

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0192**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 4, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 131734). Claimant filed a timely request for hearing. On February 1, 2018, ALJ Meerdink conducted a hearing and issued Hearing Decision 18-UI-102243, affirming the Department's decision. On February 20, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Attis Trading Company, Inc. employed claimant, last as store manager, from April 6, 2016 to December 13, 2017. At all relevant times, claimant was an Oregon medical marijuana card holder.

(2) Upon hire, claimant's manager trained her to process all cannabis sales to employees using her own medical marijuana card number. The employer's owner personally requested and required that claimant process his cannabis purchases using her medical marijuana card number. Although claimant had reservations about doing so, claimant understood the clear instructions she had received and was afraid she would lose her job if she refused to follow them. Claimant therefore processed the owner's and all employees' cannabis transactions she handled using her medical marijuana card number.

(3) In early 2017, the manager who had trained claimant stopped working for the employer. Claimant was not retrained. Claimant continued to process the owner's and employees' cannabis purchases under her medical marijuana card number as she had been taught.

(4) On December 13, 2017, the employer's new manager discovered that claimant was processing others' cannabis purchases using her own medical marijuana card number. As a result, the employer significantly underpaid taxes on retail sales of cannabis to non-medical marijuana cardholders. When confronted, claimant told the manager that she was doing as she had been trained. On December 13, 2017, the manager discharged claimant for processing others' cannabis purchases under her medical marijuana card number.

**CONCLUSIONS AND REASONS:** We disagree with the Department and the ALJ and conclude that claimant's discharge was not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(3)(a) (August 3, 2011) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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.

The ALJ found as fact that claimant was "trained [] to sell cannabis to employees by using her medical marijuana card to avoid paying taxes on the cannabis products," but nevertheless concluded that claimant's discharge was for misconduct because claimant "deprived the state of 20 percent taxes for each transaction," and the "expected repercussions of tax evasion" to the employer "is significant and an obvious risk" to the employer, making claimant's conduct "at least a wanton disregard for the employer's interest." *See* Hearing Decision 18-UI-102243 at 1, 3. We disagree, as the ALJ's analysis ignores that there was no benefit to claimant in evading taxes, and fails to account for the significance of the fact that both her training manager and the owner requested and required her to act as she did.

There is no dispute that claimant engaged in unlawful acts by processing others' cannabis purchases using her medical marijuana card, nor is there a reasonable dispute that evading tax on non-cardholders' cannabis purchases and violating cardholder rules could have potentially serious legal ramifications to both the employer and claimant. The illegality and potential seriousness of the behavior is not where the inquiry ends, however. The relevant question is whether claimant's unlawful acts should be considered misconduct for purposes of disqualifying her from receiving unemployment insurance benefits. In this case, we cannot conclusively say that it should.

Claimant provided firsthand, unrefuted testimony establishing that upon hire her manager trained her that it was the employer's policy for employees with a medical marijuana card number to process all employee purchases under their card number. Although the practice was unlawful and the training questionable, the owner endorsed the training and the business's underlying policy by requesting and requiring claimant to process the owner's cannabis purchases under her card number, leaving claimant with no reason to question the policy, and no avenue to protest following the policy or to express concerns about it. It is important to note that the employer's witness at the hearing did not dispute or refute that claimant was so trained and was so required, that the employer's witness agreed that claimant was not advised at any point in time that the employee sales policies differed from her training, and that he agreed claimant was not given retraining on the employer's employee sales policies at any point during her employment.

Given those circumstances, it is more likely than not that the employer did not have a reasonable right to expect claimant to disobey its employee sales policies. Her compliance with her training and policies as she understood them therefore did not amount to a willful or wantonly negligent disregard of the

employer's interests. In other words, the employer cannot both require claimant to engage in particular acts and reasonably prohibit her from the same behavior such that her violation of the prohibition becomes misconduct.

The employer therefore discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

**DECISION:** Hearing Decision 18-UI-102243 is set aside, as outlined above.<sup>1</sup>

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

**DATE of Service:** March 20, 2018

**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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<sup>1</sup> This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.