

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1183

Reversed & Remanded

PROCEDURAL HISTORY: On August 15, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 85152). Claimant filed a timely request for hearing. On September 19, 2017, ALJ Wyatt conducted a hearing, and on September 22, 2017, issued Hearing Decision 17-UI-93065, affirming the Department's decision. On October 5, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-93065 is reversed and this matter is remanded for further development of the record.

In Hearing Decision 17-UI-93065, the ALJ found that the employer discharged claimant on June 20, 2017 for not reporting for work or notifying the employer that she would be absent on June 18, 19 and 20, 2017 because she was incarcerated at the Lane County Jail from the early morning hours of June 17 until her release on June 22, 2017. Hearing Decision 17-UI-93065 at 1-2. The ALJ also found that claimant had been arrested for "DUII" and "reckless endangerment"¹ early on June 17 after being stopped for speeding with her children in her car and failing a breathalyzer test showing that her blood alcohol level exceeded the legal limit. *Id.* At hearing, claimant testified she had consumed alcohol at her residence the night of June 16 with her boyfriend, after which her boyfriend threatened both her and her children, causing her to go outside and call police from her van. Audio Record ~ 21:30 to 25:30. According to claimant, after about an hour, the police had not yet responded, and her boyfriend came out of the residence and angrily approached her van. Claimant testified that she became frightened and decided that it was necessary to drive herself and her children to her grandparents' house approximately five miles away. Along the way, she was stopped by the police who subsequently arrested her for the stated charges. *Id.* She later entered a diversion program to resolve the DUII charge and pled guilty to

¹ ORS 163.195 Recklessly endangering another person. (1) A person commits the crime of recklessly endangering another person if the person recklessly engages in conduct which creates a substantial risk of serious physical injury to another person. (2) Recklessly endangering another person is a Class A misdemeanor. [1971 c.743 §96].

reckless endangerment for which she was incarcerated until June 22, 2017, when she contacted the employer and explained her circumstances.

The ALJ concluded the employer discharged claimant for misconduct, reasoning that under *Weyerhaeuser Co. v. Employment Div.*² claimant was at least wantonly negligent because she willfully drove at an excessive speed after drinking, which ultimately led to her arrest, subsequent guilty plea and incarceration. Hearing Decision 17-UI-93065 at 3. He also concluded that by pleading guilty to reckless endangerment, the plea itself established, as a matter of law, that she was at least wantonly negligent in creating the situation that made it impossible for her to attend work. *Id.* However, the ALJ did not inquire, and the record fails to show, why claimant pled guilty to the crime of reckless endangerment.

It is true that the Court was not legally permitted to accept claimant's guilty plea unless claimant made the plea, and there was sufficient evidence to establish not only that claimant committed the crime, but that she did it willfully or consciously. *See accord* ORS 135.390 (requirements of a guilty plea); ORS 161.086(9)³ (defining the culpable mental state for commission of recklessly endangering another person). However, in view of claimant's testimony suggesting that the behavior that formed the basis of her conviction may have been justifiable as a choice between evils,⁴ such as either driving with her children while intoxicated or exposing her and her children to possible domestic violence, the ALJ should have inquired whether claimant was represented by legal counsel at the time of her plea, whether that possible defense had been considered and rejected, and if so, why. The ALJ should have also inquired whether her plea of guilty was made for reasons other than simply admitting she was guilty of the crime, for example to prevent the loss of child custody, or whether it was essentially an *Alford* plea, in which claimant refused to admit that she committed the criminal act but nonetheless agreed that there were sufficient facts to sustain a conviction for the crime alleged.⁵ Finally, the ALJ should have inquired if there was any other reason why she submitted to conviction for a crime she is now saying, in essence, that she did not commit.

² *Weyerhaeuser Co. v. Employment Div.*, 107 Or App 505 (1991) (When an employee's violation of an employer's attendance policy occurs because of incarceration, the relevant issue for the purpose of a misconduct analysis is whether claimant willfully or with wanton negligence created the situation that made it impossible for him or her to comply with the requirements of the attendance policy.)

³ ORS 161.086(9) "Recklessly," when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

⁴ 161.200 Choice of evils. (1) Unless inconsistent with other provisions of chapter 743, Oregon Laws 1971, defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when:

(a) That conduct is necessary as an emergency measure to avoid an imminent public or private injury; and
(b) The threatened injury is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.

⁵ An *Alford* plea is a guilty plea in which the defendant does not admit commission of the criminal act or asserts that he or she is innocent. In such a situation, the trial court must determine that there is a factual basis for the plea. *North Carolina v. Alford*, 400 US 25, 91 S Ct 160, 27 L Ed 2d 162 (1970).

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 had the mental state required for a willful or wantonly negligent failure to report for work from June 17 through June 20, 2017 or failure to maintain contact with the employer during that time frame, Hearing Decision 17-UI-93065 is reversed, and this matter remanded for further development of the record.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-93065 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.

DECISION: Hearing Decision 17-UI-93065 is set aside, and this matter remanded for further proceedings consistent with this order.

J. S. Cromwell and D. P. Hettle.

DATE of Service: November 7, 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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