IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

CHEIKH SECK,	)	
	)	
Appellant,	)	
	)	
v.	)	WD75148
	)	
DIVISION OF EMPLOYMENT SECURITY,	)	Opinion filed: June 11, 2013
	)	
	)	
Respondent.	)	

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

Before Division Three: Cynthia L. Martin, Presiding Judge,
Joseph M. Ellis, Judge and Gary D. Witt, Judge

Cheikh Seck ("Claimant") appeals from an order issued by the Labor & Industrial Relations Commission disqualifying him from receiving unemployment benefits for six weeks based upon a finding that he was terminated from his employment with the Missouri Department of Transportation ("Employer") for misconduct related to work. For the following reasons, the Commission's decision is reversed.

Claimant was hired by Employer as a bridge maintenance worker on July 19, 2010. On July 18, 2011, Claimant informed Employer that he had injuries to his shoulder and thumb that he thought required treatment. Employer told Claimant that he

needed to leave work and seek treatment for those conditions from his personal physician. On July 19, 2011, Appellant sought treatment from Dr. Jacquelyn Allen, who diagnosed him with a left shoulder strain and thumb pain. She prescribed muscle relaxants and physical therapy for his shoulder. She released him to return to light-duty work, restricting him from lifting over twenty pounds due to his injury and from the use of heavy machinery due to the side effects of the muscle relaxants.

When Claimant reported back to work and provided Employer with a form from the doctor noting the work restrictions, Employer informed Claimant that no light-duty work was available and that he could not return to work until he had a release to return to full duty from his doctor. Claimant was told he would have to use sick days or vacation while he was off work. Claimant returned to the doctor twice attempting unsuccessfully to have the restrictions sufficiently lifted to return to work.

On August 2, 2011, Claimant again returned to the doctor's office. He was seen by the doctor's nurse, who obtained a Medical Certification from Dr. Allen releasing him to return to work without restriction.[1]

On Wednesday, August 3, 2011, Claimant faxed a copy of the Medical Certification to his employer. On that form, in the space designated for "Time

[1] Claimant asserted in his written statement to the Appeals Tribunal and in his testimony that, on July 26, he provided Employer with a prescription note from Dr. Allen, obtained at an appointment on July 25, stating that he was released to return to work without restriction but that Employer refused to allow him to return to work until the doctor filled out Employer's Medical Certification form. While it is unclear whether the Commission accepted that testimony as credible, it would provide a reasonable explanation why Claimant was only seen by the doctor's nurse on August 2 prior to being given the Medical Certification release form.

Examination Completed," which had been left empty by the doctor, Claimant wrote, "finish medecine [sic] and return to work 8/8."[2]

Upon receiving the Medical Certification form, Employer found the misspelling of the word medicine as "medecine" on the form suspicious. Employer called the doctor's office and was informed that the doctor had not written the statement related to medicine and that Claimant had been released to return to work August 2.

After he had returned to work on August 8, Claimant was approached by his supervisor and asked about the line on the form about finishing his "medecine," and Claimant acknowledged personally writing that line. Claimant continued to work for Employer until September 8, 2011, when he was informed by Employer that he was being terminated for falsifying the doctor's note.

On September 13, 2011, Claimant filed a claim for unemployment benefits with the Division of Employment Security ("the Division"). On September 21, 2011, Employer filed its letter of protest simply stating that Claimant had been "released from employment due to unsuccessful conduct" and requested that he be disqualified from unemployment compensation "due to the circumstances surrounding [his] release." No further explanation was provided. On October 5, 2011, after discussing Claimant's termination with a human resources employee of Employer over the telephone, a deputy for the Division issued his determination that Claimant should be disqualified from unemployment benefits for six weeks because he had been discharged for

[2] The Division concedes on appeal that, before Claimant faxed the doctor's form to Employer, during a telephone conversation with his supervisor, "[Claimant] told the supervisor that he had a full release to return, but he would like to delay his return so that he could take the rest of his muscle relaxants." It is unclear from the Commission's decision, however, whether the Commission accepted this now conceded fact.

misconduct connected with work for falsifying a doctor's note and submitting it to Employer.

Claimant filed an appeal of the deputy's determination with the Appeals Tribunal. A hearing was conducted on November 4, 2011. Employer did not participate in that hearing. The Appeals Tribunal subsequently issued its decision concluding that Claimant had been discharged from his employment for falsifying his doctor's note to change his return to work date from August 2 to August 8 and that such actions constituted misconduct connected to his work. The Appeals Tribunal found:

> Claimant falsified the doctor's note by writing on the document that he was released to work on August 8, 2011. Claimant asserts that he wanted to return to work. However, the claimant changed his return to work date from August 2, 2011 to August 8, 2011, which is misconduct. Claimant was not credible.

Claimant filed an application for review with the Labor and Industrial Relations Commission. On March 27, 2012, the Commission affirmed the decision of the Appeals Tribunal and adopted that decision as its own.

In his sole point on appeal, Claimant contends that the Commission erred in denying him benefits because the evidence was insufficient to support a finding that he was guilty of misconduct. Our review of the Commission's decisions is governed by § 288.210 which states:

> The findings of the commission as to facts, if supported by competent and substantial evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the appellate court shall be confined to questions of law. The court, on appeal, may modify, reverse, remand for rehearing, or set aside the decision of the commission on the following grounds and no other:
>
> (1) That the commission acted without or in excess of its powers;

(2) That the decision was procured by fraud;
(3) That the facts found by the commission do not support the award; or
(4) That there was no sufficient competent evidence in the record to warrant the making of the award.

"To determine whether there is sufficient competent and substantial evidence to support the Commission's decision, we examine the evidence in the context of the entire record." ***Scott v. Division of Emp't Sec.***, 377 S.W.3d 603, 605 (Mo. App. W.D. 2012) (citing ***Hampton v. Big Boy Steel Erection***, 121 S.W.3d 220, 222-23 (Mo. banc 2003)). "[W]e defer to the Commission on issues involving the credibility of witnesses and the weight to be given to their testimony." ***Martinez v. Nationwide Paper***, 211 S.W.3d 111, 115 (Mo. App. S.D. 2006). "However, we owe no deference to the Commission's conclusions of law or application of the law to the facts." ***Higgins v. Missouri Div. of Emp't Sec.***, 167 S.W.3d 275, 279 (Mo. App. W.D. 2005).

"Pursuant to § 288.050.2, if an individual is fired for misconduct connected with his or her work, that individual may be denied employment security benefits for four to sixteen weeks." ***Peck v. La Macchia Enters.***, 202 S.W.3d 77, 80 (Mo. App. W.D. 2006). "In general, a claimant bears the burden of demonstrating that he or she is entitled to unemployment benefits; however, when the employer claims that the applicant was discharged for misconduct, the burden shifts to the employer to prove the claim of misconduct connected with work."[3] ***Id***.

[3] While Employer, which bore the burden of proving misconduct, did not participate in the hearing, "[n]evertheless, in all cases where the burden of proof is on one party, the evidence produced by the other party may lift or lighten the load." ***Scott v. Division of Emp't Security***, 377 S.W.3d 603, 606 (Mo. App. W.D. 2012) (internal quotation omitted). "There is no requirement that the evidence presented and considered by the decision-maker must have been offered by the party bearing the burden of proof." ***Id***. (internal quotation omitted).

"[T]here is a vast distinction between conduct justifying an employee's termination and misconduct precluding unemployment benefits." ***Scott***, 377 S.W.3d at 606 (internal quotation omitted). Section 288.030.1(23), RSMo Cum. Supp. 2010, defines "misconduct" as:

> an act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of standards of behavior which the employer has the right to expect of his or her employees, or negligence in such degree or recurrence as to manifest culpability, wrongful intent or evil design, or show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer.

"Each of these categories of misconduct requires a culpable intent on the part of the employee." ***Scott***, 377 S.W.3d at 605. "Work-related misconduct must involve a willful violation of the rules or the standards of the employer." ***Mathews v. B & K Foods, Inc.***, 332 S.W.3d 273, 277 (Mo. App. S.D. 2011) (internal quotation omitted). "Willful misconduct can be established when a claimant, either by action or inaction, consciously disregards the interest of the employer or behaves in a way that is contrary to that which an employer has a right to expect from an employee." ***West v. Baldor Elec. Co.***, 326 S.W.3d 843, 847 (Mo. App. E.D. 2010). "Whether an employee's actions constituted misconduct is a question of law that we review *de novo*." ***Scott***, 377 S.W.3d at 605.

Certainly, willfully falsifying documents with the intent to deceive an employer can constitute misconduct related to work. *See* ***Massey v. Labor & Industrial Relations Comm'n***, 740 S.W.2d 680, 681-83 (Mo. App. E.D. 1987) (holding willful falsification of medical history report in application for employment can constitute misconduct if the

false statement was material to the employment); *see also* ***Miller v. Kansas City Station Corp.***, 996 S.W.2d 120, 123 (Mo. App. W.D. 1999) (noting that lying to one's employer about being sick in order to miss scheduled work can be grounds for finding the employee barred from receiving benefits due to misconduct associated with work). However, for a discharge based upon an employee lying or falsifying documents to result in a denial of unemployment benefits based upon misconduct connected with work, the falsification must be material to the employment. ***Massey***, 740 S.W.2d at 681-83. For instance, an employee could properly be fired for lying to his employer about having won first place in a pie-eating contest and producing a counterfeit certificate or picture in support of that lie but, absent evidence that the false representation was material to the employee's employment, denial of unemployment benefits for misconduct would be improper.

In the case at bar, the record contains no evidence that the statement on the doctor's Medical Certification was of any import to Employer, aside from the lack of attribution as to its source serving as the reason stated for its termination of Claimant's employment. No evidence was submitted at the hearing that Employer required a doctor's note for an employee to take a sick day;[4] the evidence established only that Employer required Claimant to produce a doctor's note clearing him to return to work without restriction before Employer would allow Claimant to return to work.[5] Likewise,

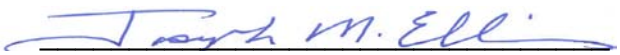
[4] The record also does not reflect whether or not the sick days taken by Claimant were paid or unpaid.

[5] Indeed, as noted *supra*, though it is unclear whether the Commission found it credible, Claimant asserted in his written statement to the Appeals Tribunal and in his testimony that, on July 26, he provided Employer with a prescription note from Dr. Allen, obtained at an appointment on July 25, stating that he was released to return to work without restriction but that Employer refused to allow him to return to work until the doctor filled out Employer's Medical Certification form. Even discounting this

no evidence was submitted indicating that Employer otherwise wanted Claimant to return to work prior to August 8, that Claimant knew that Employer wanted him back before that date, or that Employer had any objection to Claimant taking August 3 and 4 off as sick days regardless of what was stated in the doctor's note.[6] Thus, there is no evidence in the record that the content of the notation made by Claimant, even if misleading as to its source, was material to Employer or Claimant's employment.

As noted *supra*, Employer bore the burden of proving misconduct connected with work. ***Peck***, 202 S.W.3d at 80. Part of that burden was proving that the false statement for which the claimant was fired was material to Claimant's employment. ***Massey***, 740 S.W.2d at 681-83. The record in this case simply does not contain sufficient, competent evidence from which the Commission could have determined that this burden was satisfied.

The Commission's decision is, therefore, reversed.



Joseph M. Ellis, Judge

All concur.

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uncontradicted testimony, nothing in the record reflects that Employer's reason for requiring Claimant to produce the medical form was for any reason other than requiring a full release before allowing Claimant to return to work.

[6] As noted *supra*, the Division concedes on appeal that, before Claimant faxed the doctor's form to employer, during a telephone conversation with his supervisor, "[Claimant] told the supervisor that he had a full release to return, but he would like to delay his return so that he could take the rest of his muscle relaxants." Nothing in the record indicates that the supervisor offered any objection to that course of action.