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## **Bum Scoop Can Have Bad Consequences**

By CAPT Samuel F. Wright, JAGC, USNR\*

Q: I was called to active duty for what was expected to be about 18 months on February 19, 2005, and I gave proper notice to my civilian employer. In my last day at work in my civilian job, I suffered what I thought was a very minor injury on the job. I did not even report it to my supervisor, because I thought that it was minor, but it turned out that the injury was much more severe than I had thought. That injury caused an Army doctor to determine that I was not qualified for mobilization, and I was sent home March 9, just 18 days after I entered active duty. The Army gave me an airplane ticket home, and I arrived home in the early evening of Wednesday, March 9.

A sergeant major told me that after leaving active duty I had 30 days to communicate to my civilian employer my availability to return to work, and I contacted the employer Wednesday, March 16, just seven days after leaving active duty. The employer, however, says that I was too late in reporting back to work, that my position has been filled, and that I am out of a job. Help!

A: As I explained in Law Review 7, the deadline to report back to work or apply for re-employment depends upon the duration of the period of service from which you are returning. If the period of service is fewer than 31 days, you are required to report for work "not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation from the place of that service to the person's residence." [38 U.S.C. 4312(e)(1)(A)(i).] More time is provided after longer periods of service.

In determining the deadline that applies, it is the actual duration and not the expected duration of the period of service that controls. You expected to be on active duty for 18 months, but as it turned out you were only on active duty for 18 days. You arrived home the evening of Wednesday, March 9, so you should have reported back to work on Thursday, or certainly by Friday. You did not contact the employer until a week later, so you are probably out of luck.

USERRA provides for an extension of up to two years, on the deadline to report for work or apply for re-employment, in the case of a "person who is hospitalized for, or convalescing from, an injury or illness incurred in, or aggravated during, the performance of service in the uniformed services." [38 U.S.C. 4312(e)(2)(A) (emphasis supplied).] This deadline extension does not apply to you if you incurred the injury before you entered active duty and did not aggravate it during your active duty period.

I have included this article in this column as a “word to the wise.” I have been speaking and writing about the re-employment statute for almost a quarter century, because I am aware that there is a lot of “bum scoop” being spread around by folks who ought to know better, and the price is paid by folks like you, who rely on what they are told. USERRA is a great law, but it is very important that you “dot the I's and cross the T's.” I initiated this column to help Reserve Component members do what they need to do to protect their rights.

Q: It has turned out that my injuries were quite severe, and I am unable to work, at least for some months. I have retained an attorney and have filed a claim against my civilian employer under our state's workers' compensation law. The employer is contesting my right to this compensation on two grounds. First, the employer denies that any on-the-job injury took place, because I did not report it at the time. Second, the employer claims that the injury took place while I was in the Army, not while I was at work at my civilian job. This is a real mess.

A: Another lesson to be learned from this situation is that if you suffer an injury at work, you should report it to your supervisor and fill out the required paperwork within an hour or two after the accident, even if it seems that your injuries are quite minor. You should also report to the company doctor or nurse to be checked out.

The other point here is that you cannot have it both ways. You cannot claim, for re-employment purposes, that you suffered or aggravated the injury while you were on active duty, for purposes of excusing your delay in reporting back to work, while claiming, for workers' compensation purposes, that the injury is the result solely of an accident at work.

\* Military title used for purposes of identification only. The views expressed herein are the personal views of the authors and should not be attributed to the U.S. Marine Corps, the Department of the Navy, the Department of Defense, or the U.S. government.

The best way to reach Captain Wright is by e-mail, at [samwright50@yahoo.com](mailto:samwright50@yahoo.com).