Implementing Policy by E-mail Notice Disapproved.

An employee of General Dynamics Government Systems Corp. was terminated due to excessive absenteeism. The employee sued under the Americans with Disability Act (ADA), arguing that his absenteeism was caused by sleep apnea, a medical condition that the company should have accommodated under the ADA. Based on affidavit evidence that it had earlier announced by e-mail a new policy for arbitration of all personnel disputes, General Dynamics moved for a stay of the proceedings and an order requiring the claim to be submitted to arbitration. The federal district court rejected this motion, holding that e-mail notification was inadequate to establish an agreement by employees to arbitrate disputes. The company appealed the decision.

The First Circuit Court of Appeals stated that the fundamental issue was the sufficiency of the employer's communications about its new policy. Did it provide adequate notice to employees that continued employment would be viewed as an agreement to arbitrate and a waiver of the right to take a claim to court. Looking first at the general **form** of the notice, the appellate court refused to hold that the use of e-mail as the medium of communication was *per se* insufficient. Such a ruling would be inconsistent with the federal Electronic Signatures in Global and National Commerce Act (E-Sign Act), which states that the use of electronic means of communicating notice cannot, by itself, render the notice inappropriate.

The appellate court then reviewed the specific circumstances of General Dynamics' notice of the new arbitration policy. While e-mail was the preferred intra-company means of communication, no other major change in personnel policy had been instituted in this manner. Moreover, the company chose a "no response required" format for the e-mail, so it was not possible to show that the notice was actually brought to the employee's attention. The court observed that "within the context of this case, the e-mail communication, in and of itself, was not enough to put a reasonable employee on inquiry notice of an alteration to the contractual aspects of the employment relationship." *Campbell v. General Dynamics Government Systems Corp.*, 407 F.3d 546, 557(1st Cir. 2005).

In completing its evaluation of the use of e-mail to introduce binding policy, the court reviewed its actual **content** - what it said - to determine whether it provided fair warning about a waiver of litigation rights in favor of mandatory arbitration. The e-mail, while mentioning arbitration as a new method of dispute resolution, failed to indicate clearly that it was to be mandatory, that resort to a judicial forum would no longer be an option, and that an employee, by continuing to work, would be regarded as having accepted these provisions as part of the employment contract.

Finally, General Dynamics argued that the policy was contained in a newly issued handbook and was, for that reason and irrespective of the effectiveness of the e-mail notice, contractually binding upon its employees. The court disagreed, holding that in view of the company's past use of handbooks, a new handbook did not alert employees to new contractual terms contained therein.

In concluding its opinion, the court cautioned against interpreting its decision to mean that contractually binding employment terms may never be introduced by means of e-mail communications. However, in this case, the court found as follows in ruling against General Dynamics:

> In the last analysis, the question is whether the announcement provided minimally sufficient notice by signaling to a reasonable employee that the Policy was a contractual instrument whose terms would be deemed accepted upon continued employment (and, thus, placed the employee on inquiry notice of the contemplated waiver of his legal rights). Having examined the totality of the circumstances -- the method, content, and context of the communication -- we answer that question in the negative.

Campbell v. General Dynamics Government Systems Corp., 407 F.3d at 559.

The implications of this opinion for employers are clear: courts will insist on higher "notice" and "consent" standards for policy changes involving the surrender by employees of important rights. This appellate court decision is only binding upon states in the Northeast that are within the jurisdiction of First Circuit Court of Appeals. However, the decision suggests that prudent personnel practice will require fully informed, written, and signed acknowledgments of significant new terms of employment.