

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 REPLY BRIEF**

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## INTRODUCTION

Respondent Department of Employment and Economic Development (respondent) failed to prove that Mr. Lamah is not eligible for unemployment benefits pursuant to Minn. Stat. § 268.095, subds. 1(3) and 1(5). Minnesota Statute Section 268.095, subd. 1(5) provides that Mr. Lamah is eligible for unemployment benefits through his full-time employer even though he separated from his part-time employment. In addition, Minn. Stat. § 268.095, subd. 1(3) provides that Mr. Lamah is eligible for unemployment benefits because he separated from his temporary work assignment within 30 days of beginning the assignment because it was unsuitable.

Respondent also failed to show that this matter should not be remanded for a new hearing if this Court does not overturn the decision denying Mr. Lamah unemployment benefits. Material facts regarding both the nature of Mr. Lamah's separation from Doherty and Mr. Lamah's work assignment at Northern Star are in dispute. These facts are in dispute because the Unemployment Law Judge (ULJ) prejudiced Mr. Lamah's substantial rights by not properly developing the record and failing to appoint an interpreter to insure that Mr. Lamah obtained due process of law and had a fair hearing.

## ARGUMENT

### **I. Respondent improperly dismisses and misapplies Minnesota unemployment law in concluding that Mr. Lamah's employment with Doherty was full time.**

#### **A. Respondent improperly dismissed and misapplied *Zoet v. Benson*.**

Contrary to respondent's assertion that *Zoet v. Benson Hotel Corp.*, 274 N.W.2d 120 (Minn. 1978) is "of little if any relevance to the unemployment compensation

system, which is highly regulated by a complex statutory scheme,” *Zoet* is still good law and is the only Minnesota unemployment compensation case to define part-time employment. Since the terms “part time” and “full time” are not defined in the unemployment statutes or DEED’s rules, this Court should rely on *Zoet* to define part-time employment.

Minnesota Statute Section 645.17(4) provides guidance to this Court regarding how to construe “part time,” stating that, “In ascertaining the intention of the legislature the courts may be guided by the following presumptions: . . . (4) when a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language . . . .” This statute confirms that the *Zoet* definition of part time is the definition of part time for the purposes of Minn. Stat. § 268.095, subd. 1(5). In *Zoet*, the Minnesota Supreme Court defined “part-time employment” in 1978 when applying Minn. Stat. § 268.06, subd. 5. The legislature added the part time exception to disqualification for quit found in Minn. Stat. § 268.095, subd. 1(5) in the mid-1980s. As the legislature has not subsequently defined part time in the unemployment statute, the legislature intended that the definition of “part-time employment” found in *Zoet* be used for part time found in Minn. Stat. § 268.095, subd. 1(5).

After dismissing *Zoet*, respondent then proceeds to misapply its holding. *Zoet* defined part-time employment as, “less than the usual number of hours per day for a particular job.” *Zoet*, 274 N.W.2d at 122. Respondent fails to follow the analysis in *Zoet* in arguing that the term “particular job” means the general field of work, not the actual

job worked by the actual person. This assertion also ignores this Court's practice of examining the individual circumstances of each applicant and the ULJ's obligation to consider all relevant facts pursuant to Minn. Stat. § 268.105, subd. 1(b).

In *Zoet*, to determine if the relators were eligible for unemployment benefits, the Court focused on whether the relators were employed for substantially the same number of hours at the time of their application for unemployment benefits as they had been before their application. *Zoet*, 274 N.W.2d at 121-122. In considering the relators' employment history, the Court specifically stated that "the reality of [the relators'] *particular employment relationship*" (emphasis added) must be part of the analysis. *Zoet*, 274 N.W.2d at 121. The Court considered the relators' work history, earnings, and nature of employment to determine that they were part-time workers employed on a substantially similar basis as they had been employed previously. At no time did the Court rely on information regarding the relators' general field of work rather than the relators' specific work history and employment relationship.

Further, it is the practice of this Court to examine all relevant facts, including individual circumstances, and to apply the law to those individual facts. *See Mbong v. New Horizons Nursing*, 608 N.W.2d 890 (Minn. Ct. App. 2000), *Henry v. Dolphin Temp. Help Serv.*, 386 N.W.2d 277 (Minn. Ct. App. 1986). An analysis of whether an applicant's particular job is part time or full time should be based on the applicant's specific job not the standard of all jobs in a particular sector. Finally, the standard advocated by respondent is unworkable because it makes the evaluation of whether a job is part time or full time needlessly complex. Respondent's standard requires extended

investigation into the field of a particular job and what the standard full-time position in that field is, rather than simply looking at the individual circumstances of an applicant's employment.

Contrary to respondent's contention that upholding the *Zoet* definition of part-time employment would create "administrative nightmares" by expanding what work is considered part time, affirming this definition maintains the status quo. As respondent points out, *Zoet* was decided nearly 30 years ago. The exception to disqualification found in Minn. Stat. § 268.095, subd. 1(5) was passed by the legislature nearly 20 years ago.<sup>1</sup> If following *Zoet's* definition of "part-time employment was going to create "administrative nightmares" under the exception, this would have already happened. The reality is that few people hold more than one job at a time. According to the Department of Economic and Employment Development (DEED), only ten percent of Minnesota workers hold more than one job at a time. (DEED, *Minimum Wage Workers in MN 1999-2006* <http://www.deed.state.mn.us/lmi/publications/review/0706/feature.htm>.)

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<sup>1</sup> Through Minn. Stat. § 268.095, subd. 1(5), the legislature codified the holdings from a number of cases in which the Court overturned the department's finding that applicants were ineligible for unemployment benefits because they quit, were fired, or stopped taking assignments from temporary agencies or part-time jobs even though they qualified for unemployment benefits through full-time jobs from which they were separated for non-disqualifying reasons. See *Glende v. Comm'r of Econ. Sec.*, 345 N.W.2d 283 (Minn. Ct. App. 1984), *Berzac v. Marsden Bldg. Maint. Co.*, 311 N.W.2d 873 (Minn. 1981), *Sticka v. Holiday Vill. S.*, 348 N.W.2d 761 (Minn. 1984), *Holman v. Olsten Corp.*, 389 N.W.2d 236 (Minn. Ct. App. 1986). Under Minn. Stat. § 645.17, it is reasonable to assume that the legislature did not intend that industrious workers be denied unemployment benefits when they would be eligible for unemployment benefits through their full-time employment but for the circumstances surrounding their separation from a second part-time or temporary job.

Finally, some version of the *Zoet* definition is used in many states and serves as a workable rule to determine if a particular individual at a particular job is a part-time or full-time employee. While some states have chosen to define part time relative to full time for the purposes of unemployment compensation, other states have chosen to define part time and full time based on an individual's work history. See *Bloomsburg Univ. of Pa. of the State Sys. of Higher Educ. v. Unemployment Comp. Bd. of Review*, 692 A.2d 586, 589 (Pa. Commw. Ct. 1997), 34 Pa. Code § 63.35(a), *Borromeo v. Bd. of Review*, 483 A.2d 833, 835 (N.J. Super. Ct. 1984), N.J. Ann. § 12:17-3.1(a)(1), Ind. Code § 22-4-3-2. Both of these approaches treat the terms "part time" and "full time" as relative terms, taking into account the differences between particular jobs and particular employees at those jobs.

This Court should uphold *Zoet's* definition of part-time employment, thereby ensuring that the exception to disqualification found in Minn. Stat. § 268.095, subd. 1(5) will continue to be used as it has been used for the last 20 years.

**B. Respondent misconstrues state law by defining 32 hours as full time.**

Respondent implausibly argues that the definition of unemployed found in Minn. Stat. § 268.035, subd. 26 is also the definition of part-time employment. Minnesota Statute Section 268.035, subd. 26 states that, "An applicant shall be considered 'unemployed' (1) in any week that the applicant performs less than 32 hours of service in employment, . . . ." Minn. Stat. § 268.035, subd. 26. Respondent asserts that an applicant who works less than 32 hours per week is not only "unemployed," but also "partially unemployed" or "less than employed." The terms "partially unemployed" and

“less than employed” appear nowhere in the unemployment compensation statute. By using these phrases, respondent collapses the category of unemployed persons and persons employed part time and argues that there is no middle ground. According to respondent, either a person is statutorily unemployed or is a full-time worker at 32 hours per week. However, if the legislature meant that the terms “part time” and “unemployed” were the same, there is no reason to use the term “part time” in the statute at all.

Even as respondent argues that 32 hours per week should be considered full-time employment, respondent also notes that some types of employment are full time at less than 32 hours per week, such as airline employees. The difficulty in using a set number of hours as a definition of full-time employment illustrates why it is good policy not to define the terms part time and full time by using a specific number of hours worked. As shown by respondent, these terms are relative to the particular job and particular individual.

Minnesota Statute Section 268.044, subd. 1(a) provides additional evidence that the legislature did not consider 32 hours equivalent to full time. Under Minn. Stat. § 268.044, subd. 1(a), employers are required to submit a quarterly wage report detailing the number of hours worked by and the amount paid to employees. Some employees, such as salaried individuals, may be considered “full time” but do not report the number of hours they work in a week. In reporting the hours worked by these full-time employees, the legislature instructs employers to report these salaried full-time employees as having worked 40 hour weeks. Minn. Stat. § 268.044, subd. 1(a). Under this statutory provision, the legislature does not consider full-time work to be 32 hours

per week, but accepts the general standard of 40 hours per week as a guideline when determining what constitutes full-time employment.

The legislative history which discusses the replacement of the term full time with a more specific 32 hour standard in Minn. Stat. § 268.035, subd. 26 shows that the reason for the change was administrative ease. Hearing on H.F. No. 2646 Before the House Committee on Labor-Management Relations (Jan. 27, 1998) (statement of Lee Nelson, Attorney, Department of Economic Security) and Hearing on S.F. No. 2621 Before the Senate Committee on Jobs, Energy and Community Development (Jan. 30, 1998) (statement of Lee Nelson, Attorney, Department of Economic Security). In advocating for this change, the Department of Economic Security never indicated to either the House or Senate Committees that the term “full time” should be defined as 32 hours or more. Rather, the department’s attorney argued that the failure of the legislature to define the term full time used in the statute created administrative difficulties for the department in determining eligibility for unemployment benefits and led to abuses of the unemployment benefits system. To remedy this ambiguity and more effectively administer the program, the department argued that a specific number was needed to determine when an individual who was working less than full time would be eligible for unemployment benefits and proposed that anyone working 32 hours or more would be ineligible to receive unemployment benefits. Hearing on S.F. No. 2621 Before the Senate Committee on Jobs, Energy and Community Development (Jan. 30, 1998) (statement of Lee Nelson, Attorney, Department of Economic Security). The definition of unemployed as less than 32 hours per week has no application whatsoever on what the terms full time and part

time mean in the context of the exception to disqualification for quit found in Minn. Stat. § 268.095, subd. 1(5).

This Court should uphold the definition of “part-time employment” provided in *Zoet* and find that Mr. Lamah is eligible for unemployment benefits pursuant to Minn. Stat. § 268.095, subd. 1(5). Mr. Lamah’s work at Northern Star was part time as he worked less than the usual 40 hour shift of his particular job at Northern Star. Mr. Lamah is eligible for unemployment benefits through his employment with Grazzini.

**II. Respondent ignores basic principles of employment law and ignore the ULJ’s findings in concluding that Mr. Lamah’s assignment at Northern Star was ongoing and that Mr. Lamah did not quit his employment at Northern Star because it was unsuitable.**

**A. Respondent ignores basic principles of employment law in concluding that Mr. Lamah had an ongoing assignment with Northern Star.**

Respondent ignores the basic principles of offer and acceptance in employment law in concluding that Mr. Lamah is ineligible for unemployment benefits because he quit an ongoing work assignment with Northern Star. Mr. Lamah did not have an ongoing work assignment with Northern Star as Doherty never offered and Mr. Lamah never accepted an offer of ongoing employment at Northern Star. The absence of an ongoing work assignment is evidenced by the fact that Mr. Lamah was required to call daily to find out if further work was available for that day. Neither Doherty nor Mr. Lamah ever intended his work for Northern Star to last more than each day. Because Mr. Lamah’s work assignments with Northern Star only lasted one day, Mr. Lamah qualifies for benefits under Minn. Stat. § 268.095, subd. 1(3) because he quit unsuitable

employment within 30 calendar days of beginning his most recent work assignment with Northern Star.

In the sphere of temporary work, determining eligibility for unemployment benefits pursuant to Minn. Stat. § 268.095, subd. 1(3) must be analyzed in the context of the length of each specific work assignment and not by the length of time a temporary employee has received work assignments from a temporary agency. *See Thompson v. Dolphin Clerical Group*, 2003 WL 21500175 (Minn. Ct. App. 2003) (App. 114-116). Even though Mr. Lamah received work assignments from Doherty in excess of 30 days, he never worked more than a one-day assignment. Thus, Mr. Lamah was under no obligation to continue seeking work assignments from Doherty when the work assignments were clearly unsuitable.<sup>2</sup>

Respondent misrepresents the purpose of Mr. Lamah's daily calls to Doherty as verifying his hours or verifying his schedule. This misrepresentation of Mr. Lamah's daily phone calls contradicts the ULJ's finding that Mr. Lamah called "to see if there was further work for the following day." (App. 109.) Respondent's mischaracterization of Mr. Lamah's calls as verifying hours implies that these calls were simply to schedule a previously committed job assignment. Respondent can then argue that Mr. Lamah had an

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<sup>2</sup> Respondent notes that if Mr. Lamah's employment relationship with Doherty began and ended with each of Mr. Lamah's daily work assignments at Northern Star, then Mr. Lamah cannot be eligible for unemployment benefits under Minn. Stat. § 268.095, subd. 1(3) because Mr. Lamah had no employment relationship with Doherty from which he could quit. As recognized by the legislature, Mr. Lamah had an employment relationship with Doherty after the completion of his last daily job assignment with Northern Star. Under Minn. Stat. § 268.095, subd. 2(d), a temporary employee continues to have an employment relationship with the temporary agency for five days after the completion of the most recent job assignment. *See* Minn. Stat. § 268.095, subd. 2(d).

ongoing work assignment with Doherty. However, the ULJ's finding that Mr. Lamah called to see if there was further work recognizes that Mr. Lamah never knew from day to day if he would be offered work and that on any day Doherty might not offer a job assignment to Mr. Lamah at all.

At the same time, respondent admits that, "a series of one-day assignments with different clients, or even for the same client if they genuinely carry no understanding that they are ongoing, may not constitute a single period of employment." However, respondent then argues that this does not apply to Mr. Lamah because Mr. Lamah's daily calls to the Doherty representative at Northern Star were to verify his hours for the day rather than to see if further work was available. By ignoring the ULJ's finding that Mr. Lamah called to find out if further work was available for him that day, respondent conveniently ignores the crucial fact that Doherty never made and Mr. Lamah never accepted an offer of an ongoing assignment at Northern Star.

Respondent takes issue with Mr. Lamah's assertion that once a temporary agency offers an ongoing assignment and a temporary employee accepts this offer, this employment contract is basically a guarantee that the temporary employer will continue to provide work to the temporary employee as agreed in their employment contract. Respondent argues that few temporary assignments are guaranteed to last for a specific amount of time and provides examples of situations in which a temporary employee might accept an offer of an ongoing assignment that does not have a specific end date. What respondent fails to recognize is that when, for example, a temporary employer makes an offer of an ongoing work assignment to a temporary employee to fill in for an

employee on leave or to help with a project until it is finished, the intention of both the temporary employer and the temporary employee is that the employer guarantees work will be available and the employee guarantees to perform this work until such time as the parties intended – i.e., the end of the permanent employee’s leave or the end of the project.

The Court in *Smith v. Employers’ Overload Co.*, 314 N.W.2d 220 (Minn. 1981) recognized the significance of the intention of the parties to an employment contract stating that “[t]he term of employment is determined by reference to the intention of the parties.” *Smith*, 314 N.W.2d at 223. While it is true that temporary employers and employees might choose to break the terms of their employment contract for an ongoing assignment, the party that fails to abide by the terms of the employment contract is legally liable for breaking the contract. As nothing in the record indicates that Doherty or Mr. Lamah ever entered into an employment contract for an ongoing work assignment or intended that Mr. Lamah have an ongoing work assignment at Northern Star, Mr. Lamah did not have an employment contract for an ongoing work assignment at Northern Star.

**B. Respondent ignores the ULJ’s findings by asserting that Mr. Lamah did not quit his employment with Northern Star because it was unsuitable.**

Respondent incorrectly argues that, even if this Court finds that Mr. Lamah did not work an ongoing assignment at Northern Star for over 30 days, Mr. Lamah does not meet the exception to disqualification for quit found in Minn. Stat. § 268.095, subd. 1(3) because Mr. Lamah did not quit his job because it was unsuitable. This contention is not supported by the record. The ULJ explicitly found that, “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” even though the work was unsuitable for Mr. Lamah. (App. 109.) In reaching this conclusion, the ULJ recognizes that, had Mr. Lamah not worked in excess of 30 days for Doherty, he would have met the standard for the exception to disqualification under Minn. Stat. § 268.095, subd. 1(3).

To understand why Mr. Lamah stopped seeking work assignments from Doherty, it is necessary to consider his testimony regarding his work history and training as a professional tile setter. At the hearing, Mr. Lamah testified that his last day of work for Grazzini Brothers was November 23, 2005. He then testified that he gave Doherty notice of his leave on December 2 or 3, 2005. (Tr. 18, 44)<sup>3</sup> It is no coincidence that Mr. Lamah gave notice that he was going to take time off from Doherty soon after he was laid off from his suitable employment with Grazzini. Throughout his testimony, Mr. Lamah implied that his work with Doherty was not suitable employment by emphasizing that his primary employment was as a skilled and professional tile setter. Mr. Lamah gave notice to Doherty soon after his lay off from Grazzini precisely because the Doherty job was unsuitable. While Mr. Lamah may never have specifically stated that he was taking time off from Doherty because the work assignments were unsuitable, this conclusion is implicit in his testimony and actions after he was laid off from Grazzini. The ULJ recognized that Mr. Lamah separated from his employment with Doherty because it was

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<sup>3</sup> In fact, as shown in the evidence submitted with Mr. Lamah’s request for reconsideration, Mr. Lamah was actually laid off from Grazzini on Friday, December 2, 2005, and gave notice that he was taking time off from Doherty on Monday, December 5, 2005. (App. 39, 100.)

unsuitable by finding that the sole reason Mr. Lamah was not eligible for the exception to disqualification for quit pursuant to Minn. Stat. § 268.095, subd. 1(3) was because Mr. Lamah had worked for Doherty in excess of 30 days.

If this Court finds that Mr. Lamah did not have an ongoing work assignment with Northern Star and quit his employment with Doherty, the ULJ's decision should be reversed and Mr. Lamah should be eligible for benefits under Minn. Stat. § 268.095, subd. 1(3) because he quit within 30 days of his most recent work assignment with Northern Star because the work was unsuitable.

**III. If reversal is not granted, this case must be remanded because the ULJ's findings of fact are not supported by evidence in the record and the hearing procedures prejudiced Mr. Lamah's substantial rights.**

**A. The ULJ's legal ruling that Mr. Lamah's assignment with Northern Star was ongoing is not supported by the record.**

Respondent argues that the undisputed fact that Mr. Lamah gave notice to Doherty that he was leaving to go to Africa for one month is evidence that the assignment at Northern Star was ongoing. However, the requirement that Mr. Lamah give notice before taking time off was a term of his employment contract with Doherty. As Mr. Lamah attested in his affidavit, he was told by Doherty when he was hired that he should give notice to Doherty if he would be taking time off. (App. 39.) Further, as Ms. Huffer testified during the hearing, the Doherty representative at Northern Star entered a note into Doherty's computerized system on December 8, 2005, Mr. Lamah's last day, that he would be gone for about one month and that Mr. Lamah had given five days' notice (Tr. 37). The fact that Doherty's representative did not enter anything into the computer until

Mr. Lamah's last day of work supports Mr. Lamah's contention that he did not have an ongoing assignment with Northern Star. If Mr. Lamah had an ongoing assignment with Northern Star and was expected to be there every day, it is reasonable to assume that the Doherty representative would have entered a note in the computer the day she received Mr. Lamah's initial notice and proceeded to look for an employee to replace Mr. Lamah.

Further, while respondent argues that the testimony clearly shows that the parties understood the work at Northern Star was to be ongoing, a review of the transcript shows that this is not true. While at one point during the hearing Mr. Lamah states that he was given only one assignment (Tr. 12), he also indicates that he had no idea how long the assignment would last (Tr. 15), that he did not have a regular work schedule or hours, and that "they only tell you to call . . . and see if they need you, and if they need you, then you go to work." (Tr. 16.) Nothing in this testimony indicates that Doherty ever offered or that Mr. Lamah ever accepted an offer of ongoing assignment with Northern Star. While Ms. Huffer testified that Mr. Lamah's position was "temp to perm" (Tr. 34), this is irrelevant to the central issue of whether or not Doherty offered and Mr. Lamah accepted an offer of ongoing employment with Northern Star. The mere fact that at some time in the future Doherty may have offered Mr. Lamah a permanent position with Northern Star has no bearing on whether or not Mr. Lamah had an ongoing work assignment at that time.

If this Court does not reverse the ULJ's ruling and finds that the evidence is not conclusive that Mr. Lamah had a daily job assignment at Northern Star, then this matter

should be remanded to allow the ULJ to fully develop the record regarding whether or not Mr. Lamah had an ongoing work assignment with Northern Star.

**B. The case should be remanded to determine if Mr. Lamah was granted a leave of absence.**

Respondent argues that Lamah “was never granted a leave of absence by Doherty, nor did he request one.” However, there is no reasonable evidence in the record which supports a finding of fact regarding the nature of Mr. Lamah’s time off.

Minnesota Statute Section 268.085, subd. 13a(c) states that, “A voluntary leave of absence shall not be considered a quit . . . .” As recognized by the ULJ, Mr. Lamah had good personal reason to request a leave of absence for one month to take his sick son to Africa to be with his wife. However, the ULJ failed to develop the record regarding all the circumstances surrounding Mr. Lamah’s notice that he was taking time off since the ULJ never asked either Mr. Lamah or Ms. Huffer if Mr. Lamah was granted a leave of absence. Ms. Huffer’s testimony that Mr. Lamah was placed on ISTAT, or inactive status, after he gave notice he was taking time off bolsters Mr. Lamah’s position that he was still employed by Doherty and that he did not quit when he gave notice he was taking time off. The ULJ did not adequately develop the record to make a determination if Mr. Lamah’s placement on ISTAT meant that a leave of absence had been granted.

The ULJ made a finding that Mr. Lamah quit, even though the testimony regarding Mr. Lamah’s separation with Doherty was contradictory, unclear and incomplete. (Tr. 7, 22-23, 37.) While both Mr. Lamah and Ms. Huffer initially agreed with the statement that Mr. Lamah quit (Tr. 7), both Mr. Lamah and Ms. Huffer provided

testimony later in the hearing indicating that Mr. Lamah did not, in fact, quit. Mr. Lamah later testified that he only applied for unemployment benefits after he gave Doherty notice of his leave of absence, after he contacted Doherty when he was available for work again, and after he did not receive any work assignments for two weeks. (Tr. 22-23.) Ms. Huffer's later testimony shows that Doherty did not consider Mr. Lamah's notice that he was taking time off to be a quit. As Ms. Huffer testified, Doherty labeled Mr. Lamah ISTAT which meant he was still on Doherty's roster, but that Doherty would no longer contact him with offers of new work assignments. (Tr. 39.) This Court has found that a temporary agency's assertion that it terminated an employee is inconsistent with keeping that employee on the roster. *Whitehead v. Moonlight*, 529 N.W.2d 350, 353 (Minn. Ct. App. 1986). Similarly, Doherty's assertion that Mr. Lamah quit is not consistent with Doherty keeping Mr. Lamah on its roster.

Both Mr. Lamah's and Doherty's actions after Mr. Lamah decided he could not safely take his sick son to Africa indicate that both he and Doherty understood that he was still employed and had not quit. During the hearing, Mr. Lamah testified that he repeatedly called Doherty requesting work and that he was told, "it's very slow now, call next week." (Tr. 25.) Mr. Lamah explained that after a month of calling for assignments, Jennifer from Doherty told him that they would call him when there were additional assignments. (Tr. 26.)<sup>4</sup>

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<sup>4</sup> Additional evidence from the affidavit submitted with his request for reconsideration also supports a finding that Mr. Lamah did not quit and was still employed with Doherty after December 8, 2005. On December 13, 2005, Mr. Lamah contacted the Doherty representative at Northern Star to inform her he was available for additional work

The finding that Mr. Lamah quit his employment with Doherty is not supported by the record. The ULJ failed to develop the record as to the meaning of ISTAT, failed to question Ms. Huffer's lack of personal knowledge regarding the circumstances of Mr. Lamah's separation from both Northern Star and Doherty, and failed to require Ms. Huffer to produce any documentation relevant to Mr. Lamah's efforts to obtain additional work assignments. Since there is evidence indicating that Doherty continued to treat Mr. Lamah as an employee after December 8, 2005, this Court should remand the case to allow the ULJ to further develop the record regarding whether or not Mr. Lamah in fact quit.

**C. Remand is required to provide Mr. Lamah with a fair hearing as communication problems during the hearing prejudiced Mr. Lamah's substantial rights.**

Respondent claims that no communication problems existed during the hearing and that any alleged communication problems were a result of Mr. Lamah lying. This argument directly contradicts both the ULJ's finding that there were communication problems during the hearing, as well as the fact that the ULJ made no finding that Mr. Lamah's credibility was an issue in either the original decision or the order of affirmation. Minnesota Statute Section 268.105, subd. 1(c) requires the ULJ to make a

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assignments, but was told that work at Northern Star was not available. On December 15, 2005, and several days thereafter, Mr. Lamah went to Doherty's office in Brooklyn Park seeking work assignments, spoke with Robin at the receptionist desk to ask about other placements, and left his cell phone number with her. Mr. Lamah also went to Doherty's Edina office and requested assignments from a male employee. After December 15, 2005, he called both offices numerous times seeking work assignments. (App. 39-40.) At no time during his efforts to obtain work assignments was Mr. Lamah ever told that he was no longer considered an employee of Doherty or that he needed to reapply to be considered for employment.

specific finding of fact regarding credibility if the credibility of a participant “has a significant effect on the outcome of the decision.” Minn. Stat. § 268.105, subd. 1(c). Thus, it is reasonable to infer that the ULJ did not find that Mr. Lamah’s credibility was an issue and that there were communication problems at the hearing.

Even if Mr. Lamah’s credibility were an issue, the communication problems inherent in the hearing clarify what may, on first glance, appear to be a “lack of candor” on the part of Mr. Lamah. Respondent’s brief alleges that Mr. Lamah purposely lied about his separation from Doherty when he said that Doherty had no work for him. However, as the transcript shows, Mr. Lamah repeatedly tried to tell the ULJ about the circumstances surrounding his separation from Northern Star, which included why he needed to take a month off to go to Africa. The ULJ did not understand that these circumstances were relevant to Mr. Lamah’s separation. After being repeatedly told to skip these important facts, Mr. Lamah summed up his ultimate separation with Doherty truthfully – explaining that after calling again and again for additional work assignments and finding that none were available, he applied for unemployment benefits.

Respondent also argues that Mr. Lamah lied regarding the date of his separation from Doherty and the number of hours he worked at Northern Star. In his affidavit submitted with his request for reconsideration, Mr. Lamah explains that the three months during which he worked assignments at Northern Star were a time of incredible stress for him, which makes his recollection of the period poor. In his affidavit, Mr. Lamah explains that he began working at Doherty soon after his wife miscarried and three days before his wife was deported. In addition, Mr. Lamah shows that he worked an average

of 77 hours a week while working for both Grazzini and Northern Star. (App. 37, App. 90.)

Respondent also asserts that Mr. Lamah did not need an interpreter and did not have difficulty communicating during the hearing. Respondent points out that in documents provided to Mr. Lamah prior to the telephone hearing, Mr. Lamah was apprised, in “clear and simple” English, of his right to an interpreter. Respondent provides no basis for the contention that the language in the documents provided to Mr. Lamah was clear and simple and does not provide any proof that an individual testing at a low intermediate level in a written English proficiency test would be able to understand these documents.<sup>5</sup> In his affidavit, Mr. Lamah expressly states that he did not know that he had the right to ask for an interpreter. Nothing in the record contradicts this fact. Regardless, the law does not require Mr. Lamah to know that he has a right to an interpreter or to request an interpreter. Instead, the ULJ had an affirmative obligation to continue the hearing and appoint an interpreter when Mr. Lamah was unable to fully participate in his unemployment hearing due to his difficulty understanding English.

Accordingly, if this Court does not reverse the ULJ’s decision and grant Mr. Lamah’s unemployment benefits, this case should be remanded to allow the ULJ to fully develop the record by appointing an interpreter and ensuring that Mr. Lamah receives due process of law and a fair hearing.

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<sup>5</sup> With his request for reconsideration, Mr. Lamah attaches the results of a written English proficiency test showing that Mr. Lamah tested into an advanced beginning/low intermediate level ESL course. (App. 87-89.)

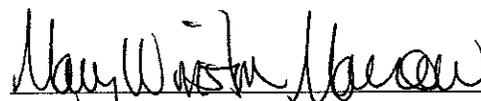
## CONCLUSION

The ULJ denied Mr. Lamah's unemployment benefits based on a misapplication of Minnesota law and on a reliance on a record that prejudiced Mr. Lamah's substantial rights to a fair hearing and due process of law. Therefore, the ULJ's decision denying Mr. Lamah unemployment benefits must be reversed. If this Court does not reverse the ULJ's decision denying Mr. Lamah unemployment benefits based on a misapplication of Minnesota law, Mr. Lamah is entitled to a new hearing to allow the ULJ to appoint an interpreter and ensure that the record is fully and accurately developed.

Respectfully submitted,

LEGAL AID SOCIETY OF  
MINNEAPOLIS

Dated: January 16, 2007



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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.

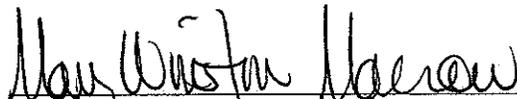
**CERTIFICATION OF  
REPLY BRIEF LENGTH**

**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 reply brief is 5,822 words. This reply brief was prepared using Microsoft Word.

Dated: January 16, 2007.

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