

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**VIRGIL WALKER,**

**Appellant,**

**v.**

**DIVISION OF EMPLOYMENT SECURITY,**

**Respondent.**

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DOCKET NUMBER WD71876

**Date: March 1, 2011**

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Appeal from:  
Labor and Industrial Relations Commission

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Appellate Judges:  
Division Two: Joseph M. Ellis, P.J., Alok Ahuja and Karen King Mitchell, J.J.

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Attorneys:  
Virgil Walker, Appellant Pro Se,  
Shelly A. Kintzel, Esq., Jefferson City, MO, for respondent.

**MISSOURI APPELLATE COURT OPINION SUMMARY**  
**COURT OF APPEALS -- WESTERN DISTRICT**

**VIRGIL WALKER**

**Appellant,**

**v.**

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WD71876

Labor and Industrial Relations Commission

Before Division Two Judges: Joseph M. Ellis, P.J., Alok Ahuja and Karen King Mitchell, J.J.

Virgil Walker worked for Adesa St. Louis, Inc. as a driver in a vehicle auction lot in Belton. Based on an incident in February 2009, Walker had been admonished by management that he could not leave work early without notifying his supervisor in advance.

Walker worked almost twelve hours on June 29, 2009. Because of the heat, he testified that when he left on June 29 he felt "kind of sick" and "heat exhausted." On June 30, Walker was at work as usual, but after ten hours on the job, he again became "kind of woozy" and "fatigued" due to the heat. Walker checked in the office for the facility manager, but could not find her; Walker's immediate supervisor was on vacation. Walker accordingly informed another employee, who he believed to be in charge in the absence of his other supervisors, that he was sick and leaving early. On July 1, Walker again left work early, again after working approximately ten hours.

Adesa ultimately terminated Walker for leaving work on June 30 and July 1, 2009, without informing his supervisor. An Appeals Tribunal referee concluded that Walker had committed misconduct. The Labor and Industrial Relations Commission adopted the Appeals Tribunal's decision by a 2-1 vote. Walker appeals.

**REVERSED.**

**Division Two holds:**

On appeal, the Department of Labor and Industrial Relations concedes that the Commission's decision is not supported by sufficient competent evidence in the record. We agree.

Under § 288.050.2, RSMo, a claimant is disqualified from receiving unemployment benefits "[i]f a deputy finds that a claimant has been discharged for misconduct connected with the claimant's work." The burden of proving misconduct is on the employer. "Misconduct" requires that the employee willfully disregard employer requirements of which the employee is aware.

Here, the Appeals Tribunal decision adopted by the Commission contains several fundamental factual errors. The referee erroneously found as a fact that Walker left his employment "midway through [his] regular eight-hour shift" without notifying a supervisor, although Walker in fact left after ten hours of a shift of indefinite duration. The Tribunal's finding that Walker "made no effort" to inform his supervisor also materially misstates the evidence, because Walker's uncontroverted testimony indicates that he could not locate the facility manager or his immediate supervisor, and therefore decided to tell another employee who had previously been in charge when other supervisors were absent. Moreover, although the referee found that there was "[n]o evidence" that Walker "had been unable or too sick to leave a note, or phone the supervisor when he got home," there is no indication that the employer's work rules required such efforts. Moreover, a lack of evidence on this issue should work against the employer – who bears the burden of proving misconduct – not against Walker.

Our review of the record indicates that the employer failed to satisfy its burden to establish misconduct. The employer presented only two witnesses. They disagreed as to the identity of the individuals to whom Walker had a duty to report. Moreover, neither of them had personal knowledge of the circumstances surrounding Walker's departure from work on June 30 or July 1, 2009. Thus, the record contains only Walker's account of the relevant events. There is no evidence that Walker's supervisors were capable of being contacted; nor was there evidence as to precisely what Adesa's policies required Walker to do when his supervisors were unavailable. In these circumstances, there was not sufficient competent evidence from which to conclude that Walker willfully violated rules or standards of his employer of which he was aware. Misconduct was not proven.

**Opinion by: Alok Ahuja, Judge**

March 1, 2011

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