

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0789**

*Reversed*  
*Disqualification*

**PROCEDURAL HISTORY:** On April 15, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 155905). The employer filed a timely request for hearing. On May 14, 2019, ALJ Snyder conducted a hearing, and on May 22, 2019, issued Order No. 19-UI-130411, affirming the Department's decision. On June 10, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

On July 17, 2019, EAB issued EAB Decision 2019-EAB-0532, reversing Order No. 19-UI-130411 and remanding it to the Office of Administrative Hearings (OAH) for further development of the record. On July 30, 2019, ALJ Snyder conducted another hearing, and on August 7, 2019, issued Order No. 19-UI-134686 concluding that the employer discharged claimant not for misconduct. On August 16, 2019, the employer filed an application for review with EAB.

EAB considered the employer's written argument in reaching this decision.

**FINDINGS OF FACT:** (1) Pathway Enterprises Inc. employed claimant from April 24, 2018 until March 20, 2019 as a direct support professional.

(2) The employer expected claimant to follow clients' care plans, and to refrain from restraining or retaliating against individuals he supported. The employer also expected claimant to follow Oregon Intervention System (OIS) "reasonable response" techniques at all times, including when engaging with an upset individual. OIS approved techniques included "evasion" (getting out of the way of the individual) and "deflection" (using a cupped hand to deflect a strike so as not to harm the individual). Exhibit 1, T-Log Entry, March 20, 2019, Transcript (May 14, 2019) at 15. OIS did not permit holding an individual's arms under any circumstances. In May 2018, claimant completed a 16-hour basic workshop in OIS. Exhibit 1, OIS Guidelines. The training included four hours of practical training about how to deflect and evade physical "power struggles" to stay safe and keep others safe. Transcript (May 14, 2019) at 12. The employer expected staff to refrain from substituting their own techniques unless the

techniques were discussed with the individual's treatment team, approved by the employer's behavior specialist, and written into the individual's treatment plan. Claimant knew or should have known this expectation.

(3) Sometime prior to March 2019, one of claimant's coworkers had told him that the direct support professionals were supposed to limit the cheese sticks to one per individual. On March 19, 2019, while claimant was working, an individual who had dementia went into the kitchen after dinner and asked for a snack. The individual had already had a beverage and snack after dinner. Claimant gave him a cheese stick. The individual replied that he wanted another cheese stick. Claimant refused to give the individual a second cheese stick and offered the individual grapes instead. The individual became upset and struck claimant in the face, knocking off claimant's glasses. There was room for claimant to back out of the way. Claimant held the individual's forearms and spoke with him. The individual left the kitchen and went into his room. Claimant wrote an account of what occurred with the individual in the employer's logbook. Claimant recorded in the logbook that he "held [the individual's] arms with a hope to stop him from further violence." Exhibit 1, T-Log Entry, March 19, 2019.

(4) The individual involved in the March 19, 2019 incident with claimant had no dietary guidelines, so was permitted to eat whatever he wanted whenever he wanted. The individual was on a higher caloric diet because he had been losing weight, which was documented in the individual's medical chart and support plan.

(5) On March 20, 2019, the employer's program manager learned that claimant had held the individual's forearms on March 19, 2019. The program manager reviewed claimant's account in the logbook of what occurred, and discussed the incident with claimant. The program manager asked claimant to show her "exactly what happened." Transcript (May 14, 2019) at 7. Claimant "grabbed" the manager's forearm and told her that was the manner he used to stop the individual from further violence on March 19. Claimant told her he held the individual's arms to his sides for two minutes.

(6) On March 20, 2019, the employer discharged claimant for holding an individual's arms in violation of the employer's policies and OIS.

(7) The State of Oregon Department of Human Services (Oregon DHS) investigated the incident that occurred on March 19, 2019. On May 28, 2019, Oregon DHS issued a Notice of Abuse Determination that determined that a preponderance of evidence showed claimant wrongfully restrained the individual on March 19 in violation of ORS 430.735(1)(i). EAB Exhibit 1. The notice found as fact that claimant held the individual's wrists for "at least two minutes." *Id.*

**CONCLUSIONS AND REASONS:** The employer discharged claimant for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. "As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct." OAR 471-030-0038(3)(a) (December 23, 2018). "[W]antonly negligent" means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his

or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.” OAR 471-030-0038(1)(c). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

Order No. 19-UI-134686 found as fact that claimant “grabbed [a] resident’s arms and held them to the resident’s sides for approximately two minutes, as Claimant spoke to the resident and attempted to calm the resident down.” Order No. 19-UI-134686 at 2. Order No. 19-UI-134686 then concluded that such conduct was not a willful or wantonly negligent violation of the employer’s expectations because claimant “believed he handled the situation to the best of his ability at that time.” Order No. 19-UI-134686 at 3. The record does not support this conclusion.

Claimant testified at the first hearing on May 14, 2019 that after the individual struck him on March 19, 2019, he “put [his] hands on his forearms and calmly talked to him.” Transcript at 23. However, at the July 30, 2019 hearing, claimant first testified that he “did not restrain [the individual’s] arms to his side . . . [and] did not hold them down to his side.” Transcript (July 30, 2019) at 17. Claimant then testified at the July 30 hearing that he was holding the individual’s arms in such a manner that “[t]here’s no way he could have done anything with them,” suggesting he did restrain the individual’s arms. Transcript (July 30, 2019) at 20. When claimant described his conduct to the program manager on March 20, 2019, he showed her that he “grabbed” the individual’s arms and told her he held them for two minutes. The Oregon DHS decision also found that claimant held the individual for two minutes. EAB Exhibit 1. Thus, despite claimant’s assertion during the July 30 hearing that he did not restrain the individual on March 19, claimant’s inconsistent testimony, his prior statements to the employer and in the employer’s logbook, and the state investigation show by a preponderance of evidence that claimant held the individual’s arms for two minutes.

Claimant asserted that he would not have been able to leave the room on March 19, because they were in a small space, in a small room, and claimant is a large person. Transcript at 26, 28. However, the employer’s residential director provided persuasive evidence that OIS anticipates this dilemma, and claimant had been trained to “pivot” away from the individual, which is a technique that can be used even in a small space. Transcript (May 14, 2019) at 35. She asserted that, using this technique, claimant could have moved out of the “strike zone” between him and individual and continued to de-escalate the situation without holding the individual’s arms. *Id.* Even had claimant been unable to leave the room, he testified that the individual was “in the middle of the room” and that claimant could have moved away from him. Transcript (July 30, 2019) at 24. Claimant knew or should have known that holding the individual’s arms on March 19 was contrary to the employer’s expectations and OIS. His conduct was a willful violation of those expectations.

Claimant’s conduct cannot be excused as a good faith error. Claimant testified that he understood the OIS, but argued implicitly that he had a good faith belief that the employer would condone his actions on March 19 because the OIS guidelines recommend providing support with “person-centered emphasis,” a publication posted on the facility wall, and his personal research on “the internet” regarding “dealing with dementia,” all recommended making a “personal contact” with an individual. Exhibit 1, OIS Guidelines; Transcript at 24. First, the record does not show that the poster on the wall or other resources regarding dementia patients recommended using physical touch or holding an

individual's arms down to redirect a person with dementia. Moreover, when claimant described having used his own "special tool needed for all dementia patients" on prior occasions, he described "touching" the individual, which was different than "grabbing" the individual's arms for two minutes as he did on March 19. Transcript (May 14, 2019) at 27. The OIS recommendation for a "person-centered emphasis" could not be reasonably interpreted to include "grabbing" or restraining an individual. Finally, claimant admitted at hearing that he was not necessarily acting to support the individual, when he stated, "I can't tell you that I didn't hold his arms to not protect myself . . ." Transcript at 29.

Not only did claimant fail to show a reasonable basis for believing that the employer would condone the method he used to address the March 19 situation, claimant's testimony about OIS shows that claimant sometimes chose not to follow its techniques because he disagreed with it. Claimant testified that he disagreed with using the OIS technique of evasion with this individual with dementia, and testified that "running away from [the individual whose arms he held] wasn't going to . . . fix the problem. The only thing that was going to fix the problem [was] communicating with him." Transcript (May 14, 2019) at 26. Claimant testified that "even if I made that escape [by evading the individual], . . . it's not helping the individual." Transcript (May 14, 2019) at 28. Claimant also testified that he received OIS training about how to avoid instinctive physical reactions, but "that doesn't mean [OIS] was the answer to this situation. This particular situation [sic] he needed to have reaffirmation. He needed to be supported and it needed to happen now in my opinion." Transcript (May 14, 2019) at 28-29. Claimant's statements tend to show that claimant knew that his method of addressing the confrontation on March 19 was not consistent with OIS. The statements show that claimant made a conscious decision to disregard the OIS response, and to use his own method of handling the interaction instead of moving away from the individual.

Nor does the record show that claimant had a good faith basis to believe that the employer would approve of him replacing the OIS methods with his own. To the contrary, the employer's residential director testified that, if staff attended a training or believed they had superior knowledge that would be beneficial to an individual, the employer expected the staff to "bring it to the team," and refrain from "act[ing] rogue." Transcript at 33.

Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). The record does not establish if the incident on March 19 was isolated, as defined by OAR 471-030-0038(1)(d)(A). However, even if an incident is isolated, it is not excused as an isolated instance of poor judgment if the act was unlawful. OAR 471-030-0038(1)(d)(D) provides that acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). The preponderance of the evidence in the record, including the Oregon DHS determination, shows that claimant violated ORS 430.735(1)(i) prohibiting the wrongful use of a physical restraint upon an adult. Because claimant's conduct on March 19 violated the law or was tantamount to unlawful conduct, it cannot be excused as an isolated instance of poor judgment.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of unemployment benefits based on this work separation.

**DECISION:** Order No. 19-UI-134686 is set aside, as outlined above.

J. S. Cromwell and S. Alba;  
D. P. Hettle, not participating.

**DATE of Service: September 23, 2019**

**NOTE:** You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at [courts.oregon.gov](http://courts.oregon.gov). Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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# Understanding Your Employment Appeals Board Decision

## English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

## Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

## Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

## Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyong ito.

## Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

## Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

## Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

**Khmer**

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

**Laotian**

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

**Arabic**

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**Farsi**

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

**Employment Appeals Board - 875 Union Street NE | Salem, OR 97311**  
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