He was notified of his selection through a letter dated September 9, 1985. Joint Stipulations of Fact, para. 38; Defendant's Exhibit 74.

E. Position 011: Water Regional Services Supervisor

1. The SWCB issued an advertisement for position 011, dated July 29, 1985. An amended advertisement, dated August 12, 1985, was also issued. Defendant's Exhibit 61; Plaintiff's Exhibit 10.

2. The SWCB received thirteen applications for the position, including Sandhu's. Joint Stipulations of Fact, para. 23.

3. The position was primarily supervisory, rather than technical. Testimony of Das.

4. Das and Pignato independently screened the applications and recommended candidates for interviews. Joint Stipulations of Fact, para. 24.

5. As part of the screening process, Das and Pignato prepared selection matrices evaluating the candidates' application materials on the basis of their knowledge and skill in the following areas: Public Management, Program Supervision/Evaluation, Grants Management, Engineering, Chemistry, Biology, and Supervision.

6. There are clearly inconsistencies between Das' and Pignato's matrices for Sandhu. In fact, the two disagreed on four of the seven criteria. Defendant's Exhibits 64 and 65.

7. The conflicting evaluations are not, however, unique to Sandhu's application. Das' and Pignato's evaluations of Grandstaff also conflict in four criteria areas. In addition, there was also disagreement over three criteria in the evaluations of Bullard, Jenkins, and Stitzer. The matrices were not intended to and could not have achieved total objectivity and uniformity. Testimony of Das and Pignato; Defendant's Exhibit 64 and 65.

8. Nevertheless, it is difficult to understand Das' failure to give Sandhu credit for chemistry and biology when he was Sandhu's direct supervisor, especially since Das admits that he would have given Sandhu's successor, who does the exact same job, credit in those areas. Testimony of Das.

9. If Sandhu had received one additional "yes," he would, on Das' matrix, have scored high enough to qualify for an

interview. Testimony of Das. His score on Pignato's matrix, however, still would not have qualified him for an interview. Defendant's Exhibit 65. There was no evidence offered as to how such a discrepancy would have been reconciled.

10. Three of the candidates withdrew their applications. Of the remaining ten candidates, seven were chosen for interviews. Sandhu, however, was among the three candidates not interviewed. Joint Stipulations of Fact, paras. 27-28.

11. The interviews were conducted by Das, Pignato, and Woodfin. Joint Stipulations of Fact, para. 28.

12. J.R. Bell was the unanimous choice for the position at the conclusion of the interviews. He was offered the job through an offer letter dated October 16, 1985. Joint Stipulations of Fact, para. 29; Plaintiff's Exhibit 18; Defendant's Exhibit 69.

## II. CONCLUSIONS OF LAW

1. The sequence of proof and burdens prescribed by McDonnell, Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973), and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981), are applicable to cases of retaliation. Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (1985). The ultimate burden of persuasion, however, always remains on the plaintiff to prove the defendant's discriminatory motivation. Burdine, 450 U.S. at 253, 256.

2. The plaintiff employee bears the initially burden of establishing a prima facie case of retaliation by a preponderance

of the evidence. Ross, 759 F.2d at 365. However, "the burden of establishing a prima facie case 'is not onerous.'" Id. (citing Burdine, 450 U.S. at 253).

3. To establish a prima facie case of retaliation in violation of Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), the plaintiff must establish:

- (1) that he engaged in protected activity;
- (2) that the SWCB took adverse employment action against him; and
- (3) that a causal connection existed between the protected activity and the adverse action.

Williams v. Cerberonics, Inc., 871 F.2d 452, 457 (4th Cir. 1989).

4. Sandhu has established a prima facie case with regards to each of the alleged retaliatory actions. Sandhu, as a Sikh born in India, is a member of a class protected under Title VII, and his pursuit of a prior, unrelated case of employment discrimination against the defendant constitutes a protected Title VII activity.

5. Sandhu's forced lateral transfer and his failure to receive the promotion he sought constitute adverse job actions. See, e.g., Collins v. Illinois, 830 F.2d 692, 702-04 (7th Cir. 1987) (lateral transfer may constitute adverse job action); Pecker v. Heckler, 802 F.2d 709 (4th Cir. 1986) (discussing appropriate remedies for retaliatory failure to promote).

6. The proximity of time between the protected activity and the adverse job actions gives rise to an inference that those actions were taken in retaliation for the prior protected activity. See Cerberonics, 871 F.2d at 457. The proximity in time in the instant case is striking. The district court rendered its decision

in Sandhu's prior case on March 29, 1985. By May 8, 1985, little more than one month later, Sandhu was notified that he would be transferred. The decisions not to interview and, thus, not to hire him for the two positions occurred three to four months after that.

7. "Once a prima facie case has been presented, the employer then has the burden of producing a legitimate nondiscriminatory reason for the adverse action, thereby rebutting the presumption of retaliation raised by the prima facie case. The employer is not required to prove the absence of a retaliatory motive, but only to raise a 'genuine issue of fact,' as to whether retaliation for protected activity occurred." Ross, 759 F.2d at 365 (citation omitted); see also Burdine, 450 U.S. at 253.

8. The defendant has satisfied this burden in the instant case. With regard to the transfer, the defendant has forwarded the facially legitimate justification that a transfer was necessary because of the staffing requirements of the Dam Safety Program. Further, the defendant stated that Sandhu was chosen because he had the qualifications necessary and because the transfer would allow him to use his knowledge and skill in hydrology. With regard to the promotions, the defendant has forwarded the facially legitimate justification that it determined, through a generally objective screening process, that other candidates were more qualified.

9. Once the employer produces a legitimate, non-discriminatory justification, the burden shifts back to the employee "to show, by a preponderance of the evidence, that the

employer's proffered reasons . . . are pretextual." Cerberonics, 871 F.2d at 456.

10. The "plaintiff has the ultimate burden of showing pretext by proving that the filing of the discrimination lawsuit was the 'motivating part' in the decision." McNairn v. Sullivan, 929 F.2d 974, 980 (4th Cir. 1991) (emphasis added) (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 244 (1989)).

11. Sandhu satisfied this burden with regard to the forced transfer. He did not, however, satisfy it with regard to the promotions.

A. Forced Transfer

1. Sandhu has successfully demonstrated that the defendant's proffered justification for his forced transfer is pretextual.

2. Das, a mere three days after assuming the position of Acting Director of the Piedmont Regional Office, met with Sandhu to express his dissatisfaction with Sandhu's job performance. The litany of criticisms that were directed at Sandhu during this meeting included a number of personal work characteristics that Das would not have been aware of merely from his limited prior exposure to Sandhu's work product or his three days in his new position. Meeting with Sandhu under these circumstances gives rise to an inference that Sandhu was the subject of a strong institutional animus that was passed to his supervisors as they entered the department.

3. This, in turn, must be coupled with the circumstances surrounding Sandhu's transfer and the explanations given for that

transfer. According to the defendant, the whole transfer process was precipitated by a chance hallway meeting between Pignato and Gay. Even though Woodfin had been aware of the staffing problems in Dam Safety for some time and had allowed employees to transfer out of Dam Safety during that period, it was based on the chance hallway meeting that Pignato and Woodfin decided there was a serious and immediate need to transfer someone into Dam Safety. Rather than advertising the position, either internally or externally, to determine whether there were any qualified applicants interested in the position, Pignato was sent on a secret search--not even Gay was informed of the process--to find an appropriate candidate to transfer.

4. Sandhu was not consulted about the possibility of, or his interest in, being transferred. It strikes the Court as passing strange that the agency would not have bothered to show Sandhu the courtesy of notifying and discussing the transfer with him given his long period of employment with the agency and his generally satisfactory performance. The failure to discuss the transfer with Sandhu is further evidence of a general animus against him.<sup>1</sup>

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<sup>1</sup> The defendant argues that Sandhu was consulted after he was notified and that the decision could have been changed at any time. To a certain extent, this misses the point. The courtesy would have been to seek his input up front rather than force him to scramble to undo the decision after the fact. Further, the argument is patently disingenuous. Sandhu made a vociferous and detailed objection to his transfer that included many substantial reasons why the transfer was bad for him personally and why he was not qualified for the job. The decision, however, remained unchanged.



5. Woodfin represented that Sandhu was picked for the position based on his knowledge and experience in hydrology. Sandhu's qualifications, however, are suspect at best. As testimony revealed, Sandhu had had no experience in hydrology for over a decade and his knowledge had, in that period, become stale--the area of hydrology changed dramatically in the decade between Sandhu's experience in the Flood Plain Insurance Program and his transfer.

6. The questionable nature of Sandhu's qualifications is amplified by his experience at Dam Safety. Upon being transferred, Sandhu was assigned exclusively to office work. The field work, including the vast increase in field work caused by a major flood in the Fall of 1985, was done exclusively by Gildea, the only other engineer in Dam Safety. Sandhu was not permitted to do field work until sometime after July of 1986.

7. Sandhu was, however, unquestionably qualified, both by experience and knowledge, to remain in his position as a Pollution Control Engineer B.

8. While the defendant is correct that this Court does not sit as a super personnel department to reexamine the wisdom of the SWCB's personnel decisions, the inference to be drawn from this strange set of facts is unescapable. Sandhu had a long history of complaints against his supervisors and the way they treated him. The EEOC complaint and the employment discrimination suit appear to have been the last straw. The frustration that Sandhu's supervisors apparently felt over Sandhu's complaints may be

understandable. Nevertheless, transferring him because of or in retaliation for his complaint and claims of discrimination is a violation of Title VII.

B. Denial of Promotions

1. The plaintiff has not, however, proved that the defendant's failure to promote him to position 373 or position 011 was retaliatory; he failed to rebut the defendant's explanation that it simply hired a more qualified applicant.

2. With regard to position 373, there is little or no evidence, other than what can be inferred from the timing, that the decision was motivated by a retaliatory purpose. Timing alone, however, is insufficient proof to rebut the defendant's legitimate nondiscriminatory explanation. See, e.g., Cerberonics, 871 F.2d at 452.

3. Based on the evidence presented, the selection process appears to have been fairly objective. There were unquestionably some subjective elements to the evaluation process and to the eventual selection of a particular candidate. It would, however, be nearly impossible, and would likely not be desirable, to create a purely objective process. In the present case, based on the evidence presented, it appears that the selection process was conducted in a fair and nondiscriminatory manner.

4. The evidence with regard to position 011 is somewhat more equivocal. In particular, Das' evaluation of Sandhu's qualifications, especially biology and chemistry, seem somewhat suspect. In order to prevail, however, the plaintiff must "prov[e]

that the filing of the discrimination lawsuit was the 'motivating part' in the decision." McNairn, 929 F.2d at 980 (citing Hopkins, 490 U.S. at 244). The plaintiff has failed to prove that the decision to hire Bell rather than Sandhu was based in "motivating part" on a retaliatory intent. Rather, it appears that Bell was hired because he was perceived to be the most qualified.

C. Relief

1. The plaintiff is entitled to relief for the retaliatory transfer.

2. Since the transfer was lateral, there was no loss of pay or benefits. Therefore, Sandhu is not entitled to front or back pay.

3. He is, however, entitled to equitable relief. The SWCB will be ordered to effectuate Sandhu's transfer from Dam Safety<sup>2</sup> to the Piedmont Regional Office of the SWCB. The plaintiff will assume the position of Pollution Control Engineer B with any raises and benefits he would have received as a matter of course had he never been transferred. See Pecker, 801 F.2d at 711-13 ("'[O]ur objective is to place plaintiff in a position as near as possible to where [he] would now be had discrimination not occurred.'" (citation omitted)).

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<sup>2</sup> While the SWCB would not appear to have the power to force the Dam Safety Program to transfer Sandhu, the parties have agreed, as a condition to this Court's Order dismissing the Department of Conservation and Recreation as a party defendant, that the SWCB will be authorized to provide full relief to the plaintiff. See Joint Stipulations of Fact, para. 40; Order Granting Motion to Dismiss the Department of Conservation and Historic Resources.

4. Sandhu, as the prevailing party, is also entitled to reasonable attorney's fees. 42 U.S.C. § 2000e-5(k); See Alvarado v. Board of Trustees of Montgomery College, 928 F.2d 118, 123 (4th Cir. 1991). If the parties are unable to reach a settlement on reasonable attorney's fees, Sandhu shall file his request for fees five days after the entry of the accompanying Final Order; the defendant shall file any objections within the following five days; and the plaintiff, in turn, will have three days to reply to those objections.

Let the Clerk send a copy of these Findings of Fact and Conclusions of Law and the accompanying Final Order to all counsel of record.

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DATE

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UNITED STATES DISTRICT JUDGE