

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0582**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On April 11, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 83457). Claimant filed a timely request for hearing. On May 6, 2016, ALJ Vincent conducted a hearing, and on May 9, 2016 issued Hearing Decision 16-UI-59121, affirming the Department's decision. On May 17, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

**CONCLUSIONS AND REASONS:** Hearing Decision 16-UI-59121 is reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for further proceedings.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. 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, on five occasions, claimant reported to work late because she overslept.<sup>1</sup> The ALJ concluded claimant's discharge was for misconduct, reasoning that "claimant's tardiness was usually the result of oversleeping," she "either intentionally failed to report to work or made a conscious decision to rely on a means of waking up (setting only one alarm) that interfered with reporting to work on time in the past," and her "decision to rely on one alarm on March 22, 2016 was at minimum wantonly negligent."<sup>2</sup> The ALJ also stated that her conduct was not excused from being considered

<sup>1</sup> Hearing Decision 16-UI-59121 at 1.

<sup>2</sup> *Id.* at 3.

misconduct for "absences due to illness or other physical or mental disabilities" under OAR 471-030-0038(3)(b) because "[t]here is no evidence indicating the claimant's conduct was such behavior."<sup>3</sup>

As a preliminary matter, there is no evidence in this record suggesting that claimant "intentionally failed to report to work" for her scheduled shifts on any of the five occasions at issue. The record also does not support the ALJ's conclusions that claimant's repeated tardiness was the result of wantonly negligent behavior, or that it was not excused from constituting misconduct as an absence due to a physical or mental disability. Claimant testified at the hearing that she had insomnia. Audio recording at ~22:40. Although the word "insomnia" is sometimes used colloquially to describe a poor night of sleep, claimant testified that she had insomnia for five or six years, struggled to maintain a sleep schedule, and, over the years, had taken five to six medications in an attempt to treat her condition, presumably prescription medication from a healthcare provider, suggesting that claimant's insomnia was a medical condition. Audio recording at ~22:45. She testified that her attempts to maintain a good sleep schedule were interrupted while she had and recovered from severe bronchitis and a resultant chest injury earlier in the year, and was prescribed four medications, all of which further interrupted her sleep and caused some of her tardy arrivals. Audio recording at ~25:15. Claimant further testified that she took steps to ensure that she got enough sleep, scheduled her activities and work to occur at times of the day that worked with her sleep schedule, and usually woke up with her alarm. Audio recording at ~24:40.

On remand, the ALJ should inquire further about claimant's medical conditions (insomnia, bronchitis, chest injury) to determine whether or not claimant's partial absences from work in January, February and March 2016 should be excused as being the result of physical or mental disabilities. With respect to each of the five absences at issue, the ALJ should inquire with claimant about what time she was scheduled to work, what time she attempted to go to sleep, what time she actually fell asleep, how long she planned to sleep, how long she actually slept, whether she thought she would sleep as long as she did, and, given the information she provides, whether, at the time she went to sleep on each occasion, she thought she had taken sufficient steps to ensure that she would wake up in time to report to work as scheduled. For example, the record shows that, on March 22, 2016, claimant went to sleep at 5:00 a.m. slept through her alarm and the scheduled start of her shift, and did not wake up until the employer called her at almost 3:00 p.m., almost 10 hours after she fell asleep. The ALJ should ask claimant if she usually slept 10 hours at a time, thought she would sleep for fewer hours, whether she had taken any medication that caused her to sleep as long as she did, or was aware when she fell asleep at 5:00 a.m. that she would probably sleep through the scheduled beginning of her shift at 2:00 p.m. Only with that type of information about each of claimant's absences can we determine whether claimant's oversleeping and resultant tardiness was caused by her medical condition(s), or the result of her conscious disregard for the employer's expectation that she report to work when scheduled.

With respect to claimant's failure to set a second alarm or implement some sort of backup alarm to wake her in case she slept through her cell phone alarm, the record was not developed sufficiently for us to determine whether claimant's continued reliance on her cell phone alarm was willful or wantonly negligent. On remand, the ALJ should ask claimant how many of the five incidents at issue were the result of her sleeping through her cell phone alarm, when the first time she slept through a cell phone

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<sup>3</sup> *Id.*

alarm occurred, whether she tried changing the alarm noise, turning up the volume or setting her cell phone to sound more than once after the first time she failed to wake up to the alarm, whether she asked anyone to help her wake up in time to report to work, and, if not, why she chose not to buy another alarm or ask for help after receiving the February 12th warning from the employer. The ALJ should also ask claimant why she believes her cell phone alarm failed to wake her on March 22nd, but the employer's calls, presumably to the same cell phone, did.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether claimant's discharge was for misconduct, Hearing Decision 16-UI-59121 is reversed, and this matter is remanded for development of the record.

**DECISION:** Hearing Decision 16-UI-59121 is set aside, and this matter remanded for further proceedings consistent with this order.<sup>4</sup>

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

**DATE of Service: June 20, 2016**

**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>4</sup> **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-59121 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.