

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Reverend Father John P. O'Malley, O.S.A., Individually, and
James A. Nesbitt, Individually v. The Reverend Father Patrick H.
O'Neill, O.S.A.

58 U.S.L.W. 2324 (11th Cir. 1989) · No. No. 88-5572 · Decided November 14, 1989

SUMMARY

The Eleventh Circuit affirmed dismissal of the plaintiffs' civil RICO claims arising from their termination by St. Thomas University officials. The court held that the alleged loss of employment was not proximately caused by the predicate acts of mail fraud and that the plaintiffs were not the targets or victims of that fraud. It also held that the RICO conspiracy allegations were conclusory and insufficiently supported by factual allegations.

CASE DETAILS

COURT	United States Court of Appeals for the Eleventh Circuit
WRITING FOR THE COURT	Cox, Circuit Judge; Anderson, Circuit Judge; Shoob, District Judge, sitting by designation
JURISDICTION	Federal
DECIDED	November 14, 1989
DOCKET	No. 88-5572
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from dismissal of a complaint for failure to state a claim. Plaintiffs asserted substantive and conspiracy claims under civil RICO based on alleged mail fraud and sought damages and equitable relief.
STANDARD OF REVIEW	De novo review of dismissal for failure to state a claim; alleged facts were assumed true.
PRECEDENTIAL VALUE	Published Eleventh Circuit opinion; majority holding is precedential, with a special concurrence questioning the result's consistency with Sedima.
PARTIES	The Reverend Father John P. O'Malley, O.S.A., individually, James A. Nesbitt, individually v. The Reverend Father Patrick H. O'Neill, O.S.A., St. Thomas of Villanova University, Board of Trustees of St.

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QUESTIONS PRESENTED

1. Whether plaintiffs had standing to seek civil RICO damages under 18 U.S.C. § 1964(c) for employment losses allegedly resulting from their refusal to participate in or conceal mail fraud.
2. Whether the complaint and RICO Case Statement adequately alleged a RICO conspiracy under 18 U.S.C. § 1962(d).

HOLDINGS

1. Plaintiffs lacked standing under 18 U.S.C. § 1964(c) because their termination was caused by O'Neill's decision to fire them for refusing to participate in or conceal the alleged scheme, not directly by the predicate acts of mail fraud. The alleged injury therefore did not satisfy RICO's proximate-causation requirement, and plaintiffs were not the targets or victims of the alleged mail fraud.
2. The RICO conspiracy claim was properly dismissed because the complaint and RICO Case Statement alleged at most that some defendants knew of O'Neill's activities and did not allege facts showing that they were willing participants in a conspiracy.

KEY QUOTATIONS

"Thus, in order to have standing to sue for damages under section 1964(c) the plaintiffs must show: (1) a violation of section 1962; (2) injury to business or property; and (3) that the violation caused the injury." (887 F.2d at 1561)

"We hold that there is no principled difference between a discharge for refusal to participate in the predicate acts alleged and a retaliatory discharge for reporting such illegal activity. In either case the injury does not flow directly from the predicate acts." (887 F.2d at 1562)

"We align ourselves with the Cullom court and hold that the plaintiffs here were fired by reason of O'Neill's decision to have them fired, not because of the commission of the predicate acts." (887 F.2d at 1563)

FACTUAL BACKGROUND

O'Malley, a vice-president and provost, and Nesbitt, dean of admissions at St. Thomas University, alleged that the university president concealed an operating deficit by misusing restricted federal student-assistance funds, seeking grants without matching funds, and relying on nonexistent pledges in financial projections. They also alleged that false reports were mailed to government entities, creditors, trustees, and others, and that O'Neill

asked Nesbitt to submit a false immigration verification form. After plaintiffs confronted O'Neill and refused to participate in or conceal the alleged scheme, O'Neill terminated Nesbitt and demanded O'Malley's resignation; O'Malley was terminated after refusing to resign.

PROCEDURAL HISTORY

The United States District Court for the Southern District of Florida dismissed the federal RICO claims, concluding that plaintiffs lacked standing because their employment losses were not caused by the alleged predicate mail-fraud acts and that the conspiracy allegations were conclusory. The district court dismissed the remaining state-law claims without prejudice after dismissing the federal claims. The Eleventh Circuit affirmed.

DISPOSITION

affirmed

CASES CITED

- Cruz v. Beto, 405 U.S. 319, 322 (1972)
- Burch v. Apalachee Community Health Services, Inc., 840 F.2d 797, 798 (11th Cir. 1988)
- Sooner Products Co. v. McBride, 708 F.2d 510, 512 (10th Cir. 1983)
- Barger v. State of Kansas, 620 F. Supp. 1432 (D. Kan. 1985)
- United States v. Boldin, 772 F.2d 719, 727 (11th Cir. 1985), modified on other grounds, 779 F.2d 618 (11th Cir.), cert. denied, 475 U.S. 1048 (1986)
- United States v. Pepe, 747 F.2d 632, 659 (11th Cir. 1984)
- United States v. Alonso, 740 F.2d 862 (11th Cir. 1984)
- Haroco v. American Bank and Trust Co., 747 F.2d 384, 398 (7th Cir. 1984), aff'd, 473 U.S. 606 (1985)
- Nodine v. Textron, Inc., 819 F.2d 347, 348-49 (1st Cir. 1987)
- Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496-97 (1985)
- Cullom v. Hibernia National Bank, 859 F.2d 1211, 1213-16 (5th Cir. 1988)
- Morast v. Lance, 807 F.2d 926, 933 (11th Cir. 1987)
- Sperber v. Boesky, 849 F.2d 60, 63 (2d Cir. 1988)
- Cenco v. Seidman & Seidman, 686 F.2d 449, 457 (7th Cir.), cert. denied, 459 U.S. 880 (1982)
- Burdick v. American Express Co., 865 F.2d 527, 529 (2d Cir. 1989)
- Callan v. State Chemical Manufacturing Co., 584 F. Supp. 619, 623 (E.D. Pa. 1984)
- Pujol v. Shearson/American Express, Inc., 829 F.2d 1201, 1205 (1st Cir. 1987)
- Diamond v. Reynolds, No. 84-280 (D. Del. July 15, 1986), aff'd in part and rev'd in part on other grounds, 853 F.2d 917 (3d Cir. 1988), cert. denied, 489 U.S. 1084 (1989)
- Terre du Lac Association, Inc. v. Terre du Lac, Inc., 772 F.2d 467, 472-73 (8th Cir. 1985), cert. denied, 475 U.S. 1082 (1986)
- Alexander Grant and Co. v. Tiffany Industries, Inc., 742 F.2d 408, 411 nn. 7-8 (8th Cir. 1984), vacated and remanded, 473 U.S. 922 (1985), on remand, 770 F.2d 717 (8th Cir. 1985), cert. denied, 474 U.S. 1058 (1986)

- Blount Financial Services, Inc. v. Walter E. Heller and Co., 819 F.2d 151, 152 (6th Cir. 1987)
- McNally v. United States, 483 U.S. 350 (1987)
- United States v. Gimbel, 830 F.2d 621 (7th Cir. 1987)

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