EO: 200
BYE: 201737

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0005

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 13, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 154257). Claimant filed a timely request for hearing. On December 22, 2016, ALJ Seideman conducted a hearing, and on December 23, 2016 issued Hearing Decision 16-UI-73576, affirming the Department's decision. On January 4, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Village Inn Restaurant employed claimant as an assistant manager from December 27, 2015 to September 22, 2016.

(2) In September 2016, the employer issued claimant a written warning for having sent a text message to the owner while the owner was off duty. Claimant believed the warning was arbitrary and unwarranted, thought the employer was trying to get rid of him, and felt upset.

(3) Claimant complained to his wife, and claimant's wife also became upset with the employer. Claimant's wife, without claimant's knowledge or encouragement, went to the employer's social media account and wrote, "Nasty food. It's wrong every time I order. It's horrible management and a drunken owner. Avoid at all cost." Audio recording at ~10:55.

(4) Claimant also posted some comments about the situation to his personal social media account, including whether anyone knew of any job openings and criticisms of his "boss," who he said had been "pulling some shady shit." Audio recording at ~ 12:55. Claimant's social media account was restricted to his friends and family, and claimant did not refer by name to the employer's business or any of the individuals involved with the written warning. Audio recording at ~ 23:35.

(5) Claimant's coworker showed claimant's wife's public social media comment to the general manager; she also saw the comments on claimant's private account. On September 22, 2016, the employer discharged claimant.

CONCLUSIONS AND REASONS: We disagree with 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 the social media comments, without differentiating between claimant's comments and those his wife made, "were so bad that" the employer discharged claimant. Hearing Decision 16-UI-73576 at 2. The ALJ concluded that claimant's discharge was for misconduct because,

> The wife used the employer [social media] and made very bad comments about the boss and the business. Employer acknowledges that claimant did not do that. However, then claimant began making comments on what he said was a private [social media account]. However, other people, including people at work, observed them and they were very bad comments about employer. Claimant's acts were a willful disregard of what any employer had the right to expect, and constituted misconduct.

Hearing Decision 16-UI-73576 at 3. The ALJ went on to summarily conclude that claimant's conduct was not excusable as an isolated instance of poor judgment because "[t]he comments and actions were so serious that they made a continued employment relationship impossible." *Id.* The record fails to support the ALJ's findings or conclusion.

Although the employer's witness initially testified that the employer discharged claimant because of the negative postings he made on social media about the employer's business and the owner, the general manager also testified that she agreed that claimant's social media account postings were private. She stated:

> [T]he thing that really really worried me and the owner was the comment I guess that your wife put on [the employer's social media account] . . . we just assumed honestly that you were very upset and you were not going to take care of the restaurant . . . you did do a great job . . . I just thought that you completely lost interest with those posts on [social media]. So it did worry us to leave you here because you opened the restaurant, you took care of our customers, you took care of our money, you closed the restaurant, and you took care of all of that. So with those negative comments I just didn't feel comfortable leaving you with the restaurant.

Audio recording at ~ 29:10. The ALJ subsequently asked the general manager if claimant's wife's comments were the ones that "got him into the trouble," and the general manager replied:

> I – I really think so, because if she wouldn't have posted that on our [social media account] I wouldn't have known what was going on, or actually maybe the friend that found that wouldn't have been snooping in maybe in his [social media account]. But actually that is the one thing that triggered I want to say everything. And I mean coming from my manager's wife, to write that, I did feel very uncomf . . . not comfortable leaving him because he took care of my restaurant.

Audio recording at ~ 31:00. Based on the general manager's testimony, it is apparent that the employer discharged claimant because of assumptions and conclusions drawn based on the comments claimant's wife posted to the employer's public social media account, and did not discharge him because of his own comments to what the employer considered a private social media account. *Compare* Audio at ~ 10:15, ~ 29:10. Claimant's wife's conduct, done without his knowledge or encouragement, is not attributable to claimant himself as willful or wantonly negligent misconduct. His discharge was, therefore, not for misconduct, and he is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 16-UI-73576 is set aside, as outlined above.[1]

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

DATE of Service: January 23, 2017

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. 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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[1] This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits, if owed, may take from several days to two weeks for the Department to complete.