

## Ask the Lawyer: Defense Available for Troops Unknowingly Absent from Military

By Mathew B. Tully

Q.

What happens if you've been AWOL for a long time without knowing it?

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It's not common, but it does happen: Service members unknowingly fall into absence without leave or deserter status.

Such situations sometimes arise after a service member gets in trouble off base and leaves civilian confinement.

In such instances, troops may be able to raise a mistake-of-fact affirmative defense. To understand how this defense plays into AWOL and desertion, it's important to understand the nature of these crimes.

AWOL is a general intent crime, where a service member is not where he is supposed to be at a given time. Desertion is a specific intent crime, where the service member is not where he is supposed to be at a given time but has a specific intent to stay away from the military.

As the Navy-Marine Corps Court of Criminal Appeals noted in *U.S. v. Campbell* (1986), the mistake-of-fact defense can be raised by service members when an honest, mistaken belief led to a specific intent crime, such as desertion.

A service member must have had both an honest and reasonable mistaken belief to raise this defense in a general intent crime, such as AWOL. This is because, the court continued, the "ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances."

The *Campbell* case involved a Navy Reserve sailor who was convicted by special court-martial of desertion for 9½ months and of AWOL for five days.

The sailor had left his ship without authorization shortly after Christmas and was apprehended by civilian law enforcement officers about 10 months later.

Thirty days into his unauthorized absence, his shipmates told the sailor that he had been discharged in absentia from the Navy — which was a mistaken belief shared by his command.

Considering what the sailor's shipmates told him and the fact that he continued living and working in the local community openly — as opposed to going into hiding — the court concluded the sailor had a valid mistake-of-fact defense that the government failed to rebut.

However, the court upheld the AWOL conviction because the sailor did not have a mistaken belief when he initially left his ship without authorization.

Regardless of the length of absence from the military, service members who are AWOL or listed as deserters should consult with a military law attorney who can help them explore possible affirmative defenses, such as mistake-of-fact or duress.

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