

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 06cv1903-EWN-MEH

EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION,

Plaintiff,

v.

MORELAND AUTO GROUP, LLP d/b/a KIDS AUTOMOTIVE, INC., KIDS  
FINANCIAL, INC., and BRANDON FINANCIAL, INC.

Defendants

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**ANSWER AND COUNTERCLAIM**

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Defendants Moreland Auto Group, LLP, Kids Automotive, Inc., Kids Financial, Inc. and Brandon Financial, Inc. (referred to collectively as “The Kids Automotive Defendants”), by and through their attorney of record Timothy L. Nemechek, Esq., of Cairns Nemechek & Magruder, LLC, and submit the following Answer and Counterclaim to the Complaint filed by Plaintiff, U.S. Equal Employment Opportunity Commission (“EEOC”). Defendants respond as follows:

**NATURE OF THE ACTION**

The Kids Automotive Defendants generally and specifically deny the allegations contained within this portion of Plaintiff’s Complaint. Specifically, the Kids Automotive Defendants deny that they engage in any unlawful employment practices, as defined by Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991. Further, Defendants deny that they engage in the unlawful employment practice of

retaliating against employees for complaining against discrimination. Kids Automotive Defendants deny that a public enforcement action is required and object to any attempt by Plaintiffs to certify a class action.

### **JURISDICTION OF VENUE**

1. Defendants admit the allegations in paragraph 1 of Plaintiff's Complaint.
2. Defendants admit that this Court has jurisdiction over the instant action. However, Defendants deny that any of the alleged unlawful employment practices took place.

### **PARTIES**

3. Defendants admit that Plaintiff EEOC is authorized to bring the instant action by Sections 706(f)(1) and 706(f)(3) of Title VII, 42 U.S.C. §§2000e-5(f)(1) and (3). Defendants further admit that the agency's duties are defined by the foregoing statute. Defendants deny the remaining allegations in paragraph 3 of Plaintiff's Complaint.
4. Defendants Kids Financial, Inc. and Kids Automotive, Inc. admit the allegations in paragraph 4. of Plaintiff's Complaint. Defendant Moreland Auto Group, LLP and Brandon Financial, Inc. deny the allegations in paragraph 4 of Plaintiff's Complaint.
5. Defendants Kids Automotive, Inc. and Kids Financial, Inc. admit the allegations in paragraph 5 of Plaintiff EEOC's Complaint. The remaining Defendants deny the allegations in this paragraph.
6. Defendants admit the allegations in paragraph 6 of Plaintiff's Complaint.

### **STATEMENT OF CLAIMS**

7. Kids Automotive Defendants admit that more than 30 days have passed since the filing of charges of discrimination by Georgene Wayne ("Wayne") and Nancy Castanon ("Castanon"). Defendants deny the remaining allegations in paragraph 7 of Plaintiff's Complaint.

**First Claim: Sexual Harassment and Hostile Work Environment**

8. Defendants deny the allegations in paragraph 8 of Plaintiff's Complaint.
9. Defendants deny the allegations in paragraph 9 of Plaintiff's Complaint.
10. The Kids Automotive Defendants deny the allegations in paragraph 10 of Plaintiff's Complaint. Defendants specifically deny each and every allegation contained within Subsections (a) through (f).
11. Defendants deny the allegations in paragraph 11 of Plaintiff's Complaint.
12. Defendants deny the allegations in paragraph 12 of Plaintiff's Complaint.
13. Defendants deny the allegations in paragraph 13 of Plaintiff's Complaint.
14. Defendants deny the allegations in paragraph 14 of Plaintiff's Complaint.
15. Defendants deny the allegations in paragraph 15 of Plaintiff's Complaint.
16. Defendants deny the allegations in paragraph 16 of Plaintiff's Complaint.
17. Defendants deny the allegations in paragraph 17 of Plaintiff's Complaint.
18. Defendants deny the allegations in paragraph 18 of Plaintiff's Complaint.
19. Defendants deny the allegations in paragraph 19 of Plaintiff's Complaint.

**Second Claim: Retaliation**

20. The Kids Automotive Defendants reallege their responses to paragraphs 1 through 19 of Plaintiff's Complaint.
21. The Kids Automotive Defendants deny the allegations in paragraph 21 of Plaintiff's Complaint.
22. The Kids Automotive Defendants deny the allegations in paragraph 22 of Plaintiff's Complaint.
23. The Kids Automotive Defendants deny the allegations contained within paragraph 23 of Plaintiff's Complaint, namely that any of these entities engaged in retaliatory conduct of any type. Defendants further specifically deny the allegations contained within subparagraphs (a)-(e).
24. Defendants deny the allegations in paragraph 24 of Plaintiff's Complaint.

25. Defendants deny the allegations in paragraph 25 of Plaintiff's Complaint.
26. Defendants deny the allegations in paragraph 26 of Plaintiff's Complaint.
27. Defendants deny the allegations in paragraph 27 of Plaintiff's Complaint.
28. Defendants deny the allegations in paragraph 28 of Plaintiff's Complaint.
29. Defendants deny the allegations in paragraph 29 of Plaintiff's Complaint.

**PRAYER FOR RELIEF**

WHEREFORE, Defendants Moreland Auto Group, LLP dba Kids Automotive, Inc., Kids Financial, Inc. and Brandon Financial, Inc. request that this Court:

A. Deny Plaintiff EEOC's request for permanent injunction or injunctive relief in any form or of any type.

B. Deny Plaintiff EEOC the relief requested contained within this paragraph of Plaintiff's Complaint.

C. Deny Plaintiff's request for monetary damages of any type for Wayne and Castanon, including back pay and/or pre-judgment interest.

D. Deny Plaintiff's requested relief for Wayne, Castanon and any other similarly situated individual.

E. Deny Plaintiff's request for relief on behalf of Wayne, Castanon or any other similarly situated individual.

F. Deny Plaintiff's request for relief on behalf of Wayne, Castanon or any other similarly situated individual.

G. Deny Plaintiff's request for relief on behalf of Wayne, Castanon or any other similarly situated individual.

H. Deny Plaintiff's requested relief, namely requesting training to officers, managers and employees regarding discriminatory harassment and retaliation in the workplace.

I. Deny Plaintiff's requested relief in paragraph I of Plaintiff's Complaint.

J. Deny Plaintiff's request for relief in paragraph J of Plaintiff's Complaint.

**FIRST AFFIRMATIVE DEFENSE**

That some or all of Plaintiff's claims are barred by the applicable statutes of limitations.

**SECOND AFFIRMATIVE DEFENSE**

Plaintiff's Complaint fails to state any claims upon which relief can be granted.

**THIRD AFFIRMATIVE DEFENSE**

Plaintiff's claims for relief are barred by the equitable doctrines of laches and estoppel.

**FOURTH AFFIRMATIVE DEFENSE**

Wayne and Castanon were "at-will" employees whose employment was terminable without notice.

**FIFTH AFFIRMATIVE DEFENSE**

Plaintiffs Wayne and Castanon have failed to exhaust all administrative remedies under state and federal law and, as such, its claims are barred.

**SIXTH AFFIRMATIVE DEFENSE**

Plaintiff's injuries and damages, if any, were solely and proximately caused by a third person or persons over whom The Kids Automotive Defendants had neither control nor the right of control.

**SEVENTH AFFIRMATIVE DEFENSE**

Plaintiff has failed to mitigate its damages, if any.

**EIGHTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred as its injuries/damages, if any, were proximately caused by an intervening event attributable to persons, firms and/or corporations other than The Kids Automotive Defendants.

**NINTH AFFIRMATIVE DEFENSE**

Some or all of Plaintiff's claims (on behalf of Wayne and Castanon) are barred by the exclusivity provisions of the Colorado Workers' Compensation Act.

**TENTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred or limited by the doctrine of set-off.

**ELEVENTH AFFIRMATIVE DEFENSE**

Plaintiff failed to provide proper notice to The Kids Automotive Defendants of its claim and failed to comply with the provisions of Section 24-10-101, C.R.S. et seq.

**TWELFTH AFFIRMATIVE DEFENSE**

In the event a verdict is returned in favor of the Plaintiff, Defendants are entitled to a reduction of a damage award, if any, to the extent of any payment made to Wayne and Castanon from a collateral source.

**THIRTEENTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred because it has sued the wrong party and has failed to include an indispensable party to the litigation.

**FOURTEENTH AFFIRMATIVE DEFENSE**

Defendants assert the absence of a proximate, causal relationship between Defendants' conduct and Wayne and Castanon's separation from employment.

**FIFTEENTH AFFIRMATIVE DEFENSE**

Wayne and Castanon unreason ably failed to av ail themselves of preventative or corrective opportunities provi ded by the Defendants and the Defendants exercised reasonable care to prevent or correct any allegedly improper conduct.

**SIXTEENTH AFFIRMATIVE DEFENSE**

Defendants fully performed any a nd all duties owed to Plaintiff under applicable law, including but not limited to, taking all reasonable steps to prevent harassment and/or discrimination in the wor k place. Plaintiff is therefore barred from asserting any cause of action against Defendants.

**SEVENTEENTH AFFIRMATIVE DEFENSE**

Defendants allege that its actions, i f any, with respect to Plaintiff were take n for legitimate, non-discriminatory business reasons including, but not li mited to, Plai ntiff's failure to satisfactorily perform.

**EIGHTEENTH AFFIMATVE DEFENSE**

Defendants assert that if any of Defendants' agents or employees acted negligently, intentionally, willfully, or otherwise tortiously, unlawfully or wrongfully conducted themselves, to cause damage to Plaintiff, any such action was beyond the scope of such agent's employment and was without advance knowledge, authorization, consent or ratification of Defendants.

**NINETEENTH DEFENSE**

Plaintiff's Complaint and each purported cause of action alleged therein, fails to state facts sufficient to allow recovery of exemplary or punitive damages against Defendants.

**TWENTIETH AFFIRMATIVE DEFENSE**

Plaintiff's alleged damages, if any, under Title VII are limited under the provisions of Section 102 of the Civil Rights Act of 1991, 42 U.S.C. §1981(a)(b)(3).

**TWENTY-FIRST AFFIRMATIVE DEFENSE**

Defendants assert that if Wayne and Castanon suffered any emotional distress or physical injury (and Defendants deny that Plaintiff suffered such distress or injury) their emotional distress and alleged physical injury were proximately caused by factors other than their employment, the actions of Defendants, or anyone acting on Defendants' behalf.

**TWENTY-SECOND AFFIRMATIVE DEFENSE**

Plaintiff's right to recovery is barred in whole and in part by the doctrine of After Acquired Evidence.

**TWENTY-THIRD AFFIRMATIVE DEFENSE**

Defendants did not enter in any form of contract, implied or express, with Wayne and Castanon, as they were at-will employees throughout their employment with Defendants.

**TWENTY-FOURTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are frivolous, vexatious, unreasonable, and/or are filed in bad faith, and for that reason justify an award of attorney's fees and costs against Plaintiff in favor of Defendants.

**TWENTY-FIFTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred by the principles and/or legal doctrines of collateral estoppel and res judicata.



## **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

Defendants reserve the right to identify additional defenses as they become known through discovery. Defendants further reserve the right to bring a claim of malicious prosecution against the Plaintiff in the future, and any other appropriate counterclaims.

### **COUNTERCLAIM**

30. Kids Automotive Defendants reincorporate their responses in paragraphs 1 through 30 to Plaintiff's Complaint.

31. At all relevant times herein, Defendants have complied with the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. and Title I of the Civil Rights Act of 1991, 42 U.S.C. §1981a.

32. At all times relevant herein, Plaintiff EEOC was charged with the responsibility of fully investigating discrimination complaints brought by employees of the Kids Automotive Defendants.

33. Furthermore, at all relevant times Plaintiff EEOC was statutorily charged with the responsibility of conducting a full, fair and complete investigation of discrimination charges, pursuant to §§706(f)(1) and 706(f)(3) of Title VII, 42 U.S.C. §2000e-5(f)1-3.

34. Plaintiff and Counter-Defendant EEOC failed to comply with the foregoing sections, by not conducting a full, fair and complete investigation of the charges brought by Wayne and Castanon. This failure to conduct a full, fair and complete investigation included but not limited to:

(a) failing to interview all material witnesses to the pending charge of discrimination, including a co-owner of one or more of the relevant entities;

(b) failing to consider written materials submitted on behalf of the Kids Automotive Defendants; and

(c) failing to consider applicable defenses to the charges of discrimination, including jurisdiction.

35. Because of the conduct of Plaintiff and Cross-Defendant EEOC, the Kids Automotive Defendants have sustained damages, including losses associated with the disruption of their business operations, attorney's fees (including costs of defending the within action), as such further and other damages to be proven at trial.

WHEREFORE, on the instant counterclaim, Defendant and Counterclaimant Kids Automotive request that this Court:

A. Issue a judicial declaration finding that Defendant has complied with the provisions of Title VII of the Civil Rights of 1964, as amended and Title I of the Civil Rights Act of 1991.

B. Order Plaintiff EEOC to make Defendant whole for the costs of defending the within action, including attorney's fees, costs, expert fees and expenses related to defending the instant charges of discrimination and subsequent civil action.

C. Grant such further relief as the Court deems necessary and proper.

**JURY DEMAND**

The Kids Automotive Defendants request a jury trial as to all issues so triable.

Date this 12<sup>th</sup> day of December, 2006.

Respectf

ully submitted,

Denver,  
(303)  
(303)

s/Timothy L. Nemechek  
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*Attorney for Defendants*

#### CERTIFICATE OF SERVICE

I hereby certify that on this 12<sup>th</sup> day of December, 2006, a true and correct copy of the foregoing ANSWER AND COUNTERCLAIM was served via electronic filing, and addressed to the following:

Lynn Palma, Esq.  
EEOC  
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s/Marian Mesta