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"No Show, No call" No Unemployment Benefits? Well, Maybe . . . Making Job Abandonment Stick in New Jersey

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We get this and similar questions from employers often, "Our policy states that if an employee does not show up for work or call in for three days it is deemed job abandonment. We make sure they have the policy and understand it. So why did the Department of Unemployment deem them eligible for unemployment benefits? The employee abandoned their job!"

You think you crossed all your t's and dotted all your i's, but not so fast. Under New Jersey law (specifically N.J.A.C. 12:17-9.11), only an employee who: (1) is absent from work for five or more consecutive work days; *and* (2) who without good cause fails to notify the employer of the reasons for his or her absence shall be considered to have abandoned his or her employment. Therefore, only when both preconditions are met does the employee become subject to disqualification for benefits for voluntarily leaving work without good cause. Good cause in this case is a pretty high standard. The employee must have no control over the situation giving rise to the failure to notify and further, the reason must be so compelling as to prevent the employee from notifying the employer of the absence. These same requirements apply to employees returning to work following an approved leave of absence.

The New Jersey Appellate Division, in *Espina* v. *Board of Review,* 402 N.J. Super. 87, (App. Div. 2008) provides a good example of this regulation in action. In *Espina,* the employer granted the employee an approved FMLA leave through April 13, 2006. Upon exhaustion of her FMLA leave, the employer approved the employee's request for an additional week of leave because she did not have childcare. The employer, in writing, advised the employee that: (1) the additional time-off was an "unauthorized leave of absence;" (2) she was expected to return to work Wednesday, April 26, 2006; and (3) failure to return to work as scheduled would be considered a voluntary resignation. The employer denied the employee's additional request for an extension of the return to work deadline, as well as her request to convert to part-time status.

The employee did not report to work as required on April 26, 2006, because she had not yet been able to find acceptable childcare. **That day,** the employer terminated her employment and sent her a 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, the employee advised the employer that she had obtained childcare and requested reinstatement**.** The employer refused.

The employee appealed the denial of unemployment to the Appellate Division, arguing that the employer could not characterize her termination as job abandonment until five days after her scheduled return to work on April 26th as instructed by the employer. She argued that the employer had acted prematurely by discharging her the first day she failed to return, and therefore, she was entitled to unemployment benefits. The Appellate Division agreed.

The Appellate Division did not challenge the employer's decision to discharge the employee. 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 the employee'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 only provided the employee with the opportunity to collect unemployment.

The *Espina* case was relied on as recently as June of this year in *Toomin v. Board of Review, Department of Labor and Benjamin Moore & Company* (unpublished App. Div. decided June 1, 2016). In *Toomin*, the employee, a program specialist, went on maternity leave on September 13, 2013 and was due to return to work on May 7, 2014. The employee told her employer that her childcare arrangements had fallen through, and she would not be able to return to work until the end of June 2014.

On May 5, 2014, the employer sent the employee an email indicating that if she was unable to return to work by May 11, or another mutually agreeable date before the end of May 2014, her position would have to be filled by another person. The employee responded immediately indicating that she needed more time to make childcare arrangements. On May 6, 2014, the employee received an email informing her that she would be separated from employment as of May 7, 2014.

Here, the Appellate Division found that the evidence showed that the employee's approved leave ended on May 7, 2014, and that she affirmatively advised the employer that she could not return to work on the previously agreed upon date. . The employer was willing to allow her to return on a mutually agreed-upon date before the end of May 2014, but the employee made clear she could not return before the end of June 2014. Under the circumstances, the employer reasonably determined that the employee would not be returning to work. Under these circumstances, the employer was not required to wait five consecutive work days before determining that employee had voluntarily quit her position.

The Appellate Division distinguished this case from the *Espina* case by holding that **"**in this [Toomin] case, …, [the employee] made clear she could not return to work before the end of June 2014. Furthermore, [the employee] did not contact her employer and indicate she was ready to return to work within five working days after her approved leave ended."

The bottom line, employers retain the flexibility to terminate at will employees for a failure to return to work. But if the goal of an employer's policy is to prevent a "no-show, no-call" employee from collecting unemployment benefits, the employer should, under most circumstances, wait the required five days.

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