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# CALIFORNIA SUPREME COURT RULING

# IN ASMUS V. PACIFIC BELL

**June 2000**

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# California Supreme Court Ruling in Asmus v. Pacific Bell

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On June 1, 2000, the California Supreme Court ruled, in *Asmus v. Pacific Bell*, that an employer may unilaterally terminate an employment policy that contains a specified condition if the condition is one of indefinite duration, and the employer effects the change after a reasonable time, on reasonable notice, and without interfering with the employees' vested benefits. The California Supreme Court granted the Ninth Circuit's request to certify this issue for decision because it desired to provide guidance to employers on the question of how employers can terminate or modify an existing policy or practice "so as not to create unwanted contractual obligations," the question left open by the Court in *Scott v. Pacific Gas & Electric Co.*, 11 Cal.4th 454 (1995) (holding that unilaterally created employment policies are enforceable).

### Factual Background of *Asmus*

This case involved Pacific Bell's "Management Employment Security Policy" (MESP), issued by the company in 1986. In the MESP, Pacific Bell stated: "It will be Pacific Bell's policy to offer all management employees who continue to meet our changing business expectations employment security through reassignment to and retraining for other management positions, even if their present jobs are eliminated. This policy will be maintained so long as there is no change that will materially affect Pacific Bell's business plan achievement." In a question and answer memorandum included with the MESP, Pacific Bell explained that the type of changes it envisioned that might cause Pacific Bell to eliminate the plan were "major changes" that would affect its rate of return, earnings or the viability of the business. Pacific Bell further stressed that this phrase was not intended to give the company "an easy out" but that it meant to refer to a "serious financial situation."

In January 1990, Pacific Bell notified its management employees that due to changes in the industry, it may be forced to discontinue the MESP. In October 1991, it announced that it would terminate the MESP effective April 1, 1992. On the same day of this announcement, Pacific Bell announced a "Management Force Adjustment Program," a program which provided generous severance benefits designed to decrease management through job reassignments and voluntary and involuntary layoffs. Employees who chose to continue working for Pacific Bell would receive increased pension benefits. Employees who chose to resign in December 1991 would receive additional enhanced pension benefits. Finally, employees who chose to resign in November 1991 would receive additional enhanced pension benefits and outplacement services, medical and life insurance for one year, and severance pay equaling the employee's salary and bonus multiplied by a percentage of the employee's years of service.

The plaintiffs were a group of employees[1] affected by the MESP cancellation who chose to remain with Pacific Bell in exchange for the increased pension benefits. The plaintiffs filed an action in federal district court seeking declaratory and injunctive relief, as well as damages for breach of contract, breach of fiduciary duty, fraud and violations of the Employee Retirement

[1]The original class consisted of 60 employees. However, the district court granted summary judgment in favor of Pacific Bell as to 52 employees who had signed releases with the company waiving their right to assert claims arising from their employment under the MESP or its termination.

Income Security Act (ERISA), 29 U.S.C. § 1000 et seq. The matter came before the California Supreme Court after the Ninth Circuit requested certification.

**The Majority and Dissenting Opinions**

The California Supreme Court split 4 to 3 in this case. The majority opinion, as well as the dissenting opinion, focused on one issue: whether the condition Pacific Bell set forth in the MESP -- that the policy would be maintained so long as there is no change that would materially affect Pacific Bell's business plan achievement -- stated an ascertainable event that could be measured with a reasonable degree of certainty. Because the majority found that the condition was not ascertainable, it considered the condition one of indefinite duration that could be modified. The dissent vigorously argued that the condition was ascertainable because Pacific Bell had defined the term with specificity in the plan as well as the accompanying question and answer memorandum.

**Practical Implications**

The majority addressed a number of issues that have concerned employers for some time. First, and most importantly, it clarified whether continued employment is adequate consideration for an employer's modification of a unilateral contract. The majority answered in the affirmative, holding that an employee's decision to continue employment under the modified unilateral contract is sufficient consideration. The court noted, however, that the employer must honor the initial unilateral contract for a "reasonable time" and employees must be given "reasonable notification" of the change. As a practical matter, this means that employers can make changes, upon reasonable notice, without the need to provide additional consideration to its employees. Thus, employers seeking to implement new policies, such as confidentiality agreements or arbitration agreements, do not necessarily have to provide "something more" to their employees.

One question that is likely to arise in the future is whether this decision will provide a method by which employers can extinguish implied contracts not to terminate but for cause (which can be created by virtue of an employer's long-standing practices and policies). In other words, will an employer be able to, by issuing a new policy or directive, declare that going forward all employment is "at-will" and assert that the employee's continued employment constituted adequate consideration for that modification. Although the language in *Asmus* certainly leaves room for this argument, it did not squarely address this issue.

In discussing whether the MESP was illusory, the majority stated that a policy containing an "unqualified right to terminate" is not enforceable. This simply reemphasizes that employers can avoid turning handbooks or individual policies into contracts by incorporating an unqualified right to terminate the policy at any time for any reason.

Although a central element of the majority's holding requires that a change or modification not interfere with an employee's vested benefits, the decision provided virtually no guidance on what types of benefits it considers "vested." The majority simply held that an employment security policy is not a vested benefit. Thus, employers are left with little guidance on what other types of benefits they may or may not be able to modify or terminate upon reasonable notice.

**Conclusion**

*Asmus* is a very positive case for employers. The majority recognizes that employers need to retain the flexibility to modify or terminate policies to keep up with changes in the marketplace. Thus, the majority developed a general rule to allow employers to make these critical changes without breaching an otherwise enforceable unilateral contract. In doing so, the majority balanced the rights of the employee to rely upon the employer's policy by requiring reasonable notice of the changes and holding that such changes cannot affect vested rights. Although the dissent makes a strong argument that, under traditional contract principles, Pacific Bell did make

a promise of an ascertainable duration, for the time being employers can feel fairly certain that absent some much more precise language regarding the circumstances for discontinuance (*e.g.* a specific term or event), they will retain the discretion to modify or terminate their policies without risk of contractual liability.

If you have any questions about this development, please call Andrew C. Peterson or Melissa M. Mulkey, the authors of this update, in our Los Angeles office at 213-612-2500.