

938 F.3d 724

United States Court of Appeals, Fifth Circuit.

Calvin Gary WALKER; Walker’s Electric;  
Walkers Electric; Jessie Haynes,  
Plaintiffs - Appellants

v.

BEAUMONT INDEPENDENT SCHOOL  
DISTRICT; Aaron Covington; Leroy  
Saleme; Vernon Butler; Jane Kingsley;  
[Terry Ingram](#); Michael “Mike” Neil; Tom  
Neild; Venice Monroe; A. B. Bernard;  
Jimmy Simmons; Robert Turner; Joe  
Domino; Lenny Cabarello; Jack Carroll;  
Beaumont Examiner; Don Dodd; Jennifer  
Johnson; Beaumont Enterprise; Brooke  
Crum; International Brotherhood of  
Electrical Workers; Local Union 479,  
International Brotherhood of Electrical  
Workers; Steven Lisle; Duwayne  
Herrmann, Also Known as Dwayne  
Hermann; Chris Kibby; David Gonzales;  
Wayne Reaud; Michael Getz; Cory  
Crenshaw; Malcolm Bales; Jerry Jordan;  
[Bob Rawls](#); [Timothy Brewer](#); Deanna  
Stevens, Defendants - Appellees

No. 17-40752

FILED September 18, 2019

## Opinion

[KURT D. ENGELHARDT](#), Circuit Judge:

With this appeal, we review the district court’s dismissal of the entirety of Appellants’ claims pursuant to the Texas Citizens’ Participation Act, (“TCPA”), [Tex. Civ. Prac. & Rem. Code, § § 27.001-27.011 \(West\)](#) and [Rule 12 of the Federal Rules of Civil Procedure](#). For the reasons stated herein, we AFFIRM that dismissal as to all claims and all parties named herein as defendants.<sup>1</sup>

## BACKGROUND

Plaintiff Calvin Gary Walker (“Walker”), Walkers Electric, and Walker’s Electric originally filed suit in July 16, 2015, in the United States District Court for the Eastern District of Texas, Marshall Division. The *Walker* action was consolidated, on February 23, 2016, with a related case, *Haynes v. Crenshaw, et al.* (civ. action no. 1:15-CV-437), filed by Plaintiff Jessie Haynes (“Haynes”). Following transfer from the Marshall Division to the Beaumont Division, Plaintiffs-Appellants (“Appellants” or “Plaintiffs”) Walker and Haynes filed a consolidated Fourth Amended Complaint on December 22, 2015.

As set forth in the Fourth Amended Complaint, Appellants assert that they are the victims of an extensive, long-lasting conspiracy (“conspiracy” or “Conspiracy”) designed to prevent African-American individuals in Beaumont from gaining power and influence in order to perpetuate “white dominion over Beaumont local politics.” This conspiracy, spanning approximately a decade, allegedly involved approximately 35 residents and organizations in the Beaumont area, including the Beaumont Independent School District (“BISD”), the BISD Board of Trustees and subsequent BISD Board of Managers, two local newspapers and their employees, two online journalists, the local chapter of the International Brotherhood of Electrical Workers (“IBEW”) and several of its members, a Beaumont City Councilperson, two local attorneys, the United States Attorney for the Eastern District of Texas, two Assistant United States Attorneys, and two agents with the Federal Bureau of Investigation (“FBI”). The objective of this alleged conspiracy was to ruin Appellants’ reputations and businesses as part of a larger campaign to harm minority individuals who “stepped out of line” and “defied the status quo.”

### I. Walker

Walker is a Master Electrician and owner of Walker’s Electric Company, which offers electrical services in Beaumont. He asserts that the conspiracy against him began around 2004 when members of IBEW asked him to join and he refused, at which point he was told that the union would “get him one way or another.” Walker then contracted to provide electrical services to the BISD, a position that had previously been held by an IBEW member. In April 2008, IBEW filed a complaint against

Walker with the Texas Department of Licensing and Registration (“TDLR”), asserting that Walker had obtained his electrician’s license through fraud. Although Walker initially contested the matter and continues to assert that IBEW was behind and heavily involved with the investigation, he ultimately agreed to pay a fine, relinquish his Master Electrician’s license, and re-take the required licensing exam.

Walker asserts that IBEW then conspired with BISD board members to ruin Walker’s reputation and business. According to Walker, the BISD board members complained at BISD Executive Cabinet meetings that he was making too much money for a minority and was a sloppy businessman. He additionally avers that BISD personnel sought to ensure that he did not get any other contracts with the BISD and imposed onerous record-keeping requirements upon him. Specifically, Walker contends that he, a black non-union electrician, was the only contractor required to submit detailed invoices. He further alleges that, in 2008, BISD Chief Financial Officer Jane Kingsley, acting on behalf of the BISD, attempted (unsuccessfully) to ensure Walker’s contract with the BISD was not renewed by illegally conducting the bid process.

Having failed to prevent Walker from contracting with the BISD, the IBEW and the BISD allegedly next turned to Malcolm Bales, the United States Attorney for the Eastern District of Texas, to prompt Walker’s May 2011 indictment on 37 counts of fraud. In addition, Walker alleges that Deanna Stevens and Timothy Brewer—the FBI agents involved in his prosecution—tampered with potential witnesses during his trial, offering bribes to one and threatening two others. Members of the United States Attorney’s Office also allegedly leaked information about Walker’s case to members of the IBEW and the BISD. Walker was tried on the fraud counts in December 2011, which resulted in a hung jury and mistrial.

Subsequently, on July 17, 2012, Walker pleaded guilty to one count of willful failure to pay income taxes. He complains that members of the conspiracy, including members of the press and the BISD’s Board of Trustees, thereafter relentlessly smeared him by wrongfully stating that he had pleaded guilty to defrauding the BISD and that he had agreed to repay it for the money that he had stolen. Walker asserts that, although the records of the BISD contained altered documents, there was no evidence admitted at trial that Walker or his wife submitted those documents to the BISD in connection with receiving payments for projects. Walker additionally alleges that Bob Rawls, the Assistant United States Attorney assigned

to the case, urged the BISD to cease doing business with Walker and sent letters to a number of government entities and individuals, falsely informing them that Walker was a thief.

Walker complains that members of the conspiracy continued to engage in a smear campaign against him and that BISD board members and other conspirators repeatedly stated that Walker had admitted to submitting fraudulent invoices. Walker further contends that members of this conspiracy joined with their media allies at *The Examiner*, *The Beaumont Enterprise*, and two websites to spread these allegedly unfounded allegations. Unidentified members of the conspiracy also purportedly interfered with Walker’s existing contract with BISD by improperly terminating his contract in 2014. Accordingly, Walker alleges he was prevented from being awarded the BISD contract and lost substantial business from other prospective customers because the BISD’s “Evaluation Matrix,” prepared by BISD (Employee) Appellees – Leroy Saleme (BISD Chief Financial Officer), Aaron Covington (BISD Director of Contracts), and Vernon Butler (BISD Superintendent) – to compare contractors, falsely represented that he had admitted to padding BISD invoices, along with other purported falsehoods.

Walker further contends that the conspiracy has continued such that that United States Attorney Bales, unsatisfied with Walker’s plea of guilty to willful failure to file income taxes, has conspired with the Jefferson County District Attorney Cory Crenshaw, a former Assistant United States Attorney, to form a joint task force in order to prosecute Walker in state court, despite the BISD’s internal audit’s having revealed he had not defrauded the BISD.

## **II. Haynes**

Haynes, too, allegedly was victimized by the conspiracy for supporting (former) BISD Superintendent Carroll Thomas. Specifically, she claims that BISD Board of Trustees member Michael Neil pushed her away from a door leading to a press conference at BISD after she prevented Jerry Jordan, a journalist for [SETInvestigates.com](http://SETInvestigates.com), from entering the press conference. Additionally, rather than Neil’s being prosecuted for assault, Haynes was prosecuted and subsequently convicted in state court for obstruction of a public passageway. She additionally claims that, at her trial, at which Neil, Jordan, and City Councilperson Michael Getz (who was also present outside the press conference) testified, and Wayne Reaud, owner of the *Beaumont Examiner*, a Media-Appellee, was present, was a product of the RICO racketeering enterprise and conspiracy. She

alleges “the Conspiracy engaged in a concerted campaign to harass [her], tarnish her reputation, attack her integrity, and threat[en] criminal and/or administrative repercussions.” Also allegedly included in the campaign was Neil’s attendance at an incident where individuals marched down the BISD’s hallways chanting “Fire Jessie [Haynes] now,” responding “lol” to an online comment about Haynes’ criminal conviction and involvement in a verbal altercation in a parking lot with two of Haynes’ supporters. Haynes adds that that the conspiracy also attacked a book that she wrote.

To aid the panel’s understanding of their claims, Appellants’ brief includes the chart set forth below, which generally identifies the claims asserted along with the corresponding appellant(s) and appellee(s). Appellants identify six categories of Appellees. “Conspiracy” refers to all of the Appellees collectively. The other five categories of Appellees identified by Appellants are: the Media Appellees, City Councilperson Getz, the IBEW Appellees, the BISD Appellees, and the Prosecutors.

Claim	Appellant(s)	Appellee(s)
<b>Defamation</b>	Walker	
Libel	Walker	Media Appellees
Slander	Walker	Conspiracy
<b>Tortious Interference</b>		
With Existing Contract	Walker	Conspiracy
With Prospective Contracts	Walker	Conspiracy
<b>Civil Rights Violation</b>	Walker	BISD Appellees
<b>Civil Conspiracy</b> (State Law)	Walker	Conspiracy
<b>RICO</b>		
§1962(c) – racketeering	Walker	BISD Appellees
	Haynes	Neil, Crenshaw, Jordan, Reaud, and Getz
§1962(a) – use of income from pattern of racketeering	Walker	IBEW Appellees
§1962(d) - Conspiracy	Walker and Haynes	Conspiracy
<b>Assault</b>	Haynes	Neil

In response to the Fourth Amended Complaint, the Appellees filed multiple motions to dismiss. The IBEW Appellees moved pursuant to [Federal Rule of Civil Procedure \(“FRCP”\) 12\(c\)](#). All other Appellees moved for dismissal under [FRCP 12\(b\)\(6\)](#) and/or the Texas Citizens Participation Act (“TCPA”). In addition, the BISD Appellees moved for dismissal under [FRCP 12\(b\)\(1\)](#), and the BISD moved for dismissal of the individual BISD Employees, Board of Managers,<sup>2</sup> and Trustees (collectively the “BISD Agents”) under the Texas Tort Claims Act (“TTCA”), [Tex. Civ. Prac. & Rem. Code § 101.106](#).

With the issuance of eleven written rulings by District

Judge Crone (considering nine “Reports and Recommendations” issued by Magistrate Judge Giblin), all claims against all defendants were dismissed on one or more grounds. This appeal followed.

\* \* \* \*

**II. RICO claims**

Walker and Haynes assert RICO violations against various Appellees pursuant to [18 U.S.C. §§ 1962\(a\), 1962\(c\), and 1962\(d\)](#). These claims require Appellants to properly allege a RICO “enterprise” and “pattern” of “racketeering activity.” The district concluded Appellants failed to satisfy these duties. We agree.

To establish a RICO “enterprise,” a plaintiff must provide evidence of the existence of an entity separate and apart from the pattern of racketeering activity. [United States v. Turkette](#), 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981). The entity does not have to be a formal or legal entity, but it must have some sort of hierarchical or consensual decision-making structure, and it must exist for purposes other than just to commit predicate acts. [In re McCann](#), 268 F. App’x 359, 366 (5th Cir. 2008); [United States v. Bledsoe](#), 674 F.2d 647, 663 (8th Cir. 1982). A plaintiff establishes the existence of an enterprise by providing “evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.” [Turkette](#), 452 U.S. at 583, 101 S.Ct. 2524. For an informal enterprise, known as an association-in-fact enterprise, the “group need not have a hierarchical structure or a ‘chain of command’; decisions may be made on an ad hoc basis and by any number of methods—by majority vote, consensus, a show of strength, etc.” [Boyle v. United States](#), 556 U.S. 938, 948, 129 S.Ct. 2237, 173 L.Ed.2d 1265 (2009). “Members of the group need not have fixed roles; different members may perform different roles at different times ....” *Id.* Further, “while the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The ‘enterprise’ is not the ‘pattern of racketeering activity.’” *Id.* Plaintiffs must “plead specific facts, not mere conclusory allegations which establish the enterprise.” [Manax v. McNamara](#), 842 F.2d 808, 811 (5th Cir. 1988). Finally, “a RICO plaintiff must plead the specified facts as to each defendant. It cannot ... ‘lump[ ] together the defendants.’ ” [In re MasterCard Int’l, Inc., Internet Gambling Litig.](#), 132 F. Supp. 2d 468, 476 (E.D. La. 2001), *aff’d*, 313 F.3d 257 (5th Cir. 2002) (quoting [Goren v. New Vision Int’l, Inc.](#), 156 F.3d 721, 730 (7th Cir. 1998)).

As discussed by the district court, Appellants' pleading of an enterprise in the Fourth Amended Complaint is wholly conclusory and unsupported by facts. Walker asserts that all Appellees shared some connection with him, were similarly critical of his dealings with the BISD, and/or have sought or supported the imposition of criminal and/or civil penalties against him relating to his dealings with the BISD. Nevertheless, assuming all of that to be true, the facts alleged are insufficient to render plausible Walker's attempted characterization of the various unrelated Appellees as an "ongoing organization, formal or informal, that functions as a continuing unit." The same is true of the conspiracy allegations relative to a knowing agreement to commit at least two predicate acts in furtherance of a substantive RICO offense.

Turning to the element of "racketeering activity," neither defamation, intentional interference, nor online harassment qualifies as a RICO predicate act. *See* 18 U.S.C. § 1961(1). Absent a taking of property sufficient to establish extortion for purposes of § 1961(1), the same is true of the IBEW members' alleged threatening of Walker when he refused to join the union. And although Haynes contends that she suffered state prosecution in retaliation for seeking redress for Neil's alleged physical

assault her (when he forced her away from a doorway), witness tampering and witness retaliation for purposes of § 1961(1), § 1512, § 1513, and § 1515(a)(1) involve only federal proceedings and offenses. Finally, although the district court concluded Walker had properly alleged four predicate acts (witness tampering and retaliation by the FBI and FBI agent Stevens against her ex-husband, Luke Stevens, and witness tampering and bribery by FBI agents Stevens and Brewer), the district court also aptly concluded the acts presented no threat of continuing criminal activity because all four acts occurred during a limited period of time and solely by certain federal officers in relation to Walker's criminal trial.

\* \* \* \*

**Conclusion**

Finding no reversible error in the district court's dismissal of the entirety of Appellants' claims, we AFFIRM.

**All Citations**

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**Footnotes**

- 1 As the record reflects, Appellants have asserted numerous claims against approximately 35 defendants. The Fourth Amended Complaint is 52 pages long and contains 222 numbered paragraphs. In the interest of brevity, all natural persons will first be identified herein by their first and last names, and titles, if known. Subsequent references to these persons shall be to only their last names.
- 2 The Fourth Amended Complaint lists the following defendants as members of the BISD Board of Managers: Venice Monroe, A.B. Bernard, Jimmy Simmons, Robert Turner, Joe Domino, Lenny Cabarello, and Jack Carroll.