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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0899**

Martin T. Breaker,
Appellant,

vs.

Bemidji State University, et al.,
Respondents.

**Filed April 8, 2019
Affirmed
Bratvold, Judge**

Ramsey County District Court
File No. 62-CV-16-688

Gregg M. Corwin, Joshua D. Hegarty, Gregg M. Corwin & Associate Law Office, P.C.,
St. Louis Park, Minnesota (for appellant)

Keith Ellison, Attorney General, Janine Kimble, Assistant Attorney General, St. Paul,
Minnesota (for respondents)

Considered and decided by Rodenberg, Presiding Judge; Reilly, Judge; and
Bratvold, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301-4335 (2012), entitles military service members to reemployment and prohibits employment discrimination. Appellant Martin T. Breaker

challenges the judgment dismissing his claims against respondents for USERRA violations. The district court granted summary judgment on Breaker's claim for reemployment for two reasons. First, the district court determined that record evidence established that changed circumstances had eliminated the position that Breaker had held before his military service. Second, the district court determined that respondents offered Breaker a comparable position upon his return from military service. The district court also granted summary judgment on Breaker's claim for discrimination, reasoning that Breaker did not submit evidence that his military status was a substantial or motivating factor in respondents' decision to eliminate the position that Breaker had previously held. Because Breaker failed to raise genuine issues of material fact on either of his two claims, we affirm.

FACTS

Between 1997 and 2005, Breaker taught as an assistant professor in the business administration department at respondent Bemidji State University (BSU),¹ which is part of respondent Minnesota State Colleges and Universities (MnSCU) (collectively, respondents). Breaker entered into a series of fixed-term, nine-month contracts, each of which expressly stated there was "no implication of future employment." Some of the terms of Breaker's employment were covered by a labor contract negotiated between MnSCU and the Inter Faculty Organization (union), which "represents the traditional

¹ The case caption in the district court identifies this respondent as "Bemidji State University" and that name is used in the caption on appeal. The caption on appeal must match the caption used in the district court's decision. *See* Minn. R. Civ. App. P. 143.01. We note that the correct spelling is Bemidji.

teaching faculty at the seven MnSCU state universities.” Breaker points out that, regardless of the fixed-term of his teaching contracts, he never reapplied for any subsequent fixed-term position after his first year with BSU.²

Throughout the time that he taught for BSU, Breaker resided in Ely. Breaker taught undergraduate business classes principally via Interactive Television (ITV), which allowed him to teach from Ely. Per the relevant labor contract, teaching ITV courses resulted in a higher level of pay per credit than teaching the equivalent courses in person.

In addition to teaching, Breaker also worked as the coordinator for the off-campus business program, which was offered in conjunction with the Arrowhead University Center (later Consortium) (AUC), a group of community and technical colleges in the Iron Range. As the AUC business program coordinator, Breaker taught and coordinated ITV courses, advised students, and promoted the program. The AUC business program coordinator position increased Breaker’s pay from BSU; Breaker was not an AUC employee.

In August 2005, the United States Army called Breaker to active duty in Iraq. At the time, Breaker and BSU anticipated that he would be released from active duty the following year. But Breaker’s deployment was extended until 2008. Breaker notified BSU about his changing status and, when Breaker was released from active duty, the parties exchanged a series of written offers.

² The union-MnSCU contract provided that a fixed-term contract is normally limited to a maximum of four years and “carrie[d] no implication for future employment.” The labor contract also provided an exception to the four-year limit for positions funded by an external source. Until spring 2002, Breaker’s position was funded by an external source.

In July 2008, BSU extended Breaker an offer of reemployment (the first offer) for the 2008-09 academic year. The first offer stated that the AUC business program coordinator position no longer existed and offered him “an on-campus, one-year fixed term assignment as an Associate Professor in Business Administration.” Both parties agree that the rank of associate professor “was the correct academic rank to offer” Breaker upon his return. The letter also stated that BSU would let Breaker know “about the salary for the position” and that Breaker would be responsible for teaching four business administration department classes during the fall semester. On July 30, 2008, Breaker rejected BSU’s first offer, stating that “there are many issues regarding” his employment.

In August 2008, BSU extended Breaker another offer (the second offer), which stated that BSU considered Breaker’s military leave to be USERRA eligible. The second offer was for a one-year, fixed-term contract as an associate professor at “Step 13.” BSU used a step system for calculating salaries; a higher step equated to a higher salary and seniority. The second offer also stated that, because the AUC business program coordinator position no longer existed, BSU could not offer it to Breaker. But the letter described the second offer as the “comparable” position, and stated that Breaker would be eligible for “[o]verload assignments.” The second offer also addressed seniority-based benefits and sabbatical eligibility:

As being on USERRA leave, Mr. Breaker will accrue pension/retirement benefits, HRA contributions, sick leave, and any seniority based benefits pursuant to applicable law. Contractual benefits not tied to seniority, such as tuition waiver, will not have accrued while Mr. Breaker was on leave. Similarly, sabbatical leave is not based on seniority but instead on actually [sic] years of service to the University. We are

prepared to agree, however, that Mr. Breaker's fixed-term service prior to his military leave will count for purpose[s] of eligibility for a future sabbatical.

Breaker rejected the second offer.

Breaker began attending law school in Grand Forks, North Dakota in August 2008.

In October 2008, BSU extended Breaker another offer of reemployment (the third offer), which repeated many of the terms from the second offer and stated that, for spring 2009, Breaker would be assigned "to teach three Statistics courses and two Economics II (Macro) courses." The third offer included an overload assignment that BSU stated would yield additional income above Breaker's step 13 salary. The third offer also stated that the business administration department "is currently reviewing" its policy of allowing only tenured or tenure-track professors to teach online courses, which excluded Breaker from this type of instruction. Breaker refused the third offer.

In July 2009, BSU extended Breaker an offer of reemployment, this time for the 2009-10 school year (the fourth offer). The fourth offer was for a fixed-term position as an associate professor at "Step 13 (\$61,829)" in the business administration department. The offer repeated many of the terms of the second and third offers and added that (1) Breaker would be guaranteed "additional work opportunities" to earn at least \$15,000 and (2) BSU would count Breaker's time in active military service toward his eligibility for sabbatical leave. Breaker refused the fourth offer.

Since 2010, Breaker has sued BSU and MnSCU in state and federal court, resulting in two appeals to this court. In *Breaker v. Bd. of Trustees*, A11-2286, 2012 WL 2874038, at *1-2 (Minn. App. July 16, 2012) (*Breaker I*), review denied (Minn. Sept. 25, 2012), this

court affirmed summary judgment against Breaker on various claims relating to his employment at BSU.

Shortly after that appeal concluded, Breaker filed the complaint underlying this appeal, which stated two USERRA claims, one for failing to reemploy Breaker and a second claim for discrimination based on his military service. The district court initially dismissed Breaker's complaint as barred by res judicata based on *Breaker I*. Breaker appealed, arguing that, due to an intervening change in the law, BSU was not entitled to immunity from his USERRA claims. This court reversed and remanded, reasoning that "Breaker lacked a full and fair opportunity to litigate his USERRA claims in *Breaker I*, and the district court erred in dismissing Breaker's USERRA claims on the basis of res judicata." *Breaker v. Bemidji State Univ.*, 899 N.W.2d 515, 525 (Minn. App. 2017) (*Breaker II*).

Upon remand and after discovery closed, BSU moved for summary judgment. After a hearing, the district court granted summary judgment to both respondents and directed entry of judgment. Breaker appeals.

D E C I S I O N

A district court shall grant a motion for summary judgment when a moving party "shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01.³ "We review the grant of summary

³ The district court appears to have applied the former version of rule 56, which was recently "revamped" to more "closely follow" the federal rules. Minn. R. Civ. P. 56 2018 advisory comm. cmt. When promulgating amendments to rule 56, effective on July 1, 2018 and applicable to pending cases, the supreme court specifically indicated that amended

judgment de novo to determine whether there are genuine issues of material fact and whether the district court erred in its application of the law.” *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quotations omitted). In reviewing a grant of summary judgment, “we view the evidence in the light most favorable to the nonmoving party . . . and resolve all doubts and factual inferences against the moving part[y].” *Rochester City Lines, Co. v. City of Rochester*, 868 N.W.2d 655, 661 (Minn. 2015).

I. The district court did not err by granting summary judgment on Breaker’s claim that respondents failed to reemploy him in violation of 38 U.S.C. § 4312.

USERRA was enacted by Congress to: (1) eliminate or minimize disadvantages to a service member’s civilian employment, (2) provide for prompt reemployment of service members upon release, and (3) prohibit discrimination against service members resulting from their service. 38 U.S.C. § 4301(a). To give effect to Congress’s intent, USERRA should be “liberally construed for the benefit” of service members. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285, 66 S. Ct. 1105, 1111 (1946) (applying a federal act that was a precursor to USERRA); *see also* 20 C.F.R. § 1002.2 (2018) (Congress has chosen to keep “the large body of case law that had developed under those [previous service members’ rights] statutes . . . in full force and effect, to the extent it is consistent with USERRA.”).

language on the standard for granting summary judgment reflects recent Minnesota caselaw. *Order Promulgating Amendments to Rules of Civil Procedure*, No. ADM04-8001 (Minn. Mar. 13, 2018). Because the legal standard is unchanged, we utilize the current version of rule 56, even though the district court’s decision was issued before the amended rule took effect.

Under section 4312(a), a military service member must meet certain requirements before they are entitled to reemployment when they return to the workforce. 38 U.S.C. § 4312(a)(1)-(3). If USERRA's preliminary requirements are satisfied, a returning service member whose service period was greater than 90 days must be reemployed "in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform." *Id.* § 4313(a), (a)(2)(A).

In the district court and on appeal, respondents do not challenge whether Breaker satisfied USERRA's preliminary requirements. The district court granted summary judgment in favor of respondents based on two arguments, which we will address in turn.

A. The changed circumstances affirmative defense

An employer has an affirmative defense to a returning service member's right to reemployment under USERRA if "the employer's circumstances have so changed as to make such reemployment impossible or unreasonable." *Id.* § 4312(d)(1)(A). The changed circumstances defense, however, "is a very limited exception to be applied only where reinstatement would require creation of a useless job or where there has been a reduction in the work force that would reasonably have included the veteran." *Davis v. Halifax Cty. Sch. Sys.*, 508 F. Supp. 966, 968 (E.D.N.C. 1981). This exception to reemployment is so that an employer who has "eliminated a [service member's] position or otherwise drastically changed their business [can] avoid rehiring someone for a job that no longer exists." *Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992). The burden is on the employer to

prove the existence of this affirmative defense, 38 U.S.C. § 4312(d)(2), and the exception must be narrowly construed against the employer. *United States v. Nevada*, 817 F. Supp. 2d 1230, 1242 (D. Nev. 2011).

The district court determined that the parties did not dispute that ITV courses and the AUC business program coordinator position “no longer existed, in large part due to conditions beyond BSU’s control.” Having found that no genuine issue of material fact existed regarding respondents’ changed circumstances, the district court concluded that summary judgment was appropriate. Breaker first argues that the district court erred regarding the ITV courses because BSU “has, at most, shown that there was a shift between offering . . . [classes] through the use of ITV to offering it through online courses” and that he should have been permitted to teach online courses at BSU.

Breaker’s argument fails to raise a question of fact about the ITV courses for three reasons. First, based on the record evidence, including appellant’s admissions in briefings filed with this court, it is undisputed that BSU’s business administration department no longer offered ITV courses by the time Breaker was eligible for reemployment. Second, it is also undisputed that BSU’s business administration department’s online instruction policy precluded Breaker and other similarly situated business administration professors from teaching online courses. Multiple professors in BSU’s business administration department were not eligible to teach online courses during the relevant period because they, like Breaker, were not tenured or tenure-track professors. Third, teaching online courses at BSU is not the same as teaching ITV courses at BSU because online courses did not yield higher pay per credit under the union contract, as did ITV courses.

Breaker's second argument is that the district court erred in concluding that the AUC business program coordinator position was eliminated; he contends that the position was restructured into the online business advisor position. Breaker argues that the two positions were "interrelated" based on evidence showing the professor who succeeded him as the AUC business program coordinator later became the online business advisor. But the record evidence establishes that the AUC business program coordinator position was distinct from the online business advisor position in two ways. First, the scope of responsibilities for the two positions was different because the online business advisor is responsible for advising all online students in the off-campus business degree program, while the AUC business program coordinator position worked only with students from the Arrowhead region. Second, the online business advisor position requires additional training and a vote by the faculty to obtain the position. In contrast, the AUC business program coordinator position did not require additional training or a faculty vote. Importantly, Breaker does not offer any evidence that would lead a reasonable factfinder to conclude that BSU restructured the AUC business program coordinator position into the online business advisor position.

Based on the record evidence, we agree with the district court that no genuine issue of material fact exists regarding BSU's changed circumstances defense because the school no longer offered ITV courses, Breaker was not eligible to teach online courses, and the AUC business program coordinator position was eliminated, not restructured.⁴

⁴ The district court also concluded that respondents also had established a second affirmative defense as a matter of law, i.e., that Breaker's teaching position was brief and

B. Comparable position

Under USERRA, a returning service member is entitled to “the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, *or a position of like seniority, status and pay*, the duties of which the person is qualified to perform.” 38 U.S.C. § 4313(a)(2)(A) (emphasis added). The Code of Federal Regulations notes that a service member is “entitled to reemployment in the job position that he or she would have attained with reasonable certainty if not for the absence due to uniformed service” and that such a position must include “with reasonable certainty the pay, benefits, seniority, and other job perquisites” the service member would have obtained. 20 C.F.R. § 1002.191 (2018).

In *Fishgold*, the Supreme Court clarified how to determine which position the service member would have obtained when it held that a returning service member “does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously.” *Fishgold*, 328 U.S. at 284-85, 66 S. Ct. at 111. This reasoning is known as the “escalator” principle and has since been applied to USERRA reemployment claims by the federal courts. See *Serricchio v. Wachovia Sec. LLC*, 658 F.3d 169, 190 (2d Cir. 2011).

“[T]he appropriate inquiry in determining the proper reemployment position for a returning servicemember is . . . whether it was reasonably certain that the returning

non-recurrent. Because we resolve this appeal for other reasons, we decline to address respondents’ second affirmative defense.

servicemember would have attained the higher position but for his absence due to military service.” *Rivera-Melendez v. Pfizer Pharm., LLC*, 730 F.3d 49, 57 (1st Cir. 2013); see *Huhmann v. Fed. Express Corp.*, 874 F.3d 1102, 1105-06 (9th Cir. 2017) (describing the escalator principle and reasonable-certainty tests as “two intersecting doctrines” used together to “guarantee that progress in the returning service member’s overall career trajectory has not been set back by his service”).

The district court observed that the escalator principle “protect[s] service members from being reemployed in jobs that are inferior to those they held before deployment.” The district court concluded that, because Breaker’s previous positions were one-year, fixed-term positions, BSU offered Breaker a comparable teaching position upon his return to employment. Breaker argues that the district court erred in determining that the “most comparable position available” was a one-year fixed-term position on BSU’s campus. Breaker specifically contends that all of BSU’s reemployment offers “failed to compare with his former position in terms of ‘seniority, status, and pay.’” We discuss each characteristic in turn.

1. Seniority

Breaker argues that BSU’s reemployment offers did not provide him with comparable seniority. USERRA states that a returning service member is entitled to a position of “like seniority.” 38 U.S.C. § 4313(a)(2)(A). Under USERRA, seniority is defined as “longevity in employment together with any benefits of employment which accrue with, or are determined by, longevity in employment.” *Id.* § 4303(12).

Breaker contends that BSU's reemployment offers did not provide him with comparable seniority, primarily, because he was not offered appropriate sabbatical leave. Breaker has some support for his position. In its second and third offers, BSU stated that sabbatical leave was not seniority-based, but based on years of actual service to the university; in these offers, BSU proposed to count Breaker's actual years at BSU toward sabbatical eligibility. But Breaker fails to recognize that BSU's position changed in its fourth offer in which BSU promised to also count Breaker's time on deployment for sabbatical leave. Thus, we conclude that the record evidence establishes that BSU included Breaker's previous years of service for BSU and his three years of deployment in determining sabbatical leave.

BSU's fourth offer also included seniority-based pay raises that occurred during Breaker's deployment towards determining Breaker's appropriate salary step. Additionally, BSU's fourth offer proposed that Breaker should receive other seniority-based benefits, such as pension/retirement benefits and sick leave. We can discern no genuine issue of material fact with regard to the seniority of the position BSU extended to Breaker in its fourth offer.

2. Status

Breaker contends that BSU's reemployment offers of a one-year teaching position were not comparable in status to the position he had before deployment. To determine what a reemployed service member's status would be following deployment, the employer must assess factors such as the service member's "opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location."

20 C.F.R. § 1002.194 (2018). None of these factors are individually determinative of an employee's status. *See id.* USERRA also "does not prohibit lawful adverse job consequences that result from the employee's restoration on the seniority ladder." *Id.*

Both parties agree that BSU offered Breaker the correct comparable rank of associate professor. The district court stated that, "[g]iven the circumstances, and demonstrated by the undisputed facts in the record, it is clear that BSU offered [Breaker] the most comparable position available." Breaker argues, however, that the offers were not comparable because BSU required that he teach different courses in a different location. We consider the record evidence for the courses assigned and teaching location.

The record evidence established that BSU's offers asked Breaker to teach classes different from those he had previously taught. But the record also established that other BSU professors could be, and were, assigned to teach classes that they had not taught before and without an opportunity to select their courses. Breaker does not argue that he was not qualified to teach the classes identified in BSU's reemployment offers or that these classes were not of a like status to those he taught previously, which is what USERRA requires.

Breaker also argues that his "previous working location was remote from the BSU campus," and BSU "only offered [Breaker] reemployment which would have required him to relocate in order to teach" at the BSU campus. Breaker offered his deposition testimony stating that if BSU had allowed him "to teach online, then [he] could have taught from [his] home in Ely, [and he] would not have had to move to [BSU]." Breaker also testified that he chose to attend law school at Grand Forks because of its location and proximity to BSU.

BSU points out that Breaker actually applied to the University of North Dakota Law School *well before* BSU extended its first offer to teach on-campus at BSU and that it was not onerous for Breaker to teach at BSU and live in Ely, because he attended law school in Grand Forks at the same time he lived in Ely. BSU asks this court to weigh evidence and determine credibility, which is inconsistent with BSU's request for summary judgment and our role on appeal. *See Savelle v. City of Duluth*, 806 N.W.2d 793, 796 (Minn. 2011).

Even so, when the evidence on this point is taken in the light most favorable to Breaker, BSU's offers of a teaching position in Bemidji do not raise a genuine issue of material fact based on location because BSU had no teaching position to offer in Ely. To the extent that Breaker is arguing that BSU should have offered him the opportunity to teach online courses from Ely, we have already discussed why he was not eligible to teach online courses at BSU. We conclude that Breaker failed to raise a genuine issue of material fact regarding the status of the position in BSU's reemployment offers.

3. Pay

Breaker contends that BSU's offers proposed a pay level that was not comparable to the step salary he would have been entitled to under the escalator principle. Breaker argues that he should have been offered employment at step 14, not step 13. The district court did not specifically address the comparability of pay, but noted that Breaker "disagreed with how his pay was calculated."

The record evidence establishes that, throughout all four offers by BSU, Breaker, the union, and BSU all agreed that step 13 was the comparable pay level. In his brief on appeal, Breaker concedes that "in communications regarding rehire in 2008, he did not

expressly dispute the offered Step 13.” The record evidence provides additional context. While the union initially determined that step 20 was the appropriate step for Breaker, both BSU and Breaker recognized that he was paid at step 21 during the 2005-2006 academic year. During the 2007-2008 academic year, BSU renumbered the step system so the parties had to translate step 21 into the appropriate step for Breaker after his deployment.

In determining Breaker’s appropriate pay step after his deployment, BSU included pay raises that would have been granted during Breaker’s deployment had he not been on active duty. After considering the step Breaker was at before deployment, along with the pay raises granted during his deployment, both BSU and Breaker agreed that he should be paid at step 13 for the 2008-2009 academic year. While Breaker disputes this on appeal, he points to no evidence in the record to support his position.

Breaker also contends that BSU did not offer to reemploy him in a position where he could earn additional pay comparable to teaching ITV courses and working as the AUC business program coordinator. A “servicemember is entitled to any compensation, in whatever form, that the employee would have received with reasonable certainty if he or she had remained continuously employed.” *Serricchio*, 658 F.3d at 184 (quotation omitted). In its fourth offer, BSU offered Breaker additional work opportunities of “not less [than] \$15,000” in addition to his base salary, which is comparable to what he would have earned had the AUC business program coordinator position and ITV courses been available.

We conclude Breaker has not established a genuine issue of material fact regarding the comparability of the seniority, status, or pay of the position in BSU’s reemployment

offers. Accordingly, we affirm the district court’s decision to grant summary judgment to BSU on Breaker’s reemployment claim.

II. The district court did not err by granting summary judgment on Breaker’s claim that BSU discriminated against him in violation of 38 U.S.C. § 4311.

Breaker argues that the district court erred by summarily dismissing his section 4311 discrimination claim, because the “evidence in the record shows that [he] has established a prima facie case of discrimination under USERRA.” Breaker acknowledges that he lacks direct evidence of discrimination, but asserts that he has proven a “close temporal nexus” between his military deployment and BSU’s discontinuation of the AUC business program coordinator position, which he contends is circumstantial evidence of discrimination.

USERRA section 4311 provides, in relevant part, that:

A person who is a member of, . . . performs, . . . or has an obligation to perform service in a uniformed service shall not be denied . . . reemployment, . . . promotion, or any benefit of employment by an employer on the basis of that membership, . . . performance of service, . . . or obligation.

38 U.S.C. § 4311(a). An employee must “bear the initial burden of showing by a preponderance of the evidence” that their military status “was *a substantial or motivating factor* in the adverse employment action.” *Sheehan v. Dep’t of Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001) (emphasis added) (quotations omitted); 20 C.F.R. § 1002.22 (2018). A service member’s status is “a motivating factor if the defendant relied on, took into account, considered, or conditioned its decision on that consideration.” *Coffman v. Chugach Support Servs., Inc.*, 411 F.3d 1231, 1238 (11th Cir. 2005). *Sheehan* recognized that:

Discriminatory motivation under the USERRA may be reasonably inferred from a variety of factors, including proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses.

Sheehan, 240 F.3d at 1014; *see also Maxfield v. Cintas Corp. No. 2*, 427 F.3d 544, 552 (8th Cir. 2005). When proximity in time is attenuated between the adverse employment action and military service, a plaintiff must offer other evidence to demonstrate causation. *See Savage v. Fed. Express Corp.*, 856 F.3d 440, 448 (6th Cir. 2017) (holding a period of 33 or 41 days sufficient to establish temporal proximity).

Once an employee makes a showing of discrimination by the preponderance of the evidence, the burden of persuasion and production shifts to the employer to “prove that the [adverse] action would have been taken in the absence of such membership . . . [or] service.” 38 U.S.C. § 4311(c)(1); *see Sheehan*, 240 F.3d at 1014. Section 4311's protection against discrimination is separate and distinct from section 4312's right to reemployment, even though both may be implicated by the same factual set of circumstances. *See Bradberry v. Jefferson Cty.*, 732 F.3d 540, 545-47 (5th Cir. 2013).

The district court determined that Breaker's claim was “primarily that BSU discriminated against him because he was not reemployed.” The district court also noted that Breaker “offered no evidence that his membership in the armed services was a ‘motivating factor’ behind BSU's action of ending [the ITV teaching position or AUC

business program coordinator] position while he was on leave, or behind any of the other actions BSU made.” Because Breaker “failed to demonstrate a prima facie case for discrimination,” the district court granted summary judgment to BSU on Breaker’s section 4311 discrimination claim.

Breaker did not submit any direct evidence of discriminatory motivation based upon his military service. Breaker instead contends that BSU “almost immediately” began to eliminate the AUC business program coordinator position after he was deployed. The record, however, established a significant time lapse between Breaker’s deployment for military service (August 2005) and BSU’s decision to eliminate the AUC business program coordinator position (August 2007). In fact, BSU contacted Breaker in April 2006 about returning to his old position, including the AUC business program coordinator position. It was not until 2007, which was two years after Breaker began his deployment, that BSU eliminated the AUC business program coordinator position.

Because there was a two year gap from the time Breaker left for military service, and the time BSU eliminated the AUC business program coordinator position, we conclude that Breaker needed to offer some additional evidence from which a jury may infer his military status was a substantial or motivating factor in BSU’s decision to eliminate the AUC business program coordinator position. *See, e.g., Brown v. Houser*, 129 F. Supp. 3d 1357, 1379 (N.D. Ga. 2015) (holding that an appellant must offer additional evidence to prove causation “[i]n the absence of close temporal proximity”); *cf. Maxfield*, 427 F.3d at 552 (finding genuine issue of material fact of discrimination under USERRA when appellant was demoted on same day he returned from military leave and discriminatory

animus could be inferred from employer's actions). But Breaker offered no additional evidence from which a jury could infer BSU's discriminatory motive. Moreover, BSU provided Breaker with four USERRA-compliant reemployment offers, and Breaker does not explain how multiple offers of reemployment is evidence of discriminatory motivation.

Accordingly, we affirm the district court's judgment dismissing Breaker's section 4311 discrimination claims on summary judgment.

Affirmed.