

No. A06-1680

State of Minnesota
In Court of Appeals

DANIEL LAMAH,

Relator,

vs.

DOHERTY EMPLOYMENT GROUP INC,

Respondent,

and

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

Respondent.

RESPONDENT-DEPARTMENT'S BRIEF AND APPENDIX

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I. LEGAL ISSUES

A. Under the law, a quit from employment occurs when the decision to end the employment, at the time the employment ends, is the employee's. Daniel Lamah was working in a long-term temporary assignment, but gave notice that he would not be returning to that assignment because he was going to Africa for a month. Did Lamah quit his employment?

B. At the hearing before the unemployment law judge, the judge questioned Lamah, who answered questions and made statements on his own behalf. He never requested an interpreter either before or during the hearing. Did the judge conduct the hearing in conformity with the law?

II. STATEMENT OF THE CASE

This case involves whether Relator Daniel Lamah is entitled to unemployment benefits. Lamah established a benefit account with the Minnesota Department of Employment and Economic Development. A department adjudicator initially determined that Lamah quit his employment with Doherty Employment Group, and that he therefore was disqualified from receiving benefits. (D-1)¹ Lamah appealed. A de novo hearing was held, and the Unemployment Law Judge affirmed the initial determination, finding that Lamah quit his employment for other than a good reason caused by the employer, and that he was disqualified. (Appendix to Department's Brief, A4-A6)

¹ Transcript references will be indicated as "T." Exhibits in the record will be "D" for the department, "App." for the applicant, with the exhibit number following.

Lamah filed a request for reconsideration with the Unemployment Law Judge, who affirmed the initial decision. (Appendix to Department's Brief, A1-A3)

This matter is before the Minnesota Court of Appeals on a writ of certiorari obtained by Lamah under Minn. Stat. §268.105, subd. 7(a) (2004) and Minn. R. Civ. App. P. 115.

III. STATEMENT OF FACTS

From September 6, 2005 to December 8, 2005, Daniel Lamah worked for Doherty Employment Group, a staffing agency, in a packaging assignment at Northern Star. (T.32-33) He worked from 3:00 PM to 11:00 PM, Monday through Friday. (T.16) But because he was occasionally not needed on a particular day, he called in each day to verify his schedule. (T.16) He worked an average of 36.15 hours per week for Doherty. (T.35)

In early December 2005, Lamah informed Doherty that he would not be returning to the Northern Star assignment after December 8, because he would be taking a trip to Africa for a month. (T.37) A note was made in his file that he would be unavailable. On December 14, an agent for Doherty who did not see or did not notice the note called Lamah to offer work. (T.37) Lamah refused the work, reiterating that he was going to Africa. (T.14) He was placed on "inactive status," meaning he would no longer be contacted for jobs. (T.39)

When he started working for Doherty, Lamah had another full-time job with Grazzini Brothers as a tile-setter. He was laid off from that job prior to the time he stopped working for Doherty, meaning that at the time Lamah quit the Northern Star assignment, it was his only full-time job.

IV. ARGUMENT

A. SUMMARY OF ARGUMENT

Lamah made the decision to end his employment with Doherty by giving notice that he would not be returning after December 8. He did not request, nor was he granted, a "leave of absence." He simply announced that December 8 was his last day. This constitutes quitting employment, whether he hopes to come back and reapply for positions when he returns or not. The ULJ correctly determined that he quit employment.

The ULJ also correctly determined that no exception to disqualification applied, because the Doherty job was not a part-time job, but a full-time job. He worked 36.15 hours per week for Doherty on average, and under the unemployment insurance law, that is treated as full-time work. There is no exception to disqualification when an employee quits a full-time job, simply because he has the capacity to earn more money in a different full-time job.

Lamah makes several arguments about the procedure at the evidentiary hearing. These arguments fail, primarily because the hearing was fairly and appropriately conducted, but also because the facts of the case are not in dispute,

and Lamah presents only legal issues. There is no reason to remand the case for another hearing, particularly when the relevant facts are undisputed.

B. STANDARD OF REVIEW

Effective for Unemployment Law Judge decisions issued on and after June 25, 2005 that are directly reviewed by the Court of Appeals, the legislature stated the standard of review at Minn. Stat. § 268.105, subd. 7(d) (Supp. 2005) as follows:

(d) 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.

The unemployment law judge's fact findings are reviewed in the light most favorable to the decision and if there is any reasonable evidence to sustain those findings, they must be affirmed. *Lolling v. Midwest Patrol*, 545 N.W.2d 372, 377 (Minn. 1996). When witness credibility and conflicting evidence are at issue, the court defers to the unemployment law judge's ability to weigh the evidence and make those determinations. *Whitehead v. Moonlight Nursing Care, Inc.*, 529 N.W.2d 350, 352 (Minn. App. 1995).

C. BURDEN OF PROOF

In 1999, the legislature eliminated any “burden of proof” in determining entitlement to unemployment benefits. Minn. Stat. §§ 268.069, subd. 2, 268.101, subd. 2(d) and 268.105, subd. 1. There is also no longer a presumption of entitlement. When an individual applies for unemployment benefits, she is required to provide information as to why she is unemployed and give all known facts surrounding that separation from employment. Minn. Stat. § 268.101, subs. 1 and 2. Upon that information and any information an employer may provide or that may be gathered from any other source, the department first determines if the applicant quit employment. If the applicant is found to have quit, under Minn. Stat. § 268.095, subd. 1, the applicant is disqualified from unemployment benefits unless a preponderance of that available evidence shows that one of the eight exceptions applies. The matter is decided upon the available evidence, regardless of its origin.

This process was implemented based upon the principle that unemployment benefits are considered state funds and that an application for benefits is a request for benefits from the state trust fund and not a claim against an employer. *See* Minn. Stat. § 268.069, subd. 2.

D. ARGUMENT FOR DISQUALIFICATION

Whether an applicant for benefits was discharged or quit is a question of fact. *Hollar v. Richard Manufacturing Co.*, 346 N.W. 2d 692, 694 (Minn. App.

1984).² The statute defines “quit” and “discharge” at Minn. Stat. § 268.095, subs. 2 and 5 (2004). Those subdivisions are as follows:

Subd.2. Quit defined.

(a) A quit from employment occurs when the decision to end the employment was, at the time the employment ended, the employee's.

* * *

Subd. 5. Discharge defined.

(a) A discharge from employment occurs when any words or actions by an employer would lead a reasonable employee to believe that the employer will no longer allow the employee to work for the employer in any capacity. * * *.”

An applicant who quits employment is disqualified from receiving unemployment benefits unless one of the eight enumerated exceptions applies.

Minn. Stat. § 268.095, subs. 1 and 3 (Supp. 2005) provide in pertinent part:

Subd. 1. **Quit.** An applicant who quit employment shall be disqualified from all unemployment benefits according to subdivision 10 except when:

(1) the applicant quit the employment because of a good reason caused by the employer as defined in subdivision 3;

* * *

Subd. 3. Good reason caused by the employer defined.

(a) A good reason caused by the employer for quitting is a reason:

- (1) that is directly related to the employment and for which the employer is responsible;
- (2) that is adverse to the worker; and

² See also *Markert v. National Car Rental*, 349 N.W. 2d 859, 861 (Minn. App. 1984); *Larson v. Pelican Lake Nursing Home*, 353 N.W. 2d 647, 648 (Minn. App. 1984); *Midland Electric Inc. v. Johnson*, 372 N.W. 2d 810, 812 (Minn. App. 1985); *Krantz v. Loxtercamp Transport, Inc.*, 410 N.W. 2d 24, 26 (Minn. App. 1987); *Shanahan v. District Memorial Hospital*, 495 N.W. 2d 894, 897 (Minn. App. 1993); and *Goodwin v. B P S Guard Services, Inc.*, 525 N.W. 2d 28, 29 (Minn. App. 1994).

(3) that would compel an average, reasonable worker to quit and become unemployed rather than remaining in the employment.

(b) The analysis required in paragraph (a) must be applied to the specific facts of each case.

1. The ULJ correctly found that Lamah quit his employment.

Lamah claims in his brief that he did not quit his employment. Interestingly, he does not claim he was laid off or otherwise discharged, nor does he explain what status he believes he was in. He simply argues that he did not quit, offering no alternate explanation of how his employment ended. It seems certain he could not argue he was discharged, since the employer clearly had work for him if he had continued to show up. The ULJ thus concluded that Lamah did, in fact, quit his employment with Doherty.

It is undisputed that Lamah called Doherty and announced that he would no longer be appearing for work as scheduled at the assignment where he had been working regularly for three months. While there are passing references in the brief to a "leave," Lamah certainly was never granted a leave of absence by Doherty, nor did he request one. An announcement that one is not coming to an assignment anymore and will be back at a future time to reapply for other work is not a request for a leave of absence. A leave of absence would have to be granted by Doherty, which never granted him any leave of absence and never agreed to hold any position open for him. Lamah made a decision to end his employment with Doherty when he announced that he would not be returning to his ongoing assignment at Northern Star because he was going to Africa.

Lamah's argument that he did not quit apparently is primarily based on a claim that there was no "ongoing assignment" to quit from, because he had no contract with Doherty under which he was guaranteed ongoing work. In fact, the brief argues, in spite of the fact that he had been working the same shift doing the same work for the same client for more than 36 hours a week for three months, there was no ongoing assignment; he simply had one day of work at a time. This argument is based entirely on the fact that Lamah called each day to verify that he was needed before he came in.

The argument is untenable. Lamah's own behavior makes it quite clear that he understood his assignment to be ongoing and not, as the brief rather implausibly claims, a situation where he simply called every day in hopes of receiving a brand-new offer of a single day of employment. Were that the case, then Lamah would not have given notice that he was leaving the assignment to go to Africa in the first place. He would simply have stopped calling in to receive his "offer of employment for the day." If the assignment had not been ongoing, there would have been no reason for him to give notice. Consider that the brief says in its statement of facts that Lamah gave notice in early December "that December 8 would be his last day at Northern Star." (Rel. Br. 5) The department agrees that this is what occurs. Had he had no ongoing assignment, he certainly could not have given advance notice that December 8 would be his last day.

Furthermore, Lamah and Doherty both treated it as a single ongoing assignment. Asked, "Were you on one assignment or more than one assignment

with [Doherty]?", Lamah answered, "One assignment." (T.12) Asked how long he was told the assignment would last, Lamah said it would last not for one day, but "as long as they need us." (T.15) Doherty similarly treated it as a single ongoing assignment, and in fact Doherty representative Mary Huffer testified that it was a "temp-to-perm" assignment, meaning that it could potentially become a permanent position. (T.34) It is evident that neither Lamah nor Doherty ever considered this to be a series of 60 or so one-day assignments.

Lamah's argument relies on the novel claim that a temporary assignment only lasts as long as the employee's hours have been scheduled and guaranteed. Anytime the specific hours have yet to be finally scheduled and verified, he argues, there is no assignment for any of those hours. Under this theory, if an employee worked at a business that posts a weekly schedule where the employees check the schedule each week to find out what hours they will be working, an employee could only be classified as working in a series of one-week assignments, since she might or might not appear on the schedule the following week – she would undoubtedly not be "guaranteed" anything. This, of course, could last for years in long-term jobs done through staffing agencies, with employees treated as working in a series of perhaps hundreds of single assignments, simply because their hours vary slightly and are subject to modification from week to week.

Lamah's argument that a temporary assignment requires guaranteed scheduled hours is without legal authority. He cites no case in which any court has ever taken what the agency and employee both treated as a single assignment and

treated it as a series of shorter assignments simply because the employee called in periodically or even daily to verify his hours. It is very common for employees in a variety of fields to work in flexible arrangements in which the hours vary somewhat. It is true, of course, 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. That is entirely beside the point. Lamah's claim is far broader: that calling in to verify his hours *for the particular day* in an ongoing assignment is the equivalent of calling in to be offered a new assignment.

Contrary to the implications of Lamah's brief, work does not need to be "guaranteed" to be ongoing. There are very, very few jobs – temporary or permanent – that carry a guarantee that they will continue. Temporary assignments to fill in for an employee on leave are often without a definite end date. Assignments to come in and help with a project until it is finished are similar. A temporary assignment that was guaranteed to last from one date to another date would be the exception rather than the rule. The vast majority of temporary assignments can be ended at any time, just like most at-will employment in general.

2. Lamah does not qualify for the exception to disqualification for individuals who quit employment within 30 days of starting that employment because it is unsuitable.

The construct advanced in Lamah's brief, in which what both Lamah and Doherty characterized as a single three-month assignment is reclassified as a series of perhaps 60 one-day assignments at the same place doing the same thing, is carried over into the next section of the brief. There, Lamah argues that even if he did quit his employment with Doherty – not merely his assignment, but his employment with Doherty – restarted anew every day when he called to verify his hours for that day. Therefore, Lamah claims, in spite of the fact that he had been in his assignment at Northern Star for three months, he qualifies under an exception to disqualification where “the 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) (2004 and Supp. 2005).

This argument fails for several reasons. It goes without saying that Lamah's argument would entirely twist the purpose of this exception. The purpose of the exception is to allow a window for employees to try out jobs that may or may not work out, and if they try the job and find it to be unsuitable and quit for that reason during the first 30 days, they are not disqualified. The exception is not intended for employees who remain in a job for three months before quitting. Because Lamah's argument unambiguously distorts the purpose of the exception, it is fortunate that for three reasons, the language of the statute does not allow the exception to be applied in this case.

First, as explained above, the artificial construct in which Lamah formed a new employment relationship every day when he called in to verify the schedule for the day is inconsistent both with the parties' understanding of the situation and with common sense. It is not possible that in crafting this exception, the legislature envisioned that an employee in the same job for three months would be considered employed for less than 30 days simply because his scheduled hours for each day had to be double-checked. As explained above, many employees work on posted weekly schedules where they have no scheduled or guaranteed hours until they see the next schedule posted. In many of those jobs, the schedule is subject to change at any time. Under Lamah's argument, these employees could work for years and still take advantage of an exception intended for those in their first month of employment.

Second, the exception requires that the applicant quit the employment *because* it was unsuitable. It does not simply require that the applicant quit the employment *and* that the employment be unsuitable. Lamah was unambiguous that the reason he quit the assignment at Northern Star was that he was taking a trip to Africa. That is what he told the ULJ when he eventually testified truthfully about his conversation with Doherty; that is also what he told Doherty. He never testified at any time, nor does his brief argue, that he decided to stop working at the Northern Star assignment because of the nature of the assignment. The section of the brief in which Lamah argues for the application of this exception entirely ignores this requirement, although in the brief's statement of facts, it makes clear

that Doherty quit the employment because he was going to Africa, not because it was unsuitable. (T.5)

Third, the argument is circular and illogical. Lamah first claims that he did not quit on the basis that there was no ongoing assignment, but then claims that even if he did quit – meaning there *was* an ongoing assignment – he hadn't been working in it for 30 days. The problem is that this requires the court to go back and rely on the same initial flawed claim that there was no ongoing assignment. The argument simply doesn't make any sense. It amounts to "There was no ongoing assignment for me to quit, but even if I did quit an ongoing assignment, I hadn't been working in that assignment for 30 days, because... there was no ongoing assignment." Obviously, this cannot be. If the court concludes, as the evidence shows, that there was an ongoing assignment for Lamah to quit in the first place, then that assignment certainly had been in place for more than 30 days, so this argument cannot possibly have merit and he cannot possibly qualify under this exception.

3. Lamah does not fall under the exception to disqualification for employees who quit part-time employment and have other full-time employment.

Lamah argues in the alternative that if he did quit his employment, it was part-time employment, and therefore he falls under an exception to disqualification that applies where "[t]he employment [that the applicant quit] 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 (Supp. 2005). The department agrees that the evidence in the case indicates that Lamah also had full-time employment with Grazzini Brothers in his base period, and that he separated from that employment for nondisqualifying reasons; namely, a layoff due to lack of work.

The issue, of course, as the ULJ found, is that Lamah’s employment with Doherty was not “part time.” The argument in Lamah’s brief is that because he was scheduled for up to 40 hours and sometimes worked less than that as a result of schedule changes (though he also sometimes worked more than that), he worked “part time.” Lamah argues that any employee with scheduled hours who winds up working anything less than the maximum hours for which he is initially scheduled for is working “part time.” This would presumably apply to any employee who is let go a half-hour early because business is slow, and would have the bizarre result that the same job would be a part-time job one week and a full-time job another week, depending on perhaps an hour or two of variation in the schedule.

Because of the administrative nightmares that this would present, it is fortunate that there is no support for this interpretation anywhere in statute or case law. The case law that Lamah cites, consisting of a single 1978 case, *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 unique to the program.

The fundamental flaw in Lamah's argument is his conviction that "part-time employment" is something that is not part of the nature of a job, but part of the nature of a particular *day* at that job. Lamah argues that any day when an employee works fewer hours than originally scheduled, the job is "part time." The unemployment statutes do not look to the nature of a particular day or to the relationship between scheduled hours and the hours actually worked. They look to the nature of the employment.

Even if the definition taken from *Zoet* is accepted, it is of no help to Lamah here. The *Zoet* discussion states that part-time work is generally "less than the usual number of hours per day for a particular job." This can be looked at in one of two ways: "a particular job" can be viewed as a particular job classification, or it can be looked at as a particular person's job. Neither interpretation would make Lamah's job "part time."

If the court looks to the usual number of hours per day for individuals working in packaging, there is no evidence that 7.23 hours per day, which was Lamah's average, is less than the usual number of hours for individuals in manufacturing. In many businesses, 35-hour or 37.5-hour weeks are common. There is no reason why a 36.15-hour week would automatically be considered "part time" compared to regular manufacturing jobs. If the court looks to the usual number of hours per day for Lamah's particular job, then those hours were defined by the nature of his employment. Because he was working an average of 36.15 hours per week, it is clear that days when he did not work were the exception

rather than the rule, and that most days, he went in and worked for eight hours, just as he would in any other full-time job. The fact that employees are occasionally sent home early does not make all of their jobs part time.

There is another reason, however, why the ULJ's decision that 36.15 hours per week is adequate to constitute full-time work, and that reason arises from the statutes themselves. In order to collect unemployment benefits, an individual must be unemployed, and under the law, anyone who works fewer than 32 hours per week is unemployed. Minn. Stat. §268.035, subd. 26 (Supp. 2005). Anyone working at least 32 hours per week is *not entitled to any unemployment benefits*, while those working fewer than 32 hours are treated as unemployed or partially unemployed and, depending on their earnings, they can often collect at least some benefits. The 32-hour cutoff, however, is absolute: those who work at least 32 hours collect no benefits, no matter what they earn.

The statutory scheme essentially treats those who are working at least 32 hours as employed to the point where they do not require benefits, no matter how little money they earn. They are, for the purposes of the unemployment insurance statutes, fully employed. This is the most significant threshold in terms of hours of employment per week, and it creates the line between who is and who is not considered less than employed, such that benefits are appropriate. It makes sense, therefore, to treat 32 hours as a general rule of what is considered "full-time work" for the purposes of unemployment benefits.

It should be noted that if Lamah had continued to work at Northern Star after being laid off from Grazzini Brothers, he would not have been eligible for unemployment benefits, because he would still have been employed. He would, in fact, have been just as “employed” under the statute as he was before. As stated above, many employees do not work 40 hours per week; 35-hour or 37.5-hour schedules are very common in regular full-time work.

Lamah’s argument would vastly expand the reach of the exception to disqualification that is at issue. For an employee genuinely working part-time – that is, in most cases, less than 32 hours per week³ – the effect of the provision that Lamah cites is far more limited than it would be for him. When an employee quits a job that offered him less than 32 hours of work, he quits a job that would not have kept him “employed” under the statute in the first place. It makes sense not to entirely disqualify someone who would otherwise get benefits simply because he quits, for instance, a 15-hour-a-week second job. Even had he kept that job after losing his full-time job, he would have been “unemployed” and likely eligible for at least partial benefits under the statute. Disqualification therefore seems inappropriate, because the individual would be “unemployed” under the statute whether he quit the second job or not.

Lamah’s case is completely different. The purpose of unemployment

³ There may be occupations in which employees customarily work less than 32 hours per week as a full-time schedule – airline pilots and some other transportation-related employees might be such employees.

insurance is to provide benefits to employees who are unemployed through no fault of their own. Where an employee's part-time job would not keep him from being "unemployed" under the statute, losing his full-time job means he is unemployed through no fault of his own, whether he quits his part-time job or not. In Lamah's case, however, he worked enough hours with Doherty that had he not quit, he would not have been unemployed according to the statutory definition. Lamah only made himself eligible for benefits by making himself unemployed: he quit a job that, under the law, would have avoided unemployment. For an employee working, for instance, 15 hours per week, this is not the case.

Lamah's work for Doherty was full-time work, as the ULJ found.

E. HEARING PROCEDURE

Lamah makes a variety of complaints about the procedure used in his evidentiary hearing and requests remand, although the determinative facts are undisputed. This is curious, but fortunately, as the complaints are not persuasive, remand would not be necessary in any event.

Lamah's primary argument is that he was not provided with an interpreter. It should be noted that a critical basic misrepresentation of fact is central to this argument, which is that Lamah was not informed prior to the hearing in any language he could understand that he had the right to request an interpreter. Lamah's affidavit, which was submitted with his request for reconsideration, includes a glaring falsehood: that the document informing him of his right to an interpreter, but none of them were "in a language that [he] speak[s]." (Rel. Br.

App. 41) The brief repeats that Lamah “did not know” that he could request an interpreter. In his request for reconsideration, it further claims that the document explaining the right to an interpreter is “translated into Lao, Vietnamese, Khmer, Somali, Hmong, and Spanish.” (App. 16)

This is technically truthful, but very misleading, because while those are the only languages into which the document is “translated,” the right to an interpreter is also explained in clear and simple *English*, which Lamah was capable of understanding. Interestingly, with all the documents, including an unofficial and apparently irrelevant “transcript,” that are included with Lamah’s brief, he has elected not to include the insert itself, as one might expect. In fact, the insert explains in English: “This and the accompanying documents are important. If the reader does not understand the documents, the reader should seek immediate assistance.” It goes on: “If you require an accommodation for the hearing, such as a sign or language interpreter, reader, or any assistive equipment, please call the Appeals Office at (651-296-3745) as soon as possible.” (Appendix, A7-A8))

Lamah’s English is not perfect, but the record demonstrates – and, in fact, his own testimony at the hearing makes clear – that it is entirely adequate to understand the instruction that he could request an interpreter. He had every opportunity to request an interpreter for the hearing, and he chose not to.

The record of the hearing suggests, quite simply, that the reason Lamah did not request an interpreter for the hearing was that he didn’t need one. Consider the following words, taken from his closing argument:

...during my last eight years working for Grazzini, I never had to work for another company. I was making enough money and I had enough to take care of my family. But when I went through this legal [unintelligible] to have my wife stay here to help me take care of my child that was born with sickle-cell disease anemia, when I knew that if she's gone with her, I knew I wouldn't be able to work. And after I lost the case, I was gone, I had no choice than to do what I can to be there for him and to do what I can. And up to today, he's with me. I'm struggling with him and I'm, at the same time, doing everything I can to have something that I can be doing. The union is fighting for me, and I believe because now it's summertime, I'm going to be working very soon. I was doing packaging job. I finished St. Paul Technical College. I'm a professional tile setter; bricklayers' union. That's what I was doing...

But up to today, I'm doing everything I can to get a job and be able to provide for my family. I believe in working, but I don't decide that I have to be employed, and I'm doing everything that I can to find someone that will employ me to use my talent and my gifts. And I ask, ma'am, Judge, you can look at my record, but I believe that I have always been a hard-working person and I'm doing everything that I can to get a job, and I pray that you will understand that. I had Doherty Staffing as a temporary job, and that didn't work well. I had no choice than to apply for unemployment. And I am at home now with my sickle-cell child, and I am doing everything I can, from church to church to get food to eat. Now we are three months behind now in our mortgage. And I know God will provide, but I pray that I will get something very soon. The construction is picking up now in the summertime. I pray something will come out and I ask for your understanding and your support. Thank you.
(T.53-55)

The reason for the inclusion of this lengthy excerpt is that while it is often easy to locate isolated parts of a transcript and show that exchanges between an individual and the judge were confusing and appear even more so when transcribed, it is critical to keep in mind that this can happen for a variety of reasons, not all of which are the result of poor language skills. The above statement involves complex thoughts, complex syntax, appropriate vocabulary,

and a fair amount of eloquence as to the circumstances in which Lamah finds himself. While it contains a couple of minor errors, many applicants with English as their first language would envy its clarity, and many ULJs would be perfectly happy to have all applicants be as capable of expressing themselves.

Lamah's comments at the hearing simply do not suggest that he is incapable of meaningful participation in a hearing conducted in English. The notion that the ULJ was compelled to spontaneously stop the hearing and appoint an interpreter because Lamah was unable to understand the proceedings is not supported by the record, particularly the transcript in which Lamah spoke persuasively and clearly on his own behalf and never told the judge that he didn't understand or didn't speak English and wanted the hearing stopped. The above passage makes clear that Lamah knew more than enough English to inform the judge if he was having difficulty at the hearing, and he didn't – probably because he did not, in fact, need an interpreter.

There were some communication difficulties, certainly. It is difficult, however, to determine which difficulties, if any, resulted from Lamah's language skills and which resulted from the same things that come up in every hearing: reluctance to answer the judge's questions, discomfort when confronted with inconsistencies, and, in some cases, false or misleading testimony on the part of witnesses.

It should be noted that some of Lamah's testimony was clearly false. He claimed that he averaged about 20 or 22 hours of work for Doherty, and that he

sometimes worked as little as 8, 12, or 14 hours a week. This, which would obviously make it more plausible to consider the employment part-time, did not turn out to be true. Nothing about Lamah's affidavit, in which he claims not to express complex thoughts well, indicates that he doesn't know the difference between 12 hours and 30 hours. Similarly, Lamah claimed that at the time he stopped working for Doherty, he still had his job at Grazzini Brothers, which obviously makes his decision to quit Doherty easier to sympathize with, since it would mean he did not voluntarily become entirely unemployed. (T.19) This, too, turns out to be false. He gave an incorrect end date at Doherty to support this claim, claiming unequivocally that he did not work for Doherty after November 12, when in fact, he worked for Doherty until December 8 – significantly, after he had already been laid off from Grazzini Brothers.

He also falsely stated that there were weeks after he started work with Doherty when he did not get any work at all from them. (T.22) The records attached to his own brief demonstrate that this, too, was false, as he would certainly know. In fact, there were no weeks after his very first week when he worked anything less than 30.5 hours. (Rel. Br. App. 97) He certainly was aware that it was not truthful to testify that there were weeks when he got no work at all, or that he worked 8 or 12 hours. He also claimed that the most hours of work he ever got through Doherty came around Thanksgiving, when he got 38 hours of work for the week. This was not true. There were no fewer than five weeks over an approximately three-month period when he worked more than 38 hours. All of

this was testimony offered specifically and with some detail, and it simply was not truthful. The fact that some of Lamah's exchanges with the ULJ lack clarity does not reflect only language problems; it reflects an unfortunate lack of candor on his part.

Lamah also specifically misrepresented the reason why he stopped working at the Northern Star assignment. Asked why he stopped working at that particular assignment, Lamah claimed it was because "they didn't have work." (T.22) Lamah knew this was false. He was well aware that this was not the reason he stopped working at Northern Star. He knew that the reason he stopped working at Northern Star was that he called and gave notice that he would be going to Africa. Rather surprisingly, one of the main sections of the transcript in which the brief claims the ULJ did not "understand" Lamah's testimony is a section in which he was not telling her the truth about this matter. The brief cites pages 22 and 23 of the transcript, admitting that Lamah was testifying that "Doherty did not have work for him," which was not truthful. (Rel. Br. 27) In fact, Doherty did have work for him until the day he quit; he stopped working only because he quit the assignment at Northern Star, and it appears that it was his effort to conceal this fact that made his testimony so confusing. It is unfortunate that the brief specifically attempts to hold it against the ULJ that she encountered difficulties in "understanding" testimony that was not truthful. Certainly, the testimony was confusing; it was not intended to accurately convey the facts, but to conceal them.

The ULJ had difficulty from the beginning getting Lamah to answer the questions she was asking, rather than going off in another direction. This is not unusual in unemployment hearings, where parties are often not experienced with being examined by a judge, and where they often have a lot they want to say, not all of which is relevant, and much of which the ULJ will ask about later. The ULJ repeatedly had to direct Lamah to answer the question she was asking, rather than talking about something else. She also specifically told him that if he had any trouble understanding the question she was asking, he should tell her so. He said, "Okay." (T.12) At no time during the remainder of the hearing did he ever tell the judge that he didn't understand what she was asking.

Lamah's brief makes much of a claim that he told the judge that he was "having trouble communicating in English," or the like. (Rel. Br. 3) The brief refers to the same exchange referenced earlier, in which the judge determined that Lamah had not testified forthrightly. He had originally testified that he worked at Northern Star until Doherty stopped having any work for him there, at which point he stopped calling in. He did not disclose that he voluntarily left the Northern Star assignment, as he later admitted, because he was planning a trip out of the country. After the employer supplied this piece of information and Lamah agreed that it was correct, the judge asked him, "Why did you testify before that you stopped calling because they didn't offer you work when, in fact, you stated now that you stopping calling, you told them you weren't available." (T.46) Confronted with his misleading earlier testimony, Lamah stated, "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 [to Africa] didn't work, I continued to ask every time if there is anything I can do.” (T.46)

This is the entirety of Lamah's mention of his language skills during the hearing: this statement that perhaps the reason he testified to one thing and then to something else was that in this particular case where he appeared not to have been truthful, he might be “expressing [him]self a little bit wrong.” This was, of course, not the only time that he testified inaccurately, as explained above. After he told the judge this, he went on to give a perfectly coherent, if not particularly relevant, response: he reiterated that when the trip didn't work out and he didn't wind up going to Africa, he went back to calling in and asking for work. He had said this before, and while Doherty Staffing had no record that this actually occurred, it is not determinative in this case. By that time, he had already quit and was in effect looking to be rehired for a new assignment. He was not disqualified from benefits for any failure to call in and request assignments.

Interestingly, the brief repeatedly excoriates the ULJ for failing to understand Lamah's testimony adequately, which it “demonstrates” by showing that she repeatedly asked him some of the same questions and told him that it didn't appear that she was getting an answer. In fact, the record shows that the ULJ in this case carefully guided Lamah through every part of his testimony, redirecting him to the matter at hand when he would veer off-track. When she would reach the end of a section of testimony, she would ask him a series of

questions just to clarify that she understood exactly what he was saying. An example of this comes at pages 45 and 46 of the transcript, where the judge completes a series of questions about what he did and when regarding his decision to leave the Northern Star assignment. She then says, "Let me see if I understand." She clarifies her understanding of his testimony by restating what she understands him to be saying, and asks him to confirm that she has it right. He confirms, in fact, that every statement she makes about her understanding of his situation is accurate. Far from being unfair, the ULJ was painstaking in ensuring that she understood the facts from both parties before she closed the hearing.

The ULJ in this case did not hold an unfair hearing. In fact, she held a very careful hearing in which she consistently guided Lamah back to the matters at hand. Just as the rules require, she assisted him in the presentation of his testimony by clarifying, organizing, and structuring the questioning so that she could understand what happened. The department would stress that the need to do this is not unique to applicants whose first language is other than English. It is often necessary to ask clarifying questions so that the judge understands exactly what an individual is testifying to. That is what she did here. The fact that particular answers were unclear doesn't mean that the *record* is ultimately unclear, precisely because she was careful in clarifying the testimony until she understood it. The brief appears to mistake the ULJ's care and thoroughness for bafflement.

In fact, the care with which the ULJ conducted the hearing and her thoroughness in determining the relevant facts is reflected in the fact that, despite

the claims about the unfair hearing and the lack of good evidence, the facts of this case that are relevant to the ULJ's decision are undisputed. No one disputes how Lamah's employment came to end: he announced that he was leaving for Africa and December 8 would be his last day, although he ultimately didn't go to Africa. No one disputes how many hours he worked: his brief acknowledges that he worked 36.15 hours per week, on average, and attaches documentation of his hours demonstrating that the employer's testimony about those hours was true (and that Lamah's was not). No one disputes that he worked another job at Grazzini Brothers, or that he separated from that job for nondisqualifying reasons.

It is unclear what Lamah believes another hearing with an interpreter would show, or what testimony Lamah would provide that would make any difference. Not only does he not present any new evidence or facts; he affirmatively has agreed with all the relevant facts the ULJ used in her decision. The brief complains, for instance, that the ULJ did not require the employer to provide copies of documentation on which its witness relied, but Lamah concedes every relevant point to which the employer testified that was drawn from that documentation. Lamah and the employer agreed about nearly everything, with the exception of the work hours, which the documentation (included with Lamah's own brief) has resolved in favor of the employer's testimony.

The brief similarly complains that Lamah was not permitted to submit his W-2 from Grazzini, but that document has no relevance, as the ULJ correctly found. The only thing that matters about the Grazzini job is that the work with

Grazzini was “full-time employment” and that he separated from it for nondisqualifying reasons, which is not in dispute. There is no reason why it would be relevant to compare the amount of money he made at Grazzini to the amount he made at Doherty, and certainly no legal reason why the amount of money earned in one job would determine whether an entirely different job is “part-time.”

The glaring question not answered by the brief is this: if the hearing was so unfair and the record was not developed, exactly what facets of the situation were not explored? In what way was the record not developed? The ULJ determined the nature of the job at Doherty as to whether it was part-time or full-time – certainly, Lamah can argue that 36.15 hours is part-time as a matter of law, or that because the job was scheduled for up to 40 hours and was often for a few hours less than that, it should be part-time as a matter of law. But there doesn’t appear to be any missing testimony or evidence that could possibly cast any additional light on that issue. Similarly, the ULJ determined the sequence of events when Lamah left his employment. We know why he stopped working, we know the nature of his assignment, we know that he gave notice, and we know that he was then placed on inactive status and would no longer be called. Again, if Lamah wants to make legal arguments based on those facts, he certainly can, but the facts were fully developed.

It is true that it took some doing on the part of the ULJ, in part because Lamah was not particularly candid in certain parts of his testimony, but the facts ultimately became quite clear in this case. Lamah’s arguments are legal ones:

primarily that a three-month assignment becomes a series of one-day assignments if the applicant calls in daily to verify the schedule, and that 36.15 hours of work per week should be considered “part-time.” The department does not believe that either of these arguments has merit, but in any event, they do not require any additional testimony or evidence. The lengthy affidavit that Lamah submitted with his request for reconsideration, while it reiterates that he considered the Doherty job secondary, contains no additional relevant *facts* that would change the ULJ’s decision in this case, even if the entire affidavit were taken as true. That is clearly one of the reasons the ULJ saw no need to reopen the case and hold an additional hearing.

Again, Lamah’s arguments here do not require remand. He disagrees with the conclusion that the job was full time, and he disagrees that he had an ongoing assignment at Doherty. Interestingly, his affidavit states that he was told *before he started* that he would need to give at least a couple of days of notice before quitting the Northern Star assignment, which is entirely inconsistent with the entire “long series of one-day assignments” argument in his brief. (Rel. Br. App. 41) But in any event, there is nothing in the affidavit that, if testified to at a hearing, would change the outcome. The ULJ undoubtedly believed, as Lamah stresses in the affidavit, that he thought of the Doherty job as secondary to the Grazzini job, and that it paid less. None of this makes the job “part time.” A job’s status as “part time” or “full time” does not depend on how much the employee cares about or wants the job, or on where it falls as a priority in his life. He

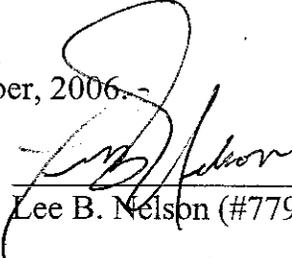
stresses in the affidavit that he was not guaranteed work for a particular period, but neither are most employees, particularly in temporary assignments.

Ultimately, the reason Lamah presents no new relevant facts is precisely that the ULJ was thorough and careful in her fact-finding. She figured out, from the testimony of Lamah and the employer and from the documentation she had available, what happened in this case. The facts are clear and essentially undisputed. Lamah does not want another opportunity to present evidence; he wants an opportunity for his attorney to argue again from exactly the same facts and hope to be more persuasive. There is no reason for remand. The record is entirely adequate for a decision.

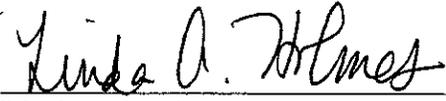
V. CONCLUSION

The Unemployment Law Judge correctly concluded that Lamah quit his employment and that no statutory exception to disqualification applied. He therefore was disqualified from receiving benefits. The hearing was fairly conducted, and no remand is needed. The department asks that the Court affirm the agency decision.

Dated this 13th day of December, 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).