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Evans v. MassMutual Financial Group, Round 2

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1.1.2.2—Coverage of Independent Contractors and Partners

Evans v. MassMutual Financial Group, 856 F. Supp. 2d 606 (W.D.N.Y. 2012).

This is Round 2 of *Evans v. MassMutual Financial Group,* 187 L.R.R.M. (BNA) 2664, 158 Lab. Cas. (CCH) Par. 10099, 2009 W.L. 3614534 (W.D.N.Y. Oct. 23, 2009). I discuss Round 1 in detail in Law Review 1053 (September 2010).

In late 2003, Major (now Lieutenant Colonel) Andrae Evans, a member of ROA, applied for and was brought on board as a financial sales unit manager for MassMutual at its office in Rochester, New York. He was working in that capacity when he was called to active duty, as a member of the New York Army National Guard, in April 2004. As he departed for service, MassMutual management gave him assurances that his position would be waiting for him on his return, but by the time he returned the management had changed. He deployed to Iraq and was released from active duty in November 2006, when he promptly applied for reemployment with MassMutual.

Andrae Evans met the five eligibility criteria for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA), with the possible exception of the first one. As I explained in Law Review 0766 and other articles,[1] an individual must meet these five conditions to have the right to reemployment:

1. Must have left a position of employment for the purpose of performing voluntary or involuntary service in the uniformed services.
2. Must have given the employer prior oral or written notice.
3. Cumulative period or periods of uniformed service, relating to the employer relationship for which the individual seeks reemployment, must not have exceeded five years.[2]
4. Must have been released from the period of service without having received a punitive or other-than-honorable discharge.
5. Must have made a timely application for reemployment after release from the period of service.[3]

There is no dispute that Andrae Evans gave prior notice to MassMutual, that he has not exceeded the five-year limit, that he served honorably and did not receive a disqualifying bad discharge, and that he made a timely application for reemployment after release from the period of service. MassMutual asserts that Andrae Evans does not have the right to reemployment because he did not hold a *position of employment* prior to his call to the

colors. The company asserts that Andrae Evans was an *independent contractor* and not an employee.

Andrae Evans filed this lawsuit in January 2009.[4] Instead of filing an answer, MassMutual filed a motion to dismiss, in accordance with Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP). To get a suit dismissed at the outset, a defendant must show the court that *even if everything the plaintiff alleges is true* the plaintiff is not entitled to any relief that the court can award. In Round 1, District Judge Charles J. Siragusa of the United States District Court for the Western District of New York overruled the motion to dismiss, and the discovery process began.

At the end of the discovery process, MassMutual filed a motion for summary judgment, in accordance with Rule 56 of the FRCP. MassMutual claimed that, based on the facts and evidence adduced during discovery, there is *no material issue of fact* remaining between MassMutual and Andrae Evans and that the company is entitled to judgment as a matter of law. The case was reassigned from Judge Siragusa to Judge David G. Larimer, and Judge Larimer denied the company's summary judgment motion with a well-written 12-page decision dated April 13, 2012.

We will keep the readers informed of developments in this important case. The next step is the trial, unless the parties come to an agreement on a settlement. Andrae Evans has not demanded a jury trial, so the trial will probably be to Judge Larimer alone. If the judge rules for Evans, the company will probably appeal to the United States Court of Appeals for the Second Circuit.[5] It is not inconceivable that this case could make it to the Supreme Court.

Of the almost 850,000 National Guard and Reserve personnel who have been called to the colors since the terrorist attacks of September 11, 2001, at least a few hundred have been salespersons on commission, like Andrae Evans. I have heard from several folks in this category, as a result of Law Review 1053. We favor a broad interpretation of USERRA coverage, so that Andrae Evans and others similarly situated will have the benefits of USERRA.

As I explained in Law Review 104, and other articles, Congress enacted USERRA in 1994, as a long-overdue recodification of the Veterans' Reemployment Rights Act (VRRA), which can be traced back to 1940. Shortly after World War II, the Supreme Court decided the first of its 17 (so far) cases on the reemployment statute. The Court held that this statute should be "liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946). Applying this liberal construction of the law to Andrae Evans' situation, I think it is fair to say that he was an employee of the insurance company, not an independent contractor, and that he has reemployment rights under USERRA.

Section 4303 of USERRA defines 16 terms used in this law, including the term "employee" and the term "employer." "The term 'employee' means any person employed by an employer." 38 U.S.C. 4303(3). "Except as provided in subparagraphs (b) or (c) [not pertinent to this issue], the

term 'employer' means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities." 38 U.S.C. 4303(4).

USERRA's legislative history (showing the intent of Congress) addresses directly and succinctly the broad and expansive interpretation of the term "employee": "Section 4303(3) would define 'employee' in the same expansive manner as under the Fair Labor Standards Act, 29 U.S.C. 203(e), … and the issue of independent contractor versus employee should be treated in the same manner as under the Fair Labor Standards Act. *See Brock v. Mr. W Fireworks Inc.,* 814 F.2d 1042 (5th Cir. 1987)." House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2454.

In the *Brock* case, the Secretary of Labor (William Brock) sued a fireworks company to enforce the Fair Labor Standards Act (minimum wage and overtime rules) with respect to the individuals who operated the company's fireworks stands. The District Court dismissed the lawsuit, holding that the operators were independent contractors and not employees. The secretary of labor appealed, and the Court of Appeals reversed the District Court, noting that the fireworks company controlled almost all aspects of the businesses and that the operators were economically dependent upon the fireworks company. It is clear that Congress intended that this liberal interpretation of employee should also apply under USERRA.

Section 4331 of USERRA (38 U.S.C. 4331) gives the Secretary of Labor the authority to promulgate regulations about the application of this law to state and local governments and private employers. The Secretary did promulgate such regulations and published them in the *Federal Register* on Dec. 19, 2005. The regulations are published in Title 20, Code of Federal Regulations, Part 1002. The regulations specifically address the independent contractor issue:

> *Does USERRA cover an independent contractor?* (a) No. USERRA does not provide protections for an independent contractor. (b) In deciding whether an individual is an independent contractor, the following factors must be considered: (1) the extent of the employer's right to control the manner in which the individual's work is to be performed; (2) the opportunity for profit or loss that depends upon the individual's managerial skill; (3) any investment in equipment or materials required for the individual's tasks, or his or her employment of helpers; (4) whether the service the individual performs requires a special skill; (5) the degree of permanence of the individual's working relationship; and, (6) whether the service the individual performs is an integral part of the employer's business. (c) No single one of these factors is controlling, but all are relevant to determining whether an individual is an employee or an independent contractor.
> 20 C.F.R. 1002.44.

When the secretary of labor published the USERRA Regulations on Dec. 19, 2005, she also published a lengthy and scholarly preamble, addressing in detail the intent behind these regulations and addressing the comments that were received after the secretary had published

proposed USERRA Regulations in the *Federal Register* in September 2004. The preamble can be found in the 2005 edition of the *Federal Register* (pp. 75246-75292). I invite the reader's attention to a lengthy and scholarly discussion of the distinction between employees and independent contractors, for USERRA purposes (pp. 75253-75254). The discussion includes many case citations, including Supreme Court cases, and it strongly supports the liberal interpretation of USERRA coverage for folks like Andrae Evans.

The VRRA did not confer rulemaking authority on the secretary of labor, but the Department of Labor published its *Veterans' Reemployment Rights Handbook* in 1957, 1970, and 1988. Several courts have given some weight to the policies expressed in the *Handbook* in determining the meaning and intent of the reemployment statute. *See, e.g., Leonard v. United Air Lines Inc.,* 972 F.2d 155, 159 (7th Cir. 1992). I discuss *Leonard* in detail in Law Review 0857.

> In order to be protected by the reemployment statute, an employee must leave a position in the employ of an employer with the intent to perform military training or service, or to be examined for such training or service. An employer-employee relationship must exist, as distinguished from the relationship between partners in a business and from the relationship between an independent contractor and the firms for which he performs work. Although there is no specific definition in the statute, Congress intended that the statute should be liberally construed in determining whether an employer-employee relationship exists. An employer-employee relationship generally exists when one party hires, supervises, commends and disciplines, exercises management discretion, generally controls the work environment, or pays wages or salaries in exchange for labor or services of another party.[6]

The *Handbook* also contains multiple examples in each chapter, illustrating the meaning and operation of the reemployment statute. I invite the reader's attention to Example 2 in Chapter 3 of the 1988 *Handbook:*

> Mr. B operates a small insurance agency with the aid of a secretary hired and paid by him. His only compensation is in the form of commissions on various kinds of insurance policies he sells for the Q Group of insurance companies. By agreement with Q, he sells no other insurance, uses Q's name in his advertising, and is required to follow detailed business procedures prescribed by Q. He is a commissioned officer in the Coast Guard Reserve, and he is recalled to active duty during the Mariel Boat Lift Crisis of 1980.
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> B is an employee within the meaning of the statute, and not a true independent contractor. The result would be different if he also sells substantial amounts of insurance for other companies and generally exercises a greater degree of independence in operating the agency. All the surrounding facts must be considered in determining whether a person is an employee or an independent contractor.[7]

Applying the reemployment statute liberally for those who serve our country in the Armed Forces, as Congress has intended and the Supreme Court has commanded, Andrae Evans was

an *employee* of MassMutual before he was called to the colors and he has reemployment rights under USERRA.

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[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 739 articles about USERRA and other laws that are particularly pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

[2] There are nine exceptions to the five-year rule—these are kinds of service that do not count toward the individual's five-year limit with his or her current employer. Please see Law Review 201 for a detailed discussion of the five-year limit and its exceptions.

[3] After a period of service of 181 days or more, the individual must apply for reemployment with the pre-service employer within 90 days after release. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

[4] From the outset, Andrae Evans has been represented by the law firm Tully Rinckey PLLC, of Albany (New York), Washington (District of Columbia), and Arlington (Virginia). Tully Rinckey was founded by ROA life member Mathew B. Tully, a Lieutenant Colonel in the New York Army National Guard who has been deployed to Iraq and Afghanistan multiple times and is currently on active duty in Afghanistan. Tully Rinckey has had some notable successes in USERRA cases and other cases involving the rights of those who serve in the military and protect the rights that we all enjoy.

[5] The 2d Circuit is the federal appellate court that sits in New York City and hears appeals from district courts in Connecticut, New York, and Vermont.

[6] Veterans' Reemployment Rights Handbook, 1988 edition, page 3-1.

[7] Handbook, page 3-5.