

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1262**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On September 12, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 132404). Claimant filed a timely request for hearing. On October 11, 2017, ALJ Meerdink conducted a hearing, and on October 26, 2017 issued Hearing Decision 17-UI-95434, concluding the employer discharged claimant, but not for misconduct. On November 2, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

On November 16, 2017, the employer submitted timely written argument. However, the employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). We therefore did not consider the argument when reaching this decision. Even if we had, however, the outcome of this decision would remain the same. In its argument, the employer asserted that the final attendance violation resulting in claimant's discharge was misconduct because claimant had established a pattern of such violations. In a discharge case, however, the initial focus is on the final violation of the employer's expectations resulting in the claimant's discharge. Only if the final violation was willful or wantonly negligent does the focus shift to prior violations as necessary for a determination of whether final violation maybe excused as an isolated instance of poor judgment, and therefore not misconduct.<sup>1</sup> In the present case, we agree with the ALJ determination that the final attendance violation resulting in claimant's discharge was not willful or wantonly negligent, and therefore not misconduct. Claimant's prior attendance violations are not material to that determination.

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the hearing decision under review is **adopted**.

**DECISION:** Hearing Decision 17-UI-95434 is affirmed.

<sup>1</sup> See OAR 471-030-0038(3)(a) and (b) (August 3, 2011), and OAR 471-030-0038(1)(d).

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

**DATE of Service: November 22, 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](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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