Suit Over Veteran's Job Status Before Deployment May Proceed

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A National Guardsman who left his job to serve in Iraq can sustain an employment action because questions remain as to whether he was an independent contractor and whether he would have been promoted had he not been deployed, a federal judge has found.

Western District Judge David Larimer in Rochester held that even though the plaintiff signed documents before his deployment to Iraq agreeing that he was an "independent contractor"—who are not covered by the Uniformed Services Employment and Reemployment Act—he may be able to establish that he was an actual employee for purposes of the act.

Additionally, Larimer said that even if Andrae Evans was a sales agent and not a sales manager when he was sent overseas, he may be entitled to the higher position now under an "escalator principle," which holds that a returning service member is entitled to return to the position he would have held if he had not been deployed.

Larimer, in an April 13 decision, refused to dismiss Evans' claim against MassMutal Financial Group and, further, said the plaintiff "need not show that his military status was a motivating factor in defendants' refusal to hire him as a sales manager upon plaintiff's return from military service."

Evans v. MassMutual Financial Group

, 09-cv-6028, arose after the plaintiff returned from active duty in 2006 and asked for reinstatement as a sales manager. The company refused, and instead offered Evans a position as a sales agent, which he declined.

MassMutual asserted two main arguments in attempting to have the case dismissed.

First, the company argued that Evans was not an employee, and therefore the act is inapplicable.

Larimer acknowledged that signed documents support MassMutual's position, as does the fact that Evans received a commission and not a salary. But the judge said that just because the parties described the position as "independent contractor" does not mean it was.

Larimer noted the paucity of case law directly on point and said "there is no litmus test by which to determine employment status."

So he turned to analogous provisions in the Fair Labor Standards Act that define "employee."

Since Evans was required to be at his office at certain times, it "suggests that MassMutual

had at least some control over his work schedule," Larimer said.

Second, MassMutual argued that Evans was a sales agent when he went to Iraq and it is not certain that if he had remained with the company he would have completed the requirements to be a sales manager.

Larimer said that under the "elevator principle," returning veterans are entitled not only to re-employment but "the position he would have held had it not been for his deployment." The judge said there is evidence that Evans was on track to become a sales manager, bringing into play the "escalator principle."

But the judge said that even if Evans would have met all the requirements to become a sales manager, that does not necessarily mean that MassMutual was obligated to immediately place him in that position.

"If a junior airline pilot with relatively little flight experience is summoned to active duty…he may not be entitled, upon his return, to be made captain of a 747 simply on a theory that he would have attained that rank but for his military service," Larimer wrote. "The statute recognizes this, by providing that a returning service member must also be 'qualified to perform' the duties of the job in question."

The plaintiff is represented by Douglas James Rose of Tully Rinckey in Albany.

Greg Rinckey, managing partner at Tully Rinckey, said there is little case law on Uniformed Services Employment and Reemployment Act matters. He said most cases settle because the employer wants to avoid negative publicity.

"There are not too many cases that get to trial, so when you have a USERRA case there is a potential to make law," Rinckey said.

Paul Keneally of Underberg & Kessler in Rochester is defending MassMutual.

He said MassMutual "feels strongly about its position" and that a trial is the next logical step.

Keneally added, "The judge certainly noted there is evidence on our side on both the independent contractor and the sales manager issues, but that it wasn't enough for summary judgment and there are questions of fact. He certainly didn't say the plaintiff is going to succeed at trial on those two issues, so we are encouraged."

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