

closed 2/19/85

STATE OF NEW HAMPSHIRE
COMMISSION FOR HUMAN RIGHTS

No. ES(P) 2306-1195-694

Sharon McAleer

v.

K-Mart Corporation

FINDINGS AND ORDER

PROCEDURAL BACKGROUND

1. Complainant Sharon McAleer (McAleer) filed a timely complaint against Respondent K-Mart Corporation (K-Mart) with the New Hampshire Commission for Human Rights (the Commission) on September 17, 1982.

2. In her complaint, McAleer alleged that she had been discriminated against in her employment on the basis of sex.

3. The complaint was investigated by Commissioner Nancy Richards-Stower who found probable cause to credit McAleer's allegation that K-Mart had failed to offer McAleer a comparable position upon her return from pregnancy leave in violation of N.H.C.A.R. HUM 402.03(a).

4. As all attempts at conciliation failed, a public hearing was held on this charge on June 12, 1984 before Hearing Commissioners Robert J. Normandeau, Kenneth E. Fredette and Gail F. Paine.

FINDINGS OF FACT

Based on its consideration of all the evidence presented at the hearing along with the parties' stipulation of facts, the Commission finds as follows:

1. K-Mart Corporation is an employer within the meaning of RSA 354-A.

2. Sharon McAleer, who resides at 1 Kimball Avenue, Salem, New Hampshire, was employed by K-Mart, in Salem, from March 4, 1974 until September 10, 1982.

3. On June 17, 1982, McAleer commenced a medical leave of absence as a result of complications due to pregnancy.

4. Immediately prior to the start of this leave, McAleer was employed as a cashier/merchandise employee in the Sporting Goods Department. Her rate of pay was \$5.70 per hour and her hours were 8:00 a.m. to 2:00 p.m., Monday through Friday and totalled 30 hours per week. She was a full-time employee and eligible for benefits.

5. McAleer was a member of the K-Mart Corporation Retirement Pension Plan, and her pension was due to vest on March 4, 1984.

6. McAleer was on approved medical leave from June 17, 1982 until she was certified able to return to work on September 10, 1982.

7. During the period of her leave, McAleer's duties were reassigned to other employees.

8. As a result of this reassignment, McAleer's pre-leave position was eliminated and an identical position was not made

available to her when she was able to return to work on September 10, 1982.

9. When she was able to return to work McAleer was offered a position in the K-Mart Sporting Goods Department, working in the evening and on weekends.

10. This position involved the same duties, same pay, same total hours, same location, and same benefits as her previous position. It differed from her previous position only in the days and times she would be required to work.

11. McAleer refused this job and resigned from K-Mart because, for personal reasons, she was not able to work in the evening or on weekends.

12. At the time that McAleer was due to return from her leave there were two comparable employees with less seniority and less experience employed in the Sporting Goods Department.

13. If McAleer had not been on leave, one of the less senior employees would probably have been transferred to evenings and weekends, and McAleer would have retained her original schedule.

14. Subsequent to her refusal to accept the evening and weekend job, McAleer was also offered a job working in the Sporting Goods Department of the K-Mart located in North Andover, Massachusetts.

15. This job involved the same duties, same pay, same total hours, and same benefits. It differed from her previous position only in the location of the store at which she would be working.

16. McAleer refused this job because it would have increased her driving time to and from work from three minutes to thirty minutes each way and because her Massachusetts' wages would be subject to Massachusetts' income tax, thereby leaving her with less take-home pay than she had received in New Hampshire.

17. K-Mart could have offered McAleer her original job by transferring a less senior employee instead of transferring McAleer.

18. Other K-Mart employees returning from non-pregnancy related medical leave had previously been required to accept changes in their job assignments and work schedules.

19. In transferring McAleer while she was on pregnancy leave, K-Mart treated McAleer in the same manner as it had treated other employees on leave for temporary disabilities.

20. McAleer could have accepted K-Mart's offer if she had resolved her personal problem.

RULINGS OF LAW

K-Mart is alleged to have violated N.H.C.A.R. HUM 402.03(a).

This rule provides as follows:

An employer shall permit a female employee to take leave of absence for the period of temporary physical disability resulting from pregnancy, childbirth, or related medical conditions. When the employee is physically able to return to work, her original job or a comparable position shall be made available to her by the employer unless business necessity makes this impossible or unreasonable.

Accordingly, the issue before the Commission on this appeal is whether either of the positions offered McAleer by K-Mart

upon her return from pregnancy leave were "comparable" within the meaning of Rule 402.03(a). Based upon the particular facts of this case, as found by the Commission and set forth above, the Commission rules that both of the positions offered to McAleer by K-Mart, though not identical, were more "comparable" than not to her previous position within the meaning of Rule 402.03(a).

In addition, although distinct from the Rule 402.03(a) comparability issue upon which Commissioner Richards-Stower found probable cause, the evidence presented at the hearing raised a question of whether K-Mart had met the requirements of N.H.C.A.R. HUM 402.03(b). The Commission finds that this action does not violate Rule 402.03(b). To be prohibited by this rule K-Mart's conduct has to be discriminatory. No evidence was presented that K-Mart treated McAleer differently than it treated other, non-pregnant employees who, like McAleer, were unfortunate enough to require temporary disability leave. The Commission can only enforce State anti-discrimination laws. It cannot impose its views of appropriate personnel practices on the Respondent. That K-Mart did not "remove" a less senior person and return McAleer in her previous position, does not establish a violation of New Hampshire law. See Rule 402.03 (a); Rule 402.03(b).

For the reasons set forth above, the Commission finds and rules Respondent K-Mart's actions regarding the employment of Complainant McAleer do not constitute discrimination on

the basis of sex and the complaint is hereby dismissed.¹

SO ORDERED.

Date: <u>January 15, 1985</u>	<u>Robert J. Normandeau</u> Robert J. Normandeau, Chair
Date: <u>February 9, 1985</u>	<u>Kenneth E. Frédette</u> Kenneth E. Frédette
Date: <u>January 25, 1985</u>	<u>Gail F. Paine</u> Gail F. Paine

¹Due to the substance of its decision in this matter it is unnecessary for the Commission to reach K-Mart's claim that Rule 402.03(a) is preempted by Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. §§ 2000 (e), et seq.