

ISLSSL meeting Chicago May 25, 2005

Comparative Approaches to Adjudicating Challenges to Dismissals The American Shortfall

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It seems obvious that a society should provide protection for employees who are unjustly dismissed from their employment. Yet for that to happen there must be national statutes affording such protection. The evidence shows a wide variation in countries providing such protection against arbitrary dismissal.

In countries following the code tradition there are fairly explicit statutes detailing employment practices including dismissal with provision for severance pay based on duration in employment. In countries following the Anglo Saxon tradition the statutory mandates are less stringent. Most countries provide specialized Labor Courts with jurisdiction over such dismissal issues.

But few countries match the US in failure to provide such protections. The US has no statutory bar against unfair dismissal, nor indeed provision for notice, severance pay or the like. The employee must litigate in a court of general jurisdiction to prove that the termination violated a contractual commitment, or specific statutes prohibiting termination based on discrimination, or protected union activity, invocation of OSHA statutory protections, or the like. Our system of collective bargaining is assumed to provide the protection against unjust dismissal through appeal through the grievance procedure to arbitration. As credible a system as that might be, it applies to about a tenth of the entire workforce, and only 8% of the private sector. Because of our adherence to the concept of majoritarianism, (that the employer is required to negotiate with only the one union that a majority of the employees has designated), that leaves more than 100,000,000 workers without any such protection as victims of our "termination at will doctrine". In other countries the prevalence of multiple unions within an enterprise and the availability of works councils as the forum for workplace discussions, tend to provide a less confrontational environment for resolving workplace disputes, while government provided labor courts are left to resolve dismissal issues.

The declining numbers of union members suggests that the protections long assumed for workers in the US are becoming even less prevalent. We have much to learn from other countries.