

1 88. On October 28, 2005, after reviewing the
2 report, Plaintiff met with his supervisor Mike
3 Ayala in person, and reported to him that he
4 felt the incident report filed by Ferguson could
5 create a problem for his disability benefit
6 claim, because he was left out of the report. He
7 did not report to Ayala that he felt any
8 reportable use of force had been left out of the
9 report.

Ayala Decl., ¶5.

Tristan Depo., Vol. II, pp. 254:19 – 257:24
(Vann Decl., Ex. B).

9 89. On or about November 1, 2005, Plaintiff
10 spoke to Martha Castaneda on the telephone,
11 and she informed him that he would not be
12 receiving EIDL benefits because the
13 information available to her indicated he was
14 not eligible for EIDL benefits. After this
15 conversation, on November 1, 2005, Plaintiff
16 drove to the office to speak with his Supervisor,
17 A.J. Garcia.

Tristan Depo., Vol. II, pp. 260:17 - 266:24
(Vann Decl., Ex. B).

16 90. When Plaintiff met with A.J. Garcia on
17 November 1, 2005, Plaintiff informed him that
18 he felt he had been left out of the report and
19 that it was causing problems for his disability
20 benefits. He did not tell Garcia that he was
21 assaulted by the parolee.

Tristan Depo., Vol. II, 268:18-274:17 (Vann
Decl., Ex. B).

21 91. Plaintiff drafted a supplemental report to
22 Ferguson's Parole Violation Report describing
23 his participation in the arrest and presented it
24 A.J. Garcia on or about November 4, 2005.

Tristan Depo., Vol. II, pp. 283:21-284:14;
289:7-289:15, 307:3-7, depo. Ex. 16 (Vann
Decl., Ex. B).

25 92. Garcia made some handwritten edits to the
26 document, which Plaintiff incorporated into a
27 final document. Plaintiff claims Garcia's
28 changes are "false" and that Garcia requested
the changes in order to "downplay the use of

1 force” but the revised report, Exhibit 13 to his
2 deposition, is substantially similar to Exhibit 16
3 drafted by Plaintiff. It contains the allegations
4 that the parolee charged Plaintiff and that the
5 parolee resisted arrest by refusing to put his
6 hands behind his back, and Plaintiff had to put
7 his knee in his back as a defensive measure and
8 force his hands out from under him.

9 Tristan Depo., Vol. II, pp. 288:12 – 292:25;
10 294:14 – 305:7, 334:2-336:18, depo. Exs. 13,
11 16 (Vann Decl., Ex. B).

12 93. On or about November 7, 2005 Plaintiff
13 wrote a letter to Regional Parole Administrator
14 Jeff Fagot requesting that he be approved for
15 EIDL, in which he admitted he had been
16 unaware of how specific he needed to be in his
17 description of the incident to obtain EIDL, and
18 that his reason for not previously including
19 detail about the use of force was that “I was
20 trying not to make this incident any bigger than
21 it needed to be.” He also admitted that he
22 understood the Return to Work office’s
23 position because they did not have the
24 information to describe the incident.

25 Tristan Depo., Vol. II, p. 309:4-24, depo. Ex.
26 14 (Vann Decl., Ex. B).

27 94. Plaintiff never told anyone he felt he was
28 being asked to make a false report.

Tristan Depo., Vol. II, p. 334:2-336:18 (Vann
Decl., Ex. B).

95. In support of his whistleblowing causes of
action, Plaintiff alleges that he called the
Deputy Director of Corrections Marilyn
Kalvelage on Monday, November 11, 2005 to
discuss his concerns about not being permitted
to accurately submit reports and request her
intervention. He alleges that he told her he had
had attempted to “whistleblow” with Ayala on
October 28th and attempted to “whistleblow”
with Castaneda on November 1 about the
“EIDL issue” and the reports. He further
claims that he reported to Kalvelage that
Castaneda informed him that he was not

1	eligible for EIDL due to her “false interpretation of the MOU.”	
2	Tristan Depo., Vol. III, pp. 364:13 – 365:6;	
3	369:11-21 (Vann Decl., Ex. C).	
4	96. Plaintiff alleges his conversations with Ayala informing him that he was concerned	
5	Ferguson’s report did not support his EIDL claim and Ayala’s reassurances to him that he	
6	would be covered were “whistleblowing.”	
7	Tristan Depo., Vol. III, pp. 369:22-370:8 (Vann Decl., Ex. C).	
8	97. Plaintiff alleges his conversation with Martha Castaneda regarding the omission of his	
9	activities from Agent Ferguson’s report were “whistleblowing.”	
10	Tristan Depo., Vol. III, pp. 370:13-371:15 (Vann Decl., Ex. C).	
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12	98. In his conversation with Marilyn Kalvelage, Plaintiff complained that Ferguson had submitted a false report by omitting him from the report and changing the nature of how the incident occurred, and that Tim Fowler had informed Garcia that Plaintiff’s supplemental report would not be accepted. The conversation ended with Kalvelage asking him if he would testify that Ferguson submitted a false report, and telling him she would ask Jeff Fagot to call him.	
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19	Tristan Depo., Vol. III, pp. 370:13-377:25 (Vann Decl., Ex. C).	
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21	99. In his conversations with Deputy Director of Corrections Marilyn Kalvelage, Plaintiff did not report to her that Agent Garcia asked him to make changes to a report that rendered it “false.”	
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24	Tristan Depo., Vol. III, 373:23-374:6 (Vann Decl., Ex. C).	
25	100. On November 14, 2005, Jeff Fagot called Plaintiff at home. During the conversation, which Plaintiff also characterizes as “whistleblowing,” Plaintiff informed Fagot that Ferguson’s report was creating a problem for him, and that Martha Castaneda had informed	
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1 him that his EIDL was not being approved, and
2 that he was not being allowed to file a
3 supplemental Parole Violation Report
regarding the October 21, 2005 incident.

4 Tristan Depo., Vol. III, 382:16-386:23 (Vann
Decl., Ex. C).

5 101. Plaintiff also believes he may have told
6 Fagot that his workers' compensation claim,
7 which was filed on October 25, 2005, four days
after his injury, was "untimely."

8 Tristan Depo., Vol. III, 388:21-389:21 (Vann
Decl., Ex. C).

9 102. Plaintiff never informed Fagot that he felt
10 Garcia had asked him to make changes to his
11 Supplemental Parole Violation Report that
12 rendered it false; in fact, he stated he would be
willing to change it further in order to have it
accepted.

13 Tristan Depo., Vol. III, 389:22-390:7 (Vann
Decl., Ex. C).

14 103. During their conversation, Jeff Fagot
15 instructed him to complete an "incident report,"
16 detailing his involvement in the arrest, a
17 procedure Plaintiff characterizes as "standard
18 protocol" despite the fact that Plaintiff did not
19 follow such protocol within 24 hours of the
incident as called for by CDCR policy. Fagot
did not convey any other instructions or
directives to Plaintiff at that time.

20 Fowler Decl., ¶4.

21 Tristan Depo., Vol. III, 390: 8-11; 396:19-
397:4; 399:15-400:4 (Vann Decl., Ex. C).

22 104. After speaking with Fagot, on Monday
23 November 14, 2005, Plaintiff reported to the
24 office to write his report and had trouble
logging into his computer.

25 Tristan Depo., Vol. III, 402:7-405:9; 406:8-
412:3 (Vann Decl., Ex. C).

26 105. Later in the afternoon of November 14,
27 2005, Ayala instructed Plaintiff to come to the
28 office to write a Field Incident Report because
he had been advised by Acting District

1 Administrator Ben Holloway to do so. Ayala
2 did not believe this was necessary because the
3 reports already indicated Plaintiff was present,
4 but he did not tell Plaintiff not to submit a
5 report.

6 Ayala Decl., ¶5, Ex. A.

7 106. On November 14, 2005 Plaintiff
8 completed and submitted a "Field Incident
9 Report" that is substantially similar to the
10 earlier supplemental Parole Violation Report he
11 drafted. Plaintiff completed part "C," the third
12 and fourth pages of the report, and "backdated"
13 this portion of the Incident Report to 10/21/05
14 despite the fact that he did not fill out and sign
15 the report until November 14, 2005.

16 Tristan Depo., Vol. II, Depo. Exs. 13 and 16;
17 Vol. III, 413:20-414:24, depo. Ex. 17 (Vann
18 Decl., Exs. B and C).

19 107. The first two pages of the Field Incident
20 Report completed by Ayala are substantially
21 similar to Plaintiff's statement, and also contain
22 the allegations that the parolee placed his
23 shoulder into Plaintiff's chest and that the
24 parolee resisted arrest by refusing to put his
25 hands behind his back, and that Plaintiff had to
26 put his knee in the parolee's back to obtain
27 compliance and handcuff him.

28 Tristan Depo., Vol. III, 414:24-:416-1, depo.
Ex. 17 (Vann Decl., Ex. C).

108. Agent Ferguson also submitted a
supplemental amendment to his original
October 21, 2005 report that does not
substantially contradict Plaintiff's version of
events.

Tristan Depo., Vol. III, 427:14-22, depo. Ex. 18
(Vann Decl., Ex. C).

109. In support of his whistleblowing
retaliation claim, Plaintiff alleges that he
reported to Maritza Rodriguez in a letter dated
March 13, 2007 that he was being assigned an
excessive workload after returning to work on
light duty in January, 2007. He subsequently
made complaints to her that his workload upon
return to full duty in March, 2007 was also

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excessive.
Tristan Depo., Vol. V, 710:19 –711:6, 772:13-774:19, 775:24-777:22, depo Exs. 30, 33 and 34 (Vann Decl., Ex. E).

110. The workload provided to Plaintiff when he returned to work in January 2007 was assigned for legitimate, nondiscriminatory reasons. Prior to Plaintiff's return to work on light duty on January 17, 2007, Garcia and Ayala discussed how to assign an equitable workload to Plaintiff upon his return to Unit #1. Plaintiff was not permitted to perform any field duties, requiring other Agents in the unit to spend additional hours in the field. In an effort to balance job responsibilities, Plaintiff was assigned as the OD on a daily basis, allowing the other Agents to spend more time in the field. Plaintiff was also given Unit #1's Release Program Studies ("RPS" or "pre-paroles"), and a caseload which is represented on the February, 2005 Caseload Roster for Plaintiff. This was expected to be a temporary workload assignment since Plaintiff was expected to return to full duty within 60 days and the requirements could be completed within the office and while Plaintiff was performing OD duties.
Ayala Decl., ¶¶9-13, Ex. C; Garcia Decl., ¶¶9-14, Ex. D.

111. Each assigned caseload carries a numerical workload point value and the caseload assigned to Plaintiff while on light duty carried a point value of 141. This was well below the highest workload in the unit of 154 and met the union contract requirements that all Agent's workloads be within 20 points of one another.
Ayala Decl., ¶14, Ex. D.
Garcia Decl., ¶15, Ex. F.

112. Plaintiff was not counseled or disciplined, or the subject of any other adverse action, for not completing all assigned work while on light

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duty. Ayala Decl., ¶16.	
113. The workload provided to Plaintiff by Acting Unit Supervisor Tryna Woods and Ayala when Plaintiff returned to full duty in March 2007 was assigned for legitimate, nondiscriminatory reasons as soon as he completed lapsed training required to permit him to return to field work. Plaintiff's newly assigned caseload carried a workload of 194 points, which was within 20 points of the lowest agent workload in the unit of 180 points, as required by the governing union contract. Ayala Decl., ¶¶16-17, Ex. E.	
114. Plaintiff's new caseload assigned in mid-March, 2007, is reflected in the March 28, 2007 Caseload Roster for Plaintiff and was designed to allow for many of his cases to develop over time from the pre-parole status so that he would be familiar with the case prior to a parolee's release and could supervise the parolee from the beginning. It was also designed with the knowledge that the requirements of some of the assigned cases had already been met by other Agents, or by Plaintiff, while he was on light duty, and would not require additional work in March. Additionally, the required work was waived for March, April and May on 25 of the assigned cases, which represented 48 of Plaintiff's workload points (or 38 % of his active cases), allowing additional time for Plaintiff to get up to speed and get these cases back in compliance. Ayala Decl., ¶¶18-21, Ex. F.	
115. Plaintiff was not counseled or disciplined, or the subject of any other adverse action, for not completing all assigned work in the new caseload assigned to him in March 2007. Ayala Decl., ¶22.	
116. Ayala's denial of Plaintiff's request demand to leave his OD coverage early at 11 a.m. on March 13, 2007, to allow him to have an hour for lunch and an hour for driving to his scheduled 1 p.m. training, as well as the denial	

1 of a 1/2 hour of overtime to drive to training,
2 was based on legitimate, nondiscriminatory
3 reasons. Plaintiff had previously been
4 scheduled as the OD from 8 a.m. to 12 p.m.,
5 had ample notification of this schedule, and
6 needed only half an hour to drive to the training
7 location approximately 19 miles away. This
8 allowed for a half-hour lunch break and the
9 denial of overtime was something that Plaintiff
10 was permitted to appeal thereafter through the
11 grievance process. Additionally, permitting
12 Plaintiff to leave early would have adversely
13 affected another Agent in the Unit.

14 Ayala Decl., ¶22, Ex. G.

15 **Issue 4: Plaintiff's Fourth Cause of Action for Whistleblowing under Government**

16 **Code 8547 Has No Merit.**

17 117. Defendant hereby incorporates each and
18 every preceding material fact as if fully set
19 forth.

20 118. Plaintiff submitted his allegations of
21 discrimination, retaliation and whistleblowing
22 to the **State Personnel Board ("SPB")** in two
23 complaints, the first of which was filed in June
24 2007 as an appeal of the decision of CDCR's
25 Office of Civil Rights to close his **Equal
26 Employment Opportunity ("EEO")**
27 Complaint without investigation, and the
28 second of which was filed in December 2007 as
a "Whistleblower Retaliation Complaint."
These two complaints were later consolidated
under the case number assigned to the first case
filed by Plaintiff, Case No. 07-4456.

Plaintiff's Complaints to the SPB, dated June 7
and December 20, 2007, and SPB
correspondence dated January 31, 2008 (RJN,
Exs. C, D, and E).

Declaration of Terry Price ["Price Decl."],
¶¶1-4, 7.

Tristan Depo., Vol. I, pp. 63:20-65:1, depo.
Exs. 3 and 4 (Vann Decl., Ex. A).

119. Plaintiff's combined appeals to the SPB
were calendared for an evidentiary hearing to

1 be held on March 24, 2008. Thereafter, one of
2 the parties filed a motion seeking a continuance
3 due to a conflict between the scheduled date
4 and an already planned vacation, and the SPB
5 granted that motion and vacated that hearing
6 date by and Order dated March 11, 2008.

7 SPB correspondence dated January 31, 2008,
8 and SPB Notice of Hearing (RJN, Exs. E and
9 F).

10 Decl. of Terry Price, ¶¶4-6.

11 120. Plaintiff voluntarily withdrew his
12 combined SPB appeals by a request letter to the
13 SPB dated January 4, 2009, and the SPB
14 complied by issuing an Order on March 17,
15 2009, which vacated all conferences and
16 hearings, and closed the combined matter.

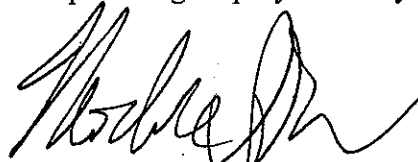
17 Order by the SPB, dated March 17, 2009 (RJN,
18 Ex. G).

19 Price Decl., ¶ 7.

20 Dated: February 10, 2011

Respectfully Submitted,

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22 Attorney General of California
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