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No Substitutes Please: Pennsylvania Non-Lawyers Barred from Representing Employers in Unemployment Compensation Proceedings

By: Robert W. Pritchard and Shannon H. Paliotta

Reversing a long-standing practice in Pennsylvania, the Commonwealth Court of Pennsylvania held in a 5-2 decision that corporations may not be represented by non-lawyers at unemployment compensation hearings.

In *Harkness v. Unemployment Compensation Board of Review*, No. 150 C.D. 2004 (Pa. Commw. Feb. 3, 2005), 2005 Pa. Commw. Lexis 48, Claimant sought review of the Board's decision denying her unemployment compensation on the grounds that her former employer, Federated Logistics, Macy's Department Store, was represented at the hearing by a representative from an unemployment compensation services company rather than a licensed attorney.

Lani Harkness worked at the cosmetics counter of a Macy's Department Store. After she was approached by a disgruntled customer, Harkness violated store policy by failing to promptly contact a manager and telling the customer to "get your fat ass out of here." Macy's terminated Harkness' employment shortly thereafter. Harkness applied for, but was denied unemployment benefits by a UC Service Center. She appealed to the Board, and Macy's retained TALX UC eXpress, a company that provides comprehensive unemployment compensation services (including hearing representation) to employers. During the hearing, the non-lawyer from TALX UC eXpress cross-examined Harkness, entered exhibits into evidence and gave a closing statement. Harkness argued on appeal that such conduct amounted to the unauthorized practice of law.

Macy's argued that the representation was proper because of the informal nature of the proceedings and the relatively small amount in controversy. In addition, Macy's pointed to Section 702 of the Unemployment Compensation Law, 43 P.S. § 862, which states that an individual claiming unemployment compensation may be represented by counsel or "other duly authorized agent." That law has been held to allow non-lawyer representation of individual claimants. Macy's argued that such law should be extended to allow employers to be represented by non-employee, non-attorney representatives.

The Commonwealth Court rejected these arguments. The Court found that regardless of the forum, the representative's actions constituted the practice of law because he had to apply legal knowledge and technique in his representation of the employer. Such practice was unauthorized because in doing so, he implied that he possessed the competence to argue and analyze the legal problem faced by the Board. The Court held that Section 702 "could not be any clearer" and that its authorization of non-lawyer representation was limited to individual claimants.

Judge Leadbetter, joined by Judge Cohn Jubelirer, dissented on the grounds that any unauthorized practice of law by the employer's representative was harmless error given that Claimant's behavior constituted willful misconduct. In addition, the dissenting judges criticized the majority opinion as overbroad and problematic, since forcing employers to obtain legal representation in every unemployment compensation case would be costly and could result in no participation at all, hindering the fact-finding process and allowing undeserving claimants to collect benefits by default. Claimants would also be unfairly prejudiced by this new rule if their lay representatives were consistently outmatched by corporate legal representation.

As a result of the Commonwealth Court's decision, the Board recently updated its guidelines regarding representation at unemployment compensation hearings as follows:

Representation at the Hearing

Representation of Claimants:

If you are a claimant, you may represent yourself or be represented by an attorney or by any other advocate of your choice.

Representation of Employers:

- **Corporation** must be represented by an attorney.
- **Sole proprietorship** must be represented by an attorney or the proprietor/owner.
- **Partnership** must be represented by an attorney or a general partner who is an individual.
- **Trust or association** must be represented by an attorney.
- **Government agency** *(including state agency, local authority, school district, etc.)* must be represented by an attorney.
- **Limited Liability Company (LLC)** – must be represented by an attorney.

Thus, while company employees may still appear and testify at the hearings without legal representation, they are not authorized to ask questions of witnesses, make objections or deliver legal arguments.

It is our understanding that the Board will appeal the Commonwealth Court's decision. A legislative solution is also possible that would protect employers under the same law that allows claimants to use non-lawyer representation. So long as the Commonwealth Court's decision is the law, however, employers conducting business in this Commonwealth should take immediate steps to assess how they intend to participate in future unemployment compensation hearings and to secure counsel where necessary.

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