UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JAMES J. TRACEY,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 97-235-P-H***
	)	
LEWISTON SCHOOL COMMITTEE,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

While the plaintiff was on military leave from his position as the assistant superintendent of the Lewiston, Maine public school system, he lost his job when it was eliminated from the city's school budget. He now seeks legal and equitable relief against the defendant Lewiston School Committee under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. §§ 4301 *et seq*., and the analogous Maine statute, 26 M.R.S.A. § 811. The defendant moves for summary judgment and the plaintiff has filed a cross-motion seeking judgment in its favor on liability. For the following reasons, I recommend that the defendant's motion be denied and that the plaintiff's motion be granted in part.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token,

'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

Although the parties draw distinctly different inferences from the evidence in the summary judgment record, many of the facts at the core of the case are undisputed. The plaintiff became employed by the Lewiston public school system in November 1978 when he accepted a position as assistant superintendent. Deposition of James J. Tracey ("Tracy Dep.) at 6. He was also serving at the time as a captain in the Army National Guard. *Id.* His National Guard duties occupied one weekend per month and 15 days of "active duty" per year. *Id.* at 7. His practice during his employment with the Lewiston schools was to take two weeks of leave each summer to fulfill his active duty obligations, although there were also other unspecified times during the year when the

plaintiff would be absent from work in connection with his military duties. Deposition of Robert V. Connors dated October 3, 1997 ("Connors Dep. I") at 71, 77.

In April 1990 the plaintiff wrote a memorandum to Robert Connors, the Lewiston schools superintendent, seeking to clarify the amount of vacation time he had accrued. Memorandum of James J. Tracy dated April 11, 1990 and addressed to Robert V. Connors ("Exhibit 9B") at 1.[1] The gist of this memo is that the plaintiff considered himself entitled under federal law to take up to 17 days of military leave per year without losing any vacation time, and that he had been advised by Connors when he first took his job that he could take an "unlimited" amount of military leave. *Id.* Connors has no recollection of discussing this document with the plaintiff. Deposition of Robert V. Connors dated January 8, 1998 ("Connors Dep. III") at 20. Connors disputes that he ever authorized the plaintiff to take unlimited military leave. Deposition of Robert V. Connors dated October 30, 1997 ("Connors Dep. II") at 16. He has admitted to having had concerns that the plaintiff's military absences were causing him and others to have to assume additional responsibilities. Connors Dep. I at 79.

On December 5, 1994 the plaintiff made a written request of Connors and the Lewiston School Committee for an unpaid military leave of absence covering the entire 1995-96 school year. Memorandum of James J. Tracey, dated Dec. 5, 1994 and addressed to Lewiston School Committee *et al.*, Exh. 7. The purpose of the request was to allow the plaintiff to accept a graduate fellowship at the University of Texas in Austin that would meet the educational requirements for the rank of

[1] This is one of a series of deposition exhibits filed by the plaintiff in support of his summary judgment motion. It is not clear to which deposition or depositions this or any of these exhibits pertain; it appears the parties simply adopted a unified numbering system for all exhibits introduced during any depositions in the case. Citations to exhibit numbers refer to this series of documents filed with the plaintiff's motion.

general officer in the Army National Guard. *Id*. The receipt of this request caused Connors to be upset. Connors Dep. I at 87. He told the plaintiff he could not support the leave request because he did not think the school department could function without its second-in-command for an entire academic year. *Id*. at 86. Connors therefore denied the plaintiff's leave request on the ground that it would not benefit the school department. Complaint (Docket No. 1) at ¶ 9; Answer (Docket No. 2) at ¶ 9. On December 12, 1994, while meeting in executive session, the School Committee voted 8-1 to take no action on the leave request pending the receipt of a legal opinion from the city attorney.[2] City Attorney Robert S. Hark provided such an opinion in writing two days later, advising that under Maine and federal law the defendant is entitled to leave and reinstatement thereafter in connection with military training. Letter of Robert S. Hark dated Dec. 14, 1994 and addressed to Robert V. Connors (Exh. 9) at 2-3. The plaintiff provided Connors with a copy of his military orders to attend the University of Texas and Connors informed the plaintiff that he had no choice but to approve the leave request. Complaint at ¶ 11; Answer at ¶ 11. Prior to the granting of this leave request, there had never been any discussion by the Lewiston School Committee of eliminating the position of assistant superintendent. Connors Dep. I at 108.

By memorandum dated April 18, 1995 Connors provided City Administrator Robert J. Mulready with certain information about the city's school budget. Memorandum of Robert V. Connors dated April 18, 1995 and addressed to Robert J. Mulready (Exh. 10C). Connors reported that the assistant superintendent's salary was $65,091 for fiscal 1995 but only $30,000 for fiscal 1996. *Id*. at 5. The plan was to use the $30,000 to fund any "temporary projects" that required

[2] The action is memorialized at page 9 of the minutes of the Lewiston School Committee Meeting of December 12, 1994. These and the other cited Lewiston School Committee meeting minutes were filed by the plaintiff with his summary judgment motion.

completion during the plaintiff's leave. *Id*.; Connor Dep. III at 29-30. In May 1995, as part of a plan he submitted to the school committee for reducing the 1995-96 Lewiston school budget by approximately $1.2 million to a total of approximately $27.3 million, Connors recommended reducing the sum allocated to the assistant superintendent position by an additional $10,000. Memorandum of Robert V. Connors dated May 18, 1995 and addressed to Members, School Committee (Exh. 10E) at 1, 9.

Connors and the plaintiff had a meeting on May 23, 1995 for the purpose of conducting the plaintiff's annual evaluation. Connors Dep. I at 130-31. The meeting, which Connors characterized as strained, lasted only ten minutes. *Id*. at 131, 134. According to Connors, the meeting was brief because the plaintiff was about to go on a year-long leave and, hence, Connors had no recommendations to make concerning the plaintiff's work during the period. *Id*. at 131. He was, in his own words, not "happy with not having an assistant superintendent for [the] upcoming year" because "the job still needed to be done." *Id*. at 132-33.

During the plaintiff's leave for the 1995-96 school year, his responsibilities were reallocated to the superintendent, the maintenance director, the business manager and others. Defendant's Answers to Plaintiff's First Set of Interrogatories[3] ("Interrog. Resp.") at ¶ 16. The consensus on the School Committee was not to hire a temporary replacement but, rather, to take advantage of what one member called the "salary reprieve" in light of the school system's tight budget. Deposition of Paul R. St. Pierre ("St. Pierre Dep.") at 47-48.

Each January Connors would submit a "working budget" for the upcoming academic year to the School Committee. Connors Dep. I at 12. The School Committee would then discuss the

[3] This document was also filed by the plaintiff with his summary judgment motion.

budget, finalizing a formal budget proposal for transmission to the Lewiston City Council, usually by the end of March. *Id*. at 13. The working budget submitted in January 1996 for the 1996-97 academic year called for spending of $29,139,974, representing a 6.7 percent increase over the 1995-96 budget. Lewiston School Department 1996-1997 Working Budget (Exh. 20) at 149; Lewiston School Department Budget Message dated April 9, 1996 (Exh. 50) at 2. The working budget included $67,080 for the salary of the assistant superintendent. Exh. 20 at 1.

At the School Committee meeting of January 29, 1996, School Committee member Scott Lynch asked Connors to prepare a budget proposal that would permit no increase in spending over the previous year.[4] Minutes of the Lewiston School Committee Meeting Held Monday, January 29, 1996 at 2. This required Connors to reduce his budget proposal by more than $1.8 million. *Id.* Lacking specific guidelines as to what areas of the budget to trim, Connors went through his working budget with a "hatchet" and prepared a plan "to flat fund the 1996-97 budget" that he presented to the school committee February 12, 1996. Connors Dep. I at 166, 168; Memorandum of Robert V. Connors dated February 12, 1996 to Members, School Committee (Exh. 28) at 1; Minutes of the Lewiston School Committee Meeting Held Monday, February 12, 1996 at 6. The position of assistant superintendent was among those positions that would be eliminated under this proposal, as was the position of athletic director at Lewiston High School. Exh. 28 at 2, 6.

On March 4, 1996 Connors transmitted yet another budget proposal to the school committee, which assumed a budget increase of 3.5 percent and, accordingly, reinstated $952,782 in cuts he had identified in his February 12, 1996 proposal. Adjustments to $1,831,393 Reductions (Exh. 30);

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[4] Lynch was a member of the Lewiston City Council who was that body's official representative on the School Committee. Deposition of Scott J. Lynch ("Lynch Dep.") at 6-7.

Connors Dep. I at 185. This document proposed the reinsertion of the assistant superintendent and athletic director positions, *inter alia*, into the budget. Exh. 30. Connors came away from the school committee meeting on March 11, 1996 with the impression that the committee had reached consensus on increasing the school budget by 3.5 percent over the previous year's levels. Interrog. Resp. at ¶ 12. At the school committee meeting of March 18, 1996, Connors formally recommended a budget increase of 3.28 percent, which involved a total budget of $28,204,627 and included the recommendations he had made on March 4. Minutes of the Lewiston School Committee Meeting Held Monday, March 18, 1996 ("3/18 Minutes") at 2; Memorandum of Robert V. Connors dated March 14, 1996 to Members, School Committee (Exh. 34) at 1. The School Committee rejected this budget proposal by a vote of 5-4. 3/18 Minutes at 4. Instead, after specifically defeating a motion to reinstate the assistant superintendent position by a 2-7 vote, the School Committee approved a 1996-97 budget of $28,180,037. *Id*. at 7, 9. The approved budget involved the elimination of 13 positions in the school system, including that of assistant superintendent. Exh. 50 at 3. The budget ultimately submitted to the City Council for its consideration called for spending of $28,094,000, an increase of 2.88 percent over the previous year. *Id.* at 2.

According to Yvette Silva, one of the School Committee members who voted against reinserting the assistant superintendent position in the budget at the March 18 meeting, Connors had left the school committee with the impression that the system was "doing quite well without that position and things were functioning perfectly." 3/18 Minutes at 7; Deposition of Yvette I. Silva ("Silva Dep.") at 10. Silva's recollection was that this view was shared by all but "maybe one or two" school committee members. *Id*. at 11. According to school committee member Paul St. Pierre, who also voted against retaining the assistant superintendent, Connors had told the committee that

the plaintiff's absence was causing "some stress," but that "the system was functioning." 3/18 Minutes at 7; St. Pierre Dep. at 68. St. Pierre's view is that the plaintiff's absence during the budget discussions "made a lot of difference" regarding the fate of his position in the budget. *Id*. at 103. According to St. Pierre, had the plaintiff not been on leave his position would not have come up for elimination in the first place and, had such a proposal surfaced, the plaintiff "would have taken advantage of his presence to sell the school committee on the importance of his role." *Id*. at 105. Yet another school committee member who voted against retention, Thomas Shannon, is also of the view that the plaintiff's absence made it easier to cut his job from the budget. 3/18 Minutes at 7; Deposition of Thomas P. Shannon at 22.

On April 29, 1996 the City Council voted 6-1 to trim another $585,419 from the budget proposed by the School Committee, but without specifying how the school system should reduce its planned expenditures by this sum. Lewiston City Council Budget Workshop minutes dated April 29, 1996[5] at 5. The School Committee acted to reduce its budget by the required sum on May 6, 1996, a plan that again called for the elimination of the athletic director's position. Connors Dep. II at 44. However, when the City Council took final action on the School Committee budget on May 13, 1996 school expenditures were actually set to increase some $200,000 over previous-year levels.[6] *Id*. at 50. Moreover, the School Committee voted 7-1 to restore the position of athletic director to the 1996-97 budget at its meeting on June 10, 1996. Minutes of the Lewiston School Committee

[5] This document was also filed by the plaintiff with his summary judgment motion.

[6] The plaintiff has filed an account of the City Council's actions on May 13, 1996 that appeared two days later in the *Lewiston Sun-Journal* newspaper. The defendant quite appropriately objects on hearsay grounds to the court's crediting such assertions based on a newspaper article, and I therefore do not take the contents of the article into account.

Meeting Held Monday, June 10, 1996, at 6. There was no discussion at the June 10 meeting of how to fund this newly restored position. Connors Dep. II at 54.

The plaintiff wrote to Connors on May 8, 1996 advising of his intention to return to his assistant superintendent's job on July 1, 1996. Letter of James J. Tracey dated May 8, 1996 and addressed to Robert V. Connors (Exh. 64). Connors replied in writing on May 20, 1996 explaining that the plaintiff's job "has been abolished effective June 30, 1996." Letter of Robert V. Connors dated May 20, 1996 and addressed to James J. Tracey (Exh. 70) at 1. Connors offered this further explanation:

> [T]he City Council which was elected last fall included a majority committed to a no tax increase policy. In addition, there were strong opinions on both the Council and the School Committee to the effect that the priority to which the School Committee should adhere was to eliminate any unnecessary administrative positions prior to eliminating any "front-line" teaching positions. In the face of this and in the face of a declining system-wide student population, with which you are as familiar as anyone, a number of very difficult and controversial decisions were reached, including . . . the elimination of 21.5 employee positions.

Id. Therefore, Connors told the plaintiff,

> the position of Assistant Superintendent will no longer exist as of the beginning of the new fiscal year on July 1, 1996. There are currently no other administrative positions vacant to which I could assign you. For that reason, your stated intention to return to your position as of the 1st of July cannot be carried out.

Id. The plaintiff has not been employed by the Lewiston School Committee since June 30, 1996. Complaint at ¶ 17; Answer at ¶ 17.

From the spring of 1996 through at least October 30, 1997, a number of positions have become available in the Lewiston school system, some of them administrative. Connors Dep.II at 52-53. According to material provided by the defendant to the plaintiff in discovery, between July 1, 1996 and September 2, 1997 the Lewiston school system filled eight positions for which the

plaintiff was qualified: maintenance director, business manager, middle school principal, middle school assistant principal, high school social studies teacher, high school English teacher (two positions) and middle school social studies teacher. Interrog. Resp. at ¶ 17; Memorandum of Robert V. Connors dated September 2, 1997 and addressed to Robert Hark, Esq. (Exh. 77) at 1-3. The defendant identified 20 other positions filled during the period for which the plaintiff could become qualified with additional training and certification. *Id*. The plaintiff considered the position of high school or middle school principal to be of similar pay to his job as assistant superintendent, but did not consider any other administrative positions in the system to be of similar status. Tracey Dep. at 34-35. The school system never approached Tracey to ask if he were interested in any of the available jobs. Connors Dep. II at 53, 65.

III. Discussion

a. USERRA

USERRA provides a sweeping guarantee that a person who performs military service will not suffer adverse consequences to his or her civilian employment as a result of such service. Included are two distinct but related provisions that are relevant to the instant proceeding. The first is a protection against service-related discrimination. Specifically, the statute provides in relevant part that

> [a] person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

38 U.S.C. § 4311(a). Further,

> [a]n employer shall be considered to have engaged in actions prohibited . . . under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service . . . .

Id. at subsection (c)(1). An example of the kind of claim that can be maintained under section 4311 is one that involves allegations that an employee was fired because his duty as a reservist required his absence from work. *See Robinson v. Morris Moore Chevrolet-Buick, Inc*., 974 F.Supp. 571 (E.D.Tex. 1997). In this regard, USERRA resembles the federal law that protects employees from discrimination based on race or gender.

The statute also contains an additional protection not found in other areas of discrimination law, specifically keyed to the reality that military service commonly requires absences from civilian work. The statute affirmatively establishes a right to reemployment, in appropriate circumstances,[7] enjoyed by "any person whose absence from a position of employment is necessitated by reason of service in the uniformed services." 38 U.S.C. § 4312(a). However, an employer is not required to reemploy an absent employee under USERRA if, *inter alia*, "the employer's circumstances have so changed as to make such reemployment impossible or unreasonable." *Id*. at subsection (d)(1)(A). The burden of proving impossibility or unreasonableness is on the employer. *Id*. at subsection (d)(2).

USERRA also sets out in specific terms the kind of position a covered person is entitled to upon reemployment. A non-disabled person whose military service exceeds 90 days is entitled to

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[7] These circumstances involve the giving of advance notice to the employer of the military service, an absence of less than five years and the making of a formal request for reemployment. 38 U.S.C. § 4312(a). The plaintiff's compliance with these conditions is not at issue in the instant motions.

reemployment

> 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.

38 U.S.C. § 4313(a)(2)(A). If, "after reasonable efforts by the employer to qualify the person," the employee remains unqualified to perform such a position, then the person is still entitled to reemployment "in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status and pay, the duties of which the person is qualified to perform." *Id*. at subsection (a)(2)(B). Finally, if a non-disabled employee is not qualified for a position under either subsections (a)(2)(A) or (a)(2)(B) and "cannot become qualified with reasonable efforts by the employer," the employer must still provide "any other position which is the nearest approximation to a position" referred to under, first, subsection (a)(2)(A) and, then, subsection (a)(2)(B). *Id*. at subsection (a)(4). One cannot help but conclude after reading these finely drawn but plainly worded provisions that Congress has determined it will be the rare person indeed who takes a military leave from a civilian job and will not be able to reclaim another job with the same employer upon his or her return.

In my opinion, there is a genuine issue of material fact precluding summary judgment for either side on the question of whether the defendant discriminated against the plaintiff in violation of section 4311. Viewing the record in the light most favorable to the plaintiff, a reasonable factfinder could certainly conclude that his military service was a motivating factor in the defendant's decision not to reemploy him upon his return from military leave.[8] The key here is

[8] In arguing to the contrary, the defendant relies on a Seventh Circuit case decided under the (continued...)

Connors, and the evidence suggesting he was displeased by the plaintiff's plan to take a year-long military leave and only acceded to the plaintiff's plan when advised by counsel that the school department was required to do so.[9] *See Robinson*, 974 F.Supp. at 576 (supervisor's angry reaction

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[8](...continued)
Americans with Disabilities Act, *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194 (7th Cir. 1997). In *Matthews*, the court drew a distinction between employment discharge because of a disability, which is unlawful, and a discharge "because of a *consequence* of the disability — [the plaintiff's] absence from work the last half of 1991 and his not working full-time the following year." *Id*. at 1198 (emphasis in original). Assuming that such a distinction is consistent with congressional intent in the enactment of USERRA — a debatable premise, in light of the reemployment rights created under section 4313 and discussed *infra* — this record would generate a genuine issue of material fact as to whether the plaintiff's military status itself, as distinct from the absence occasioned by that status, was a motivating factor in the defendant's adverse employment decision.

[9] The defendant emphatically does not regard Connors as the pivotal figure, taking the position that any liability under USERRA in the circumstances of the case requires a determination that some quantum of the members of the School Committee were motivated by the plaintiff's military status in deciding to eliminate his position. In support of this position, the defendant relies on *Scott-Harris v. City of Fall River*, 134 F.3d 427 (1st Cir. 1997), *rev'd on other grounds sub nom. Bogan v. Scott-Harris*, 1998 WL 853213 (U.S. Mar. 3, 1998), *cert. denied sub nom. Harris v. City of Fall River*, 1998 WL 97293 (U.S. Mar. 9, 1998). *Scott-Harris* raised the "tantalizing question" of "whether a discriminatory animus displayed by fewer than the minimum number of city council members whose votes would be required to enact an ordinance can (or should) be imputed to the municipality itself." *Scott-Harris*, 134 F.3d at 430. The reference to discriminatory animus notwithstanding, the case actually arose under 42 U.S.C. § 1983 and involved an allegation that a municipality violated the plaintiff's First Amendment rights by abolishing her job because she spoke out forcefully against racial slurs that had been directed at her. *Id*. at 430-32. The First Circuit opted against a "bright-line rule" in favor of a holding that a plaintiff might, in appropriate circumstances, prove bad motive on the part of a legislative body by offering evidence of such motivation "on the part of at least a significant bloc of legislators." *Id*. at 438. Assuming that this analysis would have relevance outside the unique context of a section 1983 case, the facts presented here make it inapposite. A reasonable factfinder could determine that it was Connors — rather than the School Committee, the City Council or any of the individual members of those bodies — who was responsible for the elimination of the plaintiff's job, doing so when instructed to find places to trim the school budget. A factfinder could also credit the testimony of School Committee members that they accepted Connors' stated view that the school system was operating perfectly well without an assistant superintendent, and could determine as well that in making such a statement Connors was actually masking a desire to avenge his pique over the plaintiff's having taken military leave in the
(continued...)

to military leave request began chronology of events from which "it may plausibly be inferred" that military service was motivating factor in discharge). Although, as the defendant points out, Connors did not initially propose the elimination of the plaintiff's job in his initial 1996-97 budget proposal, doing so only after receiving instructions to find places to trim the fiscal plan, the fact remains that Connors made the suggestion in circumstances that permit a factfinder to infer the taint of discriminatory animus.[10]

On the other hand, viewing the record in a defendant-favorable light, a reasonable factfinder could also determine that the defendant has met its burden in proving that it would have made the same decision, i.e., to eliminate the assistant superintendent's job, even if the plaintiff had not been on military leave. To do so, the factfinder could credit the assertion that School Committee members and city councilors considered themselves to hold a mandate from the electorate to trim the school budget so as to avoid tax increases, that in such a climate of austerity it was appropriate to make classroom personnel a higher priority than administrators, and that they therefore would have eliminated the assistant superintendent's job regardless of the plaintiff's military status or Connors' recommendation. *See, e.g.*, St. Pierre Dep. at 111 ("unless we gave [the city councilors] the budget that they wanted to see, . . . it was going to come back to us") and 123 ("if I'd have had to decide between retaining the assistant superintendent's position or keeping Wallace School open . . . I

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[9](...continued)
first place. Under either view, the School Committee and City Council simply ratified what was, in effect, Connors' decision.

[10] Unlike the plaintiff, however, I do not find the School Committee's decision to restore the athletic director's job to the school budget to be probative of discriminatory animus against the plaintiff. In my view, the most plaintiff-favorable inference this fact will sustain is simply that the School Committee had the capacity to reverse itself after deciding to eliminate an administrative position.

would have definitely leaned toward retaining Wallace School"),[11] *id*. (describing his budget-cutting priority as seeking "the least amount of impact on the funds that directly go into the classroom"); Lynch Dep. at 5-6 ("prevailing theme" of his voter contact during his 1995 city council campaign was dissatisfaction with tax rate); Silva Dep. at 5 ("there was a fresh election, and I remember talking with all my constituents and remembering everything that they had said, no new taxes") and 23 ("if we had to eliminate any staff, I would eliminate administrative before I would eliminate teachers").

Although I believe the defendant's liability for discrimination under section 4311 must await trial for determination, I agree with the plaintiff that he is entitled to summary judgment on the issue of the defendant's liability under the reemployment provisions in sections 4312 and 4313. In this regard, I do not accept the defendant's characterization of the anti-discrimination and reemployment provisions of USERRA as simply "two alternative, but congruent methods of analyzing the evidence."[12] Memorandum of Defendant City of Lewiston in Support of Defendant's Motion for Summary Judgment (Docket No. 13) at 1. In reality, they are two distinct causes of action. The anti-discrimination provisions make it a violation of federal law for an employer to make any adverse employment decisions that are based on an employee's military service, such as the decision to fire an employee at issue in *Robinson*. In contrast, the reemployment provisions do not concern

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[11] The School Committee voted to close the Wallace School at the same March 18, 1996 meeting at which it voted against retaining the assistant superintendent's job. 3/18 Minutes at 6.

[12] In fairness, it should be noted that the plaintiff also succumbs to the tendency to confuse the rights created by the anti-discrimination and reemployment provisions. *See, e.g.*, Motion for Partial Summary Judgment as to Liability, etc. (Docket No. 15) at 9-10 (arguing that plaintiff entitled to reemployment, given lack of impossibility, unreasonableness or undue hardship, because plaintiff has made out *prima facie* case of discrimination and defendant has not sustained burden of proof on existence of legitimate, non-discriminatory reason for its decision).

themselves with discriminatory animus. Rather, absent circumstances not present here, they give an employee returning from military duty an absolute right to reemployment with his or her civilian employer, subject only to the employer's proving certain carefully enumerated exigent circumstances that essentially make such reemployment an impossibility.

The plaintiff contends that the defendant cannot demonstrate that his reemployment was impossible or unreasonable within the meaning of 38 U.S.C. § 4312(d)(1)(A). I agree. Viewing the record in a defendant-favorable light, a factfinder might reasonably determine that the budget priorities adopted by the School Committee and City Council during the plaintiff's leave made his return as assistant superintendent impossible or unreasonable. The factfinder might also determine that, because there was only one assistant superintendent in the school system, no other position of "like seniority, status and pay" within the meaning of 38 U.S.C. § 4313(a)(2)(A) existed in which to employ the plaintiff. However, as already noted, sections 4312 and 4313 require more than that of the defendant. Under 38 U.S.C. § 4313(a)(4), there is an affirmative obligation to offer the plaintiff "any other position which is the nearest approximation to a position" he enjoyed prior to his leave. The defendant may evade this obligation only by making a showing of undue hardship. 38 U.S.C. § 4312(d)(1)(B); *see also* 38 U.S.C. § 4303(15) (defining "undue hardship" as "actions requiring significant difficulty or expense" considered in light of employer's financial resources, the logistics of its operations and the nature and cost of its USERRA obligations). It is undisputed that no fewer than eight other positions for which the plaintiff was qualified became available during the 1996-97 academic year, and that the defendant neither offered any of them to the plaintiff nor even informed him of them. There has certainly been no showing that it would have been an undue hardship for the defendant to offer one or more of these positions to the plaintiff. In my view, the

plaintiff has produced sufficient evidence, unrebutted by the defendant, to entitle him to summary judgment on the issue of liability under the reemployment provisions of USERRA.

b. 26 M.R.S.A. § 811

The analog to USERRA that the Maine Legislature has enacted is far more simply worded than its federal counterpart. The statute provides:

> **1. Intent**. The intent of this section is to ensure that members of the state military forces, including the Maine Army and Air National Guards, and the Reserves of the United States Armed Forces will not suffer harm as the result of their military obligations and that an employee returning from military leave from his civilian job shall be treated no differently than any other employee with an approved leave of absence.
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> **2. Military leave of absence**. Any member of the military forces, including the Maine Army and Maine Air National Guards and the Reserves of the United States Armed Forces, who, in response to federal or state orders, takes a military leave of absence from a position other than a temporary position in the employ of any civilian employer, shall:
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> > A. Give notice to his civilian employer of his absence for military duty; and
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> > B. If the employer so requests, obtain a confirmation from the Adjutant General, Camp Keyes, Augusta, or applicable reserve component headquarters, of satisfactory completion of his military duties upon return to civilian employment or immediately thereafter.
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> **3. Reinstatement**. Any employee who is in compliance with subsection 2 and is still qualified to perform the duties of such position, must be reinstated without loss of pay, seniority, benefits, status, and any other incidences of advantages of employment as if he had remained continuously employed. The period of absence shall be construed as an absence with leave, and within the discretion of the employer, the leave may be with or without pay.

26 M.R.S.A. § 811. As with the plaintiff's federal claim, the defendant does not dispute that the plaintiff has complied with the applicable notice requirements.

The defendant contends it is entitled to summary judgment on the section 811 claim for two

reasons. The defendant first takes the position that the Maine statute should not be construed as vesting in the plaintiff any rights not secured to him under USERRA, an argument that presumably urges the court to dispose of the state claim for the same reasons the defendant maintains it is entitled to summary judgment on the USERRA claim. To the extent the defendant makes this argument, it is not entitled to summary judgment on the state-law claim for the same reason this result is precluded in its federal counterpart. The defendant also maintains that the state statute has been preempted by USERRA. As the plaintiff points out, USERRA could not be plainer in explicitly not preempting any state remedies that might secure greater rights to the plaintiff than he would enjoy under federal law, while superceding state law that would tend to diminish USERRA remedies. Specifically,

> (a) Nothing in this chapter [i.e., USERRA] shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
>
> (b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

38 U.S.C. § 4302. According to the defendant, the Maine statute is preempted because it contains none of the defenses enjoyed by defendants under USERRA, each of which the defendant characterizes as a "right or benefit" within the meaning of section 4302(b). This is a strained interpretation indeed of what is plainly an effort by Congress to establish USERRA as the baseline civilian employment rights enjoyed by persons in military service to which states are free to add but not subtract. Moreover, even if the statute were not clear on its face in this regard, the relevant

legislative history erases any possible doubt. *See* H.R. Rep. No. 103-65 at 20, *reprinted in* 1994 U.S.C.C.A.N. 2449, 2453 (section 4302(b) "a general preemption as to State and local laws and ordinances . . . which provide fewer rights or otherwise limit rights provided under [USERRA] or put additional conditions on those rights. . . . The Committee wishes to stress that rights under [USERRA] belong to the claimant . . . .). The defendant is not entitled to summary judgment on the state-law claim.

The court thus confronts the plaintiff's contention that he is entitled to summary judgment on the section 811 claim. The defendant does not take issue with the assertion in the memorandum supporting the plaintiff's motion that this record conclusively establishes that the defendant has failed to comply with what amounts to a statutory directive to reinstate an employee who remains qualified upon returning from military leave. I nevertheless believe it would be an improvident construction of section 811 to determine that summary judgment in favor of the plaintiff is appropriate on the present record.

This court is hampered by the lack of a construction of section 811 by the Law Court. Absent guidance from the Law Court, I decline to adopt the plaintiff's view that section 811 guarantees every Maine employee returning from military leave the civilian job he or she left behind. Although section 811 lacks both the references to employer motivation contained in the anti-discrimination provisions of USERRA as well as the exigency-based employer defenses in USERRA's reinstatement provisions, neither is the state statute without qualifying language. An employee is entitled only to treatment upon return from military leave "as if he had remained continuously employed." 26 M.R.S.A. § 811(3). The Legislature's declared intention is that "an employee returning from military leave from his civilian job shall be treated no differently than any other

employee with an approved leave of absence." *Id*. at subsection (1). What I discern from this language is that a factfinder could determine that the defendant has incurred no section 811 liability because it took precisely the same action — abolishing the assistant superintendent's job — that it would have taken had the plaintiff remained on the job, and, thus, that the plaintiff was not treated differently by virtue of his military absence. Therefore, viewing the record in a defendant-favorable light, the plaintiff is not entitled to summary judgment on his state-law claim.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be **DENIED** and that the plaintiff's motion for summary judgment be **GRANTED IN PART AND DENIED IN PART** as follows: **GRANTED** insofar as the plaintiff seeks to establish the defendant's liability under 38 U.S.C. §§ 4312-13 and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 13th day of March, 1998.

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David M. Cohen
United States Magistrate Judge