

IOWA DEPARTMENT OF INSPECTIONS & APPEALS  
Division of Administrative Hearings  
Wallace State Office Building  
Des Moines, Iowa 50319

**Appeal Number:** 13IWDUI014  
**OC:** 11/25/12  
**Claimant:** Appellant (1)

**DECISION OF THE ADMINISTRATIVE LAW JUDGE**

**JOHN MCDONALD**  
**1143 PINEHURST CIRCLE**  
**NORWALK, IA 50211**

**IOWA WORKFORCE DEVELOPMENT**  
**JON NELSON, EMPLOYEE SERVICES**

MELISSA HASSO, ATTORNEY  
JONI BENSON, IWD

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to the Department. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

March 6, 2013

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(Dated and Mailed)

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Iowa Code section 96.5(2)(a) – Discharge Based on Misconduct

**STATEMENT OF THE CASE**

Claimant/Appellant John McDonald appeals from a decision by Iowa Workforce Development (“IWD”) dated December 19, 2012, reference 01, disqualifying him from receiving unemployment insurance benefits due to work-connected misconduct.

IWD transferred the matter to the Department of Inspections and Appeals to schedule a contested case hearing. A contested case hearing was held before Administrative Law

Judge Heather Palmer at the Wallace State Office Building on February 7, 2013. Attorney Melissa Hasso represented Appellant John McDonald. McDonald appeared and testified. Lori Adams testified on behalf of Respondent Iowa Workforce Development (“IWD”). Jon Nelson also appeared on behalf of IWD, but did not testify. Exhibits 1 through 29 and A through H were admitted into the record.

### **ISSUE**

Whether the claimant was discharged for work-connected misconduct.

### **FINDINGS OF FACT**

IWD hired McDonald in 1989. During his employment McDonald worked as a Workforce Program Coordinator. McDonald worked for IWD for many years without any problems. McDonald worked in IWD’s Work Opportunity Tax Credit (“WOTC”) Program. The WOTC Program provides federal tax credits to employers who hire persons receiving food assistance, benefits through the Family Investment Program, and with criminal backgrounds. McDonald reported he was responsible for data entry, answering the telephone, and advising employers and parties on the WOTC program. McDonald also worked as the State Monitor Advocate and with the Migrant and Seasonal Farmworker Program.

Adams was McDonald’s supervisor. Adams testified driving is an essential function for Workforce Program Coordinators. McDonald denied Adams’ contention. McDonald contends he spent the majority of his time at his desk and never drove to work-related appointments in the last two years of his employment.

From Sunday, March 21, 2010 through Wednesday, March 24, 2010, McDonald attended training offered by the United States Department of Labor (“DOL”) in San Antonio, Texas as part of his duties with the Migrant and Seasonal Farmworker Program. Following the conference, Eric Hernandez with the DOL in Chicago contacted Adams to discuss McDonald’s behavior at the conference. Hernandez and his supervisor, Corey Bulluck spoke with Adams on March 29, 2010. Carla Lakes with the DOL also participated in the call. During the call, the DOL staff reported McDonald was inebriated at the conference and engaged in inappropriate actions with women at the conference. Adams testified that during the conference McDonald was on work time.

Lakes has known McDonald for some time. She reported the Sunday before the start of the conference she greeted McDonald at a restaurant and he responded “[w]e don’t like your kind.” Lakes is an African-American woman. Lakes noted McDonald pulled her arm, touched her buttocks and was intoxicated.

Lakes reported the following Tuesday she saw McDonald during a conference dinner. He told Lakes he liked her hair, and touched her hair and rubbed her shoulders. According to the DOL staff, another person sitting at the table told McDonald to sit down and McDonald responded, “you’re not her husband.” Hernandez reported that after the incident a person came to him and reported McDonald had rubbed another person’s back and shoulders. Hernandez said he took McDonald into the hallway and told him to take it down a notch

for the sake of his career. According to Hernandez, McDonald responded, "I don't have to listen to you, you're not my supervisor" and went back to dinner, where he grabbed a member of the wait staff. Hernandez, Bulluck and Lakes described McDonald's behavior as "vulgar."

IWD commenced an investigation. Nelson and Adams interviewed McDonald. A representative from the union, AFSCME Council 61, was also present. During the interview McDonald acknowledged he attended the conference and that he knew Hernandez and Lakes, who worked as monitors for the DOL. He stated he was not familiar with Bulluck. When questioned, McDonald stated he would be surprised if people at the conference described him as "inebriated." McDonald acknowledged drinking three to four mixed drinks during the evening.

McDonald denied making the statement "we don't like your kind" to Lakes, denied touching her hair and rubbing her shoulders, and denied someone told him to sit down. McDonald stated he may have told Lakes he liked her hair. McDonald admitted Hernandez spoke with him about touching someone, but reported Hernandez did not tell him who he allegedly touched.

IWD staff later spoke with the DOL staff. The DOL reported the hotel wait staff would not be suing McDonald, but he would not be invited back for future conferences.

On April 6, 2010, Adams provided McDonald with a letter stating his behavior was both unprofessional and unacceptable at the conference. IWD concluded McDonald violated IWD's Work Rules as follows:

*Employees are required to adhere to the expectations regarding personal conduct as presented under the following headings and understand that infractions of these rules will result in disciplinary action, if appropriate.*

2. *Work Performance*
  - a) *Deliberate and willful refusal to follow the written or oral instructions of supervisory authority, or to carry out work assignments.*
3. *Personal Action & Appearance*
  - c) *Using abusive or profane language toward others, including ethnic slurs.*
  - f) *Failure to comply with the current Notice of Revised Substance Abuse Policy.*
  - g) *Lying during an investigation.*
  - k) *Workforce Development Department employees will present themselves in a manner which enhances the accomplishments of the Department's mission.*

(Exhibit 6). Adams wrote that McDonald was expected to conduct himself in a professional manner and comply with the following:

- You will be expected to complete drug & alcohol assessment, and to report to your supervisor when that is complete.
- You will be expected to attend drug & alcohol counseling.
- You will be expected to maintain sobriety while representing Iowa Workforce Development and the State of Iowa.
- You will not be allowed to drive a state vehicle on official business for a minimum of 60 days.
- You will not be authorized to attend out of state conferences until further notice.
- You will complete and return requested Family Medical Leave Act documentation.

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(Exhibit 6). IWD also removed McDonald from his duties and the State Monitor Advocate. The letter further provided any additional “violations of Iowa Workforce Development work rules will result in more severe disciplinary action, up to and including discharge.” (Exhibit 6). McDonald signed the letter.

The afternoon of January 13, 2011, IWD Director Elizabeth Buck received a message from Lieutenant Dave Garrison with the Iowa State Patrol. Buck returned the call and received information McDonald had been arrested for operating a motor vehicle while intoxicated (“OWI”), first offense and that he had threatened to kill an officer at the Polk County Jail. IWD commenced an investigation.

IWD reviewed public records showing on January 12, 2011, McDonald had been arrested and charged with first degree harassment, OWI, and failure to maintain control. Adams contacted Des Moines Police Officer Mike Dixon. Officer Dixon reported he responded to a call that a vehicle was stuck in a snowdrift on January 12, 2011. Officer Dixon identified McDonald as the driver. He believed McDonald was intoxicated and reported McDonald failed field sobriety testing. Officer Dixon relayed McDonald was initially cooperative, but then became angry and verbally abusive while he was being transported to the jail. Officer Dixon stated McDonald was using vulgar language and called one police officer a “nigger.” Officer Dixon reported that McDonald told him “I’m going to kill you, I’m going to kill you all,” which led to the first degree harassment charge. Officer Dixon stated the Des Moines Police Department reported the incident to the Iowa State Patrol because McDonald was making statements about his job title and responsibilities for the state of Iowa.

Adams called McDonald to her office to meet with her and Heidi Wicks. Adams advised McDonald he was being investigated and the investigation could lead to discipline, including discharge. McDonald did not request a union steward.

Adams asked McDonald where he was on Thursday, January 13, 2011. McDonald replied he was sick. Adams told him she was going to start over and was willing to provide McDonald with a change to tell the truth because she knew where he was. McDonald replied he consumed some beers at the Holiday Inn and was pulled over. Adams told McDonald Buck had been contacted by the Des Moines Police and that while the incident

occurred on his private time, IWD had received information he was making statements referencing his employment and that made it her business.

Adams reviewed work rule 1A – Attendance – Failure to Call Supervisor with McDonald prior to the start of the shift. McDonald stated he was familiar with the rule, but did not have an opportunity to call and when he was released from jail he was embarrassed and called a cab.

Adams asked McDonald to comment on the statements made by Officer Dixon. He confirmed his car was stuck in the snow, but disputed he failed field sobriety testing. McDonald reported he was cooperative and denied threatening to kill the officers, being verbally abusive, using vulgar words, and calling an officer “a nigger.”

McDonald told Adams he felt sick and requested to go home for the rest of the day. Adams granted his request.

Adams contacted Nelson, a former drug and alcohol counselor working for IWD to discuss the situation. Adams and Nelson decided McDonald should be placed on a Last Chance Agreement because of the earlier complaint IWD received from the DOL about McDonald's alcohol use and behavior during the conference in 2010.

Adams looked at McDonald's work schedule and found he was supposed to complete housing inspections on January 18, 2011, which would require him to drive. Adams called McDonald and told him his state vehicle privileges were suspended. McDonald was not happy he could not drive a state car and Adams told him he could reschedule the inspections. While McDonald reported driving was not an essential function of his position, he did not rebut this testimony at hearing.

McDonald later contacted Adams and said he would drive his own vehicle for the inspections on January 18, 2011, and he would bring in proof of insurance and of his ability to drive. McDonald provided Adams with proof of his insurance and ability to drive on January 18, 2011. McDonald was upset and concerned he would lose his job. McDonald wanted to maintain his employment. Adams suggested he complete inpatient counseling.

In lieu of discipline, IWD offered McDonald a Last Chance Agreement where McDonald agreed to attend a substance abuse evaluation and all recommended treatment, provide monthly updates to his supervisor, to not come to work with the odor of alcohol on his person and to “avoid any alcohol-related convictions during the term of this Agreement.” (Exhibit G). McDonald signed the Last Chance Agreement on January 21, 2011. The term of the agreement was two years. Danny Homan, the President of AFSCME Iowa Council 61, reviewed the Last Chance Agreement and signed it.

McDonald completed a substance abuse assessment in January 2011. He was referred to intensive outpatient counseling. McDonald completed outpatient counseling with the Everest Institute. His beginning and ending diagnosis was alcohol abuse. McDonald successfully completed all recommended treatment.

On November 5, 2012, McDonald came to work with a disheveled appearance. Several IWD employees believed he might be intoxicated. McDonald expressed he was depressed and not feeling well. McDonald acknowledged he had taken some prescribed medication. He left work, ill. Given McDonald's unusual behavior, IWD conducted an investigation to determine whether McDonald was using alcohol. When Adams questioned McDonald about his alcohol use, McDonald reported he had not drunk in a long time and that he had "all but given that up." IWD found no evidence McDonald reported to work under the influence of alcohol.

Because of McDonald's unusual behavior and statements, IWD conducted research of public records and discovered McDonald had been arrested and charged with OWI, second offense, and failure to maintain control in Norwalk, Warren County, Iowa on Saturday, August 18, 2012. McDonald was not performing any job duties for IWD at the time of his arrest. The public records revealed McDonald entered a guilty plea to OWI, second offense, on November 9, 2012.

IWD commenced an investigation. McDonald admitted he had been arrested and entered a guilty plea to OWI, second offense. IWD placed McDonald on a paid suspension.

On November 26, 2012, Adams terminated McDonald's employment finding under the Last Chance Agreement he "agree to avoid any alcohol-related convictions for the two-year term of the Agreement" and he had admitted to pleading guilty to OWI, second offense. (Exhibit H). McDonald filed for unemployment insurance benefits. IWD issued a decision December 19, 2012, finding McDonald was not eligible for unemployment insurance benefits because he was discharged from work on November 27, 2012 for failing to follow instructions as contained in the Last Chance Agreement. (Exhibit 29). McDonald appealed.

## CONCLUSIONS OF LAW

A claimant may be disqualified from receiving unemployment insurance benefits if IWD finds the claimant has been discharged for misconduct in connection with the individual's employment.<sup>1</sup> The employer bears the burden of proving the claimant is disqualified for misconduct.<sup>2</sup> "Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits."<sup>3</sup>

IWD's rules define misconduct as: (1) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees; (2) carelessness or negligence of such a degree of recurrence as to manifest equal culpability, wrongful intent, or evil design; or (3) an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.<sup>4</sup> Mere inefficiency,

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<sup>1</sup> Iowa Code § 96.5-2-a; *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000); 871 IAC 24.32(1)b.

<sup>2</sup> *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000)

<sup>3</sup> *Id.* (quoting *Reigelsberger v. Employment Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993)).

<sup>4</sup> 871 IAC 24.32(1).

unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies, or ordinary negligence in isolated instances or good faith errors in judgment or discretion are not misconduct within the meaning of the statute.<sup>5</sup> Because the administrative rules focus on conduct that was “deliberate, intentional, or culpable,” the Iowa Supreme Court has found that “whether misconduct has occurred requires proof that the employee acted intentionally; a showing of mere negligence is not enough to constitute misconduct.”<sup>6</sup>

McDonald’s alcohol use has impacted his work and resulted in two convictions for OWI. McDonald was arrested for OWI, second offense, on August 18, 2012, and entered a guilty plea to the offense on November 9, 2012. McDonald did not inform IWD of his arrest or guilty plea. IWD later discovered McDonald had been arrested and entered a guilty plea to OWI, second offense, and terminated his employment for violating the Last Chance Agreement.

When McDonald entered into the Last Chance Agreement he agreed not to “come to work with the odor of alcohol on his person (violation to be determined by a minimum of two management personnel)” and agreed to “avoid any alcohol-related convictions during the term of this Agreement.” (Exhibit 10). Violation of the odor of alcohol restriction requires that the act occur while at work. The alcohol-related conviction term is not restricted to time or place.

In the case of *Kleidosty v. Employment Appeal Board*, 482 N.W.2d 416 (Iowa 1992), the employer, Rolscreen, terminated Kleidosty after she entered a guilty plea to delivery of cocaine, a class “C” felony. The employer had three work rules. The first two related specifically to controlled substances, but required the act occur on campus. The third work rule prohibited employees from engaging in “illegal, immoral or indecent conduct.” The Iowa Supreme Court found the third rule was not restricted to time or place. The Court held the employer’s rules regarding such conduct were clear and Kleidosty’s act of selling cocaine in the face of the rule constituted a “deliberate violation” under the definition of misconduct. As with *Kleidosty*, McDonald’s arrest and conviction through a guilty plea to OWI, second offense, arose out of conduct occurring outside the workplace on a Saturday. McDonald entered the Last Chance Agreement and agreed to avoid any alcohol-related convictions during the term of the Last Chance Agreement. McDonald’s conviction for OWI, second offense, occurred during the term of the Last Chance Agreement. McDonald’s conviction for OWI, second offense, constitutes a “deliberate violation” of the Last Chance Agreement. IWD correctly denied McDonald’s request for unemployment insurance benefits.

## DECISION

IWD’s decision, reference 01, dated December 19, 2012, is AFFIRMED.

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<sup>5</sup> *Lee*, 616 N.W.2d at 665.

<sup>6</sup> *Id.* (quoting *Reigelsberger v. Employment Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993)).