

No. 29328 -- Dale G. Nestor, II v. Bruce Hardwood Floors, L.P., dba Bruce Hardwood,  
a Division of B.H.F.G. Corporation, a Tennessee corporation authorized to  
do business in the State of West Virginia

**FILED**

Maynard, Justice, dissenting: **December 12, 2001**  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**RELEASED**

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I would affirm the circuit court's grant of summary judgment on behalf of Bruce Hardwood.

The appellant clearly failed to establish that his filing of a workers' compensation claim was a significant factor in Bruce Hardwood's decision to discharge him. Instead, the evidence indicates that the appellant was fired because he violated an important safety regulation. This conclusion is supported by facts which are undisputed by competent evidence. These facts include Bruce Hardwood's safety rule which provides that an employee may be discharged immediately without prior warning for reaching his or her hand into a machine while it is running or before moving parts have stopped. The appellant admitted that he grabbed a piece of wood stuck between the feed rolls of the 502 machine and the machine's back rolls injured his hand. Several Bruce Hardwood employees submitted affidavits below stating that the appellant told them that he had stuck his hand into the 502 machine while the machine parts were still moving. The appellant's minor injury required only a trip to the emergency room and a few stitches, while Bruce Hardwood has retained many employees who have filed workers' compensation actions and whose injuries were much more severe than the appellant's. Finally, other employees who have violated the same safety policy as the appellant have also been terminated.

The majority opinion sets forth, as evidence supporting the appellant's claim, that the appellant "was an excellent employee who received satisfactory employment evaluations." This is wholly irrelevant. While "[e]vidence of satisfactory work performance and supervisory evaluations before the accident can rebut an employer's claim of poor job performance," *Powell v. Wyoming Cablevision, Inc.*, 184 W.Va. 700, 704, 403 S.E.2d 717, 721 (1991), there is no claim by management in the instant case that the appellant was fired for poor job performance. To the contrary, Bruce Hardwood stated that it was aware of the appellant's performance record, but did not take it into account because of the seriousness of his violation.

Also, the majority emphasizes Bruce Hardwood's policy of reducing its supervisor's bonuses for each work-related injury as evidence of discriminatory intent. This evidence, however, is not probative in light of the fact that the decision to fire the appellant was not made by his immediate supervisor alone, but only after a meeting between his immediate supervisor, the production superintendent, and the personnel/safety director. Moreover, any adverse inference drawn from Bruce Hardwood's policy is contradicted by the fact that Bruce Hardwood has retained many employees who have filed workers' compensation claims. In sum, the appellant has failed to adduce any evidence giving rise to a genuine issue of material fact, and, therefore, summary judgment is proper.

The majority opinion indicates to me that it is impossible, without having to suffer the ordeal of a trial, for an employer to terminate an employee for any reason if that employee has recently filed a workers' compensation claim. As a practical matter, that employee enjoys immunity from discharge for

a certain period after filing his or her claim. The only valid evidence of workers' compensation discrimination in the instant case is the proximity in time of the claim and the firing. Yet this alone, under our law, does not prove a *prima facie* case of discrimination sufficient to escape summary judgment. Nevertheless, the majority opinion finds that the appellant can take such an insufficient case to trial.

Finally, I find it curious that the majority sees fit to, in effect, punish an employer for having stringent safety rules and for vigorously enforcing them. The nature of Bruce Hardwood's business requires employees to constantly exercise the utmost caution in the operation of machinery in order to prevent serious and perhaps permanent injuries. If Bruce Hardwood did not maintain and enforce safety regulations, I have no doubt that this Court would uphold, in a case of serious injury, the right of a Bruce Hardwood employee to bring a deliberate intention action against his or her employer. The majority opinion places Bruce Hardwood and similarly situated employers in a no-win situation. They are damned if they maintain and enforce safety regulations and damned if they do not.

Accordingly, for the reasons stated above, I dissent.