

New Jersey Law Journal

VOL. CXCIV - NO.8 - INDEX 750

NOVEMBER 24, 2008

ESTABLISHED 1878

IN PRACTICE

EMPLOYMENT LAW

Employers Must Be Careful With The Timing of Discharge Decisions

The meaning of 'job abandonment' under unemployment benefits law

BY MAXINE H. NEUHAUSER

Most supervisors, human resource employees and employment lawyers think that they know when an employee has abandoned their job. If, in Woody Allen's view, "eighty percent of success is just showing up," common sense says that being at work, or at least explaining why you are not, has to be a big factor in keeping your position. So, one might think that failing to show up to work, or failing to return as scheduled after an approved leave of absence, should clearly constitute job abandonment. A recent decision by the New Jersey Superior Court Appellate Division has served to clarify that not showing up will not necessarily constitute job abandonment disqualifying an employee from unemployment. Unless employers are careful about the timing of their discharge decisions, employees properly terminated for not reporting to work may nevertheless receive, and employers be charged for, unemployment benefits.

In *Espina v. Board of Re-*

Neuhauser is a member of the Newark office of Epstein Becker & Green.

view, unpublished, (App. Div. August 1, 2008), the employer Keybank National Association had granted its employee Dyana Espina, 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 a second 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 the Division of Unemployment Compensation initially granted. On administrative appeal by Keybank, however, the Department of Labor's unemployment compensation Appeal Tribunal reversed, finding that Espina was ineligible for benefits because she had voluntarily quit. The disallowance was upheld by the Board of Review and after additional administrative proceedings confirming the denial of benefits, Espina ultimately appealed to the Appellate Division. Espina argued 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 unauthor-

ized 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 only with 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. 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). The *Espina* decision thus serves to encourage employers to review, and as applicable, revise them to provide that "resignation" occurs after a minimum five-day unexcused absence. Moreover, employers who wish to successfully oppose unemployment compensation benefits to employees who fail to return from FMLA or other leaves of absence, will be well advised to provide a five-day grace period before formally terminating the employee. ■