

NO. A06-1680

State of Minnesota
In Court of Appeals

Daniel Lamah,

Relator,

v.

Doherty Employment Group, Inc.,

Respondent,

Department of Employment and Economic Development,

Respondent.

RELATOR'S BRIEF AND APPENDIX

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LEGAL ISSUES PRESENTED

- I. Is Mr. Lamah eligible for unemployment benefits under Minn. Stat. § 268.095, subd. 1(5) through his full-time, principal employer, Grazzini Brothers, after he separated from his temporary, part-time employment with Doherty Staffing?

The Unemployment Law Judge held:

The applicant worked for two employers; one on a full-time permanent basis and the other on a full-time temporary basis. The full-time permanent employment ended prior to the full-time indefinite term employment. Statutory law provides that if an applicant quits part-time employment for personal reason, with a majority of the base period based on full-time employment, the applicant would be qualified to receive unemployment benefits. There is no similar exception where the employee quits full-time temporary employment.

(App. 109.)

Minn. Stat. § 268.095, subd. 1(5) (2005)

Minn. Stat. § 268.03 (2005)

Prickett v. Circuit Science, Inc., 518 N.W.2d 602 (Minn. 1994)

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- II. Is an ongoing temporary assignment created when the temporary agency never offers and the temporary employee never accepts an ongoing work assignment and neither the temporary agency nor the temporary employee intend to commit to an ongoing work assignment?

The Unemployment Law Judge held:

Lamah had good personal reason to quit. The work Lamah performed for Doherty was not suitable based on his prior training and experience. An applicant that quits employment within 30 calendar days of beginning the employment because the employment was unsuitable is not disqualified from receipt of unemployment benefits. Lamah's separation does not fall within the statutory exception to the quit statute because he was employed with Doherty Employment Group Inc. in excess of 30 days.

An individual employed on an as-needed or on-call basis is deemed involuntarily separated from employment at the completion of each job assignment. Although Lamah called in each evening to see if there was further work for the following day, the testimony indicated that he was assigned work each week on a consistent basis. The record of earnings for Daniel Lamah proposed to be offered into evidence fails to show any significant gap in work days or periods of lack of work so as to warrant further testimony or evidence regarding that matter or a finding that the assignment was on call.

(App. 109-110.)

Minn. Stat. § 268.095, subd. 1(3) (2005)
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- III. Were Mr. Lamah's substantial rights prejudiced when the Unemployment Law Judge based her decision on findings, inferences, and conclusions obtained from a telephone hearing conducted in violation of Minn. Stat. § 546.43 and Minn. R. 3310.2911, .2921-.2922?

The Unemployment Law Judge held:

Although there was difficulty in communication between the judge and the applicant, there is insufficient evidence that communication problems resulted in a misinterpretation of the statements made by the applicant so as to result in a misstatement of a finding of fact of any consequence and misapplication of the law.

(App. 109.)

Minn. Stat. § 546.43, subd. 2 (2005)
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Goldberg v. Kelly, 397 U.S. 254 (1970)
In the Matter of GLAXOSMITHKLINE PLC, 699 N.W.2d 749 (Minn. 2005)

STATEMENT OF THE CASE

Relator, Mr. Daniel Lamah, applied for unemployment benefits on March 5, 2006, after he was laid off from his full-time job as a tile setter with Grazzini Brothers (Grazzini). Concurrent with his work for Grazzini, Mr. Lamah worked for Doherty Staffing (Doherty), a temporary placement agency, from September 6 through December 8, 2005. Unemployment Law Judge Barbara Walters (ULJ) held a telephone hearing on June 20, 2006. The ULJ did not appoint an interpreter even though Mr. Lamah and the ULJ had difficulty understanding each other because Mr. Lamah has difficulty expressing himself in English. Mr. Lamah appeared pro se at the telephone hearing and told the ULJ that he was having a hard time expressing himself in English. The ULJ denied Mr. Lamah unemployment benefits, finding that Mr. Lamah was ineligible for unemployment benefits because he worked for Doherty full time, because he quit an ongoing work assignment with Doherty, and because he worked with Doherty in excess of 30 days.

Mr. Lamah requested reconsideration, submitting proposed new evidence about his inability to fully understand or participate in the hearing because of his limited English. He also submitted additional evidence regarding his employment with Grazzini and the circumstances surrounding his separation from Doherty.

The ULJ denied Mr. Lamah's request for reconsideration and issued an Order of Affirmation on August 8, 2006. Mr. Lamah initiated review by this Court by a petition for a writ of certiorari on September 6, 2006.

STATEMENT OF THE FACTS

I. Mr. Lamah's employment

Relator, Daniel Lamah, was a full-time employee of Grazzini from April 27, 1998 or 1999, until he was laid off for lack of work in late 2005. (Tr. 18-19.) Mr. Lamah, a member of the Bricklayer's Union (Tr. 46), worked as a highly trained tile setter for Grazzini. (Tr. 54; App. 109.) At the time he was laid off from Grazzini, Mr. Lamah was working in a full-time, permanent capacity, earning \$26.10 an hour plus benefits. (Tr. 18; App. 109.) Mr. Lamah generally worked at Grazzini from 7:00 a.m. to 2:30 or 3:00 p.m. (Tr. 18.) After Grazzini laid him off, Mr. Lamah actively looked for work with the union by going to union meetings and contacting the union every week to inform them that he was available for work and looking for work. (Tr. 46.)

While still working full-time for Grazzini, Mr. Lamah began working for Doherty (Tr. 17), a temporary placement agency, as a temporary part-time employee. Mr. Lamah decided to take a second job with Doherty temporarily to supplement his Grazzini income after incurring medical expenses caring for a son with sickle cell anemia and legal fees fighting his wife's deportation. (Tr. 27-28, 43; App. 10-11.) From September 6, 2005, to December 8, 2005, Mr. Lamah worked for Doherty, earning \$9 an hour in an unskilled position as a packager for Northern Star, a company contracting with Doherty. (Tr. 14, 16, 33-34.) Throughout the employment with Doherty, Mr. Lamah was required to call each day to find out if Northern Star would offer him a new work assignment that day. (Tr. 16, 34.) Northern Star never told Mr. Lamah how long he would be given work assignments at Northern Star. (Tr. 52.) Mr. Lamah averaged 36.15 hours per week

during the time he worked with Doherty. (Tr. 35.) Mr. Lamah generally worked for Doherty at Northern Star during the 3:00 p.m. to 11:00 p.m. shift Monday through Friday after completing his work for Grazzini. (Tr. 17.) Mr. Lamah was laid off from Grazzini before he separated from his work with Doherty. (Tr. 42.)

Doherty never guaranteed Mr. Lamah work, nor told him how long work at Northern Star would be available. (Tr. 16, 52.) On occasion, Northern Star sent Mr. Lamah home from work during a shift, without advance notice, when there was not enough work for him. Northern Star sent Mr. Lamah home earlier than other employees because he did not have seniority. (Tr. 23.)

II. Mr. Lamah's separation from Doherty

In early December 2005, Mr. Lamah gave Andrea, the Doherty representative at Northern Star, five days' notice that he would be leaving for Africa and that December 8 would be his last day at Northern Star before his leave. Mr. Lamah told Andrea that he would return in about one month. On December 8, 2005, Andrea entered a note in Doherty's computerized system that she was closing Mr. Lamah's assignment because he had given five days' notice that he would be leaving the country for about one month. (Tr. 36-37, 43.)

Mr. Lamah planned to take his child with sickle cell anemia to Africa to be with his mother. However, his travel plans changed when he was informed by his son's doctor at Children's Hospital that there were no clinics in Africa which could safely treat his son. Mr. Lamah then cancelled his trip to Africa and called Andrea on December 12, 2005, to tell her he was available for work. (Tr. 42-44.) After Mr. Lamah called Doherty

for a month requesting work and was told that no work was available, Mr. Lamah applied for unemployment benefits. (Tr. 25-26.)

Doherty's unemployment claims representative, Ms. Huffer, testified during the unemployment hearing. Ms. Huffer based her testimony on records in Doherty's files. (Tr. 34, 36, 40-41.) Ms. Huffer testified that after Mr. Lamah told Doherty that he was going to take a month off to go to Africa, a Doherty employee flagged Mr. Lamah's files as "ISTAT," or inactive status, indicating that Doherty would no longer call Mr. Lamah with job offers. (Tr. 37-39.) Ms. Huffer had no documents showing Mr. Lamah's calls requesting employment after December 8, 2005. (Tr. 40.)

III. Communication problems during the hearing

During the telephone hearing, Mr. Lamah and the ULJ had difficulty communicating with each other. (App. 109.) The ULJ repeatedly asked Mr. Lamah to clarify his statements and told him that the ULJ did not understand him. At different times during the hearing, the ULJ stated, "I'm not sure if you understood the question." (Tr. 15.) "I'm not sure I'm getting an answer." (Tr. 25.) "Okay, I'm a little confused." (Tr. 23.) Later, the ULJ stated, "I'm sorry, I didn't understand a word you just said." (Tr. 29.) At three different times during the hearing the ULJ asked Mr. Lamah if he quit or was discharged from his employment with Doherty. Mr. Lamah initially answered that he left, denied that he quit, and then stated that he quit. (Tr. 7.) Later during the hearing, Mr. Lamah stated that he stopped working at Doherty because they did not have any work and that he called for a month but was told there was not work. (Tr. 22-23, 26.) Mr. Lamah had difficulty explaining the circumstances surrounding his separation from

Doherty because the ULJ did not understand him. (Tr. 23-28.) Later, Ms. Huffer, the Doherty representative, explained that Mr. Lamah gave notice that he was leaving the country for a month. (Tr. 37.)

During the hearing, Mr. Lamah indicated that he made mistakes in his testimony. When asked why his testimony was inconsistent, he stated that, "I make mistake" (Tr. 42) and that he was having difficulty communicating in English. (Tr. 46.) When Mr. Lamah was given an opportunity to cross-examine Ms. Huffer, he did not understand how to proceed or how to ask questions. Even after the ULJ tried to explain how to ask questions, Mr. Lamah had great difficulty. Mr. Lamah attempted to ask Ms. Huffer two questions about the times that he called Doherty looking for work and went to Northern Star looking for work and was sent home without work. The ULJ did not help Mr. Lamah phrase his questions or get additional information from Ms. Huffer. (Tr. 40-41.) The ULJ never informed Mr. Lamah that he had the right to an interpreter before or during the hearing.

Mr. Lamah attempted to submit evidence for the hearing. He faxed copies of his mortgage statement and his W-2s from both Grazzini and Doherty to the ULJ before the hearing. (App. 103-107.) However, the ULJ refused to accept any of the evidence with the exception of the W-2 from Doherty because Mr. Lamah had not sent copies to Doherty and the ULJ did not believe this information was relevant. Mr. Lamah asked that the ULJ allow him to send the evidence to Doherty so that the ULJ could consider it. The ULJ denied his request. (Tr. 47-50.)

The ULJ did not require Doherty to provide any documentary evidence supporting its facts nor did the ULJ require the Doherty employees who had firsthand knowledge of Mr. Lamah's employment with Doherty to testify. Mr. Lamah stated on the record that Doherty's employment records were incomplete. (Tr. 39-41.)

On June 20, 2006, the ULJ denied Mr. Lamah unemployment benefits, finding that he "quit his ongoing assignment to travel to Africa for one month" and that "[n]o exception to disqualification applies." (App. 7-8.) Mr. Lamah submitted a request for reconsideration on July 31, 2006. (App. 12.) The ULJ denied his request for reconsideration on August 8, 2006, and issued an Order of Affirmation, dated August 8, 2006, affirming the Findings of Fact and Decision issued on June 20, 2005. (App. 108-110.)

The ULJ denied Mr. Lamah unemployment benefits, in part, because Mr. Lamah was employed full-time with Doherty and the exception to disqualification for quit under Minn. Stat. § 268.095, subd. (5) did not apply. The ULJ also found that even though Mr. Lamah's work with Doherty was unsuitable, he was ineligible for unemployment benefits because he worked with Doherty in excess of 30 days and quit an ongoing work assignment with Doherty. (App. 108-110.)

STANDARD OF REVIEW

This Court reviews the decision of the ULJ under the provisions of Minn. Stat.

§ 268.105, subd. 7(d) (2005):

The Minnesota Court of Appeals may affirm the decision of the unemployment law judge or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are:

- (1) in violation of constitutional provisions;
- (2) in excess of the statutory authority or jurisdiction of the department;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) unsupported by substantial evidence in view of the entire record as submitted; or
- (6) arbitrary or capricious.

In *In the Matter of GLAXOSMITHKLINE PLC*, 699 N.W.2d 749 (Minn. 2005), the Minnesota Supreme Court discusses how to determine if a substantial right is at issue when a rule does not define substantial right. In *GLAXOSMITHKLINE*, the Court recognized that determining if a substantial right is at issue must be taken in context of the specific facts of a case, noting that prior cases have found that a person has a substantial right to be represented by an attorney of one's choice, that the right to terminate a trust is a substantial right, and that the appellate court will rarely find an order in a special proceeding nonappealable on the ground that it does not affect a substantial right. *GLAXOSMITHKLINE*, 699 N.W.2d at 754. The Court also recognized that a substantial right is defined as: "an essential right that potentially affects the outcome of a lawsuit and is capable of legal enforcement and protection, as distinguished from a mere

technical or procedural right” (quoting *Black’s Law Dictionary*, 1349 (8th ed. 2004)), *GLAXOSMITHKLINE*, 699 N.W.2d at 754.

The ULJ’s decision must be supported by reliable, probative, and substantial evidence. Minn. R. 3310.2922. This Court reviews questions of fact “in the light most favorable to the commissioner’s decision and will not disturb them as long as there is evidence that reasonably tends to sustain those findings.” *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002) (from *Ress v. Abbott Northwestern Hosp., Inc.*, 448 N.W.2d 519, 523 (Minn. 1989)). However, a decision cannot be affirmed “merely on the basis of evidence which in and of itself justifies it, without taking into account contradictory evidence or evidence from which conflicting inferences can be drawn.” *Liffrig v. Indep. Sch. Dist. No. 442*, 292 N.W.2d 726, 729 (Minn. 1980).

While this Court defers to the ULJ’s findings of fact if they are reasonably supported by the evidence in the record, questions of law are reviewed on a de novo basis, without deference, and the Court is “free to exercise its independent judgment.” *Smith v. Employers’ Overload Co.*, 314 N.W.2d 220, 221 (Minn. 1981). The ultimate determination of whether an employee is disqualified from receipt of unemployment benefits is a question of law that this Court reviews de novo. *Ress v. Abbott Northwestern Hosp., Inc.*, 448 N.W.2d at 523.

An employee who quits without good reason caused by the employer is disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 1(1) (2005). The determination that an employee quit without good reason attributable to the employer is a legal conclusion, but the conclusion must be based on findings that have

the requisite evidentiary support. *See Zepp v. Arthur Treacher Fish & Chips, Inc.*, 272 N.W.2d 262, 263 (Minn. 1978).

ARGUMENT

- I. **Mr. Lamah is eligible for unemployment benefits through Grazzini, his full-time principal employer, under Minn. Stat. § 268.095, subd. 1(5) (2005).**
 - A. **The ULJ violated Minnesota law by finding that Mr. Lamah was ineligible for unemployment benefits through his full-time employment with Grazzini pursuant to Minn. Stat. § 268.095, subd. 1(5).**

The ULJ violated Minnesota law by finding that Mr. Lamah was not eligible for unemployment benefits through an exception to disqualification under Minn. Stat. § 268.095, subd. 1(5). This provision states that a worker is not disqualified from receiving unemployment benefits if the applicant quit employment when “[t]he employment was part time and the applicant also had full-time employment in the base period, from which full-time employment the applicant separated because of nondisqualifying reasons” Minn. Stat. § 268.095, subd. 1(5). It is undisputed that Mr. Lamah had full-time employment with Grazzini and was laid off from Grazzini for lack of work in late 2005. (Tr. 18.) He was therefore not separated from Grazzini “because of nondisqualifying reasons.”

Nonetheless, the ULJ denied Mr. Lamah unemployment benefits, ruling that because Mr. Lamah had two full-time employers, Grazzini Brothers and Doherty Staffing, the exception to disqualification for quit under Minn. Stat. § 268.095, subd. 1(5)

did not apply.¹ (App. 109.) The finding that Mr. Lamah worked for Doherty full time is not supported by the evidence, the Minnesota unemployment statute, case law, administrative rules or practice, or the public policy behind unemployment benefits. Therefore, the Court should reverse the ULJ on the ground that Mr. Lamah is eligible for unemployment benefits through his employment with Grazzini.

Nothing in Minnesota law supports a finding that Mr. Lamah worked full time for Doherty. While Minnesota's unemployment statute does not define part-time or full-time employment, in *Zoet v. Benson Hotel Corp.*, 274 N.W.2d 120 (Minn. 1978), the Minnesota Supreme Court stated that “[p]art-time employment is usually defined as less than the usual number of hours per day for a particular job.” *Zoet*, 274 N.W.2d at 122. Accordingly, the term “full-time employment” is the usual number of hours per day for a particular job.²

¹ Mr. Lamah contends that he did not, in fact, quit Doherty and only applied for unemployment benefits after he stopped receiving work assignments through Doherty. However, even if Mr. Lamah did quit the employment with Doherty, Mr. Lamah is eligible for unemployment benefits under Minn. Stat. § 268.095.

² While there has been no further guidance in Minnesota statute or case law since *Zoet* regarding the definition of part-time employment, this interpretation is consistent with other states' definitions of part-time employment. While most states, like Minnesota, do not define part-time employment in their unemployment compensation statutes, the definition of part-time employment as “less than the usual number of hours per day for a particular job” is consistent with the definition of part-time employment in the unemployment compensation statutes of Colorado and Illinois, Colo. Rev. Stat. § 8-73-105 (2006), 820 Ill. Comp. Stat. 405/407 (2006), as well as Maine's interpretation of its unemployment compensation statute in *Bass and Co. v. Maine Employment Sec. Comm'n*, 250 A.2d 492 (Me. 1969). The Merriam-Webster Dictionary also defines part-time as “involving or working less than a full or regular schedule.” The Merriam-Webster Dictionary 361 (Merriam-Webster, Incorporated) (2005 paperback edition).

The evidence clearly shows that Mr. Lamah regularly worked “less than the usual number of hours per day” in his position with Northern Star. The usual number of hours for Mr. Lamah’s position was from 3:00 p.m. through 11:00 p.m., Monday through Friday, equaling a 40 hour work week. (Tr. 17.) From September through December 2005, Mr. Lamah worked an average of 36.15 hours per week for Northern Star (Tr. 35), was never guaranteed work, and was occasionally sent home prior to working the full eight hour shift because he did not have seniority with Doherty (Tr. 23). Since Mr. Lamah regularly worked less than the usual number of hours of his particular position, his work for Northern Star is properly characterized as part-time employment.

The ULJ provided no basis for her conclusion that Mr. Lamah’s work at Northern Star was full time even though he worked less than the usual number of hours per day in his position with Northern Star. The Minnesota Supreme Court notes “[a]s a general rule, this court defers to an agency’s interpretation when the language subject to construction is so technical in nature that only a specialized agency has the experience and expertise needed to understand it,” *Resident v. Noot*, 305 N.W.2d 311, 312 (Minn. 1981), citing *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808 (Minn. 1977), or “when the language is ambiguous or when the agency interpretation is one of long standing,” *Noot*, 305 N.W.2d at 312, citing *Estate of Abbott v. Dancer*, 213 Minn. 289, 6 N.W.2d 466 (1942). The Court does not defer to agency interpretation “when the language employed or the standards delineated are clear and capable of understanding” and the agency makes conclusory statements but does not demonstrate its interpretation to be one of long standing. *Noot*, 305 N.W.2d at 312-313. The Court in *Noot* also notes that the practical

effect of an agency's interpretation of a rule should not go against the purpose of the rule. *Noot*, 305 N.W.2d at 314.

The terms full time and part time are clear and common terms that are not overly technical or ambiguous. The ULJ provided no basis in either the Decision or the Order of Affirmation for the conclusory statement that 36.15 hours out of a usual 40 hour work week is full-time employment. Further, as shown below, the practical effect of finding Mr. Lamah worked full time at Doherty goes against the public policy of the unemployment statute. Accordingly, this Court should not defer to the ULJ's finding that Mr. Lamah's employment with Doherty was full time. Instead, the Court should reverse the ULJ's decision and grant Mr. Lamah unemployment benefits based on his work history with his full-time, principal employer, Grazzini.

B. Public policy supports this Court finding that Mr. Lamah meets the exception to disqualification and is eligible for unemployment benefits through Grazzini.

Minnesota Statute section 268.03 (2005) states that the public purpose of the Minnesota unemployment insurance program is to promote "the public good . . . by providing workers who are unemployed through no fault of their own a temporary partial wage replacement to assist the unemployed worker to become reemployed." Minn. Stat. § 268.03, subd. 1. In *Jenkins v. American Express Fin. Corp.*, 721 N.W.2d 286 (Minn. 2006), the Minnesota Supreme Court recently reaffirmed the Court's holding in *Prickett v. Circuit Science, Inc.*, 518 N.W.2d 602 (Minn. 1994) that "[t]he unemployment compensation statute is remedial in nature and must be liberally construed to effectuate the public policy set out in Minn. Stat. § 268.03." *Jenkins*, 721 N.W.2d at 289 citing

Prickett, 518 N.W.2d at 604. *Jenkins* recognizes that this public policy urges the Court to “narrowly construe the disqualification provisions.” *Jenkins*, 721 N.W.2d at 289.

Because of the remedial nature of the unemployment insurance laws, the Minnesota Supreme Court recognizes that disqualifying an individual from unemployment benefits for working at a temporary position is “inherently contrary to the policies of the statute.” *Smith v. Employers’ Overload Co.*, 314 N.W.2d 220, 223 (Minn. 1981). This Court has also noted that unemployment laws should not be applied in a way that leads to inequitable or punitive results. *Fiskewold v. H.M. Smyth Co., Inc.*, 440 N.W.2d 164, 167 (Minn. Ct. App. 1989).

Mr. Lamah is exactly the kind of hard working employee for whom unemployment benefits are intended. Mr. Lamah was laid off from Grazzini through no fault of his own. The law does not require him to keep working at an unsuitable, low-paying and unstable temporary job that he took as a second job for a short period in order to supplement his income. Rather, the law requires him to continue looking for suitable work in his area of expertise, which he did as soon as he was laid off from Grazzini. (Tr. 46.) The practical effect of the ULJ denying Mr. Lamah unemployment benefits by defining his work for Doherty as full-time employment is to punish Mr. Lamah for working too much. This result, that Mr. Lamah would be eligible if he had worked less before applying for unemployment benefits, is inequitable and against the public policy of the unemployment statute. Therefore, this Court should interpret part time liberally in order to effectuate the policy behind unemployment benefits.

Since Mr. Lamah consistently worked less than a full 8 hour shift or full 40 hour work week for Doherty, it was a part-time job for the purposes of unemployment benefits. Accordingly, Mr. Lamah is eligible for unemployment benefits through his principal, full-time employer, Grazzini Brothers. This Court should reverse the ULJ's finding that Mr. Lamah does not fall within the exception to disqualification for quit under Minn. Stat. § 268.095, subd. 1(5) because the finding of the ULJ is not supported by established Minnesota unemployment law and is contrary to the public policy that unemployment laws be liberally construed to assist the worker unemployed through no fault of his own.

II. An ongoing temporary assignment is not created if the temporary agency never offers and the temporary employee never accepts an ongoing work assignment and neither the temporary agency nor the temporary employee intend to commit to an ongoing work assignment.

A. Principles of contract law show that Mr. Lamah had a daily job assignment with Doherty and did not have an ongoing job assignment.

The ULJ denied Mr. Lamah unemployment benefits, in part, based on a finding that Mr. Lamah quit an ongoing temporary job assignment with Doherty. (App. 109.) To determine if a temporary employee has an ongoing job assignment, the Minnesota Supreme Court recognizes that the employment relationship between temporary employees and the temporary agency is governed by the contract rules of offer and acceptance and that “[t]he term of employment is determined by reference to the intention of the parties.” *Smith*, 314 N.W.2d at 223. Instead of analyzing the employment relationship between Doherty and Mr. Lamah using these basic contract

principles, the ULJ found that Mr. Lamah had an ongoing work assignment because he was consistently given work. (App. 109-110.)

The ULJ's finding that Mr. Lamah quit an ongoing employment assignment flies in the face of well established Minnesota case law which recognizes that the basic contract principles of offer and acceptance apply when determining if an employee of a temporary agency quit an ongoing employment relationship. The facts in *Smith* illustrate the nature of a day-to-day assignment while the facts in *McDonnell v. Anytime Temp.*, 349 N.W.2d 339 (Minn. Ct. App. 1984) illustrate the nature of ongoing work assignments. In *Smith*, the relators accepted offers of several one-day assignments with a temporary placement service.³ After working these one-day assignments, the relators chose to apply for unemployment benefits rather than continue seeking additional job offers from the temporary agency. *Smith*, 314 N.W.2d at 220. As no offer of ongoing employment was made by the temporary placement agency or accepted by the relators, the Court determined that the relators were not disqualified from unemployment benefits for "merely failing to appear for a possible offer of employment." *Smith*, 314 N.W.2d at 222.

The facts in *Smith* contrast with those in *McDonnell*, where this Court found that the relator quit an ongoing work assignment. In *McDonnell*, the relator was found to have quit an ongoing work assignment after she applied at a temporary agency, was offered and accepted a two-week assignment, and then quit after the first day and

³ For a discussion of the characteristics of temporary labor services, see *Smith*, 314 N.W.2d at 222.

informed the temporary agency she would not complete the assignment. *McDonnell*, 349 N.W.2d at 340. In *McDonnell*, this Court held that once the temporary agency made an offer of ongoing employment and the relator accepted this offer, the relator had an ongoing work assignment. Therefore, the relator quit the ongoing work assignment when she refused to complete the assignment she accepted. *McDonnell*, 349 N.W.2d at 341.

In applying the reasoning of *Smith* and *McDonnell* to this case, it is clear that Mr. Lamah did not have an ongoing work assignment with Doherty. At no time did Doherty ever offer, nor did Mr. Lamah ever accept, an offer of ongoing work at Northern Star. (Tr. 52.) Rather, from September 6 through December 8, 2005, Mr. Lamah was required to call every day to learn if Northern Star would make an offer of employment to him for that day. (Tr. 16.) Neither Doherty nor Northern Star ever guaranteed Mr. Lamah work and, as Mr. Lamah testified, he was sent home if work was not available since he did not have seniority (Tr. 23) or guaranteed work (Tr. 16). Mr. Lamah's employment relationship with Doherty was limited each day by whether Northern Star made a new offer of employment and whether Mr. Lamah accepted that offer.

To find that Mr. Lamah quit an ongoing job assignment with Doherty, the ULJ focused, not on the intent of the parties, but on whether or not Mr. Lamah was assigned work each week on a consistent basis and if there was any "significant gap in work days or periods of lack of work so as to warrant . . . a finding that the assignment was on call." (App. 110.) This finding is legal error. Nothing in the record shows that Doherty or Northern Star intended to provide an ongoing work assignment to Mr. Lamah beyond the day he was offered a new day's work. Further, nothing in the record shows that Mr.

Lamah ever intended to have an ongoing work relationship with Doherty. (Tr. 15-17, 27.) As Mr. Lamah and Doherty did not have a contractual employment relationship beyond each day when he called, was offered work, and accepted a new assignment, the ULJ's finding that Mr. Lamah quit an ongoing job assignment is an error of law.

B. The ULJ misapplied Minn. Stat. § 268.095, subd. 1(3) (2005) when the ULJ ruled that even though Mr. Lamah's work with Doherty was unsuitable, he was ineligible for unemployment benefits because he was employed with Doherty in excess of 30 days.

While the ULJ properly determined that “[t]he work Lamah performed for Doherty was not suitable based on his prior training and experience,” the ULJ wrongly found that Mr. Lamah was ineligible for unemployment benefits under Minn. Stat. § 268.095, subd. 1(3) because he “was employed with Doherty . . . in excess of 30 days.” (App. 109.) Minnesota Statutes section 268.095, subdivision 1(3) states that an employee is not disqualified from receiving unemployment benefits when: “[t]he applicant quit the employment within 30 calendar days of beginning the employment because the employment was unsuitable for the applicant.” Minn. Stat. § 268.095, subd. 1(3).

Minnesota Statutes section 268.095, subdivision 1(3) requires an applicant who quits employment to meet two elements before being eligible for unemployment benefits. First, the applicant must have quit the employment within 30 calendar days of beginning the employment. Second, the applicant must have ended the employment relationship because the employment was unsuitable.

The ULJ's finding that Mr. Lamah was ineligible for unemployment benefits because he worked with Doherty in excess of 30 days is legal error. The 30 day

provision cannot apply to temporary employees who are only given daily work assignments as every day is the beginning of their employment.⁴

The length of Mr. Lamah's employment relationship with Doherty must be analyzed within the framework of temporary employment. As the Court recognizes in *Smith*, a series of one-day assignments in which the temporary employee is only given one-day work assignments is "manifestly contrary to the notion of an ongoing employment relationship." *Smith*, 314 N.W.2d at 223. In *Mbong v. New Horizons Nursing*, 608 N.W.2d 890 (Minn. Ct. App. 2000), this Court applied the reasoning of *Smith* in finding that, "With temporary agencies, an employment relationship arises only when each temporary assignment is offered and accepted. Once each assignment is completed, the employment relationship ends because there is neither a guarantee of future assignments nor any employer obligation to provide them." *Mbong*, 608 N.W.2d at 895.⁵

As shown in *Thompson v. Dolphin Clerical Group*, 2003 WL 21500175 (Minn. Ct. App. 2003) (App. 114-116), within the unique sphere of temporary agencies, a temporary employee's eligibility for unemployment benefits is not determined by the

⁴ It is worth noting that for day laborers with a long history of working one-day assignments, one-day assignments would be suitable employment and this exception to disqualification would not apply.

⁵ During the time that *Mbong* was being appealed, the Minnesota legislature passed Minn. Stat. § 268.095, subd. 2(d), providing a statutory definition of a quit from a temporary agency. Section 268.095, subdivision 2(d) did not change established law regarding the definition of suitable work or ongoing work assignments with temporary agencies. Section 268.095, subdivision 2(d) does not apply to Mr. Lamah because his work with Doherty was unsuitable. As the positions offered by Doherty were unsuitable for Mr. Lamah based on his prior training and experience, Minnesota law does not require Mr. Lamah to request additional work from Doherty.

amount of time the temporary employee has received work assignments with the temporary agency. Rather, the temporary employee's eligibility for unemployment benefits is determined in context of each specific work assignment and the suitability of that work assignment in light of the temporary employee's demonstrated work history and past employment patterns. *Thompson*, 2003 WL 21500175. By focusing on the length of time that Mr. Lamah received work assignments with Doherty, the ULJ failed to incorporate long-standing case law that recognizes that the employment relationship between temporary agencies and temporary employees is limited to each specific work assignment a temporary employee receives with a temporary agency.

Mr. Lamah's employment with Doherty at Northern Star consisted of a series of one-day work assignments for which Mr. Lamah's employment relationship began and ended every day that he was offered and accepted a work assignment and completed that assignment. Each day's work assignment constituted the beginning of Mr. Lamah's employment with Doherty for the purposes of determining Mr. Lamah's eligibility for unemployment benefits under Minn. Stat. § 268.095, subd. 1(3).

Accordingly, the ULJ's finding that Mr. Lamah is ineligible for unemployment benefits under Minn. Stat. § 268.095, subd. 1(3) because he was employed with Doherty in excess of 30 days is legal error. Because Mr. Lamah separated from his employment with Doherty at Northern Star within 30 calendar days of beginning his most recent work assignment and because the work was unsuitable, he is eligible for unemployment

benefits through the exception to disqualification for quit under Minn. Stat. § 268.095, subd. 1(3).⁶

III. Mr. Lamah's substantial rights were prejudiced when the ULJ based her decision on findings, inferences, and conclusions obtained from a telephone hearing conducted in violation of Minn. Stat. § 546.43, subd. 2 (2005) and Minn. R. 3310.2911, .2921-.2922 (2005).

The ULJ prejudiced Mr. Lamah's substantial rights by basing the decision on findings, inferences, and conclusions obtained from a telephone hearing conducted in violation of Minn. Stat. § 546.43, subd. 2 and Minn. R. 3310.2911, .2921-.2922. Minnesota Statute section 546.43, subdivision 2 and Minnesota Rules 3310.2911, .2921-.2922 specify basic guidelines which the ULJ must follow to ensure that participants of unemployment hearings are afforded a fair hearing and due process of law. By violating established law and rules governing the conduct of unemployment hearings, the ULJ denied Mr. Lamah due process of law and a fair hearing.

This Court reviews the decision of the ULJ and:

may . . . remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are . . .

.....

⁶ In *Mbong*, 608 N.W.2d at 892-893, and in *Henry v. Dolphin Temp. Help Services*, 386 N.W.2d 277, 281 (Minn. Ct. App. 1986), this Court recognizes that an applicant's work history should be considered in determining whether temporary employment is suitable employment for purposes of unemployment benefits. Mr. Lamah's work history clearly shows that his work with Doherty was unsuitable as he has a long history of full-time work as a tile setter with Grazzini and he only worked for Doherty to supplement his Grazzini income.

- (2) in excess of the statutory authority or jurisdiction of the department;
- (3) made upon unlawful procedure; [or]
- (4) affected by other error of law

Minn. Stat. § 268.105, subd. 7(d) (2005). In *In the Matter of GLAXOSMITHKLINE PLC*, 699 N.W.2d 749 (Minn. 2005), the Minnesota Supreme Court recognized that determining if a substantial right is at issue must be taken in context of the specific facts of a case, noting that prior cases have found that a person has a substantial right to be represented by an attorney of one's choice, that the right to terminate a trust is a substantial right, and that the appellate court will rarely find an order in a special proceeding nonappealable on the ground that it does not affect a substantial right. *GLAXOSMITHKLINE*, 699 N.W.2d at 754. Determining if a substantial right is at issue should also be considered in context of the definition of a substantial right as "an essential right that potentially affects the outcome of a lawsuit and is capable of legal enforcement and protection, as distinguished from a mere technical or procedural right" (quoting *Black's Law Dictionary* 1349 (8th ed. 2004)), *GLAXOSMITHKLINE*, 699 N.W.2d at 754. There can be no doubt that the fundamental rights to due process of law and a fair hearing are essential rights since their deprivation affect the outcome of a lawsuit and they are capable of legal enforcement and protection.

Minnesota law requires unemployment law judges to ensure that individuals who have difficulty speaking or comprehending English obtain due process of law during their unemployment hearings by appointing interpreters. Minn. Stat. § 546.43, subd. 2, Minn. R. 3310.2921. Fundamentally, due process requires that individuals have the opportunity

to be heard and an opportunity to confront and cross-examine adverse witnesses.

Goldberg v. Kelly, 397 U.S. 254, 267, 269 (1970). Unemployment law judges must assist pro se parties in the presentation of evidence and conduct unemployment hearings that protect the rights of all parties to a fair hearing by ensuring that relevant facts are clearly and fully developed. Minn. R. 3310.2921. Unemployment law judges have the affirmative obligation to “recognize and interpret the parties’ claims.” *Miller v. Int’l Express Corp.*, 495 N.W.2d 616, 618 (Minn. Ct. App. 1993). This duty is particularly important when parties are unrepresented by counsel. *Miller*, 495 N.W.2d at 616.

A. The ULJ denied Mr. Lamah’s rights to a fair hearing and due process of law in violation of Minn. Stat. § 546.43, subd. 2 and Minn. R. 3310.2911, .2921.

The ULJ did not base her decision on reliable, probative, and substantial evidence. The ULJ could not clearly and fully develop all relevant facts without appointing an interpreter for Mr. Lamah, a pro se applicant. By failing to appoint an interpreter for Mr. Lamah, the ULJ denied Mr. Lamah’s due process under law as he was not heard and did not have the opportunity to confront adverse testimony. The ULJ failed to protect Mr. Lamah’s right to a fair hearing as required by Minn. R. 3310.2921 by failing to assist Mr. Lamah, a pro se applicant, in the presentation of evidence and not ensuring that all relevant facts were clearly and fully developed.

Minnesota Statute section 546.43, subdivision 2 and Minnesota Rule 3310.2911 provide explicit instructions to the ULJ about when the ULJ is obligated to appoint an interpreter and ensure that individuals who have difficulty speaking or comprehending English obtain due process of law. Minnesota Statutes section 546.43, subdivision 2

identifies agency proceedings where interpreters should be appointed, stating that: “In a proceeding before [an] . . . agency . . . where . . . the principal party in interest is a handicapped person, all of the proceedings that are pertinent shall be interpreted in a language the handicapped person understands by a qualified interpreter appointed by the . . . agency” Minn. Stat. § 546.43, subd. 2. Minnesota Rule 3310.2911 also requires the department to “continue any hearing where a witness or principal party in interest is a handicapped person so that an interpreter can be appointed.” Minn. R. 3310.2911.

A person handicapped in communication is defined as:

one who, because of a hearing, speech or other communication disorder, *or because of difficulty in speaking or comprehending the English language*, is unable to fully understand the proceedings in which the person is required to participate, or when named as a party to a legal proceeding, is unable by reason of the deficiency to obtain due process of law.

Minn. Stat. § 546.42. (Emphasis added.) The United States Supreme Court recognized that “[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.” *Goldberg*, 397 U.S. 268-269. Minnesota Statute section 546.43, subdivision 2 and Minnesota Rule 3310.2911 provide basic guidelines to protect the due process rights of individuals who are handicapped in communication by mandating the services of an interpreter. Thus, the opportunity to be heard is tailored to the capacities and circumstances of the party who needs to be heard.

In the Order of Affirmation, the ULJ stated that:

There is insufficient evidence that any errors in the findings of fact were other than minor and insignificant so as to justify a change in the decision of the judge dated June 20, 2006.

....

Although there was difficulty in communication between the judge and the applicant, there is insufficient evidence that communication problems resulted in a misinterpretation of the statements made by the applicant so as to result in a misstatement of a finding of fact of any consequence and misapplication of the law.

(App. 108-109.)

The ULJ's finding that the communication problems did not merit a change in the decision or a new hearing is legal error.

As an applicant for unemployment benefits, Mr. Lamah is the principal party in interest pursuant to Minn. Stat. § 546.43, subd. 2. The record shows that Mr. Lamah is handicapped in communication because he has difficulty speaking and communicating in English. As a result of his handicap, Mr. Lamah and the ULJ could not fully understand each other at his unemployment hearing. This lack of comprehension prevented Mr. Lamah from being heard at his hearing and from confronting adverse testimony. The record shows that the ULJ did not tailor Mr. Lamah's opportunity to be heard to his capacity and circumstances since he needed an interpreter to exercise his due process rights.

Because Mr. Lamah had difficulty speaking and comprehending English, he was unable to develop relevant facts at the hearing. The communication problems between Mr. Lamah and the ULJ resulted in a record that is confusing, contradictory, and incomplete. From the beginning of the hearing, the record is unclear whether Mr. Lamah was discharged or quit from his employment with Doherty. When the ULJ asked Mr.

Lamah whether he quit or was fired from Doherty, Mr. Lamah first said that he left, then said he did not quit, then claimed to have quit. (Tr. 7.) Later, when the ULJ tried to elicit more facts on the Doherty job from Mr. Lamah, additional testimony indicated that Mr. Lamah did not actually quit:

Q: Did you receive anything telling you that you had to contact them at the completion of a job assignment to seek further work?

A: I don't recall, but I do, I was told that anytime there's no work, I should call to see if they have something. And I kept calling and sometimes they don't have nothing and . . .

Q: So you said you, yourself, chose to stop calling?

A: No, no. I say I was told . . .

Q: I understand that, but did you, yourself, stop calling?

A: No. I continue to call.

Q: So what happened that you ceased to work then at Northern Lighting?

A: They didn't have work. And the last two weeks that I was calling, there was no work.

Q: I thought you told me you quit?

A: I'm saying that I quit, I quit because I was calling and I couldn't get no work.

Q: Okay, I'm a little confused . . .

(Tr. 22-23.)

Mr. Lamah then tried to explain again that he stopped calling Doherty when there was no work. The ULJ's response was, "Okay. Why did you say you quit then?" (Tr. 23.) Mr. Lamah attempted to explain that Doherty did not have work for him, that he was low in seniority, and that the circumstances regarding his wife's deportation and sick child made it difficult for him to remember specific details. (Tr. 23-25.) The ULJ again interrupted him and asked, "Okay, I'm not sure I'm getting an answer. Why did you stop working for them? What happened?" (Tr. 25.) While Mr. Lamah tried to explain what

happened, the ULJ asked him five times whether he eventually stopped calling Doherty. (Tr. 25-26.) When Mr. Lamah again tried to explain that his wife was deported and how that was related to his separation with Doherty, the ULJ cut him off, saying:

- Q: How is this related, I understand, I have read the documents. I'm not sure how this is related to your separation. Did you stop calling them for a reason related to your family, or did you stop calling them because there was no work?
- A: I did not stop calling them because I do not want to work. I . . .
- Q: Okay. So then your stopping calling had nothing to do with your personal circumstances.
- A: Yes.
- Q: Is that correct?
- A: They . . .
- Q: Is that correct?
- A: No, no.
- Q: Did you stop calling them for some personal reason?
- A: I had . . .
- Q: Is that yes or no, please.
- A: Yes, ma'am.
- Q: You stopped calling them for some personal reason? Why?

(Tr. 27-28.)

Mr. Lamah again tried to explain the circumstances of his separation, but the ULJ misunderstood what he said and began asking if he told Doherty that he could no longer work the evening 3:00 p.m. to 11:00 p.m. shift. (Tr. 28.)

- Q: I'm sorry. Did you tell them you couldn't accept work anymore working evenings?
- A: No. Madam, I'm saying that I told them, the time that I had the two weeks straight off, the third week nothing coming, so I call and I said, please, if you can find me anything, I'm ready to do it. I need money now, I need something.

- Q: Okay. So would you still have worked the 3 to 11 hours, 3:00 p.m. to 11:00 p.m.?
- A: At that time, that was not even mentioned.
- Q: I'm sorry, I didn't understand a word you just said. What did you say?

(Tr. 28-29.)

Finally, it was Mary Huffer, the Doherty representative, who was able to testify that Mr. Lamah intended to take a month off to leave the country. (Tr. 37.) Ms. Huffer also stated that Mr. Lamah was placed on ISTAT, or inactive status, but the ULJ did not question her any further regarding whether Doherty considered that Mr. Lamah quit or went on leave. (Tr. 39.) When Mr. Lamah testified again, the ULJ asked him whether he told Doherty he was not available to work because he was going out of the country. Mr. Lamah responded, "I didn't say that I was no longer available to go to work for them. I told them I was going to Africa . . ." and then indicated that his plan was to return in one month so he could pay off his legal debt. (Tr. 43.) Still, the ULJ kept asking him why he told Doherty he was unavailable to work:

- Q: Mr. Lamah, why did you testify before that you stopped calling because they didn't offer you work when, in fact, you stated now that you stopped calling, you told them you weren't available.
- A: I'm maybe expressing myself a little bit wrong in the English (unintelligible), but what I want to say is I do not, when the trip didn't work, I continued to ask every time if there is anything I can do.
- Q: But you stopped an ongoing assignment then because you were going to go to Africa, correct?
- A: Ma'am when . . .
- Q: Is that yes?
- A: No. No. If I can . . .
- Q: Go ahead.

A: My explanation is when I told them that I was going to Africa and this was going to be my last week, and that week finished. . . .

(Tr. 46-47.)

Similarly, the testimony regarding whether Mr. Lamah worked an ongoing assignment with Doherty was riddled with misstatements and confusion as a result of Mr. Lamah's limited English skills and the ULJ's failure to assist him as a pro se applicant. When the ULJ originally asked Mr. Lamah if he had one assignment or more than one, he answered, "A couple of times." (Tr. 12.) Later, he responded, "One assignment." (Tr. 12.) The ULJ asked him if he ever asked how long the assignment would last. He responded that he did not know and did not ask because the job was temporary. (Tr. 15.) After Mary Huffer stated the job was "temp to perm," but that Mr. Lamah did have to call in daily, the ULJ failed to ask her when the job was to become permanent or whether Mr. Lamah was guaranteed work. (Tr. 34.) The ULJ did, however, again ask Mr. Lamah about the nature of the position:

Q: And was this a temporary to hire position, Mr. Lamah?

A: Yes, ma'am.

Q: But you still have to call in everyday for work?

A: You say the date that I will hire?

Q: Did they tell you that it was temporary to hire, that if you worked, say, 90 days or so, you might become an employee directly of the company? Did they tell you that?

A: No, ma'am.

Q: Well, what did you think, how long was the position supposed to last?

A: The position was supposed to last, as the name is temporary work, anytime they have work, in my understanding, I don't know whether I'm right or wrong . . .

- Q: So you don't know how long they said it would last.
A: Yeah, for me, I don't know, it's temporary work, if they will use me as much as they want to.
Q. Okay. Did they tell you it was going to be full time?
A. I never asked and I was not told.
Q. Anything else, Mr. Lamah?
A. No, ma'am.

(Tr. 52.)

Mr. Lamah was also unable to adequately confront adverse testimony. As shown below, when it was Mr. Lamah's turn to cross-examine the witness adverse to his position, he could not adequately frame questions to clarify or counter her testimony.

- Judge Walters: Mr. Lamah, any questions for Ms. Huffer?
Mr. Lamah: My question is I am surprised that . . .
Judge Walters: Do you have a question? You may ask a question only. What is your question?
Mr. Lamah: Oh.
Judge Walters: A question is something she answers. Do you have something that you want to ask her that she can answer?
Mr. Lamah: Like what she was just saying or something . . .
Judge Walters: You can ask her anything regarding the matter before me. Do you have a question of Ms. Huffer?
Mr. Lamah: Yes. My question is, so if you don't have any record of all the phones that I make, you don't have any record, looking for work?
Ms. Huffer: No. There's no . . .
Mr. Lamah: You don't have any record of any turned back with me when I was, when I arrived at work North Star and there was no work, I was sent back home, you don't have any record?
Ms. Huffer: Yes, I can see the days that you went to work and you were sent home.
Mr. Lamah: Okay. All right, ma'am.
Judge Walters: Any other questions?
Mr. Lamah: No.

(Tr. 40-41.)

With his request for reconsideration, Mr. Lamah submitted additional evidence and an affidavit prepared with the assistance of an interpreter. The affidavit and additional evidence provide compelling information regarding the extent of the communication difficulties between Mr. Lamah and the ULJ during the hearing. Mr. Lamah's request for reconsideration supports his contention that the ULJ did not fully and clearly develop the record or base the decision on reliable, probative, or substantial evidence. Information submitted with Mr. Lamah's request for reconsideration includes:

- Mr. Lamah is from the Democratic Republic of Congo; his first language was Wandi. He is fluent in French and has no formal education or training in English. Mr. Lamah first learned English through watching TV, listening to the radio, and reading the Bible, newspapers, magazines, and books when he came to the United States in 1998 (app. 35);
- Mr. Lamah often finds that people have a hard time understanding him because of his thick accent and limited vocabulary, and he has trouble expressing complex ideas or situations in English (app. 35-36);
- On July 28, 2006, Mr. Lamah took a written English proficiency test, placing in the high beginning/low intermediate level for ESL classes (app. 87);
- During the unemployment hearing, the ULJ spoke very quickly and did not slow down to help Mr. Lamah understand the unemployment hearing (app. 43);

- The ULJ did not understand Mr. Lamah or help him tell his story (app. 42);
- Mr. Lamah did not know that he had the right to ask for an interpreter but believes that an interpreter would have helped him (app. 43);
- Mr. Lamah provided information regarding the extreme challenges in his personal life during the time he began working for Doherty because the situation in his personal life affected his memory of exact dates and details during that time and made it difficult for him to accurately and completely answer the ULJ's questions (app. 36-37, 42);
- Mr. Lamah was trained in the Democratic Republic of Congo in construction for three years, then underwent a five year apprenticeship with the Bricklayer's Union in the United States and is a Class A Certified Journeyman Tile Setter (app. 35-36);
- During the time that Mr. Lamah worked for both Grazzini and Doherty, he worked between 64 hours and 84 hours a week (app. 37, 90-97);
- In 2005 Mr. Lamah earned \$51,013.45 at Grazzini and \$4,860.75 at Doherty (app. 105-106);
- Mr. Lamah had never spoken to Mary Huffer before the hearing and did not understand why she could testify regarding his employment with Doherty as he did not know her and she did not have any personal knowledge of his employment with Doherty (app. 43-44);

- With his original request for reconsideration prepared without the assistance of an attorney, Mr. Lamah asked the ULJ to obtain Doherty's incoming telephone list to show the number of times he called requesting work (app. 101).

The ULJ denied Mr. Lamah's request for reconsideration even though the ULJ recognized that the ULJ and Mr. Lamah had communication problems during the unemployment hearing. (App. 109.) After reviewing Mr. Lamah's request for reconsideration, the ULJ found that the communication problems did not result in a misinterpretation of the statements made by Mr. Lamah so as to result in a misstatement of a finding of fact of any consequence or misapplication of the law. (App. 109.)

The ULJ is in no position to make this determination when the unemployment telephone hearing failed to protect Mr. Lamah's rights to due process and a fair hearing. The record clearly shows that throughout the unemployment hearing the ULJ did not understand Mr. Lamah's testimony, Mr. Lamah did not understand the ULJ, and Mr. Lamah was not able to confront adverse testimony. Accordingly, the ULJ's finding that the communication difficulties did not lead to misstatements of finding of facts of consequence or misapplication of the law is legal error. Mr. Lamah did not have an unemployment hearing on which the ULJ could base her findings of fact and the ULJ could only review the information submitted with Mr. Lamah's request for reconsideration in light of a fundamentally flawed hearing. The ULJ's failure to grant a new hearing denied Mr. Lamah a meaningful oral presentation of his case.

The importance of oral presentation during an unemployment hearing to ensure that all relevant facts are clearly and fully developed cannot be overstated. The United States Supreme Court recognized the significance of oral presentation in *Goldberg v. Kelly*, stating, “. . . written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, . . . , written submissions are a wholly unsatisfactory basis for decision.” *Goldberg*, 397 U.S. at 269. Accordingly, evidence submitted with Mr. Lamah’s request for reconsideration, while helpful in clarifying some issues, cannot replace evidence obtained through an in-person hearing, with the opportunity for direct testimony, direct questioning, and the cross-examination of adverse testimony.

Since Mr. Lamah never had a meaningful oral presentation of his case, the only way that the ULJ can determine that the communication difficulties did not lead to misstatements of findings of facts of consequence or a misapplication of the law is to have another hearing and appoint an interpreter. This ensures that the decision is based on a fair hearing and will protect Mr. Lamah’s due process rights, including the opportunity for direct testimony, direct questioning, and the cross-examination of adverse testimony.

B. The ULJ failed to ensure that all competent, relevant, and material evidence was part of the hearing record in violation of Minn. R. 3310.2922.

The ULJ violated Minn. R. 3310.2922 by failing to admit all competent, relevant, and material evidence into the record. The ULJ erred both by refusing to accept evidence

offered by Mr. Lamah into the record and by not requiring Ms. Huffer to submit documentary evidence regarding Mr. Lamah's employment with Doherty even though Mr. Lamah indicated that these records were inaccurate and incomplete. (Tr. 40-41.) By failing to admit all competent, relevant, and material evidence, the ULJ did not use reliable, probative, and substantial evidence as a basis for the decision denying Mr. Lamah unemployment benefits. Rather, the ULJ based the decision on testimony from a witness who did not have first-hand knowledge and a witness who could not fully understand or participate in the proceeding because of his limited English skills.

Before the hearing, Mr. Lamah submitted a copy of his 2005 W-2 from Grazzini to the ULJ as documentary evidence that Grazzini was his principal full-time employer. During the unemployment hearing on June 20, 2006, Mr. Lamah both tried to offer this document into evidence and tried to ask the ULJ to leave the record open to allow him to provide a copy of the document to Doherty. The ULJ refused to allow this document into the record because Doherty had not had the opportunity to review it and because the ULJ believed it was irrelevant. (Tr. 47-50.) However, as discussed above, this document supported Mr. Lamah's contention that Grazzini was his principal full-time employer and that he worked at Doherty in a temporary, part-time capacity. The ULJ's duty to assist unrepresented applicants in the presentation of evidence and ensure that all competent, relevant, and material evidence was part of the record required the ULJ to accept the 2005 W-2 from Grazzini into the record after assisting Mr. Lamah in providing a copy of this record to Ms. Huffer. Mr. Lamah's 2005 W-2 from Grazzini provided material evidence regarding whether or not he was eligible for unemployment benefits under

Minn. Stat. § 268.095, subd. (5). Mr. Lamah's 2005 W-2 from Grazzini complied with the requirements of Minn. R. 3310.2922 as "the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs." The ULJ violated Minn. R. 3310.2922 by refusing to allow this document into the record.

The ULJ also violated Minn. R. 3310.2922 by failing to require Ms. Huffer to submit documents upon which she based her testimony. Not only did Ms. Huffer rely exclusively on documents which were not submitted into the record, she had no personal knowledge of the information on which she based her testimony. Even when Mr. Lamah indicated that the documents were inaccurate and incomplete, the ULJ did not require Ms. Huffer to submit these documents for review. (Tr. 34, 36, 40-41.)

To ensure that only competent, relevant, and material evidence was part of the hearing record, the ULJ should have required Ms. Huffer to submit the documents on which she based her testimony and provide witnesses with personal knowledge of the information contained in them. By not requiring the submission of these documents or the testimony of individuals with first-hand knowledge of the information contained in them, the ULJ ultimately based the decision on evidence that was not reliable. The ULJ's failure to require the submission of these documents and the testimony of individuals with first-hand knowledge of the information contained in them also denied Mr. Lamah's right to a fair hearing and due process under law as Mr. Lamah was not able to confront adverse testimony. Accordingly, this case should be remanded for further proceedings to allow the ULJ to develop the hearing record. The hearing record should include evidence regarding Mr. Lamah's employment with Grazzini and Doherty, Doherty records which

were the basis of Ms. Huffer's testimony, and testimony from individuals with personal knowledge of the information contained in them.

CONCLUSION

This Court may:

remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are:

....

- (2) in excess of the statutory authority or jurisdiction of the department;
- (3) made upon unlawful procedure; [or]
- (4) affected by other error of law . . .

Minn. Stat. § 268.105, subd. 7(d).

This Court should reverse the ULJ's decision that Mr. Lamah is not eligible for unemployment benefits because Mr. Lamah's substantial right to unemployment benefits was prejudiced by the ULJ misapplying Minn. Stat. § 268.095, subs. 1(3, 5). Mr. Lamah is eligible for unemployment benefits pursuant to Minn. Stat. § 268.095, subd. 1(5) because Mr. Lamah did not work for Doherty full time. Mr. Lamah is also eligible for unemployment benefits pursuant to Minn. Stat. § 268.095, subd. 1(3) because Mr. Lamah (1) did not quit an ongoing temporary assignment; and (2) separated from Doherty within 30 calendar days of beginning the employment because the employment was unsuitable for Mr. Lamah.

If this Court does not reverse the decision of the ULJ and grant Mr. Lamah unemployment benefits, this Court should remand the case for further proceedings

conducted in compliance with Minnesota law. The violations of Minn. Stat. § 546.43, subd. 2 and Minn. R. 3310.2911, .2921-.2922 prejudiced Mr. Lamah's substantial rights as Mr. Lamah was denied a fair hearing and due process under law. The communication problems between the ULJ and Mr. Lamah prejudiced Mr. Lamah's substantial rights. Mr. Lamah was not able to fully understand or participate in his unemployment hearing and, as a result, was not heard and could not confront adverse testimony. The ULJ violated Minn. Stat. § 546.43, subd. 2 and Minn. R. 3310.2911 by failing to appoint an interpreter for Mr. Lamah. In addition, the ULJ violated Minn. R. 3310.2921-.2922 by failing to assist Mr. Lamah as a pro se applicant; by not including all competent, relevant, and material evidence in the hearing record; by not basing the decision on reliable information; and by failing to ensure that all relevant facts were clearly and fully developed.

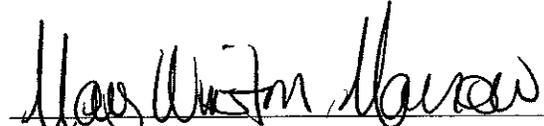
If this Court remands the case for further proceedings, the ULJ should be instructed to conduct the hearing in compliance with Minnesota law and guarantee Mr. Lamah's right to a fair hearing and due process of law. At a minimum, the ULJ should appoint an interpreter; require Doherty to submit documents on which it based its testimony; require Doherty to provide witnesses with personal knowledge of Mr. Lamah's employment with Doherty; clearly and fully develop all relevant facts; and

guarantee that Mr. Lamah is heard, can confront adverse testimony, and has a fair hearing.

Respectfully submitted,

LEGAL AID SOCIETY OF
MINNEAPOLIS

Dated: November 13, 2006



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STATE OF MINNESOTA
IN COURT OF APPEALS

Daniel Lamah,

Relator,

v.

Doherty Employment Group, Inc.,

Respondent,

Department of Employment and Economic Development,

Respondent.

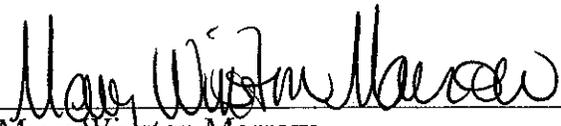
**CERTIFICATION OF
BRIEF LENGTH**

COURT OF APPEALS NO. A06-1680

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 10,393 words. This brief was prepared using Microsoft Word.

Dated: November 13, 2006.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).