JD(SF)-41-05
Denver, CO

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO, CALIFORNIA

KIDS AUTOMOTIVE, INC./KIDS FINANCIAL INC./
BRANDON FINANCIAL, INC., Joint Employer and/or
Single Employer,
Respondent

and **Case 27-CA-18809**

JIM ABRAMS, An Attorney,
Charging Party

Barbara E. Blanton Greene, Esq.,
for the General Counsel
Timothy L. Nemechek, Esq.,
for the Respondent
Jim Abrams, Esq., and
Elisa Moran, Esq.,
for the Charging Party

DECISION [1]

Albert A. Metz, Administrative Law Judge. The issues presented are 1.) jurisdiction and identity of the Respondent, and 2.) whether the Respondent interfered with, restrained and coerced Georgene Wayne, including reducing her pay because she engaged in protected concerted activity under Section 8(a)(1) of the National Labor Relations Act.[2] On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following findings of fact.

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[1] This case was heard at Denver, Colorado, on January 19-20, 2005. All dates herein are 2003 unless otherwise specified.
[2] 29 U.S.C. § 158 (a)(1).

I. JURISDICTION

The three entities named in the complaint are Kids Automotive Inc. (Auto), Kids Financial Inc. (Financial) and Brandon Financial (Brandon) and are referred to jointly as Respondent. The complaint alleges that they constitute a single and/or joint employer for purposes of this litigation. Their joint answer denies they are either a joint employer or a single employer and asserts that the only proper Respondent to this proceeding is Brandon for whom the alleged discriminatee, Georgene Wayne, worked. Brandon denies that it is engaged in commerce within the meaning of the Act. As discussed below I find that the three entities are a single employer and an employer within the meaning of the Act.

II. BUSINESS OPERATIONS

Auto and Financial began business in approximately October 1994. Auto operates a sub-prime or bad credit automobile sales lot with four locations in the Denver, Colorado metropolitan area. Financial handles financing of automobiles sold by Auto. Auto's primary business facility is located at 1300 West Alameda in Denver, Colorado. Auto and Financial occupy the same building at the West Alameda facility.

Brandon commenced operations as a finance company in approximately June 1993. Brandon's business was centered upon the purchase of sub-prime notes from new car dealerships owned by William Douglas Moreland. Brandon is also located at 1300 West Alameda in a building on the northwest side of Auto's parking lot.

Auto, Financial and Brandon have the same ownership and corporate officers. Douglas Moreland is the President of the three corporations with 30% ownership. Philip Harris is the Vice President of the three corporations and has 10% ownership in each corporation. Douglas Moreland's four children own 15% of all three corporations. Cynthia Carlheim is the corporate secretary of all three corporations. Gary Campbell is the corporate treasurer of Auto and Financial. Philip Harris, vice president and general manager, is responsible for managing the day-to-day operations of Auto, Financial and Brandon.

The pay checks of employees of all three corporations bear the Auto name as their employer. Similarly, the W-2 forms received by employees of the three corporations identify Auto as their employer. Auto pays the federal and state taxes of all three corporations. These corporations share one company, ADP, which provides their payroll services. The Respondent maintains one workmen's compensation policy that covers all employees of the three entities. Auto has received a tax refund that resulted from a write-off issued to Financial. Employees of Auto and Financial share one telephone system, the same break room and the same restroom facilities.

Employees of the three corporations are covered by the same health insurance policy with Kaiser Permanente and Auto pays the health insurance premiums for all of these employees. The same is true of the employees' dental insurance policy. Auto also provides life insurance coverage for all three corporations' employees. The Respondent maintains one managers' policy for

managers of Auto, Financial and Brandon. The Respondent also has one 401(k) plan for employees of the three corporations. Respondent has one disability insurance policy (AFLAC) for all of the Auto, Financial and Brandon employees and this policy is paid for by Auto.

Employees are allowed to transfer between companies within the Moreland Group. Such transfers are effectuated through one document used by all three entities. These corporations have one "Vacation Request and Approval" form that is used by employees of the corporations and the same vacation policy applies to all of the employees. The employees are granted the same holidays, except the retail automotive sales employees. The same "Absence Report" form is used with respect to all three corporation's employees.

Nancy Castanon, the Controller for Auto, performed services for Financial, including providing all the financial statements, supervising the cashier, deposits, paying bills, and bank reconciliation. She printed financial statements for Auto, and assisted in the audits conducted for the Respondent. Castanon also performed month end closings for Auto, Financial and Brandon. She was also involved in the installation of software at all three corporations.

Some employees of Auto and Financial work out of the Brandon building and they share one telephone system. These employees also share the same fax machine, toilet facilities, and have the same computer system.

The day-to-day records for Auto and Financial are kept together within the same building. The long-term records for Auto, Financial and Brandon are stored at the Respondent's Federal Boulevard store. The three corporations use Bank One as their common bank.

III. THE EMPLOYMENT OF GEORGENE WAYNE

Brandon started operations in 1994, specializing in car financing for individuals with poor credit. Georgene Wayne was hired at Brandon in 1996 as a credit buyer and then progressed to collections and finally to manager. As a manager she supervised four employees whose job was to collect on loans. Brandon had approximately 400 collection accounts at its peak business period. Wayne was paid a base pay of $3,000.00 per month, plus bonuses during the time she was managing employees at Brandon's facility located on South Emporia Street in Denver. In approximately May 2001 Brandon's operations were moved to 1300 West Alameda in Denver. All of the Brandon employees, except Wayne, were terminated at that time. Contemporaneous with the move Wayne's pay was raised to $4,000.00 per month as an adjustment to compensate her for the absence of a bonus. When Wayne moved to the Alameda location, she was the only employee for Brandon and was supervised by Phil Harris. Also in 2001 Brandon stopped acquiring new retail finance accounts and that part of the business began winding down. In place of that business Brandon started to concentrate on doing wholesale financing where it provided financial backing to a subcontractor, Ken Auser, who was wholesaling cars. After the relocation Wayne was no longer a manager but an administrative clerk whose duties included collecting the dwindling present and past due retail accounts and assisting Auser in the running of his wholesale car business. Even though Wayne's duties changed from managerial to administrative, her pay of $4,000 a month remained the same until July 1, 2003, at which time her pay was reduced to $3,000.

As Brandon was no longer buying new paper the number of accounts dropped and Wayne had less accounts to oversee each month as individual accounts were written off. By February 2003 there were only 58 accounts remaining in the Brandon inventory. Wayne testified as an expert witness in an unrelated case in February 2003, that she knew that Brandon's business was winding down and that, as a result, she had been looking for employment with other companies. Harris, Brandon's Vice President and General Manager, discussed the diminishing business with Wayne on several occasions starting in May, 2001. Wayne admitted that the subject was discussed and that part of the discussion concerned her compensation. Wayne was interested in increasing her pay and Harris testified that he advised her that she needed to become more involved in the wholesale aspect of the business if she was to receive more pay. Wayne, however, was dissatisfied at having to work with Auser whom she considered difficult and abrasive towards her. Wayne testified that prior to March 2003 she had discussed with Harris her frustrations at having to work with Auser. Part of that discussion was her telling Harris that she was considering quitting, although she never gave formal notice that she was terminating her employment.

In late 2002 and early 2003 the Respondent installed a new computer system. Wayne's job was effected by the new system in that she no longer had to make entries by hand as these duties were progressively being computerized.

IV. WAYNE'S PROTECTED CONCERTED ACTIVITY

Wayne worked at the Alameda location in the same building as Financial's Pre-legal Specialist, Lucille Fancher, and Attorney, Andrew Nimtz. Gary Campbell, Operations Manager for Financial and Auto had instructed Wayne to turn off the computers in the Brandon building at the end of the work day. One morning in March 2003 Wayne arrived at work and noticed that her computer was on and displayed a pornographic picture on the screen. The computer software showed that six other pornographic sites had been visited. Wayne informed Fancher about the pornography on the computer.

On or about May 21 Fancher was leaving her work desk, she turned and noticed Nimtz was looking at porn on his computer. Fancher immediately went to Wayne and told her what she had observed. Wayne told Fancher to report the matter to her manager. Fancher did complain to Financial's Collections Manager, James Malaterre, about Nimtz viewing the pornography. Malaterre told her that he would speak with Gary Campbell about the matter. Fancher also spoke with Robert York, Financial's Profit and Loss Manager, and advised him of the situation. Fancher did not receive any response to her report and on May 22 she gave Malaterre a written complaint regarding Nimtz viewing pornography on his computer.

Within a day Wayne and Fancher together approached Malaterre about the pornography. Malaterre told Wayne to report the problem to Philip Harris and suggested that she check Nimtz' computer to determine what websites he had visited. Later that day Wayne and Fancher did access Nimtz' computer and noted that websites that had been visited included "Desirees" and "hard-coreporn.com." The women then reported their findings to Malaterre. Malaterre testified that he reported Wayne and Fancher's complaints to Campbell the next day.

Wayne also told Harris about Fancher seeing Nimtz watching pornography on the company computer. Harris told Wayne that he would discuss the situation with Campbell who would then meet with Nimtz. Wayne told Fancher about her discussion with Harris and the promised meeting between Campbell and Nimtz.

Harris did discuss the matter with Campbell who then summoned Nimtz to his office. Nimtz told Campbell that the pornographic material had been attached to an e-mail he had received and that it was an innocent occurrence. Campbell, nonetheless, issued Nimtz a written warning on May 23.

A few days later, Campbell told Fancher that the situation had been handled. Fancher was not satisfied by this explanation and remained upset.

After Nimtz had viewed the pornographic websites it became a daily occurrence that Wayne's computer would display pornographic pop-ups. Wayne showed Fancher and Castanon these pornographic pop-ups. Wayne complained to Harris at least twice about the pop-ups. Harris told her the company was also having the same problem at the Federal Boulevard site. Campbell confirmed there was a pornographic pop-ups problem within the company computer system at various locations.

Wayne continued having problems with daily computer pornographic pop-ups and Fancher was not satisfied with the resolution of her complaint. Fancher testified that she did not think her complaint had been taken seriously and she did not feel safe. Wayne and Fancher discussed the matter and decided that Wayne would telephone Respondent's President, Doug Moreland.

On June 9, while Harris was out of town, Wayne telephoned Moreland. Wayne testified she told Moreland about the concerns she shared with Fancher over computer pornography. She related to Moreland that Fancher was upset with the way the pornography issue had been dealt with and was talking about filing an EEOC charge. Wayne told Moreland that she wanted to protect the company. Wayne requested that Moreland speak with Gary Campbell and Nancy Castanon about the pornography problem. She also complained that Harris was not treating her suitably; she needed a transfer and also mentioned she was contemplating quitting. Moreland asked her for a little time to look into the matters she raised, and Wayne agreed. Moreland said he would get back to her. After her conversation with Moreland, Wayne told Fancher about the telephone call.

Moreland testified that Wayne had indeed spoken with him and that the discussion included Wayne having a problem with Harris; about Fancher being unhappy with the resolution of her exposure to pornography; and Wayne's perception of mistreatment by subcontractor Ken Auser with whom she regularly worked. Moreland asked her not to quit and said he would contact Campbell and discuss matters with him. Campbell testified that he was contacted by Moreland and asked if Harris was sexually harassing Wayne and if the Nimtz pornography situation had been handled. Campbell reported to Moreland that Nimtz had been reprimanded and said that he did not believe that Harris was sexually harassing Wayne.

Moreland left town after the telephone conversation with Wayne. Eventually both Harris and Moreland returned to Denver and Harris presented Moreland with a new pay program. This led to a discussion about Wayne, her work at Brandon and Rich Thayer, another employee who worked for Kids, and whose situation is not directly involved in this case. Moreland testified that prior to this meeting Harris had regularly assured him that Wayne had been diligently working on collecting the current accounts and going after those that had been charged off and taken as a financial loss. Moreland discovered that Wayne had not been pursuing the delinquent accounts and was not doing as much work as when she was raised to $4,000 per month. Moreland blamed Harris for misleading him into believing that the Brandon operations were doing fine and he threatened to fire Harris. Moreland told Harris he was not going to pay Wayne her present salary in light of her present work. Moreland made a similar decision with regard to Thayer whose job duties had also changed. Moreland told Harris to issue Wayne a written job description that detailed all of her duties.

On approximately June 23 Harris came to Wayne's office. Wayne testified that Harris was very angry and yelled at her, "Georgene, that was low, I can't believe you called Doug." Harris continued, "I can't believe you called Doug [Moreland], and you need to quit. Why don't you just quit?" Wayne said she was waiting for Moreland to get back to her. Harris said that Moreland was not going to get back to her and had nothing else for her, and she needed to just quit. Harris then left the office. Fancher was in the same area and overheard part of Harris' remarks. She testified she heard him say that, "I can't believe that you would be so low to call Doug on this." Fancher also described Harris as being "very upset" and using a raised voice.

Harris recalled the encounter somewhat differently. He remembered he walked into the office and Wayne asked him if he had talked to Moreland. Although Harris replied, "No," he conceded in his testimony that he knew what she was referring to. Harris remembered that Wayne said that she had called Moreland, and he asked why. Wayne told him that it was because she could not work with him or Auser anymore and before she quit she wanted to know if there was another position for her. He asked her if that meant she was going to quit. Wayne told him, "probably." Harris questioned her about what she meant by "probably" and questioned her as to whether she was going to quit or not. Wayne told him that she probably was going quit. Moreland testified that he said, "Okay" and walked out of the office. He testified that he may have yelled at Wayne at the end of their conversation, but denied ever saying how dare that she call Moreland, or that he threatened her in any way.

I have carefully considered the testimony regarding Harris' meeting with Wayne concerning her call to Moreland. That consideration includes the demeanor of the witnesses, Francher's partial corroboration of Wayne's version of events, the background that Harris provided that he came close to getting fired by Moreland because of clouding the financial situation at Brandon, and his concession that he may have yelled at Wayne at the end of their meeting. Based on my assessment of all of these factors, I credit Wayne's version of what Harris said to her.

Harris testified that he had a second conversation with Wayne a couple of days before June 27. He asked her if she was in fact going to quit. Wayne replied that she wished that she could but that she was not in a position to quit.

At the end of the day on June 27 Harris came to Wayne's office and gave her a written job description setting forth her job duties. The document stated that her job was to be paid at $3,000 per month, $1,000 less than she had been earning. Wayne testified that the job duties described in the document were the same that she had been doing, although it did note that she should collect old accounts (skip tracing). Wayne testified that she had done this work, but only when she had the time for it. The job description was effective on July 1, 2003. After telling Wayne that she needed to sign the job description, Harris left the office.

Castanon testified that on June 30 Harris was in her office and said that he had a new employee who was to start working at Brandon. Castanon commented that this was good in case Wayne decided to leave. Harris replied, "You know what? Going to Doug was the stupidest thing she could have done -- was the worst thing she could have done." Harris continued, "Doesn't she understand that the only thing Doug cares about is making money?"

Harris confirmed that he did discuss Wayne with Castanon. He recalled that he said, that going to Moreland was the worst thing that Wayne could have done. He explained that he meant by that remark that it was a mistake for her to draw Doug Moreland "into this." He testified that he had been covering for Wayne and her pay for a long time so that she could continue to make what she was being paid. He acknowledged that he had put Moreland off when questioned about the Brandon business and noted that, "I knew how busy he was, and Brandon Financial was a very small part of our business, and it was one employee ..., and I was responsible for her." Harris stated that he knew Moreland "is all about the business and all about money and all about dollars in and dollars out."

Wayne ceased her employment with Brandon in January 2004. Her work was then performed by employees Lisa Musso and Jessie Dekan. Musso is an employee in the payroll department of Auto and Dekan is an accounts payable employee of Auto. Musso testified that it took her about 9-11 hours a month to do her part of Wayne's prior work. Dekan testified that she spent approximately 10-15 hours a month doing her part of Wayne's prior work.

On February 20, 2004, a "Notice of Decision" was issued by the State of Colorado Department of Labor and Employment and awarded Wayne unemployment "benefits attributable to this employment", naming Auto, located at 1300 West Alameda Ave, Denver, Colorado, as her employer.

V. ANALYSIS

A. The Single and Joint Employer Issue

The Respondent denies the allegations of the complaint that the three entities composing the Respondent are a single and/or joint employer. The Board applies four criteria in determining whether separate entities constitute a single employer: (1) interrelation of operations, (2)

common management, (3) centralized control of labor relations, and (4) common ownership or financial control. ***Hydrolines, Inc.***, 305 NLRB No. 40 (1991);***Continental Radiator Corp.***, 283 NLRB 234 at fn. 4 (1987). No one of the four criteria is controlling nor need all be present to warrant a single-employer finding. ***Blumenfeld Theatres Circuit***, 240 NLRB 206, 215 (1979), enfd. 626 F.2d 865 (9th Cir. 1980); ***Emsing's Supermarket***, 284 NLRB 302 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989). The Board has stressed that the first three criteria are more critical than common ownership. ***Airport Bus Service***, 273 NLRB 561 (1984), disavowed on other grounds in ***St. Marys Foundry Co.***, 284 NLRB 221 fn. 4 (1987).with particular emphasis on whether control of labor relations is centralized, as these tend to show ``operational integration." ***NLRB v. Al Bryant, Inc.***, 711 F.2d 543, 551 (3d Cir. 1983), and cases cited therein. ``[S]ingle employer status depends on all the circumstances of the case and is characterized by absence of an `arm's length relationship found among unintegrated companies.'" Id.

The Respondent's Answer admits that Auto, Financial, and Brandon are closely held corporations with the same shareholders and officers. The Respondent admits the various corporations are engaged in selling and financing automobiles. Respondent admits in its Answer "that the payroll function for each of the entities is administered by ADP an outside payroll service." Respondent further admits with regard to Auto "that salary, check withholding, including taxes and fringe benefits are paid under its payroll for the employees at Auto, as well as the one employee of Brandon (Georgene Wayne) at all times relevant herein."

The Respondent's operations show a large degree of integration as detailed above. The ownership, supervision and interrelationship of personnel, facilities and labor relations have been proven by the Government by a preponderance of the evidence. Based on that evidence I find an interrelation of operations, common ownership, common management, and centralized control of labor relations. I conclude that the three entities that comprise the Respondent are a single employer. ***CM Office Services***, 338 NLRB No. 102 (2003) (Respondent found single employer where among other factors its operations were affiliated business enterprises with common officers, ownership, directors, management, and supervision; that formulated and administered a common labor policy; had shared common premises and facilities; provided services for each other; had interchanged personnel with each other; had interrelated operations in areas of insurance, phone, accounting, bookkeeping, banking, and intermingled finances.) See also: ***Hahn Motors***, 283 NLRB 901 (1983).

The Respondent's joint answer admits that the combined operations of Auto and Finance annually purchase and receive goods and materials valued in excess of $50,000 directly from points and places outside the State of Colorado and that they annually derive gross revenues in excess of $500,000. Auto and Finance admit, and I find, that at all times material they were an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Having found that Brandon, Auto and Financial are a single employer, I additionally find that the Respondent's operations do effect commerce as alleged in the complaint. I conclude that, at all times material herein, this single employer was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

B. The Concerted Protected Activity Issue

The Government alleges that Wayne was engaged in protected concerted activity when she discussed with employee Fancher and management their mutual concern about the pornography on the Respondent's computer system. The Respondent denies that Wayne was ever engaged in protected concerted activity.

Section 7 of the Act protects the rights of employees to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." As the Board stated in ***KNTV, Inc.***, 319 NLRB 447, 450-451 (1995):

> An employee's activity will be deemed concerted, when it is engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. ***Pacific Electricord Co. v. NLRB***, 361 F.2d 310, 310 (9th Cir. 1966), enfg. 153 NLRB 521 (1965). Concerted activity encompasses activity which begins with only a speaker and listener, if that activity appears calculated to induce, prepare for, or otherwise relate to some kind of group action. ***Root-Carlin, Inc.***, 92 NLRB 1313, 1314 (1951); ***Atlanta Newspapers***, 264 NLRB 878, 879 (1982).

I find that Wayne and Fancher were engaged in concerted activity protected by the Act when they discussed the workplace pornography issue among themselves and with management. Their discussions clearly related to their working conditions, their concern about correcting a disturbing problem in the workplace and their agreement that Wayne would present the issue to Moreland is the essence of concerted protected activity. Wayne thus telephoned Moreland on June 9 and discussed with him, among other matters, Fancher's continuing concern about the pornography situation, Fancher's perception that the matter had not been resolved satisfactorily by management and Fancher's contemplation of filing an EEOC complaint against the Respondent. Wayne's contacting of management on behalf of herself and Fancher regarding the pornography issue was concerted activity protected under the Act. ***Every Women's Place***, 282 NLRB 413 (1986). I further find that to the extent Wayne also complained to Moreland about her individual work troubles and her personal decision to quit, that she was not engaged in concerted activity.

C. Harris' Remarks to Wayne Regarding Her Call to Moreland

The Government alleges that when Harris confronted Wayne about her telephoning Moreland that he unlawfully coerced her for her protected concerted activity. The Respondent asserts that there was nothing unlawful said by Harris to Wayne in that meeting.

The credited evidence shows that Harris was distraught about Wayne going over his head to Moreland about the concerns she voiced in the June 9 phone call. Her call to Moreland resulted in his instigation of calls to Campbell to inquire into the matters raised, including was Harris treating Wayne poorly. When Moreland later met with Harris he was upset about Harris misleading him into believing that Brandon's operations were as profitable as possible. Moreland also assessed Wayne's relative high pay versus what he perceived to be her present job duties.

Moreland was also distressed about another of Respondent's employees earning more pay than what Moreland thought was appropriate. Moreland took his ire out on Harris whom he held responsible for poor management of these issues. He threatened to fire Harris for his poor management and lack of candor about the operations of Brandon and the perceived overpayment of Wayne for her work. Moreland told Harris he was not going to pay the two employees what they were presently making for the work they were then performing. Against this background Harris then confronted Wayne on June 23 accusing her of being "low" for contacting Moreland directly and telling her she needed to quit.

As discussed above, part of the reason Wayne had contacted Moreland was the pornography issue – an issues of mutual concern between her and Fancher. I find that because Harris did berate Wayne, about going to Moreland and urge her to act on her prior intimations of quitting that his conduct did threaten, restrain and coerce Wayne, at least in part, because she had engaged in protected concerted activity. I conclude that because of this conduct the Respondent did violate Section 8(a)(1) of the Act. ***Fieldcrest Cannon, Inc.,*** 318 NLRB 470, 490 (1995) (The test of interference, restraint or coercion is not whether it succeeds or fails, but, rather, the objective standard of whether it tends to interfere with the free exercise of employee rights under the Act.)

D. Wayne's Reduction in Pay

The Government alleges that Wayne's reduction in pay was the result of her protected concerted activity in protesting about the pornography issue. The Respondent asserts that the reduction came about from Moreland's assessment that Wayne was not performing work deserving of her $4,000 salary.

The evidence shows that the Brandon business had become a very small part of the Respondent's overall operations. The Brandon business had changed over the years and was fast becoming a wholesale car operation depending solely upon the business generated by independent contractor Ken Auser. Wayne's duties had admittedly changed along with the business and the dwindling retail operation was quickly becoming insignificant as far as generating income for Moreland. Likewise for at least several years Wayne was no longer supervising others at Brandon but was the sole employee of the corporation. Harris admitted that he had not been candid with Moreland about the Brandon business and Wayne's role at that business. Wayne admitted that she did not vigorously pursue the delinquent accounts of Brandon's retail paper. The record evidence suggests that there was not a great deal of work involved in what remained of the Brandon operations in the summer of 2003. Thus the testimony of the Respondent's employees who took over for Wayne when she quit her position showed they spent only a total of 20 to 26 hours a month doing the administrative work that Wayne had been compensated for as full-time work.

The General Counsel has the initial burden of establishing that protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(1). ***Wright Line***, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The elements commonly required to support such a showing of discriminatory motivation are employer knowledge, timing, and employer animus. Once such

unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity.

Based on the record as a whole I find the Government did meet its initial *Wright Line* burden of showing that Wayne's concerted protected activity was contemporaneous with her reduction in pay and that the Respondent had knowledge of her protected activity. I find that the Government has not shown sufficiently that the Respondent had animus towards Wayne because of her concerted complaints about pornography. The record shows that the Respondent considered that issue taken care of with respect to Nimtz. Likewise it was dealing on a technical level with eliminating pornographic pop-ups from its computer system. I find that the record as a whole does not support the conclusion that the Respondent had animus against Wayne for complaining about pornography. The Respondent presented Moreland as its chief witness as to why Wayne's pay was reduced. Moreland did not exhibit animus towards Wayne when he urged her not to quit her employment and to give him time to investigate her complaints. He did some follow-up on Wayne's issues including the pornography issue. Moreland also looked closely at the Brandon operations, including Wayne's pay and did not like what he saw. The record supports Moreland's assessment of the work in that the employees who subsequently took over most of the tasks Wayne performed did the work in a total of 20-26 hours a month. I found Moreland to be a credible witness who was convincing when he testified that he made the pay reduction decision based on a pure business judgment that he was not getting good value by paying Wayne $4.000 a month for the work she was then doing. I credit his testimony in this regard and find that Wayne's pornography complaint was not a reason her pay was reduced. I find, therefore, that even assuming a presumption of animus could be demonstrated, that the Respondent has met its burden of showing that Wayne's pay would have been reduced regardless of her protected concerted activity. *Wright Line*, supra. I conclude, therefore, that the Respondent did not violate Section 8(a)(1) of the Act by reducing Wayne's pay.

CONCLUSIONS OF LAW

1. The Respondent, Kids Automotive, Inc., Kids Financial Inc., Brandon Financial, Inc., a single employer, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act.

3. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Respondent has not violated the Act except as herein specified.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:[3]

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations,
Continued

ORDER

The Respondent, Kids Automotive, Inc., Kids Financial Inc., Brandon Financial, Inc., a single employer, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Interfering with, restraining and coercing employees for engaging in protected concerted activity under the National Labor Relations Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days after service by the Region, post at its facility at 1300 West Alameda Denver, Colorado, copies of the attached notice marked "Appendix." [4] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 23, 2003. ***Excel Container, Inc***., 325 NLRB 17 (1997).

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated: May 13, 2005

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Albert A. Metz
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT interfere with, restrain or coerce our employees for engaging in protected concerted activity under the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

Kids Automotive, Inc., Kids Financial Inc., Brandon Financial, Inc., a single employer
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

600 17th Street, 7th Floor, North Tower, Denver, CO 80202-5433
(303) 844-3551, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (303) 844-3554.