

CCASE:  
JOHNNIE DELGADO V. BARRETT  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

JOHNNIE J. DELGADO,  
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. CENT 86-124-DM  
MD 86-22

BARRETT INDUSTRIES, INC.,  
RESPONDENT

Barrett Base Plant

DECISION

Appearances: Mr. Johnnie J. Delgado, San Antonio, Texas,  
pro se.; Mr. Franklin Spradling, Barrett  
Industries, San Antonio, Texas,  
for Respondent.

Before: Judge Morris

Complainant brings this action on his own behalf alleging he was discriminated against by his employer, Barrett Industries, Inc., in violation of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the "Act").

The statutory discrimination provision, Section 105(c)(1) of the Act, now codified at 30 U.S.C. 815(c)(1), provides as follows:

105(c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, 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, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

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After notice to the parties, a hearing on the merits was held in San Antonio, Texas on September 18, 1986. The parties waived their right to file post-trial briefs.

#### Applicable Case Law

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish that (1) he engaged in protected activity, and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir.1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not in any part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it nevertheless may defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936-38 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir.1983); Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C.Cir.1984) (specifically approving the Commission's Pasula-Robinette test). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-403 (1983).

#### Summary of the Evidence

Johnnie J. Delgado was terminated by Barrett Industries on February 7, 1986 (Tr. 8, 9). At the time he was the operator of a 988A Caterpillar loader. He was working 50 hours and earning \$5.40 per hour (Tr. 9, 10).

On the date of his termination Delgado was going to have lunch with his wife at lunch time. When he learned his wife was at the parking lot another operator said he would load the truck while Delgado went to eat. Due to the nature of the business the workers do not have a regular lunch period (Tr. 10-13, 26, 27).

Mr. Delgado started eating and Bob Dixon, the plant supervisor, signaled him to go back to work. When Delgado signaled he was eating Dixon restated that he wanted Delgado to load the

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trucks "right now". Delgado asked if he should go out and eat dust. Dixon replied affirmatively. Delgado said he wouldn't eat in the dust (Tr. 10, 12, 14). Delgado said he'd go back to work right quick, that is, in about five minutes, as soon as he finished eating (Tr. 14).

Delgado finished eating and walked down to his Caterpillar. Dixon had gotten another operator to drive the loader. Dixon then told Delgado that he was terminated (Tr. 11, 14-16, 27).

Everytime Delgado had talked about safety to Mr. Barrett or Frank Spradling, Bob Dixon would yell at him for talking to them (Tr. 11). After he was fired Delgado talked to Mr. Barrett who told him he couldn't do anything (about him having been fired) (Tr. 17, 18).

It is always dusty in the pit area, particularly where the material comes on the conveyor from the shaker and into the pile (Tr. 18).

About a month before he was fired Delgado had complained that his machine was leaking too much oil. He had also complained (at some undetermined time) about carbon monoxide leaking from the corroded exhaust (Tr. 19). No one at Barrett said he shouldn't complain about his equipment or anything of that nature (Tr. 19). The company didn't seem upset when he complained about the oil leak or the manifold (Tr. 20). In December 1985 Delgado had complained to his supervisor Rodrigues about the safety of the workers he was lifting in the loader bucket. They were raised to place pins in the crusher (Tr. 20-22). The company was not upset over the bucket incident (Tr. 22, 23).

Due to a back injury in November 1985, Delgado has not worked since he was terminated. The doctor released him two months ago (Tr. 24). Delgado considered himself a good employee (Tr. 24).

Franklin Spradling, director of safety, testified for Barrett Industries (Tr. 30). The witness, who was not present on February 7, 1986, testified that the company crushes limestone (Tr. 30, 31).

Delgado's job was at the pile where he would load customer's trucks (Tr. 31). Three times supervisor Dixon asked Delgado to return to work. When he would not return Dixon got another operator to perform the work (Tr. 31). About four or five workers are trained for that job (Tr. 32).

The company does not have a prescribed lunch period (Tr. 31). Other than clarifying the lunch policy, the witness had no

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problem with anything Delgado had stated (Tr. 31). He felt Delgado should have stayed on his job until he was relieved (Tr. 32). The base pile operation cannot be shut down as long as customers arrive (Tr. 33).

Mr. Delgado complaints about safety did not relate to this termination. The company, in fact, rewarded Delgado for some of his safety awareness (Tr. 34).

Mr. Spradling considered Delgado to be a good employee (Tr. 34). Dixon, who is no longer with the Barrett Company, was the top management representative at the site (Tr. 34, 35). Dixon left the company four to five weeks ago but the witness didn't know the reason (Tr. 35).

#### Evaluation of the Evidence

This alleged discrimination arose after complainant Delgado left the jobsite and joined his wife for lunch on the company parking lot. Complainant indicated this was the normal lunch time but he agreed the workers do not "punch out" for lunch (Tr. 12, 26).

While he was at lunch the plant supervisor directed him to return to work. He stated he didn't want to eat dust. When he did return he was terminated.

The facts do not establish that Mr. Delgado was engaged in a protected activity. He refused to return to work because his lunch period was interrupted. The refusal was not based on any unsafe or unhealthy condition. Rather, he told Dixon that as soon as he finished eating he would go back to work right quick (Tr. 14).

Collateral issues arise as to whether complainant was fired because he complained about safety. No evidence supports the view that the company was retaliating against complainant. In fact, the testimony of respondent's witness Spradling is unrebutted that Delgado complaints about safety did not relate to his termination. In addition, the company had previously rewarded Delgado for his safety awareness (Tr. 34).

For the foregoing reasons I conclude that the complaint of discrimination filed herein should be dismissed.

#### Conclusions of Law

Based on the entire record, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.

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2. Complainant failed to establish that he was discriminated against in violation of Section 105(c)(1) of the Act.

ORDER

Based on the foregoing facts and conclusions of law I enter the following order:

The complaint of discrimination filed herein is dismissed.

John J. Morris  
Administrative Law Judge