

January 20, 2006

United States Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: *Joesphs v. Pacific Bell Telephone Company*
No. 03-56412

Letter *Amici Curiae* of the Equal Employment Advisory Council and
the Chamber of Commerce of the United States of America
Supporting Petition for Rehearing or Rehearing *En Banc* of
Defendant-Appellant Pacific Bell Telephone Company

To the Honorable Judges of the United States Court of Appeals for the Ninth
Circuit:

Pursuant to Circuit Advisory Committee Note To Rule 29-1 of the Circuit
Rules of the United States Court of Appeals for the Ninth Circuit, the Equal
Employment Advisory Council (EEAC) and the Chamber of Commerce of the
United States of America (the Chamber) respectfully submit this letter as *amici
curiae* joining in the arguments and factual statements of Defendant-Appellant
Pacific Bell Telephone Company (Pacific Bell) and *amicus curiae* The California
Employment Law Counsel in support of Defendant-Appellant's Petition for
Rehearing or Rehearing *En Banc*.

Interest of the Amici Curiae

The Equal Employment Advisory Council (EEAC) is a nationwide
association of employers organized in 1976 to promote sound approaches to the
elimination of discriminatory employment practices. Its membership now includes
approximately 320 of the nation's largest private sector companies, collectively
providing employment to more than 20 million people throughout the United

States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community.

All of EEAC's member companies, and many of the Chamber's members, are employers subject to Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111–12117. Moreover, many members are federal contractors subject to Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, which requires covered employers to take affirmative action to employ and advance in employment qualified individuals with disabilities. EEAC's and the Chamber's members include telephone companies, electric and gas utilities, retailers, chemical and other manufacturing companies, oil companies, refineries, airlines, pharmaceutical manufacturers, railroads, health care providers, nuclear power companies, defense contractors, and many others. Some of these companies have employees who, in the course of their employment, enter the homes of residential customers to perform their duties. Others have employees who work with potentially hazardous material, operate control centers that direct potentially dangerous activities such as the flow of electric power through power lines or the flow of oil through pipelines, or use heavy or complicated machinery. Any of these instrumentalities, if used with ill intent, could cause serious harm to other employees and the public.

Accordingly, in the interest of the safety of their employees and the general public, many companies choose not to hire individuals who have a history of violent criminal conduct. Further, many companies have policies, written or unwritten, that call for immediate dismissal of employees who lie or omit crucial information on their employment applications, particularly where that information is a history of violence.

Thus, EEAC's and the Chamber's members have a direct interest in the issues presented in this case. The panel majority upheld a faulty jury instruction and several incorrect evidentiary rulings, affirming a jury verdict holding Pacific Bell liable under the ADA for refusing to reinstate an employee with a violent criminal past after he had been terminated for lying about his history on his employment application, to a position that requires unsupervised work in customers' homes. As Judge Callahan observed in her dissenting opinion, the panel majority's decision places Pacific Bell, and other employers doing business in the Ninth Circuit, in an untenable "Catch-22" position – potentially liable for the harm that may ensue if they place an employee with a violent past in the homes of residential customers, and potentially liable under the ADA if they do not.

Potential Threats of Workplace Violence Pose Critical Issues For Employers

The U.S. Department of Labor's Bureau of Labor Statistics reported that in 2004, 14 percent of the fatalities that occurred in the workplace were due to assaults and violent acts.¹ More than 5,000 cases of workplace violence are reported every day in the United States, affecting over two million Americans every year. Pinkerton Consulting and Investigations, *Top Security Threats and Management Issues Facing Corporate America* (Pinkerton Survey) (Feb. 2003).

The effects of workplace violence are not confined to the actual violent incident. In addition to the physical and mental harm to the victims, in the aftermath of violence, employers report decreased morale, productivity, increased absenteeism, increased turnover, and increased fear and safety concerns among all workers. Society for Human Resources Management, *Workplace Violence Survey* (SHRM Survey) (Jan. 2004). These effects result in a cost to employers of approximately \$36 billion annually. Pinkerton Survey (Feb. 2003).

The Panel Majority's Decision Contains Several Significant Errors of Law

As set forth more fully in the Petition for Rehearing, the panel majority's decision condones a series of outcome-determinative mistakes made by the district

¹ United States Dep't of Labor, Bureau of Labor Statistics, *Census of Fatal Occupational Injuries Summary, 2004*: Table 1. Fatal occupational injuries by event or exposure (1998-2004), available at <http://www.bls.gov/news.release/cfoi.t01.htm>.

judge in the course of the trial. First, the trial judge allowed the jury to hear evidence that Pacific Bell had reinstated other employees with criminal convictions, on the theory that these employees were “similarly situated” to Josephs, when in fact, their crimes were far less serious than his. In affirming the jury’s verdict, the panel majority overlooked a crucial and overwhelming difference – the nature of the conduct in question – and overruled an entire body of case law. Second, the panel majority rejected Pacific Bell’s contention that Josephs was not qualified based on his violent past, because the company “introduced no evidence of written company policy prohibiting employment of persons who had committed violent acts.” Slip op. at 16712. Then, by providing only the first half of the “mixed motive” jury instruction, the district court withdrew from the jury the critical issue of whether Pacific Bell would have made the same decision regardless of any potential discrimination that may have occurred.

The Panel Majority’s Decision Places Employers In An Impossible Position

As explained in more detail in the Petition, the panel majority’s decision has significant legal consequences for employers. It eliminates the “same decision” defense that an employer is entitled to use in a “mixed motive” case. It removes the most significant factor in comparing whether two employees are similarly situated – the nature and severity of the conduct involved. And finally, it places employers in a “no-win” situation – potentially liable under state law if they hire an individual with a violent past and he commits a crime, and potentially liable under the ADA if they do not.

The panel majority’s decision in this case has a host of unfortunate practical consequences as well. It certainly will make employers think twice about giving a second chance to the employee who lied about stealing a candy bar, because that decision could establish the precedent that requires it to employ an attempted murderer. Further, it deprives employers of the ability to take actions based on common sense if they do not have a specific written rule on the subject.

Conclusion

As Judge Callahan noted cogently in her dissent, however, the threshold issue in this case is that “unless it is determined that Pac Bell’s concern that Josephs is dangerous is unreasonable, Pac Bell should not be required to send him

into its customers' homes." Slip op. at 16716 (Callahan, J., dissenting). The erroneous rulings by the district court kept the jury from considering this question. The panel majority's affirmance of those rulings has serious negative legal and practical consequences for employers throughout the Ninth Circuit. For this reason, and for the reasons set forth in the Petition for Rehearing and the Brief *Amicus Curiae* of the California Employment Law Council, the Petition for Rehearing should be granted.

Respectfully submitted,

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