

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 98-1440

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

MAURICE ELEBY,

PETITIONER-RESPONDENT,

V.

**STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW
COMMISSION,**

RESPONDENT-CO-APPELLANT,

MERITER RETIREMENT SERVICES, INC.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
RICHARD J. CALLAWAY, Judge. *Reversed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

DYKMAN, P.J. Meriter Retirement Services, Inc. (Meriter) and the Labor and Industry Review Commission (commission) appeal from a circuit court

order reversing the commission's decision that Meriter did not intentionally discriminate against Maurice Eleby on the basis of race in violation of the Wisconsin Fair Employment Act (WFEA). The dispositive issue on appeal is whether Eleby proved that Meriter's stated reason for terminating him was pretextual. The commission concluded that Meriter's reason for terminating Eleby—the stealing of Meriter food—was a legitimate, nondiscriminatory reason, and that Eleby did not offer sufficient proof to refute that conclusion. We defer to the commission's findings and conclusion. Accordingly, we reverse.

BACKGROUND

Meriter operates three facilities: a health center, a retirement center and the Elderhouse. Maurice Eleby, a black male, worked as a wait staff employee at the retirement center until he was discharged in August 1993. Linda Lane, a white female, is the director of food and nutrition for all three of Meriter's facilities. Jane Sarafini, a white female, was the food service supervisor at the retirement center. On the days that Sarafini did not work, a shift supervisor was in charge. Joan Nelson, a white female, was the shift supervisor from October 1992 until January 1994.

Meriter's work rules state that the unauthorized possession or removal of Meriter property may result in disciplinary action ranging from a verbal warning to immediate discharge. Meriter considered the eating or taking of its food without authorization to be a violation of this rule. While Lane stated that she was not aware of anyone ever violating this rule, Sarafini and Nelson both testified that they had suspicions that employees were eating Meriter food without authorization.

Nelson testified that she suspected that several employees under her supervision were eating Meriter food while working. She also heard rumors that Eleby and some of his white co-workers were eating food. There were approximately twenty instances in which she suspected that employees were taking food. However, Nelson decided not to make a “big issue” out of it and did not report her suspicions to Sarafini or Lane.

Sarafini stated that her suspicions were based upon her observations of employees who would duck behind posts or turn around and not be able to speak because their mouths were so full. She stated that she personally observed Eleby and three white employees with food in their mouths. Sarafini stated that she would not conduct an investigation; she simply would say, “If you have something in your mouth and are eating, its against the work rules. Don’t do it. Stop it.” She did not take any disciplinary action against the employees she suspected of eating, nor did she present this information to Lane.

On or around July 12, 1993, Brenda Johnson, a wait staff employee, observed Eleby take a stack of sliced ham from a cooler in the kitchen, wrap it in a paper towel, tuck it under his shirt and leave the kitchen. At some point between July 12, 1993 and August 3, 1993, Johnson discussed the incident with another co-worker and wondered if she should report it. Nelson overheard this conversation and questioned Johnson about the incident. Nelson also asked other employees if they observed the theft, but none responded that they had. After they discussed the matter, Johnson stated that Nelson left it up to her as to whether she should pursue the matter further, stating that it was her choice on whether to make a statement, and that if she chose to do so she should go see Sarafini. Johnson went to Sarafini and prepared a written statement about the incident. Johnson testified that management in no way pressured her into making a statement.

Sarafini presented Johnson's statement to Lane. Lane then met with Sarafini and Joy Zabel, a white female personnel manager, to discuss the matter. Lane believed Johnson's allegation that Eleby had taken the ham and decided that it warranted terminating his employment. Before making this decision, Lane stated that she reviewed Eleby's personnel file, which included a notation that Eleby had failed to report on his job application that he had been convicted of a crime.¹ Lane testified that this fact influenced her decision when assessing credibility between Johnson and Eleby, because it demonstrated that Eleby had been dishonest in the past.

Lane scheduled a meeting with Eleby, Zabel and herself for August 4, 1993, regarding the alleged violation. Lane prepared a termination letter in advance of the meeting. It was Lane's normal practice to complete the disciplinary paperwork first and then to meet with the employee. If after allowing the employee to respond, she determined that the disciplinary action was still warranted, Lane would carry through with the disciplinary act. If the disciplinary action was not warranted, she would not proceed.

At approximately 3:30 p.m. on August 4, 1993, Lane and Zabel met with Eleby to present him with the allegations contained in Lane's termination notice and to allow him an opportunity to respond to those allegations. As Lane attempted to go through the contents of the disciplinary action report, Eleby allegedly became upset, began interrupting Lane and tried to leave the meeting.

¹ On Eleby's job application, he falsely answered "no" to the question of whether he had ever been convicted of a crime. In March 1992, Sarafini reported the falsification to Lane. Lane gave Eleby a final warning and a three-day suspension for violating a work rule that prohibited the falsifying of an employment application. Lane apparently decided not to terminate Eleby's employment because the nature of his conviction did not involve the abuse of another person.

Eleby then stated that he wanted a witness present before he talked about the matter any further. Lane agreed to his request and rescheduled the meeting for the following day at 8:00 a.m. The meeting was subsequently rescheduled for August 6 at 8:30 a.m., so that Eleby's attorney could be present.

On August 6, Lane and Zabel stated that they waited for approximately twenty minutes in Zabel's office for Eleby to arrive before Lane had to leave for another meeting. When Eleby finally did arrive at Zabel's office at around 9:00 a.m., Zabel told Eleby that his employment was terminated and that he would be sent a letter informing him of the decision. Eleby insisted on discussing the matter further, and Zabel stated that he had an opportunity to discuss the matter on August 4th and at 8:30 that morning. She then read him the termination notice, which stated that he was being terminated for stealing the ham from the refrigerator in violation of the work rules. An argument ensued and Eleby was eventually escorted out of Zabel's office by security. A letter was then sent to Eleby setting out the events that had occurred and informing him that he was terminated.

On March 23, 1994, Eleby filed a discrimination complaint under the Wisconsin Fair Employment Act with the Equal Rights Division of the Department of Industry, Labor and Human Relations. He alleged that he was treated differently in the terms and conditions of his employment, and that he was wrongfully discharged because of his race and sex. On January 26, 1995, the Department initially determined that there was probable cause to believe the allegations of Eleby's complaint.

On June 28 and 30, 1995, a hearing was conducted. On September 30, 1996, the administrative law judge ("ALJ") issued her decision,

holding that Meriter terminated Eleby's employment because of his race. The ALJ found that Meriter's work rule prohibited food service people from eating or taking Meriter food. Despite this work rule, many of the food service employees including Eleby ate Meriter food while working; however, only Eleby was disciplined for it. The ALJ believed that Nelson and Sarafini were "unconsciously influenced" by Eleby's race in the way they accepted Johnson's account of what occurred and failed to fully investigate the matter and thoroughly weigh the evidence. The ALJ also was "troubled" by the fact that Lane based her decision to terminate Eleby on Johnson's statement, which was made three weeks after the theft, and that she decided to terminate Eleby without first talking to him. The ALJ ultimately concluded that "although they may not have been aware of it, Nelson, Sarafini, Lane, and Zabel were all influenced by Eleby's race in handling the events that led up to his discharge and in the termination decision itself." She ordered Meriter to reinstate Eleby with back pay and benefits, plus attorney's fees and costs in the amount of \$23,360.73.

On October 18, 1996, Meriter petitioned the commission for administrative review of certain portions of the ALJ's decision. On August 28, 1997, after consulting with the ALJ regarding her assessment of the credibility and demeanor of the witnesses, the commission reversed the ALJ's decision and dismissed Eleby's discrimination complaint. The commission stated that the ALJ's decision was not based upon an assessment of the witnesses' credibility or demeanor, and that the ALJ stated that she ruled as she did because she believed that Eleby would not have been discharged if he had not been black. The commission reached an opposite result, drawing different inferences from the underlying evidence.

The commission explained its decision in a lengthy memorandum opinion. First, the commission disagreed with the ALJ's conclusion that Nelson and Sarafini treated Eleby differently because of his race. The commission noted that both Nelson and Sarafini treated Eleby the same as other employees in the past who they had observed, suspected or heard rumors were eating or taking Meriter food; they did essentially nothing. The commission pointed out that while Sarafini may have suspected others of eating Meriter food while they were working, this was the first incident in which an employee was personally observed taking a large quantity of food and leaving the premises with it. The commission next noted that both Nelson and Sarafini let Johnson decide whether to report her observations, and that they did not pressure her into making the written statement. Finally, there was no evidence that anyone at Meriter ever heard Nelson or Sarafini say anything negative about black individuals.

The commission also disagreed with the ALJ's conclusion that Lane treated Eleby differently because of his race. First, the commission was not sure why the ALJ attached significance to the fact that the termination was based on a report by Johnson as to what she observed three weeks earlier. The commission was satisfied that Lane had no reason to question Johnson's credibility, but that she did have reason to doubt Eleby because he was dishonest in filling out his job application. Second, in response to the ALJ's concern that Lane made her decision before meeting with Eleby, the commission stated that the evidence suggested that it was common practice for Lane to prepare a termination notice prior to meeting with the employee. Lane would decide after meeting with the employee whether to proceed with the termination process. Third, the commission was satisfied that Lane provided Eleby with ample opportunity to meet with her and give his side of the story; he simply failed to take advantage of those

opportunities by being argumentative at the first meeting and by being late for the second meeting. Finally, the commission disagreed with the ALJ's conclusion that Lane was "predisposed" to believing Johnson's statement because of a racial bias she had against blacks. It concluded that if Lane was racially biased, she would have terminated him as she did a white female employee for falsifying an employment document.² Instead, she only gave him a three-day suspension. The commission was further persuaded by the fact that Eleby and another black employee both admitted to having no recollection of Lane ever making any derogatory comments about black individuals.

The commission also disagreed with the ALJ's conclusion that Joy Zabel's handling of this case was influenced by Eleby's race. The commission concluded that Zabel did not give Eleby an opportunity to state his case at the August 6th meeting, not because of race, but because he failed to take advantage of the opportunities he was given to present his story. Furthermore, Lane was the ultimate decision maker in this case, not Zabel, and Lane's decision to terminate Eleby was therefore not affected by the fact he was not given a chance to talk to Zabel.

The commission also concluded that Meriter's decision to terminate was not based solely on this incident of theft. Lane testified that her decision was influenced by the fact that he had lied on his employment application regarding his prior conviction, and that demonstrated to her a history of dishonesty. The

² In April 1993, Lane came to believe that a white female employee had provided false information regarding a requested bereavement leave. An investigation was conducted and Lane completed a termination notice for the woman prior to giving her advance notice or an opportunity to present her side of the story. The woman's explanation apparently did not change Lane's mind, and Lane proceeded with termination.

commission ultimately concluded that Eleby did not adequately establish that Meriter's reason for terminating him was pretextual. It was satisfied that based on the context and surrounding circumstances, Eleby was terminated for violating a work rule, not for being a member of a protected class.

Eleby appealed the commission's decision to the circuit court, which reversed the commission, concluding that Meriter had not articulated a legitimate, non-discriminatory reason for terminating Eleby. Meriter and the commission appeal.

STANDARD OF REVIEW

On appeal, we review the commission's decision and not that of the circuit court. See *Knight v. LIRC*, 220 Wis.2d 137, 147, 582 N.W.2d 448, 453 (Ct. App. 1998). Our standard of review for agency decisions depends upon whether the issues presented are questions of law or questions of fact. *Id.* If the issue presented is a question of law, we apply one of three levels of deference to the agency conclusion: "great weight," "due weight" or "de novo." *Id.* In *Knight*, we set out what these three standards entail and when they are applied:

The "great weight" standard is the highest level of deference given to an agency conclusion of law or statutory interpretation. This level of deference is accorded to an agency conclusion when the following four elements are met: (1) the agency is responsible for administering the statute, (2) the agency conclusion or interpretation is long standing, (3) the agency employed its specialized knowledge or expertise in forming the conclusion or interpretation, and (4) the agency interpretation provides consistency and uniformity in the application of the statute. Under this standard, a reviewing court must uphold the agency interpretation if it is reasonable and if it is not contrary to the clear meaning of the statute.

The "due weight" or "great bearing" standard is the second highest level of deference given to an agency

conclusion of law or statutory interpretation. This level of deference is used if the agency interpretation is “very nearly” one of first impression. Under the due weight standard, “[W]e will not overturn a reasonable agency decision that furthers the purpose of the statute unless we determine that there is a more reasonable interpretation under the applicable facts than that made by the agency.”

Finally, the “de novo” standard is the least deferential. It is used if the agency conclusion of law or interpretation is one of first impression. No weight is given to the agency interpretation when this standard is employed.

Knight, 220 Wis.2d at 148-49, 582 N.W.2d at 453 (citations omitted).

If the issue presented concerns a question of fact, we apply the “substantial evidence” standard. See ***Knight***, 220 Wis.2d at 149, 582 N.W.2d at 453. An employer’s motivation when making an employment decision is a question of fact. See ***Currie v. DILHR***, 210 Wis.2d 380, 386, 565 N.W.2d 253, 256 (Ct. App. 1997). An agency’s findings of fact must be upheld on review if there is substantial evidence in the record upon which a reasonable person could rely to make the same findings. *Id.* at 386-87, 565 N.W.2d at 257; see also § 227.57(6), STATS. “Substantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” See ***Knight***, 220 Wis.2d at 149, 582 N.W.2d at 454 (quoting ***Bucyrus-Erie Co. v. DILHR***, 90 Wis.2d 408, 418, 280 N.W.2d 142, 147 (1979)). A reviewing court may not substitute its judgment for that of the agency as to the weight or credibility of the evidence on any finding of fact. See ***Currie***, 210 Wis.2d at 387, 565 N.W.2d at 257. Instead, it must examine the record for credible and substantial evidence that supports the agency’s determination.

The application of a statute or rule to a set of facts is a question of law. We generally are not bound by an agency's conclusions of law. *See Knight*, 220 Wis.2d at 150, 582 N.W.2d 454. However, in *Knight*, we stated that,

when the agency is charged by the legislature with the duty of applying the statute being interpreted, its interpretation is entitled to great weight. WFEA is administered and enforced by the Department of Industry, Labor and Human Relations. We conclude that great deference should be afforded LIRC's decision as it is the commission charged with the interpretation and application of WFEA.

See id. (citations omitted). We therefore give great weight to the commission's conclusions of law and will affirm its findings of fact as long as there is substantial evidence in the record to support those findings.

DISCUSSION

Wisconsin recognizes two theories of employment discrimination: disparate impact and disparate treatment. *Racine Unified Sch. Dist. v. LIRC*, 164 Wis.2d 567, 594, 476 N.W.2d 707, 718 (Ct. App. 1991). The disparate impact theory is used "to attack facially neutral policies that, although evenly applied, impact more heavily on a protected group." *See id.* at 595, 476 N.W.2d at 718. The disparate treatment theory is invoked when the complainant establishes that the employer treats some people less favorably than others because of their membership in a protected class. *See id.* The disparate treatment theory, unlike

the disparate impact theory, requires that the complainant prove that the employer intentionally discriminated against him or her.³ *See id.*

We have held that discriminatory intent can be inferred using the burden-shifting approach set out by the U.S. Supreme Court in *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973). *See Puetz Motor Sales, Inc. v. LIRC*, 126 Wis.2d 168, 172, 376 N.W.2d 372, 374 (Ct. App. 1985). Under this burden-shifting approach, the complainant has the initial burden of proving beyond a preponderance of the evidence a prima facie case of discrimination. To establish a prima facie case of employment discrimination under the WFEA, Eleby must prove that: (1) he was a member of a protected class under the statute, (2) he was discharged, (3) he was qualified for the position, and (4) either he was replaced by someone not within the protected class or that someone not within the protected class was treated more favorably. *See id.* at 173, 376 N.W.2d at 374-75.

Meriter contends that Eleby has not established a prima facie case of employment discrimination because he has not proven that he was replaced or treated less favorably than someone not within a protected class. We recognize the potential validity of this argument.⁴ But the commission did not address this issue and determining the reasonableness of an assumed finding takes us away

³ There was some concern at the commission and circuit court level whether a complainant is required to prove that the employer intentionally discriminated against the employer in order to establish a claim. The commission concluded that proof of intent is required under a disparate treatment case. Eleby is therefore required to establish that Meriter intentionally discriminated against him in order to prevail.

⁴ The commission did not address whether Eleby established a prima facie case. It stated that: “[w]here the employer has articulated its legitimate nondiscriminatory reason for its actions, whether a prima facie case of discrimination has been proven is no longer relevant; the only issue that remains is the ultimate factual issue of whether the employer intentionally discriminated against the plaintiff.”

from a deferential review. Therefore, without ruling on whether Eleby has established a prima facie case, we will move to the second step and, for the sake of analysis, accept that Eleby has established a prima facie case.

The establishment of a prima facie case “creates a presumption that the employer unlawfully discriminated against the employee.” *Currie*, 210 Wis.2d at 390, 565 N.W.2d at 258 (quoted source omitted). The burden then shifts to the employer to rebut the presumption by articulating a legitimate, nondiscriminatory reason for the employment decision. *See Puetz*, 126 Wis.2d at 172, 376 N.W.2d at 374. To rebut this presumption, the employer carries a burden of production, but not the burden of ultimate persuasion. *Currie*, 210 Wis.2d at 393, 565 N.W.2d at 259. The plaintiff in employment discrimination claims always retains the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against him or her. *Id.*

Meriter’s reason for terminating Eleby was that he violated a work rule by stealing ham from Meriter’s refrigerator. The commission was satisfied that theft of property is a legitimate, non-discriminatory reason for terminating an individual’s employment, particularly when there is a work rule that prohibits such behavior. That conclusion is reasonable.

After the employer articulates its reason, the complainant bears the burden of proving that the offered reason was pretextual, and that the real reason for the decision was because of the person’s status as a member of a protected class. *See Puetz*, 126 Wis.2d at 172, 376 N.W.2d at 374. In this case, Eleby asserts that Meriter’s reason was pretextual, because Meriter chose not to enforce the work rule against white employees who were suspected of eating Meriter food without authorization.

The commission found several flaws in this argument. First, it stated that Eleby assumed that Meriter had knowledge that white employees were eating or taking food without authorization; however, both Nelson and Sarafini stated that they “suspected” that certain employees, including Eleby, were eating food, but they had no actual proof; therefore, they did nothing.⁵ The commission further determined that, even if Nelson and Sarafini had actual knowledge that other employees were eating Meriter food, it would have been irrelevant because neither of them had the decision-making authority in this case.⁶ Lane was the individual that made the decision whether to terminate Eleby, and there is no dispute that she had no knowledge, direct or indirect, of anyone stealing Meriter food prior to this incident. The commission therefore concluded that Eleby failed to demonstrate that the decision-maker intentionally treated him less favorably than his white co-workers, because the evidence indicates that Lane was never confronted with a similar situation in which a white employee was involved.

The commission also accepted Lane’s testimony that her decision to terminate was not based solely on the fact that Eleby stole Meriter property. Her decision was also influenced by the fact he had lied on his job application when he stated that he had not been convicted of a crime. She stated that this fact, which was noted in his personnel record, influenced her decision in deciding whether to believe Johnson or Eleby about the events that occurred. Because Eleby falsified

⁵ The supreme court addressed the issue of an employer’s vicarious liability for supervisors’ sexual harassment in *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998). Because the acts of Nelson & Sarafini were found to be non-discriminatory, we need not attempt to fit this case into *Faragher*’s analysis.

⁶ The commission cites to three federal cases in which the courts held that the decision-maker must have knowledge to support a finding of discrimination. *Trotter v. Board of Trustees of Univ. of Alabama*, 91 F.3d 1449 (11th Cir. 1996); *Hedberg v. Indiana Bell Telephone Co.*, 47 F.3d 928 (7th Cir. 1995); *Wenner v. C.G. Bretting Mtg. Co.*, 917 F. Supp. 640 (W.D. Wis. 1995).

his job application, Lane concluded that he had a tendency to be dishonest, and two instances of dishonesty were sufficient in Lane's opinion to warrant discharge.

The commission also rejected Eleby's claim that Meriter failed to follow its own established investigative policies and procedures involving the claims of misconduct. It was satisfied that Meriter contacted Johnson, the eyewitness to the incident, and received a written statement from her regarding her observations. Meriter also contacted other individuals that may have witnessed the theft. Furthermore, Lane gave Eleby two opportunities to explain his side of the story, but he failed to take advantage of either. The commission also stated that Meriter's failure to inquire into Johnson's motive for reporting Eleby does not negate the steps it took to investigate the matter. It was satisfied that the steps Meriter took were sufficient to corroborate the charge that he violated the work rule. Overall, the commission concluded that Meriter terminated Eleby because he stole Meriter property, and that Eleby failed to persuade it that his termination was for any reason prohibited under the WFEA.

CONCLUSION

Based on our review of the record, we conclude that there was substantial evidence to support the commission's finding that Eleby had not established a discrimination claim. Its conclusion under the law was reasonable. We therefore reverse the trial court's decision and reinstate the commission's order in this case.

By the Court.—Order reversed.

Not recommended for publication in the official reports.

No. 98-1440(C)

VERGERONT, J. (*Concurring*). I agree that the correct result is reinstatement of the commission's decision. I write separately because, in my view, the commission erroneously ruled that Sarafini's and Nelson's knowledge of other employees eating or taking food was irrelevant since they did not make the decision to fire Eleby. Although, for the reasons I explain below, this error does not require reversal of the commission's decision, a discussion of the issue may avoid future error.

The commission and the courts generally look to federal employment discrimination cases as guides in interpreting our state Fair Employment Act (WFEA), unless they conflict with our legislature's intent in enacting the WFEA. See *Marten Transport, Ltd. v. DIHLR*, 176 Wis.2d 1012, 1020, 501 N.W.2d 391, 395 (1993), and *Currie v. DILHR*, 210 Wis.2d 380, 389, 565 N.W.2d 253, 257 (Ct. App. 1997). As the majority decision notes, the commission relied on three federal cases for its ruling: *Trotter v. Board of Trustees of the Univ. of Ala.*, 91 F.3d 1449 (11th Cir. 1996); *Hedberg v. Indiana Bell Telephone Co.*, 47 F.3d 928 (7th Cir. 1995); and *Wenner v. C.G. Bretting Mfg. Co.*, 917 F. Supp. 640 (W.D. Wis. 1995).

In *Trotter*, 91 F.3d at 1454, the court held that evidence of racially biased remarks by a person who was not involved in the challenged salary decision was not direct evidence of discrimination in compensation. The person, who made the remarks, previously the head nurse of the unit into which the employee was hired, had been transferred to another unit before the employee was

hired, did not handle his hiring, and did not discuss his salary with the supervisor who did make the hiring and salary decision. *Id.* In *Hedberg*, 47 F.3d at 932, the court held that an employer cannot, as a matter of law, be liable under the American with Disabilities Act if the employer had no knowledge of the claimant's disability. In *Wenner*, 917 F. Supp. at 648, the court held that the employee had not presented evidence of the fourth element in a prima facie case for retaliation under Title VII—that there is a causal link between the protected expression and the adverse action—because there was no evidence that the supervisor who fired the employee knew of the employee's complaints that he had been sexually harassed by someone employed by another company. The court rejected the employee's argument that the alleged sexual harasser might have influenced the supervisor's decision, stating:

It is proper to impose liability on employers for the discriminatory acts of their supervisory employees, such as making biased recommendations, but there is no basis in the law for making a company liable for the discriminatory acts of non-employees when the company does not know that the third party's information is tainted by a discriminatory bias.

Id.

In none of the three cases relied on by the commission were the motives or actions of the employee's direct supervisors at issue. Where supervisors other than the final decision maker do have a role in the process leading to the challenged decision, federal courts consider their motives and

conduct relevant, as the *Wenner* court's statement makes clear. *See, e.g., Stacks v. Southwestern Bell Yellow Pages*, 27 F.3d 1316, 1323, 1325-26 (8th Cir. 1994).⁷

In this case, Lane learned of the incident that led to Eleby's termination because of decisions made by Nelson and Sarafini in their roles as Eleby's supervisors. The commission found that Nelson overheard Johnson discussing with another employee her observation of Eleby taking a stack of sliced ham from a cooler, approached her, and asked her what she observed; Nelson reported the "ham-taking" incident to Sarafini who told Nelson to tell Johnson that if she wanted to make a complaint she needed to put it in writing; after Nelson told Johnson that, Johnson went to Sarafini and prepared a written statement about the incident, and Sarafini gave that statement to Lane. Nelson's reason for approaching and questioning Johnson, rather than ignoring the overheard conversation, her reason for reporting it to Sarafini, and Sarafini's reason for directing Nelson to give Johnson the option of preparing a statement and then herself giving that statement to Lane are all relevant to the ultimate issue: did Meriter discriminate against Eleby by treating him differently because of his race? And the knowledge Nelson and Sarafini each had with respect to arguably similar incidents involving white employees is highly relevant to their motives for the actions they took concerning Eleby.

I view the commission's ruling—that the knowledge Nelson and Sarafini had regarding other employees eating or taking food is irrelevant because

⁷ In my view the validity of this line of federal cases, which concerns hiring, firing, promotion and similar decisions, is not affected by the United States Supreme Court's recent decision in *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998). *Faragher* addressed the issue of an employer's vicarious liability for the acts of a supervisory employee whose sexual harassment of subordinates created a hostile work environment.

they did not make the decision to fire Eleby—to be a legal conclusion. When deciding the degree of deference to give to the commission’s legal conclusions in the context of employment discrimination cases, we have focused on the particular legal conclusion that is challenged. *See, e.g., Currie*, 210 Wis.2d at 388-89, 565 N.W.2d at 257 (giving due deference to the commission’s determination on the effect of § 903.01, STATS., on an employer’s burden of proof), and *Target Stores v. LIRC*, 217 Wis.2d 1, 13, 576 N.W.2d 545, 550 (Ct. App. 1998) (giving great weight deference to the commission’s interpretation of “reasonable accommodation” in § 111.34(1), STATS.). Although Eleby and Meriter debate the correctness of the commission’s ruling that Sarafini’s and Nelson’s knowledge was irrelevant, they do not focus on this legal ruling in their discussion of the standard of review. However, even were I to give the commission’s legal conclusion great weight deference, I would nevertheless conclude, as did the trial court, that it is erroneous.

Even when we accord great weight deference to the agency decision, we will reverse the agency decision if its interpretation of a statute is unreasonable. *See Lisney v. LIRC*, 171 Wis.2d 499, 506, 493 N.W.2d 14, 16 (1992). We do not defer to an agency’s interpretation of a statute when we conclude “that the agency’s interpretation directly contravenes the words of the statute, is clearly contrary to legislative intent, or is otherwise unreasonable or without rational basis.” *Id.* The commission’s ruling here is not supported by the cases it cites and is inconsistent with federal case law. It is also inconsistent with the purposes of WFEA, which are expressly set forth and include protecting the rights of individuals to be free from employment discrimination based on race and other categories, *see* § 111.31(2), STATS., and discouraging discriminatory practices in the employment area. *See id.* and *Marten*, 176 Wis.2d at 1020, 501

N.W.2d at 394. Excluding from consideration the motives of supervisory personnel in taking actions that lead to the challenged decision, simply because they did not make that decision, thwarts both purposes and is therefore not a reasonable interpretation of the WFEA.

In spite of the commission's ruling on this point, it did, in another portion of its decision, consider the evidence of Sarafini's and Nelson's knowledge of other employees engaging in conduct that Eleby asserted was similar; and it did consider whether their actions in responding to information about the incident Johnson related was motivated by racial bias. The commission determined that the conduct of Eleby, as related by Johnson, was not similar to the conduct of other employees of which the two supervisors had heard or which they suspected. The commission also determined that the actions of Nelson and Sarafini in responding to Johnson's oral and written statements were explained by non-discriminatory factors. It is true that the administrative law judge saw the evidence differently, as did the trial court, and Eleby points to evidence that could support a determination in his favor. However, I conclude that there is sufficient evidence in the record to support the commission's determinations on these points. Given our standard of review of factual determinations, I would therefore affirm the commission's decision.

