

# PETERS & LYONS, LTD.

ATTORNEYS AT LAW

SUITE 1000

25 EAST WASHINGTON STREET

CHICAGO, ILLINOIS 60602

DONALD F. PETERS JR  
CHRISTOPHER P. LYONS  
PATRICK F. MORAN

TELEPHONE (312) 346-7300  
FACSIMILE (312) 782-6690  
E-MAIL laborlaw@peterslyons.com

Fourth Quarter, 2005

## **LABOR UPDATE**

*Recent Developments in Labor and Employment Law*

### **NOTICE TO EMPLOYEES VIA E-MAIL CAN BE LEGALLY INSUFFICIENT**

A federal appeals court in Massachusetts recently declared that an employer's e-mail to employees announcing its new mandatory arbitration policy was insufficient to render that policy legally binding. As companies increasingly rely upon e-mail as a method of communicating with employees, this decision could have a broad impact.

Following his termination from General Dynamics, Richard Campbell sued the company under the Americans with Disabilities Act, claiming that it failed to accommodate his disability, sleep apnea, and discharged him because of it. General Dynamics quickly moved for an order staying Campbell's lawsuit and compelling him to pursue his discrimination claims through arbitration, rather than in court. In support, the company cited its new "Dispute Resolution Policy" (DRP) that had taken effect during Campbell's employment. That policy contained a mandatory arbitration agreement and provided that it was "the exclusive means of resolving workplace disputes." Under that policy, employees waived their rights to pursue such disputes judicially.

The trial court denied the company's motion, and General Dynamics appealed. The appeals court initially noted that "there is no dispute that the DRP, if enforceable and read in its entirety, would require Campbell to submit his claims to arbitration." However, the issue on appeal was whether General Dynamics had given Campbell adequate notice of the policy prior to its implementation. Campbell claimed that it had not, and thus argued that the policy could not be enforced against him.

General Dynamics countered that it had alerted Campbell and all of its employees of the existence and terms of the policy through a mass e-mail. The subject line of that April 30, 2001 e-mail contained the words "New Dispute Resolution Policy." The text of the e-mail described the policy in broad terms, stated that it would take effect May 1, 2001, and mentioned that it would become "an essential element of the employment relationship." The e-mail also included two clickable "links:" one to a two-page flyer that set forth the key terms of the policy in a question-and-answer format; and the other to a 26-page handbook that detailed its provisions.

Using an e-mail "tracking log," General Dynamics was able to definitively establish that Campbell not only received this e-mail, but also opened it. Nevertheless,

Campbell, who testified that he received up to 100 e-mails a day, claimed that he could not recall ever having seen it.

Unfortunately for General Dynamics, although it could show that Campbell opened the e-mail, it could not establish that he had actually read it, or, more importantly, opened either of its links. The court criticized this fact, and noted that the company could have required him to signify by return mail or otherwise that he had read and understood both the e-mail and its attachments. Furthermore, the court reasoned that even if Campbell could be deemed to have read the opened e-mail, its message was still legally insufficient to trigger a valid, knowing waiver of his right to access the courts. In so holding, the court observed that General Dynamics had never implemented binding policy via e-mail before, that it did not designate this particular e-mail as urgent or important, and that the text of the message did not refer to an “arbitration agreement” or mention that employees would be bound by the DRP merely by continuing their employment. Simply put, the court found that this e-mail, in and of itself, was not enough to provide Campbell with fair warning that showing up for work the next day would result in his waiver of important rights.

The court refused to go so far as to rule that e-mail notifications of arbitration or other employment policies could never be effective. Indeed, the court stressed that it “easily can envision circumstances in which a straightforward e-mail, explicitly delineating [such policies] would be appropriate.” However, it made clear that in an environment where employees are inundated daily with e-mails of varying importance, a “no response required” e-mail that fails to explain a policy’s contractual significance will not do. Employers who communicate heavily by e-mail should take note. *Campbell v. General Dynamics Gov’t Systems Corp.*, 407 F.3d 546 (1<sup>st</sup> Cir. 2005).

\*\*\*\*\*

### **DIVISION IN THE RANKS OF ORGANIZED LABOR: WHAT DOES IT MEAN?**

This summer’s schism in the AFL-CIO initially resulted in the Teamsters and Service Employees unions leaving that organization, with the United Food and Commercial Workers (UFCW) soon following. This stripped the 13 million member labor federation of one-third of its membership and more than \$20 million in annual membership dues. Three other international unions (UNITE-HERE, Laborers and United Farm Workers) tenuously remain with the AFL-CIO organization, but vow to support the defectors. These developments may be heartening for non-union employers in the long run, but in the short term it may be quite another matter.

The defections came about largely over differences in spending. The dissidents complain that the AFL-CIO leadership is expending too many dollars for the support of candidates and causes friendly to organized labor—and not enough money on organizing the unorganized. With union membership now at an all-time low percentage of the U.S. workforce (8%), there is increased urgency to return to grass roots organizing efforts. Thus, the Teamsters and SEIU, as well as the AFL-CIO national organization left behind, have announced such a shift in spending and a refocusing on traditional organizing activities. The wounded AFL-CIO recently approved a \$22.5 million organizing fund.

Another result of the split is that the agreements that prohibited AFL-CIO affiliates from raiding one another no longer apply for those major unions who have left the fold. Thus, Teamsters, SEIU and UFCW are now free to target workforces represented by other unions (and vice-versa) to attempt to get employees to decertify the incumbent union and embrace one of the dissident labor organizations. This will cause headaches for employers caught in the middle, but may provide opportunities for non-union employers to offer another choice—i.e., no union—when these situations arise.

This means that in the coming months and years, employers can expect to see increased union organizational activities. Employers who have grown complacent thinking that “my employees will never unionize,” may be in for a surprise. In cases of larger corporations, or where the company’s products or services are broadly known to the public, unions are turning more toward “corporate campaigns,” with targeted communications to customers, suppliers, regulatory agencies, lenders, creditors and stockholders.

However, some already unionized employers, facing contract renewals, may find themselves in a strong position to achieve their goals at the bargaining table. Northwest Airlines and Boeing, Co. have been aggressively seeking concessions in recent bargaining. A Fortune 500 company with a plant in West Virginia closed the plant when the union rejected pay cuts of over 50%.

In the words of the ancient Chinese curse, “May you live in interesting times.” These times are indeed interesting for organized labor in the United States and the employers who now or someday soon may be called upon to deal with them.

\*\*\*\*\*

### **NIGHT BLINDNESS -- A COVERED DISABILITY UNDER THE ADA**

A recent decision by a federal court allowed an employee to take his case to a jury to determine whether his employer fired him because of his “night blindness.”

One night, Tony Capobianco was scheduled to work a late shift driving a garbage truck for New York City’s Department of Streets and Sanitation. Capobianco had worked as a garbage collector for the Department for two months, but had never been scheduled for the night shift before. He immediately had problems while driving the truck. Capobianco reported that he could not see street signs or the lines on the road. He also reported that he had developed a migraine headache.

As a result, the Department temporarily assigned Capobianco light duty and clerical jobs. While on light duty, Capobianco went to a physician who diagnosed him with congenital stationary night blindness, an inherited disease. The doctor predicted that Capobianco would have night blindness for the rest of his life and that there was no treatment. Capobianco stated that his night blindness prevented him from doing almost anything at night, not merely driving.

The Department continued Capobianco’s employment for a time, using him as a clerical worker. A few months later, the Department terminated Capobianco “due to inability to sustain regular duty resulting from a permanent medical condition.”

After Capobianco brought his lawsuit against the Department, the Department argued that night blindness is not a “disability” under the Americans with Disabilities Act. The court disagreed and allowed Capobianco to present his case to a jury.

The court first noted that the ADA defines a disability as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.” The major life activity that Capobianco’s night blindness limits him from doing is “seeing.” The question, then, was whether Capobianco’s inability to see only at night was a “substantial” limitation. The court ruled that it was substantial, writing: “Seeing is a fundamental life activity of central performance, and the average person can see and function at night and in dim light.”

Once the court ruled that he was “disabled,” Capobianco was allowed to proceed to trial on his theory that he could perform his job with a reasonable accommodation. If he succeeds, the Department will likely be ordered to reinstate Capobianco and pay his back wages and his attorney’s fees. The Department, however, can attempt at trial to show that there is no “reasonable accommodation” it could make to allow Capobianco to perform his job as a garbage collector. The jury will decide whether a garbage collector with night blindness can work for the Department given the required schedules and various essential duties and responsibilities of the Department’s drivers.

While there had not been a decision from any court before Capobianco’s that allowed a plaintiff to claim that night blindness was a “disability” under the ADA, employers should take note that courts may disagree with their perceptions as to which of their employees are “disabled.” *Capobianco v. City of New York*, 2005 U.S.App.LEXIS 18981 (2<sup>nd</sup> Cir. 2005).

\*\*\*\*\*

### **BITS AND PIECES**

On August 15, 2005, Illinois Governor Rod Blagojevich signed into law the Illinois Family Military Leave Act. Under the new law, if certain prerequisites are met, close family members of active-duty service personnel may request unpaid leave from their employers. The employers must then extend certain job and benefit protections to the family member on such a leave. For further information contact Patrick Moran (312.456.0182).

\*\*\*\*\*

### **QUOTABLE**

*Cathbert, the Evil Director of Human Resources in the comic strip ‘Dilbert,’ delights in pouncing on employees’ idiosyncratic vulnerabilities. Perverse cleverness that is funny when limited to newsprint readily could be seen as discrimination when used to discomfit real people.*

Federal Appellate Court Judge Frank Easterbrook,  
in his August 22, 2005, opinion in *Washington v. Illinois Department of Revenue*

Since 1984, the LABOR UPDATE has been provided as a service to clients, fellow attorneys and other friends of our firm. Written entirely by Peters & Lyons attorneys, it is intended to provide useful information as to the matters covered, but should not be viewed as an exhaustive treatment of the subjects addressed or as covering all significant developments in labor and employment law. The LABOR UPDATE is not intended to be a substitute for legal advice.