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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20. U.S. Envt'l. Prot. Agency, *Presumptive Remedies: Site Characterization and Technology Selection for CERCLA Sites With Volatile Organic Compounds In Soils, 3* (1993).
21. *Presumptive Remedies: Policies and Procedures, supra* note 15.
22. Glass Geltman, *supra note 6*, at 338.
23. *Environmental Covenants Act Summary,* Uniform Law Commission, http://tinyurl.com/bmfk4xx (last visited Mar. 13, 2012).
24. Kurt A. Strasser & William Breetz, *The Benefits of a Uniform State Law for Institutional Controls, in* Implementing Institutional Controls at Brownfields and Other Contaminated Sites, 31-37 (Amy L. Edwards, ed., 2003).
25. *Environmental Covenants Act Summary, supra* note 23.
26. *Id.*
27. Strasser & Breetz, *supra* note 24, at 33.
28. U.S. Gov't Accountability Office, GAO-06-900T, *Superfund: Better Financial Assurances and More Effective Implementation of Institutional Controls Are Needed to Protect the Public* (2005).
29. *Superfund: Published Institutional Controls, U.S.* Environmental Protection Agency, http://tinyurl.com/78xqmzv (last updated Feb. 13, 2012).
30. *Id.*
31. Glass Geltman, *supra* note 6, at 348-49. **M**

Ordinances

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than ineffective or remote support' for the City's stated interests."

The *Dex Media* case is currently on appeal before the U.S. Court of Appeals for the Ninth Circuit, with oral arguments being heard on February 09, 2012. San Francisco has voluntarily postponed enforcement of its ordinance until 30 days after the Ninth Circuit renders its ruling in *Dex Media*,[9] and in the meantime, the City defendants in the San Francisco case have applied for, and obtained, a temporary stay of proceedings pending the Ninth Circuit's resolution of the *Dex Media* case.[10]

Notes

1. *See* Grass Roots Recycling Network page at http://archive.grrn.org/zerowaste/articles/campaign_zw.html.
2. The Ordinance is available online at http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances11/o0078-11.pdf.
3. *Id.*
4. Richard Gonzales, *San Francisco Moves To Ban Yellow Pages*, NPR, May 16, 2011, at http://www.npr.org/2011/05/16/136368752/san-francisco-moves-to-ban-yellow-pages.
5. *Id.*
6. Ordinance, *supra,* note 2.
7. Gonzales, *supra*, note 4.
8. *Local Search Ass'n v. City & County of San Francisco*, No: C 11-02776 SBA, 2012 U.S. Dist. LEXIS 61613 (N.D. Cal. May 02, 2012).
9. *Id.* at *3.
10. *Id.* at *12. **M**

Cases

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lease the lot at the intersection from the owner. Only one member of the Planning and Zoning Board voiced concern (because the lot was zoned "C-2" for larger businesses, and the intersection concerned was the busiest in the city). The Board granted Bowlby the requested permits and told her to proceed with her business plan, and Bowlby opened her business later that month.

In September 2009, the Board again discussed Bowlby's business and decided to revoke the permits. Bowlby was not informed about this meeting or told her permits were being reconsidered. The next day, the city building inspector gave Bowlby a letter informing her of the Board's new ruling and told Bowlby she was to immediately close her business because the Board had determined that it did not conform to the City's laws and regulations. The reasons in the letter were: (1) that Bowlby had misled the Board as to the location of her business; (2) that the location posed a safety concern because the busy intersection was not safe for children; (3) that the land was zoned C-2 and intended for larger businesses; (4) that the portable toilet next to Bowlby's business was an eyesore and a health hazard; and (5) that the overall look of the business was offensive and inappropriate for the eastern entrance to the city.

The Aberdeen Zoning Ordinance required that all appeals of Board decisions were to be made to the mayor and Board of Aldermen, and thereafter to the courts. Bowlby, instead, brought suit against the City and the Board in a Section 1983 suit in federal court, claiming, among other things, that her business was taken without just compensation, in violation of the Fifth Amendment Takings Clause, and that her business was closed without notice or a hearing, in violation of the Fourteenth Amendment Due Process Clause. The City defendants filed a motion to dismiss. The district court granted the motion based on Rule 12(b)(6), relying on the U. S. Supreme Court's decision in *Williamson County Reg. Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), in that Bowlby's takings claim was not ripe because she did not first seek just compensation in a state court for the taking of her business. As Bowlby's equal protection claim would not exist but for the taking, that, too, was unripe. The Board had not violated Bowlby's due process rights because there had not been a final deprivation by the state, since Bowlby had not appealed the decision to revoke her permission to operate her business. Bowlby appealed, arguing that she had a property interest in being allowed to operate her business, and that the Board's revocation of her business permits without prior notice or a hearing violated her Fourteenth Amendment right to procedural due process.

The U. S. Court of Appeals for the Fifth Circuit agreed and reversed the dismissal of Bowlby's due process claim, finding that business permits, along with other "privileges, licenses, certificates, and franchises . . . qualify as property interests for purposes of procedural due process." Once the Board had issued permits for Bowlby to operate her business at a designated intersection, she had a property interest in those permits, and by extension, in operating at the location identified in those permits. Once issued, a license or permit could not be taken away by the State without due process. Bowlby was due predeprivation process.

Exhaustion of state remedies was not required before a plaintiff could bring suit under § 1983 for denial of

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due process, and consequently, Bowlby was not required to go through the appeal process set out in the zoning ordinance in order to state a cognizable procedural due process claim. Addressing the "ripeness" requirement, the court noted that "the *Williamson County* final-decision requirement makes more sense when the taking alleged is a regulatory taking." Bowlby's injury was suffered at the time the Board revoked her permits, and, notwithstanding that the permits could be reinstated in the future, her permits were definitively taken away. A "procedural due process claim that is brought concurrently with a takings claim, such as Bowlby's, should be analyzed not under the principles of *Williamson County*, but according to "general ripeness principles'." Bowlby had not stated a due process claim that was "ancillary" to her takings claim, but rather, one that was separately cognizable, being a property interest in the permits to operate her business, not just in the business itself. Thus, she had an injury separate from any potential taking, as well as a final decision by the Board. Even if a court were to decide that the defendants did not violate the Takings Clause by causing Bowlby to lose her business, they still violated her right to procedural due process. *Bowlby v. City of Aberdeen*, No. 11-60279, 2012 U.S. App. LEXIS 9717 (5th Cir. May 14, 2012). ML

ListServ

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seasoned advice from friends who have faced the same monsters, and lived to tell about it.

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Kelly Addy is a Deputy City Attorney for the City of Billings, Montana. He advises the City on civil matters in all areas, with primary emphasis on Public Works and Public Records issues. He is a member of the Montana Supreme Court Commission on Courts of Limited Jurisdiction and a licensed local pastor assigned to Huntley United Methodist Church. In a previous life, he was a member of the Montana House of Representatives and its Speaker pro tempore. ML

Construction Compensation

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ronmental assessment be carried out.
20. *SOS v. Toronto (City)*, [2006] O.J. No. 671 (S.C.J.–Div. Ct.), at para. 51. Note also that there was an earlier decision which had resulted in the reconstitution of the Divisional Court panel. See *SOS v. Toronto (City)*, [2005] O.J. No. 4738.
21. Study, Kelman, L., and Soberman, R.M, *"Getting It Right," Lessons from the St. Clair Streetcar for the Implementation of Transit City* (January 7, 2010), available at http://www3.ttc.ca/About_the_TTC/Commission_reports_and_information/Commission_meetings/2010/Jan_20_2010/Reports/Transit_City_Impleme.pdf.
22. The Province was sued on the basis that it had negligently failed to ensure that construction was not disruptive. The Province indicated, at the outset, that it would move to dismiss the action against it on the basis that it owed no duty of care to the plaintiff. The claim against the Province was subsequently discontinued by consent.
23. The abuse of authority claims were based on alleged "sinister" policies of "blockbusting," as well as a "war on cars," all of which were stated to be an abuse of authority for the purposes of the claim.
24. *Curactive Organic Skin Care Ltd. v. Toronto (City) et al.*, 2011 ONSC 2041. See also, *Casa Luna Furniture v. Ottawa (City)*, [2009] O.J. No. 874 (S.C.J.), an earlier case from Ottawa with a similar result.
25. *Expropriations Act*, R.S.O. 1990, c. E. 26, s. 1(1).
26. *Ontario Municipal Board Act*, R.S.O. 1990, c. O. 28, s. 36.
27. *Curactive Organic Skin Care Ltd. v. Toronto (City) et al.*, 2011 ONSC 2041, at para 28.
28. *Ibid.* at para. 36.
29. *Ibid.* at paras. 6-7.
30. The court noted that the appellant had failed to plead any material facts to substantiate its allegations of "sinister" and secret policies, in spite of numerous requests.
31. *Antrim Truck Centre Ltd. v. Ontario (MOT)*, [2009] O.M.B.D. No. 1; aff'd, 2010 ONSC 156 (Div. Ct.); rev'd, 2011 ONCA 419; leave to appeal granted [2011] S.C.C.A 378.
32. *Antrim*, 2011 ONCA 419, at para. 79.
33. *Ibid.* at para. 144.
34. *Carpet Clear Out Corp. v. Wellington North*, [2011] O.M. B.D. No. 763.
35. *St. Pierre v. Ontario (MOTC)*, [1987] 1 S.C.R. 906.
36. *Ibid.* at para. 13. ML

Code Enforcement

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group. The hope is that, when that person sees what the association is trying to accomplish and the impact that property violations have, they may make the decision, on their own, to correct their own property violations. We have seen this approach succeed, as well.

The neighborhood associations also perform cleanup activities, as a group, to encourage all property owners in their area to keep their properties looking good. There has been great success in involving citizens with these kinds of associations. The one drawback is that these associations can get a bit grumpy if a particular violation exists longer than they think it should. Although our code enforcement officers are fairly successful in dealing with violations, these groups tend to focus on what still exists and what has come into existence since their last meeting. However, the overall benefit of these citizen groups outweighs the grief we sometimes get over particular violations.

My city council typically thinks of innovations only in terms of enacting a new ordinance. It seems to me that sometimes, new ordinances won't accomplish as much as we expect. Taking steps that are outside the normal response or way of handling a particular issue may be much more beneficial—innovation should include a level of "outside-the-box" thinking. Accordingly, I applaud any municipality using innovative approaches in code enforcement, and for living by the "try, try again" credo. ML