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KOLKSORST v. TILGHMAN: AN EMPLOYEE’S RIGHT TO MILITARY LEAVE UNDER THE VETERANS’ REEMPLOYMENT RIGHTS ACT

On August 22, 1990, President George Bush ordered approximately 50,000 military reservists and members of the National Guard to active duty because of the Persian Gulf Conflict.1 In preparing to answer a possible call for active duty, reservists attended initial training sessions, annual active and inactive training duty, and participated in special instruction courses.2 Re-


(1) participate in at least 48 scheduled drills or training periods during each year and serve on active duty for training of not less than 14 days (exclusive of traveltime) during each year;

(2) serve on active duty for training not more than 30 days during each year.

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servists, while not on active or training duty, usually are employed by civilian employers. Therefore, while training to serve their country, these employee-reservists are absent from their civilian employment. The Veterans' Reemployment Rights Act (VRRA)\(^3\) provides protection for reservists and members of the National Guard with respect to their civilian employers.\(^4\) It ensures a reservist fair treatment by providing that an employee "shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces."\(^5\)

However, no member who has served on active duty for one year or longer shall be required to perform a period of active duty for training if the first day of such period falls during the last one hundred and twenty days of his required membership in the Ready Reserve.


4. See, e.g., id. at § 2021(b)(3), which protects an employee-reservist from denial of hiring, retained employment, and promotion or job discrimination because of his reservist obligations. This section was enacted "to prevent reservists and National Guardsmen not on active duty who must attend weekly drills or summer training from being discriminated against in employment because of their Reserve membership." S. REP. NO. 1477, 90th Cong., 2d Sess. 1-2 (1968); see also 38 U.S.C. § 2022 (1988). This enforcement section of the Veterans' Reemployment Rights Act (VRRA) confers jurisdiction on the United States district courts, establishes preference on the court calendar for cases arising under the VRRA, and provides the United States Attorney or "comparable official" as counsel for persons protected by the Act. Remedies for employer violation of the VRRA include reinstatement, back pay, and damages. See, e.g., Dyer v. Hinky Dinky, Inc., 710 F.2d 1348 (8th Cir. 1983) (entitling employee-reservist to restitution damages as a result of employer's failure to reinstate a veteran); Micalone v. Long Island R.R. Co., 582 F. Supp. 973 (S.D.N.Y. 1983) (employee-reservist entitled to vacation pay, pension credits, and retirement fund payments from former employer who did not reinstate him after his tour of duty).

5. 38 U.S.C. § 2021(b)(3). The courts support the purpose of the VRRA. See Monroe v. Standard Oil Co., 452 U.S. 549, 556-57 (1981) (explaining that the statute was enacted for the purpose of protecting employee-reservists against discriminations, like discharge and demotion, motivated by their reserve status); Accardi v. Pennsylvania R.R. Co., 383 U.S. 225, 228 (1966) (referring to the former reemployment provisions now codified at 38 U.S.C. § 2021(b)(3), "persons called to serve their country in the armed forces should, upon returning to work in civilian life, resume their old employment without any loss because of their service to their country"); Dyer, 710 F.2d at 1350 (explaining how the VRRA ensures that no veteran is penalized because of absence from his civilian job); Jackson v. Beech Aircraft Corp., 517 F.2d 1322 (10th Cir. 1975) (same); Austin v. Sears, Roebuck & Co., 504 F.2d 1033 (9th Cir. 1974) (holding that purpose of § 2021(b)(3) is to preserve for the veteran returning to employment those employment benefits he was likely to have obtained if his employment was not interrupted by his service in the Armed Forces); Fann v. Modlin, 687 F. Supp. 218, 219 (E.D.N.C. 1988) (holding that the purpose of the VRRA is "to insure that a veteran or reservist who is forced to be absent from his (or her) civilian employment by reason of military leave will not be penalized upon his return").
The VRRA distinguishes between a reservist’s or National Guard member’s right to leave and subsequent reemployment for initial active duty training, active and inactive duty training, and active military duty. This Note addresses reservists’ or National Guard members’ right to leave when ordered to, or volunteering for, active or inactive military training duty and subsequent reemployment.

Circuit courts are split over whether an employee-reservist has an unconditional right to training leave or whether the request for leave must be reasonable. The Fourth Circuit has held that a reservist’s request for military leave must be unconditionally granted. The Third, Fifth, and Eleventh Circuits apply a reasonableness standard in deciding if an employer rightfully denied a reservist’s request for military leave. This lack of uniformity among the circuits results in unequal treatment of employee-reservists requesting training leave. Further, employee-reservists prevented from par-

6. 38 U.S.C. § 2024(c) (allowing a reservist called to initial active training duty leave from employment and reinstatement, upon application, within 31 days after release from such training). See, e.g., Green v. Oktibbeha County Hosp., 526 F. Supp. 49, 51 (N.D. Miss. 1981) (holding that employer violated § 2024(c) when it did not reemploy an employee-reservist returning from initial training).

7. 38 U.S.C. § 2024(d) in its pertinent part provides:
   Any [military reservist] . . . shall upon request be granted a leave of absence by such person’s employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee’s release from a period of such active duty for training or inactive duty training, or upon such employee’s discharge from hospitalization incident to that training, such employee shall be permitted to return to such employee’s position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes.

8. 38 U.S.C. § 2024(a), (b)(1). These sections provide a reservist called to active duty civilian reemployment rights if the period of military service does not exceed four years. To qualify for this right, the reservist’s release from service must be under honorable conditions. These sections parallel the reemployment rights afforded inductees into military service. See 38 U.S.C. § 2021(a)(1), (a)(2)(A), (a)(2)(B).

9. 38 U.S.C. § 2024(d) addresses a reservist-employee’s right to this kind of training leave and subsequent reemployment. See supra note 7.


11. See Kolkhorst, 897 F.2d at 1286.

12. See Eidukonis, 873 F.2d at 695-96; Ingram, 811 F.2d at 1468-69; Lee, 634 F.2d at 889. None of these circuits, however, have agreed on what standard of reasonableness to apply. See infra notes 145-56 and accompanying text.

13. Pursuant to Kolkhorst, employee-reservists living within the Fourth Circuit’s jurisdiction, upon notifying their employer as required by 38 U.S.C. § 2024(b), are ensured military training leave without fear of placing their civilian employment in jeopardy. See Kolkhorst,
participating in required training because of a civilian job conflict may lose their reserve status.\(^{14}\)

In *Kolkhorst v. Tilghman*,\(^ {15}\) the United States Court of Appeals for the Fourth Circuit confronted whether or not an employer must unconditionally grant an employee-reservist's request for military training leave.\(^ {16}\) Rejecting the view held by the Third, Fifth, and Eleventh Circuits, that an employee-reservist is only entitled to training leave if his request is reasonable,\(^ {17}\) the Fourth Circuit announced that "reasonableness is [not] required under Section 2024(d)" of the VRRA.\(^ {18}\)

The *Kolkhorst* case arose when the Baltimore City, Maryland, Police Department denied Kolkhorst, an employee, permission to attend a two-week military training exercise.\(^ {19}\) Subsequent to this denial, Kolkhorst was forced to resign from his reserve unit and filed suit against the police department claiming that the department violated his rights under the VRRA.\(^ {20}\) The United States District Court for the District of Maryland, employing a reasonableness standard, held for Kolkhorst and ordered the police department to allow Kolkhorst to rejoin his reserve unit. The district court's decision

\(^{14}\) See Dep't of Army Reg. No. 135-91, Army National Guard and Army Reserve, Service Obligations, Methods of Fulfillment, Participation Requirements and Enforcement Procedures (Feb. 1, 1985). Employment conflicts and loss of income are ordinarily not regarded valid reasons for missing training sessions. When a reservist continually is unable to complete training, his unit commander refers the case to the approval authority for a determination of whether to retain or remove the reservist from the unit. But see Dep't of Army Reg. No. 140-1, Army Reserve-Mission, Organization and Training (Feb. 1, 1985). Genuine employment conflicts with military training, as opposed to mere inconvenience for the reservist, justify authorization for rescheduling.

\(^{15}\) 897 F.2d at 1282 (4th Cir. 1990).

\(^{16}\) Id. at 1285-86.

\(^{17}\) The Third, Fifth, and Eleventh Circuits do not agree on what reasonableness standard to impose on employee-reservists requesting leave. See infra notes 145-57 and accompanying text. After considering each circuit's interpretation of the reasonableness standard, the Fourth Circuit rejected this standard and held that an employee-reservist has an unconditional right to military leave and subsequent reemployment.

\(^{18}\) *Kolkhorst*, 897 F.2d at 1286.

\(^{19}\) Id. at 1284. This was Kolkhorst's annual reservist training. Such training is necessary for a reservist to maintain an active military reserve status. Id. at 1283.

\(^{20}\) Id. at 1284. Kolkhorst sought "declaratory and monetary relief" from the department, requesting that the department allow him to regain his active military reserve status. Id.
was affirmed by the United States Court of Appeals for the Fourth Circuit.\textsuperscript{21} After considering the other circuit courts’ interpretation of the VRRA, the Fourth Circuit refused to construe the statute as imposing any reasonableness standard upon an employee-reservist’s request for military training leave, and instead held that an employee-reservist has an unconditional right to military leave and subsequent reemployment.\textsuperscript{22}

This Note first examines the evolution of the legislation protecting the employment rights of individuals who leave their jobs to serve in the United States’s military, and discusses the congressional intent in enacting reemployment rights statutes. This Note then considers the administrative guidelines promulgated by the Department of Labor to implement the VRRA.\textsuperscript{23} This Note next contrasts the alternate reasonableness standards utilized by the Third, Fifth, and Eleventh Circuits in determining if an employee’s request for military leave should be granted under the VRRA. Finally, this Note presents the Fourth Circuit’s interpretation of the VRRA in \textit{Kolkhorst v. Tilghman}\textsuperscript{24} and concludes that the Fourth Circuit correctly interpreted the VRRA when it held that an employee-reservist has an unconditional right to military leave for the purpose of active or inactive duty training, and to subsequent reemployment.

\section{I. The Veterans’ Reemployment Rights Act}

\subsection{A. The Evolution of Reemployment Rights Legislation}

The Selective Training and Service Act of 1940 (STSA) first established veterans’s reemployment rights.\textsuperscript{25} During hearings on the legislation, Sena-

\textsuperscript{21} Id. The court also awarded Kolkhorst monetary damages for income and benefits lost when he was unable to participate in reserve training. \textit{Id.} at 1288.

\textsuperscript{22} Id. at 1286.

\textsuperscript{23} See generally \textsc{Handbook, supra} note 2.

\textsuperscript{24} 897 F.2d 1282 (4th Cir. 1990).

\textsuperscript{25} Selective Training and Service Act of 1940, Pub. L. No. 783, § 8, 54 Stat. 885, 890 (1940) (formerly codified at 50 U.S.C. app. § 308). The statute provided in part:

\begin{quote}
(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within forty days after he is relieved from such training and service . . . .

c) Any person who is restored to a position . . . shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.
\end{quote}
tor Elbert D. Thomas of Utah articulated the premise underlying Congress's decision to grant reemployment rights to veterans. He explained that because an individual was obligated to serve in the Armed Forces, Congress could reasonably require his employer to rehire him when his military obligation was over. This requirement was reasonable because these individuals were defending the lives, property, and freedom of all Americans, including their employers. The United States Supreme Court, in its first decision interpreting the STSA, echoed Senator Thomas' attitude when the Court held that an employer should not penalize a veteran who served in the Armed Forces when the veteran returned to his civilian job after an absence for military duty.

The STSA was re-enacted as the Selective Service Act of 1948 (SSA) without substantive changes to veterans's reemployment rights. In 1951, however, the SSA was amended and renamed the Universal Military Training and Service Act (UMT). The UMT marked the beginning of reemployment rights of veterans in peacetime. It provided civilian reemployment

26. The Veterans' Reemployment Rights Handbook quotes Senator Thomas as explaining:

If it is constitutional to require a man to serve in the Armed Forces, [sic] it is not unreasonable to require the employers of such men to rehire them upon the completion of their service, since the lives and property of the employers as well as everyone else in the United States are defended by such service.

HANDBOOK, supra note 2, at 1-2 (quoting remarks of Sen. Thomas, 123 CONG. REC. 10,573 (1940)).

27. Id.

28. Id.

29. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 284 (1946) (holding that an employee-veteran will be reinstated, with seniority for years of military service, to his civilian position after discharge from military service as provided by the reemployment statute; however, the statute did not guarantee a right to work if the position was eliminated).

30. Selective Service Act of 1948, Pub. L. No. 759, 62 Stat. 604 (1948). Passed after the end of World War II, the SSA was enacted to continue the requirement of mandatory service in the military.


32. 65 Stat. at 86-87. The UMT declared that an employee:

shall be granted a leave of absence by his employer for the purpose of being inducted into, entering, determining his physical fitness to enter, or performing training duty in the Armed Forces of the United States. Upon his release from training duty or upon his rejection, such employee shall, if he makes application for reinstatement within thirty days following his release, be reinstated in his position without reduction in his seniority, status, or pay except as such reduction may be made for all employees similarly situated.

Id.
protection to reservists who performed active or training duty. The UMT was amended and broadened by extending reemployment rights to National Guardsmen in 1952, and providing job protection to reservists who enlisted in a reserve component and performed initial active duty for training in 1955.

In 1967, the UMT was renamed the Military Selective Service Act of 1967 (MSSA), but the UMT reemployment provisions were not changed. The MSSA was amended in 1968 to give protection to reservists and National Guardsmen against discrimination after their reemployment because of their military obligations. Finally, in 1974, Congress enacted the Vietnam Era Veterans' Readjustment Assistance Act, thereby repealing the MSSA, and amending and recodifying its provisions. Although Congress has amended, broadened, and recodified the original STSA several times over the past fifty years, the objective of the law continues unchanged: "employees with reserve obligations... [must] not be denied retention in [civilian] employment or other incident or advantage of employment because of such Reserve status."

33. Id.
34. See Armed Forces Reserve Act of 1952, Pub. L. No. 476, 66 Stat. 481 (1952). The act created the following reserve components:
(a) The National Guard of the United States;
(b) The Army Reserve;
(c) The Naval Reserve;
(d) The Marine Corps Reserve;
(e) The Air National Guard of the United States;
(f) The Air Force Reserve; and
(g) The Coast Guard Reserve. 66 Stat. at 483. In addition, each component was divided into a Ready Reserve, a Standby Reserve, and a Retired Reserve. Id.
35. The Reserve Forces Act of 1955, Pub. L. No. 305, § 262(f), 69 Stat. 598, 602 (1955). This act was later deleted by Congress and the protection afforded reservists in this act was included, by amendment, to the UMT in 1960. The amendment also equalized reserve and National Guard reemployment rights and extended protection to reservists for duty training beyond the initial training period. Pub. L. No. 86-632, § 4, 74 Stat. 467 (1960).
37. Pub. L. No. 90-491, § 1(B), 82 Stat. 790 (1968). The Military Selective Service Act of 1967 (MSSA) stated, "[a reservist]... shall not be denied retention in employment or any promotion or incident of employment because of any obligation as a member of a reserve component of the Armed Forces of the United States." Id.
39. Steven Fox, An Employer's Guide to the Veterans Re-employment Act, 14 EMPLOYEE REL. L.J. 55, 56 (1988). For example, the VRRA extended reemployment rights to employees of the states. Id.
B. The Applicable Provisions of the VRRA

Two sections of the VRRA are significant in determining the right of an employee-reservist to take military training leave. Section 2021(b)(3) protects the reservist from employment discrimination because of his reserve status. The Senate Report on the draft of § 2021(b)(3) indicated that the purpose of the section was to protect employee-reservists, who are required to attend drills and weekend and summer training, from employer discrimination in their civilian jobs because of their reserve duties. The report found that discrimination against employee-reservists increased in years prior to the legislation. The language of § 2021(b)(3) was intended to protect reservists or members of the National Guard from these discriminatory practices. The House Report regarding this legislation indicates a similar intent.

The United States Supreme Court considered § 2021(b)(3) and its legislative history in Monroe v. Standard Oil Co. In Monroe, an employee-reservist contended that § 2021(b)(3) required his employer to establish a work schedule that would accommodate his military training obligations. The Supreme Court rejected this argument. The Court held that Congress intended § 2021(b)(3) to protect employee-reservists from employer discrimination such as discharge or denial of promotion based on the reserve status of the employee. In the Court's view, Congress's goal in enacting

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41. 38 U.S.C. § 2021(b)(3) (1988) ("Any [employee with reserve obligations] . . . shall not be denied . . . retention in employment, or any . . . other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.").
43. Id. For example, some employee-reservists were denied promotions and others were discharged by their civilian employers because of their attendance at various reserve training activities. Id.
44. Id.; see also supra note 42.
45. H.R. REP. No. 1303, 90th Cong., 2d Sess. 3 (1968). "[This section] amplifies existing law to make clear that reservists not on active duty, who have a remaining Reserve obligation, whether acquired voluntarily or involuntarily, will nonetheless not be discriminated against by their employers [sic] solely [sic] because of such Reserve affiliation." Id.
47. Id. at 551. Monroe was a rotational shift employee at a Standard Oil refinery. His work schedule often conflicted with his weekend reserve duties. Monroe was permitted to exchange work days with other employees. When he could not find anyone with whom to exchange, however, the company refused to change his schedule. Although he was allowed military leave, Monroe was considered on unpaid leave of absence. When this happened, Monroe worked and was paid less than for a customary 40-hour week. Id. at 551-52.
48. Id. at 554-60.
49. Id. at 559-60.

[Section] 2021(b)(3) was enacted for the significant but limited purpose of protecting the employee-reservist against discriminations like discharge and demotion, moti-
§ 2021(b)(3) was to place employee-reservists on an equal par to employees without military status.50 Thus, § 2021(b)(3) manifests a strong congresional policy against disadvantaging employees because of their service in the military reserves or National Guard.

Section 2024(d) requires a reservist or National Guard member to request a military leave from civilian employment when active duty for training or drills conflicts with civilian work.51 The statute provides that such leave "shall upon request be granted."52 In Monroe, the Supreme Court explained that § 2024(d) granted employees a leave of absence to fulfill military training duty and, upon their return, restored them to the same status they would have enjoyed had they continued their employment without interruption.53

The scant legislative history of § 2024(d) does not indicate that an employee-reservist’s request for leave is subjected to a reasonableness standard.54 The majority of the section’s legislative history addresses the length of leave from civilian employment to which a reservist is entitled.55 In

50. Id. The Court explained that the administrative spokesman for § 2021(b)(3), Hugh W. Bradley, "made it abundantly clear that the purpose of the legislation was to protect employee reservists from discharge, denial of promotional opportunities, or other comparable adverse treatment solely by reason of their military obligations; there was never any suggestion of employer responsibility to provide preferential treatment." Id. at 562.

51. 38 U.S.C. § 2024(d) provides:

Any [military reservist] ... shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, or upon such employee's discharge from hospitalization incident to that training, such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes.

52. Id. (emphasis added).

53. "This section [2024(d)] provides that employees must be granted a leave of absence for training and, upon their return, be restored to their position 'with such seniority, status, pay, and vacation' as they would have had if they had not been absent for training." Monroe, 452 U.S. at 555 (emphasis added).


55. See infra notes 56-67 and accompanying text.
Monroe, the Supreme Court indicated that § 2024(d) applied to employee-reservists whose military training obligations lasted less than three months.\textsuperscript{56} The United States District Court for the Northern District of California, in Anthony v. Basic American Foods, Inc.,\textsuperscript{57} rejected this three-month limitation discussed by the Supreme Court in Monroe.\textsuperscript{58} In Anthony, the district court termed the Supreme Court's interpretation of § 2024(d) dicta and concluded that the rights granted to employee-reservists by the section did not cease if the training obligation lasted more than three months.\textsuperscript{59} In reaching its conclusion, the district court looked to congressional action after Monroe regarding the length of a reservist's leave from civilian employment.\textsuperscript{60} That congressional action was prompted by the United States Department of Labor's (DOL) 1982 policy reversal that § 2024(d) entitled a reservist to military leave for an unrestricted length of time.\textsuperscript{61} The new DOL policy was that § 2024(d) applied to reservists who only had up to three months of training duty within a three year period.\textsuperscript{62} In response to the DOL policy change, legislation was proposed in the House of Representatives that would have amended § 2024(d) to reflect this new policy. The Senate never acted on this proposed legislation.\textsuperscript{63} Congress, however, addressed the ninety-day limit in a report on the Veterans' Compensation Education and Employment Amendments of 1982. The report noted that these amendments did not incorporate the House of Representatives's proposed legislation regarding the

\textsuperscript{56} Monroe, 452 U.S. at 555. The Supreme Court appears to have arrived at the conclusion that § 2024(d) applied to leaves of less than three months by comparing the language of § 2024(d) with the language of the Reserve Forces Act of 1955. The Reserve Forces Act extended reemployment rights to reservists returning to civilian employment after more than three months service. \textit{Id.} The Court cites no legislative history for this interpretation. \textit{See also supra} note 35 and accompanying text.

\textsuperscript{57} 600 F. Supp. 352, 352-55 (N.D. Cal. 1984).

\textsuperscript{58} \textit{Id.} In Anthony the plaintiff was denied reemployment after taking a four and one-half month leave for active duty training. The defendant refused to reinstate the employee, claiming that § 2024(d) did not protect the employee's leave because it was for longer than three months and because the leave request was unreasonable. \textit{Id.} at 356. Subsequent to his request for reemployment, the plaintiff brought action in district court alleging that the employer's refusal to rehire him violated the VRRA. \textit{Id.} at 353

\textsuperscript{59} \textit{Id.} at 354. The Anthony court considered the Supreme Court's discussion of § 2024(d) dicta, because in Monroe the Supreme Court was interpreting § 2021(b)(3) of the VRRA and the issue of whether an employee-reservist who took a two-week leave was to receive preferential treatment. \textit{Id.} The Anthony court found that the Monroe Court discussed § 2024(d) only as a comparison to § 2021(b)(3). \textit{See Monroe}, 452 U.S. at 559-60.

\textsuperscript{60} \textit{See Anthony}, 600 F. Supp. at 354.

\textsuperscript{61} \textit{Id.}

\textsuperscript{62} \textit{Id.}

\textsuperscript{63} \textit{Id.}
length of leave to which an employee-reservist is entitled. The report acknowledged the Compromise Committee’s rejection of the DOL time limit imposed on § 2024(d) and requested abandonment of the limit.

The *Anthony* court concluded that although Congress considered the DOL’s policy change, by leaving § 2024(d) unchanged Congress “amplified the meaning of [the] statutory phrase that remained unchanged.” The court concluded that § 2024(d) placed no restrictions on the length of leave to which a reservist is entitled. This conclusion is sound. Although Congress has amended the VRRA several times, it has not amended § 2024(d), nor has Congress addressed the issue of any reasonableness standard imposed on a reservist’s request. First, it is established that “re-employment rights statutes are ‘to be liberally construed for the benefit of those who . . . serve their country.’” Second, the language of the VRRA is unambiguous. Section 2024(d) states that an employee “shall upon request

65. *Id.* The report explained:
The Committees note that this compromise agreement does not address the reemployment rights issues posed by H.R. 6788, which the House passed on September 14, 1982, to amend title 38 to clarify the period for which an employer must grant a leave of absence, in order to allow an employee to perform required active duty for training, to an employee who is a member of the National Guard or Reserve. Nevertheless, the Committees do not believe that the 90-day limit that the Labor Department has imposed on that period, based on the Solicitor of Labor’s October 8, 1981, interpretation of section 2024 of title 38, is well-founded either as legislative interpretation or application of the pertinent case law. Accordingly, the Committees urge the [Assistant Secretary of Labor for Veterans’ Employment], upon assuming the responsibility for the reemployment rights program provided in the compromise agreement, to review the situation and take appropriate action to eliminate this arbitrary limitation.

67. *Id.* at 354; see also *Cronin v. Police Dep’t*, 675 F. Supp. 847, 850-52 (S.D.N.Y. 1987) (adopter the rationale used in *Anthony*). A recent Supreme Court decision affirmed the holding of the district court in *Anthony*. See *King v. St. Vincent’s Hosp.*, 112 S. Ct. 570 (1991). In *King* the Supreme Court considered the issue of whether § 2024(d) imposed a time limit on the length of duty or training leave to which an employee-reservist is entitled. *Id.* at 570. The Eleventh Circuit, when it considered employee-reservist King’s request for a three-year tour of duty leave, held that an employee-reservist’s request for a three-year military leave is per se unreasonable. *St. Vincent’s Hosp. v. King*, 901 F.2d 1068, 1072 (11th Cir. 1990), *rev’d*, 112 S. Ct. 570 (1991). A unanimous Supreme Court, with newly appointed Justice Thomas taking no part in the consideration or decision of the case, reversed the Eleventh Circuit. *King*, 112 S. Ct. at 575. The Court held that § 2024(d) does not impose a time limit on the length of an employee-reservist’s training or duty leave. *Id.*
68. See *supra* notes 30-40 and accompanying text.
be granted a leave of absence."\textsuperscript{70} If a statute has a plain, unambiguous meaning, then courts should not distort that meaning by adding words when interpreting the statute.\textsuperscript{71} The plain meaning of § 2024(d) unconditionally grants employee-reservists leave for active or inactive duty training.\textsuperscript{72}

In interpreting § 2024(d), however, some courts have eschewed the literal meaning of the section, explaining that a court cannot construe a statute in a way that leads to an unjust or unfair result.\textsuperscript{73} Courts adopting this rationale have imposed a reasonableness standard on § 2024(d) to prevent employee-reservists from playing "fast and loose" with their leave requests.\textsuperscript{74} These contrasting approaches to statutory construction have yielded a conflict among the circuits applying § 2024(d). If the plain meaning of the statute is applied, then an employee-reservist has an unconditional right to military leave. If not, then a reasonableness standard must be imposed to prevent potential reservist misuse of military leave.

\textsuperscript{70} 38 U.S.C. § 2024(d) (emphasis added).
\textsuperscript{71} In Christner v. Poudre Valley Coop. Ass'n, 235 F.2d 946, 950 (10th Cir. 1956), the court, in using the plain meaning of a reemployment section of the Military Training and Service Act to determine jurisdiction, stated:

Courts should confine themselves to the construction of a statute as it is written and not attempt to supply omissions or otherwise amend or change the law under the guise of construction.

The fundamental rule of construction is that the court shall ascertain and give effect to the intention of the legislature, as expressed in the statute.

An unambiguous statute should be given effect according to its plain and obvious meaning.

\textit{Id.} (footnotes omitted); accord Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.") (quoting United States v. American Trucking Ass'ns, Inc., 310 U.S. 534, 543 (1940)).

\textsuperscript{72} 38 U.S.C. § 2024(d).

[\textit{I}]t has long been a maxim of statutory construction that "[g]eneral terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character."] Were we to read § 2024(d) as creating an absolute right of reinstatement, reservists would be allowed to play fast and loose with the system in a way that Congress could not have intended.

\textit{Id.} at 699 (Becker, J., dissenting) (quoting Government of Virgin Islands v. Berry, 604 F.2d 221, 225 (3d Cir. 1979) (quoting United States v. Kirby, 74 U.S. (? Wall.) 482, 486-87 (1868)) (citations omitted); \textit{see also} Church of The Holy Trinity v. United States, 143 U.S. 457, 459 (1892) (explaining that where literal construction of a statute leads to "absurd results", the literal construction must be avoided).

\textsuperscript{74} See, e.g., \textit{Eidukonis}, 873 F.2d at 688 (arguing that an employee's request for military reservist training leave must meet a reasonableness standard); Gulf States Paper Corp. v. Ingram, 811 F.2d 1464 (11th Cir. 1987) (same); Lee v. City of Pensacola, 634 F.2d 886 (5th Cir. 1981) (same).
C. Administrative Guidelines

The DOL is charged with the responsibility of providing assistance to reservists under the VRRA.\(^7\) The DOL's Veterans' Employment and Training Service has published the Veteran's Reemployment Rights Handbook (the Handbook)\(^7\) as a guideline for employers of employee-reservists and for those employees with military obligations.\(^7\) The Handbook, first published in 1970, is periodically revised to reflect amendments to the VRRA.\(^7\) The Handbook is also intended to offer guidance to courts interpreting the VRRA.\(^7\) Therefore, the DOL's application of § 2024(d) is helpful in resolving this conflict in its interpretation.\(^8\)

According to the Handbook, an employee-reservist is protected by § 2024(d) regardless of how long, how often, or how many training sessions are undertaken.\(^8\) If a reservist receives orders to report for training other than initial training, he is protected by § 2024(d).\(^8\) The Handbook explains that an employee who receives orders for reservist training duty "must simply notify the employer of the expected time of the training obligation and advise him that he will not be available to work at that time because of the training obligation. The employer must grant the requested leave and cannot impose any nonstatutory restrictions on the leave."\(^8\)

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75. See 38 U.S.C. § 2025 (1988). This section provides:

The Secretary of Labor, through the Office of Veterans' Reemployment Rights, shall render aid in the replacement in their former positions or reemployment of persons who have satisfactorily completed any period of active duty in the Armed Forces or the Public Health Service. In rendering such aid, the Secretary shall use existing Federal and State agencies engaged in similar or related activities and shall utilize the assistance of volunteers.

76. See supra note 2.

77. HANDBOOK, supra note 2, at i.

78. Id.


80. HANDBOOK, supra note 2, at 18-1 to -12. This chapter outlines the DOL's view that an employer must grant an employee-reservist's request for military training leave. Id. at 18-2. It explains what responsibilities an employee-reservist has in requesting and taking leave, and his responsibilities in returning to his civilian employment. Id. at 18-6.

81. Id. at 18-2.

82. Id.

83. Id. (emphasis added). The Handbook contains hypotheticals for employers to follow when applying the VRRA to employee-reservists who request military leave. Id. at 18-7. In Monroe, the Supreme Court considered the Handbook's examples to interpret § 2021(b)(3) of the VRRA. See Monroe, 452 U.S. at 563 n.14. One example explains that a reservist has a right to training duty leave regardless of the fact that he volunteered for training duty. HANDBOOK, supra note 2, at 18-7. Further, an employee does not have to provide repeat notice each time he goes on leave if, for example, he drills regularly on the "third weekend of the month." Id. As the hypotheticals indicate, the plain meaning of § 2024(d) does not attach a reasonableness standard to this section.
II. THE REASONABLENESS STANDARD

A. The Development of the Reasonableness Standard:

Lee v. City of Pensacola

In *Lee v. City of Pensacola*, the United States Court of Appeals for the Fifth Circuit was the first court to use a "'reasonableness' gloss" in interpreting § 2024(d). Lee was a Pensacola police officer and a member of the Florida National Guard. Lee's employer granted him military leave pursuant to § 2024(d). While on leave, Lee discovered that he was enrolled in one of "six phases" of a training program. He applied for and received an extended order from the National Guard to complete the other phases of this training. Shortly before Lee's original leave was scheduled to end, he requested an extension of his leave of absence from the police force to complete the training program. The city of Pensacola informed him that he had to resign within nine days after the expiration of his original leave or the department would begin termination proceedings against him. Lee remained on training duty and asked the city to reconsider his request for extended leave. In response to the renewed request, the city suspended Lee from the police force and, after a hearing, terminated him.

Lee, upon completion of his seven-month National Guard training, sought reinstatement on the police force. The request was denied, and Lee sued the city under § 2024(d) of the VRRA. Concluding that § 2024(d) was not intended to give an employee-reservist unreasonable powers over his employer or place an undue burden on his employer, the district court imposed

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84. 634 F.2d 886 (5th Cir. 1981).
85. Gulf States Paper Corp. v. Ingram, 811 F.2d 1464, 1468 (11th Cir. 1987). The Eleventh Circuit used the term "reasonableness gloss" to describe the Fifth Circuit's interpretation of § 2024(d) of the VRRA.
86. *Lee*, 634 F.2d at 887.
87. *Id.* at 888.
88. *Id.* The program Lee requested leave for was the "Transportation Officer Advance Course for the National Guard." *Id.* at 887. The course consisted of six separate training phases. *Id.* at 888. A reservist who completed the entire course was guaranteed continuation in the National Guard or promotion to the rank of Major when a vacancy occurred. *Id.* at 887.
89. *Id.* Lee sought legal advice from the military before he applied to extend his training. He was told that his reemployment was guaranteed by the VRRA. *Id.*
90. *Id.* at 888.
91. *Id.* Lee's civilian employment was jeopardized because he remained in training.
92. *Id.* The Civil Service Board for the city of Pensacola held a hearing. The Board's dismissal was effective the date Lee should have returned from his original leave. *Id.*
93. *Id.* at 887-88.
a reasonableness standard on the employee-reservist's request. In denying Lee's reinstatement, the court considered the length of the military training obligation and the burden imposed on the employer if the leave were granted. The court concluded the request was unreasonable.

Adopting the district court's reasonableness standard, and finding Lee's request for extended leave unreasonable, the Fifth Circuit affirmed. The court considered Lee's attempt to extend his leave without first communicating with his civilian employer about the possibility of an extension unreasonable. Lee's actions were also deemed unreasonable because he could have completed the training in later years or through correspondence courses, rather than all at once. Finally, the court found that Lee's absence imposed a significant burden on the police department. The court concluded that Lee's conduct fell short of the reasonableness standard formulated by the

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95. Id. at 2328. In making this determination, the trial court mentioned "cases cited by defendants" as precedent for its decision, but failed to refer directly to any case other than Peel v. Florida Dept of Transp., 443 F. Supp. 451 (N.D. Fla. 1977), aff'd, 600 F.2d 1070 (5th Cir. 1979). Lee, 106 L.R.R.M. (BNA) at 2328. Peel was an employee of the Florida Department of Transportation (Florida DOT) and a member of the National Guard. Peel, 443 F. Supp. at 453. Upon receiving orders to report for "Full Time Training Duty" from the National Guard, Peel requested and was denied an extended leave of absence. Id. Despite the denial, Peel reported to the military and was subsequently fired from the Florida DOT. Id. Peel sued in district court. The court granted summary judgment for Peel and ordered his reinstatement "with such seniority, status, and salary as if plaintiff had not been absent." Id. at 455. The Peel court considered the legislative history of § 2024(d) briefly. It concluded that this section was intended for training periods of up to ninety days. Id. Thus, the basis for the court's imposition of a reasonableness standard is unclear.

96. Lee, 106 L.R.R.M. (BNA) at 2328. The court found Lee's request unreasonable, because Lee knew that there was a possibility of an extension for weeks before actually requesting extended leave, and he did not communicate this. Further, Lee did not inform his civilian employer that he could have taken the other phases of the training at a later date. Lastly, after the city denied Lee's leave request, he did not discuss alternatives with his employer. Rather, he just continued his absence from his civilian job. Id.

97. Lee, 634 F.2d at 888-90; see also Ellermets v. Dep't of the Army, 916 F.2d 702 (Fed. Cir. 1990) (accepting, without explanation, the Merit Systems Protection Board's application of the Lee standard of reasonableness test when it denied a civilian reservist-engineer of the United States Corps of Engineers military training leave). In addition, two district courts have adopted the Lee standard of reasonableness. See Anthony v. Basic Am. Foods, Inc., 600 F. Supp. 352, 355 (N.D. Cal. 1984) (holding that "plaintiff's leave request should be evaluated according to whether it was reasonable both in light of 1) the circumstances giving rise to the request and 2) the requirements of the employer"); Bottger v. Doss Aeronautical Servs., Inc., 609 F. Supp. 583, 586 (M.D. Ala. 1985) (same).

98. Lee, 634 F.2d at 889. The court suggested that Lee should have communicated with his civilian employers while he was awaiting the military's decision whether to extend his leave. Id. In addition, the court found Lee's actions unreasonable when he chose not to discuss his decision to continue his military leave without considering the hardship his absence imposed upon his civilian employers. Id.
district court.\textsuperscript{99} Thus, \textit{Lee} marks the beginning of the imposition of the reasonableness standard on § 2024(d) of the VRRA.

\textbf{B. Refining the Reasonableness Standard}

The Eleventh Circuit was the next appellate court to interpret § 2024(d) of the VRRA in \textit{Gulf States Paper Corp. v. Ingram}.\textsuperscript{100} Eloise Ingram, an Army reservist for eleven years, requested leave to participate in a one-year licensed practical nurse training program.\textsuperscript{101} After volunteering for the program, Ingram notified her employer that her active duty training would begin in four months.\textsuperscript{102} Gulf States denied her request and filed suit for declaratory judgment regarding Ingram's right to reinstatement under the VRRA.\textsuperscript{103} The district court, applying the \textit{Lee} reasonableness test, held Gulf States did not violate the VRRA by denying Ingram's request.\textsuperscript{104}

The Eleventh Circuit formulated a modified reasonableness standard based on the Fifth Circuit decision in \textit{Lee}.\textsuperscript{105} First, the court recognized that it is best for Congress, rather than the courts, to compare the benefits to reservists with the burden placed on employers and to legislate accordingly. Further, recognizing that the VRRA must be liberally construed in favor of reservists, the court determined that the reasonableness standard “must be limited and extremely deferential to the reservist’s rights.”\textsuperscript{106} By acknowledging that it is Congress’s prerogative to impose restrictions on a reservist’s request, and then restating that the courts must interpret reemployment

\begin{itemize}
\item \textsuperscript{99} \textit{Id.} at 890.
\item \textsuperscript{100} 811 F.2d 1464 (11th Cir. 1987).
\item \textsuperscript{101} \textit{Id.} at 1466. The Army Reserve established the training program and recruited reservists to participate in the program because of a shortage of LPNs in the reserves. \textit{Id.}
\item \textsuperscript{102} \textit{Id.}
\item \textsuperscript{103} \textit{Id.} Gulf States contended that Ingram’s leave request was unreasonable because it was for a duration of twelve months, she had volunteered for the military training, the training was not related to her civilian job, and her absence created undue financial burden on Gulf States. \textit{Id.}
\item \textsuperscript{104} \textit{Gulf States Paper Corp. v. Ingram}, 633 F. Supp. 908, 911-12 (N.D. Ala. 1986), rev’d, 811 F.2d 1464 (11th Cir. 1987). The district court was bound by the precedent of the United States Court of Appeals for the Fifth Circuit. \textit{See infra} note 105 and accompanying text.
\item \textsuperscript{105} The United States Court of Appeals for the Eleventh Circuit was “established October 1, 1981 pursuant to the Fifth Circuit Court of Appeals Reorganization Act of 1980, P.L. 96-452, 94 Stat. 1995 . . . .” \textit{Bonner v. City of Prichard}, 661 F.2d 1206, 1207 (11th Cir. 1981). In this first case heard by the newly formed circuit, the court, en banc, adopted pre-1981 Fifth Circuit cases as precedent for the Eleventh Circuit. \textit{Id.} at 1209.
\item \textsuperscript{106} \textit{Gulf States Paper Corp.}, 811 F.2d at 1469 (\textit{quoting} \textit{Monroe v. Standard Oil Co.}, 452 U.S. 549, 565 (1981)).
\end{itemize}
rights statutes favorably for the reservist, the Eleventh Circuit modified the
Lee reasonableness test.107

The court identified three factors as the foundation of its new reasonableness
test: the length of the requested leave, the reservist’s actions in arranging
for duty and requesting leave, and the burden on the employer in finding
a replacement for the reservist during his leave.108 The court began with a
presumption that the reservist’s leave request is reasonable.109 The court
then placed the burden on the employer to rebut the presumption.110 Applying
its test to Ingram’s request, the court found Ingram’s request reasonable
because, although it burdened her employer, Ingram’s conduct was not
“questionable” as was Lee’s when he took additional leave.111 Accordingly,
the Gulf States court reversed the lower court and held that Gulf State viol-
ated § 2024(d).112

The Eleventh Circuit modified the Fifth Circuit’s reasonableness test in
several significant respects. The Eleventh Circuit’s test establishes that the
burden on the employer alone is not sufficient to find a request for leave unreason-
able.113 The court reasoned that if it were, all requests would be
found unreasonable because of the cost borne by the employer whenever an
employee-reservist takes a leave of absence.114 The primary focus of the
Eleventh Circuit’s test, therefore, is the employee’s conduct. Absent ques-
tionable conduct of the employee, such as the conduct of the employee in
Lee, the reasonableness requirement probably is met.115 Because an em-

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107. The court explained that the Lee court’s focus on the conduct of the employee does not allow a court to focus on whether the employee-reservist volunteered for military training. The court also stated that the “statute does not authorize judges to review military personnel needs and to suggest alternative ways to meet those needs.” Id. at 1469.
108. Id.
109. Id. at 1468-69.
110. Id. The court declared that the conduct of the employee is the weightiest factor for an employer to overcome in order to rebut the presumption that the employee-reservist’s request is reasonable. Id. Therefore, if an employer could show that an employee-reservist acted unreasonably, as Lee did, then the employer could rebut the presumption. Id.
111. Id. at 1470. The court referred to the Supreme Court’s opinion in Monroe v. Standard Oil Co., 452 U.S. 549 (1981). The Monroe Court explained:
The frequent absences from work of an employee-reservist may affect productivity and cause considerable inconvenience to an employer who must find alternative means to get necessary work done. Yet Congress has provided . . . that employers may not rid themselves of such inconveniences and productivity losses by discharging or otherwise disadvantaging employee-reservists solely because of their military obligations. Id. at 565.
113. Id.
114. Id.
115. Id.
ployer's cost of replacing the reservist while the reservist is on leave is not considered, this test is considerably narrower than the Fifth Circuit's reasonableness test. Still, the Eleventh Circuit accepted the Fifth Circuit's basic premise that § 2024(d) requests are subject to a reasonableness standard.

C. Broadening the Reasonableness Test

In Eidukonis v. Southeastern Pennsylvania Transportation Authority, the Third Circuit broadened the Eleventh Circuit's narrow reasonableness test. Major Eidukonis was a member of the United States Army Reserve when hired by Southeastern Pennsylvania Transportation Authority (SEPTA). During his employment at SEPTA, Eidukonis received extended leaves of absence for military training without employer objection.

Eidukonis took his annual two-week Reserve training in August 1984. Eidukonis, on the last day of his training, requested and was granted an additional twenty-six day military leave to work on a special project. The Army ordered Eidukonis to extend his leave for an additional 140 days because the special project was not completed by the end of this additional period. On receipt of these orders, Eidukonis requested and was granted the extended leave from SEPTA three days before the end of his leave. Ten days before he was scheduled to return from the 140-day leave, Eidukonis

116. But see St. Vincent's Hosp. v. King, 901 F.2d. 1068 (11th Cir. 1990), rev'd, 112 S. Ct. 570 (1991). There the Eleventh Circuit found a request for three years of military leave per se unreasonable. "Bad faith conduct [may] be shown through requests for leaves of exceptional duration. . . . [A]lthough one year is not per se unreasonable, a greater length of time might reach that level." Id. at 1071 (quoting Gulf States Paper Corp., 811 F.2d at 1469, 1470 n.4).

However, the Supreme Court recently held that § 2024(d) does not impose a time limit on an employee-reservist's request for duty or training leave. King, 112 S. Ct. at 575; see also supra note 67.

117. 873 F.2d 688 (3d Cir. 1989).

118. Id. at 690. Eidukonis stated on his job application for his position at SEPTA that he was a member of the United States Army Reserve. A reservist must accumulate 50 points a year to maintain active status as a member of the Army Reserve. An active reservist receives 15 points for maintaining his status and the remaining 35 points by participating in annual two-week training, correspondence courses, and attending various drills. Id.

119. See id. at 690-91 ("[H]e was on military leave for 153 days in 1981, 144 days in 1982, 88 days in 1983, and 180 days from 1984 through the first two months of 1985.").

120. Id. at 691. At the time Eidukonis informed SEPTA of his annual training leave he promised not to take additional military training leave that year.

121. Id. The special project was to prepare a computerized schedule for the weapon's firing ranges at Fort Indiantown Gap.

122. Id. There was no objection from anyone at SEPTA regarding the length of Eidukonis's leave, the manner in which he requested the leave extensions, or the amount of notice he gave his employers prior to taking leave. Eidukonis, 131 L.R.R.M. (BNA) 2284, 2285 (E.D. Pa. 1988). Eidukonis's direct employer, however, stated that, at the time Eidukonis requested this leave, he did not believe he had the authority to deny an employee-reservist's request for military leave. Eidukonis, 873 F.2d at 691.
requested another twenty-six day extension to complete the special project and then an additional two weeks of leave for his annual training duty. On the basis of legal advice provided by Army counsel, Eidukonis remained on military leave and did not report to SEPTA on the specified date. Eidukonis was suspended and later discharged by SEPTA for failure to report to work.

Eidukonis sued SEPTA challenging his discharge as a violation of § 2024(d). The district court held that SEPTA violated the VRRA when it fired Eidukonis. The court concluded that Eidukonis had not acted unreasonably by taking military leave to complete the special project. SEPTA allowed Eidukonis to take similar leave previously and then, without notification, implemented a new policy and ordered him to report to work within the week, even though he was on leave.

On appeal, the Third Circuit articulated its own reasonableness test to interpret the VRRA, vacated the district court’s order, and remanded the

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123. *Id.*
124. *Id.* The change in SEPTA’s attitude toward granting or denying Eidukonis’s military training leave requests is partially explained by the fact that his direct employer had read a report of the Fifth Circuit’s decision in *Lee v. City of Pensacola*, 634 F.2d 886 (5th Cir. 1981), upholding the right of an employer to discharge an employee-reservist for taking an unauthorized training leave. *Eidukonis*, 873 F.2d at 691 & n.2. In addition, Eidukonis’s employer had informed SEPTA’s personnel department that he was in a “desperate situation” because Eidukonis was one-third of his staff, and he was short-handed when Eidukonis was on extended leave. *Id.* at 691.
125. *Id.* at 692. The military attorney advised Eidukonis that “SEPTA could not terminate his employment if he continued his military service rather than reporting to work as ordered.” *Id.*
126. *Id.*
128. *Id.*
129. *Id.* The district court rejected SEPTA’s contention that Eidukonis had acted in bad faith by not notifying his employer immediately when his leave was extended. The district court stated that its decision might be entirely different if [Eidukonis’ direct employer] had said this is it. No more military leave during inventory and budget time. No more leave unless we get X days of notice. No more leave beyond two weeks a year or three weeks or four weeks or whatever. And then the plaintiff had violated those terms or conditions. But that is not what occurred.

All or any of those conditions and many more might have been completely reasonable, and plaintiff’s failure to comply with them completely unreasonable, but that certainly is an area of speculation.

*Id.* Thus, the district court based its decision more on the behavior of the employer, rather than on its interpretation of § 2024(d) of the VRRA.
Rejecting the Eleventh Circuit’s *Gulf States* test as too narrow, the *Eidukonis* court adopted a broader standard. First, the court found military leave requests for the required two-week training period "per se reasonable" because of the congressionally-recognized importance of the military reserves. The court also determined that a request for active duty leave during a national emergency is *per se* reasonable. Next, the court decided that even if an employee-reservist’s request is for voluntary duty, the protections of § 2024(d) apply.

The appellate court framed its own reasonableness standard based on three key factors. First, the conduct of the employee requesting leave must be reasonable. Second, the employee must have known that a leave extension was a possibility before the initial request for leave was made. Finally, like the Fifth Circuit in *Lee*, the court held that courts also must consider the burden on the employer. The case was remanded to the district court for application of these factors to Eidukonis’s leave. In establishing its reasonableness test, the Third Circuit combined the Fifth Circuit’s *Lee* test with the Eleventh Circuit’s *Gulf States* test. The new test re-

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131. *Id.* at 695. Specifically, the court rejected the United States Court of Appeals for the Eleventh Circuit’s requirement that “conduct akin to bad faith on the employee’s part” determines whether or not the request is reasonable. *Id.* (quoting *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464, 1469 (11th Cir. 1987)).
132. *Id.*; see also *infra* notes 183-87 and accompanying text.
134. *Eidukonis*, 873 F.2d at 695. This is in accordance with the reasonableness tests of the United States Courts of Appeals for the Fifth and Eleventh Circuits. *Id.*
135. *Id.* For example, the court explained that an early request is more reasonable than one made at the last minute. *Id.*; see, e.g., Burkart v. Post-Browning, Inc., 859 F.2d 1245 (6th Cir. 1988) (upholding termination of employee-reservist Burkart, because his notice to his employer prior to taking voluntary military training leave was inadequate); Sawyer v. Swift & Co., 836 F.2d 1257 (10th Cir. 1988) (same). But see *HANDBOOK, supra* note 2, at 18-8 (explaining that while an employee-reservist may “save[] himself and his employer some trouble” by providing his employer with earlier notification of his military training leave, the VRRA only requires an employee-reservist to give notice of training leave before the training starts).
136. *Eidukonis*, 873 F.2d at 695.
137. *Id.* at 696. The court, however, pointed out that burden on the employer is only one of many factors. Thus, in the Third Circuit’s test, burden to the employer, unaccompanied by other unreasonable behavior by the employee-reservist, is insufficient to find a request for military training leave unreasonable. *Id.*
138. *Id.* at 697. The court pointed out that the district court did not appear to weigh the burden to the employer when evaluating the reasonableness of Eidukonis’s request.
139. See *infra* notes 150-53 and accompanying text.
flected the court's special concern about the burden an employee-reservist's unqualified right to military leave causes an employer.140

One judge dissented in *Eidukonis.*141 Urging the adoption of a reasonableness test similar to *Gulf States*, the dissent found the majority's test "legally incorrect" and predicted that it would be difficult to apply because of its vague factors.142 The dissent's reasonableness test would begin with a presumption of reasonableness and then examine the employee's actions to see if his conduct in requesting leave was, in fact, reasonable.143 Applying this standard to Eidukonis, the dissent found his actions regarding Eidukonis's last leave request not "highly unreasonable" and, therefore, would have affirmed the lower court.144

**D. The Appellate Courts Have Introduced Inconsistent, Subjective Standards of Reasonableness Into the Law**

Three of the four circuit courts interpreting the VRRA have generated three different reasonableness tests for cases brought under § 2024(d).145 The Fifth Circuit's reasonableness test does not provide clear guidance for courts attempting to determine whether an employee-reservist's leave request was reasonable.146 The factors adopted in *Lee* are arbitrary (e.g., the duration of the requested leave, the prior notice the employee-reservist afforded his employer), speculative (e.g., whether the reservist could have scheduled his training at an alternative time), and subjective (e.g., the burden the absence caused his employer).147

The reasonableness test adopted by the Eleventh Circuit in *Gulf States Paper Corp. v. Ingram* is substantially narrower than the Fifth Circuit's *Lee* test but suffers comparable infirmities.148 The Eleventh Circuit's test presumes that an employee-reservist's request is reasonable. The test focuses on the conduct of the employee and holds that if such conduct was reasonable, the employer must grant the requested training leave.149

140. *Eidukonis*, 873 F.2d at 694 (explaining that "[w]hile Congress expects employers to be patriotic, we do not believe that it expects them to forego all legitimate business concerns").
141. See id. at 697 (Becker, J., dissenting).
142. *Id.*
143. *Id.* at 699. Thus, the dissent advocated a reasonableness test similar to the Eleventh Circuit's test in *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464, 1468 (11th Cir. 1987).
144. *Eidukonis*, 873 F.2d at 700 (Becker, J., dissenting).
145. See infra notes 146-56 and accompanying text.
146. See supra notes 97-99 and accompanying text.
147. *Eidukonis*, 873 F.2d at 698 (Becker, J., dissenting).
149. *Id.* at 1469. Thus, when requesting military training leave, an employee-reservist in the Eleventh Circuit has a lesser burden to overcome than an employee-reservist in the Fifth Circuit.
The Third Circuit assembled its reasonableness standard with elements of the Eleventh Circuit's test, and added the legitimate need of the employer from the Fifth Circuit's test. The confusion these irreconcilable standards have created already is manifesting itself in the district courts. The United States District Court for the Northern District of California attempted to reconcile the Fifth and Eleventh Circuits's reasonableness standards by creating a test that focuses on the employee-reservist's conduct and factors in the burden on the reservist's employer to determine if a leave of absence is granted. There can be little doubt, as the dissent in Eidukonis observed, that a combined Lee-Gulf States reasonableness test creates "an elusive precedent which will be difficult to apply and which will make it impossible for reservists and their lawyers to predict with any degree of certainty how they will fare under any given set of circumstances." 

Although disagreeing on which reasonableness standard to apply, all appellate courts considering § 2024(d) of the VRRA, until 1990, accepted the "reasonableness gloss" imposed on § 2024(d) by the Fifth Circuit in Lee v. City of Pensacola. It was not until the Fourth Circuit considered an employee-reservist's request for leave that a court rejected the imposition of any reasonableness test on a request for military leave under § 2024(d).

III. A RESERVIST-EMPLOYEE'S UNCONDITIONAL RIGHT TO MILITARY LEAVE

The Fourth Circuit's first opportunity to interpret the VRRA arose in Kolkhorst v. Tilghman. Kolkhorst joined the Baltimore City police department in June 1982, immediately after completing four years of active duty in the United States Marine Corps. Police department policy limited

150. Eidukonis, 873 F.2d at 695-96; see also supra notes 148-49 and accompanying text.
151. Eidukonis, 873 F.2d at 696.
152. See Lemmon v. County of Santa Cruz, 686 F. Supp. 797 (N.D. Cal. 1988). Lemmon, a member of the United States Army Reserve, was granted a three-year military training leave of absence from his civilian employment. Id. at 798-99. He extended his leave for an additional year. Id. at 799. Upon completion of his military leave, Lemmon sought, and was denied, reemployment from his civilian employer. Id. The district court applied a combination Lee-Gulf States reasonableness test, found Lemmon's leave reasonable, and ordered reinstatement. Id. at 802.
153. Eidukonis, 873 F.2d at 698-99 (Becker, J., dissenting).
155. 634 F.2d 886, 889 (5th Cir. 1981).
157. Id.
158. Id. at 1283. When Kolkhorst joined the police department he was a member of the Marine Corps Ready Reserve. This reserve has two components: the Individual Ready Reserve (IRR) and the Selected Marine Corps Reserve (Selected Reserve). A member of the IRR
to one hundred the number of officers allowed to be members of an active reserve unit.\textsuperscript{159} When Kolkhorst applied for his position with the police department he notified the department of his reserve status.\textsuperscript{160} In December 1983, Kolkhorst twice requested permission from the police department to join the Selected Reserve and become an active reservist. The police department failed to respond to either request.\textsuperscript{161} In February 1986, Kolkhorst elected a three-year assignment with the Selected Marine Corps Reserve.\textsuperscript{162} Three days later Kolkhorst again requested permission to join an active reserve unit. The police department denied his request but placed him on the reserve waiting list it maintained.\textsuperscript{163}

Kolkhorst scheduled leaves of absence with his immediate supervisors which enabled him to participate in his reserve unit's weekend training.\textsuperscript{164} Later that year Kolkhorst received orders to report for his annual two-week training.\textsuperscript{165} Kolkhorst requested leave to attend this training session. The police department denied the request and instructed him to resign from active military reserve status. Kolkhorst acquiesced to this demand.\textsuperscript{166} On October 3, 1986, he filed charges claiming that the police department's policy limiting the number of police officers allowed to serve as active reservists violated his rights under the VRRA. Kolkhorst argued that his rights were violated because the VRRA makes it unlawful for an employer to discrimi-

\textsuperscript{159} Id. This policy violated the VRRA and was struck down by the Fourth Circuit. There is an exception to this policy allowing new hires who, when they apply to the police department, are active members of a Reserve Unit to maintain their active status. At the time Kolkhorst began with the department there were 126 officers who were members of an active reservist unit. Thirty-three officers were on the waiting list. \textit{Id.}

\textsuperscript{160} Id. at 1284. Kolkhorst verbally explained his reservist status to the police department and was instructed to designate on his application that he was not a member of an active reserve unit and that he did not have an obligation to attend regular or periodic training sessions. \textit{Id.}

\textsuperscript{161} Id.

\textsuperscript{162} Id. By joining a Select Reserve unit, Kolkhorst became obligated to attend weekend training and the annual two-week training duty. \textit{Id.} at 1283.

\textsuperscript{163} Id. at 1284. The waiting list was created by the department when it limited to 100 the number of police officers the department would allow to retain active reserve membership status. \textit{Id.} at 1283.

\textsuperscript{164} Id. at 1284. This was an unofficial arrangement of which the department had no knowledge. \textit{Id.}

\textsuperscript{165} Id. Thus, Kolkhorst had to request an extended leave from the department which could not be arranged informally with his immediate supervisors. \textit{Id.} In addition, this request directly conflicted with the statement Kolkhorst made on his employment application that he had no periodic training obligations. \textit{See supra} note 160.

\textsuperscript{166} \textit{Kolkhorst}, 897 F.2d at 1284.
nate against its employees who want to be members of the active reserves, and because the Act requires employers to unconditionally grant military leave to employee-reservists who so request.\textsuperscript{167}

The United States District Court for the District of Maryland, applying the Eleventh Circuit's reasonableness standard,\textsuperscript{168} focused only on Kolkhorst's conduct to determine if the request was reasonable.\textsuperscript{169} The district court held Kolkhorst's request reasonable.\textsuperscript{170} The request was reasonable because Kolkhorst explained his reserve status to his employers when he applied for his position, and he joined the active reserves only after his requests for permission to do so went unanswered by the department.\textsuperscript{171}

On appeal, the Fourth Circuit first considered whether it, like the earlier circuit courts that had interpreted § 2024(d), would read a reasonableness standard into this section.\textsuperscript{172} The court's analysis encompassed an examination of § 2021(b)(3), the section's legislative history, and the Supreme Court's decision in \textit{Monroe v. Standard Oil Co.}\textsuperscript{173} The court concluded that § 2021(b)(3) protects employees in Kolkhorst's position from discrimination by their employers and, further, that employees may not be disadvantaged because they serve in the military reserves.\textsuperscript{174} The court reasoned that the police department's demand that Kolkhorst either resign from active service or face dismissal was precisely the type of discrimination prohibited by

\begin{itemize}
\item \textsuperscript{167} \textit{Id.} Kolkhorst claimed the Department's actions violated §§ 2021(b)(3), 2024(d) of the VRRA.
\item \textsuperscript{168} See supra notes 105-16 and accompanying text.
\item \textsuperscript{170} Id.
\item \textsuperscript{171} Id. The district court originally denied Kolkhorst's request for monetary damages for pay lost when he was unable to train with his unit. Id. In a later order, however, the court granted monetary damages. \textit{Id.} at 2674. The court also found unlawful the department's policy of limiting the number of police employees who could be active reserves. \textit{Id.} at 2673.
\item \textsuperscript{172} Kolkhorst, 897 F.2d at 1285.
\item \textsuperscript{173} Id.; see also supra notes 46-53 and accompanying text. The Kolkhorst court found the \textit{Monroe} decision void of any indication that "a reservist is entitled to a leave of absence in order to participate in military training only if the request is reasonable." Kolkhorst, 897 F.2d at 1286.
\item \textsuperscript{174} Kolkhorst, 897 F.2d at 1285. The court stated: [T]he Department's written order instructing Kolkhorst to either withdraw from the active reserves or face dismissal strikes to the very heart of Section 2021(b)(3)'s prohibition against terminating an employee because of his reservist training obligations. Simply stated, the Department planned to fire Kolkhorst, without cause, if he insisted on exercising his statutory right to train with a military reserve unit. This otherwise unjustified threat of termination represents an impermissible encroachment upon the normal incidents and advantages of Kolkhorst's employment.
\item \textsuperscript{Id.}
\end{itemize}
Furthermore, the court held that the department's threatened firing of Kolkhorst contravened the § 2021(b)(3) guarantee that a reservist "shall not be denied . . . retention in employment, or . . . other incident or advantage of employment." Accordingly, the court concluded that the department's policy conflicted with § 2021(b)(3) and, therefore, was unlawful.

The court refused to read any reasonableness standard into § 2024(d). After a review of the various reasonableness standards created by other courts, the Fourth Circuit concluded that neither § 2024(d), its legislative history, nor the Supreme Court's decision in Monroe imposed a reasonableness standard on an employee-reservist's request for leave. The court declared that, under the plain language of § 2024(d), Congress provided that reservists "shall upon request be granted" military training leave, and thus, Congress intended that the request be granted unconditionally. In the court's view, the imposition of a reasonableness standard contravened the purpose of § 2024(d): "to allow reservists to train with their military units without suffering prejudice or any adverse action from their employers." The court affirmed the district court order requiring the department to grant Kolkhorst's request to join an active Marine Corps Reserve unit. The result represented a clear rejection of each of the prior appellate decisions. The court deemed an employee-reservist's right to military training leave unconditional.

175. Id.
177. Kolkhorst, 897 F.2d at 1285. In finding the department's policy unlawful, the court accepts the argument presented in the amicus curiae brief of Elizabeth H. Dole, Secretary of Labor. In this brief, the DOL argued:

It would be illogical and unreasonable to conclude that there is a violation of the statute where one of these prohibited actions is taken against a Reservist, but no violation if taken against an employee who becomes a Reservist in contravention of an employer policy. The Police Department's policy, inasmuch as it leads to this dichotomy of treatment, is discriminatory because it unreasonably denies to non-Reservist employees the protections of Section 2021(b)(3).

Brief for the Secretary of Labor as Amicus Curiae at 9, Kolkhorst v. Tilghman, 897 F.2d 1282 (4th Cir. 1990) (Nos. 89-3501 and 89-3502) (footnote omitted) [hereinafter Brief].

178. Kolkhorst, 897 F.2d at 1286.
179. Id. (quoting 38 U.S.C. § 2024(d)). The court also was persuaded by the Supreme Court's statement in Monroe interpreting section 2024(d) to mean that "employees must be granted a leave of absence for training." Id. (quoting Monroe v. Standard Oil Co., 452 U.S. 549, 555 (1981)).
180. Id.
181. Id. at 1288. The appellate court also upheld damages for Kolkhorst equal to the amount of income from lost drills, training camp and prejudgment interest. Id.
182. Id. at 1282. The Fourth Circuit recently affirmed its interpretation of § 2024(d) in an unpublished decision. See Villagomez v. Van Statheros, No. 91-2332 1991 U.S. App. LEXIS
IV. THE UNREASONABLE "REASONABLENESS" STANDARDS

Congress demonstrated its view of the importance of the National Guard and Reserve units when it enacted the Reaffirmation of Recognition of National Guard and Reserve Forces. In its findings, Congress noted the importance of the National Guard and the reserves to this country's overall military policy and the importance of a prepared, trained Reserve force. Congress sought to encourage the enlisting, training, and retaining of volunteers in the active reserves. In this regard, Congress emphasized the importance of employer support to a military reservist: "The support of employers and supervisors in granting employees a leave of absence . . . is essential to the maintenance of a strong Guard and Reserve force. . . . [V]olunteers who serve the Nation as members of the National Guard and Reserve . . . require and deserve the support and cooperation of their civilian employers, in order to be fully ready to respond to national emergencies." This language lends support to the Fourth Circuit's view in Kolkhorst v. Tilghman that the plain meaning of the unconditional language of § 2024(d) imposes no reasonableness standard on an employee-reservist's request for leave.

19114 (4th Cir. Aug. 19, 1991). In this case, an employer refused to reinstate a terminated employee who, without following the employer's leave request policy, took the day off to take a military preinduction physical exam. Id. The VRRRA directs an employer to consider an employee required to report for a preinduction physical exam as being on a leave of absence. 38 U.S.C. § 2024(e). The district court granted the employer's motion for summary judgment because the employee had not provided the employer with adequate notice before taking the day off. The Fourth Circuit reversed, explaining that "[i]nexplicably, the district court failed to mention our previous holding in Kolkhorst v. Tilghman where we held that there is no requirement of reasonable notice under the [VRRRA] for an employee in Villagomez's position." Villagomez, 1991 U.S. App. LEXIS 19114 at *4-5 (citations omitted). The court restated its belief that the VRRRA unconditionally grants an employee-reservist the right to military training leave. Id.


184. Pub. L. No. 99-290, § 1(a)(1), 100 Stat. at 413. "[T]he National Guard and Reserve forces of the United States are an integral part of the total force policy of the United States for national defense and need to be ready to respond, on short notice, to augment the active military forces in time of national emergency . . . ." Id. (emphasis added).

185. See id. §§ 1(a)(2), (c)(1), 100 Stat. at 413. Section 1(a)(2) recognizes that "attracting and retaining sufficient numbers of qualified persons to serve in the Guard and Reserve is a difficult challenge during a period in which there is a decreasing number of young people from which to recruit . . . ." Id.

186. Id. §§ 1(a)(3), 1(b), 100 Stat. at 413 (emphasis added).

187. See Kolkhorst v. Tilghman, 897 F.2d 1282, 1286 (4th Cir. 1990), cert. denied, 60 U.S.L.W. 3478 (1992); see also supra notes 172-82 and accompanying text.
In its *amicus curiae* brief, the DOL pointed out an inconsistency that arises when the reasonableness standard is imposed on an employee's request to join a reserve unit.\(^{188}\) The brief explained that preventing an employee from joining the reserves, or from participating in training that jeopardizes his reserve status, leads to a "bizarre result"\(^{189}\)—bizarre because non-employees are able to join and participate freely in reservist activities while employees are restricted by the reasonableness standard. Thus, "non-employees will actually enjoy more protection from the VRRA than employees."\(^{190}\) Congress, however, intended all reservists equal treatment regardless of the civilian employment status.

In addition, the Supreme Court, in *Monroe v. Standard Oil Co.*, emphasized that Congress, not the courts, must determine the appropriate balance between a national interest in facilitating an employee-reservist's military training and the cost of this policy to the employer.\(^{191}\) In *Monroe*, the Supreme Court stated unequivocally, "Congress decided what allowance employers should make to reservists whose duties force them to miss time at work: provide them a leave of absence."\(^{192}\) Thus, the Supreme Court, while not ruling directly on § 2024(d), appears to read the plain language of this section as granting an employee-reservist an unconditional right to military leave.

Absent an amendment to the VRAA expressly imposing a reasonableness standard on § 2024(d), courts should not read a reasonableness standard into the VRRA and an employer should unconditionally grant an employee-reservist's request for military training leave. The legislative history of this section does not impose a reasonableness standard.\(^{193}\) The Supreme Court, applying the plain meaning of § 2024(d), indicated that the right to military training leave is unconditional.\(^{194}\) Any other reading of this statute presents unreasonable obstacles for the men and women Congress found to be "an integral part of the total force policy of the United States":\(^{195}\) the members of the National Guard and Reserve forces.

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188. Brief, *supra* note 177, at 11.
189. *Id.*
190. *Id.*
192. *Id.* at 564.
193. See *supra* notes 54-56 and accompanying text.
194. See *supra* note 53 and accompanying text.
V. THE FOURTH CIRCUIT CORRECTLY INTERPRETED § 2024(D)

Currently, there is no uniform standard regarding an employee-reservist's right to military training leave. Every circuit court considering this issue has interpreted § 2024(d) differently.196 Although the Supreme Court recently interpreted this section of the VRRA as not limiting the length of the military leave to which an employee-reservist is entitled, the Court has not directly addressed whether an employee-reservist's right to training leave is unconditional.197 If an employee-reservist is not ensured the right to participate in his reserve unit's military training without jeopardizing his civilian employment, he may be discouraged from volunteering. As recent developments in the Persian Gulf point out, the National Guard and reserve forces play an important role in America's military policy.198 If individuals are discouraged from joining the reserves, there will be fewer skilled volunteers to call up in times of national emergency. Further, if discouraged by their employers from taking part in the training necessary to maintain a prepared active reserve force, those reservists who are called to active duty may be ill-prepared to serve. Therefore, resolution of this conflict in favor of an employee-reservist's unconditional right to military leave is vital to America's national defense.

The Third and Eleventh Circuits have indicated concern that if § 2024(d) was construed "as creating an absolute right of reinstatement, reservists would be allowed to play fast and loose with the system in a way that Congress could not have intended."199 The court's conclusion is of dubious validity. First, reemployment rights statutes are "to be liberally construed for the benefit of those who... serve their country...."200 Secondly, it contradicts the spirit of Congress's Reaffirmation of Recognition of National Guard and Reserve Forces.201 Finally, it ignores the fact that an unconditional leave of absence is granted to an employee to allow him to attend military training, which requires orders from the employee's military reserve.202 Though an employee can volunteer for duty, given the necessity of

196. See supra notes 145-56 and accompanying text.
197. See King v. St. Vincent's Hosp., 112 S. Ct. 570 (1991); see also supra note 67. The Supreme Court declined to directly address whether § 2024(d) unconditionally grants an employee-reservist the right to training or duty leave when the Court denied the petition of certiorari in Kolhoff v. Tilghman, 60 U.S.L.W. 3478 (1992).
198. See supra note 1 and accompanying text.
201. See supra notes 183-87 and accompanying text.
orders, it is doubtful that a reservist can misuse his right to military leave. Surely a reserve unit will not issue orders to a reservist, volunteer or not, who is misusing his military leave with excessive absences from his civilian employment.

The Fourth Circuit's interpretation of § 2024(d) of the VRRA is correct. An employer must unconditionally grant an employee-reservist a leave of absence from civilian employment to train with his military unit. Congress acknowledges that it is an onerous task to attract and retain adequate numbers of qualified personnel to serve in the National Guard and reserve forces. Additionally, military leaders have indicated that the greatest challenge in maintaining the reserve forces is not recruitment, but retention, of reservists. Further, the greatest factor in retaining employee-reservists is a supportive attitude from their civilian employers. Therefore, a restrictive reading of § 2024(d) would discourage membership in the reserves, which is contrary to the policy expressed by Congress in the Reaffirmation of Recognition of National Guard and Reserve Forces Act of 1986.

VI. CONCLUSION

The VRRA was enacted to protect reservists from discrimination in civilian employment. Since 1940, Congress has recognized a responsibility to the individuals who serve in support of this country's national defense. This responsibility to a reservist is best shown by granting him an unconditional leave of absence for military training and compliance with the plain meaning of § 2024(d) of the VRRA.

The United States Supreme Court should directly resolve the conflict that currently exists among the circuits in interpreting the VRRA. The Supreme Court should not attempt to add words or additional meaning to the plain, unambiguous language of § 2024(d). The Court should affirm the reasoning of the Fourth Circuit and not attach a reasonableness standard to

206. Id.
207. See supra notes 183-87 and accompanying text.
208. The Court has interpreted § 2024(d) as not limiting the length of an employee-reservist's military training or duty leave. King v. St. Vincent's Hosp., 112 S. Ct. 570 (1991); see also supra note 67.
§ 2024(d). This would assure employee-reservists equal treatment in all states. Further, to do justice to the clear meaning of words of this section, the congressional intent, the guidelines of the DOL, and the public policy of encouraging volunteers to participate in the active reserve forces, the court must interpret § 2024(d) of the VRRA as unconditionally granting an employee-reservist’s request for leave for military training duty.

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