

Case No. 03–56412

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JOSHUA LIAM JOESPHS,

Plaintiff – Appellee,

v.

PACIFIC BELL TELEPHONE COMPANY,

Defendant – Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CASE NUMBER 99–CV–0843 B (AJB)
HONORABLE RUDI M. BREWSTER, UNITED STATES DISTRICT JUDGE

**PETITION FOR REHEARING OR REHEARING *EN BANC* OF
APPELLANT PACIFIC BELL TELEPHONE COMPANY**

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INTRODUCTION

The panel majority – over a vigorous dissent by Judge Callahan – upheld a jury verdict under the Americans with Disabilities Act (“ADA”), 42 U.S.C. §§ 12101 *et seq.*, requiring Pacific Bell to reinstate an employee discharged for concealing a violent criminal record to a position that will require that individual to work unsupervised in customers’ homes. The majority’s decision has attracted considerable public attention and concern.¹

The impact of the majority’s decision will extend far beyond this single case because its ruling fundamentally changes the legal standards governing employment discrimination claims. The jury instruction sanctioned by the majority, in the words of Judge Callahan, “removed from the jury the question of whether Josephs was not qualified because of his past, regardless of Pac Bell’s attitude toward him.” Op. 16719. The majority’s approach – which is directly contrary to the standard adopted in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and applied by other courts of appeals – thus misleads a jury into finding an employer liable whenever it concludes that discriminatory animus played *any*

¹ See, e.g., Michael Smerconish, *A Little Holiday News Refresher Course*, Philadelphia Daily News, Jan. 5 2006, at 19 (labeling decision “insanity”); Adam Liptak, *Jury Award Is Upheld in Firing Case*, NY Times, Dec. 29, 2005, at A14; Bob Egelko, *Pacific Bell Bias Verdict Upheld; Company Denied Job to Ex-Mental Patient*, San Fran. Chron., Dec. 29, 2005, at B8; Justin Scheck, *Rehiring Falls Under ADA, Ninth Rules*, Recorder (San Fran.), Dec. 28, 2005, at 1; David Kravetz, *Court Sides With Fired Pac Bell Worker: Phone Installer Had Concealed 1982 Crime, Finding of Insanity*, San Jose Mercury News, Dec. 29, 2005, at 1; *The Abrams Report* (MSNBC television broadcast Jan. 3, 2006); *The O’Reilly Factor: Jury Finds in Favor of Employee Fired for Violent Past* (Fox News television broadcast Dec. 30, 2005).

part in the challenged employment decision. *Price Waterhouse* held an employer may not be subjected to liability if the jury finds that the employer would have made the same decision in the absence of the allegedly discriminatory motivation. The majority's ruling effectively eliminates this "same decision" defense.

This error was compounded by the erroneous legal standard applied by the majority to uphold the admission of three other employees' grievance settlements on the theory that those employees were similarly situated. Judge Callahan correctly concluded that "[t]his was prejudicial error as none of the other employees displayed 'similar conduct...'" Op. 16718. Again, the majority's approach conflicts with decisions of this Court and numerous courts of appeals.

The practical impact of the majority's decision is enormous. Employers do not wish to employ potentially violent individuals for many reasons – to prevent harm to customers and fellow employees, to protect the company's image, and to avoid workplace disruption. In addition, employers face negligent hiring lawsuits in the event harm is caused by an employee. Companies therefore routinely screen their workforces for employees with violent propensities. Because predicting future dangerousness is speculative, but the costs of wrongly predicting that a person is not violent are enormous, companies err on the side of caution.

Under the legal regime produced by the majority's decision, however, if a company discovers information suggesting that an employee might be or have been mentally ill as well as violent – here, an insanity plea admitting an attempted murder in the victim's home – the company faces a terrible dilemma. It risks an ADA claim if it acts on the employee's violent past, and a claim for negligent

hiring if it does not. This dilemma is even more acute where, as in this case, the employee's job requires unsupervised activity in customers' homes.

Given the costs and uncertainties of the litigation system, clear legal standards and a focused fact-finding process are essential if companies are to have a fair chance of navigating successfully between these two risks. Here, as Judge Callahan recognized (Op. 16721), the majority's flawed jury instruction and erroneous evidentiary standard combine to deprive the employer of a determination of the key legal issue in these cases – whether the employer would have made the same decision in the absence of the alleged discriminatory motivation. And because this new regime will apply to all future claims in this Circuit, it places employers in a classic “Catch-22” situation: ADA liability if they act upon concerns about potential violence; and harm to persons, property, reputation – as well as very substantial liability risk – if they do not.

For all of these reasons, rehearing by the panel or the en banc Court is plainly warranted.

STATEMENT

Appellant Joshua Joesphs applied to work as a Pacific Bell service technician, a job that involves “unsupervised, in-home telephone installation or repair.” Op. 16700. Joesphs' employment application did not disclose that he had been convicted of misdemeanor battery of a police officer or that he had been found not guilty of attempted murder by reason of insanity. Pacific Bell hired

Joesphs, but several months later, fired him after uncovering the criminal history not disclosed on his employment application. *Id.* at 16700-01.²

Joesphs filed a grievance seeking reinstatement. While the grievance process was underway, his battery conviction was expunged. During the grievance process, the union representative cited the example of another Pacific Bell employee, Tejada, who had been reinstated after expungement of his undisclosed misdemeanor convictions for stealing candy worth \$7.74 and speeding. RT IV 265:24-265:15; RT V 112:1-6. The Pacific Bell representative “stat[ed] several times that, unlike the other employee, Josephs had spent time in a ‘mental ward,’ and that PacBell could not afford to have people out there who had been released from a mental institution.” Op. 16702.³ Pacific Bell refused to reinstate Joesphs.

Joesphs subsequently commenced this action alleging, among other claims, that his termination and the failure to reinstate him constituted discrimination on

² Recognizing the risk posed by employees who are allowed unsupervised access to customers’ homes, California law grants Pacific Bell special authority to obtain the detailed criminal history of employees serving in such positions. Cal. Penal Code § 11105(c)(9).

³ In addition to citing the differential treatment of Tejada, in the district court Joesphs relied on the alleged differential treatment of two other Pacific Bell employees who requested reinstatement after being terminated for lying about their criminal history. The first of those employees, Morris, had falsely described a felony possession-of-marijuana conviction as a misdemeanor; he was denied reinstatement, but determined to be eligible for rehiring if his conviction was expunged. EOR III, 711-712. The second employee, Gonzalez, had accosted his wife when he caught her in bed with another man. EOR III, 718. His grievance proceeding took place 15 months *after* Joesphs was denied reinstatement. EOR III, 719, 733. Pacific Bell reinstated Gonzalez after he submitted 12 letters requesting his reinstatement, including one from the victim’s sister attesting to his good character. EOR III, 721-733; RT IV 267:6-268:4.

the basis of his being “regarded as” disabled by virtue of a mental illness in violation of the ADA. The jury returned a verdict in Joesphs’ favor on the failure to reinstate claim, awarding over \$500,000 in damages, and the district court denied Pacific Bell’s motions for judgment as a matter of law and for a new trial. A panel of this Court (Leavy, Graber, Callahan, JJ.) affirmed by a divided vote.

ARGUMENT

I. THE JURY INSTRUCTION ENDORSED BY THE MAJORITY VIOLATED CLEAR SUPREME COURT PRECEDENT AND PREVENTED THE JURY FROM DETERMINING WHETHER PLAINTIFF WOULD NOT HAVE BEEN REHIRED BECAUSE OF HIS VIOLENT PAST.

The evidence on a particular employment decision often may indicate several possible reasons for the action – permissible as well as impermissible justifications. The Supreme Court squarely addressed this issue of mixed motives in *Price Waterhouse*. Interpreting Title VII, Justice Brennan concluded that Congress had intended to “eliminate[] certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice” in making employment decisions. 490 U.S. at 239 (plurality decision). Therefore, proof that the employer took gender into account “is not, * * * the end of the matter, for that describes only one aspect of Title VII. The other important aspect of the statute is its preservation of an employer's remaining freedom of choice. We conclude that the preservation of this freedom means that an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person.” *Id.* at 242.

Six Justices ruled that a plaintiff may satisfy his or her burden of proof by showing that a protected classification (*e.g.*, gender or disability) “played a motivating part in an employment decision.” *Id.* at 244 (plurality); *see also id.* at 259 (White, J., concurring); *id.* at 276–78 (O’Connor, J., concurring). If a plaintiff succeeds in making such a showing, the employer can avoid liability “by proving that it would have made the same decision even if had not allowed gender [or other protected characteristic] to play such a role.” *Id.* at 245; *see also id.* at 261 (White, J., concurring); *id.* at 276–78 (O’Connor, J., concurring). “This balance of burdens is the direct result of Title VII’s balance of rights.” *Id.* at 245 (plurality).

The courts of appeals that have applied the mixed motive analysis to ADA cases have uniformly applied the Supreme Court’s analysis in *Price Waterhouse*, recognizing that the “same decision” defense is an essential part of the legal standard. *See, e.g., Bekker v. Humana Health Plan, Inc.*, 229 F.3d 662, 670 (7th Cir. 2000); *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 470 (4th Cir. 1999); *Buchanan v. City of San Antonio*, 85 F.3d 196, 200 (5th Cir. 1996); *Pedigo v. P.A.M. Transp., Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995).

The standard jury instructions follow the same approach, clearly setting forth both elements of the *Price Waterhouse* mixed-motives standard:

Plaintiff must prove by a preponderance of the evidence that his disability was a motivating factor in Defendant's decision to [adverse action] him. A motivating factor is something that contributed to Defendant's decision.

If you find that Plaintiff has proved that his disability contributed to Defendant's decision to [adverse action] him, you must then decide whether Defendant proved by a preponderance of the evidence that it

would have [adverse action] him even if Plaintiff did not have a disability. If so, Plaintiff is not entitled to an award of damages.

Federal Civil Jury Instructions: Seventh Circuit § 4.02 cmt. d (Supp. 2005); accord, Federal Civil Jury Instructions: Ninth Circuit § 12.1C (Supp. 2005).

The district court did not give that instruction in this case. Instruction No. 27, which purported to address the mixed-motives issue, included only the first paragraph of the standard instruction. Op. 16705. The court refused Pacific Bell's request that it instruct the jury with respect to the second paragraph embodying same decision defense. RT IX 119:24-120:17; 126:4-127:8.

There is no legal justification whatsoever for the district court's failure to instruct the jury in accordance with the standard adopted by the Supreme Court in *Price Waterhouse*. Only if the jury has been instructed as to both parts of the mixed-motives analysis – the “motivating factor” *and* “same decision” inquiries – can it properly take account what Justice Brennan termed the statutorily-mandated “balance of burdens.” *Price Waterhouse*, 490 U.S. at 245.

The panel majority determined that the omission of the “same decision” instruction was not grounds for reversal because it believed another instruction, No. 14, sufficiently conveyed to the jury the “same decision” defense.⁴ The panel's conclusion was wrong, because it is factually inaccurate in the context of

⁴ Instruction 14 stated: “It is not necessary for the plaintiff to prove that the plaintiff's regarded as disability was the sole or exclusive reason for the defendant's decision, but, plaintiff must prove that defendant would not have made the same decision but for the plaintiff's regarded as disability.” Op. 16705.

this case and because the legal rule adopted by the majority effectively forecloses jury consideration of the same decision defense.

First, the record in this case makes clear that even if instruction No. 14 somehow could be construed to convey the necessary legal standard, that did not occur in this case. The jury here was given a special verdict form, including the following questions based on the statutory requirement that the plaintiff prove that the challenged decision was made “because of” a disability (42 U.S.C. § 12112):

4. Did Pacific Bell discharge plaintiff because of his regarded as disability?

5. Did Pacific Bell refuse to agree to reinstate plaintiff in the grievance settlement process because of his regarded as disability?

Op. 16704, 16706.

In the course of its deliberations, the jury asked the district court to clarify the meaning of “because of” in Question 4; over Pacific Bell’s objection the court referred the jury only to Instruction No. 27 and did not mention either the same-decision defense or Instruction No. 14. *Id.* at 16706. Although the jury’s inquiry related to Question 4, plaintiff’s counsel expressly recognized that the standard prescribed by the court in response to the jury’s inquiry would be applied by the jury in applying the “because of” language in Question 5 to assess Pacific Bell’s refusal to reinstate. RT IX 94:1–21, 122:4–123:6.

The record in this case thus leaves no doubt that the jury failed to apply the governing *Price Waterhouse* standard. The Supreme Court’s decision in that case determined that “because of” embodies *both* the motivating factor test *and* the

same decision test. Even under the panel majority's view of the law, the district court here plainly violated that standard when – in response to the jury's inquiry – it limited its definition of "because of" to the motivating factor test and ignored both the "same decision" standard and its own Instruction No. 14.

Second, and more importantly, the panel majority was wrong in its conclusion that Instruction No. 14 somehow excused the district court's failure to give a "same decision" instruction. The two instructions were separated by 12 other instructions comprising 84 lines of text; it is highly unlikely that the jury could have understood the relationship between them. EOR IV, 951, 971-981; RT VIII, 111:2-116:20. The Instruction No. 14 clause on which the majority relied – "but, plaintiff must prove that defendant would not have made the same decision but for the plaintiff's regarded as disability" – is extremely confusing, both because it includes a double negative and because it appears after a phrase limiting the plaintiff's burden ("[i]t is not necessary for the plaintiff to prove that the plaintiff's regarded as disability was the sole or exclusive reason for the defendant's decision"). *See* note 4, *supra*.

Indeed, the events in this case confirm that conclusion. The jury's request for clarification specifically referenced its "struggl[e] to determine" how to apply the causation standards. Op. 16706. As Judge Callahan observed, "[t]he jury's request for clarification as to the instruction concerning the reasons for Pac Bell's refusal to reinstate Josephs suggests that it may well have been confused on how to handle Josephs' possible dangerousness." Op. 16719.

The result, as Judge Callahan explained, is that the instructions in this case “removed from the jury the question of whether [Joesphs] was not qualified because of his past, regardless of Pac Bell’s attitude toward him. * * * The instructions as given allowed the jury to reason that [Joesphs] must be qualified if it determined that [he] did not presently have a mental disability,” regardless of his history of violence. Op. 16719–20. Notwithstanding the Supreme Court’s conclusion that the “same decision” standard is essential to implement Congress’s intent in enacting employment discrimination legislation, the majority upheld a jury instruction that effectively deprives employers of that critical defense.⁵

This case demonstrates the tremendous impact of that legal rule. There was considerable evidence that Joesphs was not qualified because of his violent past and would not have been rehired even in the absence of any discriminatory animus:

- Pacific Bell service technicians perform unsupervised, in-home work;
- Joesphs had a past history of violent conduct, *including battery on an officer and attempting to kill someone in the victim’s home*; and
- Under California law, an employer can be held liable for hiring or retaining an employee that presents an undue risk of harm. *Federico v. Superior Court*, 59 Cal.App.4th 1207, 1214 (1997).

Presented with these facts, an employer unquestionably could decide that Joesphs was not qualified for the job, and that Pacific Bell’s decision not to reinstate him

⁵ The majority also invoked *Cassino v. Reichold Chms, Inc.*, 817 F.2d 1338 (9th Cir. 1987), but that case predates *Price Waterhouse* and therefore provides no authority as to the proper instruction under a mixed-motives analysis.

was justified by the same, non-discriminatory rationale.⁶ Yet, as the dissent points out, the jury never had the chance to judge the reasonableness of that decision in this case because the jury instructions prevented it from addressing the issue.

The majority has opened the door to the use of this flawed approach in all future employment discrimination cases. Individuals with a history of violence often can point to evidence of mental illness; indeed, virtually any violent person can claim to suffer or have suffered from some borderline personality or similar DSM–IV disorder. If an employer takes adverse action against such an individual, it risks a claim for discrimination on the basis of an actual or “regarded as” disability. These jury instructions prevent employers from obtaining a fair jury determination of the defense – expressly recognized in *Price Waterhouse* – that the individual’s violent past justified the employment action without regard to any evidence of alleged discrimination.

II. THE PANEL MAJORITY HAS ESTABLISHED A NEW – AND MUCH BROADER – STANDARD FOR COMPARATIVE EVIDENCE IN DISCRIMINATION CASES.

Comparative evidence is used with great frequency by plaintiffs in discrimination cases to demonstrate that an employer’s differential treatment of

⁶ The majority found sufficient evidence to support a determination that Joesphs was qualified, but its reasoning was seriously flawed. It pointed (Op. 16712) to the absence of a “written policy” specifically prohibiting employment of persons who have committed violent acts, but neither the ADA, nor any other legal authority, requires that such a policy be in writing. It also noted (*ibid.*) that Joesphs’ work performance to date and with a prior employer had been satisfactory, but the issue is not Joesphs’ skill, but his admitted past history of violence and the undisputed risk his employment presented. *See also* pages 11-13, *infra*.

like cases is attributable to a prohibited reason such as race, sex, or disability. To isolate the prohibited reason as the factor that explains the differential treatment, it is essential that the comparators be similarly situated to the plaintiff in all material respects. This Court has previously agreed with the Second, Sixth, and Eighth Circuits that comparators must be similar “in all ‘relevant aspects’” *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998) (emphasis in original); “in ‘all material respects’” (*Graham v. Long Island R.R.*, 230 F.3d 34, 40 (2d Cir. 2000)); or “‘in all relevant respects’” (*Lynn v. Deaconess Med. Ctr.*, 160 F.3d 484, 487 (8th Cir. 1998). *Patches v. City of Phoenix*, No. 02-15408, 68 Fed. Appx. 772, 773-74 (9th Cir. 2003) (unpublished).⁷

The majority eliminated the requirement that a plaintiff’s proffered comparator be truly comparable, by ignoring differences in the nature and seriousness of the employees’ misconduct. The consequence was to allow the jury to equate plaintiff’s admitted attempt to kill someone with misdemeanor convictions for stealing \$7.74 of candy and for speeding. En banc review is necessary to determine whether this Court continues to adhere to the requirement that comparators be similarly situated in all material respects – including the seriousness of offenses to be compared. This is an issue of critical importance in employment discrimination law: “[i]n most cases the key to proving pretext is comparative evidence.” Lindemann & Grossman, *Employment Discrimination Law* at 30 (BNA 3d ed. 1996).

⁷ The *Patches* case, an unpublished decision, may be cited in support of an en banc petition pursuant to Circuit Rule 36-3(b)(iii).

In cases involving employee misconduct, this Court, like its sister courts, has assessed comparability by looking at the nature and seriousness of the misconduct. In *Vasquez v. County of Los Angeles*, 349 F.3d 634 (9th Cir. 2003), this Court dismissed plaintiff's proffered comparator because he "did not engage in problematic conduct of comparable seriousness to that of [plaintiff]." 349 F.3d at 641 (emphasis added); see also *id.* at 641 n.17 (citing other circuits' decisions).

Although both the panel majority and the dissent in the instant case cited *Vasquez*, only the dissent referenced *Vasquez's* requirement of "comparable seriousness." Op. 16718. See also *Leong v. Potter*, 347 F.3d 1117, 1124 (9th Cir. 2003) (rejecting contention that three individuals were similarly situated to the plaintiff, because "none amassed a record of misconduct comparable to Leong's.").

The majority dispensed entirely with the requirement that the seriousness of the misconduct must be comparable. It was satisfied that the three comparators proffered by Josephs were sufficiently similarly situated because "each (1) was a service technician, (2) failed to reveal prior criminal conviction on the employment application, (3) was terminated, and (4) participated in the grievance process." Op. 16714. As Judge Callahan observed in her dissent, "[O]ther than having been terminated and participating in the grievance process, criteria that are inherent in seeking reinstatement, the other employees' grievances had nothing in common with Josephs' failure-to-reinstate claim." Op. 16719 (emphasis added).

This is not merely a failure to apply established law to facts. It is the creation of a new legal standard. By holding that plaintiff's comparators are similarly situated to plaintiff because they had undisclosed "prior criminal

conviction[s],” the majority cast aside the necessity of comparing the nature and seriousness of the prior offenses, thus overthrowing the requirement that the comparator be similarly situated in all relevant respects.

III. THE MAJORITY’S RULING EXPOSES EMPLOYERS TO MASSIVE NEGLIGENT-HIRING LIABILITY.

Employers face considerable liability exposure for negligent hiring and retention claims. Such suits are common because workplace violence is pandemic, with “between 1.7 and 2 million violent acts occur[ring] each year in the workplace.”⁸ Not surprisingly, “[t]hese suits have resulted in millions of dollars in settlements and judgments, bad publicity and increased insurance premiums for employers.”⁹ A California Court of Appeal upheld a multi-million dollar jury award for negligent hiring. *Heiner v. Kmart Corp.*, 84 Cal.App.4th 335 (2000). One commentator reports that “[r]ecently, employers have lost 72 percent of negligent hiring cases,” with compensatory damages averaging “\$1.6 million.”¹⁰

Assessments of future dangerousness are notoriously difficult.¹¹ But past behavior does portend future recidivism.¹² And a recent FBI report recommends

⁸ John E. Matejkovic, *Which Suit Would You Like? The Employer’s Dilemma in Dealing with Domestic Violence*, 33 Cap. U. L. Rev. 309, 309 (2004).

⁹ Robert L. Levin, *Workplace Violence: Navigating Through the Minefield of Legal Liability*, 11 Lab. Law. 171, 175 (1995).

¹⁰ Amy L. Solomon et al., *From Prison to Work: The Employment Dimensions of Prisoner Reentry* 14 (2004), at http://www.urban.org/UploadedPDF/411097_From_Prison_to_Work.pdf (citation omitted).

¹¹ See generally Christopher Webster et al., *The Violence Prediction Scheme: Assessing Dangerousness in High Risk Men* (1994) (discussing studies demonstrating the inaccuracy of violence risk predictions).

that employers conducting workplace violence threat assessments consider the mental health of employees. See FBI, *Violence in the Workplace: Issues in Response* 26, 32 (2004), at <http://www.fbi.gov/publications/violence.pdf>.

By effectively stripping employers of the benefits of the “same decision” defense, the majority’s approach places employers in an intractable position when faced with evidence of past violent behavior – a strong correlate with future dangerousness – that is intertwined with indicia of a possible mental illness. On the one hand, the employer confronts the high likelihood of having to pay a substantial ADA claim to the potentially violent employee if it acts on the information – here, the verdict exceeded \$500,000—as opposed to the lower probability, but more costly, risk to the public of workplace violence affecting fellow employees and the public at large.

Indeed, a previous decision of this Court reinstated a negligent-hiring claim brought by a tow truck driver assaulted by an employee of the Postal Service because it *had ignored* the employee’s being “found not guilty by reason of insanity on an assault charge * * *.” *Senger v. United States*, 103 F.3d 1437, 1439–40, 1443–44 (9th Cir. 1996). A Florida court has upheld a multi-million dollar verdict in an analogous situation. *Tallahassee Furniture Co. v. Harrison*, 538 So. 2d 744, 754 (Fla. Dist. Ct. App. 1991) (noting that employer had been aware of employee’s psychiatric hospitalization). The majority’s decision

¹² Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 *Crime & Just.* 303, 316–17 (1997) (“Research on the prediction of criminal behavior has repeatedly demonstrated criminal record to be the single best predictor of future offending.”)

effectively precludes the employer from defending an ADA claim brought by an employee in the precise circumstances addressed in these cases.

Given these overlapping legal regimes, and the high stakes facing employers and the public, clear legal standards are essential. The majority's approach moves sharply in the opposite direction.

CONCLUSION

The petition for rehearing or rehearing *en banc* should be granted.

Respectfully submitted.

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