

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 26, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP3059-FT

Cir. Ct. No. 2004CV1082

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

SALWA RASHAD,

PLAINTIFF-APPELLANT,

V.

**LABOR AND INDUSTRY REVIEW COMMISSION AND MADISON AREA
TECHNICAL COLLEGE DISTRICT,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
PATRICK J. FIEDLER, Judge. *Reversed and cause remanded with directions.*

Before Deininger, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM.¹ Salwa Rashad appeals an order affirming a decision by the Labor and Industry Review Commission to deny her claim for unemployment compensation. The issues relate to whether Rashad had statutory “good cause” or a constitutional right to refuse an offer of otherwise suitable work because it conflicted with her planned religious pilgrimage. We reverse and remand for further proceedings before the commission.

¶2 Most of the commission’s findings are not in dispute. Rashad worked one semester for Madison Area Technical College (MATC) as a part-time instructor, ending in December 2002. She then sought unemployment compensation. The commission found that in week three of 2003 Rashad refused an offer of suitable work, without good cause, which had the effect of making her temporarily ineligible for benefits. *See* WIS. STAT. § 108.04(8). The offer of work was by MATC for a spring semester position. Rashad rejected the offer and made a counter-offer to work for most of the semester, except for a period during which she planned to make a religious pilgrimage.

¶3 A claimant is permitted to reject otherwise suitable work for good cause. WIS. STAT. § 108.04(8). The statute does not define the term “good cause,” and apparently neither does case law. The commission found that the work offered to Rashad was suitable, and then it turned to the issue of good cause. It noted that Rashad testified she is required to make a religious pilgrimage at least once in her life if she is physically able. The commission further noted that the required time period for this pilgrimage in 2003 was in late January and early

¹ This is an expedited appeal under WIS. STAT. RULE 809.17 (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

February and conflicted with Rashad's availability to accept the employment. The commission then wrote: "The commission is unwilling to conclude that this time conflict caused by the religious pilgrimage provided the employee with good cause. While the employee testified that she was obligated to complete the pilgrimage at least once in her life if she was physically able, there was no requirement that it be made in 2003." This was the commission's entire analysis of the good-cause issue. The circuit court affirmed the commission. On appeal, the parties agree that we review the decision of the commission, not the decision of the circuit court.

¶4 Rashad argues that the commission erred by finding that there was no requirement that she make the religious pilgrimage in 2003. She correctly notes that she testified that "the requirement has to be met as soon as the person is capable of doing it," and that she had not made the trip previously because she did not have the financial resources to do so. Rashad also argues that the commission's decision is contrary to the clause in the First Amendment to the United States Constitution protecting the free exercise of religion. She relies on various federal cases to argue that the commission's decision restricts her ability to exercise her religion and that the decision is not supported by a compelling state interest.

¶5 In response, the commission asserts that, in stating there was no requirement that the pilgrimage be made in 2003, it was not making a finding as to the religious necessity of the pilgrimage in that year. Rather, the commission argues that it was questioning Rashad's factual contention that 2003 was the first time in her life that she was able to make the pilgrimage, and therefore the commission was making a finding about her financial and physical ability. However, the commission does not explain what evidence in the record would

have supported a finding contrary to Rashad's testimony as to her prior inability to make the pilgrimage. The commission further argues that Rashad waived her constitutional argument by not raising it before the commission and that, if it was not waived, the argument should be rejected because Rashad's testimony would support a finding that the pilgrimage was not her sole reason for rejecting the employment offer. MATC makes essentially the same arguments as the commission.

¶6 We first address the question of what finding the commission was making when it stated that there was no requirement that the pilgrimage be made in 2003. We reject the argument that the commission was making a finding that Rashad had previously been financially able to make the pilgrimage but had postponed it, and therefore could again postpone it. The language in the commission's statement cannot reasonably be interpreted that way. It contains no reference to Rashad's prior financial ability, or to prior postponements of the pilgrimage. We also reject MATC's argument that the commission was making a credibility determination about Rashad's testimony as to her previous financial ability or the religious necessity of the trip. The commission, in the "memorandum opinion" section of its order, stated: "Because credibility was not at issue, the commission did not consult with the administrative law judge as to his credibility impressions. Rather, the commission reaches a different legal conclusion by applying the law to the facts at hand." Plainly, the commission did not make a finding that Rashad was untruthful.

¶7 For similar reasons, we reject the argument that the commission was making a finding that Rashad's planned trip was motivated by concerns other than religion, such as an intent to visit another family member, or that her refusal of the work offer was based partly on the reduced number of hours offered. The

commission's decision cannot reasonably be read as addressing these matters in any way.

¶8 Having rejected the respondents' alternative explanations for the commission's decision, we are left with only Rashad's argument that the commission made a determination of the religious necessity that she make the pilgrimage in 2003. This is a reasonable interpretation of the language used by the commission. However, it would also mean that the commission failed to notice or accept her testimony that the pilgrimage must be made at the first opportunity and that this was the first time she was financially and otherwise able to make the pilgrimage. The respondents point to no evidence in the record that would support a finding contrary to Rashad's testimony on that point. We conclude that, because there is no evidence in the record to support the commission's finding that there was no religious necessity for Rashad to make the pilgrimage in 2003, that finding must be vacated.

¶9 The commission's determination that Rashad lacked good cause to refuse suitable work appears to have rested entirely on that erroneous finding. There is no other explanation in the order. Because this legal conclusion was based on an erroneous finding, the legal conclusion must also be vacated, pursuant to WIS. STAT. § 102.23(6).

¶10 "Good cause" is a broad and open-ended concept. We are unable to say with confidence what decision the commission would reach on this issue using a corrected factual finding. The commission's determination of good cause is probably entitled to some degree of deference in judicial review, although it is not necessary for us to decide on a specific standard of review at this time. Accordingly, we conclude that the case should be remanded so that the

commission can reconsider the question of whether Rashad had good cause under WIS. STAT. § 108.04(8). In addition, as we discussed above, the commission does not appear to have made factual findings on potentially relevant and disputed points, such as Rashad's possible other motivations for making the trip or for refusing the work offer. Therefore, on remand, the commission should make clear findings on these points. In ordering remand, we are not expressing an opinion as to whether the commission should or must take additional evidence on any matter.

¶11 Our discussion does not address constitutional arguments Rashad makes on appeal. However, we conclude that this case should also be remanded so that the commission may address the constitutional analysis that may flow from its factual findings and statutory conclusions. Neither respondent disputes on appeal the potential applicability of the case law cited by Rashad to the general situation presented in this case. The respondents argue that Rashad waived any constitutional challenge by not previously raising the issue, but both acknowledge that we could nevertheless address the topic. We understand, in light of the fact that it was not previously raised, why the commission did not address the constitutional aspect of the dispute. However, on remand we direct the commission to address this issue as well. In broad strokes, the question is whether the application of the statutory good-cause standard leads to a denial of a constitutional right in light of the facts in this case.

¶12 In summary, we reverse and remand for the circuit court to remand to the commission to make further factual findings and conclusions related to application of the good-cause standard provided in WIS. STAT. § 108.04(8), and to address the constitutional issues argued by Rashad that may be raised by the commission's application of that standard.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

