MCDONALD, J., dissenting. I respectfully disagree that the plaintiff Eduardo Martinez has not presented evidentiary facts or substantial evidence to defeat a motion for summary judgment.

In this case, the plaintiff submitted evidence that his injury was caused at the point of operation of a metal forming machine when its clamp severed his forearm. He was loading and positioning metal into the machine when a coworker, without verbal clearance from the plaintiff, put the machine into operation. The plaintiff's work assignment to assist in the loading and positioning of metal into the machine, which bent or formed metal under pressure, was improper. The operation of the machine required the plaintiff's coworker to have his back to the plaintiff while the plaintiff loaded and positioned metal at the machine's point of operation. At the time, the Occupational Safety and Health Administration (OSHA) found that the machine had no guards or sensing devices to prevent its operation while an employee was loading and positioning metal into the point of operation.

The plaintiff also submitted a copy of the safety plan of the defendant employer, the Southington Metal Fabricating Company. That plan stated that its purpose was to avoid injury at the workplace. With reference to a forming machine, the plan specifically stated that the point of operation must be guarded where it can cause injury and that an interlocking device must be considered. A pressure sensing device, as required for point of operation devices, must protect the machine operator by interlocking into the control circuit to prevent or stop its slide motion if the operator's hand or other part of his body is within the sensing field of the device during the operation of the press slide. The plan also required guards to protect all areas of point of entry to the point of operation not protected by the pressure sensing device. The plan also required that all employees be given regular and continuing safety training. The plaintiff submitted evidence that neither he nor his coworker operating the machine had received any safety training.

In *Suarez* v. *Dickmont Plastics Corp.*, 229 Conn. 99, 111–12, 639 A.2d 507 (1994) (*Suarez I*), our Supreme Court held that a showing much like that made by the plaintiff here would allow a finder of fact to infer that the employer believed an injury was substantially certain to follow from his acts or conduct. The jury in *Suarez* v. *Dickmont Plastics Corp.*, 242 Conn. 255, 280, 698 A.2d 838 (1997) (*Suarez II*), did not draw such an inference but did find that the employer intended to injure the employee, albeit, our Supreme Court held, without sufficient evidence of specific intent to injure.

Our Supreme Court remarked in *Suarez II* that the evidence presented might sustain a finding that the employer believed an injury was substantially certain to occur where ill will or malevolence on the part of the employer was not required. Id., 279.

In this case, the plaintiff produced evidence of specific violations of the employer's own safety manual and OSHA requirements for safety devices within and outside the forming machine and evidence that the operators were not trained in the safe operation of the machine. The plaintiff also produced expert evidence that this conduct made the plaintiff's injury a predictable and substantially certain event.

As to the requirement that the defendant could be found to have believed to a substantial certainty that the conduct would result in employee injury, it must be considered that the employer adopted its own specific safety plan to avoid such an injury with a metal forming machine and then knowingly did not implement the plan in any way. The defendant's multiple failures to obey OSHA requirements, which it promised to abide by in the safety plan,[1] is further evidence of the knowing nature of the employer's conduct. When considered with the employer's knowledge of the danger inherent in the improper use of the metal forming machine, I believe that a trier of fact could find an intentional injury defined as one that the employer believed was substantially certain[2] to follow from the employer's acts or conduct. Although a failure to make the workplace safe may not itself render an employer's conduct intentional, when, as here, that fact is coupled with the employer's recognition in its safety plan that the forming machine must be made safe to avoid employee injury at the point of operation, the combination may render the conduct intentional.

I would conclude that the plaintiff's submissions raise an issue of material fact regarding the defendant's conduct toward the plaintiff and the defendant's knowledge that his injury was substantially certain to occur. See *Suarez I*, supra, 229 Conn. 111. "[W]hether the actor knows that the consequences of his or her conduct are certain or substantially certain to result from his or her act and still proceeds with the conduct, so that he or she should be treated by the law as though he or she in fact desired to produce the result, is a question of fact for the jury." Id.

Accordingly, I respectfully dissent.

[1] The plan states: "It is the intent of [the defendant] to comply with all laws concerning the operation of the business and the health and safety of our employees and the public."

[2] Our Supreme Court, in a per curiam opinion, adopted a trial court's decision that defined substantially certain as equivalent to inevitability. See *Stebbins* v. *Doncasters, Inc.*, 263 Conn. 231, 819 A.2d 287 (2003), *aff'g*, 47 Conn. Sup. 638, 820 A.2d 1137 (2002); see also *Sorban* v. *Sterling Engineering Corp.*, 79 Conn. App. 444, 451 n.3, 830 A.2d 372, cert. denied, 266 Conn. 925, 835 A.2d 473 (2003).