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MARJORIE ZAMORE V. UNITED STATES FUEL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

MARJORIE ZAMORA, COMPLAINANT	DISCRIMINATION PROCEEDING
v.	Docket No. WEST 83-48-D
UNITED STATES FUEL COMPANY, RESPONDENT	DENV CD 83-9 King 4, King 5 and King 6

DECISION

Appearances: Marjorie Zamora, Vernal, Utah, pro se;
Barry D. Lindgren, Esq., Mountain States Employees
Counsel, Inc., Denver, Colorado,
for Respondent.

Before: Judge Vail

STATEMENT OF THE CASE

Complainant filed this proceeding under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. (the Act), claiming that she was discharged by respondent because of safety related activity protected under the Act. Initially, complainant filed a complaint of discriminatory discharge with the Secretary of Labor under section 105(c)(2) of the Act. The Secretary, after investigation, declined to prosecute the complaint. Complainant then brought this proceeding directly against respondent under section 105(c)(3) of the Act.

A hearing on the merits was held in Price, Utah on August 25, 1983. Complainant appeared pro se; respondent appeared through counsel. Both parties filed post-hearing briefs. Based on the evidence presented at the hearing and considering the contentions of the parties, I make the following decision. To the extent that the contentions of the parties are not incorporated in this decision, they are rejected.

STATUTORY PROVISIONS

Section 105(c)(1) of the Act, provides in pertinent part as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the

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exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter because such miner, representative of miners, or applicant for employment has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine. . . .

Section 105(c)(2) of the Act, provides in pertinent part as follows:

Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. . . .

Section 105(c)(3) of the Act, provides in pertinent part as follows:

Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). . . .

FINDINGS OF FACT

1. United States Fuel Company ("respondent") is a subsidiary of Sharon Steel Corporation. It operates three coal mines near Hiawatha, Utah employing approximately 465 employees; supervisory and underground (Transcript at 65).

2. Marjorie Zamora ("complainant") started working for respondent as an underground miner in July 1977. After four months she was given the job as instructor and after a year and a half was designated training supervisor which position she held until November 2, 1982 when she was discharged (Tr. at 11, 12).

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3. William C. Vrettos is respondent's manager of industrial relations and is responsible for personnel, office administration, payroll, safety, and training. In January 1981, Lou Mele was the Director of Safety and Training. Under his supervision were the complainant, as supervisor of training, and Gary Lauflin, supervisor of safety. Mele terminated his employment with respondent in August 1981 and thereafter the complainant and safety supervisor reported directly to Vrettos (Tr. at 139).

4. During the latter part of 1981, Vrettos and the complainant had several meetings where they discussed the objectives of the training department for the forthcoming year (1982). Vrettos proposed a rough outline of what the objectives of the department would be and complainant ultimately submitted a written plan outlining specific objectives and completion dates which was approved by Vrettos (Exhibit R-1 and Tr. at 139-141).

5. In March 1982, Vrettos met with complainant to review the first quarter results of the 1982 action plan for the training department. He determined that complainant had not been following the plan and "specifically" told her that they wereto adhere to the plan "without exception" (Tr. at 142).

6. In April 1982, complainant entered the miners bath house at the Middlefork mine and heard several miners discussing with representatives of the Safety Department a request that the miners sign their 5000-23 task training forms. Three miners maintained they had not received the task training indicated on the forms (Tr. at 14). Complainant told the representatives of the Safety department that the miners were right and that the forms should not be shown or exposed to other miners in the bath house. The following day complainant met with representatives of the Safety department and Vrettos and stated that the 5000-23 task training forms were to be kept secure and private and that the forms were being filled out wrong (Tr. at 16 and 17). Vrettos told complainant she was being "pretty hard on safety" and criticized her for being an improper supervisor (Tr. at 16). Vrettos agreed to a class being held for teaching supervisors how to fill out the miners task training forms. This class was scheduled and held on April 22, 1982 (Tr. at 21 and Exhs. C-1, C-2, C-3 and C-4).

7. Complainant scheduled emergency medical technician training (EMT) for May and June 1982, and volunteered to teach the classes (Exh. C-5). Vrettos offered to contact doctors for the sessions but requested an outline of what was to be covered. Complainant furnished photocopies of pages from her manual which Vrettos rejected as not adequate to inform the doctors of what was required of them. Complainant then offered to get the

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doctors to appear at the classes but found on contacting them that they were busy so the classes were delayed further into the summer. Complainant was criticized by Vrettos for this delay and also for not keeping the training room cleaned up. This room was being used by Vrettos for supervisory training during the same period as complainant's EMT classes (Tr. at 29-31).

8. Complainant was requested by Vrettos on the May 1982 training report to furnish July and August 1982 schedule of all training planned. Vrettos wrote on the bottom of the form "I will schedule the instructor class." Complainant set up an instructors class for August 1982. She requested in a letter dated July 28, 1982, film from the Heart Association to be used in the training. Due to a party scheduled one day in August and the Mine Rescue Contest, which complainant had to attend, employees from the Safety Department did not attend the instructor's class until the 24th of September, 1982. As a result, complainant was required to ask for an extension on the date she was to return the film to the Heart Association (Tr. at 34, 35 and Exhs. C6-C7).

9. In June 1982, as a result of several miners asking the complainant about annual retraining, she went through her files and listed those miners who would require such retraining (Exh. C-9). Vrettos had indicated that upon submission of a list of such miners, they would be scheduled to come in on complainant's shift for retraining rather than have her return to the mine during that particular miner's shift. Vrettos argued with complainant about how to set the annual retraining classes so that it would not cause confusion as to who was trained. Finally, by September 1982, Vrettos agreed to allow complainant to set up the classes for the tipple and surface miners as she suggested. However, due to deer season and other interferences such as mixup on dates, only half of the miners scheduled attended the session. This put the matter 50 percent behind schedule (Tr., at 44).

10. In September 1982, an internal auditor of Sharon Steel Corporation did an audit of several of respondent's administrative functions that included safety, training, and personnel records. As to the training department, two areas were noted to be deficient. Training records (5000-23 forms) were incomplete for many underground miners based upon a random sample. Also, as to mine rescue requirements, the respondent was not in compliance with the law by not having two full teams ready to provide mine rescue service to the respondent (Exh-R-2 and Tr. at 147-148).

11. On October 14, 1982, complainant was requested to come to Vrettos' office for a meeting. Vrettos and Richard Graeme,

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respondent's vice president and general manager, were present. Complainant was presented a letter signed by Vrettos indicating that projects in the 1982 action plan had not been completed despite oral and written directions. Complainant was demoted from training supervisor to training instructor and warned that unless her performance and accountability improved significantly in the very near future, her employment with U.S. Fuel would be jeopardized. Complainant was to report to Vrettos for the balance of 1982 and then to the Safety Training Supervisor upon notice in 1983. Salary level would remain at its present level without reduction in lieu of any raise for the next twelve months. The letter stated the following instructions;

The Training Department's goals through the rest of 1982 are to complete the followings responsibilities:

1. As asked for since July, a schedule of the Annual Retraining by mine and individual is to be completed by Friday, October 22, 1982. If the schedule is altered you are to communicate the changes to myself within 24 hours.
2. All Maintenance Training records are to be updated, organized and reviewed with me on October 22nd. The format was given to you in October after written requests in September.
3. Your efforts to keep Task Training updated have been very unsuccessful and you have not followed by direct instruction on auditing. You will complete a monthly audit of all personnel on the property and update the Task Training form by the last day of each month. To conclude your audit, a formal notification is to be made to each respective mine foreman or department head as to the Task Training (by individual) which needs to be made. Monthly you will note if the mine foreman has completed the task training or not. You are to continue to publish the Task Training list monthly.
4. The Training Room has continued to appear unsightly. The Training Room appearance is most important to setting impressions of an operations. In the future, no training materials or tools are to be left out of the storage area more than four hours before or after training takes place. A plan is to be put into effect by October 29th to identify and store all materials and equipment used for training including a diagram of the plan. On the 29th of Oct. a tour of the new layout and storage is to be given to myself and other interested parties explaining the changes and instructions for

others to follow when using the training room facilities. A list of "RULES" for everyone's use is to be posted on the incoming door. And a list of all equipment is to be provided.

5. "Communicator" was not published in the third quarter. A November edition and a December edition is to be published giving all writers a two week notice of deadline. This communication device has become more effective with each publication and your editorial guidelines are very successful. Timely publication is important.

6. A Task Training check list for each classified equipment operation is to be made by March of 1983. The first two will be reviewed on November 12th ... shuttle car and roof bolter. These are to be combination JSA and procedure guidelines for supervisors to use in Task Training new employees.

7. The Mine Rescue training requirements and monthly guidelines are to be outlined for 1982/83 as previously requested by October 29th in formal letter format to myself for review. Changes to the program are to be communicated to me in advance of the training session.

8. In general your time at U.S. Fuel is not used affectively to accomplish Training's objectives. In the future, all secretarial typing and copying requirements are to be channeled through me 24/48 hours in advance of need. Your time as a Training Instructor is too valuable to be repeatedly used on these items.

9. On Fridays of each week, we will review a written report of your last weeks schedule and accomplishments as well as your coming weeks schedule. Please follow the Monthly Report format (which is now being replaced by the weekly report). Please include a monthly updated calendar of events weekly.

10. Electrical Training Program. Due in June, 1982 please provide an electrical training course outline for an effective 40 hour class. The sessions are to be in two hour modules including identification of materials, aids, handouts and instructors of the course.

11. Publish monthly an update of all state and federal certifications on the property to all mine foreman and above. Include in your last weeks meeting with myself.

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These instructions are not to overshadow your many accomplishments since you have been at U.S. Fuel. You have helped and assisted the organizational effort in many ways. It is most important that you restrict your efforts to the priorities listed in this letter to assure the Training function is accomplished.

/s/ William C. Vrettos
William C. Vrettos
Manager, Industrial Relations
(Exh. C-10)

12. On October 20, 1982, complainant contacted Frank Roybal and Mark Garcia of the Union Safety Committee at the bath house for King 4 and 5 mine. She told them of her problems with training and asked if they wanted to get it "straightened out" by calling in the Mine Safety and Health Administration (MSHA). Later, complainant had a conversation with George Hillas, financial secretary of the union, and Hillas asked if there was some way that the company and safety committee could get together to straighten out the problems with training. Hillas did not feel that the employees or the company could afford to be "hassled" by MSHA at that time (Tr. at 53).

13. On October 28, 1982, complainant and Vrettos discussed the annual retraining class scheduled for November 1, 1982. Complainant had prepared an outline of what she intended to cover during the course (Exh. R-3). Vrettos suggested that complainant cover certain items including three suggested by Gary Barker, respondent's general supervisor, including roof and rib control plan, sanders be inspected on the mantrip, and the ventilation plan. Vrettos also told complainant that she was to cover the 10 points for surface miners required to be covered in annual retraining under the union contract (Tr. 159-162). Also, Vrettos proposed that Keith Thomas teach the class on the rib and roof control plan (Tr. at 164).

14. On November 1, 1982, Vrettos attended the annual retraining course scheduled that day and taught by the complainant. She had a pile of 5000-23 forms on her desk in which were two forms she claimed were improper. After going through the training plan, complainant informed Vrettos that there was "a possible faulty certification in the pile." Vrettos asked complainant to give him the forms which she refused to do unless there were members of the union safety committee there. Frank Guisman, a member of the union safety committee was summoned to the class and Vrettos and Guisman took the forms to be copied (Tr. at 54-56). Vrettos had been present throughout the day except for 10 to 20 minutes when he left the room to have copies made of the task training forms.

15. At the end of the day, he met with complainant and Richard Graeme and reviewed the adequacy of the training the complainant had given that day. Vrettos went through the outline for the class and told the complainant that she had not adequately covered many of the items including check in and out procedures, mining plans, mining cycle was not covered, fire extinguishers, and the rib and roof control plan was covered in less than 10 minutes time. This was the part of the course that was supposed to be taught by Keith Thomas as discussed by Vrettos and complainant at their October 28th meeting (Tr. at 169-170). As a result of this discussion, Vrettos concluded that complainant was not keeping proper records and not doing a proper job of training and informed her that he was going to suspend her and audit the files. Vrettos asked for complainant's keys to all of the files and requested that she come back to the office on the next day (Tr. at 178).

16. On the following morning, Vrettos, with two secretarial employees, took random samples of the records for face bosses, electricians, and newly hired employees and found that 8 of 22 employees had not had orientation training forms completed and placed in their files which meant they should not be working underground. 13 of 26 new employees did not have timbering or belt tests training completed so should not have been released to general labor underground. There were very few electrical certifications, mine certifications, mine foreman or fire boss certifications in the records. Of 10 to 15 experienced miners, records were reviewed and it was found that 40 percent of the tasks they were classified in had no forms on record showing that they had been task trained (Tr. at 179).

17. A meeting was held on the day following the audit of the training department records. Vrettos, Miners' Union International and district safety representative, district president, and safety committee chairman were present. Also, Gary Lauflin was in attendance and conducted the meeting. The records from the audit of the training department were made available to the people in attendance after Lauflin had reviewed what they revealed. The Union representatives chose not to review these records (Tr. at 180). The safety supervisor contacted MSHA and asked if it was permissible to use College of Eastern Utah instructors to complete annual retraining for the miners. The College of Eastern Utah has a mining department with MSHA qualified instructors. Permission was given by MSHA for respondent to do this (Tr. at 181).

18. On November 2, 1982, Vrettos met with complainant and informed her of the results of the audit. and told complainant he was changing her suspension to a termination as of that date. The "blue slip" given to complainant read "improper insufficient work

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performance." Later on Vrettos called complainant and asked if she wished to "quit." Complainant's response was "No, you fired me and we'll leave it there" (Tr. at 182).

19. On November 27, 1982, complainant filed a discrimination complaint with the Utah Anti-Discrimination Division alleging she was fired because of her sex and age (56) and replaced with a male who was younger and less experienced. The matter was settled by a written agreement dated January 19, 1983 wherein the respondent agreed to revise complainant's personnel file from "poor work performance" to "resigned for personal reasons", expunge file of any and all comments related to this charge, provide neutral references, and discontinue its appeal action against complainant's request for unemployment compensation (Exh. R-4).

DISCUSSION

Under the analytical guidelines established in Secretary on behalf of Pasula v. Consolidation Coal Corp., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom., Consolidation Coal Corp. v. Marshall, 663 F.2d 1211 (3rd Cir.1981), and Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (April 1981), a prima facie case of discrimination is established if a miner proves by a preponderance of the evidence that (1) she engaged in protected activity and (2) the adverse action against her was motivated in any part by that protected activity. If a prima facie case is established, the operator may defend affirmatively by proving that the miner would have been subject to the adverse action in any event because of his unprotected conduct alone. See NLRB v. Transportation Management Corp., --- U.S. ----, 76 L.Ed.2d 667 (1983). Also, see Secretary on behalf of Patricia Anderson v. Stafford Construction Company and Federal Mine Safety and Health Review Commission, F.2d ----(D.C.Cir.1984), stating that an agency like the Commission has ample authority to adopt the Pasula burden of proof allocation. See Borch v. FMSHRC, 719 F.2d 194, 196 (6th Cir.1983).

In the case at issue here, Complainant alleges she was fired or discharged from her position as training instructor for respondent because she stated at the annual retraining session on November 1, 1982, that the training plan was not being followed and that "fraudulent" certification of training was issued for training not given or was inadequate. Also, that this was a culmination of a problem between complainant and William Vrettos, her immediate supervisor, which started in April 1982 (Complainant's Brief at p. 1).

I find that when the complainant asserted that there were some inadequate certifications of training of miners on their 5000-23's both in April 1982 and on November 1, 1982, during the

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retraining class, she was engaged in activity that is protected under the Act. The facts show that complainant was sufficiently concerned about the 5000-23 forms to contact Vrettos and employees of the safety department about this (Finding No. 6). On October 20, 1982, she also contacted members of the miner's union safety committee and advised them of her problems with training. At this time the complainant asked if the union officials thought the matter should be referred to MSHA. The union's response was that it should be worked out with the company at that particular time rather than involve MSHA (Finding No. 12).

The specific question is whether complainant's discharge was in any way or part motivated by or retaliation for the above protected activity. If so, a prima facie case is proven and the burden shifts to respondent to demonstrate by a preponderance of the evidence that the complainant would have been discharged even if she had not engaged in the protected activity.

Respondent presents two arguments: 1) That complainant's termination was not motivated in any part by her protected activity. 2) If it were found that respondent was motivated in part in discharging complainant for her protected activity, she would have also been terminated for her unprotected activities alone (Respondent's Brief at 6 and 9).

I find that the complainant has failed to show that she was fired by reason of her protected activity under the Act. The preponderance of the most credible evidence shows that complainant was discharged for her failure to adequately perform the duties assigned her as respondent's training supervisor. Also, timeliness of completion of tasks under the year's (1982) action plan was obviously a cause for conflict and discord between complainant and Vrettos. This is evident from the various documents admitted as exhibits in this case which describe the dissatisfaction of complainant's immediate supervisor with her job performance (Exhs. C-1, C-5, C-10, R-1, R-3).

The undisputed evidence shows that a 1982 action plan was discussed and agreed upon between Vrettos and complainant in the latter part of 1981 (Exh. R-1). The most credible evidence shows that complainant failed to follow or meet the requirements of the plan by March, 1982. At a meeting between complainant and Vrettos, he informed her that she had not met the deadlines or performed the tasks set out and was in the future to adhere to it "without exception" (Finding No. 5). Also, at meetings between Vrettos and complainant in May and the second week in July 1982, and then weekly thereafter into the fall, Vrettos "tried to get Marge to follow the plan." (Tr. at 142). The parent company's internal audit in September 1982 found deficiencies in the training department indicating a "lack of timely follow-up to document the training conducted on hourly employees, noncompliance

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with MSHA regulation requiring the documentation on both safety and task training", and other suggestions that management should adopt in training procedures (Exh. R-2). Based on this audit, Vrettos met with complainant on September 15, 1982, and established a two week deadline for auditing task training records to have them be in compliance with company and MSHA regulations. This was not completed as requested and the deadline was extended to October 10, 1982 which again was not met. Vrettos then assigned the job of auditing the underground mines to the Safety Department while complainant was assigned the job of auditing surface employees. Complainant had not performed her part of the task by October 28, 1982 (Tr. at 149-154).

As a result of the above continuing concern over the training department, Vrettos met with complainant on October 14, 1982 and outlined his criticisms of her performance. This was reduced to writing (Exh. C-10). Complainant was demoted from supervisor to training instructor and given written job responsibilities and deadlines (Finding No. 11). Also, complainant was advised that her job with respondent was in "jeopardy".

On October 28, 1982, Vrettos again met with complainant and indicated she was failing to furnish required weekly reports of her performance and also discussed the forth-coming annual retraining session. Vrettos gave her specific instructions as to what he wanted covered and that other employees were to instruct certain parts of the course. After his attendance at the meeting, Vrettos met with complainant and expressed displeasure with her performance and compliance with his instructions. Following an audit of the training department records on the following morning, Vrettos discharged complainant.

Complainant contends that much of the above occurred because of Vrettos attempt to make her job difficult, if not impossible to perform, to create a paper-trail rather than give proper training, and transfer her duties from training to other individuals not qualified (Complainant's Brief p. 1). Also, the charge is made by complainant that Vrettos was upset because of her "exposure" in the November 1, 1982 retraining session of "fraudulent certification" of task training forms. Whether or not Vrettos was "upset" over this is not the issue here. The specific issue is whether complainant was discharged because of these complaints. I do not find the evidence in this case supports complainant's argument. The facts as detailed above, show that when complainant indicated to Vrettos her concern regarding task training, he arranged for such a training class to be taught by complainant (Tr. at 144 and Exh. C-1 and C-2). This incident showed that Vrettos responded in April 1982 in a positive manner to complainant's concerns.

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Further, prior to complainant's statements made at the annual retraining class on task training, Vrettos had already indicated complainant's job was in jeopardy, not due to her protected activity, but rather, her failure to perform her duties of supervisor of the training department in a satisfactory manner. I am persuaded by the overwhelming weight of evidence that respondent fired the complainant for her unprotected conduct alone.

CONCLUSIONS OF LAW

1. Respondent at all times pertinent to this case was the operator of mines subject to the provisions of the Federal Mine Safety and Health Act of 1977.

2. I have jurisdiction over the parties and subject matter of this proceeding.

3. Complainant failed to show by a preponderance of the evidence that she was fired because of any activity protected under the Act.

ORDER

Based upon the above findings of fact and conclusions of law, IT IS ORDERED that this proceeding is DISMISSED.

Virgil E. Vail
Administrative Law Judge