

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**CHEIKH SECK,  
APPELLANT  
vs.**

**DIVISION OF EMPLOYMENT SECURITY,  
RESPONDENT**

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DOCKET NUMBER WD75148

DATE: JUNE 11, 2013

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Appeal from:

The Labor and Industrial Relations Commission

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Appellate Judges:

Division Three: Cynthia L. Martin, P.J., Joseph M. Ellis and Gary D. Witt, JJ.

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Attorneys:

Jeffrey B. Berman, for Appellant

Caroline Zuschek, Rule 13 for Appellant

Ninion S. Riley, for Respondent

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**MISSOURI APPELLATE COURT OPINION SUMMARY**

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**CHEIKH SECK, APPELLANT**

**v.**

**DIVISION OF EMPLOYMENT SECURITY, RESPONDENT**

WD75148

Labor and Industrial Relations

Before Division Three Judges: Cynthia L. Martin, P.J., Joseph M. Ellis and Gary D. Witt, JJ.

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. While on sick leave for thumb and shoulder injuries, Seck faxed Employer a copy of a Medical Certification from his doctor whereupon he had written, in a space designated for "Time Examination Completed," which had been left empty by the doctor, "finish medicine [sic] and return to work 8/8." 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. A month later, Employer terminated Seck based upon an assertion that he had presented a falsified document to Employer.

**REVERSED.**

**Division Three holds:**

(1) For a discharge based on 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. The employer bears the burden of proving materiality

(2) In this case, the record contains no evidence that the written notation by Seck was of any import to Employer, which chose not to participate in the hearing. No evidence was submitted at the hearing that Employer required a doctor's note for an employee to take a sick day; 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. Likewise, 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. 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.

Opinion by Joseph M. Ellis, Judge

Date: June 11, 2013

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