

New Jersey Court Clarifies Meaning of 'Job Abandonment' Under Unemployment Benefits Law

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Employee handbooks commonly contain a policy providing that employees who fail to report to work for three consecutive business days (*i.e.*, no-call-no-show) will be deemed to have resigned through job abandonment. By designating the termination of employment as a voluntary quit, employers no doubt intend to prevent the employee from collecting unemployment compensation because they are charged a percentage of each unemployment payment made to a former employee, and unemployment benefits are not available to employees who voluntarily quit a job without good cause attributable to the job. See N.J.S.A. 43:21-5(a). A recent decision by the New Jersey Superior Court - Appellate Division serves to encourage employers with job abandonment policies to review and, as applicable, revise them to provide that "resignation" occurs after a minimum five-day unexcused absence. *Espina v. Board of Review*, unpublished, (App. Div. August 1, 2008).

In *Espina*, the employer, Keybank National Association, had granted its employee Dyana Espina an approved FMLA leave through April 13, 2006, for maternity and newborn childcare. Upon exhaustion of her FMLA leave, Keybank granted Espina's request for an additional week of leave because she did not have childcare. In doing so, it advised Espina in writing that (i) the additional time-off was an "unauthorized leave of absence," (ii) she was expected to return to work Wednesday April 26, 2006 and (iii) failure to return to work as scheduled would be considered a voluntary resignation. The bank denied Espina's additional request for an extension of the return to work deadline, as well as her request to convert to part-time status.

Espina did not report to work as required on April 26, 2006, because she had not yet been able to find acceptable childcare. In accordance with its letter, Keybank terminated her employment that day by letter, stating: "You did not return to work on Wednesday April 26, 2006. We accept this as your voluntary resignation from your position effective immediately." Three business days later, on Monday, May 1, Espina advised Keybank that she had obtained childcare and requested

reinstatement. The company refused.

Thereafter, Espina applied for unemployment benefits, which were initially granted. On administrative appeal by Keybank, however, the Department of Labor's unemployment compensation Appeal Tribunal reversed, finding Espina was ineligible for benefits because she had voluntarily quit, and the disallowance was upheld by the Board of Review. Espina appealed the denial of unemployment to the Appellate Division, arguing that under the New Jersey's Unemployment Benefits law and associated regulations, Keybank could not characterize her termination as job abandonment until five days after her scheduled return to work. She argued that the bank had acted prematurely by discharging her the first day she failed to return, and that she was therefore entitled to unemployment benefits. The Appellate Division agreed.

In rendering its decision, the Court looked to the Division of Unemployment Compensation's regulations interpreting what constitutes leaving work voluntarily without good cause as set forth in N.J.S.A. 43:21-5(a). Dispositive for the Court was the Division's regulation stating:

An employee who has not returned to work following an approved leave of absence pursuant to the employer's written policy, union contract or business custom and who without good cause has not notified the employer of the reasons for failing to return to work within **five** consecutive work days shall be considered to have abandoned his or her employment. Such job abandonment shall subject the employee to disqualification for benefits for voluntarily leaving work without good cause attributable to such work. [N.J.A.C. 12:17-9.11(b)(emphasis added).]

The Court found that "the clear and unambiguous language of the regulation" compelled reversal of the denial of unemployment benefits because Espina's discharge occurred before five days had elapsed. The Court noted that N.J.A.C. 12:17-10.3 has a similar five-day period for employees who are discharged or suspended for unauthorized absence.

In ruling that Espina was entitled to unemployment benefits, the Court did not challenge Keybank's decision to discharge Espina. Rather, it expressly acknowledged that an employee's "inability to return to work due to the unavailability of childcare arrangements is ... not 'good cause'" within the meaning of the law and that Espina's willingness to return to work before the five-day period had elapsed did not require the employer to reinstate her. Her immediate discharge upon failure to return to work as scheduled, the Court ruled, provided Espina with only the opportunity to collect unemployment.

The Court's decision in *Espina* provides an important reminder to employers as to when job abandonment is deemed to occur for purposes of unemployment compensation ineligibility. In light of the decision, employers may wish to review their

handbooks and policies regarding termination of employment for failure to return to work and for no-call-no-show absences to establish a five-day, rather than a three-day, discharge rule.

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