

Workplace Justice Without Unions by Hoyt B. Wheeler, Brian S. Klaas and Douglas M. Mahony. W.E. Upjohn Institute for Employment Research, Kalamazoo, Michigan, 2004, xii + 229pp., ISBN 0 88099 313 8, \$40.00.

This book examines one of the most important issues in contemporary industrial relations in the United States, the provision of workplace justice to the vast majority of American workers who lack union representation. In contrast to nearly all other countries, employment in the United States is governed by the default rule of employment-at-will under which workers can be fired without notice for any reason, good or bad. Exceptions to this rule are limited to specific contractual or statutory protections in areas such as discrimination and the shrinking segment of the American workforce represented by unions. The situation for the majority of American workers who are not represented by unions and fired for reasons other than discrimination is aptly described by the authors: “Where workers can be terminated from their employment for any reason, or none at all, arbitrariness reigns. Yet this is historically the basic principle of the law of employment termination in the United States.” (p.1) As a result of this absence of general legal protections against unjust termination, such as the labor court systems found in many other countries, in the United States discussion of questions of workplace justice have increasingly focused on various types of management-initiated workplace justice systems. In this book, the authors provide both a concise, well-written overview of the current legal and policy issues relating to nonunion workplace justice and an important empirical contribution to the growing literature on this subject.

The first four chapters provide an overview of the subject of nonunion workplace justice in the United States. These chapters provide an excellent introduction for readers new to the subject and also a valuable overview of the law and policy debates for those already knowledgeable in the area. Especially noteworthy is the fine quality of the writing in these

chapters, particularly in the introduction, which situates the debates over different types of dispute resolution procedures within the broader context of workplace justice as a key component of human dignity in the workplace. In their discussion, the authors pay particular attention to the topic of employment arbitration, which has become one of the most important and controversial practices in the United States. Following recent decisions of the United States Supreme Court, employers are now able to require employees to enter into, as a mandatory term and condition of employment, agreements to arbitrate any potential legal claims against the employer. This means that even where an employee might have a legal claim under one of the statutory exceptions to the employment-at-will rule, such as the protections against discrimination in employment, the employee cannot go to court and instead must bring the claim through an arbitration procedure chosen by the employer.

The rapid spread of these mandatory employment arbitration procedures has led to fierce public policy debates, which the authors chronicle, over whether these procedures provide an effective alternative to the often Byzantine American litigation system or represent a further diminution of justice for American workers. The authors review both the legal decisions and policy debates in this area, as well as examining what limited data there is available on the operation of these procedures. In this area, they make a valuable empirical contribution in collecting and examining a set of decisions from employment arbitrations conducted under the auspices of the American Arbitration Association, the largest private association providing arbitration services in the United States. They compare outcomes of these employment arbitrations to decisions in the courts and to decisions of labor arbitrations from unionized workplaces. Overall, while these results reveal some concerns, they do not present a picture of dramatic differences between the outcomes of employment arbitration and the other dispute

resolution mechanisms. The authors do find that although employees tend to win around half the time in employment arbitration, they tend to recover lower amounts than in court. On this point, however, readers should note a caution that the authors report statistics on outcomes of Federal court cases that is based on data in a database assembled by the Federal Judicial Center that has recently been discovered to contain errors in the award amounts. The data errors produce a substantial overestimation of mean damages awarded to employees, median award estimates are less affected (for details on the problems with this data, see: Eisenberg, T. and Schlanger, M. (2003). The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis. *Notre Dame Law Review*, 78: 1455-1496.). It should be noted that this problem, which was revealed subsequent to the publication of this book, is in no way the authors' fault, and does not significantly detract from the book.

The second major part of the book is an empirical study of decision-making in workplace justice, presented in the extended fifth chapter of the book. The authors use a policy capturing methodology to study how similar cases would be decided by: employment arbitrators; labor arbitrators; human resource managers; peer review panel members; jurors; and labor court judges. Use of this methodology allows the authors to examine in isolation the effect on workplace justice of variation in who is deciding the case. A key advantage of this approach is that it allows the authors to avoid the major problem of selection effects in comparing win rates between different types of procedures. The selection effect problem arises because employees subject to a procedure low in due process that tends to be biased against employees are more likely only to appeal very strong cases of unjust treatment. The result is a biased sample of only the strongest cases for employees being observed under these procedures, which produces a relatively inflated win rate despite the anti-employee bias in decision-making. The results

reported in this study indicate the value of the policy capturing approach in that the authors find that employment arbitrators tend to be much less likely than other decision-makers to overturn terminations in similar cases, despite the similar overall win rate they found earlier. This finding of lower willingness of employment arbitrators to overturn terminations compared to other decision-makers, particularly jurors who would decide such cases in the general court system, suggests a major limitation in the ability of employment arbitration to serve as a system for providing workplace justice and should be of great concern for policy makers in this area.

A limitation of the policy capturing methodology should also be noted. Respondents were presented with standard case descriptions to ensure comparability. However, one of the areas in which the types of dispute resolution procedures being examined here are likely to vary is in the ability of the employee to effectively present his or her case. For example, whereas in labor arbitration employees are represented at the arbitration by a representative from the union who is able to cross-examine witnesses and effectively present the employee's case, in many nonunion procedures the employee is unrepresented, unable to cross-examine witnesses, or subject to other due process limitations. By standardizing how the case is presented to the decision-maker, the policy capturing methodology used in the study likely captures only a portion of the actual differences between the various types of procedure examined.

Workplace Justice Without Unions concludes by returning to the motivating question for the study of whether effective workplace justice is being provided under the type of management-initiated systems that are currently the only option available to most American workers for routine workplace disputes. The authors' conclusions indicate that though the direst predictions by critics of the outcomes of these nonunion workplace justice systems are not confirmed, there are nonetheless substantial concerns that need to be addressed if these systems

are to provide effective alternatives to the courts or to the labor arbitration system found in unionized workplaces. The last chapter is evocatively entitled “Is Justice Weeping?” At the end of this book, it is hard to resist the conclusion that if justice is not weeping, it is because those who should be concerned with its protection in the American workplace have not had their eyes wide open enough to the issues that are well described here by the authors.

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