

No. 31340– *Geraldine Toth v. Board of Parks and Recreation Commissioners, AKA BOPARC, and the City of Morgantown*

FILED

**December 11, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

McGraw, Justice, dissenting:

In this case, Ms. Toth argued that she suffered discrimination because she had prevailed in her prior lawsuit against her former employer. I believe that she raised a genuine issue of fact on this point. As the majority notes, “[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. pt. 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963).

I feel that Ms. Toth established a prima facie case that she suffered discrimination because she had availed herself of the constitutionally protected right to apply for redress of grievances. Though a jury may have ultimately found against Ms. Toth on this issue, I believe that she should have had the opportunity to present evidence of this claim to a jury of her peers. Therefore, I must respectfully dissent.