included a listing for the "Name of Individual or Organization Certifying Food as Kosher.") However, the Act did not adopt a definition, interpretation, or standard for the term "kosher," and the plaintiffs did not allege that the Act had been implemented in a discriminatory manner. An objective observer acquainted with the text, legislative history, and implementation of the statute would conclude that the purpose of the statute was secular.

Addressing the entanglement and advancement prongs of the *Lemon v. Kurtzman* test, 403 U.S. 602, 612 (1971), the court found the Kosher Act did not foster an excessive government entanglement with religion. The Act did "not adopt an Orthodox standard of *kashrut*, nor [did] it regulate what foods [were] acceptably kosher or take a position on what it means for a product to be considered kosher." The arguments on the advancement factor failed for many of the same reasons as the arguments on excessive entanglement: the Kosher Act did not endorse a particular religious denomination or sect. The fact that applying a label to a food product to inform consumers that the product had been deemed kosher by the seller or producer "merely happen[ed] to coincide with Orthodox Jewish practice," and did not evidence a specific endorsement or impairment of any religious practice or viewpoint.

On the argument that the law violated the Free Exercise Clause of the First Amendment, the law at issue was one of general applicability and neutral on its face: it applied to any seller who offered products for sale marked as "kosher," regardless of the seller's religious beliefs or affiliation. There was nothing to support the finding that the object of the Act was to infringe upon or restrict practices because of a group's religious motivation. Because the Kosher Act was "neutral, generally applicable, minimally burdensome, and ha[d] a rational basis, no Free Exercise violation exist[ed]." *Commack Self-Service Kosher Meats, Inc. v. Hooker*, No. 11-3517, 2012 U.S. App. LEXIS 9538 (2d Cir. May 10, 2012).

Personnel and Employment

Sexual Harassment

"[T]his appeal requires us to answer two questions of first impression in this Court: first, whether there is a viable claim of retaliation under Title VII of the Civil Rights Act of 1964 ... for participating in an internal employer investigation prior to any proceeding before the Equal Employment Opportunity Commission ('EEOC'); and, second, whether an employer is liable under Title VII for sexual harassment committed by a senior executive who is a proxy or alter ego for the employer, despite the existence of a possible affirmative defense under the Supreme Court's decisions in *Faragher v. City of Boca Raton*, ...and *Burlington Industries, Inc. v. Ellerth*."

Martha Townsend was employed by Benjamin Enterprises, Inc. (BEI). She alleged that as an employee, she was sexually harassed by Hugh Benjamin. Hugh was a shareholder as well as the sole corporate Vice President of BEI, and the husband of BEI's President, Michelle Benjamin. Grey-Allen, the Human Resources Director, started an internal investigation of the allegations but was fired four days later by Michelle Benjamin before it was completed. Grey-Allen alleged that her termination was in retaliation for her participation in the internal investigation. Michelle Benjamin took over the investigation and hired an outside human resources organization that concluded that "nothing happened" between Hugh Benjamin and Townsend, and that it was a "he said versus she said" case. Grey-Allen and Townsend sued BEI, Michelle Benjamin, and Hugh Benjamin for violations of Title VII.

The district court granted summary judgment dismissing Grey-Allen's retaliation claims, finding that her participation in an internal employer investigation into Townsend's sexual harassment allegations, an investigation that was not connected to any formal charge with the EEOC, did not qualify as protected activity under the participation clause of Title VII's anti-retaliation provision. A jury returned a verdict in favor of Townsend against the defendants. The jury found that Hugh Benjamin had subjected Townsend to a hostile work environment. It also found that he was the alter ego of BEI and that his actions were, therefore, imputed to BEI. Grey-Allen appealed, and the defendants challenged the district court's order denying their post-trial motion for judgment as a matter of law or, in the alternative, for a new trial. They contended that the district court erred in rejecting various arguments asserted by the defendants, including their argument that there was no "proxy" or "alter ego" exception to the *Faragher/Ellerth* affirmative defense.

The U. S. Court of Appeals for the Second Circuit affirmed. In order to gain protection under the participation clause of Title VII's anti-retaliation provision, the participation had to be in an investigation or proceeding covered by Title VII, and not in an internal employer investigation. "The language of the participation clause confines those proceedings in which participation is protected to those 'under this subchapter,' meaning subchapter VI of Chapter 21 of Title 42," adding that "[e]very Court of Appeals to have considered this issue squarely has held that participation in an internal employer investigation not connected with a formal EEOC proceeding does not qualify as protected activity under the participation clause."

Addressing the defendants' "proxy" or "alter ego" argument (that the *Faragher/Ellerth* affirmative defense remains available even when the alleged harasser holds a sufficiently high position within the hierarchy of an organization to be considered the organization's proxy or alter ego), the court stated, succinctly, that "[t]his argument cannot be squared with a fair reading of *Faragher* and *Ellerth*." The *Faragher/Ellerth* affirmative defense was unavailable when the harassing supervisor was sufficiently senior to be the employer's proxy or alter ego. The EEOC's interpretation of Title VII, as set forth in its Enforcement Guidance (*EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*), was in accord with this analysis. *Townsend v. Benjamin Enterprises, Inc.*, No. 09-0197, 2012 U.S. App. LEXIS 9441 (2d Cir. May 09, 2012).

Planning and Zoning

Permit Revocation: Due Process, Ripeness

On July 13, 2009, Debra Bowlby appeared before the City of Aberdeen Planning and Zoning Board, seeking permission to operate a "Sno-Cone" business at an intersection of the city.

She had already purchased a small hut for this business, and made arrangements to

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