

# DISCIPLINE: 5 Traps to Avoid When Disciplining Workers



What do you do when a worker violates a safety rule by, say, not wearing required PPE or failing to follow safe work procedures? You must discipline workers for safety infractions to instill respect for safety, deter future infractions and preserve a possible due diligence defence if the company is later charged with a safety violation. But if you don't exercise care when imposing discipline, especially when firing workers, the company could be subjected to grievances and lawsuits. So it's critical to understand certain principles of discipline to ensure that the disciplinary actions your company takes will withstand scrutiny if they're challenged in court or arbitration. Avoiding these key disciplinary traps will help you accomplish that goal.

## Trap #1: Not Disciplining Workers for Safety Infractions

You may be tempted to not discipline a worker if the infraction is minor and doesn't result in an injury. Supervisors in particular may want to be seen as 'nice guys' and so hesitate to discipline workers or do so only informally. But failing to impose discipline for safety infractions—even minor ones—tells workers that workplace safety isn't that important and discourages compliance with safety rules.

Not disciplining workers for safety infractions also undermines a possible due diligence defence. As explained in the *Sault Ste. Marie* case, due diligence requires employers to establish a 'proper system to prevent commission of the offence.' Such a system must include, among other things, safety rules for the workplace. But simply having such rules isn't enough—you must also enforce them by disciplining workers who violate them. So when you *don't* enforce your safety rules, you undermine the argument that you exercised due diligence.

*Example:* A worker and a supervisor were installing roofing material on a roof while wearing fall protection harnesses that weren't attached to lifelines. Their employer was penalized for a fall protection violation. The BC Workers' Compensation Appeals Tribunal rejected the employer's due diligence defence. It noted that the employer didn't adequately enforce its fall protection rules. For example, although the employer claimed to have a 'three strikes policy,' it just verbally warned non-compliant workers. It never sent any worker home for failing to use fall protection or required them to get additional fall protection

training. In addition, although the employer ultimately fired two workers who were observed not using fall protection equipment, it continued to employ them on a contract basis. And it should've disciplined supervisors who failed to fulfill their responsibilities. Given this incident and the employer's prior fall protection violations, it was clear that its OHS system wasn't motivating workers and supervisors to comply with the fall protection rules, concluded the Tribunal [*WCAT-2013-03241 (Re)*, [2013] CanLII 79442 (BC WCAT), Nov. 21, 2013].

## Trap #2: Inconsistently Enforcing Safety Rules

When you *do* impose discipline for safety infractions, you must do so consistently. For example, you can't discipline some workers for violating a safety rule but not discipline others for breaking the same rule.

*Example:* A safety coordinator conducting an audit saw a worker and a foreman operating a utility terrain vehicle (UTV) without wearing helmets or seatbelts. The employer's policy required use of Department of Transportation-approved helmets when operating UTVs unless seatbelts are worn at all times and other conditions are met. The policy didn't warn that discipline, including termination, could result for a violation of that rule. That same day, the worker and foreman saw a construction manager also operating a UTV without a seatbelt or DOT-approved helmet. When the safety coordinator approached them about their lack of helmets and seatbelts, the worker and foreman pointed out the manager's failure to comply as well. They also said that they hadn't routinely worn helmets and seatbelts but wouldn't have any problem complying in the future. In addition, an investigation revealed that the helmet requirement was commonly ignored at the site. In their disciplinary records, the worker had a prior verbal warning for lateness and the foreman had a prior written warning for lateness and a 27-day suspension for improper use of a vehicle, causing property damage. So the employer suspended the worker for three days and fired the foreman. They both filed grievances.

The Ontario Labour Relations Board ruled that the termination and multi-day suspension were disproportionate discipline for failure to comply with the company's safety rules requiring helmets and seatbelts for those using UTVs at the worksite. The Board found that these rules weren't commonly enforced. For example, there was no evidence that the senior foreman had ever spoken to any individual about the need to comply with these rules. Similarly, the sub-foreperson was aware that helmets and seatbelts weren't being worn by crew members using UTVs, yet he didn't address that directly with them or report it to management. In addition, workers weren't warned of the possible consequences for violating these rules. So the Board ruled that the worker should instead be suspended for one day and the foreman suspended for five [*Canadian Union of Skilled Workers v. Hydro One*, [2014] CanLII 10775 (ON LRB), March 6, 2014].

In addition, you must be consistent in *how* you discipline similar workers who commit similar violations.

*Example:* A worker opened the hood and stuck his hand inside the pairing machine he was operating while it was still in motion. The worker had been trained not to open the hood of a running machine because parts could fly out and kill or dismember somebody. Luckily, nobody got hurt. But the company suspended the worker for a day. Its progressive discipline policy provided for gradually harsher penalties against repeat offenders. First offenders got counseling,

followed by verbal warnings, written warnings, a short suspension, a longer suspension and, finally, termination. The suspended worker was a first offender. But the company considered his infraction to be so serious that it skipped over the first three stages of progressive discipline and suspended him. The worker claimed that the company didn't follow the progressive discipline policy and filed a grievance.

An arbitrator said that although a one-day suspension was an appropriate penalty for such a serious safety violation, he still reduced the penalty to a written warning. It may be reasonable for employers to skip steps of their progressive discipline policy when first offenders commit serious safety violations. But here, the company had been inconsistent in its enforcement of safety rules. Specifically, two other workers had committed serious safety violations: one was negligent in operating a forklift and the other showed up drunk for work. Each was also a first offender like this worker. But those workers got counseling as discipline. Thus, the company had set a precedent for being lenient with first offenders. So suspending the worker in this case was unfair. 'I cannot disregard the undisputed evidence that' the company treated this worker differently, concluded the arbitrator [*Alcatel Telecommunications Cable (Winnipeg Plant) (Re)*, [1996] M.G.A.D. No. 50, July 4, 1996].

### Trap #3: Imposing Excessive Discipline

When determining appropriate discipline for a safety infraction, you should generally use the progressive discipline approach, with discipline increasing in severity for each subsequent violation. But as mentioned in a case above, employers can skip steps in the usual progression depending on the circumstances. In fact, when imposing discipline, you must consider *all* of the circumstances of the infraction, including:

- The seriousness of the infraction;
- Whether the infraction resulted in an incident, injury or death;
- How similar infractions were handled in the past;
- Whether the worker took responsibility for the infraction; and
- The worker's history, including whether he'd committed other safety infractions in the past.

So although some safety infractions may be so serious that they let you skip steps and even fire a worker for a first offence, 'throwing the book' at a worker by imposing excessive discipline to send the message that you take safety seriously may backfire.

*Example:* A millwright at a lumber mill entered a restricted area and crossed over live chains without properly locking out all power sources, which violated the mill's lockout policy. He quickly realized what he'd done and locked out the power. But his supervisor had already seen the violation. The millwright admitted violating policy, but asked if there was really any harm done. Because the mill believed that he didn't take the violation seriously, it fired him.

An arbitrator found that the millwright had made a careless error, which he'd admitted. Although his misconduct was serious, it wasn't intentional. In addition, there was no evidence he was indifferent to safety and, in fact, he was proud of his record of 27 years without injury. Also, the penalty in this case was inconsistent with the discipline imposed on other workers for similar misconduct. So the arbitrator concluded that termination for this violation was

excessive, finding that an eight-day suspension was more appropriate [United Steelworkers Local 1 ' 207 v. Weyerhaeuser Company Ltd., [2016] CanLII 13703 (AB GAA), March 9, 2016].

#### Trap #4: Disciplining Workers for Exercising Safety Rights

Yes, you can and should discipline workers for violating a safety rule or OHS law but you *can't and shouldn't* discipline them in retaliation for exercising a safety right granted by the OHS law, such as refusing unsafe work or reporting an injury. What makes discipline retaliatory? To answer that question, courts and labour boards typically look at whether there's a 'nexus' that is, connection between the protected act and the discipline, such as in the timing of the two events.

*Example #1:* The maintenance manager for a hotel asked the general manager for a fall protection harness so he could work on a wall from a scaffold. The general manager refused. An MOL inspector ordered the hotel to hire a suitable contractor to repair the wall as it was too dangerous for the maintenance department. But the general manager kept pressuring the maintenance manager to do it himself. When he refused, he was fired. The hotel claimed it fired the maintenance manager because he wasn't skilled enough for the position. However, the Ontario Labour Relations Board found that there was 'an absolute dearth of written or verbal evidence' of the maintenance manager's lack of skills. It was clear he was fired as a reprisal for exercising his right to refuse unsafe work [Sean Rapke v. Sylvanacre Properties Limited o/a Four Points Sheraton, [2014] CanLII 75962 (ON LRB), Dec. 8, 2014].

*Example #2:* When the manager of a hair salon unplugged a charger from a power bar, the electrical outlet arced because wet wigs had been hung over it to dry. She suffered electrical burns and bruises. Her boss didn't take any steps to address the hazard or report the incident. He also pressured her to work despite her injury. So the manager reported it to the Ontario Ministry of Labour, which resulted in an inspection. The salon fired her for doing 'such a stupid thing.' It also refused to issue a record of employment so she could collect benefits.

The manager filed a reprisal complaint, which the Labour Relations Board upheld. The circumstances of the salon's firing of the manager were 'insensitive, demeaning and humiliating.' Her boss callously disregarded her workplace injury, failed to report it and pressured her to continue working despite her protestations of the seriousness of her injury. In short, the boss's conduct was unfair and in bad faith, and he took a 'cavalier attitude' towards OHS duties. The manager was summarily dismissed 'solely for acting in accordance with the statutory mandate when she reported the hazardous working condition and her injury to the Ministry,' concluded the Board. So it ordered the salon to pay the manager more than \$16,000 in lost wages and \$7,500 in aggravated damages [Brenda Bastien v. 817775 Ontario Limited (Pro-Hairlines), [2014] CanLII 65582 (ON LRB), Oct. 27, 2014].

#### Trap #5: Failing to Document Safety Infractions & Resulting Discipline

As with most elements of your OHS program, documentation of workers' safety infractions and the discipline you imposed as a result is important. Such documentation can be critical evidence if the company is prosecuted for a safety offence or faced with a grievance or wrongful dismissal lawsuit for firing a worker. Proper documentation serves two purposes:

- It puts a worker on notice of the company's dissatisfaction with his conduct and the potential consequences of future violations. For example, the existence of a paper trail makes it almost impossible for the worker to claim that he didn't know that he might be subject to more severe discipline or fired if he violated the rules again; and
- The company may be able to use the documentation in court to prove that it had just cause to fire a worker or as evidence of its due diligence.

*Example:* Over the course of 28 months, a company that manufactures auto body components disciplined a co-extrusion worker for nine different incidents, including three safety infractions. For example, the worker challenged a co-worker to a fight, showed up for work while under the influence of alcohol, and spilled a lubricant on the floor and under three production lines. The company finally fired him. So the worker sued for wrongful dismissal.

The court dismissed the lawsuit, ruling that these incidents weren't minor or 'trifling transgressions.' Each one was documented and involved threats to workplace safety, line stoppages or acts of misconduct. Cumulatively, the incidents of 'continued carelessness' amounted to just cause. Nearly all of the documentation regarding the company's concerns referenced prior warnings and indicated what the next steps might be if problems persisted. Specifically noting the company's documentation, the court concluded that the series of infractions 'do amount to enough bricks to constitute a just cause wall' [*Daley v. Depco International Inc.*, [2004] CanLII 11310 (ON SC), June 18, 2004].[\[/learn\\_more\]](#)

## **BOTTOM LINE**

Disciplining workers for safety infractions can be a minefield. You must impose discipline when workers violate safety rules but not when they exercise safety rights. The discipline imposed must be effective, consistent and deter future violations but not be excessive. And you need to keep good records of workers' safety infractions and the discipline you impose in case your actions are questioned in court. Avoiding these common disciplinary traps will help you safely navigate this minefield.