



Labor & Employment @lert

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Kentucky Employers May No Longer Represent Themselves in Unemployment Compensation Hearings

Recently, in *Nichols v. Kentucky Unemployment Commission, et al.*, No. 2017-CA-001156-MR, 2019 Ky. App. Lexis 73 (Ky. Ct. App., 2019), the Kentucky Court of Appeals ruled that Kentucky Revised Statute 341.470(3), the statute that allows corporate or partnership employers to appear *pro se* through non-lawyer representatives in unemployment proceedings, violates the separation of powers provision of the Kentucky Constitution.

In *Nichols*, after plaintiff Michael Nichols was terminated by his employer, Norton Healthcare, he filed for unemployment compensation. During the Kentucky Unemployment Insurance Commission evidentiary hearings, the Norton Healthcare manager who terminated Nichols appeared for the employer. The manager, a non-lawyer, testified and was permitted to cross-examine Nichols. The commission held for Nichols, who appealed in part on constitutional grounds.

The Court of Appeals sided with Nichols, finding that Norton Healthcare was not permitted to be represented by a non-lawyer employee in the unemployment proceedings before the referee and/or the commission. To the extent that Kentucky Revised Statute 341.470(3) allows otherwise, the court determined it was unconstitutional, because the representation of a corporation by a non-lawyer before administrative agencies like the commission constitutes the unauthorized practice of law.

Takeaways for Kentucky Employers

This decision is prospective, meaning it will not impact decisions resulting from hearings prior to the *Nichols* case.

However, on a go-forward basis, it appears that Kentucky employers must be represented by counsel at unemployment hearings. We are hoping for some guidance confirming the employer's right to respond to the former employee's initial claim for unemployment, and whether an employer may have witnesses testify (and not act as advocates) without their counsel in attendance.

This ruling necessarily increases an employer's cost of defense, and prudent employers may decide to rethink whether to challenge all or some unemployment claims upon filing. Our Thompson Hine team is available to consult with you on the strength of your defenses to any claims filed, and if you decide to proceed, we can attend the hearing on your behalf. As part of our commitment to providing innovative service, we can work with you to provide transparency and certainty surrounding the costs of now involving counsel in these proceedings.

FOR MORE INFORMATION

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