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Does He Lose His Job for Failing to Use the Magic Words?

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Q: I am the commanding officer of a Marine Corps Reserve unit recalled to active duty for Operation Iraqi Freedom. Just recently, a junior officer in my unit brought your Law Review columns to my attention, specifically Law Review 77 ("I Am Being Demobilized. What About My Civilian Job?" June 2003).

I immediately made copies of the article and distributed it to each member of my unit and encouraged them to use your sample letter when applying for re-employment in their civilian jobs. After our drill weekend, a lance corporal in my unit showed up at the office of his pre-service employer, with your letter in hand, at 0800 Monday morning. Unfortunately, that was the 91st day after he was released from active duty, and the employer won't take him back.

I think that it is most unfair that this young man has lost his job because he was one day late in using the magic words. He was unaware that federal law gave him the right to re-employment, but on about the 80th day after his release from active duty he showed up at the business and spoke to the owner, inquiring about vacancies. The owner was well aware that this young man had left his job for military service. In fact, he asked the young man about his experiences in Iraq. Because the employer was aware of the relevant facts, the young man's failure to state them in so many words should be of no consequence, I would think.

A: I am aware of at least one reported case involving similar circumstances: Thomas v. City and Borough of Juneau, 638 F. Supp. 303, 307 (D. Alaska 1986). Mr. Thomas showed up at the employer's location within the 90-day period and inquired about job opportunities, but he did not say that he was returning from military service. The court held that his failure to use the magic words did not defeat his right to re-employment because the employer was already aware that the individual had left his job with that employer for military service and was recently off active duty.

Let us assume, for the sake of argument, that your unit member's communication with the employer, on about the 80th day after leaving active duty, did not qualify as a proper application for re-employment. Nonetheless, I think that the young man is entitled to re-employment, based on the letter that he delivered on the 91st day after leaving active duty.

I invite your attention to 38 U.S.C. 4312(e)(3), which provides as follows: "A person who fails to report or apply for employment or re-employment within the appropriate period specified in this subsection shall not automatically forfeit such person's entitlement to the rights and benefits

referred to in subsection (a) but shall be subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work." USERRA's legislative history explains that this subsection "would avoid the potential inflexibility of the reporting deadlines by establishing that absences beyond the deadline would not necessarily deprive an employee of all re-employment rights, but that he or she would be subject to the employer's rules and practices (including deviations from rules) dealing with unexcused absences." [House Rep. No. 103-65, 1994 United States Code Congressional and Administrative News 2449, 2462.]

Let us assume that the normal punishment for one day of unexcused absence is a two-week suspension without pay. Your unit member was one day late in submitting his application for re-employment. That day can be treated as an unexcused absence. Thus, he is entitled to re-employment, but he would be subject to a two-week suspension without pay.

*Military title used for purposes of identification only. The views expressed in these articles are the personal views of the author and are not necessarily the views of the Department of the Navy, the Department of Defense, the Department of Defense or the U.S. government.