

U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street - Suite 4-800
San Francisco, CA 94103

(415) 625-2200
(415) 625-2201 (FAX)



Issue Date: 31 May 2007

CASE NO. 2006-SOX-0094

In the Matter of:

WILLIAM MESSER,
Complainant,

vs.

JOHN ELWAY DODGE
Respondent.

Appearances:

William Messer, *pro se*

John Husband and Greg Clouser, for Respondent

BEFORE: Anne Beytin Torkington
Administrative Law Judge

INITIAL DECISION AND ORDER DISMISSING THE COMPLAINT

This matter arises under the whistleblower protection provisions of the Sarbanes-Oxley Corporate and Criminal Accountability Act of 2002 (“SOX,” “the Act”), 18 U.S.C. § 1514A.

Complainant filed a SOX complaint with the U.S. Department of Labor, Occupational Safety and Health Administration (“OSHA”) on January 6, 2005. On May 2, 2006, the Regional Administrator determined that Complainant had not engaged in protected activity under SOX. On May 28, 2006, Complainant filed with the Chief Administrative Law Judge an objection to the Secretary’s findings and a request for hearing. The case was assigned to me on June 5, 2006.

On October 13, 2006, Complainant filed a motion for default judgment, summary judgment, or dismissal. On October 13, 2006, I issued an order denying Complainant’s motions. On November 1, 2006, Complainant filed motions for summary judgment, for sanctions, and to strike all defenses. On November 3, 2006, Respondent filed a motion for summary decision. On November 6, 2006, Respondent filed a response to Complainant’s November 1 motions. On November 7, 2006, Complainant filed a motion to supplement his November 1 motions and he also filed a reply to Respondent’s response to those motions. On November 8, 2006, I held a

conference call with the parties and issued an order denying Complainant's November 1 motions and taking under consideration Respondent's motion for summary decision. Prior to the hearing, I notified the parties that Respondent's motion for summary decision was denied.

The trial in this matter was held on November 13, 14, and 15, 2006 in Denver, Colorado. Complainant appeared on behalf of himself, and Respondent was represented by counsel. Tr at 4-5. The following exhibits were admitted into evidence: Complainant's exhibits ("CX") 1-91; Respondent's exhibits ("RX") A-U; Administrative Law Judge exhibits ("ALJX") 1-3.¹ Tr at 14-30, 246, 617-18, 670. Respondent's closing brief, Complainant's closing brief, and Respondent's reply brief are hereby admitted as ALJX 4, ALJX 5, and ALJX 6, respectively.

Stipulations:

1. Complainant's SOX complainant was timely filed.
2. The parties are subject to the jurisdiction of the Act.
3. Complainant was hired as an Assistant Service Manager ("ASM") by John Elway Dodge's Service Director, John Bear ("Bear"), on approximately August 18, 2005.
4. Complainant reported to Bear, who in turn reported to General Manager Matt Smith, and Fixed Operations Director Greg Manson.
5. John Elway Dodge's primary business function consists of the retail sale and servicing of new and used automobiles.
6. In 2005, John Elway Dodge serviced more than 26,000 vehicles.
7. John Elway Dodge is a wholly owned subsidiary of Auto Nation, Inc., which is a publicly held company.
8. Auto Nation owns and operates 281 dealerships containing 349 manufacturer franchises in 17 states.
9. Auto Nation's annual revenues exceeded \$19 billion in 2005. Approximately 13 percent of these annual revenues are generated by its dealerships' fixed operations, which include dealership parts and service departments.
10. Complainant's last day of work was December 3, 2005. He had resigned a few days prior to that.

Tr at 5-8.

Issues in Dispute:

1. Whether Complainant engaged in protected activity under the Act;
2. Whether Respondent actually or constructively knew of or suspected such activity;
3. Whether Complainant suffered an adverse employment action;
4. Whether Complainant's protected activity was a contributing factor in the adverse action taken against him;

¹ ALJX-1 is Complainant's pretrial statement; ALJX-2 is Respondent's pretrial statement; ALJX-3 is Respondent's November 1, 2006 motion for summary decision and accompanying exhibits, to which Respondent's pretrial statement referred.

5. Whether Respondent would have taken the same adverse action against Complainant in the absence of his protected activity.

Tr at 14.

SUMMARY OF DECISION

I find that Complainant has failed to prove by a preponderance of the evidence that he suffered any adverse actions that were causally related to his alleged protected activity. Because Complainant is unable to prove these elements, it is unnecessary to analyze whether Complainant actually engaged in any protected activity or whether Respondent would have taken the same adverse action against Complainant in the absence of his protected activity. Accordingly, Complainant has not met his burden, and his complaint must be dismissed.

FACTUAL BACKGROUND

Complainant was hired as an Assistant Service Manager (“ASM”) by Respondent on or around August 18, 2005. Tr at 6, 126, 293. Complainant was hired by John Bear, the Service Director, who worked under Matt Smith, the General Manager for John Elway Dodge, and Greg Manson, the Fixed Operations Director for several locations. During Complainant’s employment, John Elway Dodge was set up with two lateral support groups: one with Buster Snider as group leader and Complainant and Lance Blakeslee as ASMs, and the other with John Harris as group leader and Marvin Sparks and Fidel Para as ASMs. Tr at 147, 406-07, 506, 526. Each team also had four to six technicians. Tr at 507.

Service Manager Training

Complainant testified that when he was recruited to work at Respondent, Mr. Bear “said his goal was to make me a service manager.” Tr at 294. Complainant testified that he felt he was guaranteed to become a service manager “as long as I did my job correct.” Tr at 294. Complainant also presented the testimony of Mr. Harris that he had heard that Complainant was training for a service manager position. Tr at 166.

However, Mr. Bear testified that he and Complainant did not discuss Complainant’s aspirations for promotion during the interview process, but that Mr. Bear knew from past discussions that Complainant aspired to be a service manager. Tr at 425-26, 441. Mr. Bear testified, “I did promise that I would put forth an effort to train him. In fact, because of Mr. Manson’s concerns about [Complainant] coming on board, we had a meeting in my office prior to his employment...and it was discussed at that time that we would provide a training path for [Complainant] to be a service manager at some point. We were hoping that...his aspirations could be met, and he would put forth great effort...to help the store get turned around. So I agreed that I would put together a plan, and on a monthly basis meet with him and provide some training.” Tr at 428. Mr. Smith confirmed that Mr. Bear “mentioned to [Complainant] that if he came on board that he would give him the tools necessary if he was to go out on his own and find a service manager’s position, but no promises were made. It was strictly just [to] give him the skill set that he would need.” Tr at 343. Mr. Bear testified that he and Mr. Manson determined that the timeline for the training program would be “approximately 18 months.” Tr

at 428. Mr. Bear emphasized that none of the participants in the training program, including Complainant, Marvin Sparks, and Jim Bauman, were guaranteed a service manager position at the end of the training program. Tr at 428.

Salary Guarantee for August

Complainant testified that when he was recruited, Mr. Bear offered him a guaranteed monthly paycheck of \$7500 to come work at John Elway Dodge. Tr at 145. Complainant testified that Mr. Bear never told him that his first month's salary would be prorated or that his pay would be dependent on pay plans. Tr at 296.

However, Mr. Bear testified "when [Complainant] accepted the offer, I did guarantee him for the first month of employment that he would make \$7000." Tr at 426. Mr. Bear testified that Complainant "originally he was going to come in early in August. He was delayed until the 18th, so we explained it would be prorated for the remainder of the month. And then because the store made budget in the month of August, I got authorization to do an additional bonus of \$500 for the people that had a positive effect on us making our budget, and that was awarded to both [Complainant] and to Marvin Sparks." Tr at 425-26, 498-99. Mr. Bear explained that he made Complainant this guarantee to give him time to adjust to new procedures and "clean up some messes" left by his predecessor without having to worry about his paycheck. Tr at 429. Mr. Bear confirmed in a September 1, 2005 email to Mr. Smith that Complainant was paid \$7,000, prorated for the days he worked in August, plus a \$500 bonus. RX M; Tr at 343-45.

Subsequent Payment Under Pay Plans

After receiving a guaranteed paycheck for the month of August, Complainant was paid under two different pay plans. Tr at 296-99, 430-44, 488, 498-501; RX E, F. Complainant testified that Mr. Bear never told him that his pay would be dependent on pay plans. Tr at 296. However, Complainant conceded that he signed off on his pay plans and understood that his pay was based on three components. Tr at 298. Mr. Bear testified that after August, Complainant was paid under a pay plan beginning September 1st based on his commissions and various performance factors. Tr at 430-33, 489-91, 498-501; RX E. Mr. Bear testified that the first pay plan was a trial, and that a new pay plan was implemented on November 1st after some adjustments were made. Tr at 433-35, 489, 498-501; RX F. Mr. Bear testified that the pay plan adjustments were "never negative...we always erred on the side of the employee." Tr at 436. He testified that Complainant approved each of his pay plans and also approved pay calculation sheets explaining each paycheck. Tr at 432-39; RX N; RX O; RX P; RX Q.

Shop Billing Procedures

Complainant and many other witnesses, including Mr. Kuther, Mr. Harris, Mr. Sparks, Mr. Blakeslee, Mr. Bear, Mr. Manson, and Mr. Coad, all testified about John Elway Dodge's general procedures for pricing repairs. Tr at 76-84, 103, 180-93, 235-36, 279-86, 531-33, Tr at 551-54, Tr at 403- 417. First, the customer would typically speak with the ASM and the ASM would create a pre-work order based on a walk-around inspection and discussion with the customer. Then, the ASM would generate a work order and give it to the group leader. The

group leader distributes the preliminary work order to the technicians, who further diagnose the repair needed and determine an estimate for the repair based on the number of hours and the cost of parts. Then, the ASM contacts the customer to discuss the estimate and get the customer's approval for the price and the work to be done. The price quoted to the customer is a total dollar amount for the repair, and does not state the costs of parts, labor rate, or other elements of the cost. If a mistake is made and a repair ends up costing more than estimated, the shop usually ends up losing money rather than asking the customer to approve the higher price.

Complainant could not recall a customer refusing to pay the estimated price or trying to negotiate. Tr at 285-86. However, numerous managers and other employees, including Mr. Kuther, Mr. Harris, Mr. Sparks, Mr. Blakeslee, Mr. Bear, Mr. Manson, and Mr. Coad, testified that a customer is free to reject the quoted price and that there are sometimes negotiations over the price. Tr at 81-82, 114, 192-93, 235, 414-16, 532-33, 553, 655-56.

Complainant also denied that he, as an ASM, was the last line of defense between the estimate and what the customer paid, and that he was in the position to raise flags if he thought there was something wrong with the estimate. Tr at 286. Complainant testified that he sold repair jobs in which customers were overcharged, knowing it was wrong, because he was instructed by management to sell the job no matter what. Tr at 287-88. However, numerous managers and other employees, including Mr. Kuther, Mr. Harris, Mr. Sparks, Mr. Para, Mr. Coad, Mr. Bear, Mr. Manson, testified that the ASM is ultimately responsible for the price that is charged to the customer and the ASM is the final line of defense against overcharging. Tr at 82-83, 190-91, 235-36, 257, 417, 551, 604.

Use of ALLDATA

Complainant testified that when he started work, Mr. Bear told him that ALLDATA² was the pricing guideline or labor guide to be used for estimating repair times. TR at 127, 145, 154, 288. Complainant testified, "I was never told that the technician could shoot from the hip or price as he feels is necessary [based on his] experience.... I was given ALLDATA labor guide on every one of the service advisors' screens and told that that's what they went off of." Tr at 154. However, Complainant conceded that he was not instructed to use ALLDATA himself, since his job did not involve estimating repair times. Tr at 288-90. Complainant also conceded that he was not aware of a formal, written policy requiring the use of ALLDATA. Tr at 288.

However, many witnesses, including Mr. Sparks, Mr. Harris, Mr. Para, Mr. Smith, Mr. Snider, Mr. Blakeslee, Mr. Coad, Mr. Bear, Mr. Manson, contradicted Complainant's testimony. Tr at 119-20, 186-88, 201, 212-22, 229-35, 258 356, 409-13, 509-10, 527-28, 552-54. These witnesses testified that at the time of Complainant's employment, there was no policy requiring use of ALLDATA. In particular, Mr. Bear testified that at the time Complainant was employed, there "was just an understanding that if you needed a reference, ALLDATA was the reference that we used" and if you did not need a reference, "[y]ou would use the technician's experience." Tr at 413. These witnesses also testified that use of ALLDATA was not mandated because it is often inaccurate and does not account for all of the circumstances and variables that could

² ALLDATA is a computer program that provides an estimate of the number of hours that will be required to perform a repair. Tr at 122-23.

increase the actual repair time. *See, e.g.*, Tr at 165. They also testified that charging a customer more than the estimate given by ALLDATA is not overcharging because “ALLDATA is just a guide.” *See, e.g.*, Tr at 554. They also explained that there are many variables that could make a repair take longer than the guide estimate, including high mileage, stuck or broken bolts, and extra grease or oil in the engine. *See, e.g.*, Tr at 105. Mr. Coad and Mr. Bear testified that, in the auto industry generally, there was no requirement to use ALLDATA and no commonly accepted way to estimate times. Tr at 412, 566. These witnesses testified that there are several acceptable methods for estimating repair times, including using one’s own experience or the experience of others around the shop.

Complainant testified that, to his knowledge, Mr. Snider was the only employee at John Elway Dodge who did not use ALLDATA. Tr at 266. However, Complainant later testified that he did not know whether besides Mr. Snider others used ALLDATA or not. Tr at 290-92.

The testimony from the other witnesses was mixed about who used ALLDATA and how often they used ALLDATA versus their own experience. Tr at 165-66, 188-89, 197, 229, 262, 509, 528. Mr. Snider’s team, including Mr. Blakeslee and Complainant as ASMs, apparently used their experience to estimate repair times and rarely used ALLDATA. Tr at 509. Mr. Harris’ team, including Mr. Sparks and Mr. Para as ASMs, apparently used ALLDATA more frequently, Tr at 186, 188, 197, 229, 262, but they still used it only “as a guide for stuff that you don’t know how difficult it is or how long it’s going to take.” Tr at 188.

Lateral Support Group System

In July 2005, Mr. Bear was hired to improve customer satisfaction at John Elway Dodge. Tr at 339-43, 419, 592. Mr. Bear instituted personnel changes, including hiring Complainant. Tr at 342-43, 361, 420-21, and structural changes, including setting up a lateral support system, Tr at 345-47, 405-07, 419-20. Mr. Bear and Mr. Smith testified that there was resistance and a period of difficulty as people adjusted to the changes implemented by Mr. Bear, particularly with regard to the lateral support system. Tr at 345, 421-22.

Under the lateral support system, the ASM deals with the customers and writes up initial repair orders, and the group leader assigns work to the technicians based on their areas of specialization to diagnose, estimate, and perform the repairs. Tr at 345-47, 405, 410-21, 405 507; RX T. Mr. Bear testified that the ASMs report to him for customer-related concerns and the group leaders report to him for production-related concerns. Tr at 405.

Complainant testified that his understanding of a lateral support group was that “the group leader handled the items in the back of the shop. The assistant service manager dealt with the customers, and that was his responsibility.” Tr at 146. However, Complainant testified that Mr. Bear instructed him that Mr. Snider was Complainant’s immediate boss. Tr at 148. Complainant testified, “It wasn’t that I didn’t like it. It gave me no control over what the customers were being charged because if I had a conflict of overcharging, which I had, then I was ultimately, you know, passed over. I wasn’t allowed to speak my mind on that. When I did previously speak my mind, I was reprimanded by Mr. Snider.” Tr at 146. Complainant testified that he “didn’t have a problem with Mr. Snider personally” but that he “didn’t like what Mr.

Snider was doing.” Tr at 278. He testified that he thought having to take instruction from Mr. Snider on billing practices compromised his job. Tr at 279.

Mr. Bear testified that Complainant had raised concerns about whether Mr. Snider was his boss, and Mr. Bear reassured him that under the lateral support system, Complainant reported to Mr. Bear for customer concerns and Mr. Snider reported to Mr. Bear for production concerns. Tr at 473-74.

Notwithstanding Mr. Bear’s explanation of how the lateral support system was intended to work, there was conflicting testimony from the other witnesses. Complainant, Mr. Harris, Mr. Sparks, and Mr. Para all testified that Mr. Snider’s team operated differently than the other team. Tr at 147, 169, 222, 238-39, 260-61, 290-91, 660-61. Specifically, Mr. Sparks and Mr. Para testified that on their team, the group leader and ASMs worked as equals, while on the other team, group leader Mr. Snider appeared to be in charge of the ASMs. Tr at 239. In addition, Mr. Smith testified that the group leader and ASM are supposed to “work together hand in hand” as “equals” but that the group leader “would have a role in” managing the ASM. Tr at 361-63. On the other hand, when asked whether the group leader controlled the ASMs or they were equals, Mr. Snider testified, “It is more of a team because they’re taking care of the service drive, and the group leader would take care of the shop.... they kind of have to work together.” Tr at 521. Mr. Blakeslee confirmed that Mr. Snider, as the group leader, was in charge of the technicians and the shop, while Mr. Blakeslee and Complainant, as the ASMs, were in charge of “taking care of the customers and the service drive,” and they all “answered to John Bear.” Tr at 526.

Mr. Sparks admitted that Complainant had told him that he did not like how the chain of command was structured in the service department. Tr at 249. However, Mr. Kuther and Mr. Manson testified that Complainant had worked under a similar lateral support system at his previous job, and had not had any problems working in that structure. Tr at 75, 89, 92-93, 96-97.

Mr. Smith opined that adjusting to the lateral support system and focus on specialization created problems for the employees because technicians would not receive equal amounts of work or would have periods of down time. Tr at 346-48. Mr. Smith also testified that there were allegations of favoritism against Mr. Snider due to his distribution of work, and Complainant wanted to distribute the work himself. Tr at 348. Mr. Snider also testified that some employees were upset with some of the changes that were implemented around July 2005. Tr at 512-13. Mr. Snider testified that he started to notice more anger and complaints targeted at himself around December 2005. Tr at 513. Mr. Snider opined that this change in attitude “didn’t have to do with the changes” but rather it had to do with conversations that Complainant had with technicians in the shop claiming that Mr. Snider was overcharging customers. Tr at 514.

Access to Billing Screens

There was testimony about the fact that Mr. Snider had access to the computer screen used for billing repair orders. Complainant testified, “Buster Snider had his own booking screen. I’ve never heard of a technician that’s been in charge of going through and billing their own tickets and putting what times they want. On some of the repair orders, he put seven and a half hours, discount[ed] the labor rate at \$70 an hour, which ...affects my effective labor rate, which

ultimately lowers my pay. So I could either leave or not make a paycheck. There was no other way out. I figured that if I contacted my chain of command, which I did, something would have been resolved, but it wasn't." Tr at 135-35.

Mr. Kuther, Mr. Harris, and Mr. Sparks each testified that it was unusual for a group leader to have access to and use a billing screen. Tr at 74, 168, 224. Mr. Sparks testified that a group leader should not be given such access because that is the ASM's "job to properly bill out the invoices." Tr at 224. He explained that if a group leader had access to the billing screen, "[y]our invoice may not be what you told the customer" and it could "absolutely" affect your pay. Tr at 225.

Mr. Snider and Mr. Bear confirmed that Mr. Snider did have access to a billing screen, and that Mr. Bear had set up that access. Tr at 518-19, 408. However, Mr. Snider testified that everyone has that access and others used that access as well. Tr at 518. Mr. Bear also testified that "[a]ll of our technicians have access to the billing screen" but that "[g]enerally very few people know how to do that. They have to be trained." Tr at 503.

Complaints to Mr. Snider

Complainant testified that in late October or early November 2005, he raised concerns with Mr. Snider about the fact that Mr. Snider was not using ALLDATA to determine repair times and customers were being overcharged. Tr at 126-29. Complainant testified, "several of the technicians actually confronted me and started asking me, 'Where is Mr. Snider getting his labor times from because we don't get paid the same way?' After I started researching that, I found out that he, in fact, was billing extraordinarily high to the customers. When confronting Mr. [Snider] about it, he got very offensive. He told me not to worry about it, just to sell the job." Tr at 148. Complainant testified that Mr. Snider "became very confrontational" and argued that Mr. Bear approved of what he was charging.

Mr. Snider testified that Complainant never complained to him directly about overcharging. Tr at 515. He added that Complainant may have expressed unhappiness or frustration to him if the group was falling behind and not getting work out quickly enough, but that Complainant did not express anything relating specifically to Mr. Snider. Tr at 511. When asked if an employee could overcharge a customer by estimating many more hours than the employee knew the repair would actually take, Mr. Snider stated that "it wouldn't be right, but you could do that...[and] you would make more money." Tr at 508. Mr. Snider denied that he had ever charged a customer for work that was not done on the car. Tr at 516.

Complaints to Mr. Bear about Mr. Snider

Complainant testified that after accusing Mr. Snider of overcharging in late October or early November, he then confronted Mr. Bear to verify Mr. Snider's statement that Mr. Bear approved of what he was charging. Tr at 129, 149. Complainant testified that he told Mr. Bear "that we were charging the customer way too much for these jobs. It made it difficult on me to sell these jobs knowing that the customer was being overcharged." Tr at 148. Complainant testified that Mr. Bear "told me to keep my mouth shut. Mr. Snider made him successful at the

previous store, and Mr. Snider will make him successful at this store.” Tr at 148. Complainant stated, “I made complaints about cheating the customer, basically along the lines of consumer fraud. I made the complaints...that it...didn’t just affect the customers, but the advisors, the technicians, other AutoNation stores, and ultimately, I believe I put in stockholders at that time, shareholders.” Tr at 129. Complainant also testified, “I complained about the overcharging...at that time, I believe I called them stockholders, but I know who it affects. They set out a forecast each month of what you’re going to do. And ... if the store is overcharging customers to over-inflate...their revenues, I don’t think they make people aware of that. I’m sure that they don’t tell their shareholders.” Tr at 133-34. However, in later testimony, Complainant was less certain that he had expressed that Mr. Snider was overcharging or that many groups, including stockholders, were affected. Tr at 300-03. Complainant denied that he complained to Mr. Bear about how the service department was structured, working with Mr. Snider, the length of his training program, or not getting along with his teammates. Tr at 300.

Mr. Bear testified that Complainant first raised concerns to him “sometime in November.” Tr at 441, 443. Mr. Bear testified that he and Complainant had various discussions during their late-night training sessions, during which Complainant voiced his opinions about the structure of the store. Tr at 443, 477. Mr. Bear denied that Complainant raised any concerns about overcharging, defrauding shareholders or stockholders, or SEC violations. Tr at 447. Mr. Bear emphasized that he did not learn of Complainant’s overcharging allegations until late November when Mr. Smith told him. Tr at 447. Rather, Mr. Bear testified that Complainant raised three different concerns in their discussions:

First, Mr. Bear testified that “[Complainant] felt working with Buster and the particular program we had, this lateral support, that it would be better as a simple support program where he dispatched the work to the employees.” Tr at 42. Mr. Bear stated, “[Complainant] felt he was working for Buster rather than with Buster. I had explained the process and the way we were structured so that he reported directly to me for customer service issues, and Buster reported to me directly for production issues.” Tr at 443.

Second, Mr. Bear testified that Complainant “felt like the 18 months [training period] was too long a period. He would like to move into a management position sooner. He felt like he was ready.” Tr at 42. Mr. Bear explained that he did not feel Complainant was ready because as a mid-level manager “you’d have to be able to work within the structure that you’re already in, and you’d have to be successful at that.” Tr at 442.

Third, Mr. Bear testified that Complainant also complained about feeling like an outsider because Mr. Snider and Mr. Blakeslee were friends and would go to lunch together. Tr at 443-44. Mr. Bear opined that Complainant was not able to get along with Mr. Snider because of Complainant’s “desire to be in control of the entire team.” Tr at 444. He opined that Complainant did not get along with Mr. Blakeslee because “there’s a little bit of competitiveness because they’re both paid on commission” and because of “some of the alienation that he talked about, he perceived that Lance and Buster were close, so he voiced concerns that, you know, maybe Buster would give preference to Lance as far as getting the work done.” Tr at 444.

Mr. Bear testified that he told Complainant that he “would look into those concerns” and “gave him some suggestions on how he could work through some of those concerns with his fellow team members.” Tr at 444. Mr. Bear testified that Complainant was not responsive to his suggestions, and it seemed that Complainant “didn’t really want to put a lot of effort into it. He felt like he was right, and they were wrong.” Tr at 445.

Transfer Request

Complainant testified that he asked Mr. Bear for a transfer. Tr at 133, 153. Complainant stated that Mr. Bear refused his transfer request and told Complainant, “You can either learn to get along and fit in, or you’ll be gone.” Tr at 133, 153.

Mr. Bear confirmed that Complainant did request a transfer. Tr at 445-46, 477-78. Mr. Bear testified, “He said that because I was encouraging him to continue working in the situation, he just wanted completely out of the situation. He wanted to transfer out. I told him that I couldn’t support that; that I felt like he needed to continue with his training, and this was a good opportunity for him to be able to achieve that potential position that he was looking forward to. Also, I felt that...dealing with the situation was part of his training.” Tr at 446. Mr. Bear denied threatening Complainant that he would not become a manager if he sought a transfer. Tr at 446.

Mr. Smith testified Complainant also asked him for a transfer. Tr at 371. Mr. Smith stated, “He said that John Bear did tell him he was in a training program at the time, and that he needed to finish the program before he’d be able to.” Tr at 372. Mr. Smith denied that he told Complainant he could not transfer. Tr at 371-72. Mr. Smith testified that under AutoNation’s transfer policy, “You can transfer within the stores as long as there is no problem that you’re leaving at a store and you get a sign off from a general manager and an acceptance from the other general manager.” Tr at 372.

Sick Day

Complainant testified that shortly after complaining to Mr. Bear, he went home sick and Mr. Bear called him at home and “harassed and “chastised” him for being sick and was “very abusive” and “yelling.” Tr at 130, 321. Complainant testified that Mr. Bear confronted him again the next day when Complainant returned to work. Tr at 130. Complainant testified that Mr. Bear was angry about Complainant not doing training, but that “training had never been an issue for Mr. Bear” before. Tr at 130, 321.

Complainant also testified that on the date he went home sick at about 1 p.m., he had already sold a job, but “then the repair order was changed into Mr. Blakeslee’s number.” Tr at 131-32. Complainant testified that this was contrary to the rules of John Elway Dodge “that if you open the repair order at the time, you sold the job, you collected the job.” Tr at 132.

Staring Allegations

Complainant also testified, “after the comments I had made about overcharging, I would get stares from Mr. Bear and Mr. Blakeslee and Mr. Snider. They would constantly stare at me.”

Tr at 130. He testified, “Mr. Bear and Mr. Snider would...stare me down where I would have to duck behind my computer screen. I’d have Mr. Sparks call me...and he would jokingly [say], ‘Hey, it looks like someone is staring at you again.’” Complainant stated, “I know it was more than two times. I couldn’t tell you how many times.... A lot of the time I was ducking behind my computer screen to hide from my managers.” Tr at 153. Complainant testified, “I know it happened more than once, and I’m going to assume it happened more than twice.” Tr at 319. He added, “It was enough to make me feel uncomfortable.” Tr at 319.

Mr. Sparks recalled Mr. Snider staring at Complainant from across the service drive. Tr at 230-31. He also recalled calling Complainant and stating, “It looks like someone is staring at you again.” Tr at 230. Mr. Sparks testified that it “felt uncomfortable.” Tr at 230. He stated, “I remember one time in particular, but other than that, I don’t know.” Tr at 231.

On the other hand, Mr. Snider denied that he ever sat across the service drive with Mr. Bear and glared or stared at Complainant. Tr at 517. Mr. Blakeslee also denied that he had ever stared at Complainant with the intent to intimidate him or retaliate against him. Tr at 536.

Altercation with Mr. Blakeslee

Complainant testified that after his conversation with Mr. Bear about overcharging in late October-early November, his issues with Mr. Blakeslee accelerated. Tr at 304. Complainant testified that toward the end of November, “[i]t ended up coming down to where I confronted Mr. Lance Blakeslee about not being up front when this opening of the service drive, and...he told me... ‘Shut the f--- up, or I’m going to take you outside and beat your ass.’” Tr at 130, 306.

Mr. Blakeslee testified, “I thought we were just joking around.... He just had said some stuff to me, and I told him to knock it off, or we’d go out back.” Tr at 529. Mr. Blakeslee could not remember what Complainant had said to him to start this, but he testified that it was not something that really upset him and he “thought we were just talking trash, joking around.” Tr at 529. Mr. Blakeslee did not realize until he talked to Mr. Bear and Mr. Smith, that Complainant did not realize he was joking. Tr at 529-30. Mr. Blakeslee denied that the altercation occurred because Complainant had accused him or Mr. Snider of overcharging customers. Tr at 530.

Complainant testified that he and Mr. Blakeslee generally did not have a good working relationship but that Complainant respected him and was cordial to him. Tr at 305. Mr. Sparks denied that Complainant engaged in banter or joking around with Mr. Blakeslee. Tr at 249. Complainant felt Mr. Blakeslee was not pulling his weight around the dealership. Tr at 305-06. However, Complainant testified that this was the only time he and Mr. Blakeslee had a confrontation. Tr at 306-07.

Mr. Blakeslee testified that he thought that he and Complainant “got along pretty well.” Tr at 528. He agreed that they would have altercations “[e]very once in a while.” Tr at 528. He testified, “usually we’d just kind of joke around and stuff, but every once in a while we’d have something serious where...we’d have some argument about a customer or a ticket or something.” Tr at 528. Mr. Blakeslee testified generally that “[e]verybody on the service drive is in

competition [because we] all work on commission.” Tr at 529. He testified that this creates “a little bit” of tension between the ASMs. Tr at 529.

Mr. Snider testified that Complainant told him about the altercation and that “it seemed confrontational.” Tr at 511, 519. Mr. Snider testified that in response, he “first talked to Lance Blakeslee about it, and he told me that he was just joking.... I did talk to John Bear about it, though.” Tr at 520. Mr. Snider testified that in the time they worked together, Complainant and Mr. Blakeslee would joke with each other and “jab” each other. Tr at 511. He testified that on the service drive, there is “a little bit of competition” but the employees are “pretty friendly” and “people kind of joked with each other,” more so than in the shop. Tr at 512.

Mr. Smith testified that Complainant complained to him about this altercation with Mr. Blakeslee, and Mr. Smith counseled Mr. Blakeslee about it. Tr at 309, 372-73.

Complainant testified that he also complained to Mr. Bear about his altercation with Mr. Blakeslee. Tr at 319-21. Complainant testified, “I informed Mr. Bear that I had went to Mr. Snider about...Mr. Blakeslee’s threats prior to going to him, and Mr. Bear already knew about them.” Tr at 320. Complainant testified, “When I complained to Mr. Bear in mid-November about the threat, physical threat that Mr. Blakeslee had made to me, I knew it wouldn’t go far because of the friendship [between] Mr. Blakeslee, Mr. Snider, and Mr. Bear. He didn’t want to hear it. He tried turning the situation around, and ultimately he referred to it as hearsay with a smile on his face.” Tr at 150. See also Tr at 130.

Mr. Bear confirmed that Complainant told him about the altercation with Mr. Blakeslee. Tr at 477-78. However, Mr. Bear denied dismissing the concerns as “hearsay.” Tr at 477. Mr. Bear testified that he had already heard about the situation from Mr. Blakeslee earlier that day. Tr at 479, 501-02. Mr. Bear testified that after Mr. Blakeslee told him about the altercation, “At that point I did nothing because [Mr. Blakeslee] felt like it was over.... I told him...he had responded properly after being pushed further by not making it a physical altercation. He’s a very big man, and he can be intimidating.” Tr at 502. Mr. Bear testified that Complainant “shed further light on it, and I told him that I would investigate it further because I wanted to really try to find out what was causing this. So what I really promised to do was to observe Mr. Blakeslee because [Complainant’s] concern was that Mr. Blakeslee wasn’t up at the front on the drive as often as he should be.” Tr at 502. Mr. Bear also indicated that he thought both parties were at fault and Complainant had antagonized Mr. Blakeslee. Tr at 479. Mr. Bear testified, “There wasn’t really any resolution other than I had asked Mr. Blakeslee and [Complainant] to try to get along, so that discussion included this particular altercation.” Tr at 502.

Discussion about contacting Human Resources

Complainant testified that he told Mr. Bear that he was going to call Human Resources about the altercation with Mr. Blakeslee, and Mr. Bear told him that if he contacted Human Resources, his career would be at an end. Tr at 129, 320. Specifically, Complainant testified that Mr. Bear told him, “If you contact Human Resources, you will not be a manager. You don’t go over someone’s head.” Tr at 151, 320-21. Complainant felt threatened and retaliated against

by Mr. Bear's statement. Tr at 321. However, Complainant conceded that this incident and the day he was out sick were the only times that Mr. Bear had threatened him. Tr at 321-22.

Complainant, Mr. Smith, and Mr. Bear met and Complainant told Mr. Smith that Mr. Bear had threatened him about going to Human Resources. Tr at 150, 478. Mr. Bear denied threatening Complainant, and asserted that Complainant had misconstrued their conversation. Tr at 150, 446, 478. Mr. Bear testified that, as a learning lesson to Complainant, he had told Complainant about a difficult work experience he had had at another location that he was able to work through successfully. Tr at 447. After hearing Mr. Bear's story, Complainant told Mr. Bear "that [he] should have just gone to Human Resources or to upper management about the situation rather than working through it." Tr at 447. Mr. Bear testified, "I explained to [Complainant] that I didn't feel like that was a good career choice for myself." Tr at 447.

Complaints to Mr. Smith

In late November 2005, Complainant raised concerns to Mr. Smith about overcharging of customers. Tr at 130, 308, 350-51, 372-73. Complainant testified that he had at least two meetings with Mr. Smith and he could not recall what he said in each meeting. Tr at 308-09. He remembered expressing that he was unhappy at the dealership because of conflicts with and being treated unfairly by Mr. Blakeslee and Mr. Snider. Tr at 308-09. He also recalled telling Mr. Smith about his concerns that Mr. Snider was overcharging customers, and Mr. Smith asking for documentation so that he could investigate. Tr at 309-10. Complainant testified that he "had high hopes" that Mr. Smith would investigate. Tr at 310. Complainant could not recall if he alleged any fraud on shareholders or SEC violations to Mr. Smith. Tr at 312.

Mr. Smith confirmed that Complainant first came to talk with him about overcharging in late November. Tr at 250. He testified that Complainant also told him that "it was kind of a difficult situation" working with Mr. Snider and Mr. Blakeslee, and that Mr. Blakeslee was spending too much time socializing and Complainant had to take on more than his fair share of work. Tr at 350-51. Mr. Smith also testified that Complainant "stressed that there was a complaint that he wanted to share with me. He basically said there was two ROs, repair orders, that he was not paid on, and then he also felt like Buster Snider had overcharged on a water pump job." Tr at 350. Mr. Smith stated that Complainant "didn't feel [Mr. Snider's charge on the water pump] was fair." Tr at 351. Mr. Smith testified that Complainant did not mention shareholder fraud or SEC violations in either conversation. Tr at 353.

Mr. Smith testified that he told Complainant to bring him the evidence so that they could investigate. Tr at 351. Mr. Smith stated, "[Complainant] came to me approximately two days later. He had the three ROs with him. I told him to go ahead and review them with me, which he did. I told him that [Mr. Bear and I] would review them and get back to [him]." Tr at 351.

Mr. Smith testified that two of the ROs were from the day Complainant went home sick, and Complainant felt that he should have been paid instead of Mr. Blakeslee. Tr at 352. Mr. Smith investigated and found that Complainant should not have been paid for those ROs. Tr at 355. According to Mr. Smith, Complainant had made the appointments, but Mr. Blakeslee started the transactions with the customers and had to work the jobs through the end of the day.

Tr at 352. Mr. Blakeslee confirmed that Complainant initially made the appointments but Mr. Blakeslee “handled the customer, sold the job, called the customer and told them it was done, booked the ticket, so I changed them into my name.” Tr at 534. Mr. Blakeslee testified that he did not believe there was anything inappropriate about his taking credit for those jobs since he did the majority of the work, and he did not take credit for them as a means of retaliating against Complainant. Tr at 535. Mr. Blakeslee testified that he discussed these repair orders with Mr. Bear after the fact. Tr at 535, 538. Despite concluding that Complainant was not entitled to commission on the repair orders, Mr. Smith testified that Respondent ultimately decided to pay the \$42 to Complainant anyway to resolve the issue. Tr at 355-56.

On the water pump RO, Complainant told Mr. Smith that he believed there were overcharges based on the hourly rate for that job. Tr at 353. Mr. Smith did not have enough expertise to evaluate the claim of overcharging, so he told Complainant he would refer it to Mr. Bear. Tr at 353-54, 375. Mr. Smith testified that Mr. Bear investigated and “found that there was no stretching of the money or anything at all. The money that was sold on the RO was okayed by the customer.” Tr at 355.

Complainant’s calls to Human Resources

Complainant testified that around mid- to late November he tried to contact Human Resources. Tr at 307. Complainant testified that he first tried to call anonymously by refusing to give his name and blocking his number, because he was worried about the retaliation after Mr. Bear threatened him that his career would come to an end if he complained to Human Resources. Tr at 134, 150-51, 307-08. Complainant testified that he was in high stress and did not know what else to do. Tr at 134, 150-51. Complainant spoke to Jonathan Andrews in AutoNation’s Florida Human Resources office, who passed Complainant’s number on to Michelle Fournier, AutoNation’s Regional Director of Human Resources for the West Central Region. Tr at 134, 150-51, 307-08, 381. Complainant testified, “The reason I didn’t want to call Michelle Fournier [in the first place] is I felt that it would go straight to Matt Smith, John Bear, and then I would ultimately be fired. I couldn’t afford that.” Tr at 150-51.

On November 28, 2005, Jonathan Andrews sent an email to Michelle Fournier stating that an employee in her region had left a message and wanted to talk to Human Resources. Tr at 384, 387-88; RX K. Mr. Andrews wrote, “He sounded like he was in extreme stress, please call him.” Tr at 388; RX K.

Ms. Fournier speaks with Complainant

Complainant testified that he called Michelle Fournier and it took her at least three or four days to return his phone call. Tr at 135, 151. Complainant could not remember many details of what he and Ms. Fournier discussed. Tr at 313-14. He testified that he did discuss overcharging with her. Tr at 313. However, Complainant did not know whether he alleged any shareholder fraud or SEC violations. Tr at 314-15. Complainant testified that “she didn’t seem very interested in anything I had to say. Ultimately, I told her I would probably end up getting an attorney, which she got very angry over and asked me why I would get an attorney.” Tr at 135. Complainant stated, “I told her that...I felt that I was retaliated against; I told her that I felt

I was left in a hostile work environment; and never at one time did she say, ‘Hey, let’s transfer you somewhere.’” Tr at 135. Complainant conceded that at the time he spoke with Ms. Fournier, he had applied for and received a job offer from Rush Automotive, but that he “would have rather remained with Auto Nation.” Tr at 313. He testified that his final paycheck and how he would be paid were also some of his concerns. Tr at 314. Complainant testified that Ms. Fournier told him that she would have Mr. Manson call him. Tr at 151-52, 314.

Ms. Fournier testified that after she received Mr. Andrews’ email, she followed up and spoke with Complainant on that same day, November 28, 2005. Tr at 384, 388. Complainant told her “that he had decided to resign from the company.... He said he felt like he didn’t want to discuss it and didn’t want to get into those issues. He said he didn’t have a good feeling about AutoNation, and he wanted to leave.” Tr at 385. Ms. Fournier added, “He said he was concerned about his final paycheck, that he still had another week to work, and he felt like when he left, he wouldn’t be paid for all the work that he had been working on. He was concerned about that, so we talked about it.” Tr at 385. Ms. Fournier also testified, “I also asked him if he would be interested in transferring to another one of our stores.... He said he was not interested in a transfer.” Tr at 385. She emphasized that they did not discuss the transfer issue much because Complainant made it clear that he was not interested. Tr at 385-86. Ms. Fournier added, “I did tell him that I was going to have Greg Manson, Fixed Ops Director for the market, contact him, you know because we always want to try to understand why our associates are leaving.” Tr at 385. Ms. Fournier testified that Complainant did not mention overcharging of customers or fraud on shareholders. Tr at 387. Ms. Fournier emphasized that Complainant never complained of retaliation or hostile work environment. Tr at 393, 396.

Complainant contacts Mr. Andrews again

On November 29, 2005, Complainant called Mr. Andrews again. Tr at 388-89. Mr. Andrews wrote in an email to Ms Fournier, “[Complainant] called back today (third time). He said the [General Manager] at the store has him feeling better but the [General Manager] is out today and his manager is making his life miserable again.... Today, he mentioned the work environment is a ‘hostile work environment,’ there are pay plan discrepancies, retaliation by his manager for asking for help, and overall being treated unfairly. He said he will be resigning as a result of his manager.... I think he would consider a transfer if that is a suitable option based on the whole story.” RX J. Ms. Fournier responded that she had spoken with Complainant the previous morning. RX J. She wrote, “[Complainant] said that he appreciated the call, had decided to resign, felt there was no need to discuss the issues. He said he had a bad taste in his mouth and was leaving [AutoNation].... He told me yesterday that he didn’t want to transfer.” RX J. Ms. Fournier emphasized that in her November 28, 2005 conversation with Complainant, he did not raise any of the issues that he raised in his November 29, 2005 conversation with Mr. Andrews. Tr at 389-90, 393, 396, 399.

Mr. Bear completes repair orders for Mr. Blakeslee

Complainant testified that on or around November 29, 2005, “Mr. Blakeslee was not there for that day. Mr. Bear sat in his position all day long, wrote up repair orders in Mr. Blakeslee’s name, sold the jobs, closed the repair orders out without Mr. Blakeslee even being

there.” Tr at 132. Mr. Sparks and Mr. Para testified that they, too, had observed Mr. Bear writing up repair orders for Mr. Blakeslee when he was not there. Tr at 246-47, 256. Mr. Smith testified that Complainant had complained about Mr. Bear writing up repair orders for Mr. Blakeslee. Tr at 370. However, Mr. Smith felt this was acceptable based on the amount of work that had been done. Tr at 370. Mr. Blakeslee testified that it was Mr. Bear’s decision and choice if he wanted to write repair orders in Mr. Blakeslee’s name when he was not there. Tr at 539-40.

Mr. Manson speaks with Complainant

Mr. Manson testified that Ms. Fournier informed him that Complainant “had given his notice, and that it might be fruitful for me to contact him and see what [his concerns] were.” Tr at 595. See also Tr at 99, 101-02, 595, 632. Consequently, on or around the last day of November or first day of December, Mr. Manson spoke with Complainant. Tr at 94, 99, 594-95, 635-36. Mr. Manson explained, “In that conversation, [Complainant] shared with me that he was frustrated at the store with the way it operated. He felt that he wanted to operate in a different configuration, what we would call a simple support system where he would actually do the dispatching for the team.” Tr at 596. Mr. Manson testified that “from my memory, [Complainant] alluded that [he] didn’t feel that John was running the department correctly, and that [he] could do a better job.” Tr at 632. Mr. Manson stated that Complainant did not mention retaliation or a hostile work environment. Tr at 100-01.

Second, Mr. Manson also stated, “We also talked about the confrontation between Lance and himself. I asked him if it had been addressed by John Bear and Matt Smith. I believe he said it had.” Tr at 596. Mr. Manson testified that he did not investigate the altercation between Complainant and Mr. Blakeslee because Complainant “had told me that Matt Smith and John Bear had already done so.” Tr at 633.

Third, Mr. Manson testified that Complainant raised issues of “overflagging” not overcharging. Tr at 594. He stated, “[Complainant] said that there were instances where we had a particular technician, Buster Snider, that was overflagging for repairs; in other words, which would convert into what would be considered in some people’s minds as an overcharge.” Tr at 596, 651. Mr. Manson testified that Complainant did not complain about shareholder or stockholder fraud, SEC violations, or mail or wire fraud. Tr at 598. Mr. Manson asked Complainant to put together examples of overflagging, give them to Mr. Smith, and then Mr. Manson would look at them with Mr. Smith the following day. Tr at 94-95, 596, 633, 637. Complainant told Mr. Manson that he had already given examples to Mr. Smith and that Mr. Smith was looking into them but Complainant had not heard anything back yet. Tr at 596-97. Mr. Manson testified that he encouraged Complainant to wait until the investigation was finished before resigning, but that Complainant told him “No, I’m not going to wait. I’m done.” Tr at 597. Mr. Manson denied that Complainant said he had previously complained to Mr. Bear about overcharging and received no response. Tr at 632.

Complainant testified that when Mr. Manson called him, on or around December 1st, “I did express to Mr. Manson about the retaliation, and I did express, you know, the comments that it wasn’t right for anybody involved.” Tr at 152, 315. Complainant testified that he told Mr. Manson that he was concerned about Mr. Snider overcharging customers. Tr at 315. However,

Complainant could not recall whether he alleged shareholder fraud or SEC violations with Mr. Manson. Tr at 318. Complainant denied that he complained about the organization of the service department or argued that he could do a better job, but rather, he testified, "I believe I said I was unhappy with the things that were going on." Tr at 317. Complainant conceded that at the time he spoke to Mr. Manson, he had already resigned. Tr at 317. However, he denied that Mr. Manson asked what could be done to get him to stay. Tr at 318.

Investigation of Repair Orders

Complainant testified that, after his conversation with Mr. Manson, he gave Mr. Smith a packet of repair orders to be given to Mr. Manson for investigation. Tr at 95, 131. Complainant testified that "this packet was not two or three repair orders. This packet was at least a half inch thick of repair orders. When I gave this packet to Mr. Smith and told him that Mr. Manson was going to be there to pick this up, he immediately started going through the packet..." Tr at 152, 315-16. Complainant testified that when he told Mr. Smith what the packet was, Mr. Smith took the packet to Mr. Bear and Mr. Snider, who reviewed the repair orders. Tr at 152. Complainant testified, "After that, I knew that it was going to go nowhere because he had handed all the information that I had prepared for Mr. Manson directly to John Bear. I don't know what was lost in that information or what was taken. I just know it was more than the three repair orders that they claimed to Cathy Harris at OSHA." Tr at 152. Complainant testified that Mr. Manson never conducted the investigation. Tr at 131.

Mr. Manson testified, "The next day I went to the store at probably 6:30, 7:00 o'clock. Both Matt and [Complainant] had already left. So the following day I believe it was, I called Matt and asked if [Complainant] had dropped off anything for him and instructed [John Bear] and Matt to go through the ROs...and to report back to me if there was anything that I needed to take action on." Tr at 598. See also Tr at 98. Mr. Manson testified that Matt Smith and John Bear reviewed the repair orders. Tr at 96. Mr. Manson testified that "After John and Matt had done their role, I came back and reviewed their findings." Tr at 633.

Mr. Bear testified that he did not learn of Complainant's overcharging allegations until late November or December 1 when Mr. Smith told him. Tr at 453, 447-48. Mr. Bear testified that Mr. Smith showed him a repair order that Complainant believed showed overcharging and two repair orders on which he believed he had not received the proper commission. Tr at 448. Mr. Bear testified that, based on his prior discussions with Complainant, he believed the "true concern" was the commissions, but he investigated the repair orders regardless. Tr at 448-49.

Mr. Bear testified that when he investigated the repair order allegedly showing overcharging, he did not find any evidence of overcharging or evidence that the customer was charged more than the quoted amount or charged for work that was not performed. Tr at 449, 458-69; RX G. He testified that in his investigation, he "did have to rely on technician experience ultimately because ALLDATA did not provide all of the information necessary to complete the estimate." Tr at 463. He explained that ALLDATA "doesn't explain that you have to remove the timing belt cover to remove that water pump. I talked to two technicians, James Hernandez and Buster Snider, to make that determination. They had made that determination when they made the original estimate, as well." Tr at 463. Ultimately, Mr. Bear concluded that

the customer was not overcharged compared the number of hours actually required to do the job or compared to the price quoted to them. Tr at 460-67, 474.

With regard to the commission concerns, Mr. Bear testified, “There wasn’t much of an investigation necessary because I was personally involved with those two repair orders. [Complainant] had felt that he should be paid on them because he was working that day. He didn’t actually work on those two repair orders. They were under my control, but they were started and then subsequently finished by Mr. Blakeslee. So Mr. Blakeslee was being paid on those two repair orders.” Tr at 449. Mr. Bear opined that Complainant probably thought he was entitled to those commissions “[b]ecause at the time when he was working and Mr. Blakeslee was off and I was assisting him, any repair that was opened at that time he would have gotten credit for because he was doing the work. He would have had to finish it up basically. But in this particular case, he didn’t have to because it grew into another day where Lance Blakeslee was back and finished up his work.” Tr at 449-50. Mr. Bear emphasized that this was consistent with Respondent’s commissions policy. Tr at 450. Mr. Bear testified that Complainant was ultimately paid the commissions on the two contested orders, even though he was not entitled to them under the policy, because Mr. Smith “felt like it was just a way to deal with the issue and ensure that [Complainant] was taken care of.” Tr at 451.

Resignation/Last Day

Complainant testified, “I don’t remember if I told Mr. Smith I was going to resign or told Mr. Bear. I think it was more like, ‘I can’t take this stuff anymore.’” Tr at 311. Complainant emphasized that his memory was not clear, but that “I think [Mr. Smith] did say, ‘Hold off on it because I’m investigating this.’” Tr at 312.

Mr. Smith testified that Complainant “came into my office and let me know that he was resigning.” Tr at 354. Mr. Smith testified, “[Complainant] came in and he let me know that he was quitting. He said he was going to go back to...working on vehicles. He no longer wanted to be a service advisor. He just wanted to go back to the technician part of it. He mentioned that he was going to go to a small independent shop.” Tr at 354. Mr. Smith added that Complainant “just said he couldn’t get along, and he wasn’t comfortable with the ROs and his treatment.” Tr at 354. Mr. Smith stated, “I actually tried to talk [Complainant] out of resigning. I knew that he was on a program where he was getting the tools he needed to be a service manager at some point. I told him he’s got an investment of time at this time, and I’d like him to stay.” Tr at 355.

Mr. Bear testified that sometime in the last few days of November, Complainant “had come into work the next day after the two repair orders that were in question had been worked on by myself. The next morning he gave me his notice at that time.” Tr at 454. Mr. Bear testified that “[Complainant] told me that he felt like he couldn’t work in this environment, and that he was going to resign.” Tr at 454. Mr. Bear opined that “it had to do with the Lance Blakeslee, Buster [Snider]...group thing and his feeling that he was left out and the discussion about the two tickets which we had had.” Tr at 454. Mr. Bear testified, “I said that I understood his feeling about the tickets. I explained that he had done a great job, and I’d like for him to continue working. But I understood his willingness to leave.” Tr at 454. Mr. Bear testified that Complainant never mentioned shareholders or stockholders, fraud, or SEC violations to him. Tr

at 456. Mr. Bear testified that from the time Complainant first complained to Mr. Smith about overcharging until his last day, he never complained to Mr. Bear about retaliation. Tr at 457.

Mr. Bear testified that Complainant had given two weeks' notice but Mr. Bear felt that Complainant's unhappiness would be apparent to the customers, so they agreed that Complainant's last day would be December 3rd, since he had already agreed to work that day for Mr. Sparks. Tr at 455-56. Mr. Bear testified that Complainant had promised to give him a resignation letter but did not do so, so Mr. Bear provided him with a form letter to sign on his last day but Complainant did not do so. Tr at 457.

Complainant testified, "on December 3rd, I asked Mr. Smith what his findings were, and he said that I was correct on my findings." Tr at 312. Mr. Smith testified that he never had a chance to discuss the results of investigation with Complainant because he resigned around the same time, and he never told Complainant that he was correct. Tr at 354, 359-60. Mr. Smith testified that he talked with Complainant on his last day and urged him to stay. Tr at 359.

December 1 Memos

On December 1, Mr. Bear issued two memos clarifying shop policies. Tr at 451-54; RX H; RX I. Mr. Smith, Mr. Bear, and Mr. Manson testified that they decided to issue these memos to settle the uproar and confusion that had spread around the shop due to Complainant's allegations of overcharging and improper commissions. Tr at 118, 356-57, 425-55, 598-99.

One memo stated that all employees were required to use ALLDATA as a guide to estimate repair times and to determine what the pay should be for the technician." Tr at 452-53, 514-15, 534, 598-99; RX I. Mr. Bear testified that "we just weren't going to make as many judgment calls. We were just going to use a very much more strict guide." Tr at 455. Mr. Bear denied that they should have been using ALLDATA all along. Tr at 455. Mr. Manson testified that currently, "At John Elway Dodge, they're instructed to use ALLDATA, and any variances from that are supposed to be signed off by the Service Manager." Tr at 105.

The other memo clarified the policy on how commissions would be distributed based on how much work each employee did on a repair job. Tr at 357, 450-53, 535; RX H. Mr. Bear stated that the memo clarified "that the service advisor is responsible for making correct charges on the repair order and making sure that the technician is paid properly." Tr at 452-53; RX I.

Investigation by Mr. Coad

Mr. Coad testified that, around February 2006, he was contacted by Brian Davis, in-house counsel for Respondent, to investigate the validity of Complainant's overcharging allegations. Tr at 550. Mr. Coad was AutoNation's Fixed Operations Director for Market Three, which included the parts and service departments of four stores in Denver, Seattle, and Spokane, and John Elway Dodge was not within his zone of responsibility. Tr at 548, 555.

Mr. Coad testified in detail about how he conducted his investigation. Tr at 554-564. He looked at repair orders from September 1 to November 15. Tr at 581. Mr. Coad testified that

when he did not have knowledge of how much time a repair would take, he used ALLDATA as a measuring stick to determine how much should have been charged for each repair “because that was the only resource that I had without, you know, making this a three-month project and really tying up the shop by asking technicians about every single repair order.” Tr at 558, 575. Mr. Coad conceded that he did not speak to any technicians in conducting his investigation. Tr at 567. He noted differences between ALLDATA and the actual amount charged, but he did not make conclusions about whether the differences were the result of deliberate overcharging because he did not have full information about the vehicle or talk to the technician to investigate all of the circumstances. Tr at 559-62, 571-72, 579-80. Mr. Coad testified that he found about 15 repair charges that were possibly too high and 100 or 200 that were possibly too low. Tr at 559. Mr. Coad stated, “I could not find any pattern [for] any individual...where I had questions that it seemed too high or questions that it seemed too low.... I couldn’t tell if they were just mistakes.” Tr at 557. Mr. Coad testified that 15 possible overcharges out of 7,000 lines and 3,000 repair orders is “not even a blip on a radar” and “the dollar amount is insignificant” as far as AutoNation share prices or shareholder decisions. Tr at 560.

Mr. Manson testified that they refunded 15 customers the amounts that they had potentially been overcharged. Tr at 603. Mr. Manson testified that if there was a question about whether a customer had potentially been overcharged, they erred on the side of the customer in issuing refunds. Tr at 601. However, Mr. Manson testified that “the charge to the customer is the one thing that I really focus on.... Did we overcharge from what we first estimated to that particular customer? I will tell you in the 15 instances that we refunded customers, in all 15 instances the price quoted was the price paid.” Tr at 603. He testified that there was also no evidence that those customers were charged for work that was not done. Tr at 603-04. Mr. Manson testified that refunds were given because “[t]here was a perception in the shop based on these allegations that there was deliberate overcharging going on. In all instances we want to side with the customer whenever possible, but we were also attempting to settle the shop and get them back focused on fixing cars and taking care of customers.” Tr at 650.

Damages

When Complainant left John Elway Dodge, he went to work for Rush Automotive. Tr at 330. He worked at Rush Automotive until the end of June 2006, when there was a mutual decision that he would leave because the company was not making enough money. Tr at 331. Complainant then started his own company, Automobile Tech. Tr at 331. There was some vague testimony relating to Complainant’s wage loss and potential damages. Tr at 328-337

ANALYSIS

The whistleblower protection provisions of the Sarbanes-Oxley Act provide that no covered company or agent of such company

“may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee--

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--

`(A) a Federal regulatory or law enforcement agency;

`(B) any Member of Congress or any committee of Congress; or

`(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)...”

18 U.S.C. § 1514A.

To prevail, a SOX complainant must prove by a preponderance of the evidence that: (1) the complainant engaged in a protected activity; (2) the respondent knew that the complainant engaged in protected activity; (3) the complainant suffered an adverse employment action; and (4) the protected activity was a contributing factor in the adverse action. *Reddy v. Medquist, Inc.*, ARB No. 04-123, ALJ No. 2004-SOX-35 (ARB Sept. 30, 2005). Failure to prove by a preponderance of the evidence any one of the above listed elements of proof warrants dismissal of their complaint. *Allen v. Stewart Enterprises, Inc.*, ARB No. 06-081, ALJ Nos. 2004-SOX-60 to 62 (ARB July 27, 2006). If the complainant succeeds in establishing that protected activity was a contributing factor, the employer may avoid liability if it can establish by clear and convincing evidence that it would have taken the same adverse action in absence of the complainant’s protected activity. 18 U.S.C § 1514A(b)(2)(C); 29 C.F.R. § 1980.109.

1. Protected Activity

In *Harvey v. The Home Depot, Inc.*, 2004-SOX-20 (ALJ May 28, 2004), the ALJ wrote that “a fundamental protected activity under SOX...involves an employee providing information to supervisory authority based on a reasonable belief that a SOX violation has occurred.” Slip op. at 12-13 (footnotes omitted). A SOX violation must relate to at least one of the following: 1) 18 U.S.C. 1341 (fraud and swindles by mail); 2) 18 U.S.C. 1343 ("fraud by wire, radio, or television"); 3) 18 U.S.C. 1344 (bank fraud); 4) 18 U.S.C. 1348 (securities fraud); 5) a violation of any rule or regulation of the Securities Exchange Commission; or 6) violation of any provision of federal law relating to fraud against shareholders. 18 U.S.C. § 1514A (a)(1). The complainant need not show that the conduct actually occurred or that it constituted a violation of the law, but only that he reasonably believed that the respondent engaged in fraud. *Allen v.*

Stewart Enterprises, Inc., 2004-SOX-60, 61 and 62 (ALJ Feb. 15, 2005); *Tuttle v. Johnson Controls Battery Division*, 2004-SOX-76 (ALJ Jan. 3, 2005); *Halloum v. Intel Corp.*, 2003-SOX-7 (ALJ Mar. 4, 2004); *Welch v. Cardinal Bankshares Corp.*, 2003-SOX-15 (ALJ Jan. 28, 2004). Thus, the complainant's belief "must be scrutinized under both subjective and objective standards." *Tuttle v. Johnson Controls Battery Division*, 2004-SOX-76 (ALJ Jan. 3, 2005)(citing *Melendez v. Exxon Chemicals Americas*, ARB No. 96-051 (July 14, 2000)). Moreover, the complainant must articulate, with a certain degree of specificity, his belief in the occurrence of a violation of federal fraud statutes, SEC rules or regulations, or any other federal law relating to shareholder fraud. *Reddy v. Medquist, Inc.*, ARB No. 04-123, ALJ No. 2004-SOX-35 (ARB Sept. 30, 2005); *Grant v. Dominion East Ohio Gas*, 2004-SOX-63 (ALJ Mar. 10, 2005); *Lerbs v. Buca Di Beppo, Inc.*, 2004-SOX-8 (ALJ June 15, 2004).

Here, Complainant's alleged protected activity is that he complained to various managers about overcharging of customers. Specifically, Complainant alleges that he complained that the company does not tell its shareholders that it is over-inflating its revenues by overcharging customers, Tr at 133-34, and that the shareholders could ultimately be affected if word of mouth spread about the overcharging of customers. Tr at 302-03. On the other hand, Respondent alleges that no intentional overcharging occurred, Complainant did not have a subjective or objectively reasonable belief that a SOX violation occurred, and Complainant never raised any concerns about shareholders to any managers during his employment. Respondent notes that Mr. Smith, Mr. Bear, Ms. Fournier, and Mr. Manson each denied that Complainant had raised concerns to them about shareholder fraud. Tr at 353, 386, 447, 456-57, 597-98.

There was also significant testimony about Respondent's employee handbook, the ACT-Alert Line, and the proper procedures and channels for raising concerns at John Elway Dodge. Tr at 267-77, 327- 28, 348-350, 364, 368-69, 375, 382-83, 394-96, 398, 648, 485-87. However, whether Complainant was aware of or used the proper procedures and channels, or whether Complainant could have been disciplined for condoning or failing to report violations, is not relevant. It only matters whether Complainant engaged in protected activity and was retaliated against for doing so.

I find that it is unnecessary to analyze whether Complainant engaged in protected activity. Even assuming that Complainant did have a subjective and objectively reasonable belief that shareholders were defrauded and affected by overcharging and that he did communicate those concerns to his managers, he nevertheless cannot show that he suffered adverse actions as a result of this alleged protected activity.

2. Respondent's Knowledge

There is no real dispute between the parties that Respondent's managers knew about Complainant's alleged protected activity, so I find that it is unnecessary to analyze that issue.

3. Adverse Actions and Causation

SOX provides that no covered company or agent of such company "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in

the terms and conditions of employment because of any” protected activity by that employee. 18 U.S.C. § 1514A.

In *Hirst v. Southeast Airlines, Inc.*, ARB Nos. 04-116, 04-160, ALJ No. 2003-AIR-47 (ARB Jan. 31, 2007), The ARB cited the Supreme Court's ruling that a Title VII plaintiff must show that a reasonable employee or job applicant would find the employer's action "materially adverse," i.e., "the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." USDOL/OALJ Reporter at 10-11, quoting *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2409 (June 22, 2006). See *McClendon v. Hewlett Packard, Inc.*, 2006-SOX-29 (ALJ Oct. 5, 2006) (applying the Supreme Court's standard from *White* in a SOX case). Since the instant case arose in the Tenth Circuit, it is also appropriate to consider the expansive definition of adverse action found in *Hillig v. Rumsfeld*, 381 F.3d 1028 (10th Cir. 2004), in which the court held that the fact that the unlawful personnel action turned out to be inconsequential goes to damages, not liability, although the standard does not encompass mere inconvenience or alteration of job responsibilities. *Hendrix v. American Airlines, Inc.*, 2004-SOX-23 (ALJ Dec. 9, 2004).

Here, Complainant conceded that he never was counseled for poor performance, received a negative employment evaluation, or received any discipline for poor performance. Tr at 325. He also agreed that he was never demoted or transferred, and he never had any changes in his duties, responsibilities, work schedule, or supervisors. Tr at 325-26. However, Complainant alleges a number of other negative actions that must be analyzed as potential adverse actions.

Pay and Commission Issues

Complainant alleged that, at the time he was recruited and hired, Mr. Bear promised him a monthly salary of \$7,500. Tr at 145. Complainant also testified that Mr. Bear never told him that his first month's salary would be prorated or that his pay would be dependent on pay plans. Tr at 296. However, Mr. Bear credibly testified that Complainant was only guaranteed a prorated salary of \$7000 for the month of August, plus a \$500 bonus, in order to ease his transition into the job. Tr at 425-30, 498-501. The evidence also shows that Complainant signed off on pay plans and compensation calculation sheets for the subsequent months. RX E-F; RX L-Q. Moreover, Complainant's first pay plan went into effect on September 1st, RX E, which is well before his earliest alleged protected activity in late October-early November. Tr at 126-29. For all of these reasons, I find that Complainant was never guaranteed a permanent salary of \$7500 and he did not suffer a reduction in his pay as a result of any protected activity.

Complainant also alleged that he was improperly denied commissions on two repair orders from the day he went home sick. Tr at 352. Complainant testified that he had already sold the job, but "then the repair order was changed into Mr. Blakeslee's number." Tr at 131-32. Complainant testified that this was contrary to the rules of John Elway Dodge "that if you open the repair order at the time, you sold the job, you collected the job." Tr at 132. However, when Complainant spoke to Mr. Smith about these commissions, Mr. Smith fully investigated and found that Complainant was not entitled to those commissions because he did not do enough work on those repairs, according to the commission policy. Tr at 352, 355. Although Complainant had made the appointments, Mr. Blakeslee followed through on the rest of the

repair orders. Tr at 352, 534-35. Further, Mr. Blakeslee testified that he did not believe there was anything inappropriate about his taking credit for those jobs and he did not do so as a means of retaliating against Complainant. Tr at 535. Despite concluding that Complainant was not entitled to commissions for the repair orders, Mr. Smith testified that they ultimately decided to pay Complainant the commissions to resolve the issue. Tr at 355-56. Respondent also issued a policy clarifying its commission policy to avoid any similar issues in the future. RX H. Thus, I note that Complainant ultimately was paid for all commissions to which he claimed he was entitled. I also find that the initial denial of these commissions was proper according to the shop's policy and was not related to any protected activity.

Service Manager Training and Promotion

Complainant alleges that at the time he was recruited, Mr. Bear “said his goal was to make [Complainant] a service manager” and Complainant felt he was guaranteed to become a service manager “as long as [he] did [his] job correct[ly].” Tr at 294. However, Mr. Bear testified that he “did promise that [he] would put forth an effort to train [Complainant]...and it was discussed at the time that we would provide a training path for him to be a service manager at some point.” Tr at 128. Mr. Manson confirmed that Mr. Bear “mentioned to [Complainant] that if he came on board that he would give him the tools necessary if he was to go out on his own and find a service manager’s position, but no promises were made. It was strictly just to give him the skill set that he would need.” Tr at 343. Mr. Bear testified that he agreed to meet with Complainant and the other participants in the training program monthly, and that the timeline for the training program would be “approximately 18 months.” Tr at 428. Mr. Bear emphasized that none of the participants in the training program was guaranteed a service manager position at the end of the program. Tr at 428. Mr. Bear testified that Complainant “repeatedly stated that he felt like the 18 months was too long a period. Her would like to move into a management position sooner.” Tr at 42.

I find that Complainant failed to show that he was ever promised a service manager position or that he was promised such a position within the time periods at issue. Given that the schedule and timeline for the training program was established around when Complainant was hired and that the monthly training sessions had begun before any protected activity occurred, Complainant also failed to show that his training timeline was slowed in any way. Moreover, a complainant cannot establish an adverse action based on failure to promote where the Complainant did not present sufficient evidence to establish that he actually applied for a position for which he met the requisite qualifications. *Hughart v. Raymond James & Associates, Inc.*, 2004-SOX-9 (ALJ Dec. 17, 2004). Complainant failed to show that he was qualified for a service manager position or applied for such a position and was denied. For these reasons, I find that Complainant did not suffer any delay in his training program or any failure to promote him to the position of service manager as a result of any protected activity.

Hostile Work Environment

The following events are not substantial enough by themselves to constitute adverse actions, but may be considered together as evidence of a hostile work environment. To establish a hostile work environment, the alleged conduct must be “sufficiently severe or pervasive to

alter the conditions of . . . employment and create an abusive working environment." *McClendon v. Hewlett Packard, Inc.*, 2006-SOX-29 (ALJ Oct. 5, 2006) at 80, citing to *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993). The factors relevant to evaluating a claim of hostile work environment include "the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance." *Allen v. Stewart Enterprises, Inc.*, ARB No. 06-081, ALJ Nos. 2004-SOX-60 to 62 (ARB July 27, 2006). The ARB has held that stonewalling, friction, and hostility do not constitute a hostile work environment because they "are similar to the 'petty slights, minor annoyances, and simple lack of good manners' that often take place at work and that all employees experience. These ordinary tribulations of the workplace do not rise to the level of adverse actions because they do not result in tangible job consequences or deter employees from engaging in protected activity." *Allen*, ARB No. 06-081, slip op. at 16.

First, Complainant alleges that when he went home sick one day, Mr. Bear called him at home and "harassed" and "chastised" him for being sick, and was "very abusive" and "yelling." Tr at 130, 321. Complainant testified that when he returned to work the next day, Mr. Bear confronted him again about having missed training. Tr at 130. I note that neither Mr. Bear nor any other witnesses testified about this alleged conduct. However, even assuming that this conduct occurred exactly as alleged by Complainant, I find that one instance of abusive yelling by one's manager is not sufficiently severe or pervasive to alter the conditions of employment or interfere with the employee's performance.

Second, Complainant also alleges that Mr. Snider, Mr. Blakeslee, and Mr. Bear "constantly" stared at him from across the service drive. Tr at 130, 319. He testified, "Mr. Bear and Mr. Snider would . . . stare me down where I would have to duck behind my computer screen. I'd have Mr. Sparks call me . . . and he would jokingly [say], 'Hey, it looks like someone is staring at you again.'" Complainant stated, "I know it was more than two times. I couldn't tell you how many times, you know. A lot of the time I was ducking behind my computer screen to hide from my managers." Tr at 153. Complainant testified, "I know it happened more than once, and I'm going to assume it happened more than twice." Tr at 319. He added, "It was enough to make me feel uncomfortable." Tr at 319. Mr. Sparks confirmed that he recalled Mr. Snider glaring at Complainant and that he had called Complainant and stated, "It looks like someone is staring at you again." Tr at 230-31. Mr. Sparks testified that he "felt uncomfortable." Tr at 230. Mr. Sparks stated, "I remember one time in particular, but other than that, I don't know." Tr at 231. However, Mr. Snider denied that he ever sat across the service drive with Mr. Bear and glared or stared at Complainant. Tr at 517. Similarly, Mr. Blakeslee denied ever staring at Complainant with the intent to intimidate him or retaliate against him. Tr at 536.

I find that Complainant failed to show that this staring was done with the intent to harass or intimidate him, rather than merely being the result of "bad manners." Moreover, even assuming that this staring occurred as alleged by Complainant, I find that two or three instances of staring are not sufficiently frequent or pervasive to alter the conditions of employment or create a hostile work environment. In addition, even though Complainant alleged that the staring made him feel uncomfortable and he felt he had to hide behind his computer screen, I do not find that this interference with his work was severe enough to constitute a hostile work environment.

Third, the evidence shows that there was a verbal altercation between him and Mr. Blakeslee. Tr at 130, 305-07. Complainant confronted Mr. Blakeslee about the fact that he should be up on the service drive when customers arrive in the morning, and Mr. Blakeslee responded by telling Complainant “Shut the f--- up, or I’m going to take you outside and beat your ass.” Tr at 130, 305-07. Mr. Blakeslee testified that he could not remember what Complainant had said to him to start this, but he testified that it was not something that really upset him and he “thought we were just talking trash, joking around.” Tr at 529.

I note that Complainant probably was justified in feeling physically threatened by Mr. Blakeslee during this altercation given that Mr. Blakeslee was described as large and intimidating. Tr at 502. However, I nevertheless find that this conduct does not establish a hostile work environment for a number of reasons. First, Complainant initiated this altercation by confronting Mr. Blakeslee about his work. Tr at 130, 306, 479, 502. Second, the confrontation did not escalate to a physical altercation. Third, Complainant conceded that this was the only serious altercation between himself and Mr. Blakeslee. Tr at 306-07. Fourth, Mr. Snider, Mr. Bear, and Mr. Smith listened to Complainant’s concerns, investigated, counseled Mr. Blakeslee, and offered to do more but Complainant said it was resolved. Tr at 372-73, 502, 520. Lastly, I decline to find that Mr. Blakeslee was “just joking around,” but rather, I find that this altercation was just another event in the tense, contentious working relationship between Complainant and Mr. Blakeslee. Complainant testified that he and Mr. Blakeslee generally did not have a good working relationship but that Complainant respected him and was cordial to him. Tr at 305. Mr. Sparks testified that “[y]ou could just see the tension between” Complainant and Mr. Blakeslee. Tr at 249. Mr. Harris testified that he had observed heated conversations between Complainant and Mr. Blakeslee. Tr at 661-64. Mr. Blakeslee himself testified that he and Complainant had serious arguments in the past “about a customer or a ticket or something,” and that there was tension between them due to competition for commissions. Tr at 528-29. Thus, I find that this altercation was not sufficiently severe or pervasive to create a hostile work environment, and that the friction and hostility between Complainant and Mr. Blakeslee were of the type that often take place at work and that many employees experience.

Fourth, Complainant alleges that Mr. Bear told Complainant he would never become a manager if he complained to Human Resources about the altercation with Mr. Blakeslee, and that he felt threatened and retaliated against by Mr. Bear’s statement. Tr at 320-21. However, Complainant conceded that this incident and the day he was out sick were the only times that Mr. Bear had threatened him. Tr at 321-22. On the other hand, Mr. Bear testified that Complainant had misunderstood a story that Mr. Bear had told him about a difficult situation he had experienced at another location that he chose to work through on his own because he felt that complaining to Human Resources was not a good career choice for himself. Tr at 447. Complainant and Mr. Bear met with Mr. Smith about this conversation. Tr at 150, 446, 478.

I find Mr. Bear’s explanation of the conversation and of Complainant’s misunderstanding to be credible. However, even if I did find that Mr. Bear explicitly and intentionally threatened Complainant that he would not become a manager if he complained to Human Resources, one threat that is not carried out is probably insufficient to constitute a hostile work environment or an adverse action. *See Bozeman v. Per-Se Technologies, Inc.*, 1:03-CV-3970 (N.D.Ga. Sept. 12, 2006); *Hughart v. Raymond James & Associates, Inc.*, 2004-SOX-9 (ALJ Dec. 17, 2004).

Thus, considering these four allegations together, there is insufficient evidence to conclude that most of this conduct occurred at all or occurred in the way alleged by Complainant, including Mr. Bear's harassment when Complainant went home sick, various employees staring at Complainant, and Mr. Bear's threat that Complainant would not become a manager if he complained to Human Resources. Although the evidence shows that there was a verbal altercation between Complainant and Mr. Blakeslee, this one instance is insufficient to constitute a hostile work environment. These four allegations confirm that Complainant had difficult, tense working relationships with Mr. Bear, Mr. Snider, and Mr. Blakeslee, but those are "ordinary tribulations of the workplace [which] do not rise to the level of adverse actions." For all of these reasons, I find that Complainant failed to show that he suffered a hostile work environment. In addition, even assuming *arguendo* that these events did occur and do constitute a hostile work environment, there is no evidence, other than the overall order or timeline of events, that any of these events was causally related to any protected activity.

Constructive Discharge

To establish a claim of constructive discharge, the complainant must show that his "working conditions were rendered so difficult, unpleasant, and unattractive that a reasonable person would have felt compelled to resign, such that the resignation is effectively involuntary." *Reines v. Venture Bank and Venture Financial Group*, 2005-SOX-112 (ALJ Mar. 13, 2007)(applying the standard from *Pennsylvania State Police v. Suders*, 124 S.Ct. 2342 (2004)).

First, Complainant also alleges that "Mr. Bear, Mr. Smith and Human Resources felt that it was okay to leave me in a hostile work environment even after I asked for a transfer. I was given a choice to stay in an overly hostile environment or tendered [sic] my resignation." ALJX 5 at 6. Complainant also asserts that he "was never offered a transfer," but rather, he was "refused a transfer." ALJX 1 at 2.

The evidence shows that Complainant asked Mr. Bear about a transfer sometime in November. Tr at 441-46, 477-78. Mr. Bear denied Complainant's request because Mr. Bear "felt like [Complainant] needed to continue with his training, and this was a good opportunity for him to be able to achieve that potential position that he was looking forward to. Also, [Mr. Bear] felt that...dealing with the situation was part of his training." Tr at 446. After Mr. Bear refused his transfer request, Complainant also asked Mr. Smith about a transfer. Tr at 371-72. I do find that Complainant requested and was denied a transfer. However, for the same reasons as discussed above with regard to Complainant's hostile work environment claim, I find that Complainant's working conditions were not so difficult, unpleasant, or unattractive that a reasonable person would have felt compelled to resign if he were denied a requested transfer.

The evidence shows that the issue of a transfer came up again on November 28 and 29, 2005 in Complainant's conversations with Human Resources. When Complainant talked to Ms. Fournier on November 28, 2005, he had already decided to resign. Tr at 384-88. Ms. Fournier testified that she asked Complainant if he would be interested in transferring to another location, and Complainant responded that he was not interested in a transfer. Tr at 385-86. Ms. Fournier also wrote to Mr. Andrews on November 29, 2005 that Complainant told her that he did not want

a transfer. RX J. There is no evidence that Complainant ever asked Mr. Andrews or Ms. Fournier or any of his managers for a transfer in late November-early December. RX J. Complainant conceded that he never filled out a transfer request form. Tr at 326. Complainant concedes that he had already applied for and received a job offer from Rush Automotive at the time he spoke to Ms. Fournier and he was concerned about his final paycheck, Tr at 313-14, but he denies that Ms. Fournier ever offered him a transfer. Tr at 135. Given that Complainant had already been offered another job and decided to resign at the time of their conversations, I find Ms. Fournier credible that Complainant was offered and declined a transfer at that time.

Second, Complainant alleges that he was retaliated against and forced out of the company. ALJX 1 at 1-2. Mr. Harris and Mr. Sparks testified that Mr. Bear and Mr. Snider did not want Complainant working there and were trying to force him out of his job. Tr at 159, 219, 221, 243. Mr. Harris also stated that, around mid to late November, after Complainant went to Mr. Bear with concerns about overcharging, Complainant was not very happy and his attitude and demeanor changed and kept going downhill. Tr at 162-63.

Again, as discussed above with regard to the alleged adverse actions and hostile work environment claim, I do not find that Complainant was retaliated against. On the contrary, the evidence shows that Respondent, including Mr. Smith, Mr. Bear, Mr. Manson, and Mr. Coad, took Complainant's allegations of overcharging seriously and investigated the repair orders he provided. Tr at 95-102, 447-51, 458-69, 596-98, 633. Respondent also clarified its policies in response to Complainant's allegations, Tr at 118, 356-57, 450-54, 514-15, 535, RX H and RX I. Respondent also had Mr. Coad conduct a full investigation and issued refunds. 373, 550-81, 600-04, 650. The evidence also shows that other employees such as Ms. Farson, Tr at 205-14, Mr. Sparks, Tr at 221-22, Mr. Harris, Tr at 199-20, had raised concerns to Mr. Bear about similar issues and were not retaliated against. I also do not find that Complainant was "forced out" of the company. On the contrary, the evidence indicates that, after he tendered his resignation, Mr. Smith, Mr. Bear, and Ms. Fournier each tried to convince him to stay. Tr at 354-59, 385, 454.

Lastly, Complainant testified, "Buster Snider had his own booking screen. I've never heard of a technician that's been in charge of going through and billing their own tickets and putting what times they want. On some of the repair orders, he put seven and a half hours, discount[ed] the labor rate at \$70 an hour, which ...affects my effective labor rate, which ultimately lowers my pay. So I could either leave or not make a paycheck. There was no other way out. I figured that if I contacted my chain of command, which I did, something would have been resolved, but it wasn't." Tr at 135-35. I note that Complainant's assertion that Mr. Snider was effectively lowering Complainant's pay by discounting the labor rate appears inconsistent with Complainant's allegation through the rest of this case that Mr. Snider was engaged in overcharging. I also note that even if Mr. Snider did discount labor rates, this would have a limited effect on Complainant's pay check given that the effective labor rate is only one factor that determines an employee's pay. Tr at 298, 430-33, 489-91, 498-501. In addition, there is no other evidence to support that Complainant complained about Mr. Snider discounting labor rates. I find that the evidence shows that Respondent's managers were responsive to Complainant's concerns and would have attempted to resolve this issue if brought to their attention.

For all of these reasons, I find that Complainant has not established that his resignation was a constructive discharge.

Blacklisting / Refusal to Rehire Concerns

Complainant testified that after he had left John Elway Dodge, he received several calls from technicians at John Elway Dodge and other AutoNation stores asking him about the complaint he had filed. Tr at 154. He testified, “poison just ran completely through AutoNation; that limits my jobs. I’m never receiving a job at AutoNation again.” Tr at 154-55. Complainant added, “I was informed that Mr. Bear went around the shop telling everybody that they had won the case. I feel that this probably intimidated quite a few employees that...believed that overcharging is going on...because I lose credibility.” Tr at 155.

The ARB has defined blacklisting as “when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment. . . . In addition, blacklisting requires an objective action—there must be evidence that a specific act of blacklisting occurred. Subjective feelings on the part of a complainant toward an employer’s action are insufficient to establish that any actual blacklisting took place.” *Pickett v. Tennessee Valley Authority*, ARB Nos. 02-056 and 02-059, ALJ No. 2001-CAA-18, slip op. at 8-9 (ARB Nov. 28, 2003). Even a showing that a complainant applied for subsequent positions and was not hired is insufficient where there is no evidence to link any of the applications or subsequent refusals to hire with any protected activity. *McIntyre v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 2003-SOX-23 (ALJ Jan. 16, 2004).

Applying this standard, I find that Complainant’s allegations are too vague to establish that any blacklisting or improper refusals to hire took place. Complainant alleges that “poison ran through AutoNation,” but he has not established that this was the result of any deliberate effort to disseminate damaging information that prevented him from finding employment. Complainant has also failed to claim or show that he applied for another position and was rejected due to Respondent’s alleged blacklisting. For these reasons, I find that Complainant has failed to show that he suffered an adverse action in the form of blacklisting or refusal to rehire.

Litigation Conduct

Complainant also objected to certain conduct by Respondent in the course of the litigation of this case as retaliatory. However, it is unclear whether I have authority to consider these allegations at this time. These allegations, by their nature, were not included in Complainant’s complaint to OSHA and were not investigated by OSHA. The exhaustion requirement of the whistleblower provision of the Sarbanes-Oxley Act precludes recovery for a discrete act of retaliation that arose after the filing of the administrative complaint which was never presented to OSHA for investigation. *Willis v. Vie Financial Group, Inc.*, 2004 WL 1774575 (E.D. Pa. Aug. 6, 2004). Later allegations that are of a drastically different type from those contained in the complaint may not, consistent with due process, be considered in the instant case. *Kingoff v. Maxim Group LLC*, 2004-SOX-57, slip op. at 4 (July 21, 2004). Accordingly, to the extent that any later allegations constitute distinct acts of retaliation, the complainant must file a new complaint with OSHA raising those allegations. *Reines*, 2005-

SOX-112, at 49 n.15 (ALJ Mar. 13, 2007); *Kingoff*, 2004-SOX-57(referring later allegations to OSHA for investigation). *C.f. Hunter v. Anheuser Busch*, 2006-SOX-108 (Oct. 18, 2006)(dismissing second complaint that was based on allegations of fraud and perjury in the litigation of the first case, since those allegations were already objected to and were part of the appeal of the first case). For purposes of thoroughness, I will briefly address Complainant's allegations of retaliation based on Respondent's conduct during the litigation of this case.

First, Complainant alleges that Respondent improperly deleted and/or did not provide all copies of emails that he sought through discovery. Tr at 670-71. Respondent asserts that it provided copies of all emails that were responsive to Complainant's discovery request and that any emails that were not provided were no longer available due to Respondent's standard email deletion policy. Tr at 672-77. Complainant and Respondent's counsel each testified or made offers of proof about the deletion of emails. Tr at 670-77. Mr. Manson testified that under Respondent's email retention policy, once an email is moved from a user's inbox to the user's deleted emails folder and the user deletes that deleted emails folder, the email is retained for 60 days before it is fully erased from the system. Tr at 590-91, 634. Emails that are in a user's deleted emails folder remain on the system. Tr at 590-91, 634. Respondent's counsel confirmed that this is how Respondent's email retention procedures operate and that they searched for and provided all emails that were still on the system. Tr at 672-77. Complainant presented the testimony of Mr. Kuther that Auto Nation does not have an automatic 60-day email deletion policy, and that emails stay in each email user's deleted file until it is cleared out by the email user. Tr at 75. However, I find that, because he is not a manager, Mr. Kuther is not in the best position to know about Respondent's email deletion policy. I also note that Mr. Kuther's testimony that emails remain in a user's deleted file until he or she clears out that file is actually consistent with the evidence presented by Respondent. Based on all of the evidence and arguments presented, I find that Respondent did not improperly delete or withhold any emails that were sought by Complainant during discovery or that were otherwise relevant to this case. Therefore, I find that there was no retaliation or adverse action related to emails.

In addition, there were concerns raised before and during the hearing that Employer's managers and/or counsel may have told some witnesses that the subpoenas were not enforceable and that they did not need to appear at the hearing. Tr at 141-43, 156-57, 250-51, 469-71, 503-04. Despite this, it appears that all witnesses who were subpoenaed did testify. I find that the issues with subpoenaing witness were most likely the result of a misunderstanding, rather than any concerted effort by Respondent to thwart the presentation of Complainant's case. Therefore, I find that there was no retaliation or adverse action related to the subpoenaing of witnesses.

Lastly, some witnesses, including Mr. Kuther and Mr. Harris, expressed concerns about retaliation or blacklisting as a result of their testimony. Tr at 55, 84, 158-59, 162, 165. However, these witnesses each acknowledged that Respondent has a policy against retaliation and that they are protected by law against such retaliation. Tr at 76, 157, 185-86. They also acknowledged that Respondent's counsel had responded appropriately to their concerns and had informed them of avenues for reporting retaliation if it occurred. Tr at 76, 185-86. Other witnesses explicitly testified that they were not at all concerned about retaliation based on their testimony. Tr at 252. I find that it is normal for witnesses to have some concerns about testifying in a case involving their current employer, and that there is no evidence of witness

intimidation by Respondent in this case. Therefore, I find that there was no retaliation or adverse action related to witness intimidation.

CONCLUSION

I find that Complainant has failed to prove by a preponderance of the evidence that he suffered any adverse actions that were causally related to his alleged protected activity. Because Complainant is unable to prove these elements, it is unnecessary to analyze whether Complainant actually engaged in any protected activity or whether Respondent would have taken the same adverse action against Complainant in the absence of his protected activity. Accordingly, Complainant has not met his burden, and his complaint must be dismissed.

ORDER

The relief sought by Complainant is hereby DENIED, and his complaint is hereby DISMISSED.

A

ANNE BEYTIN TORKINGTON
Administrative Law Judge

ABT:eh

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of the administrative law judge’s decision. *See* 29 C.F.R. § 1980.110(a). The Board’s address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it