

1 UNITED STATES COURT OF APPEALS

2
3 FOR THE SECOND CIRCUIT

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6
7 August Term, 2011

8
9 (Argued: August 30, 2011 Decided: May 9, 2012)

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11 Docket Nos. 09-0197-cv(L), 09-4509-cv(XAP)

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14 MARTHA DIANE TOWNSEND,

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16 Plaintiff-Cross-Appellee,

17
18 KARLEAN VICTORIA GREY-ALLEN,

19
20 Plaintiff-Appellant-Cross-Appellee,

21
22 -v.-

23
24 BENJAMIN ENTERPRISES, INC., HUGH BENJAMIN, MICHELLE BENJAMIN,

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26 Defendants-Appellees-Cross Appellants.

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31 Before: LIVINGSTON and LOHIER, Circuit Judges, and KOELTL, District
32 Judge.*

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35 This is an appeal and cross-appeal from a final judgment of
36 the United States District Court for the Southern District of
37 New York (Yanthis, Magistrate Judge). The parties challenge the

* The Honorable John G. Koeltl, of the United States District Court for the Southern District of New York, sitting by designation.

1 decisions of the district court that granted summary judgment
2 dismissing plaintiff Karlean Victoria Grey-Allen's Title VII
3 retaliation claim; denied the defendants' post-trial motion for
4 judgment as a matter of law or, in the alternative, for a new
5 trial; and awarded plaintiff Martha Diane Townsend \$141,308.80
6 in attorney's fees and costs.

7 Because we find no error in the district court's decisions,
8 we affirm.

9 Judge Lohier concurs in a separate opinion.

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11

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Chester, NY, for Plaintiff-Appellant-
Cross-Appellee Karlean Victoria Grey-
Allen and Plaintiff-Cross-Appellee
Martha Diane Townsend.

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NY, for Defendants-Appellees-Cross-
Appellants Benjamin Enterprises, Inc.,
Hugh Benjamin, and Michelle Benjamin.

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Employment Opportunity Commission.

MARGARET MCINTYRE, for Amicus Curiae National
Employment Lawyers Association, New
York.

1 JOHN G. KOELTL, District Judge:

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3 Among other issues, this appeal requires us to answer two
4 questions of first impression in this Court: first, whether
5 there is a viable claim of retaliation under Title VII of the
6 Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et
7 seq. ("Title VII"), for participating in an internal employer
8 investigation prior to any proceeding before the Equal
9 Employment Opportunity Commission ("EEOC"); and, second,
10 whether an employer is liable under Title VII for sexual
11 harassment committed by a senior executive who is a proxy or
12 alter ego for the employer, despite the existence of a
13 possible affirmative defense under the Supreme Court's
14 decisions in Faragher v. City of Boca Raton, 524 U.S. 775
15 (1998), and Burlington Industries, Inc. v. Ellerth, 524 U.S.
16 742 (1998).

17 These questions arise in the following context. The
18 plaintiff Martha Diane Townsend was employed by defendant
19 Benjamin Enterprises, Inc. ("BEI"). She alleged that she was
20 sexually harassed by defendant Hugh Benjamin, who was the
21 husband of BEI President Michelle Benjamin, and the sole
22 corporate Vice President of BEI, as well as a shareholder of
23 BEI. Plaintiff Karlean Victoria Grey-Allen, the Human
24 Resources Director ("HR Director") of BEI, began to conduct an

1 internal investigation of the allegations. However, before
2 completing the investigation, she was fired by defendant
3 Michelle Benjamin. Grey-Allen alleged that her termination
4 was in retaliation for her participation in the internal
5 investigation.

6 Grey-Allen and Townsend sued BEI, Michelle Benjamin, and
7 Hugh Benjamin in the United States District Court for the
8 Southern District of New York for violations of Title VII; New
9 York Human Rights Law, N.Y. Exec. Law § 290 et seq. ("New York
10 Human Rights Law"); and New York State tort law. The District
11 Court (Yanthis, Magistrate Judge)¹ granted summary judgment
12 dismissing Grey-Allen's retaliation claims, and a jury
13 returned a verdict in favor of Townsend against BEI, Michelle
14 Benjamin, and Hugh Benjamin. Thereafter, the Magistrate Judge
15 denied the defendants' motion for judgment as a matter of law
16 or, in the alternative, for a new trial, and awarded Townsend
17 attorney's fees and costs.

18 This is an appeal and a cross-appeal challenging three
19 orders of the Magistrate Judge.

¹ Pursuant to 28 U.S.C. § 636(c), the parties consented to have the Magistrate Judge conduct all proceedings including trial.

1 First, Grey-Allen challenges the order granting summary
2 judgment dismissing her Title VII retaliation claim.² The
3 district court granted summary judgment on the ground that
4 Grey-Allen's participation in an internal employer
5 investigation into Townsend's sexual harassment allegations,
6 an investigation that was not connected to any formal charge
7 with the EEOC, did not qualify as protected activity under the
8 participation clause of Title VII's anti-retaliation
9 provision. Townsend v. Benjamin Enters., Inc., No. 05 Civ.
10 9378, 2008 WL 1766944 (S.D.N.Y. Apr. 17, 2008).

11 Second, BEI and the Benjamins challenge the district
12 court's order denying their post-trial motion for judgment as
13 a matter of law or, in the alternative, for a new trial.³
14 They contend that the district court erred in rejecting
15 various arguments asserted by the defendants, including their

² The district court granted summary judgment dismissing Grey-Allen's retaliation claims under both Title VII and the New York Human Rights Law, and noted that "[c]ourts analyze retaliation claims under the New York Human Rights Law in the same manner as Title VII claims." Townsend v. Benjamin Enters., Inc., No. 05 Civ. 9378, 2008 WL 1766944, at *2 & n.3 (S.D.N.Y. Apr. 17, 2008). Grey-Allen did not brief the issue of whether it was error for the district court to grant summary judgment dismissing her New York Human Rights Law retaliation claim and has therefore waived any such argument.

³ BEI and Michelle Benjamin appeal those portions of the jury verdict that were against them. Hugh Benjamin does not appeal the tort verdict against him.

1 argument that there is no "proxy" or "alter ego" exception to
2 the Faragher/Ellerth affirmative defense.

3 Third, BEI and the Benjamins challenge the district
4 court's order awarding Townsend \$141,308.80 in attorney's fees
5 and costs. They argue that Townsend was not entitled to fees
6 and costs accrued after the defendants made an Offer of
7 Judgment pursuant to Federal Rule of Civil Procedure 68
8 because, they assert, the Offer exceeded the sum of Townsend's
9 ultimate recovery and her fees and costs at the time of the
10 Offer. They contend that the district court mistakenly
11 reached a contrary conclusion because it erred in calculating
12 the reasonable hourly rate for an attorney's services by
13 considering the prevailing market rate in the district, rather
14 than the rate stated in Townsend's retainer agreement with her
15 counsel.

16 Because we find no error in the district court's
17 thoughtful and well-reasoned opinions, we affirm.

18

19

BACKGROUND

20

I.

21 Townsend began working at BEI in June 2002. She held the
22 position of office manager and First Impressions Director, or
23 receptionist. BEI trains disadvantaged or low-skilled
24 individuals to work for local companies. Michelle Benjamin,

1 the President of BEI, is a co-owner of BEI and has the power
2 to hire and fire employees. Hugh Benjamin is married to
3 Michelle Benjamin and is the sole corporate Vice President of
4 BEI, as well as a corporate shareholder. Hugh Benjamin once
5 owned 34% of the corporate shares but owned only 5% of the
6 corporate shares at the time of trial.

7 Townsend alleged that Hugh Benjamin sexually harassed her
8 from the summer of 2003 through March 2005 by directing
9 sexually offensive comments at her, propositioning her,
10 touching her sexually, and sexually assaulting her. On March
11 9, 2005, Townsend told Michelle Benjamin about the harassment.
12 On March 17, 2005, Townsend reported the sexual harassment to
13 Karlean Victoria Grey-Allen, the HR Director of BEI.

14

15

II.

16 Grey-Allen began working for BEI as the HR Director in
17 August 2004. When Townsend reported the sexual harassment to
18 her, Grey-Allen asked Townsend to provide a written and oral
19 account of the events that had occurred. Grey-Allen also
20 spoke with the New York State Division of Human Rights, which
21 suggested that she interview Hugh Benjamin and then separate
22 him from Townsend. Grey-Allen then interviewed Hugh Benjamin
23 and asked him to work from home.

1 On March 21, 2005, Grey-Allen discussed the sexual
2 harassment allegations with Dennis Barnett, a management
3 consultant retained by BEI. Barnett had been assigned to
4 train Grey-Allen when she arrived at BEI, and Grey-Allen
5 described him as a mentor with whom she believed she could
6 share confidential concerns. Michelle Benjamin learned of
7 Grey-Allen's conversation with Barnett and allegedly deemed it
8 inappropriate. Michelle Benjamin terminated Grey-Allen that
9 same day, asserting that Grey-Allen had breached
10 confidentiality by speaking with Barnett.

11 On March 22, 2005, Michelle Benjamin took over the
12 investigation of Townsend's sexual harassment allegations.
13 She allowed Hugh Benjamin to return to the office. She also
14 retained HR Delivery, Inc. ("HR Delivery"), an outside human
15 resources organization, to conduct the investigation. Grey-
16 Allen contends that the investigation by HR Delivery was
17 inadequate and that Michelle Benjamin controlled how the
18 investigation was conducted and what information HR Delivery
19 was able to access. HR Delivery ultimately concluded that
20 "nothing happened" between Hugh Benjamin and Townsend and that
21 it was a "he said versus she said" case.

22 On March 23, 2005, Townsend resigned from BEI. She told
23 Michelle Benjamin that she could not "take it in that office"
24 after Hugh Benjamin was permitted to come back to work. In

1 April 2005, Townsend and Grey-Allen filed a joint complaint
2 with the EEOC. No charge had yet been filed with the EEOC at
3 the time Grey-Allen conducted her investigation or at the time
4 Grey-Allen was terminated.

5

6

III.

7 Townsend and Grey-Allen filed their complaint in the
8 Southern District of New York on November 4, 2005. On
9 February 3, 2006, the defendants served Townsend with an Offer
10 of Judgment pursuant to Rule 68 for \$50,000, inclusive of all
11 attorney's fees and costs accrued through that time. Townsend
12 rejected that Offer. The defendants did not make an Offer of
13 Judgment to Grey-Allen.

14 On March 13, 2008, the district court initially denied
15 the defendants' motion for summary judgment that sought to
16 dismiss all claims by Townsend and Grey-Allen. Townsend v.
17 Benjamin Enters., Inc., No. 05 Civ. 9378, 2008 WL 686631
18 (S.D.N.Y. Mar. 13, 2008). However, on the defendants' motion
19 for reconsideration, the district court granted summary
20 judgment dismissing Grey-Allen's retaliation claims under
21 Title VII and the New York Human Rights Law, holding that, by
22 participating in an internal investigation into Townsend's
23 sexual harassment allegations that was not associated with any
24 EEOC proceeding, Grey-Allen had not engaged in protected

1 activity under the participation clause of Title VII's anti-
2 retaliation provision.⁴ Townsend, 2008 WL 1766944, at *2.

3 Townsend's claims proceeded to a jury trial. On December
4 12, 2008, the jury returned a verdict in favor of Townsend for
5 \$30,400. The jury found that Hugh Benjamin had subjected
6 Townsend to a hostile work environment and also found that he
7 was the alter ego of BEI and that his actions were therefore
8 imputed to BEI. The jury also found Hugh Benjamin liable for
9 civil battery. The jury did not find BEI liable under Title
10 VII for constructive discharge. The jury award consisted of
11 \$5200 against BEI, Michelle Benjamin, and Hugh Benjamin under
12 Title VII and the New York Human Rights Law⁵ and \$25,200
13 against Hugh Benjamin under New York tort law.

14 On October 2, 2009, the district court awarded attorney's
15 fees and costs to Townsend in the amount of \$141,308.80. The
16 district court thereafter denied a motion for reconsideration
17 of this fee award. Townsend v. Benjamin Enters., Inc., No. 05
18 Civ. 9378, 2009 WL 3722716 (S.D.N.Y. Nov. 6, 2009).

⁴ The district court noted that Grey-Allen "concede[d] that she cannot claim protection under the opposition clause [of Title VII] because she lacked a good faith belief that Townsend was sexually harassed." Townsend, 2008 WL 1766944, at *2.

⁵ BEI alone was found liable for violations of Title VII, and Michelle Benjamin, Hugh Benjamin, and BEI were found jointly and severally liable for violations of the New York Human Rights Law.

1 Grey-Allen filed her notice of appeal on January 12, 2009
2 and an amended notice of appeal on November 2, 2009. Cross-
3 appellants BEI, Michelle Benjamin, and Hugh Benjamin filed
4 their notice of appeal on October 28, 2009.

5

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DISCUSSION

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I.

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A.

9 Grey-Allen contends that the district court erred in
10 holding that the participation clause of Title VII's anti-
11 retaliation provision does not protect participation in an
12 internal employer investigation not associated with any formal
13 EEOC charge. She argues that the district court thus erred in
14 granting summary judgment dismissing her Title VII retaliation
15 claim on this basis. We review a district court's grant of
16 summary judgment de novo, construing the evidence in the
17 manner most favorable to the non-moving party. See Okin v.
18 Vill. of Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 427
19 (2d Cir. 2009).

20 The district court found that Grey-Allen did not engage
21 in protected activity under the participation clause because

22 "[i]n order to gain protection under the participation
23 clause, the participation must be in an investigation or
24 proceeding covered by Title VII, and thus not in an
25 internal employer investigation." Correa v. Mana Prods.,
26 Inc., [550 F. Supp. 2d 319, 329 (E.D.N.Y. 2008).] Here,

1 it is undisputed that Grey-Allen's investigation was
2 conducted pursuant to her employer's internal procedures;
3 more to the point, Grey-Allen's actions were not
4 associated with any Title VII proceeding.

5
6 Townsend, 2008 WL 1766944, at *2. The question of whether the
7 participation clause covers internal investigations not
8 associated with a formal EEOC charge⁶ is a question of first
9 impression in this Court.

10 Section 704(a) of Title VII contains both an opposition
11 clause and a participation clause, making it unlawful for an
12 employer to retaliate against an individual "because he has
13 opposed any practice made an unlawful employment practice by

⁶ We express no opinion on whether participation in an internal investigation that is begun after a formal charge is filed with the EEOC falls within the scope of the participation clause. Some courts have answered this question in the affirmative. Abbott v. Crown Motor Co., 348 F.3d 537, 543 (6th Cir. 2003) ("[W]e hold that Title VII protects an employee's participation in an employer's internal investigation into allegations of unlawful discrimination where that investigation occurs pursuant to a pending EEOC charge."); Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1353 (11th Cir. 1999) ("[W]e recognize that, at least where an employer conducts its investigation in response to a notice of charge of discrimination, and is thus aware that the evidence gathered in that inquiry will be considered by the EEOC as part of its investigation, the employee's participation is participation 'in any manner' in the EEOC investigation."); see also EEOC v. Total Sys. Servs. Inc., 221 F.3d 1171, 1174 n.3 (11th Cir. 2000) (distinguishing case from Clover on the ground that no EEOC charge had been filed before the alleged retaliatory act). Because the investigation and alleged retaliation at issue here occurred before any charge was filed with the EEOC, we need not reach this question. See Hatmaker v. Mem'l Med. Ctr., 619 F.3d 741, 747 (7th Cir. 2010) (reserving judgment on this question when internal employer investigation had no nexus to pending EEOC charge).

1 this subchapter, or because he has made a charge, testified,
2 assisted, or participated in any manner in an investigation,
3 proceeding, or hearing under this subchapter." 42 U.S.C. §
4 2000e-3(a). In the proceedings below, Grey-Allen conceded
5 that she was not covered by the opposition clause, because she
6 did not know whether Townsend's allegations of harassment were
7 true and thus lacked a good-faith belief that the
8 discriminatory action had occurred, which is required for
9 protection under the opposition clause.⁷ Townsend, 2008 WL
10 1766944, at *2. Instead, Grey-Allen asserted that, by
11 conducting an investigation into Townsend's allegations of
12 sexual harassment in her capacity as BEI's HR Director, she
13 engaged in protected activity under the participation clause.
14 "As in all statutory construction cases, we begin with
15 the language of the statute.'" United States v. Am. Soc'y. of
16 Composers, Authors & Publishers, 627 F.3d 64, 72 (2d Cir.
17 2010) (quoting Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450
18 (2002)). Grey-Allen contends that the language "participate[]

⁷ The district court granted summary judgment before the Supreme Court rendered its decision in Crawford v. Metropolitan Government of Nashville & Davidson County, 555 U.S. 271 (2009), which adopted an expansive interpretation of the opposition clause of Title VII's anti-retaliation provision. Counsel for Grey-Allen contended at oral argument that Grey-Allen would have been protected by the opposition clause had the proceedings occurred after Crawford and had she relied on the opposition clause. (Oral Arg. Tr., Aug. 30, 2011 ("Tr."), at 9-10.)

1 in any manner in an investigation, proceeding, or hearing
2 under this subchapter," 42 U.S.C. § 2000e-3(a), encompasses
3 participation in any proceeding intended to remedy employment
4 discrimination under Title VII, including internal sexual
5 harassment investigations not connected with any formal EEOC
6 proceeding or charge. We decline to adopt such a strained
7 interpretation of the language of the statute.

8 The language of the participation clause confines those
9 proceedings in which participation is protected to those
10 "under this subchapter," meaning subchapter VI of Chapter 21
11 of Title 42. 42 U.S.C. §§ 2000e-2000e-17. Much of this
12 subchapter is devoted to describing the enforcement powers of
13 the EEOC and the procedures by which the EEOC carries out its
14 investigations and hearings. See, e.g., 42 U.S.C. §§ 2000e-5,
15 2000e-8, 2000e-9. An "investigation . . . under this
16 subchapter" thus plainly refers to an investigation that
17 "occur[s] in conjunction with or after the filing of a formal
18 charge with the EEOC; it does not include participating in an
19 employer's internal, in-house investigation, conducted apart
20 from a formal charge with the EEOC." Total Sys. Servs., 221
21 F.3d at 1174.

22 Every Court of Appeals to have considered this issue
23 squarely has held that participation in an internal employer
24 investigation not connected with a formal EEOC proceeding does

1 not qualify as protected activity under the participation
2 clause. See Hatmaker, 619 F.3d at 746-47; Total Sys. Servs.,
3 221 F.3d at 1174; Vasconcelos v. Meese, 907 F.2d 111, 113 (9th
4 Cir. 1990). The Courts of Appeals for the Fifth and Sixth
5 Circuits have also suggested that, for conduct to be protected
6 by the participation clause, it must occur in connection with
7 a formal EEOC proceeding. See Abbott, 348 F.3d at 543; Byers
8 v. Dall. Morning News, Inc., 209 F.3d 419, 428 (5th Cir.
9 2000).⁸

10 While Grey-Allen points to the decision by the Court of
11 Appeals for the Ninth Circuit in Hashimoto v. Dalton, 118 F.3d
12 671 (9th Cir. 1997), where the court concluded that the
13 plaintiff's visit to the Navy's Equal Employment Opportunity
14 (EEO) counselor qualified as protected activity under the
15 participation clause, id. at 680, Hashimoto is distinguishable
16 from Grey-Allen's case. The EEOC regulations in force at the
17 time Hashimoto was decided required a federal employee to make
18 a complaint to the EEO counselor within thirty days of the
19 alleged discrimination as part of the required exhaustion of
20 administrative remedies. See id. at 678; 29 C.F.R.

⁸ Several district courts in this Circuit have similarly concluded that participation in an internal investigation is not participation in a proceeding triggering the participation clause. See, e.g., Correa, 550 F. Supp. 2d at 329; Bick v. City of New York, No. 95 Civ. 8781, 1997 WL 381801, at *4 (S.D.N.Y. July 10, 1997).

1 § 1613.214(a)(1)(i) (1987). Thus, the complaint to the EEO
2 counselor constituted participation in an investigation,
3 proceeding, or hearing "under" Title VII, because the
4 complaint was required by the EEOC regulations as a
5 prerequisite to bringing a claim.⁹

6 The case law from other Courts of Appeals thus supports
7 our conclusion that the plain language of the participation
8 clause does not include participation in an internal employer
9 investigation unrelated to a formal EEOC charge.

10 Grey-Allen relies on the decisions in Deravin v. Kerik,
11 335 F.3d 195 (2d Cir. 2003), and McMenemy v. City of
12 Rochester, 241 F.3d 279 (2d Cir. 2001), but those decisions
13 offer little support for her position. Deravin stands merely
14 for the proposition that defending oneself in an EEOC
15 investigation is protected activity under the participation
16 clause; it sheds no light on whether participation in an
17 internal employer investigation so qualifies. 335 F.3d at
18 204-05. While this Court held in McMenemy that a city

⁹ The same was true in Kurtz v. McHugh, 423 F. App'x 572 (6th Cir. 2011), where the court found that the plaintiff engaged in protected activity under the participation clause by making a statement to the EEO counselor and otherwise participating in EEO proceedings. Id. at 578. The employee in that case was a federal employee and was thus required under the EEOC regulations to make a complaint to the EEO counselor within forty-five days of the discriminatory conduct in order to exhaust administrative remedies. See id. at 575-76; 29 C.F.R. § 1614.105(a)(1) (2010).

1 employee's internal investigation of sexual harassment
2 allegations constituted protected activity, this Court
3 analyzed the participation clause and opposition clause
4 together and thus did not decide the independent question of
5 whether participation in an internal employer investigation
6 qualifies as protected activity under the participation
7 clause. 241 F.3d at 283-85.

8 Grey-Allen also contends that the affirmative defense
9 created by the Supreme Court in Faragher and Ellerth brings
10 internal investigations "under" Title VII within the language
11 of the participation clause. In Faragher and Ellerth, the
12 Supreme Court established an affirmative defense to an
13 employer's vicarious liability for a hostile work environment
14 created by a supervisor of the plaintiff employee. To raise
15 such a defense successfully, the employer must not have taken
16 a tangible employment action against the plaintiff and must
17 demonstrate: "(a) that the employer exercised reasonable care
18 to prevent and correct promptly any sexually harassing
19 behavior, and (b) that the plaintiff employee unreasonably
20 failed to take advantage of any preventive or corrective
21 opportunities provided by the employer or to avoid harm
22 otherwise." Faragher, 524 U.S. at 807; Ellerth, 524 U.S. at
23 765. While the Faragher/Ellerth affirmative defense creates
24 an incentive for employers to conduct internal investigations

1 in order to show that they have met the first prong of this
2 defense, it does not impose an obligation on employees to
3 participate in such investigations as a necessary prerequisite
4 to bringing a discrimination claim under Title VII. See Total
5 Sys. Servs., 221 F.3d at 1174 n.3 (“According to the EEOC,
6 [Faragher and Ellerth] essentially made reporting an incident
7 of harassment to the employer a new prerequisite to filing a
8 claim. We disagree with the EEOC’s use of these important
9 decisions. . . . We do not believe Congress intended to
10 protect absolutely every sexual harassment complaint made to
11 an employer . . . as a protected activity under the
12 participation clause.”). Faragher and Ellerth do not provide
13 a basis for bringing internal investigations not associated
14 with a formal EEOC charge “under this subchapter” within the
15 language of the participation clause.¹⁰

¹⁰ The EEOC has submitted an amicus brief urging us to adopt a contrary interpretation of the participation clause, one that embraces internal employer investigations. The EEOC’s views are entitled to deference to the extent they have the power to persuade. See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (“The weight of [an agency’s] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”); N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health, 556 F.3d 114, 130-31 (2d Cir. 2003) (amicus brief from the Food and Drug Administration was subject to Skidmore deference). However, for the reasons explained above, we do not find the EEOC’s interpretation persuasive in this case.

1 Grey-Allen also argues more generally that, because
2 internal investigations are integral to the deterrent aims and
3 effective operation of Title VII, participation in such
4 investigations should qualify as protected activity. However,
5 this cannot be squared with the plain language of the
6 participation clause, which requires that the investigation in
7 which the employee participates be "under" Title VII, not
8 merely integral to effectuating its purposes.

9 We thus affirm the district court's grant of summary
10 judgment dismissing Grey-Allen's Title VII retaliation claim.

11

12 B.

13 Because we affirm the district court's grant of summary
14 judgment dismissing Grey-Allen's Title VII retaliation claim,
15 we need not address the question of whether a reasonable jury
16 could find that Grey-Allen was the victim of retaliation.

17

18 **II.**

19 BEI and the Benjamins raise a number of arguments on this
20 appeal. They first assert that the district court erred in
21 denying their motion for judgment as a matter of law or, in
22 the alternative, for a new trial. Specifically, they claim
23 that the district court committed the following errors: (1)
24 concluding that there is a "proxy" or "alter ego" exception to

1 the Faragher/Ellerth affirmative defense; (2) finding that a
2 reasonable jury could conclude that Hugh Benjamin was a
3 “proxy” or “alter ego” for BEI; (3) instructing the jury on
4 proxy/alter ego liability; and (4) instructing the jury on
5 Michelle Benjamin’s individual liability.¹¹

6 Second, BEI and the Benjamins argue that the district
7 court abused its discretion in awarding Townsend \$141,308.80
8 in attorney’s fees and costs.

9

10 A.

11 BEI and the Benjamins argue that the district court erred
12 in denying their motion for judgment as a matter of law or, in
13 the alternative, for a new trial. We review a district
14 court’s denial of a motion for judgment as a matter of law de
15 novo. See Parrot v. Guardian Life Ins. Co. of Am., 338 F.3d
16 140, 142 (2d Cir. 2003). “We will reverse the denial of
17 judgment as a matter of law only if, notwithstanding making
18 all credibility assessments and drawing all inferences in
19 favor of [the non-moving party], a reasonable juror would be
20 compelled to accept the view of [the moving party].”

21 Medforms, Inc. v. Healthcare Mgmt. Solutions, Inc., 290 F.3d
22 98, 109 (2d Cir. 2002) (internal quotation marks and citations

¹¹ BEI and the Benjamins also argue that, if the Faragher/Ellerth affirmative defense can be applied in this case, they established that defense as a matter of law.

1 omitted). We review a district court's denial of a motion for
2 a new trial for abuse of discretion. See Hydro Investors,
3 Inc. v. Trafalgar Power Inc., 227 F.3d 8, 15 (2d Cir. 2000).
4 "A motion for a new trial ordinarily should not be granted
5 unless the trial court is convinced that the jury has reached
6 a seriously erroneous result or that the verdict is a
7 miscarriage of justice." Medforms, 290 F.3d at 106 (internal
8 quotation marks and citations omitted).

9

10 1.

11 BEI and the Benjamins first argue that the district court
12 erred in concluding that the doctrine of proxy/alter ego
13 liability survives Faragher and Ellerth. They contend that
14 the Faragher/Ellerth affirmative defense remains available
15 even when the alleged harasser holds a sufficiently high
16 position within the hierarchy of an organization to be
17 considered the organization's proxy or alter ego. This is a
18 question of first impression in this Court.

19 This argument cannot be squared with a fair reading of
20 Faragher and Ellerth. In Faragher, the Supreme Court began by
21 outlining its previous case law on the liability of employers
22 in sexual harassment cases. 524 U.S. at 785-93. While noting
23 that "our cases have established few definite rules for
24 determining when an employer will be liable for a

1 discriminatory environment that is otherwise actionably
2 abusive," id. at 788, the Court highlighted those areas of the
3 law in which there was little ambiguity.

4 One such area was the doctrine of proxy/alter ego
5 liability, which is related to, but distinct from, vicarious
6 liability. The Court noted that it was "[not] exceptional
7 that standards for binding the employer were not in issue in
8 Harris [v. Forklift Systems, Inc., 510 U.S. 17 (1993)]," given
9 that "the individual charged with creating the abusive
10 atmosphere was the president of the corporate employer" and
11 thus "was indisputably within that class of an employer
12 organization's officials who may be treated as the
13 organization's proxy." Id. at 789. The Court also cited this
14 Court's decision in Torres v. Pisano, 116 F.3d 625 (2d Cir.
15 1997), for the proposition that "a supervisor may hold a
16 sufficiently high position 'in the management hierarchy of the
17 company for his actions to be imputed automatically to the
18 employer.'" Faragher, 524 U.S. at 789-90 (citing and quoting
19 Torres, 116 F.3d at 634-35 & n.11). This doctrine, as
20 approvingly described by Faragher, thus holds an employer
21 liable in its own right for wrongful harassing conduct, rather
22 than vicariously liable for actions of the employer's agents.¹²

¹² The Court in Faragher also relied upon the proxy/alter ego doctrine to explain its prior cases holding that liability for

1 Similarly, the Court in Ellerth invoked the alter ego
2 doctrine in its discussion of employer liability principles
3 and carefully distinguished the doctrine from the facts of the
4 case before it. 524 U.S. at 758 (“Subsection [219(2)](a) [of
5 the Restatement (Second) of Agency] addresses direct liability
6 . . . and indirect liability, where the agent’s high rank in
7 the company makes him or her the employer’s alter ego. None
8 of the parties contend [the supervisor’s] rank imputes
9 liability under this principle. . . . So, for our purposes
10 here, subsection[] (a) . . . can be put aside.”). Ellerth
11 instead derived the appropriate standard for non-proxy
12 employer liability, and its two-part affirmative defense, from
13 Section 219(2)(d) of the Restatement, which “concerns
14 vicarious liability for intentional torts committed by an
15 employee.” Id. at 759; see also id. at 759-65.

16 Moreover, Faragher and Ellerth made clear that they did
17 not intend to depart from these well-established theories of
18 employer liability in sexual harassment cases. Indeed,
19 Faragher explained that the Supreme Court had affirmed the

discriminatory employment actions with tangible results is to
be imputed to employers. 524 U.S. at 790 (“A variety of
reasons have been invoked for this apparently unanimous rule.
Some courts explain, in a variation of the ‘proxy’ theory
discussed above, that when a supervisor makes such decisions,
he ‘merges’ with the employer, and his act becomes that of the
employer.” (emphasis added)).

1 relevance of agency principles in those cases in Meritor
2 Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986), and that
3 "Meritor's statement of the law is the foundation on which we
4 build today." 524 U.S. at 791-92. Thus, the Faragher/ Ellerth
5 affirmative defense builds upon rather than repudiates the
6 theory of proxy/alter ego liability articulated in the Court's
7 prior cases.

8 Every Court of Appeals to have considered this issue has
9 held that the Faragher/ Ellerth affirmative defense is
10 unavailable when the supervisor in question is the employer's
11 proxy or alter ego. See Ackel v. Nat'l Commc'ns, Inc., 339
12 F.3d 376, 383-84 (5th Cir. 2003) (holding that the
13 Faragher/ Ellerth defense is unavailable "when the harassing
14 supervisor is . . . 'indisputably within that class of an
15 employer organization's officials who may be treated as the
16 organization's proxy'" (quoting Faragher, 524 U.S. at 789)
17 (emphasis omitted)); Johnson v. West, 218 F.3d 725, 730 (7th
18 Cir. 2000) (same); cf. Passantino v. Johnson & Johnson
19 Consumer Prods., Inc., 212 F.3d 493, 517 (9th Cir. 2000)
20 (holding that the Faragher/ Ellerth affirmative defense is
21 "inapplicable as a defense to punitive damages when the
22 corporate officers who engage in illegal conduct are

1 sufficiently senior to be considered proxies for the
2 company").¹³

3 The EEOC's interpretation of Title VII, as set forth in
4 its Enforcement Guidance, is in accord with this analysis.
5 See EEOC Enforcement Guidance: Vicarious Employer Liability
6 for Unlawful Harassment by Supervisors, 1999 WL 33305874, at
7 *18 (June 18, 1999) ("[When the alleged harasser qualifies as
8 the employer's proxy], the official's unlawful harassment is
9 imputed automatically to the employer. Thus, the employer
10 cannot raise the [Faragher/ Ellerth] affirmative defense, even
11 if the harassment did not result in a tangible employment
12 action." (footnote omitted)). The EEOC's Enforcement Guidance
13 is entitled to deference to the extent it has the power to
14 persuade. See Skidmore, 323 U.S. at 140; Nat'l R.R. Passenger
15 Corp. v. Morgan, 536 U.S. 101, 110 n.6 (2002) (EEOC's
16 interpretation contained in Compliance Manual subject to

¹³ Other Courts of Appeals have continued to apply the proxy/alter ego doctrine after Faragher and Ellerth but have not ruled on whether proxy/alter ego liability bars an employer from raising the Faragher/ Ellerth defense. See Helm v. Kansas, 656 F.3d 1277, 1286 (10th Cir. 2011) ("We have not squarely addressed whether an employer may rely on the Faragher/ Ellerth defense when a victimized employee seeks to impose liability on the employer under the alter-ego theory We need not decide that issue to resolve this case, however, as we conclude that . . . Judge Stewart did not operate as the alter ego of the State."); Mallinson-Montague v. Pocrnick, 224 F.3d 1224, 1228 n.2, 1232-33 (10th Cir. 2000) (court did not address the issue because the plaintiff did not raise the question and the Faragher/ Ellerth affirmative defense failed on the merits).

1 Skidmore deference); Mack v. Otis Elevator Co., 326 F.3d 116,
2 127 (2d Cir. 2003) ("While we are not bound by [the EEOC's]
3 enforcement guidelines, they are entitled to respect to the
4 extent that they are persuasive."). For the reasons explained
5 above, we find the EEOC's interpretation persuasive.

6 In sum, there was no error in the district court's
7 conclusion that the Faragher/ Ellerth defense is unavailable
8 when the alleged harasser is the employer's proxy or alter ego
9 and in the district court's denial of the defendants' post-
10 trial motion on this basis.

11

12

2.

13 BEI and the Benjamins next argue that the jury could not
14 reasonably have concluded that Hugh Benjamin was BEI's alter
15 ego and that the district court thus erred in denying the
16 defendants' motion for judgment as a matter of law on this
17 basis. We disagree.

18 BEI and the Benjamins argue that no reasonable jury could
19 find that BEI condoned Hugh Benjamin's harassment, given that
20 BEI's President was Hugh Benjamin's wife. However, the
21 relevant question is not whether the employer approved of the
22 actions of the supervisor but rather whether the supervisor
23 occupied a "sufficiently high position 'in the management
24 hierarchy of the company for his actions to be imputed

1 automatically to the employer.'" Faragher, 524 U.S. at 789-90
2 (quoting Torres, 116 F.3d at 634); see also Ackel, 339 F.3d at
3 384 ("[T]he only factor relevant to the determination of
4 whether [the supervisor in question] was a proxy for [the
5 employer] is whether he held a 'sufficiently high position in
6 the management hierarchy' so as to speak for the corporate
7 employer." (quoting Faragher, 524 U.S. at 789)).

8 In this case, the jury reasonably could have concluded
9 that Hugh Benjamin occupied such a position. Courts of
10 Appeals have considered supervisors to be of sufficiently high
11 rank to qualify as an employer's proxy or alter ego when the
12 supervisor is "a president, owner, proprietor, partner,
13 corporate officer," or otherwise highly-positioned in the
14 management hierarchy. Johnson, 218 F.3d at 730; see also
15 Helm, 656 F.3d at 1286 ("In Faragher, the Supreme Court
16 suggested that presidents, owners, proprietors, partners,
17 corporate officers, and supervisors with a high position in
18 the management hierarchy are the types of officials who can be
19 considered an organization's alter ego."); EEOC v. Karenkim,
20 Inc., No. 08 Civ. 1019, 2010 WL 3810160, at *4-5 (N.D.N.Y.
21 Sept. 22, 2010) (applying same standard). Here, Hugh Benjamin
22 is the only corporate Vice President of BEI, operating as
23 second-in-command, with a position immediately below Michelle
24 Benjamin in the corporate hierarchy. He is also a corporate

1 shareholder with a financial stake in BEI. All of BEI's
2 corporate shares are held by Hugh Benjamin, Michelle Benjamin,
3 and their two children. Given these facts, the jury
4 reasonably could have concluded that Hugh Benjamin was
5 sufficiently high within the corporate hierarchy to qualify as
6 BEI's alter ego. See Ackel, 339 F.3d at 384 (finding a
7 triable issue of fact with respect to whether supervisor was a
8 proxy for the corporation when he was President and General
9 Manager of the company and a stockholder and member of the
10 Board of Directors with managerial duties); Mallinson-
11 Montague, 224 F.3d at 1232-33 (holding that alter ego
12 instruction was appropriate based on the supervisor's high
13 managerial rank as Senior Vice President of Consumer Lending
14 and his supervisory duties).

15 Moreover, Hugh Benjamin exercised a significant degree of
16 control over corporate affairs, which is consistent with alter
17 ego liability. He collaborated with Michelle Benjamin on
18 corporate decisions including hiring, and the supervisors and
19 managers in the field reported directly to him. See
20 Mallinson-Montague, 224 F.3d at 1233 (finding persuasive that
21 Senior Vice President of Consumer Lending "had the authority
22 to hire and fire employees in [his] department" and "was the
23 ultimate supervisor of all employees in [his] department").
24 While Michelle Benjamin had the power to overrule Hugh

1 Benjamin's decisions, this fact alone, without more evidence
2 of pervasive control over Hugh Benjamin by other corporate
3 officers at BEI, is not sufficient to establish as a matter of
4 law that Hugh Benjamin was not BEI's alter ego. Compare id.
5 at 1233 (holding that an alter ego instruction was appropriate
6 when supervisor in question answered only to the company's
7 president), with Johnson, 218 F.3d at 730 (holding that a
8 supervisor could not be considered employer's proxy/alter ego
9 when he had at least two levels of supervisors and likely
10 others within the organization's bureaucracy). Nor does the
11 fact that Hugh Benjamin owned only 5% of the corporate stock
12 at the time of trial conclusively establish that he is not
13 BEI's alter ego. "Stock ownership is not a prerequisite for
14 acting as a corporation's proxy," Ackel, 339 F.3d at 384;
15 moreover, Hugh Benjamin owned 34% of the corporate shares
16 until 2004, when some of the shares were transferred to the
17 Benjamins' children for estate planning purposes, a transfer
18 that did not affect Hugh Benjamin's decisionmaking authority.
19 Thus, because Hugh Benjamin occupied a high managerial rank
20 within BEI and because he exercised significant control over
21 the company's operations, the jury reasonably could have
22 concluded that he was BEI's alter ego. The district court
23 therefore did not err in denying the defendants' motion for
24 judgment as a matter of law on this basis.

1
2 BEI and the Benjamins also argue that the district
3 court's jury instruction on alter ego liability was erroneous
4 and that the district court abused its discretion in denying
5 the defendants' motion for a new trial on this basis. We will
6 grant a new trial if the jury instruction was erroneous and if
7 that error was not harmless. Sanders v. N.Y.C. Human Res.
8 Admin., 361 F.3d 749, 758 (2d Cir. 2004). "[A] jury charge is
9 erroneous if the instruction misleads the jury as to the
10 proper legal standard, or it does not adequately inform the
11 jury of the law." Luciano v. Olsten Corp., 110 F.3d 210, 218
12 (2d Cir. 1997).

13 The district court's jury instruction on alter ego
14 liability provided in relevant part that:

15 Under both federal and state law, an employer is strictly
16 liable for hostile work environment sexual harassment by
17 a supervisor when the supervisor's role is more than a
18 mere supervisor and is actually identical to that of the
19 employer.

20
21 In other words, where an employee serves in a supervisory
22 position and exercises significant control over an
23 employee's hiring, firing or conditions of employment,
24 that individual operates as the alter ego of the
25 employer, and the employer is strictly liable for any
26 unlawful employment practices of the individual without
27 regard to whether the employer knew of the individual's
28 conduct.

29
30 Therefore, . . . you must determine whether, under all of
31 the circumstances, [Hugh Benjamin] served in a
32 supervisory position and exercised significant control

1 over an employee's hiring, firing or conditions of
2 employment.

3
4 If you determine that Hugh Benjamin was employed in a
5 position sufficiently elevated within the corporate
6 hierarchy as to be viewed as the employer's alter ego,
7 then you must also find Defendant Benjamin Enterprises
8 strictly liable for hostile work environment sexual
9 harassment under both federal and state law, and
10 Defendant Michelle Benjamin strictly liable for hostile
11 work environment sexual harassment under New York State
12 law.

13
14 On the other hand, if you determine from all of the
15 circumstances that Hugh Benjamin's role in the
16 corporation was not sufficiently elevated within the
17 corporate hierarchy to be considered the employer's alter
18 ego, then the employer's liability is not
19 automatic

20
21
22 BEI and the Benjamins contend that the jury instruction
23 was erroneous because it suggested to the jury that an
24 individual could be an employer's alter ego merely because
25 that individual "serves in a supervisory position and
26 exercises significant control over an employee's hiring,
27 firing or conditions of employment." They argue that alter
28 ego liability is not so broad as to encompass such a wide
29 range of individuals. We agree.

30 The jury instruction was erroneous because it gave the
31 jury a misleading impression of the proper standard for alter
32 ego liability. Specifically, the instruction twice stated
33 that an individual qualifies as the alter ego of an employer
34 where that individual "serve[s] in a supervisory position and

1 exercise[s] significant control over an employee's hiring,
2 firing or conditions of employment." However, an individual's
3 mere status as a supervisor with power to hire or fire is not
4 sufficient to render that individual an alter ego of an
5 employer. See Faragher, 524 U.S. at 792 ("Title VII does not
6 make employers 'always automatically liable for sexual
7 harassment by their supervisors" (quoting Meritor,
8 477 U.S. at 72)); Mallinson-Montague, 224 F.3d at 1233
9 (finding that "the district court erred in concluding that the
10 alter ego instruction was appropriate simply because [the
11 defendant] was the Plaintiffs' supervisor and exercised a high
12 degree of control over them").¹⁴

13 It is true, as Townsend argues, that other portions of
14 the jury instruction ameliorated this error to some extent by
15 stating that "the supervisor's role [must be] more than a mere
16 supervisor" and by directing the jury to consider whether
17 "Hugh Benjamin was employed in a position sufficiently
18 elevated within the corporate hierarchy as to be viewed as the
19 employer's alter ego." However, we cannot conclude that these
20 portions of the charge were sufficient to correct the
21 misleading impression created by the other erroneous
22 statements. Given that the jury instruction twice stated that

¹⁴ Indeed, counsel for both parties objected to this language in the proposed jury instruction.

1 an individual qualifies as an alter ego where he or she
2 "serve[s] in a supervisory position and exercise[s]
3 significant control over an employee's hiring, firing or
4 conditions of employment," the jury could have been left with
5 the erroneous impression that a supervisor in this position
6 is, by definition, "sufficiently elevated within the corporate
7 hierarchy" for alter ego liability to attach.

8 However, the error in the instruction was harmless. "An
9 error is harmless only when we are persuaded it 'did not
10 influence the jury's verdict.'" Sanders, 361 F.3d at 758
11 (quoting Gordon v. N.Y.C. Bd. of Educ., 232 F.3d 111, 116 (2d
12 Cir. 2000)). We are persuaded that the error here did not
13 influence the jury's finding with respect to alter ego
14 liability because no reasonable juror could have concluded
15 that Hugh Benjamin was not the alter ego of BEI. Hugh
16 Benjamin was extremely elevated in the corporate hierarchy of
17 BEI, serving as the only corporate Vice President, second only
18 to Michelle Benjamin, BEI's President. As a senior corporate
19 officer, he answered only to Michelle Benjamin and exercised
20 managerial responsibility for day-to-day operations of BEI.
21 He was also a corporate shareholder with a financial stake in
22 BEI. Given Hugh Benjamin's extremely high rank within BEI and
23 his significant control over the company's operations, we are
24 persuaded that any error in the district court's jury

1 instruction did not influence the jury's finding with respect
2 to alter ego liability and was therefore harmless.

3 Accordingly, we affirm the district court's denial of the
4 defendants' post-trial motion on this basis.

5

6 4.

7 We have found that the district court correctly concluded
8 (1) that the Faragher/Ellerth defense is unavailable when the
9 supervisor in question is the employer's proxy or alter ego;
10 (2) that the jury reasonably could have concluded that Hugh
11 Benjamin was BEI's alter ego; and (3) that there was no
12 prejudicial error in the jury instruction on alter ego
13 liability. Because BEI was thus properly precluded from
14 raising the Faragher/Ellerth defense in the proceedings below,
15 the argument by BEI and the Benjamins that the
16 Faragher/Ellerth defense was proven in this case as a matter
17 of law is moot.

18

19 5.

20 BEI and the Benjamins next claim error in the district
21 court's instruction regarding individual liability for
22 Michelle Benjamin under the New York Human Rights Law. The
23 jury instruction provided in relevant part that:

1 If you determine that Hugh Benjamin was employed in a
2 position sufficiently elevated within the corporate
3 hierarchy as to be viewed as the employer's alter ego,
4 then you must also find Defendant Benjamin Enterprises
5 strictly liable for hostile work environment sexual
6 harassment under both federal and state law, and
7 Defendant Michelle Benjamin strictly liable for hostile
8 work environment sexual harassment under New York State
9 law.

10
11
12 BEI and the Benjamins do not dispute that the jury
13 instruction correctly states the law on employer liability
14 under § 296(1) of the New York Human Rights Law. Under this
15 provision, an individual is properly subject to liability for
16 discrimination when that individual qualifies as an
17 "employer." N.Y. Exec. Law § 296(1). An individual qualifies
18 as an "employer" when that individual has an ownership
19 interest in the relevant organization or the "power to do more
20 than carry out personnel decisions made by others." Patrowich
21 v. Chem. Bank, 473 N.E.2d 11, 12 (N.Y. 1984) (per curiam).
22 The jury instruction accurately reflects these principles.
23 Because there was no dispute that Michelle Benjamin had an
24 ownership interest in the company and the power to hire and
25 fire employees, it was proper for the district court to
26 instruct the jury that, as a matter of law, it must find
27 Michelle Benjamin strictly liable upon a finding that Hugh
28 Benjamin qualified as BEI's alter ego.

1 BEI and the Benjamins nonetheless contend that the jury
2 instruction was unfair because the claims against Michelle
3 Benjamin had been premised on a theory of aiding and abetting
4 liability under § 296(6) of the New York Human Rights Law
5 rather than a theory of employer liability under § 296(1).
6 However, this assertion does not demonstrate that the jury
7 instruction was incorrect as a statement of the legal
8 principles applicable to § 296(1). Nor does it matter that
9 the original complaint premised its claims against Michelle
10 Benjamin on § 296(6). "The failure in a complaint to cite a
11 statute, or to cite the correct one, in no way affects the
12 merits of a claim. Factual allegations alone are what
13 matters." Albert v. Carovano, 851 F.2d 561, 571 n.3 (2d Cir.
14 1988) (en banc); see also Flickinger v. Harold C. Brown & Co.,
15 947 F.2d 595, 600 (2d Cir. 1991) (directing the entry of
16 judgment for plaintiff on a legal theory not pleaded in the
17 complaint). Moreover, BEI and the Benjamins have not shown
18 that they were prejudiced in any way by the fact that this
19 theory of liability was not raised earlier. The defendants
20 had notice of the proposed jury charge and an opportunity to
21 object to it prior to summations. They do not assert that
22 they would have conducted their defense any differently had
23 the original complaint alleged employer liability under
24 § 296(1), perhaps because they do not dispute that Michelle

1 Benjamin plainly qualifies as an employer under this
2 provision.¹⁵ Thus, the district court's jury instruction on
3 Michelle Benjamin's individual liability was not erroneous.

4

5 B.

6 BEI and the Benjamins next argue that the district
7 court's award of attorney's fees was an abuse of discretion.
8 "Our review of an award of attorneys' fees is 'highly
9 deferential to the district court'" and we will reverse such
10 an award only for an abuse of discretion. Crescent Publ'g
11 Grp., Inc. v. Playboy Enters., Inc., 246 F.3d 142, 146 (2d
12 Cir. 2001) (quoting Alderman v. Pan Am World Airways, 169 F.3d
13 99, 102 (2d Cir. 1999)).

14 Under Title VII, "the court, in its discretion, may allow
15 the prevailing party . . . a reasonable attorney's fee . . .
16 as part of the costs." 42 U.S.C. § 2000e-5(k). In this case,
17 the district court awarded attorney's fees and costs to
18 Townsend in the amount of \$141,308.80. This award included
19 fees and costs accrued both before and after the defendants
20 made an Offer of Judgment pursuant to Rule 68 ("Rule 68
21 Offer") in the amount of \$50,000. BEI and the Benjamins

¹⁵ At oral argument, counsel for BEI and the Benjamins conceded that "[i]f there were a pleading that [Michelle Benjamin] were the employer then [the district court] would have been right" to give the instruction at issue here. (Tr. 40).

1 contend that the plaintiff is not entitled to fees and costs
2 accrued after the defendants' Rule 68 Offer.

3 Rule 68 provides in relevant part that:

4 [A] party defending against a claim may serve on an
5 opposing party an offer to allow judgment on specified
6 terms, with the costs then accrued. . . . If the judgment
7 that the offeree finally obtains is not more favorable
8 than the unaccepted offer, the offeree must pay the costs
9 incurred after the offer was made.

10
11 Fed. R. Civ. P. 68. Thus, a prevailing plaintiff may not
12 recover from the defendant attorney's fees and costs accrued
13 after an Offer of Judgment is served if the Offer exceeds the
14 sum of the plaintiff's ultimate recovery plus the amount of
15 fees and costs accrued by the plaintiff as of the time of the
16 Offer. See Marek v. Chesny, 473 U.S. 1, 11-12 (1985); Reiter
17 v. MTA N.Y.C. Transit Auth., 457 F.3d 224, 229 (2d Cir. 2006).

18 Here, the district court concluded that the \$50,000 Rule 68
19 Offer did not exceed the sum of the \$30,400 jury verdict and
20 the fees and costs accrued as of the date of the Rule 68
21 Offer. The district court determined that the plaintiff was
22 therefore entitled to recover reasonable fees and costs,
23 including those accrued after the Rule 68 Offer.

24 To determine pre-Offer attorney's fees, the district
25 court applied the familiar method of deriving reasonable
26 hourly rates for attorney and paralegal services from the
27 prevailing market rate for counsel of similar experience and

1 skill in the district, and multiplying these respective rates
2 by the number of hours reasonably expended by attorneys and
3 paralegals prior to the Rule 68 Offer.¹⁶ BEI and the Benjamins
4 contend that the district court erred in arriving at an
5 attorney hourly rate of \$350 based on prevailing market rates,
6 rather than a rate of \$250 based on Townsend's retainer
7 agreement with counsel. That retainer agreement provided that
8 Townsend would pay to her attorneys various amounts depending
9 on whether the case settled or went to trial. One measure was
10 that Townsend would pay to her attorneys 30% of any pre-trial
11 settlement or \$250 per hour, whichever was greater. The
12 parties agree that, had the rate of \$250 been used, the Rule
13 68 Offer would have exceeded the sum of the plaintiff's
14 ultimate recovery plus pre-Offer fees and costs.

15 The district court did not err in declining to use the
16 retainer rate as the basis for calculating the reasonable
17 hourly rate. In Blanchard v. Bergeron, 489 U.S. 87 (1989),
18 the Supreme Court made clear that, in determining a reasonable
19 hourly rate for an attorney's services, the amount set forth

¹⁶ The district court determined the reasonable hourly rate for attorneys' services to be \$350 and the reasonable rate for the paralegal to be \$100. Multiplying these respective figures by the reasonable hours expended, and adding \$308.50 in pre-Offer costs, the district court arrived at a total of \$25,963.50. The sum of this figure and the \$30,400 jury award was \$56,363.50, more than the \$50,000 Rule 68 Offer.

1 in a contingent fee retainer agreement is not dispositive.

2 Id. at 93. The Court explained that:

3 [A]s we see it, a contingent-fee contract does not impose
4 an automatic ceiling on an award of attorney's fees
5 As we understand § 1988's provision for allowing
6 a 'reasonable attorney's fee,' it contemplates reasonable
7 compensation, in light of all of the circumstances, for
8 the time and effort expended by the attorney for the
9 prevailing plaintiff, no more and no less. Should a fee
10 agreement provide less than a reasonable fee calculated
11 in this manner, the defendant should nevertheless be
12 required to pay the higher amount.

13
14 Id.; see also Reiter, 457 F.3d at 232-33 (holding that the
15 market rate rather than the retainer agreement rate was the
16 best measure of the reasonable hourly rate when the retainer
17 agreement rate was discounted for the plaintiff in a civil
18 rights case). Indeed, this Court has instructed that
19 determination of a reasonable hourly rate "contemplates a
20 case-specific inquiry into the prevailing market rates for
21 counsel of similar experience and skill to the fee applicant's
22 counsel," an inquiry that may "include judicial notice of the
23 rates awarded in prior cases and the court's own familiarity
24 with the rates prevailing in the district." Farbotko v.
25 Clinton Cnty., 433 F.3d 204, 209 (2d Cir. 2005).

26 The district court, relying on Farbotko, conducted just
27 such a case-specific inquiry here. The court examined the
28 hourly rates awarded to civil litigators in similar firms in
29 the district, concluding that they ranged from \$225 to \$375

1 per hour. The court also noted that one of Townsend's
2 attorneys had been awarded \$310 per hour in another case in
3 the Southern District of New York two years before the fee
4 award in this case. The court declined to rely on an
5 affidavit from an attorney in another law firm attesting that
6 rates charged by attorneys in her firm ranged from \$675-900,
7 reasoning that this attorney's firm was much larger in size
8 than Townsend's attorneys' firm and thus not an accurate
9 comparator for assessing hourly rates in the district. The
10 court also noted its "familiarity with prevailing rates in
11 this district for attorneys of similar skill, reputation and
12 experience at small firms engaged in civil rights litigation."
13 Based on all these factors, the court concluded that a
14 reasonable hourly rate for Townsend's attorneys was \$350,
15 rather than the \$375 they had requested. The district court
16 thus clearly conducted a careful analysis of comparable hourly
17 rates in the district. The rate of \$350 was wholly reasonable
18 and was not an abuse of discretion.¹⁷ Using this rate, the

¹⁷ It is important to note that the relevant time period in relation to which the prevailing market rate should be calculated, for purposes of assessing whether a plaintiff is entitled to post-Offer fees and costs, is the time at which the Rule 68 Offer was served on the plaintiff (here 2006), rather than the time at which the attorney's fee application was made (here 2009). There is no indication that the district court's analysis was erroneous in this respect. In examining the rates awarded to other civil litigators in the district, the court cited awards that took place between 2005

1 amount of pre-Offer fees and costs, in combination with the
2 plaintiff's ultimate recovery, exceeds the Rule 68 Offer.
3 Thus, the district court was correct to award fees and costs
4 incurred both before and after the Rule 68 Offer.

5 BEI and the Benjamins also argue that the district court
6 should have adjusted the pre-Offer fee award downward for lack
7 of success because of the allegedly low amount of the jury
8 verdict. However, "[a] presumptively correct 'lodestar'
9 figure should not be reduced simply because a plaintiff
10 recovered a low damage award." Cowan v. Prudential Ins. Co.
11 of Am., 935 F.2d 522, 526 (2d Cir. 1991); see also Kassim v.
12 City of Schenectady, 415 F.3d 246, 252 (2d Cir. 2005) ("[W]e
13 have repeatedly rejected the notion that a fee may be reduced
14 merely because the fee would be disproportionate to the
15 financial interest at stake in the litigation."). Moreover,
16 the district court carefully analyzed the hours for which
17 compensation was sought, reducing those it deemed excessive,
18 and also applied an across-the-board reduction of 15% to the
19 post-Rule 68 Offer fees to reflect the lack of success on
20 Townsend's constructive discharge claim and to account for
21 some excessiveness in the fee application. It was well within

and 2008 and also noted an award to one of Townsend's
attorneys in 2007. These are not so far in time from the 2006
Rule 68 Offer to suggest that the district court's analysis
was erroneous.

1 the district court's discretion to refuse to apply a further
2 downward adjustment to the pre-Offer fee award.

3 We thus affirm the district court's attorney's fee award
4 in its entirety.

5

6 **CONCLUSION**

7 We have considered all of the arguments of the parties.
8 To the extent not specifically addressed above, they are
9 either moot or without merit. For the reasons explained
10 above, we **affirm** the judgment of the district court.

1 LOHIER, Circuit Judge, concurring:

2 I agree completely with the majority opinion relating to Townsend. I also reluctantly
3 concur in its decision to affirm the dismissal of Grey-Allen’s claim under Title VII of the Civil
4 Rights Act of 1964. I write separately to explain that affirming requires reference to the
5 legislative history of Title VII’s antiretaliation provision because the text is ambiguous. I also
6 write to suggest that Congress should act to clarify Title VII if it desires to prohibit private
7 employers from retaliating against employees merely because they participate in internal
8 investigations of discrimination complaints prior to any involvement by the EEOC.

9 Title VII’s antiretaliation provision, section 704(a), has two distinct clauses forbidding
10 retaliation against employees engaged in protected activity: the opposition clause and the
11 participation clause. The opposition clause makes it “unlawful . . . for an employer to
12 discriminate against any . . . employee[] . . . because he has opposed any practice made unlawful
13 . . . by this subchapter,” while the participation clause makes it unlawful for an employer to
14 discriminate against any employee “because he has made a charge, testified, assisted, or
15 participated in any manner in an investigation, proceeding, or hearing under this subchapter.” 42
16 U.S.C. § 2000e-3(a).

17 Although there may be some question about whether Grey-Allen “opposed” any unlawful
18 employment practice (a question to which I turn below), she accused her employer of violating
19 only the participation clause. Similarly, on appeal, Grey-Allen’s employer relied solely on its
20 assertion that the participation clause does not apply to internal investigations. There was strong
21 evidence that it fired Grey-Allen for no reason other than that she conducted an effective internal
22 investigation of a sexual harassment claim against a corporate vice-president. I begin, therefore,

1 with the following question: Does the participation clause allow a private employer to fire a
2 human resources director or EEO officer because she conducted a neutral investigation of an
3 employee’s discrimination claim without involving the EEOC?

4 Congress has never directly confronted the issue of whether private-sector employees
5 who undertake these important investigations are protected from retaliation under the
6 participation clause. The Supreme Court explicitly left open the question of whether the
7 participation clause protects these employees in Crawford v. Metropolitan Government of
8 Nashville & Davidson County, Tennessee, 555 U.S. 271 (2009), even as it answered a similar
9 question in the context of the opposition clause. Ultimately, the statutory text and legislative
10 history of Title VII persuade me that the majority opinion correctly resolved this question in
11 favor of the employer in this case, although I arrive at that conclusion using a different route.

12 I start with the text of the statute. I agree with my colleagues that the phrase
13 “investigation . . . under this subchapter” clearly includes EEOC investigations. I disagree,
14 however, that the phrase, which should be interpreted broadly, unambiguously excludes internal
15 investigations conducted by employers. See EEOC v. Total Sys. Servs., Inc., 240 F.3d 899, 901
16 (11th Cir. 2001) (dissent from denial of rehearing in banc). First, certain provisions of Title VII
17 – the “subchapter” to which the clause refers¹ – suggest a role for non-governmental enforcement
18 of the statute. For example, section 705(g)(1) of Title VII authorizes the EEOC to “cooperate
19 with and . . . utilize regional, State, local, and other agencies, both public and private, and
20 individuals.” 42 U.S.C. § 2000e-4(g)(1). Second, other provisions of Title VII expressly limit

¹ Title VII is codified as Subchapter VI of Chapter 21 of Title 42 of the United States Code.

1 the term “investigation” to an investigation by the EEOC, indicating that Congress clearly could
2 and did refer solely to EEOC investigations when it intended to do so. See id. § 2000e-5(b)
3 (referring to “investigation by [the] Commission”); id. § 2000e-8(a) (referring to “any
4 investigation of a charge filed under [the EEOC’s enforcement provision] of this title [section
5 706]”); id. § 2000e-9 (referring to “investigations conducted by the Commission or its duly
6 authorized agents or agencies”). As a result, I conclude that the phrase “investigation . . . under
7 this subchapter” is ambiguous, and I proceed to the legislative history to determine what
8 Congress meant by it. See SEC v. Rosenthal, 650 F.3d 156, 161 (2d Cir. 2011).

9 Congress appears to have had only government investigations in mind in 1964. There is
10 no indication in the legislative history of Title VII that Congress meant to include internal
11 investigations by private employers in the participation clause. I recognize that “when it
12 originally enacted Title VII, Congress hoped to encourage employers to comply voluntarily with
13 the act,” EEOC v. Shell Oil Co., 466 U.S. 54, 77 (1984), but Congress does not appear to have
14 embraced internal investigations as a way to do so. It did not once mention internal
15 investigations by private employers in the debates and speeches leading up to the enactment of
16 Title VII or in subsequent major amendments to the statute. This is not surprising since, as the
17 EEOC acknowledged at oral argument, it appears that “there really weren’t” such investigations
18 prior to 1964. Tr. of Oral Arg. at 17:11-19. They also appear not to have been among
19 Congress’s concerns in subsequent major amendments to Title VII in 1972, 1978 and 1991.
20 Instead, it seems that Congress focused on protecting employees who participated in EEOC

1 investigations, other federal-sector investigations,² or analogous state-sponsored investigations.

2 Without evidence that private-sector internal investigations existed and that Congress considered
3 them at the time it enacted Title VII, I am hard pressed to conclude from the legislative history
4 that Congress intended to include these investigations in the ambit of the participation clause.

5 Even the EEOC's interpretation of the participation clause, as reflected in its Compliance
6 Manual, is of little help to Grey-Allen. While not entitled to full deference under Chevron,
7 U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), the manual and
8 other EEOC directives nevertheless "reflect a 'body of experience and informed judgment to
9 which courts and litigants may properly resort for guidance,'" and are "entitled to a 'measure of
10 respect' under the less deferential Skidmore standard." Fed. Express Corp. v. Holowecki, 552
11 U.S. 389, 399 (2008); see also Crawford, 555 U.S. at 276. Although the EEOC argued as amicus

² As originally enacted in 1964, Title VII did not apply to federal employees. "Instead, employment discrimination claims brought by federal employees were governed by Executive Orders and agency regulations. In general, a federal agency accused of discrimination would investigate the claim, conduct a hearing and render a final decision . . ." Pueschel v. United States, 369 F.3d 345, 352 (4th Cir. 2004). As Congress was surely well aware in 1964, federal regulations in place pursuant to Executive Order No. 10590, 20 Fed. Reg. 409 (Jan. 19, 1955), directed the heads of each federal department or agency to designate an Employment Policy Officer (later changed to an Equal Employment Opportunity, or "EEO," Officer), who was required to conduct prompt internal "investigation[s] of each complaint" "of alleged discrimination in personnel matters within his department or agency." 5 C.F.R. §§ 1401.4, 1401.17 (1964); see 5 C.F.R. § 713.204(d)(4) (1968) (designating EEO Officers to investigate complaints within federal agencies). These internal federal agency investigations continued after Congress amended Title VII by passing the Equal Employment Opportunity Act of 1972 (the "EEOA") to extend its coverage to most federal employees. See 42 U.S.C. § 2000e-16; 117 Cong. Rec. 32,105 (1971); S. Rep. No. 92-415, at 14 (1971), reprinted in Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, at 423 (1972) ("Under present procedures, in most cases, each [federal] agency is still responsible for investigating . . . itself."). For these reasons, the phrase "investigation . . . under this subchapter" appears to include internal investigations of discrimination conducted by federal agencies through EEO Officers.

1 on appeal that it has long regarded internal investigations as covered by the participation clause,
2 see Br. of EEOC as Amicus Curiae in Supp. of Appellant Grey-Allen 19, the EEOC’s
3 Compliance Manual does not state that the participation clause covers activity undertaken in the
4 course of an internal investigation by an employer. The manual’s guidance about whether an
5 individual is protected under the participation clause does not mention internal investigations,
6 referring instead to “individuals [who] challeng[e] employment discrimination under the statutes
7 enforced by EEOC in EEOC proceedings, in state administrative or court proceedings, as well as
8 in federal court proceedings, and to individuals who testify or otherwise participate in such
9 proceedings.” 2 EEOC Compliance Manual § 8-II-C, p. 614.0005 (May 1998); see id. § 2-II-A,
10 p. 605.0005 (2008) (referring the reader to the 1998 EEOC Compliance Manual for more
11 detailed guidance on protected activity).³ To be sure, the manual states that “[p]rotected activity
12 [under section 704(a)] . . . includes . . . presenting evidence as part of an internal investigation
13 pertaining to an alleged EEO violation.” Id. § 2-II-A, p. 605.0005. But it justifies its
14 interpretation by reference to the opposition clause rather than the participation clause. See id.
15 n.41.

³ In contrast to the current manual, which does not state that cooperating with internal investigations is protected by the participation clause, an archived page of the EEOC’s website cites “[c]ooperating with an internal investigation of alleged discriminatory practices” as an example of protected activity under the participation clause. Retaliation, <http://archive.eeoc.gov/types/retaliation.html> (last modified Mar. 11, 2009). Of course, the EEOC, like any other agency, is entitled to change its mind and change course. But the argument that it advances in its amicus brief (an argument that accords with the March 2009 archived website page referenced above) differs from its published, official interpretation of the participation clause, and it offers no support for its assertion that it has long adopted a more expansive interpretation of the participation clause. In the absence of a reasoned analysis explaining why its position differs from that set out in the Compliance Manual, the EEOC’s new argument is “‘entitled to considerably less deference’ than a consistently held agency view.” Am. Fed’n of State, Cnty. & Mun. Emps. v. Am. Int’l Grp., Inc., 462 F.3d 121, 129 (2d Cir. 2006) (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994)).

1 For these reasons, I am compelled to agree with the decision to affirm the judgment of
2 the District Court. As a policy matter, however, the distinction between investigations in which
3 the government is involved and internal investigations strikes me as antiquated and arbitrary.
4 The facts of this case starkly illustrate the arbitrariness. Had Grey-Allen conducted her
5 investigation under the auspices of a government agency such as the EEOC, her actions would
6 have been protected under the participation clause. But because she conducted the same internal
7 investigation without EEOC involvement, her actions are not protected.

8 Changes in the last decade to the enforcement and interpretation of Title VII underscore
9 the wisdom of eliminating this distinction and protecting employees who participate in private-
10 sector internal investigations. In particular, Faragher v. Boca Raton, 524 U.S. 775 (1998), and
11 Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), represent a significant shift in the
12 Title VII landscape, and the changes wrought by both cases are now woven into governmental
13 and corporate equal employment opportunity practices. Internal investigations form an integral
14 part of Title VII today, with or without the formal involvement of the EEOC – so much so that
15 the Supreme Court has interpreted Title VII broadly to avoid “undermin[ing] the
16 Ellerth-Faragher scheme, along with the statute’s ‘primary objective’ of ‘avoid[ing] harm’ to
17 employees.” Crawford, 555 U.S. at 279 (emphasis added) (quoting Faragher, 524 U.S. at 806).

18 I recognize that the conclusion that the majority and I draw from the text, legislative
19 history, and agency interpretations of Title VII is in tension with these recent developments and
20 with the principle that, when reviewing Title VII, we should broadly interpret the phrase “under
21 this subchapter.” See Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863, 868 (2011) (“Title
22 VII’s antiretaliation provision must be construed to cover a broad range of employer conduct.”).
23 But it is up to Congress, now accustomed to the centrality of internal investigations in the

1 employment context as a result of these developments, to consider the issue. Congress is best
2 placed to fill this statutory gap between the text and history of the participation clause on the one
3 hand, and Title VII's broad antiretaliation goals on the other hand. It may decide to do so by
4 clarifying that the participation clause prohibits private employers from firing their human
5 resources directors and EEO officers simply because they have conducted an internal
6 investigation of, say, a sexual harassment complaint.

7 I have two final observations. First, in agreeing that Grey-Allen was not protected from
8 retaliation under the participation clause as Congress conceived it in 1964, the majority and I
9 take some solace in the possibility that, after Crawford, employees in Grey-Allen's position will
10 be protected by the opposition clause. That remains to be decided; whether a human resources
11 director who neutrally investigates a claim of discrimination nevertheless can be said to
12 "oppose" a discriminatory practice is an open question in this Circuit. Second, when Congress
13 enacted Title VII, it was aware of the existence of state agencies like the New York State
14 Division of Human Rights ("NYSDHR"), and it authorized the newly created EEOC "to
15 cooperate with and . . . utilize regional, State, local, and other agencies." 42 U.S.C. § 2000e-
16 4(g)(1); see United States Equal Employment Opportunity Commission, Legislative History of
17 Titles VII and XI of Civil Rights Act of 1964, 3044-45 (1968) (interpretative memorandum
18 introduced into congressional record by Senators Clark and Case, the Senate floor managers for
19 Title VII). Moreover, it contemplated that the EEOC and, by extension, analogous state agencies
20 would provide "technical assistance" to employers who requested it to "further their compliance
21 with" Title VII. 42 U.S.C. § 2000e-4(g)(3). In this case, Grey-Allen sought and received advice
22 from the NYSDHR on proceeding with the sexual harassment investigation. In my view,
23 involving a state agency such as the NYSDHR was enough to transform the internal

1 investigation into an “investigation . . . under this subchapter.” 42 U.S.C. § 2000e-3(a). The
2 majority opinion does not suggest anything to the contrary. Grey-Allen, however, never
3 advanced this argument before the District Court, and she therefore forfeited it. See Local 377,
4 RWDSU, UFCW v. 1864 Tenants Ass’n, 533 F.3d 98, 99 (2d Cir. 2008) (finding an argument
5 not raised before the district court forfeited on appeal); Tr. of Oral Arg. at 5:6-24, 8:12-20,
6 21:12-22:3. Even with these two possible forms of protection, however, Congress should clarify
7 whether the kind of investigation Grey-Allen conducted falls within the protective sweep of the
8 participation clause.