

# Was Termination for Failure to Use PPE Excessive?



## SITUATION

A safety coordinator conducting an audit sees a worker and a foreman operating a utility terrain vehicle (UTV) without wearing helmets or seatbelts. The employer's policy requires use of Department of Transportation-approved helmets when operating UTVs unless seat belts are worn at all times and other conditions are met. The policy doesn't warn that discipline, including termination, could result for a violation of that rule. That same day, the worker and foreman see a construction manager also operating a UTV without a seatbelt or DOT-approved helmet. When the safety coordinator approaches them about their lack of helmets and seatbelts, the worker and foreman point out the manager's failure to comply as well. They also say that they haven't routinely worn helmets and seatbelts but wouldn't have any problem complying in the future. But they also claim the employer hasn't provided DOT-approved helmets. In fact, the safety coordinator can find only one helmet available for UTV users and an investigation reveals the helmet requirement is commonly ignored at the site. In their disciplinary records, the worker has a prior verbal warning for lateness and the foreman has a prior written warning for lateness and a 27-day suspension for improper use of a vehicle, causing property damage. So the employer suspends the worker for three days and fires the foreman. They both file grievances.

## QUESTION

**Is the discipline for failure to wear appropriate PPE excessive'**

- A. No, because failure to comply with PPE requirements creates a safety risk.
- B. No, because the rule was routinely ignored and so management had to send a message.
- C. Yes, because the safety requirement wasn't consistently enforced, workers weren't warned of the consequences of violations and the employer didn't provide the required PPE.
- D. Yes, because the worker's and foreman's prior disciplinary matters weren't for the same type of conduct.

## ANSWER

**C. Because the PPE requirement wasn't consistently enforced, helmets weren't provided and the policy didn't warn of the consequences of violations, the discipline imposed on these employees was excessive.**

## EXPLANATION

This hypothetical is based on a decision by the Ontario Labour Relations Board, which ruled the termination and multi-day suspension were disproportionate discipline for failure to comply with company policy requiring a helmet or seatbelt while operating a UTV. The Board acknowledged that the company safety rules required helmets and seatbelts for those using UTVs at the worksite and that both the worker and foreman had been trained on these rules. However, the board found the rule wasn't commonly enforced and the workers weren't warned of the possible consequences for violating it. In addition, the company didn't provide sufficient helmets for those who would need them, essentially making compliance impossible. So the Board ruled that the worker should instead be suspended for

one day and the foreman suspended for five.

## **WHY THE WRONG ANSWERS ARE WRONG**

**A is wrong** because although the failure to wear helmets or seatbelts does present a safety risk, there are other factors to consider in determining discipline, including whether anyone was injured, the degree of risk, the severity of potential injury, the worker's disciplinary record and the consistency of the employer's enforcement of the rule violated. In this case, the violation created a risk for the two violators but not necessarily others on the work site. Also, even supervisors didn't comply with the rule. And the employer failed to supply a sufficient number of helmets to enable compliance with its rule. All these factors indicate that termination and a three day suspension weren't proportionate to the violation, despite the safety risks it created.

**B is wrong** because the fact that the rule was routinely ignored and the employer did nothing to address that fact actually supports a finding that the discipline is excessive. It isn't enough for an employer to create safety rules; it must also enforce those rules and do so consistently. Proper discipline of violators sends a message to others that the employer takes safety seriously. But selective enforcement could undermine the safety culture and give rise to discrimination claims. Also, the worker and foreman here weren't put on notice that such serious discipline or any discipline for that matter could result from a violation of the PPE rule. Therefore, the lack of prior enforcement doesn't justify such harsh discipline in this case.

**D is wrong** because prior disciplinary actions are a proper factor when setting discipline for subsequent infractions, even if the prior violations were for different conduct. For example, prior discipline for violating a rule requiring use of PPE, theft of company property and insubordination to a

supervisor involve different types of conduct but all demonstrate a worker's unwillingness to follow rules and respond to discipline. Therefore, the fact that the worker's and foreman's prior misconduct were unrelated to PPE or safety in general doesn't mean the employer can't consider those infractions when disciplining them for this latest violation.

**Insider Says:** For more information about using progressive discipline, see the [Discipline & Reprisals Compliance Centre](#).

## **SHOW YOUR LAWYER**

[\*Canadian Union of Skilled Workers v. Hydro One\*](#), [2014] CanLII 10775 (ON LRB), March 6, 2014