



Non-Lawyers Can No Longer Represent Kentucky Employers At Unemployment Proceedings

Insights

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The Kentucky Court of Appeals just held that non-lawyers may no longer represent employers in unemployment proceedings, ruling that such a practice is unconstitutional. As a result, you must immediately adjust any business practice that involves human resources managers, supervisors, or other non-lawyers handling such administrative proceedings.

Quick Factual Background

The facts of the *Nichols v. Kentucky Unemployment Insurance Commission* case are straightforward. Michael Nichols worked for Norton Healthcare as a clinical engineering specialist, until Systems Director of Clinical Engineering, Scott Skinner, fired Nichols, claiming that he failed to comply with instructions, falsified records, and committed misfeasance with company records. Nichols immediately applied for unemployment benefits.

Norton opposed Nichols' application, stating that it had discharged Nichols for misconduct. The Kentucky Unemployment Insurance Commission's (KUIC's) Unemployment Division initially determined that Norton had fired Nichols for misconduct and that he had made intentional misrepresentations in his application, which warranted his disqualification from unemployment benefits. Thereafter, Nichols appealed this decision to a referee.

The referee conducted two evidentiary hearings. Nichols was represented by counsel, and following the state's long-standing practice of allowing non-lawyers to represent parties, Skinner appeared for the company. Skinner also testified at the hearings and offered several critical facts. While the referee conducted most of the questioning during Nichols' testimony, he allowed Skinner to cross-examine and ask several questions of Nichols.

The referee affirmed the Unemployment Division and ruled in the company's favor, and the KUIC, after conducting a *de novo* review of the record, also affirmed the decision. Nichols then filed a petition for judicial review in Jefferson Circuit Court, asserting multiple errors by the KUIC. One of those errors he alleged was that the proceedings before the referee and the KUIC were unconstitutional due to Skinner's appearance as a non-lawyer representative on behalf of Norton. The circuit court affirmed the KUIC's decision in all respects, and Nichols appealed to the Kentucky Court of Appeals.

State Court Of Appeals Upends Common Practice

State Court of Appeals Opens Common Practice

In a short opinion released on Friday, April 26, the Court of Appeals concluded that Skinner was not authorized to represent Norton during the proceedings, because Kentucky Revised Statute (KRS) § 341.470(3)—the statutory provision allowing corporate or partnership employers to appear *pro se* through non-lawyers in unemployment proceedings—violates the separation-of-powers provisions of the Kentucky Constitution. The court said that it “encroached on the exclusive power of the judiciary to establish rules relating to the practice of law.”

The court recognized that Kentucky Rule of the Supreme Court (SCR) 3.020 holds that representation of a corporate or non-natural entity by a non-attorney amounts to the unauthorized practice of law. Accordingly, since KRS § 341.470(3) provides differently, it infringes upon the separation-of-powers provisions of the Kentucky Constitution and is, therefore, unconstitutional. In support of its decision, the Court relied on the Kentucky Supreme Court’s 1998 decision in *Turner v. Kentucky Bar Association*, which held a similar statute authorizing non-lawyers to represent and advise workers’ compensation claimants was unconstitutional.

Since Norton was represented by a non-attorney in the proceedings before the KUIC, the court vacated the circuit court’s order and remanded the matter to the KUIC for a new administrative hearing at which Norton is entitled to be represented by an attorney.

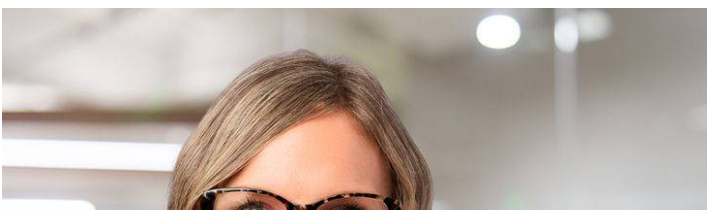
Fallout

So what does this mean for Kentucky employers? Given this opinion, employers operating in Kentucky should immediately cease the practice of sending managers, human resources representatives, or any other non-lawyer third parties to represent them at unemployment proceedings. Doing so could be the unauthorized practice of law and any decision obtained in your favor might not be enforceable.

There is, of course, a possibility that the KUIC and/or Norton will ask the Kentucky Supreme Court to grant discretionary review of the decision. We will continue to monitor the situation and provide updates, so you should ensure you are subscribed to [Fisher Phillips’ alert system](#) to gather the most up-to-date information. Until then, if you have any questions, please contact your Fisher Phillips attorney or any attorney in our [Louisville office](#).

This Legal Alert provides an overview of a specific state court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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