TRISTAN SEPARATE STATEMENT OF FACTS

INTRODUCTION

A Separate Statement of Facts is submitted by Plaintiff in Support of Plaintiff's Opposition to the Defendants' Motion for Summary Judgment (MSJ). The MSJ attempts to minimize misconduct by Named Defendants and the CDCR by describing violations of the California Government Code, serious violations of the California Code of Regulations Title 15, and violations of the regulations contained in the California's Department Operations Manual as "trivial." The MSJ is replete with inaccuracies and omissions of relevant facts, partly because the MSJ relies on Declarations that are factually inaccurate and also omit relevant facts as demonstrated by Plaintiff's Declaration in this matter.

The MSJ is incorrect when it claims that Plaintiff's claims of harassment, discrimination and retaliation do not have merit because Plaintiff is either confused about which Protected Class he belongs to, or because Plaintiff's claims describe similar misconduct.

Plaintiff is not confused when he claims that he was discriminated against as an injured and disabled worker as a result of Defendants' and the CDCR's misconduct against him while he was injured and disabled, by Named Defendants. As a result, Plaintiff was in a Protected Class while injured and disabled and he was engaged in Protected Activities. The misconduct by named defendants and the CDCR were violations of the California Government Codes and California Labor Code as well as CDCR's DOM Regulations. The misconduct of Named Defendants was reported by Plaintiff because they tried in 2005 not only to prevent him from submitting a workers' compensation claim, but then tried to prevent him from submitting reports required by CDCR regardless of whether there was a workers' compensation claim. In 2008, De Leon refused to accept Dr. Hanson's evaluation that Plaintiff may have suffered a re-injury and made Plaintiff go through a series of needless doctor's appointments only to tell Plaintiff that a doctor had been chosen for him. In both 2005 and 2008, Plaintiff's supervisor and the Return to Work Office attempted to prevent Plaintiff from accessing benefits offered injured

workers by the CDCR of Enhanced Industrial Disability Leave and Modified/Light Duty. These benefits are offered by the CDCR and not workers compensation. This constituted discrimination against an injured and disabled worker because he was not going to be afforded access to the same benefits available to other injured and or disabled CDCR employees. The misconduct against Plaintiff was primarily at the hands of Ayala, Garcia, Castaneda and De Leon. However, the CDCR administration, Plaintiff's Chain of Command, failed to protect and provide Plaintiff relief from the continued harassment and retaliation.

Additionally, Plaintiff is not confused when he claims status as a Whistleblower which he has clearly demonstrated. Plaintiff is clear in his claims and the evidence submitted that he was retaliated against due to his reporting the misconduct of his supervisors and others in authority and he was retaliated against for reporting violations of regulations. Plaintiff's reports of supervisor's misconduct were clearly Protected Activities. Again, Plaintiff's Chain of Command failed to respond to Plaintiff's pleas for relief and they failed to provide Plaintiff with any protection.

Plaintiff is not confused when he claims that he, a Hispanic, reported the misconduct of his supervisors and others that he believed to be Hispanics. The individuals included M. Ayala, A.J. Garcia, Rodriguez, De Leon and M. Castaneda. Plaintiff reported the cover-up of an incident during which Garcia threatened Plaintiff by stating "you may win the battle but you are going to lose the war." Ayala encouraged Plaintiff to continue with the cover-up by telling Plaintiff that he did not need any documentation regarding the incident by stating "we have your back" meaning that he and Garcia would support him if he didn't report the incident. When Plaintiff reported the misconduct of Ayala and Garcia and Castaneda's Return to Work Office, the retaliation began in the form of harassment and discrimination by Ayala and Garcia. Plaintiff was discriminated against because he, an Hispanic, violated the trust of other Hispanics, when he reported their misconduct. After Plaintiff had Whistleblown to administrators, Fagot and Kalvelage, he was admonished by M. Rodriguez, a Hispanic, not to go to Fagot with any more complaints and instructed Plaintiff to go to her with any complaints.

Plaintiff did belong to the Protected Classes of injured worker, disabled worker, and Whistleblower, and he was discriminated against because of his race, because he an Hispanic, reported the misconduct of his supervisors and others who Plaintiff believes were Hispanic. The evidence submitted supports the fact that Plaintiff was involved in Protected Activities while being a member of the listed Protected Classes.

Plaintiff made good faith efforts to exhaust the administrative remedies available to him. Plaintiff had faith that because he was employed as a law enforcement officer by a law enforcement agency that was required to operate within the regulations as specified in the California Code of Regulations Title 15 and the CDCR DOM regulations. With this as the foundation of his approach in seeking relief and protection from the harassment, discrimination, and retaliation, Plaintiff made a good faith effort at every level of the CDCR, and in the end his efforts proved to be exercises in futility. Plaintiff wrote letters to Ms. Rodriguez, District Administrator; Jeff Fagot, Regional Administrator; Tom Hoffman, Director of Parole; and Scott Kernan, Undersecretary of Adult Operations. Plaintiff made telephone calls to Fagot and Kalvelage, Deputy Director of Parole and filed an employee grievance. Plaintiff participated in the CDCR's Office of Civil Rights Intake Interview and an Office of Internal Affairs Investigation. Plaintiff also filed an Appeal with the State Personnel Board (SPB) and was willing to enter into SPB's Mediation only to have the offer of Mediation rejected by the CDCR Legal.

Plaintiff requested and was granted a Hearing before the SPB only to have the CDCR refuse to comply with requests for Discovery. To add insult to injury, the CDCR cancelled and did not reschedule the hearing because the CDCR allegedly needed more time to prepare. After waiting for some response from SPB regarding a Hearing date, Plaintiff contacted SPB and SPB informed Plaintiff that they could not compel the CDCR to have a hearing if the CDCR needed more time to prepare. Plaintiff was under the impression from SPB that the responsibility was on the CDCR to reschedule the hearing as he was willing to attend a hearing at any time. However, it appears that the CDCR is

trying to shift that burden to Plaintiff by stating that Plaintiff did not reschedule the hearing. Plaintiff didn't cancel the hearing in the first place.

As a result of CDCR's indifference to Plaintiff's pleas, CDCR's rejection of SPB's offer of mediation, and CDCR's tactics of delays and resistance to a hearing, Plaintiff sought and obtained information from SPB as to how to compel CDCR to deal with his issues. Plaintiff was advised to contact FEHA regarding a Right to Sue Letter and FEHA stated that Plaintiff could not have a case pending with SPB and be granted a Right to Sue Letter. Therefore, he needed to withdraw his SPB Appeal in order to obtain a Right to Sue Letter. Plaintiff completed the required form to the best of his ability with the limited space that was provided on the internet form that he completed. It is Plaintiff 's hope that the Court will agree that he made a good faith effort at exhausting his administrative remedies. With this history in mind, Plaintiff does not see the benefit of any additional exercise in futility by going back to the same process in dealing with CDCR Legal, the Parole Director and Deputy Directors again or even their supervisor the Undersecretary of Adult Operations.

The MSJ makes claims that because Plaintiff did not specifically name M. Ayala, A.J Garcia and M. Rodriguez in the Right to Sue Letter, that the named defendants, Ayala and Garcia and Rodriguez should be removed as Named Defendants. Plaintiff submits that the FEHA Right to Sue Letter authorized Plaintiff to pursue his issues with supervisors in Court. Defendants Ayala and Garcia have already submitted Declarations in which they state that they were Plaintiff's supervisors and therefore, cannot claim that they should not be named as defendants as claimed in the MSJ. In their Declarations they state that they have personal knowledge of Plaintiff and the circumstances that they are addressing in their Declarations. Additionally, M. Rodriguez, District Administrator, was Plaintiff's third tier supervisor which is demonstrated by Defendants Exhibits and Plaintiff's Exhibit 35 in Volume II that reflects the CDCR's organizational chart.

The MSJ arguments that each of the four Causes of Actions by Plaintiff are without merit is disputed as Plaintiff's claims are supported by the Plaintiff's Motion in Opposition of

Defendant's Motion for Summary Judgment, this Separate Statement of Facts and Plaintiff's Declaration, which disputes the declarations submitted in support of Defendants Motion for Summary Judgment.

Regarding Issue No. 1: Defendants argue that Plaintiff's claims for discrimination, retaliation and harassment are without merit under FEHA because Plaintiff alleges the exact same conduct as grounds for these claims. The facts brought forth by Plaintiff support that discrimination can be in the form of harassment and that retaliation can be in the form of harassment and discrimination. They are not exclusive of one another as Defendants appear to argue, because the acts of misconduct against Plaintiff involved harassment, discrimination and retaliation.

Plaintiff belonged to different Protected Classes depending on the point in time that the misconduct against him was taking place. For example, Plaintiff was disabled from October 21, 2005 through March 6, 2007 when he was released to full duty by his doctor, and during this time period Plaintiff was in a Protected Class, engaged in Protected Activities for which he was retaliated, harassed and discriminated against. Not only do the CDCR regulations prohibit discrimination against a disabled employee but so does FEHA and California Labor Code 132a and California Labor Code 1102.5 (b)(c)(d) which includes the filing of a workers' compensation claim, a Protected Activity. Just as important, from October thru December 2005, while injured and disabled, Plaintiff was involved in Whistleblowing, reporting the misconduct of his supervisors, Ayala and Garcia, and the Return to Work Office under M. Castaneda. During this time period, Plaintiff was disabled and he was discriminated against when he engaged in Protected Activities when he attempted to get the October 21, 2005 incident properly documented for his Workers' Compensation Claim and for the CDCR's Enhanced Industrial Disability Leave (a benefit) and request to work in Modified/Light Duty, a reasonable accommodation position. While Plaintiff was disabled in a Protected Class, he was retaliated against for engaging in a Protected Activity which was the reporting the misconduct of his supervisors and the Return to Work Coordinator, which is a Protected Activity under the Government Codes 8547, 8547.3 and 8547.8 of the Whistleblower

Statute, and California Labor Code 1102.5 (b)(c)(d) and CDCR DOM Regulation 31140.10. Additionally, California Labor Code 1102.6 states that if there is a "preponderance of evidence" regarding the violation of Labor Code 1102.5, the *"Burden of Proof" in on the employer to present clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons."* Plaintiff provided a preponderance of evidence that his supervisors did not have legitimate independent reasons for the misconduct against Plaintiff when he was disabled and attempting to document the circumstances surrounding the incident that resulted in his injuries and his workers' compensation claim.

Plaintiff worked while disabled in a Modified/Light Duty position from January 17, 2007 until March 14, 2007. During this time period Plaintiff, a disabled worker, was discriminated against, harassed and retaliated against through excessive workload. A comparison of Plaintiff's workload prior to the October, 21, 2005 incident and Whistleblowing, and after he returned to work on Light Duty, reflects a tremendous workload increase. A comparison of the workload of Agent Monahan prior to the transfer of her cases to Plaintiff while he was on Light Duty reflects that Monahan's workload while she was on Full Duty was actually less that Plaintiff's on Light Duty. A comparison of Plaintiff's workload on Light Duty, as compared to other Agents on Full Duty, during the same time frame, reflects that his workload was actually greater than those of Agents on Full Duty. Plaintiff complained about the workload to his supervisors and they did not provide any relief, because all of the excess work was in violation of the Light Duty Agreement which was signed by Garcia and Plaintiff. The CDCR Office of Civil Rights defines a disability as "temporary" or "permanent." Plaintiff was a member of a Protected Group because he was still disabled and had not been cleared to work Full Duty.

Plaintiff worked Full Duty from March 14, 2007 until January 28, 2008. However, he was still being harassed and retaliated against for participating or having participated in Whistleblowing which is a Protected Activity, and he is a member of a Protected Class, Whistleblower, as provided for in the Whistleblower statute. During this time period,

Plaintiff began to write letters in which he complained to the CDCR Chain of Command beginning with Ms. Rodriguez and up to and including the Director of Parole, Tom Hoffman and the Undersecretary of Adult Operations, Scott Kernan.

Plaintiff's reporting of his supervisors' misconduct falls under the Protected Class of Whistleblower. Additionally, during this same time period, Plaintiff participated in an Intake Interview with the CDCR's Office of Civil Rights which is also a Protected Activity. The OCR did not investigate the issues of discrimination of a disabled and injured worker. The harassment, discrimination and retaliation continued, but instead of workload, it now manifested itself in other forms such as denial of overtime; manipulating Plaintiff into cancelling his vacation; forcing Plaintiff to work through his lunch; scheduling Plaintiff to be OD on Fridays and Mondays instead of rotating it; ordering Plaintiff to serve as OD when there was no legitimate work-related reason for doing so because there was already an OD; and having Plaintiff complete the initial work on parolee and then transferring the case to another agent so that the workload points would not appear to be excessive for Plaintiff. As individual acts, these may seem minor however, these acts taken in total, over a prolonged period of time, constituted a hostile work environment and placed Plaintiff was under tremendous stress. Plaintiff's concerns, with only a few exceptions, were ignored.

From January 28, 2008 until the present, Plaintiff was disabled and again Plaintiff was again a member of a Protected Class, engaged in Protected Activities for which he was harassed, retaliated and discriminated against. However, from March 23, 2010 until January 2011 Plaintiff was working while disabled on Modified Duty, which continued his status as part of a Protected Class because by CDCR's policies and FEHA are clear that the disability can be temporary or permanent in nature and that discrimination against a disabled employee is prohibited, due to the employee's Protected Class.

The Plaintiff has been, throughout the time period before the Court in Plaintiff's Complaint, a member of several Protected Classes, involved in Protected Activities and the CDCR failed in its responsibility as prescribed in Government Codes and the

California Code of Regulations, Title 15 and CDCR's DOM to investigate Plaintiff's allegations in a timely and effective manner and to provide Plaintiff with relief and protection against further discrimination, harassment and retaliation.

The MSJ argues in Issue 2 that: Plaintiff's Second Cause of Action for Harassment is without merit for the same reasons, stating that Plaintiff makes exactly the same allegations in support of harassment as he does for the First Cause of Action for retaliation and discrimination. As stated above, Plaintiff was subjected to harassment as part of the Defendants' acts of discrimination and retaliation. The retaliation in some cases took the form of harassment and the discrimination sometimes took the form of harassment. The acts of misconduct by Defendants are not exclusive only to harassment or only to discrimination or only to retaliation, but rather the Defendants' acts of misconduct against Plaintiff include harassment, discrimination and retaliation. Plaintiff was harassed while he was a disabled worker working in a Light Duty capacity through excessive workload and refusal to reduce his workload by his supervisors or approve any overtime for the extra workload or hours worked. He was harassed after he returned to work on Full Duty through a variety of actions by his supervisor Ayala which created a hostile work environment for Plaintiff. Some of these actions by Ayala taken out of the context of the total harassment, discrimination and retaliation by Plaintiff's supervisors may seem minor, but taken in the total context of everything that Plaintiff was being subjected to, it created a stressful, hostile work environment to the point that Ms. Woods an Acting Parole Agent III referred Plaintiff to the Employee's Assistance Program. Plaintiff was treated by clinicians and they determined as did other clinicians at Kaiser that Plaintiff was suffering from job-related Post Traumatic Stress.

Plaintiff's plight with harassing actions did not stop with Ayala, it continued through the actions of De Leon, in the Return to Work Office, which was under the supervision of M. Castaneda. Plaintiff had to endure needless delays in treatment because De Leon would not accept certain doctor's Off Work Orders and Return to Work Modified Duty Orders without any legitimate work-related reason or any CDCR regulation that would support De Leon's actions. De Leon made a medical decision that Plaintiff's 2008 knee injury

was not a re-injury of the same knee in the same place but that it was a new injury, causing Plaintiff to suffer needless delays in his treatment, surgery and recovery. As a result of De Leon's actions Plaintiff used his personal leave credits for an extended period of time instead of being quickly treated and returned to work. De Leon and Rosemond, Plaintiff's supervisors, were involved in a serious of harassing and discriminatory actions against Plaintiff when Plaintiff was trying to return to Work on Modified Duty. Again there were no CDCR regulations to support their actions against Plaintiff; and to the contrary, the CDCR regulations which Plaintiff had to provide both Rosemond and De Leon supported Plaintiff's requests regarding Modified/Light Duty. This misconduct was reported by Plaintiff to various administrators and Plaintiff was not offered any relief, nor was Rosemond or De Leon, to Plaintiff's knowledge, admonished regarding their harassing and discriminatory conduct against Plaintiff.

The MSJ argues in Issue 3 that: Plaintiff's Third Cause of Action for Whistleblowing under Labor Code 1102.5 has no merit, even though the Plaintiff's Complaint, Plaintiff's response to Defendants' request for Discovery, Plaintiff's Responses to Form Interrogatories and Special Interrogatories, Plaintiff's Deposition Testimony and Defendants' own exhibits provide evidence to the fact that Plaintiff's Third Cause of Action does have merit under Labor Code 1102.5. The MSJ ignores the fact that CDCR's regulations provide for the Protection of Whistleblowers. The MSJ also argues that Plaintiff did not file a Tort Claim or a claim with the Victim's Compensation Board even though Plaintiff's claims do not fall under Tort Claims or the Victims Compensation Board.

The evidence is replete with examples of letters to Rodriguez, Fagot, Hoffman, Kernan and Hoshino in which Plaintiff Whistleblew. The evidence is replete with examples that Plaintiff suffered retaliation for his Whistleblowing beginning as early as October and November 2005 during Plaintiff's initial Whistleblowing to Fagot, Regional Administrator, and Kalvelage, Deputy Director of Parole over the phone regarding the misconduct of his supervisors Ayala and Garcia. Plaintiff was reporting serious misconduct of Dishonesty, Code of Silence and the Cover-Up of an incident. Plaintiff

testified honestly in investigatory interviews regarding regulation violations of his supervisors with Region IV Investigator, George Ruiz, OCR Investigator, Gail Richie and Office of Internal Affairs Investigator Gene Pettit, which are all Protected Activities of a Whistleblower. Plaintiff has provided evidence of repeated acts of retaliation, and therefore his complaint does have merit under Labor Code 1102.5.

The MSJ argues in Issue 4 that: Plaintiff's Fourth Cause of Action for Whistleblowing under Government Code 8547 has no merit even though the CDCR DOM 31140.10 regulation that provides for Whistleblowing and the protection of Whistleblowers references California Gov Code 8547 and Plaintiff did report the misconduct of his supervisors and others within the CDCR. In fact, CDCR DOM regulation 31140.10 states that the protection provided to a Whistleblower by the CDCR go beyond the protections of the Whistleblower Statute in California Government Code 8547. Plaintiff's Complaint, response to Interrogatories and Plaintiff's Motion in Opposition to the Motion for Summary Judgment provide evidence that Plaintiff was not afforded the protection required by the Whistleblower Statute. Additionally, Defendant's Exhibits, such as the Letter from Maritza Rodriguez to Plaintiff, or the Letter from Fowler to Plaintiff and the failure of Region IV to fully investigate and take action against Plaintiff's supervisors when he reported their misconduct are but a few examples that provide evidence that Plaintiff was not provided any protection as required. Additionally, the MSJ tries to argue that the Plaintiff did not exhaust his administrative remedies. However, it is clear that Plaintiff made every reasonable and good faith effort to avail himself of the administrative remedies available to him. Not only did he write letters up to and including the Director of Parole Mr. Tom Hoffman and the Undersecretary of Adult Operations, Mr. Scott Kernan, but he also filed an employee grievance, exhausted the levels available to him, and he filed an Appeal to the State Personnel Board (SPB), which was met with resistance and unreasonable delays by the CDCR. The CDCR refused to enter into SPB "mediation" with Plaintiff, they refused to cooperate with Discovery Requests, and they postponed the scheduled hearing and refused to reschedule stating that they needed more time, even though they had more than ample time to review Plaintiff's issues. Plaintiff was advised by SPB that they could not compel the CDCR to

move faster if the CDCR stated that they needed more time for Discovery Requests and time to prepare for a hearing. Plaintiff was advised by SPB that the only way to compel the CDCR to cooperate was by requesting a Right to Sue Letter. When Plaintiff contacted FEHA, he was advised that he had to withdraw his Appeal before the SPB. Plaintiff was granted the Right to Sue and proceeded to file his Complaint before the Court.

Plaintiff is of the opinion that it would not serve any useful purpose to place his issues before the CDCR Legal instead of the Court when it was CDCR's Legal that refused to enter into "mediation" per SPB's conversation with Mr. Bob Gualtney from CDCR's Legal and then CDCR's Legal engaged in a series of tactics to delay and thwart Plaintiff's efforts before SPB. Plaintiff has exhausted his pleas to the highest levels in CDCR' Administration without CDCR's administration offering to deal with his issues. Plaintiff's only recourse at this point is through his Complaint before the Court.

The following information provided in this Separate Statement of Facts is meant to demonstrate and prove that CDCR and the Defendants discriminated, harassed and retaliated against Plaintiff and that these acts occurred for no legitimate, independent business reason.

1. Plaintiff began his career in 1992 and promoted by successfully competing in Civil Services Examination from Student Assistant to Materials and Stores Supervisor, to Correctional Officer, to Correctional Sergeant and was an acting Lieutenant/Watch Commander prior to his being hired as a Parole Agent I in 2003. Plaintiff received excellent Performance Evaluations while working at the R. J. Donavan Correctional Facility. Plaintiff passed the Parole Agent Academy in January 2004 and received his First Probation Report of Performance on 4-26-04. He received "Outstanding" ratings in two areas: Learning Ability and Attitude. The PAIII who was the rater for this report noted, "I have been impressed with your attitude and learning ability. Your first Board Report was well written and showed sound investigative skills. You have been able to make your monthly supervision specs and show no compunction in seeking advice when

needed. I'm most pleased with your progress and am looking forward toward your continued growth as a Parole Agent." Plaintiff received his Second Probation Report of Performance on 7-14-04. This time he received "Outstanding" ratings in three areas: Learning Ability, Attitude, and Relationships with People. The PA III who was the rater stated, "Your Board Reports are well written and timely. You have kept up with the supervision specifications of your cases. You are a team player who willingly accepts other duties when requested. You are well liked by your fellow staff members and you are becoming more knowledge (sic) of the various resources available for our population. I am pleased with your progress." Plaintiff received no Final Probation Evaluation when he completed his probationary period although it is required by the DOM and SPB. Plaintiff requested a final probation report and never received one. Plaintiff continued to progress and do well as evidenced by the positive comments regarding his performance as a Parole Agent I from Parole Agent II W. Contreras, and A.J. Garcia Parole Agent III, noted on his 2004 and 2005 Caseload Rosters prior to Plaintiff's Whistleblowing. During this time, his caseload was reasonable and his pre-parole count was consistent with those of other agents. Also, Plaintiff recently received a positive Performance Evaluation on November 18, 2010 for the work that he performed while working in a Modified/Light Duty assignment. Three of seven factors were marked as "Exceeds Expected Standards." They are Quality of Work, Relationships with People, and Meeting Work Commitments. Four Factors were rated as "Meets Expectations" and there were no "Improvement Needed" ratings. The PAIII who rated Plaintiff commented that his work was accurate, well organized and his daily logs were submitted in a timely manner. Plaintiff was noted as following policy and procedure and thoroughly reviewing field files and making the necessary documentation in the computer systems. The supervisor continued, "You are cooperative with your supervisor and your peers. You have developed an interpersonal relationship with law enforcement staff at San Diego County Jails. In addition you participate in the rotation to cover El Centro Parole Unit in Imperial County." The rater continued regarding meeting work commitments, "You have contributed to the overall compliance of Valdivia by conducting the Notice of Rights serves within the mandated time frames. You complete your daily assignments, meet all deadlines and follow all established policies and procedures."

While working in CDCR, Plaintiff obtained his A.A. and B.A. degrees to enhance his career. He was on the Security Squad at R.J. Donovan Correctional Facility and was a Range Safety Officer. Plaintiff never had any disciplinary action taken against him; and prior to 2005, Plaintiff had never written a letter complaining about any action or misconduct against him by a supervisor, he had never filed an employee grievance, or filed an appeal with the State Personnel Board or a Complaint in any Court.

All of this information is important to establish at the outset, because Plaintiff is being portrayed by the Defendants as an employee who has been unreasonable in complaining about supervisors and managers who are not complying with their expected responsibilities, his complaining about being assigned excessive workloads while working light duty and full duty and Defendants diminishing their accountability in not allowing Plaintiff to return to work on Light Duty status after his injuries. The stress and hardship that Plaintiff has endured from these intentional acts of retaliation, harassment and discrimination from Whistleblowing is egregious. He has always been proud of his profession as a law enforcement professional and to be treated in this manner by those of his own profession has been heartbreaking for him. It has damaged his reputation, his career and it has damaged his ability to promote. Over the last five years, he continued to believe that the "system" would work and would bring him relief. It did not, and it has not.

> Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, page 215; Interrogatory #27; Volume VI- Exhibit 1, First Amended Complaint, Page 3 Lines 14-27; Volume I-Exhibit 1, Parole Caseload 2004 prior to 10-21-05 incident; Volume I-Exhibit 2, Parole Caseload 2005 prior to 10-21-05 incident; Volume I-Exhibit 85, Plaintiff's Performance Evaluations; Volume II-Exhibit 24, DOM 85010.9, Annual Performance Appraisals Required; Volume II-Exhibit 24, DOM 85010.10 Unit Supervisor Required to Complete the Appraisals; Volume II, Exhibit 20, Bargaining Unit 6 Contract/LBFO section 19.06, CDC Parole Agent Workload

2. The harassment, discrimination and retaliation begun by Named Defendants lasted years and it became a "pattern and practice" by the CDCR. Not only has it lasted until the present but each attempt by Plaintiff to obtain relief and protection was either ignored or dismissed by the CDCR Administration to the highest levels. Plaintiff was under the false impression that because he was employed by a law enforcement agency that supervisors and administrators would act in accordance with the rules, regulations and Government Codes. Plaintiff was also under the false impression that if he reported the misconduct of supervisors and administrators that the CDCR would react in a positive manner and deal with the misconduct of those involved. Plaintiff was under the impression that because a law enforcement agency relies on its credibility in dealing with other law enforcement agencies, other governmental agencies and the courts, that the CDCR administration would have a vested interest in getting to the bottom of the harassment, discrimination and retaliation. Plaintiff did not expect delays in CDCR's responses to his pleas for help through the grievance process and State Personnel Board Appeal. Plaintiff's attempts at having the CDCR respond to his complaints was exhausted because of the length of time that it has taken to force the CDCR to deal with his issues.

The misconduct began with an attempted "cover-up" by Plaintiff's co-worker Agent Ferguson regarding an incident on October 21, 2005, during which Plaintiff was the arresting agent and in the course of the arrest, he was assaulted by the parolee and injured. However, the misconduct of his supervisors and administrators did not stop. While the cover-up was initially supported by Ayala and Garcia, the rest of the CDCR administration joined in the continued cover-up through a series of attempts to minimize the misconduct of supervisors, administrators and others that had charge over Plaintiff's workload, working conditions, CDCR benefits for injured employees, and workers' compensation benefits.

This cover-up was supported by Garcia who would not allow Plaintiff to submit an injury report, a Protected Activity. Garcia was an experienced supervisor who should have known the rules and regulations of the CDCR; and even if he did not, he had the ability to access the California Code of Regulations and CDCR DOM on the Internet or the CDCR Intranet in his office. He even had the resources of the Return to Work Coordinator's Office in Region IV Headquarters and the same resources available in CDCR's Headquarters. Garcia's attempt at a cover-up was aided by the Assistant Unit Supervisor Michael Ayala because he also refused to allow Plaintiff to submit the appropriate documentation regarding the incident.

Plaintiff was aware that he was not being allowed to submit his Injury Report within 24 hours of his injury. However, during the initial stages of the cover-up, Plaintiff was unaware that Garcia and Ayala had totally failed in their responsibilities to submit a Parole Incident Report within 24 hours as indicated in Fowler Declaration. Plaintiff was unaware that Garcia and Ayala had failed to submit an Incident Report as required by CDCR regulations within 72 hours and that they had not completed a Use of Force Report nor had they completed an Unholstered Firearm Report, all of which were required by CDCR policy. Therefore, Garcia and Ayala tried to cover-up the incident by telling Plaintiff that he could not write his own report because it would expose their complete disregard for CDCR's policies regarding this type of incident. However, when Garcia raised this issue to Assistant Regional Administrator Fowler, Fowler also refused to allow Plaintiff to submit his supplemental incident report and denied Plaintiff the ability to request EIDL. His supervisors denied Plaintiff the opportunity to provide documentation for his SCIF Claim and for his claim for EIDL. These failures and acts occurred for no legitimate, independent business reason.

Once Plaintiff realized that this was a cover-up and he was not going to be able to substantiate the injury, he became concerned that he could easily be accused of workers comp fraud, so he sought advice. His only alternative seemed to break the chain of command, Whistleblow and report the misconduct of Ayala and Garcia. Plaintiff had met Mr. Jeff Fagot during Plaintiff's Parole Agent Academy training and he was

counseled to speak to Fagot regarding the cover-up by Ayala and Garcia. Plaintiff reported Ayala and Garcia's misconduct not only to Regional Administrator Jeff Fagot, but also to Deputy Director Marilyn Kalvelage. Plaintiff did not have any ill intentions toward either Ayala or Garcia, he just wanted his workers' compensation claim processed, he did not want to be accused of workers' comp fraud and he wanted to be able to apply for the CDCR benefits such as EIDL and Modified/Light Duty. Plaintiff was able to file his workers' compensation claim and he was provided with Light Duty, and after contesting violations of policy regarding Modified Duty, he was able to work light duty. However, the end result was that he suffered harassment, discrimination and retaliation. This type of misconduct against Plaintiff was not sporadic or trivial in nature. Attempts were made to terminate his employment through an investigation that never should have been levied against him. Plaintiff went from being viewed as an outstanding Parole Agent to one who did not even warrant a Performance Evaluation. The misconduct of Defendants Garcia, Ayala, Rodriguez and others within the CDCR, who had authority over Plaintiff, is defined as "Serious" by the CDCR Department Operations Manual (DOM) and warranted their termination.

The misconduct of Named Defendants and CDCR regarding Plaintiff's pay and benefits, are violations of a number of California Government Codes, including the Whistleblower Statutes 8547.1, 8547.2, 8547.3, 8547.8 and the CDCR failed to take action against individuals involved in unlawful reprisals/retaliation as covered in California Gov Code 19572, Cause for Employee Discipline.

Named Defendants and the CDCR failed to protect Plaintiff from supervisors who retaliated against Plaintiff in violation of CA Labor Code 1102.5 (b)(c)(d); and defendants and the CDCR violated CA Labor Code 132a when Garcia, Ayala and Castaneda discriminated and retaliated against Plaintiff by trying to prevent Plaintiff from filing his workers' comp claim and the supporting documentation and attempting to deprive him of the same benefits (EIDL and Modified Duty) as other injured employees in the CDCR.

CDCR's failure to conduct thorough and timely investigations of Defendants' misconduct was a violation of the *California Penal Code, Section 6065, and CDCR's Office of Internal Affairs (OIA) DOM Regulations*.

> Volume II-Exhibit 14, Penal Code 6065; Volume II-Exhibit 11, DOM 31140.1, Misconduct Reported; Volume II-Exhibit 11, DOM 31140.2, Fair and Consistent; Volume II-Exhibit 12, DOM 31140.4.3, Timely Investigations; Volume II-Exhibit 13, 31140.22, Retaliation Investigations; Volume II-Exhibit 24, DOM 85010.9, Annual Performance Appraisals Required; Volume II-Exhibit 24, DOM 85010.10 Unit Supervisor Required to Complete the Appraisals

Failures to provide Plaintiff relief and protection from retaliation for *Whistleblowing* are *Government Code Violations.*

> Volume II-Exhibit 33, California Government Codes 8547.1, 8547.2, 8547.3, 8547.8, Whistleblower Statute and Penalties; Volume II-Exhibit 33, California Labor Code 1102.5(b)(c)and(d), Protection from Retaliation

The personnel actions against Plaintiff are described as "trivial" and they were anything but trivial. They were violations of Government Codes and CDCR Title 15 as well CDCR DOM that could have resulted in serious adverse personnel actions against Named Defendants and others within CDCR up to and including their termination from state service.

For example:
Plaintiff's being "unable to log on to his computer" was a violation of a number of DOM regulations and Government Codes and is *not* "trivial":

Plaintiff was <u>prevented</u> access to his computer by Ayala in *retaliation* for Whistleblowing to Fagot. Ayala's preventing Plaintiff access to his computer was preventing an injured employee from substantiating the incident regarding his Workers' Compensation Benefits; it was a violation of the California Government Code; and it was discrimination

against a disabled employee, and retaliation in violation of *California Labor Code 1102.5(b)(c)(d); California Insurance Code 1871.4; California Labor Code 132 a; and violation of CDCR Policy under the California Code of Regulations Title 15 Section 3430, DOM 31140.10; California Government Code 8547.1, DOM 33030.9 and California Government Codes 8547.3, 8547.8.*

> Volume VI-Exhibit 1, Page 12 Lines 6-27; Volume II-Exhibit 33, California Labor Code 1102.5(b)(c)and(d), Protection from Retaliation; Volume II-Exhibit 33, California Insurance Code 1871.4, Unlawful to discourage from filing Workers Comp Claim; Volume II-Exhibit 33, California Labor Code 132a, Misdemeanor to Discriminate/Injured worker; Volume II-Exhibit 33, California Government Codes 8547.1, 8547.3, 8547.8, Whistleblower Statutes; Volume II-Exhibit 24, CCR Section 3430, Protects Rights and Privileges of Employees; Volume II-Exhibit 2, DOM 31140.10, Reporting Misconduct; Volume II-Exhibit 30, DOM 33030.9, Employee Adverse Action

Due to Ayala's and Garcia's cover-up, Martha Castaneda, Return to Work Coordinator, stated that there was no documentation to support Plaintiff's Workers Compensation Claim or the Enhanced Industrial Disability Leave (EIDL) request. However, Martha Castaneda, instead of reporting that Garcia had failed to submit an Incident Report, placed that responsibility on Plaintiff. Plaintiff was then placed in an adversarial position with his supervisors Garcia and Ayala because they were involved in a cover-up of the incident and did not want the incident documented. The CDCR failed to conduct a thorough investigation into their misconduct and took no action against them.

> Volume I-Exhibit 17, Transcript of Interrogation, Page 30 Lines 18 – 25 and Page 31 Lines 1 – 3; Page 35 Lines 17 – 23.

Defendant Ayala was <u>dishonest</u> regarding the fact that the computer was not broken, but he instructed Plaintiff to contact AISA Computer Repair person Jan Stevenson. Ayala knew that the password had been changed and he, Ayala, <u>knew</u> the new password, but <u>refused</u> to give it to Plaintiff until he was ordered to do so by Fagot. *The Plaintiff testified to this during his Fact Finding Investigation. Dishonesty according to the CDCR*

Discipline Matrix (DOM Section 33030.19 and California Government Code 19572) can result in the termination of the employee. Ayala's misconduct was also a violation of California Gov Code 132a, which states that it is unlawful to discriminate against an injured worker because Plaintiff would not have normally been locked out of his computer. Plaintiff was not involved in any misconduct or any criminal activity nor was he prohibited from access to the building or to the computer because he was a threat to anyone. These acts against Plaintiff occurred for no legitimate, independent business reason.

> Volume I-Exhibit 17, Transcript of Interrogation, Page 70 Lines 14-25, and Pages 71-74; Volume II-Exhibit 31, Employee Discipline Matrix; Volume II, Exhibit 33, California Government Code 19572(x), Retaliation Unlawful

Ayala, Garcia, and Fowler's preventing Plaintiff from submitting an accurate report so that he could substantiate his Workers' Compensation Benefits is a misdemeanor under the *California Insurance Code 1871.4.* It is also a violation of *DOM Section 33030.19, for Code of Silence, and Retaliation per DOM 31140.10 and the California Government Code 8547.1.*

> Volume II-Exhibit 33, California Insurance Code 1871.4; Volume II-Exhibit 33, California Government Code 8547.1; Volume II-Exhibit 31, DOM 33030.19, Employee Discipline Matrix; Volume II-Exhibit 2, DOM 31140.10, Reporting Misconduct/Protecting Employee from Retaliation

It was not until the Plaintiff contacted Mr. Fagot to advise Mr. Fagot that he was not able to log onto his computer that defendant Ayala gave him access to his computer.

> Volume VI-Exhibit 1, First Amended Complaint, Page 12, Lines 6-27

The statement that supervisors did not submit his Workers' Compensation paperwork "quickly enough" omits relevant facts, is misleading and not "trivial" as it was a violation of the CDCR DOM regulations and Government Code. Garcia committed a misdemeanor under the *California Insurance Code 1871.4* and violated *CDCR DOM*

31020.7.5.1.1, and DOM 31020.5.3 when Garcia did not allow Plaintiff to submit a SCIF Injury Report on Friday, October 21, 2005, because a SCIF Injury Report must be completed within 24 hours of the injury.

> Volume II-Exhibit 33, California Insurance Code 1871.4; Volume II- Exhibit 3, DOM 31020.7.5.1.1; Volume II-Exhibit 4, DOM 31020.5.3, SCIF Form completed in 24 hours; Volume II-Exhibit 33, Government Code 132 a

On Monday, October 24, 2005 Garcia ordered Plaintiff to submit an "Accident Report" instead of a Workers' Compensation/SCIF Injury Report and told him to see his doctor for his injury. Garcia gave Plaintiff a SCIF form to complete on 10-25-05 but this SCIF form was falsified by Garcia and he also refused to sign it. On 1-9-06 Garcia completed another SCIF form that clearly describes that Plaintiff did use force on parolee Estrada. However, in that form he also falsified the date that Plaintiff was provided his SCIF form as demonstrated by *SCIF Form Workers' Comp Claim dated 10-25-05 and SCIF Form Employer's Report of Injury dated 10-25-05.*

> Volume I-Exhibit 4, Accident Report dated 10-24-05; Volume I-Exhibit 6, SCIF Forms dated 10-25-05; Volume I-Exhibit 18, SCIF Form by Garcia dated 1-9-06;

Garcia falsified the facts around the Plaintiff's arrest of parolee Estrada and made a number of handwritten changes to Plaintiff's Supplemental Report dated 10-26-2005. An example of two changes that he made in falsifying the report and Plaintiff's use of force are that he changed "dropped his knee" to "positioned his knee" and "resisted being cuffed" to "refused to" be cuffed. *"Overcoming resistance" is defined as <u>force</u> by CDCR DOM regulations.*

Garcia minimized the Plaintiff's use of force because he was aware that he and Defendant Ayala and Larry Ferguson, the Agent of Record for parolee Estrada, had covered-up the incident in violation of *CDCR DOM 51030.1.* These failures and acts against Plaintiff occurred for no legitimate, independent business reason.

Volume II- Exhibit 6, DOM 51030.1, Incident Report Policy; Volume II-Exhibit 6, DOM 51030.5.1, Supplemental Incident Reports; Volume II-Exhibit 3, DOM 31020.7.5.1, How to Request EIDL; Volume II-Exhibit 6, DOM 51030.3, Reportable Incidents

The altering of a peace officer's report is a serious violation of the *CDCR's Discipline Matrix DOM 33030.19* in that defendant Garcia was dishonest and these changes were made for no legitimate, independent business reason.

Volume II-Exhibit 31, Employee Discipline Matrix, E.7. Falsifying Official Reports

Prior to the October 21, 2005 Incident, Plaintiff's workload was on par with that of other agents in the office. This is evidenced by the *2004 Caseload Rosters Prior to October 21, 2005 Incident and 2005 Caseload Rosters Prior to October 21, 2005 Incident.* The excessive workload was harassment and retaliation against a disabled employee who had reported his supervisor's misconduct as evidenced by the *Excessive Workload during Light Duty Status and Excessive Workload after return to work Full Duty 3-14-07.*

Director Hoffman's February 1, 2008 Memorandum reiterated the authorization of overtime, for caseloads over 154 points. This policy regarding overtime, per the memorandum, had been in effect since the July 1, 2001 Unit 6 Contract and was in effect in 2007 during which Plaintiff was denied overtime for caseloads which were sometimes as high as 204 points.

Volume I-Exhibit 1, Plaintiff Parole Caseload *2004* prior to 10-21-05 Incident; Volume I-Exhibit 2, Plaintiff Parole Caseload *2005* prior to 10-21-05 Incident; Volume I-Exhibit 25, Excessive Workload during Light Duty Status; Volume I-Exhibit 29, Excessive Workload after Return to Full Duty 3-14-07; Volume II, Exhibit 20, Bargaining Unit 6 Contract/LBFO section 19.06, CDC Parole Agent Workload; Volume I-Exhibit 94, Memo

from T. Hoffman re: Authorizing Overtime and Modifying Cases with Excess Points

After the October 21, 2005 Incident, Plaintiff's Pre-Parole Workload was sometimes 10 times higher than that of other agents in the office. Ayala and Garcia's Declarations state that they met, prior to Plaintiff's return to work for his Light Duty assignment on 1-17-07, and they decided to assign all of the Unit #1 RPS's to Plaintiff as well as assigning him the High Control Parolee-At-Large (HC PAL) caseload as well as assigning him OD duty every day. These statements demonstrate that they conspired in advance to increase Plaintiff's workload before the Light Duty Agreement was even signed in violation of the Agreement. This decision to overload Plaintiff upon his return to work on Light Duty status occurred for no legitimate, independent business reason.

While it may appear to be an unimportant event, in addition to the admitted determination by Ayala and Garcia to harass and retaliate against the Plaintiff upon his return, it is one more example of this type of behavior on the part of his supervisors. Plaintiff reported to Garcia that the State Car that he had been issued by the State Garage needed to be exchanged for another one. The car that he had just been given had over 120,000 miles on it and was leaking oil all over Plaintiff's driveway and the Homeowner's Association told him he had to take care of it. In an obvious act of harassment, Garcia told him it was too bad and to park it on the street. Plaintiff explained that overnight parking on the street was prohibited by the Homeowner's Association. Garcia stated that if he wanted to turn the car in that he had to be at the Mira Mar State Garage at "8:00 a.m. sharp." Another Parole Agent, Rivera, intervened and said that it seemed unfair to make Plaintiff report to the garage at 8 a.m. since there was no need to be there that early. Since a Parole Agent's day begins when he/she leaves the house and ends when he/she returns home ("portal to portal") it was unreasonable for Garcia to expect Plaintiff to leave his house early, fight rush hour traffic to travel approximately 1 hour north on the freeway to arrive at Mira Mar at 8:00 a.m. After the parole agent had spoken up on Plaintiff's

behalf, Garcia changed his mind. There was no legitimate, independent business reason for Garcia to order Plaintiff to report to the State Garage at 8:00 a.m.

> Volume III-Exhibit 1, Ayala Declaration, Page 4 Lines 26-28; Page 5 Lines 1-20; Page 6 Lines 8-16; Volume III-Exhibit 2, Garcia Declaration, Page 5 Lines 22-28; Page 6 Lines 1-24; Page 7 Lines 4-12; Volume I-Exhibit 24, Light Duty Agreement; Volume 1, Exhibit 27, Letters to Rodriguez dated 2-10-07 and 3-13-07

Garcia and Ayala gave Plaintiff excessive workload assignments while on Light Duty as evidenced in *Plaintiff's Caseload Roster dated 1-31-07; Activity Reports dated 2-1-07 in which Ayala transferred High Control Parolee At Large Cases to Plaintiff; and Declaration of Michael Ayala Exhibit C Caseload Roster dated 2-23-07.*

Ms. G. Parker, Plaintiff's former office partner, testified in an OIA investigation in March 2008 that most case-carrying agents were assigned approximately 2 or 3 RPS's each month. The investigator recorded that Ms. Parker explained that Plaintiff was assigned a total of 70 RPS's between January 2007 and April 2007. Ms. Parker stated that this was excessive. She stated that some of the 70 RPS's were "walk-ins." In those cases, the parolee had been released from prison without the knowledge of parole staff and the RPS had to be completed immediately. The combination of walk-in RPS's, the due dates for completing the other RPS's, and the need for Plaintiff to complete his other duties appeared to Ms. Parker to be a large workload. When the investigator asked Parker how she knew the number of RPS's assigned to Plaintiff, she recalled an occasion when she observed Field Unit Notice Agent (FUNA) Mr. F. James enter the office and sat on Plaintiff's desk. He counted the RPS's and asked Plaintiff, "Who did you.….off?" Parker said that Plaintiff shrugged his shoulders and shook his head.

Ms. Parker also testified that it takes her approximately 30 minutes to 1 ½ hours to complete an RPS on a parolee depending on the complexity of the case. However, in

Ayala's Declaration, he minimized the workload that Plaintiff was assigned by stating, it took "fifteen to twenty minutes with the most complex case requiring up to an hour."

Ms. Parker continues to validate Plaintiff's claims of excessive workload by contradicting with both Garcia's and Ayala's statements made in their Declarations. Ms. Parker testified in the OIA investigation that "it is difficult to complete any assigned work while working as the O.D. because the work flow is intense." She explained, "The O.D. must deal with parolees that come to the office, conduct UA testing on the parolees when needed, and answer calls from other law enforcement agencies." Both Ayala and Garcia state in their Declarations, in identical language, that "the duties of the OD rarely, if ever, take up to 8 hours per day and most of the time, a Parole Agent can complete office work on their cases throughout the day." Their erroneous generalizations intentionally misrepresent the workload associated with serving as the O.D. in a busy parole office. Plaintiff was required to be O.D. every day of the month during his Light Duty Assignment in addition to the other workload that he was assigned. Normally a Parole Agent will be assigned O.D. duty 3 or 4 times in a month. Plaintiff was assigned O.D. duty every day of the month, or between 21 and 22 times per month. This excessive workload and acts of retaliation occurred for no legitimate, independent business reason.

During this time, Ayala continued to harass Plaintiff. Ayala created a "training file" for Plaintiff and hung it on the wall inside his office for anyone to see. This is confirmed by the testimony given to OIA by Ms. Parker. Ayala violated DOM 33010.31.4.3 Supervisory Files and Penal Code 832.7 Personnel Records, which state in part that an employee's personnel records are confidential. He violated the law when he posted Plaintiff's training information on his office bulletin board and it was done for no legitimate, independent business reason.

In addition to the excessive workload already described, Plaintiff was given the responsibility of completing the TIR's (Transfer Investigation Requests) for Chula Vista #1. When someone is arrested at the San Diego border, he or she is assigned to the Chula Vista #1 after being paroled from prison. It is common for that parolee not to have

resources in the area and may require a TIR to transfer that parolee to another Parole Office, to another county or to another state. Plaintiff was required to handle a TIR for a parolee for whom he had completed the RPS but who was paroled to a hold to San Francisco. Because the case was complex and was handled expertly and professionally by Plaintiff, he was commended by the Pubic Defender assigned to the San Francisco Pubic Defender's Office for the work he did on this case.

Director Hoffman's February 1, 2008 Memorandum reiterated the authorization of overtime, for caseloads over 154 points. This policy regarding overtime, per the memorandum, had been in effect since the July 1, 2001 Unit 6 Contract and was in effect in 2007 during which Plaintiff was denied overtime.

Also, this memorandum from the Director states, "The US and the AOR should discuss the current caseload relative to the agent's ability to effectively manage the caseload at it current level." There were no discussions of this kind between Plaintiff and Garcia or Plaintiff and Ayala

During the month of February 2007, Plaintiff's Caseload Roster shows that he was assigned a workload of 140 points. These workload points do not count RPS's as workload points; the workload points do not include Plaintiff being assigned to OD duty every day; the workload points do not include Oral RPS's or TIR's as noted above.

> Volume I-Exhibit 25, Excessive Workload during Light Duty Status; Volume I-Exhibit 87, Internal Affairs Investigation Report S-11-OIS-310-07-A (2346) Pages 18-19 of 51 – Testimony supports excessive workload; Volume III-Exhibit 1, Declaration by Ayala, Page 6 Lines 24-25, Page 5 Lines 18-20; Volume III-Exhibit 2, Declaration by Garcia, Page 6 Lines 22-24; Volume II-Exhibit 14, DOM section 33010.4.3 Supervisory Files; Volume II-Exhibit 34, PC 832.7, Personnel Records; Volume II, Exhibit 20, Bargaining Unit 6 Contract/LBFO section 19.06, CDC Parole Agent Workload; Volume I-

Exhibit 94, Memo from T. Hoffman re: Authorizing Overtime and Modifying Cases with Excess Points

On 2-1-07, M. Ayala transferred 47 HC PAL parolees to Plaintiff's caseload in violation of the Light Duty Agreement signed on 1-17-07.

Volume I-Exhibit 25, Excessive Workload during Light Duty Status

Ayala assigned the parolees from Agent Monahan's HC PAL caseload to Plaintiff without paying overtime knowing that he could not effectively locate these HC PALs which was the HC PAL parole agent's responsibility. Ayala put the public at risk knowing that these HC PALs were dangerous and would continue to be at-large in the community as demonstrated by *Monahan's Workload and the Unit Workload Summaries.* Also, in his Declaration, Ayala contends that monitoring this caseload by completing the once a month collateral contacts was "easy." Ayala states, "Collateral contacts are easy to accomplish and do not require an agent to leave the office." If that is the case, then how can the Parole Division justify a full time position for a Parole Agent I who monitors 47 HC PAL cases that only need one "easy" collateral contact per month? Also, the HC PAL Parole Agent is not an office assignment. Parole Agent Monahan worked in the community.

Ayala was discriminatory in that he authorized overtime for other agents but he denied Plaintiff's request for overtime. This was in violation of the Director Hoffman's February 1, 2008 Memorandum in which he reiterates the provisions of the July 1, 2001 Unit 6 Contract/MOU which outlines provisions for overtime.

Also, this memorandum from the Director states, "The US and the AOR should discuss the current caseload relative to the agent's ability to effectively manage the caseload at it current level." There were no discussions of any kind between Plaintiff and Garcia or Plaintiff and Ayala regarding his ability to effectively manage the workload that they had given him.

Volume I-Exhibit 86, Monahan's Caseload Roster; Volume I-Exhibit 29, Excessive Workload after return to Full Duty dated 3-14-07; Volume III-Exhibit 1, Declaration by Ayala, Page 6 Line 14; Volume II, Exhibit 20, Bargaining Unit 6 Contract/LBFO section 19.06, CDC Parole Agent Workload; Volume I-Exhibit 94, Memo from T. Hoffman re: Authorizing Overtime and Modifying Cases with Excess Points

Ayala and Garcia's Declarations use identical language and cite a supposed February 2005 Caseload Roster that was assigned to Plaintiff while on Light Duty. The Caseload Roster attached to Ayala's declaration is "February 23, 2007" not "February 2005." Plaintiff was not assigned to light duty in February 2005.

Volume III-Exhibit 1, Ayala's Declaration, Page 5, Lines 6-8; Volume III-Exhibit 2, Garcia's Declaration, Page 8, Line 10

Both Ayala and Garcia state in their declarations, in identical language, that the February Caseload Roster represented the work done by Plaintiff during the month of February 2007. This is untrue. This was a "working roster" dated a week prior to the final Caseload Roster at the end of the month that would have included Plaintiff's final notations and the parolee names on the automated caseload roster. The February 23, 2007 Caseload Roster is not the final roster. If this was the final roster, then the name of parolee Villasenor, Adrian, would not be in Plaintiff's handwriting. It would be in final automated form.

Volume III-Exhibit 1, Ayala Declaration, Exhibit C, Page C-4

M. Ayala refused to allow Plaintiff a lunch hour and Plaintiff did not request "overtime driving to training." He did however expect to be compensated for being forced to work 9 hours. Ayala stated in his declaration, "Finally, I am aware of no requirement that an Agent must be permitted to take an hour for lunch…" However, *per DOM and the BU 6 Contract, "The workday may include, <u>at the employee's discretion</u>, no meal break, or an optional one (1) hour, or one-half (1/2) hour meal break.* Agent Davis' schedule was not

at risk to be "adversely impacted" as Ayala claims in his Declaration. Davis had already agreed to take one hour of Plaintiff's four-hour OD schedule that day. Davis had already been scheduled for OD duty for the rest of the day. If Davis had been allowed to cover this hour for Plaintiff, this would have allowed Plaintiff time to drive to training and to get lunch beforehand. It is important to note that it was not Plaintiff's responsibility to arrange for coverage, it was Ayala's. Ayala created the March 2007 OD. Ayala also approved and signed Plaintiff's schedule for March 2007 which shows that he was scheduled to work 8:00 a.m. to 5:00 p.m. and that he was scheduled for PAST training from 1:00 p.m. to 5:00 p.m. The March 2007 OD schedule and shows that Davis was scheduled for OD duty between 1:00 p.m. and 5:00 p.m. that day. Since Ayala did not arrange for coverage beforehand, Plaintiff arranged for the coverage with Davis. When Ayala found out, he refused to allow Davis to cover Plaintiff's lunch hour and time to drive to training. Because of Ayala's decision, Plaintiff drove to the training during his "lunch hour" and was not given any compensation for overtime. This act of retaliation and discrimination against Plaintiff violated DOM and their own Officer of the Day Procedures for the Chula Vista Unit dated 7-6-06 and occurred for no legitimate, independent business reason.

Volume II-Exhibit 21, DOM 85030.21, Parole Agent Lunch Hours; Volume II-Exhibit 22, Bargaining Unit 6/LBFO Section 19.03 (A); Volume III-Exhibit 1, Declaration by Ayala, Page 11 Lines 8-12; Volume I-Exhibit 24, Officer of the Day Procedures for Chula Vista Parole Agents dated 7-6-06; Volume I-Exhibit

In order to keep from being disciplined by Ayala, who was now the PAIII (Acting), Plaintiff was forced to work before and after normal work hours and during his lunch breaks. Defendant Maritza Rodriguez, District Administrator, ignored plaintiff's request for relief, which is evidence of the CDCR's failure to protect Plaintiff in his protected status as a Whistleblower.

Volume I-Exhibit 27, Letters to Rodriguez dated 2-10-07 and 3-13-07;

Volume II-Exhibit 31140.10, Reporting Misconduct and Protecting Employee from Retaliation

Plaintiff cancelled his vacation based upon his supervisor M. Ayala's *false* statement that he, Ayala, could not have three (3) agents off on vacation at the same time and Ayala's actions violated CDCR DOM Employee Discipline Matrix involving Dishonesty. Ayala's dishonesty, caused Plaintiff's wife to cancel her vacation and their family vacation was ruined.

Once Plaintiff cancelled his vacation defendant Ayala gave some of Plaintiff's vacation slot to Parole Agent Tony Lamar without advising Plaintiff that he in fact could have three (3) agents off at the same time. When Plaintiff complained, he was told that he had 5 minutes to make a decision and that if chose to take his original vacation slot back, Lamar's vacation would now be cancelled. Plaintiff could not make a decision that quickly because it also involved his wife being able to get her vacation slot back and it also placed Plaintiff in an adversarial position against Agent Lamar who had been told that he could take his vacation. This act of discrimination and disregard for Plaintiff occurred for no legitimate, independent business reason.

> Volume II-Exhibit 21, Vacation awarded by State Service; Volume II-Exhibit 33, DOM 19572 (m), Discourteous Treatment; Volume II-Exhibit 23, CCR 3391, Employee Conduct; Volume II-Exhibit 25, DOM 33030.3.1, Employee Conduct; Volume II-Exhibit 26, Law Enforcement Code of Ethics

The statement that Plaintiff was "offered the opportunity to transfer to a different unit" omits relevant facts regarding violations of the DOM and Unit 6 Contract and was harassment and retaliation. Plaintiff, in violation of his seniority per the *Bargaining Unit 6 Contract/LBFO 12.02(A) and CCR 3430,* was going to be "Involuntarily" transferred to another unit instead of other less senior agents who had been recently placed with Chula Vista #1: Parole Agents Castillo and Davis.

> Volume II-Exhibit 22, BU6/LBFO, section 12.02 (A), Involuntary Transfer by Inverse Seniority; Volume II-Exhibit 24, CCR 3430, Protects Right of Civil Service Employees

When Plaintiff complained of disparate treatment by Ayala to Rodriguez, instead of investigating Plaintiff's complaints, Plaintiff was told to "go back to a prison" and that "he was not cut out for Parole."

Volume I-Exhibit , Letters to Rodriguez dated 2-10-07 and 3-13-07; Volume I-Exhibit 85, Plaintiff's Performance Evaluations

This was retaliation, harassment and failure to protect a Whistleblower who was engaged in Protected Activity as a Whistleblower and a Union member who had a right to equal workload.

Plaintiff's being ordered to serve as OD during the San Diego fires in October, 2007 was an act of retaliation and harassment by Defendant Ayala. Officers of the Day are scheduled in advance and Plaintiff was not scheduled to be OD. Ayala ordered Plaintiff into the office even though Plaintiff had taken time off to go to the doctor's office. Plaintiff did not understand why he was being ordered in and asked why and if he needed a representative. Ayala told him in a very rude tone of voice "the fires" and hung up Plaintiff a second time. Once Plaintiff arrived at the office he was told by Ayala that he was going to be the OD and Ayala told Agent Castillo, the OD, to go home as well as all the other agents in the office.

Defendant Ayala ignored Plaintiff's request not to be assigned OD even though Plaintiff's family was on stand-by to evacuate. Ayala ignored Plaintiff's pleas that he should be allowed to pick up his sons. His sons' school had been cancelled due to the fires and he needed to pick up his sons from the Military Base because his friend, who had been taking care of his sons at his home, was called to the flight line at the Military Base due to the fires emergency.

Parole Agent I Garcia (not PAIII Garcia), who was listening to Plaintiff's pleas, took Plaintiff to PAIII Contreras and asked PAIII Contreras to listen to Plaintiff's situation. PAIII Contreras, not Plaintiff's or Defendant Ayala's supervisor, relieved Plaintiff of the OD Duty and allowed Plaintiff to leave and pick up his sons from the Military Base.

These acts by Ayala against Plaintiff occurred for no legitimate, independent business reasons.

> Volume II-Exhibit 33, DOM 19572 (m), Discourteous Treatment; Volume II-Exhibit 23, CCR 3391, Employee Conduct; Volume II-Exhibit 25, DOM 33030.3.1, Employee Conduct; Volume II-Exhibit 26, Law Enforcement Code of Ethics

The statement that Plaintiff's supervisors are being accused of "failure to adequately assist" Plaintiff in filing a workers compensation claim is misleading, omits facts and attempts to trivialize the seriousness of the defendant's misconduct. Plaintiff was not allowed by Defendant Garcia to submit an Injury Report on October 21, 2005, the date of incident, in violation of DOM 31020.7.5.1.1; DOM 31020.5.3

> Volume II-Exhibit 3, DOM section 31020.7.5.1.1, Supervisors Responsibility; Volume II-Exhibit 4, DOM 31020.5.3, SCIF Form Completed in 24 Hours

Plaintiff was ordered by Defendant Garcia to submit an "Accident Report" on October 24, 2005, instead of an "Injury Report." Defendants Garcia and Ayala knew that they had failed to submit an Incident Report, and Altercation/Unholstered Firearms Report, and a Use of Force Report. This was a violation of the Government Code and DOM Sections 51030.1, 51030.3, 51030.5, 51030.7.2.1.

> Volume II-Exhibit 33, California Insurance Code 1871.4, Unlawful to Discourage from filing a Workers Comp Claim; Volume II-Exhibit 6, DOM 51030.1, Incident Report Policy; Volume II-Exhibit 6, DOM 51030.3, Reportable Incidents; Volume II-Exhibit 6, DOM 51030.5, Formal Incident Reports; Volume II-Exhibit 7, 51030.7.2.1, Altercation/Unholstered Firearm Report

The CDCR DOM 51030.5 requires that an Incident Report be written within 72 hours of the incident and reported to the Director if there is an injury or use of force.

> Volume II-Exhibit 6, DOM 51030.5, Formal Incident Reports;

The incident was reported on October 21, 2005, the date of the incident, to Defendant Garcia by the Agent of Record (AOR) Larry Ferguson and Plaintiff and again on October 25, 2005 during a Unit Meeting with Ayala and Garcia per the *Unit Meeting Agenda dated 10-25-05.*

Volume I-Exhibit 7, Unit Meeting Agenda Chula Vista #1 on 10-25-05

Plaintiff became aware on October 28, 2005 that Mr. Larry Ferguson, the AOR (Agent of Record), had written a Parole Violation Report/Board Report that had excluded Plaintiff as the parole agent who actually, pursued, restrained, and arrested Parolee Estrada. Plaintiff confronted Ayala because Plaintiff had reported his involvement in detail during the Parole Unit Meeting on October 25 and Ayala and Garcia were present at the meeting. The report was approved on October 26, 2005 by Ayala. Plaintiff asked to be allowed to submit a supplemental report to correct the omission and Ayala denied Plaintiff's request stating that Plaintiff had reported it at the Unit Meeting and he stated, "We have your back." This is *Dishonesty and Code of Silence which is grounds for termination according to the Employee Discipline Matrix*.

Volume I-Exhibit 3, Ferguson's Charge Report dated 10-21-05; Volume I-Exhibit 5, Ferguson's Board Report dated10-24-05; Volume II-Exhibit 31, DOM 33030.19, Employee Discipline Matrix, Section B, Code of Silence or Retaliation and Section E, Integrity

Plaintiff was in Garcia's office on November 9, 2005, when Fowler denied Plaintiff's request to submit the Supplemental Report, *which again is the Code of Silence and warrants termination*. In his Declaration, Fowler falsifies the events of the October 21, 2005 injury and intentionally omits from his Declaration that he had a telephonic meeting with Plaintiff and Garcia on November 9, 2005 regarding Plaintiff's request to submit a Supplemental Report to document what occurred during the arrest of parolee Estrada. In that meeting, Fowler told Plaintiff that he could not submit the Supplemental Report that he had prepared, and Garcia handed his report back to him at the end of the telephonic conversation. In his Declaration, Fowler misleads the reader to expect that Plaintiff was responsible for submitting his portion of the Incident Report within 24 hours. However,

he was aware that the events of October 21, 2005 required an Incident Report and an Altercation/Unholstered Firearm report, but he did not request any reports and did not require Plaintiff's supervisors to write either report. In fact, as noted above, he refused to allow Plaintiff to file his report. In his Declaration, Fowler incorrectly identified those who are responsible for preparing an Incident Report when force is used. DOM 51030.7.2 identifies the Unit Supervisor, in this case, Garcia, as the one who should have written the report within 24 hours of the occurrence. In his Declaration, Fowler omits the fact that per DOM 51030.7.2.1, this incident of October 21, 2005 also required an Altercation/Unholstered Firearm Report to be prepared. It was not. These failures by Defendants and acts against Plaintiff, which affected his ability to accurately document the incident, occurred for no legitimate, independent business reasons.

> Volume VI-Exhibit 1, First Amended Complaint Page 11, Lines 11-19; Volume VI-Exhibit 3, Response to Special Interrogatories, Page 7, Lines 16-21; Volume I-Exhibit 8, Plaintiff's Supplemental Report dated 10-26-05; Volume II-Exhibit 31, DOM 33030.19, Employee Discipline Matrix, Section B, Code of Silence or Retaliation

The Incident Report was not submitted by Ayala or Garcia until Plaintiff Whistleblew to Mr. Jeff Fagot on November 14, 2005. However, as indicated in this and other documents no action was taken against Ayala, Garcia or Fowler.

> Volume VI-Exhibit 3, Amended Response to Special Interrogatories, Page 8 Lines 3-28, Page 9 Lines 1-4

Martha Castaneda, RTWC, would have known that per CDCR DOM that Garcia or Ayala had to complete the Incident Report, not the Plaintiff.

> Volume II-Exhibit 19, DOM 31020.7.6.3 and DOM 31020.7.7.9, RTWC Responsibilities; Volume II-Exhibit 6, DOM 51030.1, Incident Report Policy; Volume II-Exhibit 6, DOM 51030.3, Reportable Incidents; Volume II-Exhibit 6, DOM 51030.5, Formal Incident Reports;

Plaintiff was not afforded the same rights and protections as either an injured employee or a Whistleblower. Ayala's failure to submit an accurate Incident Report and his approving a false Board Report is considered Failure of Good Behavior and Dishonesty and Code of Silence according to the CDCR DOM Employee Discipline Matrix 33030.19.

Volume I-Exhibit 3, Ferguson's Charge Report dated 10-21-05; Volume I-Exhibit 5, Ferguson's Board Report dated10-24-05; Volume II-Exhibit 31, DOM 33030.19, Employee Discipline Matrix, Section B, Code of Silence or Retaliation and Section E, Integrity

Plaintiff reported Garcia's and Ayala's misconduct to Investigator Ruiz during Plaintiff's Fact Finding Investigation which was conducted at Region IV Headquarters. Ms. JoAnn Gordon was Plaintiff's representative during the investigation.

Volume I-Exhibit 17, Transcript of Interrogation of Plaintiff 12-9-05; Volume II-Exhibit 2, DOM 31140.10, Reporting Misconduct and Protecting Employee from Retaliation

Fowler's declaration is misleading and omits relevant facts when he declares that he requested that Ferguson, Ayala and Plaintiff be investigated by OIA, because while he did request OIA to conduct the investigation, it appears that OIA referred the matter to Region IV for an investigation. George Ruiz, Parole Agent III, conducted the Fact Finding investigations. Normally, OIA Investigators are Special Agents and not Parole Agents. Additionally, Fowler should not have been involved in requesting the investigation, because he was the Administrator that prohibited Plaintiff from submitting his report and the request for EIDL on November 9, 2005, when Plaintiff was in Garcia's office. Additionally, Fowler did not request an investigation of Garcia even though Plaintiff's documents were replete with evidence of Garcia's misconduct.

Volume III-Exhibit 5, Declaration of T. Fowler, Page 4, Lines 11-14

The Region IV Investigation against Plaintiff was not "trivial." If the allegations of "Dishonesty and Code of Silence" against Plaintiff had been sustained, the Plaintiff would have been terminated according the *CDCR DOM Employee Discipline Matrix.*

Volume II-Exhibit 31, DOM 33030.19, Employee Discipline Matrix, Section B, Code of Silence, Section E, Integrity

The charges against Plaintiff were false because on October 26, 2005 Tara Heller allegedly states in the request for investigation that Plaintiff's "shoulder" was injured. Plaintiff never claimed his shoulder was injured. He claimed that the "*parolee's shoulder hit Agent Tristan's chest*" when the parolee was trying to avoid being arrested. Tara Heller states in the request for investigation that the incident occurred on October 20, 2005 instead of October 21, 2005. She also states that Plaintiff changed his account of what transpired during the incident. Plaintiff did not and has not changed his account of what transpired. She also stated that his knee injury did not qualify for Workers Compensation benefits. This is incorrect, because the CDCR Return to Work Office only processes the claim. SCIF decides whether an injury is work related or not and not the CDCR.

Despite all of the inaccuracies in Tara Heller's report, Fowler requested that Fagot authorize an investigation. What is even more disturbing is that Fowler should have been investigated and Fagot knew that Plaintiff was a Whistleblower and he still authorized an investigation on inaccurate information.

Volume I-Exhibit 8, Plaintiff's Supplemental Report dated 10-26-05; Volume I-Exhibit 12, Plaintiff's Incident Report Part C dated 11-14-05

Plaintiff had accurately reported the incident and injury on October 21, 24th, and 25th, 2005 but Ferguson, Ayala and Garcia were dishonest about Plaintiff's attempts to report it. Additionally, even though Ferguson's Parole Violation Report violated CDCR DOM Board Report reporting requirements outlined in DOM, it appears that Ruiz, Fowler, Assistant Regional Administrator, Rodriguez and Fagot did not find any evidence of Ferguson's, Ayala's or Garcia's misconduct.

On November 9, 2005 Plaintiff was denied permission by Fowler to submit his report regarding the October 21, 2005 incident. Fowler has Plaintiff investigated, but fails to investigate Garcia or himself. After Plaintiff was told that he could not submit either his Supplemental Report or his request for EIDL, Garcia told him that pursuing his rights could be a career mistake and that he could "win the battle, but lose the war." This was clearly a threat by a supervisor to cover-up the facts of the parolee's arrest on October 21, 2005.

> Volume VI-Exhibit 1, First Amended Complaint Page 11, Lines 11-19; Volume VI-Exhibit 3, Response to Special Interrogatories, Page 7, Lines 16-21; Volume I-Exhibit 8, Plaintiff's Supplemental Report dated 10-26-05; Volume II-Exhibit 31, DOM 33030.19, Employee Discipline Matrix, Section B, Code of Silence or Retaliation

November 14, 2005, Plaintiff reported to Regional Administrator, Fagot and shortly thereafter to Deputy Director Kalvelage, the fact that he was not being allowed by Garcia, Ayala and Fowler to submit an Incident Report and *CDCR DOM 31140.4.11; DOM 31140.5; DOM 31140.10 require that reported misconduct be investigated.*

> Volume VI-Exhibit 3, Amended Response to Special Interrogatories, Page 8, Lines 3-6, Page 9, Lines 1-3, 12-17; Volume VI, Exhibit 3, Amended Response to Special Interrogatories, Page 9, Lines 6-17;Volume II-Exhibit 1, DOM 31140.4.11, Supervisors/Managers to report misconduct; Volume II-Exhibit 2, DOM 31140.5, Employees to Report Misconduct; Volume II-Exhibit 2, DOM 31140.10, Protection for Whistleblowing

Fagot approved the investigation, at Fowler's recommendation, against Plaintiff on November 21, 2005 weeks after Plaintiff had Whistleblown regarding Ferguson's false Board Report, Castaneda's misrepresentation of EIDL, and had contacted Fagot regarding Ayala's misconduct and Garcia's refusal to allow Plaintiff to submit his

reports. Fowler was conflicted because he had prevented Plaintiff from submitting a report.

Even though Fowler refused to allow Plaintiff to submit his report, Fowler chose to have Plaintiff investigated, while choosing not to have Garcia or himself investigation. The appropriate course of action would have been to have an uninvolved administrator review all of the allegations and that administrator would have been in a better position to decide who should be investigated. An independent review could have resulted in Fowler, Fagot and Kalvelage being the "Subjects" of an investigation.

Volume III, Exhibit 5, Declaration of T. Fowler, Exhibit A-1

Plaintiff, a disabled Whistleblower was discriminated against because the Whistleblower was investigated instead of investigating the misconduct of Garcia and Fowler. Fagot and Kalvelage should have been investigated for failing to protect a Whistleblower and for failing to investigate Plaintiff's allegations of misconduct against Garcia. Fowler and Fagot and Kalvelage *failed to protect the Whistleblower, in violation of DOM 31140.10 and DOM 33030.5.3.* These acts against Plaintiff occurred for no legitimate, independent business reason.

Volume II-Exhibit 2, DOM 31140.10, Protection for Whistleblowing; Volume II-Exhibit 2, DOM 33030.5.3, Supervisors/Manager to request an investigation

If Plaintiff had not kept copies of the documentation, such as the "Accident Report," and a copy of Ferguson's Charge Report, which included him in the arrest the parolee, and Ferguson's Parole Violation Report, which excluded him in the arrest of parolee Estrada, Plaintiff would not have documented evidence to clear him of the charges against him or substantiate his Workers' Compensation Claim that he was involved in the arrest.

Volume I-Exhibit 4, Accident Report dated 10-24-05; Volume I-Exhibit 6, SCIF Forms dated 10-25-05; Volume I-Exhibit 3, Ferguson's Charge Report dated 10-21-05; Volume I-Exhibit 5, Ferguson's Board Report dated 10-24-05

The Code of Silence continued because Plaintiff had to have his copy of the Investigatory Tape transcribed and a copy was provided to Internal Affairs, because Tricia Ramos from the Southern Region Office of Internal Affairs contacted Plaintiff and stated that Region IV did not have a copy of the investigative interview conducted by George Ruiz. Additionally, OIA advised Plaintiff that the Civil Rights Office stated that the Intake Interview was not taped and they could not provide a copy to OIA. This is further evidence of a systemic Code of Silence by Region IV because his copy of the Fact Finding Transcript provides evidence that Plaintiff did report the misconduct of Ayala and Garcia.

Volume I-Exhibit 17-Transcript of Interrogation of Plaintiff 12-15-05

Plaintiff's not being able to return to work on Light Duty/Modified Duty was not a "trivial" issue and Plaintiff had to cite CDCR's DOM Regulations to the RTWC Office. CDCR policy as stated in the California Code of Regulations and CDCR's DOM cannot be overridden by a memorandum from a Deputy Director. CDCR policy can only be temporarily suspended if the Director of Corrections or his/her designee has declared a state of emergency and even then, only timeframes as it relates to due process can be temporarily suspended.

Castaneda is disingenuous when she cites a memorandum from L'Etoile dated July 12, 2005 as the reason that Light Duty was denied when Plaintiff was ordered to go home on October 28, 2005, because Region IV staff said that Parole did not have "Light Duty." Later without any memorandum reversing the memorandum that Castaneda cites, Plaintiff is allowed to work light duty in Parole, but only after he challenged the Region IV policy that "there is no light duty" which meant that they were not willing to waive any of the essential functions as required by Title 15 and DOM regulations. Plaintiff however, was retaliated against for demanding that Region IV RTWC Office comply with CDCR's regulations regarding Light Duty.

Volume III-Exhibit 6, Declaration of Castaneda, Page 4, Lines 13-20, refused light duty to Plaintiff; Volume III-Exhibit 6, Declaration of Castaneda, Exhibit C, Memo from L'Etoile

Castaneda ignores the fact L'Etoile's memo refers the reader to CCR Title 15 Section 3436 which states that the *"essential functions of the job can be temporarily waived."*

Volume II-Exhibit 19, CCR Title 15 Section 3436

Again, Castaneda fails to note in her Declaration that Parole cannot ignore, circumvent or create policy that overrides CDCR Policy, which has the force of law and cannot be overridden or circumvented. Nor, does it appear that she contested the inappropriate memorandum that she cites with the Return to Work Office or Personnel Office in CDCR Headquarters. Defendants and the CDCR ignored *CDCR DOM 31040.3.1; DOM 31040.3.3; DOM 31040.3.5 and Title 15 3436 when they advised Plaintiff that Parole did not have Light Duty.*

Volume II-Exhibit 19, DOM 31040.3.1, Light Duty Assignments; Volume II-Exhibit 19, DOM 31040.3.3, Waiving of Essential Functions; Volume II-Exhibit 19, DOM 31040.3.5, Light Duty Determination; Volume II-Exhibit 19, CCR Title 15 Section 3436, Limited Term Light Duty Assignments

After Plaintiff's second injury in January 2008, Plaintiff was again denied Light Duty. The Return to Work Order on Modified duty from Dr. Hanson dated January 30, 2008 was ignored by Plaintiff's supervisors and the RTWC Office. Again, the RTWC Office refused Light Duty to Plaintiff after he submitted a Return to Work Order on Modified duty dated February 28, 2008. These failures and acts against Plaintiff occurred for no legitimate, independent business reason.

Volume I-Exhibit 47, Dr. Hanson's Clearance for Light Duty; Volume I-Exhibit 62, Dr. Maywood's Clearance for Light Duty/Desk Work dated 2-28-08; Volume III-Exhibit 3, Declaration of K. Rosemond, Page 2 Lines 24-28, Page 3 Lines 1-18;

The RTWC Office and CDCR's failure to follow their own regulations forced Plaintiff off work and he had to accept 2/3 pay and supplement the 2/3 pay with his Leave Credits in order to support his family.

The statement "CDCR failed to negotiate an acceptable 'Light Duty Agreement' with him" is not "trivial" and omits relevant facts including the fact that if an "employee refuses to work Light/Modified Duty" the employee's workers compensation *benefits can be terminated, and in this case Plaintiff's pay and benefits* *<u>were</u>* *terminated.*

Volume II-Exhibit 19, DOM 31040.3.9, Refusal of Light Duty Assignment

Plaintiff voluntarily had his doctor modify his medication regime so that he could work Light Duty.

> Volume I-Exhibit 65, Fax to De Leon regarding medication information; Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, Page 22, Lines 9-13

Rosemond and De Leon were required per the DOM to "discuss and agree" with Plaintiff which duties Plaintiff could perform while he was on Light Duty and document those in a Light Duty Agreement. Rosemond was also required per the DOM to contact Plaintiff's doctor to advise him of Plaintiff's work duties and inform doctor of Light Duty Assignments "which may enable the employee to return to work sooner." Volume II-Exhibit 19, DOM 31040.3.3 and DOM 31040.3.5; Volume II-Exhibit 3, DOM 31020.7.5.1.1, Supervisor's Responsibility

De Leon states in his Declaration that Plaintiff was provided with a "Standard" Modified/Light duty form. Region IV RTWC cannot have a "Standard" form because CDCR's regulations require that the "essential functions" of the job be waived and each job is different. CDCR forms all CDCR Numbers on them so that they can be identified as CDCR forms. Additionally, the purported "Standard Form" is on CDCR Memorandum stationary.

> Volume III-Exhibit 4, Declaration by C. De Leon, Page 6, Line 5 and Line 22 and Exhibit J and K-1 and K-2

Rosemond and RTWC De Leon, instead of coming to terms with Plaintiff on an agreement, presented Plaintiff with an "ultimatum" that Plaintiff sign the purported Light

Duty document. Plaintiff never refused to work Light Duty; he simply wanted the Light Duties outlined in a Light Duty Agreement.

Based on the testimony given by M. Castaneda, C. De Leon, and K. Rosemond, it is clear that neither the RTWC Office, nor Plaintiff's supervisor, planned to offer Plaintiff a light duty assignment in good faith. M. Castaneda states in her Declaration that, "Based on input and advice received from Headquarters in January 2007, Parole Region IV discontinued adherence to L'Etoile's 2005 policy." She states that the "Headquarters policy" was "ultimately memorialized in a May 23, 2007 memorandum (Castaneda Exhibit H-1) …regarding limited term light duty assignments. She states that the May 23rd memo is the current policy in effect in Parole Region IV and reiterates substantively the practice utilized by Parole Region IV since January 2007."
Castadaneda's statement, however, is contradicted by her actions and De Leon's actions in May 2008. This May 23rd memo, as well as the CDCR Regulations and the DOM, states that light duty will be "individually assessed" and that light duty will be given to those who "cannot perform the essential function(s) of their job." Neither Castaneda nor De Leon, nor Rosemond adhered to the policy in this memo. The requirement that light duties be "individually assessed" did not occur on May 7 or May 8, 2008. No where in this supposed "Standard Form," which Plaintiff was given on May 7, are any duties listed at all. Plaintiff continued to ask that he be given those duties specific to his *light duty* assignment. On May 8, 2008, neither De Leon nor Castaneda waived the essential functions of the job. Instead, the list they gave to Plaintiff on May 8, which was prepared by Rosemond, had mostly full-duty Parole Agent functions listed. In fact, Rosemond admits in his Declaration that those duties he gave to Plaintiff to agree to perform are the "statement of the duties for the classification of Parole Agent I from the website for the California State Personnel Board." The concept that Plaintiff could perform most of these full-duties in the office between 8:00 a.m. and 5:00 p.m., whether or not Plaintiff was restricted from "any tactics or use of physical force," as Rosemond claims is ludicrous. These failures and acts against Plaintiff occurred for no legitimate, independent business reason.

Also, even though Castaneda states that the May 23rd memo is the "current policy in effect in Parole Region IV," De Leon sent a letter to Dr. Maywood dated May 15, 2008, after De Leon had contacted SCIF to discontinue Plaintiff's Workers Comp Benefits, asking Dr. Maywood to assess Plaintiff's restrictions given the fact that Plaintiff will be "required at all times to be capable of performing all essential functions" of his Peace Officer classification. This completely contradicts the May 23rd memo and CDCR Regulations which state that light duty will be given to those who "cannot perform the essential function(s) of their job." Therefore, it is clear that at no time did the RTWC office offer Plaintiff a light duty assignment in "good faith."

Volume III-Exhibit 6, Declaration by Castaneda, Page 6 Line 28 and Page 7 Lines 1-2; Volume III-Exhibit 6, Declaration by Castaneda, Page 6 Lines 16-28 and Page 7 Lines 1-7 and Exhibit G-1 and H-1; Volume III, Declaration by Rosemond, Page 5 Lines 1-4

Plaintiff was not notified by either Rosemond or the RTWC that his pay and benefits were cancelled. Instead, a concerned clerk called Plaintiff and advised him of the CDCR's plans to cancel his pay and benefits.

3. The workload for a Parole Agent must be consistent with the CDCR DOM and the Unit 6 Contract which require that a parole agent's workload has to be equitably distributed.

> Volume II-Exhibit 21, DOM 85030.17, Work Rules; Volume II-Exhibit 21, DOM 85030.24, Work Schedule; Volume II-Exhibit 20, BU 6/LBFO 19.05, Caseload Audits; Volume II-Exhibit 20, BU 6/LBFO 19.06, CDC Parole Agent Workload

There are different types of caseloads that require different levels of field work such as Minimum, Control/Services, High Control, PAL's, High Control PAL's, and 2nd Strikers which provide for different level of points that are applied to an agent's workload points. Some positions do not require that agents supervise a caseload of parolees but rather serve due process notices to parolees under the Valdivia Court decision and others are assigned to Substance Abuse Treatment or Pre-Release Programs.

4. Plaintiff asked Garcia for an Injury Report on October 21, 2005 and Garcia replied by telling him to go home. Plaintiff tried again on October 24, 2005 to have Garcia submit an Injury Report and instead Garcia gave Plaintiff an Accident Report. Finally after Plaintiff could not obtain medical treatment for his knee injury, Garcia relented and had Plaintiff complete an Injury Report. Just because "Plaintiff filed a Workers' Compensation claim on October 25, 2005," this is not a Workers Compensation issue, but rather an attempt to prevent Plaintiff from obtaining his benefits because, as described in numerous of Plaintiff documents before the Court, Garcia and Ayala were involved in *Dishonesty, Code of Silence, and Retaliation.*

> Volume II-Exhibit 33, California Insurance Code 1871.4; Volume II-Exhibit 33, California Government Code 8547.1; Volume II-Exhibit 31, DOM 33030.19, Employee Discipline Matrix; Volume II-Exhibit 2, DOM 31140.10, Reporting Misconduct/Protecting Employee from Retaliation

Garcia and Ayala failed to comply with CDCR DOM regulations that required 1.) Injury Report within 24 hours, 2) Incident Report within 72 hours of October 21, 2005 including Part C's of the Incident Report from Ferguson and Plaintiff 3.) Use-of Force Report and Use of Force Critique 4.) Altercation/Unholstered Firearm Report; 5.) An accurate and complete description of the arrest on the Parole Violation Report.

> Volume II-Exhibit 4, DOM 31020.5.3, SCIF required in 24 hours; Volume II-Exhibit 6, DOM 51030.5, Incident Reports within 72 hours; Volume II-Exhibit 7, CCR Title 15 section 3268.1(a)(2), Reporting Use of Force; Volume II-Exhibit 7, DOM 51030.7.2.1, Altercation/Unholstered Firearm; Volume II-Exhibit 8, DOM 81040.14, Parole Violation Report Format/Supporting Evidence

On Friday, October 21, 2005, Plaintiff reported that he had injured his knee and Garcia was required per DOM and Workers Comp regulations to submit an Injury Report within 24 hours and he did not.

> Volume II-Exhibit 4, DOM 31020.5.3, SCIF required in 24 hours; Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, Page 4, Lines 6-9

On Monday, October 24, 2005 Plaintiff again reported to Defendant Garcia that he injured his knee and Garcia had Plaintiff submit an "Accident Report" and told Plaintiff to get medical attention for his knee from his own doctor, but Kaiser would not even make an appointment without the appropriate SCIF Injury Report Forms and he again refused to have Plaintiff submit an Injury Report.

Volume I-Exhibit 4, Accident Report dated 10-24-05

On Tuesday, October 25, 2005 Garcia completed, but falsified, an Injury Report and did not sign it.

Volume I-Exhibit 6, SCIF Forms dated 10-25-05

5. Plaintiff submitted Dr. Markman's note which cleared him to work modified duty. Plaintiff was discriminated against because other employees of the CDCR were allowed to work modified duty but Plaintiff's request was denied. On October 28, the Return to Work Office was notified of the activity restrictions imposed for 21 days by Dr. Markman, Plaintiff's treating physician. The doctor placed Plaintiff on Light Duty on October 26, 2005. On October 28, 2005 Tara Heller said that the doctor's order did not state he could perform "office duty." He was told to go home. Plaintiff went back to the doctor on November 1, 2005 and had the doctor amend his order to include "office duty." When he faxed the amended document to the RTWC Office on November 1, 2005 , he was then told by the RTW Office that there was "No Light Duty" in Parole. *This constitutes "Dishonesty and Discrimination against a Disabled Employee" because the CDCR <u>does</u> permit Light Duty in DOM 31040.3.1; DOM 31040.3.3; and DOM 31040.3.5 and CCR 3436 and Parole cannot have a policy separate from the CDCR that prohibits Light Duty.*

> Volume I-Exhibit 9, Fax of Dr. Markman's original Return to Work Order dated 10-26-05; and Fax of Dr. Markman's amended Return to Work Order dated 10-26-05, Volume II-Exhibit 19, DOM 31040.3.1, Light Duty Assignments; DOM 31040.3.3, Waiving of Essential Functions; DOM 31040.3.5, Light Duty Determination; Volume II-Exhibit 33, California Labor Code 1102.5(b)(c)and(d), Protection from Retaliation; Volume II-Exhibit 33, California Insurance Code

1871.4, Unlawful to discourage from filing Workers Comp Claim; Volume II-Exhibit 33, California Labor Code 132a, Misdemeanor to Discriminate/Injured worker; Volume II-Exhibit 33, California Government Codes 8547.1, 8547.3, 8547.8, Whistleblower Statutes; Volume II-Exhibit 24, CCR Section 3430, Protects Rights and Privileges of Employees; Volume II-Exhibit 2, DOM 31140.10, Reporting Misconduct; Volume II-Exhibit 30, DOM 33030.9, Employee Adverse Action

6. On October 28, 2005, T. Heller from the RTWC's Office, told Plaintiff that he was eligible for Enhanced Industrial Disability Leave (EIDL).

Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, Page 4, Lines 17-23

Castaneda, RTWC, was dishonest with the Plaintiff when she told him that he had to file a police report and that he had to be punched or kicked by the parolee and assault charges had to be filed on the parolee by the District Attorney in order for him to be eligible for EIDL. This is false information.

Volume II-Exhibit 3, DOM 31020.7.5.1, How to Request EIDL

After Plaintiff requested EIDL to Mr. Fagot, Plaintiff was subjected to *"Retaliation"* in the form of a Fact Finding Investigation when the individuals that should have been investigated in addition to Ayala were Garcia and Fowler.

Volume I-Exhibit 14, Notice of Personnel Investigation dated 12-2-05

Volume I-Exhibit 15, Investigatory Interview Notice to Garcia 12-8-05

Volume I-Exhibit 16, Investigatory Interview Notice to Plaintiff 12-9-05

Volume I-Exhibit17, Transcript of Interrogation of Plaintiff 12-15-05

The following is relevant: 1) October 21, 2005 Plaintiff reported the incident to Garcia, with other agents present, Plaintiff asks for an SCIF Injury Report but Garcia tells him to go home. 2) October 21, 2005, Ferguson submitted a Charge Report/approved by Garcia that documents that Plaintiff was involved in the arrest 3) October 24, 2005 Plaintiff requested and was again denied the opportunity to file an Injury Report 4) October 25,

Plaintiff reported the incident and injury in detail during the Parole Unit Meeting with Garcia and Ayala present 5) October 26, 2005, Plaintiff's doctor cleared Plaintiff for modified duty 6) October 28, 2005 Plaintiff confronted Ayala about the omission in the Parole Violation Report of his arresting Estrada. 7) October 28, Plaintiff was advised that the doctor's Light Duty order was not written correctly and was told to go home 8) EIDL was verbally denied on November 1, 2005 by Castaneda 9) Plaintiff met on November 1, 2005 with Garcia regarding the failure to document the incident 10) Plaintiff gave his Supplemental Report to Garcia on November 7 and Garcia altered it. 11) Fowler denied Plaintiff's request to submit the Supplemental Incident Report on November 9, 2005. 12) Shortly thereafter, Plaintiff reported the misconduct of Ayala and Garcia to Kalvelage 13) Plaintiff reported to Fagot on November 14, 2005 that Fowler and Garcia were refusing to allow Plaintiff to submit a report, and then shortly thereafter, Plaintiff is "Noticed" that he is the "Subject" of Fact Finding Investigation 14) Plaintiff was the Subject of a Fact Finding on December 15, 2005 even though Plaintiff was the Whistleblower.

Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, Page 4, Lines 1-4; Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, Page 4, Lines 6-13; Volume I-Exhibit 3, Ferguson's Charge Report; Volume I-Exhibit 7, Unit Meeting Agenda dated 10-25-05; Volume I-Exhibit 9, Dr. Markman's Return to Work Orders dated 10-26-05; Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, Page 5, Lines 4-8; Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, Page 4, Lines 17-19; Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, Page 5, Lines 21-28; Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, Page 7, Lines 16-21; Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, Page 8, Lines 3-6; Volume I-Exhibit 14, Notice of Personnel Investigation dated 12-2-05; Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, Page 58, Lines 4-15 and Page 9 Lines 6-11;Volume I-Exhibit 17, Transcript of Interrogation of Plaintiff 12-15-05

7. Plaintiff's request for EIDL should have been submitted by Garcia as required by CDCR regulations. However, the regulations also allow for the employee to submit his own request for EIDL. In Plaintiff's case Garcia did not submit a request for EIDL and

Fowler refused to allow Plaintiff to submit his request. There was no dispute about whether or not Plaintiff qualified for EIDL, there was a cover-up.

A request for EIDL is either "Approved" or "Denied." It does not result in an investigation of the individual requesting it. If there is doubt, clarification is requested, it is usually not investigated. The investigation had but one purpose and that was to retaliate against the Whistleblower.

If there was confusion, it was because Garcia and Ayala attempted to Cover-Up the incident by not submitting an Injury Report, an Incident Report, correct a false Board Report, request EIDL or submit a Altercation/Unholstered Firearms Report as required by CDCR DOM.

RTWC Castaneda placed the responsibility on Plaintiff to obtain and submit the Incident Report when the responsibility was on Ayala and Garcia, not the Plaintiff. The *CDCR DOM 51030.7.2 clearly states that it is the responsibility of the supervisor to complete and submit the Incident Report and DOM 31020.7.5.1 outlines the supervisor's responsibility to request EIDL.*

Volume II- Exhibit 7, DOM 51030.7.2, Incident Reporting Procedures

Volume II-Exhibit 3, DOM 31020.7.5.1, How to Request EIDL

Volume II-Exhibit 7, DOM 51030.7.2.1, Altercation/Unholstered Firearm Report

Plaintiff's facts regarding the lack of appropriate reports and Plaintiff's request for EIDL, is replete with *Dishonesty and Code of Silence by Ferguson, Ayala and Garcia, which was supported by Fowler, which was the reason that there were no reports.* However, despite all of the evidence that supported Plaintiff's accounts regarding Garcia and Ayala's misconduct as part of their cover-up, Plaintiff was investigated and as far as Plaintiff is aware, Garcia and Ayala were cleared of any misconduct. Garcia retired honorably and Ayala was promoted to Parole Agent III, while Plaintiff's career was destroyed.

Volume II-Exhibit 33, California Insurance Code 1871.4; Volume II-Exhibit 33, California Government Code 8547.1; Volume II-Exhibit 31, DOM 33030.19, Employee Discipline Matrix; Volume II-Exhibit 2, DOM 31140.10, Reporting Misconduct/Protecting Employee from Retaliation

Plaintiff reported to Garcia that he arrested the parolee, used force and injured his knee on October 21, 2005 and then Plaintiff again reported the incident and injury to Garcia on October 24, 2005 and at the Parole Unit Meeting on October 25, 2005.

As of October 25, 2005, when the SCIF form was completed, Ms. Castaneda could have simply called Ayala or Garcia, Plaintiff's supervisors and asked for the documentation. However, Ms. Castaneda told Plaintiff he was not eligible for EIDL.

As of November 1, 2005, when Plaintiff tried to describe the nature of the incident and the assault, Ms. Castaneda was dishonest with the Plaintiff regarding EIDL requirements. As a RTWC she should have been aware of DOM 31020.7.5.1 which describes How to Request EIDL. Castaneda, as the RTWC should have known that the parolee striking an agent's chest (Plaintiff), constituted an assault.

Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, Page 4, Lines 1-4; Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, Page 4, Lines 6-13; Volume I-Exhibit 7, Unit Meeting Agenda dated 10-25-05; Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, Page 5, Lines 21-28; Volume II-Exhibit 3, DOM 31020.7.5.1, How to Request EIDL; Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, Lines 16-21;

8. Mr. Fagot, the Regional Administrator, retroactively approved the Plaintiff's request for EIDL but it was at the cost of Plaintiff's career because the harassment, discrimination and retaliation was pervasive throughout the Plaintiff next five years as a Parole Agent in the Chula Vista Complex:

Volume III-Exhibit 6, Declaration of Castaneda, Letter to Plaintiff from Fagot approving EIDL dated January 12, 2006, Exhibit E-1

Plaintiff's supervisors, Ayala and Garcia tried to cover-up the entire incident of October 21, 2005 until Plaintiff Whistleblew and then they retaliated against him, while he was off work recovering from surgery, when he was on Light Duty, and when he returned to work Full-Duty.

Plaintiff was told by Defendant M. Rodriguez during their meeting regarding his letter to her that maybe "he wasn't cut-out for Parole" even though he had numerous positive comments from Ms. Contreras, Parole Agent III, and Defendant A.J. Garcia regarding his work prior to the 10-21-05 incident.

It is important to note that Plaintiff received a Performance Report on November 18, 2010 with three factors that received "Exceeds Expected Standards": Quality of Work, Relationships with People, and Meeting Work Commitments. The comments made by the supervisor were very complimentary.

Volume I-Exhibit 27, Letters to Rodriguez dated 2-10-07 and 3-13-07; Volume I-Exhibit 31, Letter to Plaintiff from Rodriguez dated 3-29-07; Volume I-Exhibit 1, Plaintiff Parole Caseload 2004 prior to October 21, 2005 incident; Volume I-Exhibit 2, Plaintiff Parole Caseload 2005 prior to October 21, 2005 incident; Volume I-Exhibit 85, Plaintiff's Performance Evaluation dated 11-18-10

9. The investigations conducted in December 2005 in respect to Plaintiff, Ayala and Ferguson were not conducted by the Office of Internal Affairs. The documentation provided in Discovery indicates that the Office of Internal Affairs delegated the investigation to Region IV and Region IV conducted its own investigation, which was highly inappropriate. Plaintiff had Whistleblown to Fagot on November 14, 2005 and then Fagot approved the investigation against the Whistleblower instead of investigating the reported misconduct of Garcia. The investigation was requested by Fowler and Fowler was the administrator that refused to allow Plaintiff to submit his report and then Fowler's request for investigation indicated allegations of Dishonesty and Code of Silence.

The people that were involved in the Code of Silence were Ayala, Garcia and Fowler. Region IV should have had another Region or CDCR Headquarters conduct the investigation because Fagot, Fowler, Garcia and Ayala, the entire chain of command in Region IV, was remiss in their duties as supervisors and administrators. The Fact Finding investigation against Ayala was not thorough as required by Penal Code 6065 nor were Garcia and Fowler investigated.

The Declaration from Fowler, Assistant Regional Administrator, is factually incorrect, omits relevant facts, is misleading and disingenuous because Fowler did not request an investigation into Garcia's misconduct because he and Garcia had conspired to keep Plaintiff from submitting his report, dated October 26, 2005, on November 9, 2005 during a phone call between Garcia and Fowler.

The document indicates that Fagot requested an OIA investigation against Ferguson, Plaintiff and Ayala, based upon inaccurate information from Tara Heller, per the review of Request for Investigation, signed by Heller and Fagot.

> Volume III-Exhibit 5, Declaration of T. Fowler, Page 4, Lines 11-14; Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, Page 7, Lines 16-21; Volume III, Exhibit 5, Declaration of T. Fowler, Confidential Request for Internal Affairs Investigation, Exhibit A-1; Volume II-Exhibit 14, Penal Code 6065, Penal Code Requirements for Conducting an Investigation

CDCR OIA DOM regulations and Penal Code 6065 requires that if during the course of an investigation, misconduct against other individuals is alleged, that those individuals must be investigated. Garcia and Fowler were not investigated.

OIA did not conduct a Category I or II, as implied by Fowler in his Declaration, instead, OIA authorized a Fact Finding Investigation that was conducted by Region IV, not OIA.

Parole Agents Silva and Rivera were not interviewed regarding Plaintiff's allegations against Ayala or Garcia in violation of DOM OIA regulations and Penal Code 6065. Plaintiff should not have been investigated and Fagot should have investigated Ayala and Garcia before any investigation was begun on Plaintiff. If Fagot was going to go forward with the investigation then it should have been completed by another Region or Headquarters and not Region IV, because of Fowler's refusal to let Plaintiff submit his report on November 9, 2005.

> Volume II-Exhibit 14, California Penal Code 6065, Requirements for Conducting an Investigation; Volume II-Exhibit 11, DOM 31140.2, OIA policy requires fair and consistent investigations; Volume I-Exhibit 15, Investigatory Interview Notice to Garcia – Witness dated 12-8-05; Volume I-Exhibit 16, Investigatory Interview Notice to Plaintiff 12-9-05; Volume I-Exhibit 17, Transcript of Interrogation of Plaintiff dated 12-15-05

10. Fowler's Declaration omits relevant facts and is misleading because even though Fowler states in his Declaration that he requested an investigation against Ferguson, Ayala and Plaintiff. Fowler should have included Garcia as part of the investigation and he should have excluded himself from the process. Instead Fowler continued the cover-up by excusing himself and Garcia from the investigation.

Requests for EIDL are either Approved or Denied based upon the documentation provided in the Incident Report. Investigations are not required unless there is evidence of dishonesty. Garcia's involvement in the Cover-Up and Dishonesty was never the subject of an investigation. Fowler's Declaration is misleading because the CDCR requires that each person who is the "Subject" of an investigation is given a "Notice" in writing that he/she is the Subject of an investigation.

If a Witness becomes the subject of the Investigation during the Investigative Interview, the <u>Investigative Interview must be stopped</u> and the Witness is advised that they are now the "Subject of the Investigation." When Garcia was being interviewed as a "Witness" against Plaintiff, Ruiz should have stopped the investigative interview, admonished

Garcia of his right to a representative before continuing the investigation, especially if Ruiz had reviewed the "chronology" of events which included the dates of the Accident Report, the Injury Reports, the Incident Report and Ferguson's Charge Report and Parole Violation Report. Ruiz, the investigator was a Parole Agent III, and he should have known what was required of Garcia as a supervisor regarding the appropriate documentation of the incident and injury by Garcia.

> Volume III-Exhibit 5, Declaration of T. Fowler, Page 4, Lines 11-14; Volume II-Exhibit 3, DOM 31020.7.5.1, How to Request EIDL; Volume II-Exhibit 14, California Penal Code 6065, Requirements for Conducting an Investigation; Volume II-Exhibit 11, DOM 31140.2, OIA policy requires fair and consistent investigations; Volume I-Exhibit 15, Investigatory Interview Notice to Garcia – Witness dated 12-8-05

11. Fowler's Declaration is incorrect and misleading because he states that the Office of Internal Affairs conducted the investigation, and that after its conclusion, the Plaintiff was advised that the allegations against Plaintiff were not sustained. The investigation against Plaintiff was not conducted by the Office of Internal Affairs. It was conducted by Region IV. In these types of situations, OIA delegates the Fact Finding Investigation back to the Hiring Authority and in this case it was Jeff Fagot, the Regional Administrator.

The Office of Internal Affairs has "Special Agents" that are trained to conduct Internal Affairs Investigations. OIA does not utilize Parole Agent III's to conduct their investigations. Mr. George Ruiz, while he identifies himself as an investigator, he refers to himself as a Parole Agent III conducting a Region IV investigation, not a Southern Region Office of Internal Affair Investigation.

Region IV does not have an Office of Internal Affairs and therefore they were not authorized to conduct an Internal Affairs Investigation. Region IV was authorized to conduct a Fact Finding Investigation. The purpose of a Fact Finding is to determine whether there is enough evidence to refer the matter back to the Office of Internal Affairs

for an OIA investigation. In this case, Region IV chose not to find any misconduct on the part of Ferguson and Ayala despite the overwhelming evidence that they were involved in misconduct and it appears that George Ruiz chose not to implicate Garcia or Fowler in any misconduct nor to implicate Fagot or Kalvelage in their failure to protect the Plaintiff in his role as a Whistleblower.

Penal Code 6065, which covers investigations, requires that the investigation is to be thorough and is to include all evidence that supports and mitigates allegations of misconduct. Plaintiff's witnesses and evidence that supported the misconduct of Ayala and Garcia were not included. Plaintiff was placed under tremendous stress because the investigation was in retaliation to his Whistleblowing and the charges against him could have resulted in his termination.

> Volume II-Exhibit 14, California Penal Code 6065, Requirements for Conducting an Investigation; Volume II-Exhibit 31, Employee Discipline Matrix, Section B Code of Silence or Retaliation

12. In his Declaration, T. Fowler gives misleading and false information in stating that the CDCR has one year to complete an investigation and that the investigation was completed within the one year as it was concluded in May 2006. Fowler however, omits the fact that two months earlier, in March of 2006, the investigation had been completed, according to Kalvelage, and Fagot thought that Plaintiff had already been noticed that he was cleared. Whether it was Fagot, Fowler or someone else's responsibility, Plaintiff was notified two months later in May that he had been cleared. Plaintiff was left languishing wondering what the out come of the investigation was going to be especially since he had been told that his witnesses such as Silva, Rivera and others had not been interviewed by George Ruiz, but he was aware that Garcia had been interviewed as a witness against him.

Additionally, if the investigation had been in compliance with DOM and Penal Code 6065, Ruiz would have had to advise Fagot that Fowler and Garcia were involved in

misconduct and that the matter was going to have to be referred back to OIA for an OIA investigation, not a Fact Finding.

Additionally, Fowler fails to state that, after Plaintiff had suffered severe distress because he had been charged with offenses that could have resulted in dismissal, he called Plaintiff at home to advise him that he had been cleared of the charges in the Fact Finding Investigation, and callously told him that he was to “use this as a training experience.”

> Volume III-Exhibit 5, Declaration by T. Fowler, Page 5 Lines 23-25; Volume I-Exhibit 19, E-Mails to M. Kalvelage 1-20-06; Volume I-Exhibit 20, Investigation Disposition from J. Fagot dated 5-4-06; Volume II-Exhibit 14, California Penal Code 6065, Requirements for Conducting an Investigation

13. Castaneda is misleading in her Declaration when she states that Acting Deputy Director of Adult Parole, Mr. Jim L’Etoile issued a policy in a Memorandum dated July 12, 2005 that there was no Light Duty in Parole because *L’Etoile refers the reader to Title 15 Section 3436 which states that the “employee will continue working in their current position while temporarily waiving the essential functions of the job.”* The Region IV, RTW Office made a policy decision to ignore the part of the memorandum that refers supervisors and the RTWC to comply with Title 15. However, neither Region IV nor Parole Headquarters can override or ignore CDCR policy. Policy is instituted after it has been approved by the Director and promulgated through the Office of Administrative Law and distributed in an Administrative Bulletin or published in the California Code of Regulations or CDCR’s DOM.

Prior to Plaintiff’s Light Duty request in May 2008, Plaintiff became aware that a Parole Agent I, nicknamed “A.Z.” who had been given a light duty assignment. She was given a minimum supervision caseload and made an Acting PAII. She was <u>not</u> OD everyday of the week. Compared to her duties, Plaintiff was treated in a discriminatory manner because he was OD every day of the week in addition to carrying a caseload and performing all of the other duties such as completing all of the Pre-Paroles for the Unit.

Volume III-Exhibit 6, Declaration of M. Castaneda, Exhibit C-1, Memorandum from J. L'Etoile dated 7-12-05; Volume II- Exhibit 19, CCR Title 15 section 3436, Limited Term Light Duty Assignments

14. According to M. Castaneda, Plaintiff did not request to return to light duty until January 11, 2007. She stated that the "file maintained on Agent Tristan's January 21, 2005 injury" does not reflect that "he renewed his request any earlier." This information is wrong. Castaneda cites an erroneous date regarding Plaintiff's injury as it occurred on October 21, 2005 not January 21, 2005 as she reports. Also, subsequent to Plaintiff's injury on October 21, 2005, he received a number of clearances to Return to Work Modified duty. The first one was on October 26, 2005, 5 days after he was injured. Dr. Markman wrote two Clearances for Modified Duty, both of which were rejected by the RTWC Office. The following information is provided to demonstrate Plaintiff's continual requests to return to work modified duty before January 10, 2007 which contradicts Castaneda's Declaration testimony. Listed are (7) Returns to Work Modified Duty between March 2006 and January 2007, two of which can be shown were faxed to her office during that time. They are:

1) March 15, 2006: "May return to work; Modified (light) activity with the following restrictions: No lifting greater than 5 pounds, No standing greater than 15 minutes each hour in an 8 hour day. Other- No running"

- *Plaintiff turned this order in to Garcia. Garcia said he would check with the RTWC Office. Garcia told him he could not return to work because he had not been cleared of the charges levied against him in December 2005.*
- On May 4, 2006, Plaintiff was notified that he was cleared of the charges against him. However, Plaintiff had surgery on his knee shortly thereafter. He then requested from his doctor to return to work Modified duty and was written another clearance to return to work on September 6, 2006:

2) September 6, 2006: "Modified (light) activity with the following restrictions: No lifting greater than 10 pounds; No standing greater than 30 minutes. No physical altercations; no physical training; work 4 hour increments and allow for continued physical therapy."

- *Plaintiff faxed this document to Castaneda on September 7, 2006 (see fax cover sheet) but was told that he could not return to work for less than 8 hours per day.*
- However, there is no prohibition in the DOM or the CCR Title 15 Secion 3436 to working less than 8 hours per day.

3) October 4, 2006: "May return to work Modified (light) activity with the following restrictions: No lifting greater than 10 pounds; No bending, No stooping; No squatting; No kneeling; No standing (minutes left blank); No physical altercations, no physical training; 4 hour shifts; Cont. PT

- *Plaintiff again was not allowed to return to work Modified duty*

4) November 1, 2006: "May return to work Modified (light) activity with the following restrictions: No lifting greater than 10 pounds; No bending, No stooping; No squatting; No kneeling; No standing (minutes left blank); No physical altercations; No physical training, 4 hours shifts

- *The RTWC office again refused Plaintiff the opportunity to return to work.*

5) November 15, 2006: "May return to work Modified (light) activity with the following restrictions: No lifting greater than 10 pounds; No bending, No stooping; No squatting; No kneeling; 4 hr. shifts, no physical training, no altercations.

- *Plaintiff faxed this clearance to the RTWC Office, Ms. Rosina Ortiz (see fax cover sheet,) but he was not allowed by the RTWC office to return to work.*

6) December 13, 2006: "May return to work Modified (light) activity with the following restrictions: No lifting greater than 10 pounds; No bending, No stooping; No squatting; No kneeling; 4 hr. shifts, no physical training or altercations."

- *Plaintiff was again told he could not return to work with these restrictions.*

7) January 10, 2007: Dr. Hanson approved "Office Duty"

- *Plaintiff faxed this doctor's clearance and request to return to work to the RTWC Office. The RTWC office told Plaintiff that it was not specific enough regarding his restrictions and they would not accept it.*

8) January 11, 2007: "May return to work Modified (light) activity, with the following restrictions: Office Duty; hours 8-5:00, no altercations with parolees, no transportation of parolees."

- *The RTW Office, Castaneda, eventually accepted this return to work order*.

In her Declaration, on Pages 6 and 7, M. Castaneda contradicts herself. First she said that the doctor's clearance of January 10 for "office duty" is not specific enough. Then the one that was written by the doctor on January 11, to be more specific, includes "office duty," but the description of "no altercations with parolees" or "transportation of parolees," was not acceptable to her. In her Declaration she states that it was still not good enough because "he could not conduct surveillance, apprehensions or arrests…" There is no "surveillance" conducted in the Parole Office. Castaneda states in her Declaration that she was given input from Headquarters in Sacramento regarding the light duty policy and then "sought input from Agent Tristan's then supervisor, PA-III A.J. Garcia" as to whether Plaintiff could be accommodated. Garcia said that he could. Garcia and the RTWC Office decided he could accommodate Plaintiff with the restriction of "no altercations with parolees," but prior to that time they had consistently given excuses as to why they could not.

During the entire time between May 2006 and January 2007, Plaintiff was consistently requesting opportunities to return to work. However, during that time Castaneda was being dishonest with the Plaintiff because she had already decided not to allow Plaintiff to return to work, but she did not tell him that. She just continually found fault with the doctor's clearances and made a decision on her own to disallow Plaintiff's return to work. This is substantiated by her own testimony in her Declaration. She confirms on Page 8, Lines 8 through 11, that "Between July 12, 2005 (the date Mr. L'Etoile issued the policy memorandum attached as Ex. C) and Agent Tristan's return to work on limited term light duty in January 2007, <u>Parole Region IV did not waive the essential functions of any</u>

Parole Agent in order to allow them to work in a light duty capacity." Castaneda was dishonest and unethical with Plaintiff from the beginning. His first doctor's clearance to return to work light duty was October 26, 2005, 5 days after his injury. On October 28, 2005, Tara Heller told Plaintiff that the return to work order did not include the words "office duty." When Plaintiff asked Dr. Markman on November 1, 2005 to include those words on the existing order, and he did so, and Plaintiff was then told there was no light duty in Region IV Parole. Per Castaneda's Declaration, she had no intention of allowing Plaintiff to return to work under any other circumstances but full duty. It can be concluded, therefore, that any and all communication that she had with Plaintiff was not made in "good faith" and was conducted under dishonest and disingenuous circumstances. How is it that the RTWC Office, under her direction and guidance, told Plaintiff that "4 hour increments" were unacceptable, that "no altercations" was unacceptable, and that "office duty" was unacceptable if she had no intention of giving him an opportunity to work light duty anyway. Neither Castaneda nor her staff ever had any intention of allowing Plaintiff to return to work in any other capacity but full duty. She made that clear in her Declaration.

It is interesting to note that Plaintiff signed a Light Duty Agreement dated January 17, 2007 which states he will not be "involved in alterations," but prior to this time that phrase written in the numerous return to work clearances for Plaintiff was not acceptable to the RTW Office.

It is important to note that the only thing that the RTW Headquarters did in 2007 was re-iterate the existing policy for light duty that was already in the DOM and CCR 3436. Prior to this time the RTW Office in Region IV continued to deny Plaintiff the opportunity to work light duty in spite of the fact that the policies surrounding light duty and light duty assignments were consistently outlined in the rules and regulations of the CDCR. These acts and failures to abide by the DOM and the CDCR Regulations occurred for no legitimate, independent business reason.

> Volume I-Exhibit 9, Fax of Dr. Markman's original Return to Work Order dated 10-26-05; and Fax of Dr. Markman's amended Return to Work Order dated 10-26-05; Volume III-Exhibit 6, Declaration by Castaneda, Page 6 Line 28 and Page

7 Lines 1-2 and Page 8 Lines 8-11; Volume I-Exhibit 21, Clearances for Modified Duty from 3-15-06 to 1-10-07; Volume III-Exhibit 6, Declaration by Castaneda, Page 6 Lines 16-28 and Page 7 Lines 1-7 and Exhibits G-1 and H-1

Early January, 2007 Ms. Contreras confronted Plaintiff in the hallway of the Chula Vista Parole Office and told Plaintiff that among other things that his request for Light/Modified Duty was going to be "denied."

Volume I-Exhibit 21, Clearance for Modified Duty from 9-6-06 to 1-10-07; Volume I-Exhibit 24, Light Duty Agreement dated 1-17-07; Volume VI-Exhibit 3, Page 60 Lines 15-19;

15. Castaneda's declaration omits relevant facts which demonstrate discrimination against an injured/disabled employee. Her Declaration is misleading when she purports that she initially denied Plaintiff's request for Light Duty based upon the *"no-light-duty policy articulated by Jim L'Etoile."* Castaneda's Declaration fails to state that L'Etoile's memorandum refers to *CDCR Title 15 Section 3436 which states that "essential functions" can be temporarily waived and this contradicts her Declaration.*

Castaneda is incorrect in her Declaration because Plaintiff had to provide a copy of the CDCR DOM policy, which outlines the CDCR Light Duty policy, to Rosemond and De Leon on or about May 8, 2008. Additionally, Plaintiff faxed on May 8, 2008 at 9:19 a.m. a copy of the policy to De Leon and he responded that Parole did not recognize the Light Duty Policy.

De Leon, as the Return to Work Coordinator, must have known that the CDCR did have a Modified/Light Duty policy as this was included as part of his duties as the Return to Work Coordinator. Instead, he chose to harass an injured employee by making him research the information that was not his area of expertise and after Plaintiff faxed him a copy of the CDCR policy that did permit Light Duty and the requirements of the RTWC and supervisor, De Leon stated that he didn't recognize the policy.

Volume III-Exhibit 6, Declaration of M. Castaneda, Page 4 Lines 16-20; Volume III-Exhibit 6, Declaration of M. Castaneda, Exhibit C-1, Memorandum from J. L'Etoile dated 7-12-05; Volume II-Exhibit 19, CCR Title 15 Section 3436, Limited Light Duty Assignments; Volume I-Exhibit 65, Copy of Fax to De Leon regarding DOM Light Duty regulations sent 5-8-08; Volume I-Exhibit 19, DOM 31020.7.6.3 and DOM 31020.7.7.9 RTWC Responsibilities

16. Castaneda purports in her Declaration that based upon a change in Parole's policy Plaintiff was permitted to return to work in a Limited Term Light Duty assignment on or about January 17, 2007, but Castaneda does not provide any evidence that Parole's Light Duty Policy changed until after January 17, 2007 which is after the fact. Castaneda states that this was based upon some information that she received however, she doesn't say from whom whether it was a CDCR Headquarters decision or a Parole Headquarters decision. The memorandum that she refers to in her Declaration from Mr. Prunty does not coincide with her statement that there was a policy change. However, it is evident that Region IV had decided to circumvent CDCR's Light Duty Policy in 2005 when Plaintiff was told that there was no light duty in Parole. Additionally, Plaintiff had to research the CDCR DOM in order to prove to Rosemond and De Leon that there was a CDCR Light Duty Policy. Plaintiff faxed a copy of the Light Duty Policy to De Leon as proof that there was not a change in Parole Policy. It is evident that the Region IV Return to Work Office did not provide Plaintiff with the opportunity to work Modified Duty willingly, or because there was a change in policy. It was changed because Plaintiff forced them to recognize that there was a CDCR policy that they could not ignore. However, once he forced them to recognize the policy, they retaliated as evidenced by the purported "Standard Form Light Duty Agreement" that De Leon tried to pass off as a Light Duty Agreement.

Volume II-Exhibit 19, CCR Title 15 Section 3436, Limited Light Duty Assignments; Volume I-Exhibit 65, Copy of Fax to De Leon regarding DOM Light Duty regulations sent 5-8-08

17. Castaneda and De Leon's declarations are inaccurate and misleading when they state that Plaintiff was not subjected to *Discrimination and Retaliation* because no Parole Agents were allowed to work Light Duty between July 12, 2005 and January 2007. The fact that the Return to Work Coordinator's Office, under the direction of Martha Castaneda and De Leon, chose to ignore CDCR policy and attempted to deprive Plaintiff of the benefits that an injured employee may be entitled to is discriminatory. Additionally, the fact that Castaneda and De Leon subjected Plaintiff to unreasonable demands by having to go back and forth to doctor's offices believing that if the doctor's wording in the Return to Work Orders satisfied Castaneda and De Leon that he would be allowed to work Modified Duty was in retaliation for Plaintiff insisting that CDCR policy be compiled with. Additionally, neither Region IV Parole nor Parole HQ can override official CDCR approved policy. Again as stated earlier, prior to Plaintiff's Light Duty request in May 2008, a Parole Agent I, nicknamed "A.Z." had been given a Light Duty assignment. Her light duty assignment was a minimum supervision caseload and she was made an Acting PAII. She was not assigned OD duty everyday of the week. Plaintiff was treated in a discriminatory manner because he was OD every day of the week in addition to carrying a caseload and performing all of the other duties such as all of the Pre-Paroles for the Unit.

18. Both Garcia's and Ayala's Declarations are factually incorrect in stating that Plaintiff was not assigned an unreasonable and excessive workload between January 2007 and March 2007. To begin with, Light Duty is designed to "transition" an injured or ill employee back into the workplace environment and the Light Duty Agreement dated January 17, 2007, which was signed by Garcia, is consistent with light duty assignment duties. By design, Light Duty is not to be used to overload the injured or ill employee to the point that the employee has to seek relief from supervisors. However, this is what Plaintiff had to do when he complained about the excessive workload to Garcia and Ayala. When Plaintiff first began to work Light Duty, he felt as though the workload was going to be reasonable. However, when Agent Monahan the High Control PAL Agent was injured in Parole Agent Safety Training and she could not report to work, Ayala and Garcia began to place an excessive amount of workload on Plaintiff. In addition to being

OD everyday of the week, Garcia ordered the Plaintiff to process all Oral RPS's and all Unit RPS's. Additionally, the Caseload Rosters dated January 31, 2007, February 23, 2007 and March 28, 2007, which demonstrate the transfer of Monahan's cases to Plaintiff, in addition to all of the other work, indicates that Plaintiff was given excessive workload in violation of the Light Duty Agreement. This decision was made for no legitimate, independent business reason.

On January 31, 2007, in addition to Plaintiff's responsibility to be OD everyday of the week, Garcia ordered the Plaintiff to process all Oral RPS's, and all Unit RPS's, the caseload roster shows that the Plaintiff had been given 37 Active Parole Cases and 15 Pre-Parole cases, in violation of the Light Duty Agreement. Plaintiff's complaints were ignored.

On February 1, 2007 the Plaintiff was given, in addition to the above listed duties, Agent Monahan's 47 High Control Parolee-At-Large Cases as shown by the two Activity Reports dated 2-1-07. As evidence of the retaliation and discrimination that Plaintiff was subjected to, Parole Agent Monahan was required to make only one (1) collateral contact per parolee per month but Plaintiff was assigned the 47 cases and he was ordered to make two (2) collateral contacts per month as soon as he was assigned her cases.

It should be noted that as a High Control PAL agent she was not ordered to serve OD duty everyday of the week, but Plaintiff was. There was no legitimate, independent business reason for this workload.

Ayala was discriminatory in his refusal to authorize Plaintiff overtime in accordance with the July 1, 2001 Unit 6 Contract/MOU which was in effect in 2007 as reiterated in Director Hoffman's February 1, 2008 Memorandum, because Plaintiff is aware that Ayala authorized overtime for other agents in Ayala's unit but refused to authorize overtime for Plaintiff.

Also, this memorandum from the Director states, “The US and the AOR should discuss the current caseload relative to the agent’s ability to effectively manage the caseload at it current level.” There were no discussions of this kind between Plaintiff and Garcia or Plaintiff and Ayala.

> Volume III-Exhibit 2, Declaration by Garcia, Page 6, Lines 15-16; Volume III-Exhibit 1, Declaration by Ayala, Page 5, Lines 10-11; Volume I-Exhibit 24, Light Duty Agreement dated 1-17-07; Volume I-Exhibit 25, Excessive Workload during Light Duty Status; Volume I-Exhibit 29, Excessive Workload after return to work Full-Duty 3-14-07; Volume I-Exhibit 91, Plaintiff’s Caseload Roster dated 3-20-07; Volume II, Exhibit 20, Bargaining Unit 6 Contract/LBFO section 19.06, CDC Parole Agent Workload; Volume I-Exhibit 94, Memo from T. Hoffman re: Authorizing Overtime and Modifying Cases with Excess Points

19. Plaintiff was cleared for Full Duty on March 5, 2007 and he was certified on his firearm and participated in Parole Agent Safety Training. Ayala told Plaintiff that he would decide when he would be off of OD Duty every day of the week and not before then, and he forced Plaintiff to drive to the required training during his lunch break in violation of DOM and the Unit 6 Contract. He also inappropriately ordered Plaintiff to attend “baton” training before he could be relieved of OD duty and could carry a regular caseload which was ordered for no legitimate, independent business reason other than to harass the Plaintiff.

Maritza Rodriguez must have been aware of Plaintiff’s Whistleblowing to Fagot because she admonished Plaintiff not to go to Fagot with any issues. In keeping with Rodriguez’s instructions, on March 13, 2007, Plaintiff sent another letter to Defendant M. Rodriguez in which Plaintiff complained about the retaliation, excessive workload and disparate/discriminatory treatment he was being subjected to by Ayala. In response, she minimized the distress that Plaintiff was under and the harassment and retaliation that he was being subjected to. Rodriguez wrote a letter to Plaintiff incorrectly recounting their discussion on March 29, 2007. The fact is that this meeting was a “happenstance.”

Plaintiff had caught her in the hallway on March 29 and asked her if they were going to have a meeting and was she going to consider the issues that he had outlined in both letters to her. By that time, two letters had been written to Rodriguez about the hostile work environment, harassment and retaliation that Plaintiff was experiencing; one was dated February 10 and one dated March 13. She had neither responded to them nor set up a meeting with Plaintiff. So when Plaintiff saw her and approached her on March 29, she had a conversation with him that day. When Plaintiff received her letter dated March 29, he realized that she had re-counted their meeting incorrectly and that she did not understand his issues. He therefore, wrote a response to her letter dated April 12, 2007, but again received no response.

Ayala was discriminatory in that he authorized overtime for other agents as evidenced by Parole Agent Silva's overtime request for High Control Cases but he denied Plaintiff's request for overtime. This was in violation of the Director Hoffman's February 1, 2008 Memorandum in which he reiterates the provisions of the July 1, 2001 Unit 6 Contract/MOU which outlines provisions for overtime

Also, this memorandum from the Director states, "The US and the AOR should discuss the current caseload relative to the agent's ability to effectively manage the caseload at it current level." There were no discussions of this kind between Plaintiff and Ayala.

> Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, Page 62, Lines 15-21; Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, Page 62, Lines 23-28 and Page 63 Lines 1-26; Volume I-Exhibit 27, Letters to Rodriguez dated 2-10-07 and 3-13-07; Volume I-Exhibit 31, Letter from Rodriguez to Plaintiff dated 3-29-07; Volume I-Exhibit 35, Letter to M. Rodriguez from Plaintiff dated 4-12-07; Volume II-Exhibit 2, DOM 33030.5.3, Supervisors and Managers refer misconduct for investigation; Volume II-Exhibit 2, DOM 31140.10, Reporting Misconduct and Protection from Retaliation; Volume II, Exhibit 20, Bargaining Unit 6 Contract/LBFO section 19.06, CDC Parole Agent Workload; Volume I-

Exhibit 94, Memo from T. Hoffman re: Authorizing Overtime and Modifying Cases with Excess Points; Volume I-Exhibit 90, Authorization for Extra Hours for Monahan's Caseload – J. Silva

20. Fowler omits relevant facts in his Declaration concerning violations of *DOM regarding Investigations and violations of Penal Code 6065.* He states that he forwarded Plaintiff's complaint to the CDCR's Office of Civil Rights because Plaintiff made statements in the letter to Fagot such as "disparate treatment" and "hostile work environment." While this is true, it is misleading; because in the same letter, Plaintiff complained about being retaliated against for reporting misconduct and being truthful in investigations. Fowler should have been aware that reporting misconduct places Plaintiff in the Protected Class of Whistleblower and that the actual reporting of misconduct is a Protected Activity. Plaintiff's letter to Fagot should have been forward to OIA and OCR at the same time, due to the nature of Plaintiff's complaints, which included Retaliation against a Whistleblower, discrimination against an injured employee, and discrimination because he Whistleblew against members of his own race. To make matters worse, Fowler advised Ayala that Plaintiff's complaints against him had been sent to OCR but Fowler did not offer Plaintiff any protection against continued retaliation from Ayala. Additionally, Fowler's Declaration states that he chose not to disrupt the operation of the Chula Vista office and left the Plaintiff (victim) under Ayala's (perpetrator) supervision. This was a gross failure by Fowler to protect a Whistleblower and once Plaintiff was interviewed by Gail Richie, the CDCR's Office of Civil Rights, she did not offer Plaintiff any protection or relief. Plaintiff is not aware of any admonishment that Gail Richie made to Ayala not to retaliate, nor any admonishment to Fagot or Fowler to protect Plaintiff because he had participated in the CDCR's Office of Civil Rights Complaint process. This was a failure of Fagot, Fowler and Richie to adhere to the CDCR regulations regarding the protection of an employee who participates in the Office of Civil Rights Complaint process. These failures occurred for no legitimate, independent business reason.

Volume II-Exhibit 14, California Penal Code 6065, Requirements for Conducting an Investigation; Volume II-Exhibit 33, California Labor Code 1102.5(b)(c)(d), Prohibits employer retaliation; Volume II-Exhibit 33, California Government Code 8547.1, 8547.3, 8547.8, Whistleblower Statute; Volume I-Exhibit 33, Letter to Fagot re: hostile work environment dated 4-2-07; Volume I-Exhibit 34, Letter to Plaintiff from Fowler dated 4-3-07; Volume III-Exhibit 5, Declaration of Fowler, Page 7 Lines 1-3

21. Fowler's Declaration states that Fowler considered various factors in his decision to leave Plaintiff under the supervision of Defendant Ayala, because there was no touching or threats of violence. This was a gross failure by Fowler because he ignores the fact that Retaliation can be in the form of Harassment, Disparate Treatment regarding workload and working conditions, and that the pattern and practice of retaliation can lead to severe stress due to the Hostile Work Environment. Additionally, Fowler ignored the fact that the *Whistleblower Protection Act does not require that there be touching, abusive language or threats of violence, in order for the Whistleblower to be provided protection from further retaliation.* Fowler fails to mention in his Declaration that there are four (4) Units in the Chula Vista Complex and Defendant Ayala and another Parole Agent II could have swapped positions or Fowler could have offered Plaintiff a transfer to one of the other three units. However, in his Declaration Fowler admits that he ignored all of the options in violation of Government Codes and CDCR regulations. Leaving Plaintiff under Ayala's supervision was not done for any legitimate, independent business reason.

Volume VI-Exhibit 5, Declaration of Fowler, Page 6 Lines 23-27; Volume II-Exhibit 33, California Labor Code 1102.5(b)(c)(d), Prohibits employer retaliation; Volume II-Exhibit 33, California Government Code 8547.1, 8547.3, 8547.8, Whistleblower Statute

22. Plaintiff's Whistleblowing not only includes letters to Rodriguez, as an example of his Whistleblowing, he reported the misconduct of his supervisors in telephone calls to Administrators Fagot, and Kalvelage; letters to Tom Hoffman, Director of Parole, and

Scott Kernan, Undersecretary; and Martin Hoshino, Director of OIA; he filed a Whistleblower Complaint and Employee Contract Grievance; and e-mails and faxes that Plaintiff sent to De Leon and Castaneda. Also Plaintiff testified against his supervisors in the Fact Finding Investigation by George Ruiz, the OCR Investigation by Gail Richie, and the OIA Investigation by Gene Pettit.

- *The entire CDCR Chain of Command failed to adhere to the Whistleblower Protection Act, DOM OIA Regulations and Penal Code 6065.*

Volume I-Exhibit 40, Letter to M. Hoshino, Director of OIA, dated 6-3-07; Volume I-Exhibit 44, Letter to S. Kernan from Plaintiff; Volume IV-Exhibit 2, Whistleblower Complaint filed 12-20-07, E.Vann's Declaration, Exhibit A-36; Volume I-Exhibit 66, E-Mails to M. O'Neal, De Leon and M. Castaneda dated 5-8-08; Volume I-Exhibit 76, E-Mails to De Leon, Castaneda, Costner, T. Hoffman, S. Kernan, R. Harvey dated 5-22-08 and 5-29-08; Volume V-Employee Contract Grievance dated 5-20-08 and CDCR Responses; Volume I-Exhibit 17, Transcript of Interrogation of Plaintiff 12-15-05; Volume I-Exhibit 38, Letter to G. Richie from Plaintiff dated 4-30-07; Volume I-Exhibit 57, OIA Letter to Plaintiff re: interview as a witness dated 2-22-08; Volume II-Exhibit 14, California Penal Code 6065, Requirements for Conducting an Investigation; Volume II-Exhibit 33, California Labor Code 1102.5(b)(c)(d), Prohibits employer retaliation; Volume II-Exhibit 33, California Government Code 8547.1, 8547.3, 8547.8, Whistleblower Statute;

23. Plaintiff was given excessive workload while on Light Duty. The Light Duty Agreement identifies specific duties for Plaintiff and did not include carrying a Caseload and completing all of the RPS's, Oral RPS's and Initials for the entire Unit, as well as Transfer Investigation Requests (TIR's).

- Plaintiff was given a Caseload of High Control Parolees-at-Large (PAL's) whose casework was as much as two (2) years out-of-date and he was told to bring it up-to-date. This workload in itself was excessive and unreasonable.

- Agent Monahan was required to make one (1) collateral contact per month and Garcia ordered Plaintiff to make two (2) collateral contacts per month.
- The High Control PAL agent must also monitor the 5-year Discharge Reviews for the BPT and prepare a report when due.
- Agent Monahan was not OD everyday of the week.
- Garcia's and Ayala's Declarations are factually incorrect, misleading and omit relevant facts as evidenced by the Unit Workload Summaries.

Ayala was discriminatory in that he authorized overtime for other agents but he denied Plaintiff's request for overtime. This was in violation of the Director Hoffman's February 1, 2008 Memorandum in which he reiterates the provisions of the July 1, 2001 Unit 6 Contract/MOU which outlines provisions for overtime

Also, this memorandum from the Director states, "The US and the AOR should discuss the current caseload relative to the agent's ability to effectively manage the caseload at it current level." There were no discussions of this kind between Plaintiff and Garcia or Plaintiff and Ayala

> Volume I-Exhibit 25, Excessive Workload during Light Duty Status; Volume I-Exhibit 86, Caseload Roster for HC PAL Agent Monahan 1-29-04; Volume II, Exhibit 20, Bargaining Unit 6 Contract/LBFO section 19.06, CDC Parole Agent Workload; Volume I-Exhibit 94, Memo from T. Hoffman re: Authorizing Overtime and Modifying Cases with Excess Points

24. While Plaintiff was on Light Duty, because he was OD every day of the week while carrying an ever-increasing caseload/workload as indicated by the Unit Workload Summaries he was subjected to harassment and retaliation.

- Monahan, the previous High Control PAL Agent, was not required to be OD everyday of the week and complete all of the Unit RPS, Initials, and Oral RPS's and Urinalysis Testing of parolees for other agents as Plaintiff was.

When Plaintiff was assigned these cases, his supervisor doubled the casework requirements from one (1) Collateral Contact a month to two (2) Collateral Contacts per month. Although both Ayala and Garcia state that Plaintiff was expected to only complete (1) Collateral Contact per month, and they deny that he was told to make two (2), Plaintiff's Caseload Rosters demonstrate otherwise. The Caseload Roster of February 23, 2007 shows two (2) collateral contacts on seven (7) of these HC PAL cases, which were not completed because he wanted to do the extra work. This expectation was made of Plaintiff for no legitimate, independent business reason.

- This was still expected in addition to Plaintiff's other caseload responsibilities and being OD everyday of the week.
- The actual workload for the High Control PAL caseload was doubled and the points do not reflect this doubling of the workload.

Volume I-Exhibit 25, Excessive Workload during Light Duty Status; Volume I-Exhibit 86, Caseload Roster for HC PAL Agent Monahan 1-29-04; Volume II, Exhibit 20, Bargaining Unit 6 Contract/LBFO section 19.06, CDC Parole Agent Workload; Volume I-Exhibit 94, Memo from T. Hoffman re: Authorizing Overtime and Modifying Cases with Excess Points

25. The statement that Plaintiff was not disciplined for not completing all assigned work while on Light Duty does not diminish the workload to which he was assigned. Plaintiff was fearful of continued retaliation and therefore worked prior to and after his normal work day and through his lunches in an effort to complete the excessive workload without any compensation. Plaintiff was admonished by Defendant Garcia by stating "Just get it done!" when Plaintiff complained that the workload was excessive.

Plaintiff's complaints to Defendants Ayala, Garcia and Rodriguez regarding the excessive workload were ignored and plaintiff was demeaned when he complained about being treated in a discriminatory/disparate manner.

Also, a memorandum from the Director of Parole, T. Hoffman states, "The US and the AOR should discuss the current caseload relative to the agent's ability to effectively manage the caseload at it current level." There were no discussions of this kind between Plaintiff and Garcia or Plaintiff and Ayala.

> Volume I-Exhibit 25, Excessive Workload during Light Duty Status; Volume I-Exhibit 86, Caseload Roster for HC PAL Agent Monahan 1-29-04; Volume I-Exhibit 29, Excessive Workload after return to Full Duty; Volume I-Exhibit 27, Letters to Rodriguez dated 2-10-07 and 3-13-07; Volume II-Exhibit 33, California Labor Code 1102.5(b)(c)(d), Prohibits employer retaliation; Volume II, Exhibit 20, Bargaining Unit 6 Contract/LBFO section 19.06, CDC Parole Agent Workload; Volume I-Exhibit 94, Memo from T. Hoffman re: Authorizing Overtime and Modifying Cases with Excess Points; Volume I-Exhibit 91, Plaintiff's Caseload Roster dated 3-20-07

26. Defendant Ayala attempted to prevent Plaintiff from being released from his excessive Light Duty workload by telling Plaintiff "you will no longer be OD when I tell you that you are no longer OD."

Ayala lied to Plaintiff when Ayala told him that he had to attend "baton" training prior to being relieved of being OD everyday of the week. When Defendant Garcia retired mid-February, Defendant Ayala warned Plaintiff, "There is a new Sheriff in town" and he continued the misconduct against Plaintiff.

> Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, Page 62 Lines 15-21; Volume II-Exhibit 33, California Labor Code 1102.5(b)(c)(d) Prohibits Employer Retaliation; Volume II-Exhibit 30, DOM 33030.9, Causes for Employee Adverse Action

27. Statements made that Defendants Ayala and Garcia took into consideration Plaintiff's prior knowledge of cases assigned to him are incorrect and misleading. These

claims fail to acknowledge that Plaintiff would have had knowledge of the new cases assigned to him anyway because he had completed all the RPS's and Initials and not because of any consideration those Defendants gave him.

The "Points" only reflect a portion of the workload that Plaintiff was assigned, it does not reflect the workload of completing RPS's, Initials and Oral RPS's. The workload was assigned to Plaintiff by Ayala, not Tryna Woods. Tryna Woods was the only supervisor that was willing to reduce Plaintiff's workload. After Plaintiff's workload was reduced, Ms. Woods referred Plaintiff to the Employee Assistance Program (EAP) because of the stress that he was subjected to by Ayala. Plaintiff began the program on 4-23-07 and continued through 6-30-07.

Exhibit F in the Ayala Declaration is not a "true and correct" copy. Plaintiff's copy of this March 2007 Roster dated 3-28-07 is the final copy. The March Caseload Roster attached to Ayala's Declaration was written on after the fact and has the initials "DT" shown on the pages of the roster, meant to show that Plaintiff made the notations when they were actually made by Ayala. The notation in the upper left corner of the first page was also made by Ayala after the fact and these notations were neither shown to Plaintiff nor made by Plaintiff. They are in Ayala's handwriting, not Plaintiff's.

> Volume III-Exhibit 1, Declaration of M. Ayala, Exhibit F-1 through F-5; Volume I-Exhibit 30, Plaintiff's Final March 2007 Caseload Roster; Volume I, Exhibit 36, EAP Treatment Services begin 4-23-07 thru 6-30-07

28. When Plaintiff returned full duty in March 2007, he worked before and after normal work hours and through his lunch breaks in order to complete the assigned work. Plaintiff was denied overtime and other agents were allowed to claim overtime. Plaintiff completed the Pre-Paroles and Initials, and then cases were transferred to other agents on the 19th so that Plaintiff's points would be within the required 20 points and the receiving Agent was given credit for the Points and authorized overtime by Ayala. Tryna Woods gave Plaintiff some relief from the excessive workload when Plaintiff complained to her.

29. It is incorrect and misleading to conclude that Plaintiff just wanted to leave early for his lunch break. Also, Ayala did not have the discretion to give ½ hour lunch breaks because a lunch break would adversely affect the unit. Plaintiff was <u>not</u> asking to leave "early" and Ayala violated the DOM and Bargaining Unit 6 Contract:

The Plaintiff had already arranged for another agent to assume the OD duty for one hour from 11:00AM to 12:00 PM without any adverse effect on the unit. Also, per Chula Vista's OD Schedule Procedures, the OD is expected to be provided a one hour lunch between 1100 hours and 1400 hours. Per the DOM, the Plaintiff is allowed, "<u>at his discretion</u>" a ½ hour or 1 hour lunch break and per the Bargaining Unit 6 Contract. Ayala's Declaration is incorrect. He estimated ½ hour travel time to the training. The correct amount of time is approximately 45 minutes. The ½ hour estimate is a best case estimate and does not allow for traffic conditions, parking, etc.

> Volume III-Exhibit 1, Declaration by M. Ayala, Page 10 Lines 12-28, Page 11 Lines 1-12; Volume II-Exhibit 21, DOM 85030.21, Parole Agent Lunch Hours; Volume II-Exhibit 21, DOM 85030.24, Work Schedule, O.D.; Volume II-Exhibit 22, Bargaining Unit 6/LBFO section 19.03 (A): Volume I-Exhibit 24, Officer of the Day Procedures for Chula Vista Parole Agents dated 7-6-06

30. Ayala's misconduct toward Plaintiff was a pattern prior to Ayala's promotion on December 26, 2007. On January 30, 2008, Plaintiff was cleared to work Modified Duty by Dr. Hanson and the California State Personnel Board (SPB), in a letter dated 1-31-08, advised Ayala and Garcia that Plaintiff had lodged a complaint of retaliation against them and was seeking disciplinary action. Ayala was still working in the same Chula Vista Parole complex that Plaintiff was working in and Rodriguez, the Administrator who had promoted Ayala, was still in charge of the District.

There was nothing to preclude the CDCR from assigning Plaintiff under the supervision of Ayala in the future in the same manner that they had assigned Plaintiff to training conducted by Ayala.

> Volume I-Exhibit 48, SPB Letter re: Complaint against Ayala dated 1-31-08

31. The facts regarding the assignment of Parole Agents to FUNA positions are as follows:

- There are two options available to the CDCR by which it can assign Parole Agents to positions. One is from input from the Union, which includes seniority, and the other is based upon the Administrative need.
- Rodriguez, Fagot and Kalvelage were aware that the CDCR had a responsibility to protect the Plaintiff from any further retaliation by transferring Plaintiff to a FUNA position because the FUNA position did not report to Ayala, Garcia or Rodriguez.
- Castaneda's Declaration is incomplete in that she describes the process for employee transfers.
- In Plaintiff's request for a transfer there was both an "employee hardship" and CDCR had an obligation to "protect" Plaintiff from further retaliation, which they did not.

32. Plaintiff did not "voluntarily" give up his scheduled vacation, rather he was manipulated into canceling his vacation. Ayala told Plaintiff that he could not have three (3) parole agents on vacation at the same time. Ayala told Plaintiff that P.A. John Silva had a pre-paid vacation and because he, Plaintiff, was more senior, Silva's vacation would be cancelled. Plaintiff did not want Silva to lose money, so Plaintiff canceled his vacation.

Plaintiff and his wife had coordinated their vacation time off to coincide with their two sons' school break. However, based upon the false information provided by Ayala, of not being able to have three agents off at the same time, Plaintiff was manipulated into canceling his vacation.

Defendant Ayala gave some of Plaintiff's vacation days to Parole Agent Tony Lamar, without telling Plaintiff that he could have three (3) agents on vacation at the same time

and without giving Plaintiff the first opportunity to reschedule his vacation. Ayala's decision was made for no legitimate, independent business reason.

> Volume I-Exhibit 33, Letter to Fagot dated 4-2-07 re: Hostile Work Environment; Volume II-Exhibit 21, Vacation awarded by State Service; Volume II-Exhibit 33, DOM 19572 (m), Discourteous Treatment; Volume II-Exhibit 23, CCR 3391, Employee Conduct; Volume II-Exhibit 25, DOM 33030.3.1, Employee Conduct; Volume II-Exhibit 26, Law Enforcement Code of Ethics

33. The January 2008 injury occurred when Plaintiff, who was the OD, jumped down some stairs and ran in order to arrest a parolee who was wanted by the Sheriff's Department for attempted murder. When Plaintiff caught up with the parolee, the parolee was bending under the dashboard as if to obtain a weapon and the parolee could have run over the Plaintiff with his car, but Plaintiff placed himself in harm's way and ordered the parolee to exit the car.

Sheriff's Deputies commended the Plaintiff because of his quick action and skill, and a "high speed pursuit" was avoided. It was avoided because the parolee, who was attempting to evade arrest, was able to get to his car and was about to drive off when Plaintiff ordered the parolee out of the car at gunpoint. It should be noted that the CDCR can extend EIDL to an employee who is injured in the line of duty under extraordinary circumstances such as this heroic arrest of a murder suspect, but the CDCR chose not to award the Plaintiff EIDL.

> Volume I-Exhibit 46, Board Report/Incident Report/Sheriff's Report for 1-28-08 Arrest

34. Dr. Hanson wrote a Return to Work on Modified Duty for Plaintiff on January 30, 2008. There is no CDCR rule or regulation that requires that an injured employee must obtain a doctor's off work order from the doctor that is listed in the employee personnel file as the "pre-designated doctor." De Leon inappropriately and carelessly rejected Dr.

Hanson as Plaintiff's treating physician. Plaintiff then made an appointment with Dr. Solorzano, who was Plaintiff's personal doctor at Kaiser Permanente. De Leon then rejected Dr. Solorzano's off work order and told Plaintiff that he had to be seen by Dr. Turla. Plaintiff was aware that Dr. Turla had been deployed to Iraq and that is why Kaiser had assigned Plaintiff to Dr. Solorzano. Plaintiff explained this to De Leon but De Leon told Plaintiff that he needed to get an off work order from Dr. Turla. Plaintiff went back to Kaiser and discovered that Dr. Turla had returned from Iraq and Dr. Turla gave Plaintiff an Off Work Order. In the meantime, Plaintiff had been forced to go from doctor to doctor for no reason other than harassment and retaliation from the Return to Work Office. Finally, because De Leon had decided that his knee was not a re-injury and that it was a new injury Plaintiff was forced to see Dr. Maywood. De Leon's failures and acts occurred for no legitimate, independent business reason.

Additionally, Plaintiff was not allowed to work Modified Duty by De Leon even though he had successfully challenged Region IV's Return to Work Coordinator's Policy regarding Modified Light Duty and had worked Modified Duty in January 2007.

De Leon states that he did not make any medical determinations regarding Plaintiff's knee injury. However, Dr. Hanson thought the current injury could be an "exacerbation" of the October 21, 2005 injury. De Leon in effect made a medical determination when he decided that it was a "new injury" which was counter to Dr. Hanson's medical assessment. Additionally, because De Leon determined that it was a new injury, Plaintiff was not allowed to be treated by Dr. Hanson and that is why Plaintiff was forced to see Dr. Maywood.

An exacerbation of an old injury may have made the Plaintiff eligible for EIDL again, but this possibility was eliminated by De Leon. De Leon's decisions regarding Plaintiff's injuries delayed the treatment to Plaintiff's knee and resulted in Plaintiff having to go to Kaiser Emergency because of the physical therapy that he was being prescribed by Dr. Maywood.

De Leon, in the RTW Office, was being supervised by Ms. Castaneda, who was the same person who inappropriately denied Plaintiff's EIDL in 2005, denied Plaintiff's request to work Light Duty, and who did not request an Incident Report from Ayala or Garcia regarding the October 21, 2005 incident.

De Leon reported to Castaneda, who reported to Fowler and Fagot, the same CDCR Parole chain of command that failed to protect Plaintiff from retaliation in 2005 and 2007.

> Volume I-Exhibit 47, Dr. Hanson's clearance for Modified Duty dated 1-30-08; Volume I-Exhibit 49, Dr. Solorzano's Off-Work Order dated 2-11-08; Volume I-Exhibit 52, Dr. Hanson's Progress Report and Off Work Order dated 2-13-08; Volume I-Exhibit 53, Dr. Solorzano's Evaluation dated 2-13-08; Volume I-Exhibit 59, Dr. Turla's Off Work Order; Volume I-SCIF Letter dated 2-26-08 requiring Plaintiff to see Dr. Maywood; Volume I-Exhibit 62, Dr. Maywood's Initial Orthopedic Evaluation

35. Plaintiff did not tell Rosemond that he had to keep his foot elevated as claimed in Rosemond's Declaration. If Dr. Hanson had ordered Plaintiff to keep his foot elevated, Plaintiff would not have reported to work and would have asked Dr. Hanson for an Off Work Order. The reality appears to be that the Region IV did not want Plaintiff to work Modified/Light Duty because in subsequent conversations with Rosemond and De Leon, Plaintiff was told that there was "No Light Duty" in Region IV Parole and De Leon stated that he did not recognize the CDCR Policy regarding Light Duty. Their attempts to prevent Plaintiff from a reasonable accommodation, *was discrimination against a disabled employee and their communication with him was not in "good faith."*

Dr. Hanson's Clearance for Modified Duty had only <u>one</u> restriction: "semi-sedentary" and Plaintiff should have been allowed to work Modified Duty instead of being forced to use his personal leave credits to supplement his pay. Therefore, the statement that Plaintiff's pay was not affected is misrepresenting what

happened. Plaintiff's pay was not affected because Plaintiff had to use his leave credits to get a full-pay check.

To make matters even worse for Plaintiff, De Leon advised Plaintiff that he could not continue to see Dr. Hanson for this injury, because in De Leon's opinion Plaintiff's knee injury was a new injury and not a re-injury. Mr. De Leon and Mr. Rosemond refused Plaintiff a Light Duty Assignment and De Leon instructed Plaintiff to obtain an Off-Work Order, thereby justifying their decision to not allow Plaintiff to work Modified Duty. Plaintiff did not need a separate Off Work Order. De Leon and Rosemond could have refused Plaintiff's a Return to Work but instead they manipulated Plaintiff into getting an off work order to excuse their inappropriate decision making.

Volume I-Exhibit 47, Dr. Hanson's Clearance for Modified Duty dated 1-30-08; Volume III-Exhibit 4, Declaration by C. De Leon's, Exhibit, Page 3, Lines 10-12

36. The CDCR does not require that an Off Work Order be from a specific doctor. De Leon and Rosemond could have accepted an Off Work Order from a clinic that the Plaintiff had never gone to. De Leon and Rosemond harassed the Plaintiff by making this injured worker, who had just risked his safety in the interest of public safety go from doctor to doctor when they could have accepted Dr. Hanson's note in the first place. The only reason that Plaintiff obtained Off-Work Orders from Dr. Solorzano, and Dr. Turla was because De Leon required it.

De Leon told Plaintiff that he could not see Dr. Hanson who had treated his October 21, 2005 knee injury. There was no legitimate reason that De Leon had for refusing Plaintiff medical treatment from Dr. Hanson. Dr. Hanson's medical group had provided Plaintiff treatment for his previous work related injury.

In fact, after seeing Plaintiff for this injury on January 28, Dr. Hanson wrote a letter to SCIF Robin Smith, Claims Examiner, dated February 13, 2008, which De Leon received a copy of, that shows Dr. Hanson as one of the doctors in the Grossmont Orthopaedic

Medical Group and he signed the letter as a Qualified Medical Evaluator, State of California. In the letter he stated to SCIF that "Mr. Tristan saw his primary care doctor at Kaiser, who evaluated his back. <u>He left the knee treatment up to me."</u> Dr. Hanson was never excluded from the "State Fund Medical Provider Network" as De Leon claimed. Dr. Hanson continued to be available to treat Plaintiff's knee but was told by De Leon that Dr. Hanson could not treat him.

Even though De Leon denies it, De Leon made a "medical decision" that the January 28, 2008 injury was a "new" injury and <u>not</u> an exacerbation of the old October 21, 2005 injury as stated by Dr. Hanson in his report regarding Plaintiff and that is why Dr. Hanson ordered an MRI which was not taken until much later. Dr. Maywood, the SCIF selected doctor as a result of De Leon's manipulation of Plaintiff's doctors, refused to order an MRI.

De Leon ignored the fact this was the same knee that was injured in the same area as in his October 21, 2005 injury and Dr. Hanson's evaluation. Mr. De Leon and Mr. Rosemond made the decision that Plaintiff could not work Light Duty, and then De Leon told Plaintiff that he needed the Off-Work Order in order to get paid. The *misconduct of De Leon in this matter were acts of discrimination against an injured employee.*

It is apparent from De Leon's Declaration that he did not operate in "good faith" toward the Plaintiff. De Leon states, "Agent Tristan had not been working since January 28, 2008, the ***<u>alleged date of his injury</u>***, but Dr. Hanson's note did not excuse Agent Tristan to be off of work, so I requested that Agent Tristan provide us with a note excusing his absence from work." Not only did he deny Plaintiff an opportunity for a light duty assignment, he felt that Plaintiff was dishonest in claiming this injury. This Declaration was taken earlier this year (the date of April 29, 2011 on the cover page of the Declaration is incorrect) and De Leon continues to consider Plaintiff's injury an "<u>alleged</u>" injury. Plaintiff's claim was accepted by SCIF many months ago and it is not an "alleged" injury. The employees in the RTW Office do not decide whether it is an "alleged" injury or real injury, SCIF does.

Volume I-Exhibit 47, Dr. Hanson's Clearance for Modified Duty dated 1-30-08; Volume III-Exhibit 4, Declaration by C. De Leon, Page 3, Lines 7-12 and Lines 20-26

37. Plaintiff was advised by the SCIF Adjuster that because the CDCR, more specifically De Leon, had made a determination that Plaintiff needed to file an new claim because this was a "new" injury that Plaintiff could not see Dr. Hanson for treatment.
There was no reason for Plaintiff to see three (3) different doctors within days for the same injury, other than De Leon told Plaintiff that he needed an "off work" order, and De Leon did not accept Dr. Hanson's Return to Work Modified Duty Order nor did he allow Plaintiff to see Dr. Hanson. Plaintiff advised Mr. De Leon that he would see his primary care doctor at Kaiser, Dr. Solorzano and he was seen by Dr. Solorzano on 2-11-08 and received an Off Work Order that he had been led to believe by De Leon that he needed in order to get paid.

De Leon does not have or provide any rule or regulation that he can cite as to why he would not accept Dr. Solorzano's off work order because De Leon gave Plaintiff "false information" that Plaintiff did not have a "Pre-Designated Doctor Form" in his Personnel File. De Leon fails to state that CDCR does not reject a "legitimate" off work order <u>from any doctor</u> regardless of whether or not an employee has a Pre-Designated doctor form. *Using De Leon's argument, no doctor's off work order would have been accepted for Plaintiff while Dr. Turla was in Iraq on a tour of duty. Or, De Leon would have been forced as he did for Plaintiff to see a doctor that SCIF was going to designate for Plaintiff. This was all unnecessary because Plaintiff should have been treated by Dr. Hanson who was familiar with Plaintiff's knee and what kind therapy worked best for Plaintiff.*

However, as proof that De Leon was harassing and discriminating against an injured worker, the Regional Administrator did find that Plaintiff did have a "Pre-Designation Form" in his Personnel File and it listed Kaiser as his Health Care Provider and Dr. Turla, a Kaiser doctor as Plaintiff's doctor and at Kaiser a patient may be required to <u>see any</u>

doctor that is available. Again, De Leon's failures and acts occurred for no legitimate, independent business reason.

De Leon omits in his Declaration that Plaintiff reported De Leon's dishonesty to Regional Administrator, Marty O'Neal. The Pre-Designated Doctor Form was then found by De Leon. Mr. O'Neal called Plaintiff and apologized for De Leon's misinformation to Plaintiff.

The "Pre-Designation Form" said that Dr. Turla, Kaiser Permanente, was the Plaintiff's pre-designated doctor. Since Plaintiff had completed the pre-designation form, however, Dr. Turla had gone to Iraq, and Kaiser had assigned Plaintiff to Dr. Solorzano. When Plaintiff submitted the Off Work order from Dr. Solorzano, De Leon would not accept it because it was not Dr. Turla. Plaintiff had to return to Kaiser to ask if Dr. Turla was back from Iraq and he found that he was and saw Dr. Turla, who provided Plaintiff and an Off Work Order on 2-27-08. This was pure harassment and it was unnecessary for Plaintiff, with an injured knee to go from doctor to doctor because he thought he would not get paid if he did not comply with the direction from De Leon. De Leon's directions to Plaintiff and his requirements for these off work orders were for no legitimate, independent business reason.

De Leon told Plaintiff that he had to be seen by a new SCIF doctor. De Leon did not allow Plaintiff to see Dr. Hanson because De Leon had decided it was a "new" injury. However, Dr. Hanson had already submitted a Progress Report to SCIF Claims Examiner, Robin Smith, dated 2-13-08 requesting an MRI for Plaintiff and he suggested that the pain was the same type as Plaintiff's injury in 2005.

Plaintiff's treatment for his work related injury was needlessly delayed because he was told by De Leon that a doctor would be assigned to me by Worker's Comp and Dr. Maywood was selected. Plaintiff then received a letter from SCIF Claims Examiner, Robin Smith, dated 2-26-08 which states, "Arrangements have been made to have you

examined by a physician regarding your injury." On February 28, 2008 Plaintiff was forced to see Dr. Maywood or risk losing his benefits and treatment for his injury instead of Dr. Hanson or Dr. Solorzano or Dr. Turla

Prior to the exam with Dr. Maywood, Plaintiff wrote on the medical questionnaire given to Dr. Maywood's office that he requested "to continue treatment with original provider," meaning Dr. Hanson. Dr. Maywood was not Plaintiff's physician of choice but Plaintiff was forced to see Dr. Maywood through a series of actions by De Leon and the Return to Work Office and they try to shift that responsibility to SCIF. The letter that was sent to Plaintiff by Robin Smith, SCIF Adjuster, clearly states that Dr. Maywood was selected <u>for Plaintiff</u>. Plaintiff had no choice, in spite of his previously being seen by Dr. Hanson, who continued to be an approved SCIF doctor.

> Volume I-Exhibit 47, Dr. Hanson's Clearance for Modified Duty dated 1-30-08; Volume I-Exhibit 49, Dr. Solorzano, Kaiser, Off-Work Order dated 2-11-08; Volume I-Exhibit 52, Dr. Hanson's Progress Report and Off-Work Order dated 2-13-08; Volume I-Exhibit 53, Dr. Solorzano's Evaluation dated 2-13-08; Volume I-Exhibit 59, Dr. Turla, Kaiser, Off-Work Order; Volume I-Exhibit 55, SCIF Letter dated 2-26-08 requiring Plaintiff to see Dr. Maywood; Volume I-Exhibit 62, Dr. Maywood's Initial Orthopedic Evaluation/order for desk work dated 2-28-08; Volume III-Exhibit 4, Declaration by C. De Leon, Page 3, Page 4, Page 5, Lines 1-8; Volume I-Exhibit 58, Letter to Plaintiff from SCIF dated 2-26-08 assigning Dr. Maywood

38. The Modified Duty Order from Dr. Maywood dated February 28, 2008 was legitimate because there are no "prisoners or suspects" who come into the Parole Office, only parolees and their families, law enforcement agencies and other CDCR employees.

However, De Leon then told Plaintiff that he would not accept this Modified Duty Order until Dr. Maywood added the word "parolees" to conform to the work environment. Plaintiff did what De Leon told him to do and went back to Dr. Maywood and asked him to add the word "parolees" to the Return to Modified Duty order. When Plaintiff

returned with the change to the Return to Modified Duty order, although it was misspelled by Dr. Maywood, De Leon said that now that it said "parolees" on the order, that Plaintiff could not work Light Duty.

Again, Plaintiff's pay and benefits were impacted because Plaintiff had to use his own leave credits to supplement his pay. This reduced the amount of leave credits to the point that eventually, he would not be able to get any pay at all if his workers compensation benefits were exhausted or he was ill or injured in a non-work related situation. De Leon's expectations were for no legitimate, independent business reason.

Per the CDCR DOM 31020.7.5.1.1, Rosemond and De Leon were required to work with Plaintiff and the Plaintiff's doctor to "inform the doctor of the employee's work duties and any modified duties which may enable the employee to return to work earlier."

> Volume I-Exhibit 62, Dr. Maywood's Initial Orthopedic Evaluation/order for desk work dated 2-28-08; Volume III-Declaration by C. De Leon, Exhibits G-1 and H-1 and Page 5, Lines 1-8; Volume II-Exhibit 19, DOM 31040.3.3 Limited Term Light Duty Assignments; Volume II-Exhibit 19, DOM 31020.6.3 and DOM 31020.7.7.9 RTWC Responsibilities; Volume II-Exhibit 18, DOM 31020.7.5.1.1, Supervisor's Responsibility

39. Dr. Hanson had provided Plaintiff with an appropriate Modified Return to Work Order on 1-30-2008. Plaintiff did what De Leon told him to do and went back to Dr. Maywood and asked him to add the word "parolees" to the Return to Modified Duty order. When Plaintiff returned with the change to the Return to Modified Duty order, De Leon said that now that it said "parolees" on the order, that Plaintiff could not work Light Duty. Had De Leon not rejected Dr. Hanson as a potential provider because Plaintiff's new injury may have been a re-injury, Plaintiff would have continued seeing Dr. Hanson and been eligible for EIDL. Rosemond and De Leon caused Plaintiff to use his leave credits to supplement his 2/3 pay.

> Volume I-Exhibit 47, Dr. Hanson's Clearance for Modified Duty dated 1-30-08; Volume I-Exhibit 62, Dr. Maywood's Initial Orthopedic Evaluation/order

for desk work dated 2-28-08; Volume III-Exhibit 4, Declaration by C. De Leon, Exhibits G-1 and H-1 and Page 5, Lines 1-8; Volume II-Exhibit 19, DOM 31040.3.3 Limited Term Light Duty Assignments; Volume II-Exhibit 19, DOM 31020.6.3 and DOM 31020.7.7.9 RTWC Responsibilities; Volume II-Exhibit 18, DOM 31020.7.5.1.1, Supervisor's Responsibility

40. The March 18, 2008 Modified Duty Order from Dr. Maywood was presented to De Leon and again was unacceptable. Dr. Maywood was forced on Plaintiff. Dr. Maywood refused to provide Plaintiff with the needed knee surgery and instead forced Plaintiff to perform therapy that re-injured his back. Plaintiff was advised by De Leon and Robin Smith, SCIF Claims Examiner that he had to continue to see Dr. Maywood and after a period of time he could pick another doctor from their approved list. However, in the meantime, Plaintiff's knee surgery, which he would eventually get from Dr. Shoemaker, was delayed and he was forced to suffer inappropriate therapy that required Plaintiff to go to Kaiser Urgent Care. De Leon's decision to preclude Plaintiff from being treated by Dr. Hanson and requiring him to be treated by a physician who eventually prescribed therapy that re-injured his back was for no legitimate, independent business reason.

Volume I- Exhibit 58, SCIF Letter requiring Plaintiff to see Dr. Maywood dated 2-26-08; Volume II-Exhibit 19, DOM 31040.3.5 Determination of Limited Term Light Duty Assignments; Volume III-Exhibit 4, Declaration C. De Leon, Dr. Maywood's Clearance for Modified Duty 3-18-08, Exhibit I-1; Volume II-Exhibit 19, DOM 31020.6.3 and DOM 31020.7.7.9 RTWC Responsibilities; Volume II-Exhibit 18, DOM 31020.7.5.1.1, Supervisor's Responsibility

41. De Leon states that Plaintiff could not return to work from April 1, 2008 through April 22, 2008. Because of De Leon's decisions regarding which doctors could not treat his injuries, Plaintiff was forced to "Kaiser Urgent Care" in order to get relief from the back pain that was caused by the weight-lifting therapy that was prescribed by Dr. Maywood. Plaintiff was forced to perform this therapy or lose his benefits. As a result of Dr. Maywood's therapy, Plaintiff's back went into spasms. When he contacted Dr.

Maywood's office, he was not available and his office suggested that he go to his medical provider, Kaiser for treatment. Once at Kaiser, Plaintiff contacted Robin Smith who stated that he should go home, take muscle relaxers left over from his 2005 injury because she would not authorize payment to Kaiser. None of this would have happened had De Leon not decided to declare Plaintiff's injury a new injury instead of a re-injury.

Delays were encountered regarding the surgery to his knee because De Leon rejected Dr. Hanson. De Leon was not forthright when he stated that Plaintiff did not have a "Pre-Designation Form" in his Personnel File. Plaintiff reported De Leon's dishonesty to Regional Administrator, M. O'Neal. The Pre-Designated Doctor Form was found by De Leon and Mr. O'Neal called Plaintiff and apologized for De Leon. Due to De Leon's decision, Plaintiff was not eligible for EIDL and Plaintiff had to use his personal Leave Credits to supplement his 2/3 pay for an extended period of time while he was forced to shuffle back and forth between doctors.

> Volume III-Exhibit 4, Declaration C. De Leon, Dr. Maywood's Off Work Order dated 4-1-08, Exhibit I-2; Volume VI-Exhibit 1, First Amended Complaint, Page 26 Lines 22-27.

42. De Leon's Declaration omits relevant facts when he states that on April 23, 2008, Plaintiff submitted a Return Work Modified Order from Dr. Maywood. Dr. Maywood provided Plaintiff with a Return to Work Modified Duty on April 22, 2008, Plaintiff tried to submit it on April 22, 2008. Plaintiff was told that Rosemond was not available until April 25, 2008 and he told Plaintiff to come back. Plaintiff returned on April 25, 2008 and Rosemond, Plaintiff's supervisor stated that he did not know of any CDCR Light/Modified Duty policy in Parole. Plaintiff was told to return after May 5, 2008 because RTWC De Leon was on vacation and it included taking off Cinco de Mayo. Plaintiff again reported, this time on May 6, 2008 as directed by Rosemond. Therefore, the May 9, 2008 Memorandum from Rosemond to Mr. O'Neal is factually incorrect in its content and it also states that Plaintiff did not return to work as ordered on Monday April 27, 2008 when April 27, 2008 was a Sunday.

Volume I-Exhibit 63, Dr. Maywood's Clearance for Modified duty dated 4-22-08; Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, Page 21 Lines 26-28 and Page 22 Lines 1-13; Volume III-Exhibit 3, Rosemond Declaration, Letter to M. O'Neal from Rosemond dated 5-9-08, Exhibit D-3;

43. Rosemond's Declaration and De Leon's Declaration omit relevant facts. They didn't just "determine" that Plaintiff's restrictions allowing contact with parolees could be accommodated. Plaintiff had to prove to Rosemond and De Leon that the CDCR did have a Modified/Light Duty policy. Either Rosemond or De Leon could have easily accessed this policy on the Internet or the CDCR Intranet, but again they chose to harass and discriminate against an injured worker by making him do their jobs and providing them with the CDCR policy regarding Modified/Light Duty. To begin with, Rosemond, Plaintiff's supervisor told Plaintiff that there was no such thing as "Light Duty" in Parole on April 25, 2008 when Plaintiff reported to work. Plaintiff was ordered by Rosemond to find the CDCR DOM Limited Term Light Duty Assignments policy while still on sick leave status and on his own time and bring it to Rosemond as proof that such a CDCR policy existed. Again, Rosemond could have found the Modified Duty policy on CDCR's website which includes Title 15 and DOM, but he chose to assign his responsibilities to Plaintiff while Plaintiff was off work disabled.

Plaintiff was told by Mr. Rosemond that he, Plaintiff, had to fax the policy to Mr. De Leon, instead of Rosemond faxing the policy to De Leon. This is another example of harassment against an injured worker.

Once Plaintiff faxed the CDCR DOM policy to Mr. De Leon, Mr. De Leon stated that Parole did not recognize the policy. This is another example of harassment and discrimination against an injured worker because De Leon could have found the policy himself.

As a result of Mr. De Leon's refusal to allow Plaintiff to be treated by Dr. Hanson, or his own personal physician at Kaiser Permanente, as of April he still had not had the required surgery for his knee. During this entire time, Plaintiff had to use his Leave Credits to supplement the approximate 60% of the pay that he was receiving because of his work-related injury. Plaintiff had previously tried numerous times to return to work Light Duty with the same injuries and pain that he was in, but Dr. Maywood, a doctor chosen for him, did not write an appropriate return to work on light/modified duty.

Volume I-Exhibit 62, Dr. Maywood's Initial Orthopedic Evaluation/order for desk work dated 2-28-08; Volume III-Exhibit 4, Declaration of C. De Leon, Dr. Maywood's Clearances for Modified Duty dated 2-28-08, Exhibits G-1 and H-1; Dr. Maywood's Clearance for Modified Duty dated 3-19-08, Exhibit I-1; Dr. Maywood's Clearance for Modified Duty dated 4-1-08, Exhibit I-2; Volume I-Exhibit 63, Dr. Maywood's Clearance for Modified Duty dated 4-22-08; Volume I-Exhibit 65, Fax of DOM Sections to De Leon dated 5-8-08 at 9:19 a.m.; Volume I-Exhibit 65, Fax of Plaintiff's medication information to De Leon's Office dated 5-2-08 at 2:03 p.m.

44. After Plaintiff reported to work on April 25, 2008, Rosemond said that he was concerned that Plaintiff could not perform his duties safely on the medication that he was on. He said that Plaintiff told him that the medications made him dizzy. That was untrue. Plaintiff never told Rosemond that. In fact, De Leon's Declaration regarding this same issue does not support Rosemond's account of what transpired between Rosemond and Plaintiff regarding his medications. De Leon's Declaration states that Rosemond called him and told him that he was concerned about the side effects of Plaintiff's medications; not that Plaintiff had told him that the medications made him dizzy.

Plaintiff did not tell Rosemond that he was dizzy or could not think clearly on the medication. Plaintiff was asked by Rosemond about the possible effects of the medication and Plaintiff responded but did not say that he was dizzy or could not think clearly, otherwise he would not have been able to drive to the office. As with any

medication there are possible side effects, but that does not mean that all of the side effects have the same effects on every person.

Additionally, the doctor did not state that Plaintiff could not drive or that he was a danger to himself or others while on the medication. Plaintiff voluntarily requested that Dr. Maywood change his medication routine so as to ease Mr. Rosemond's concerns regarding Plaintiff's or other person's safety, even though there was no evidence that Plaintiff posed a threat to the safety of others or himself.

Additionally, Plaintiff was unaware that Rosemond had sent a Memorandum dated May 9, 2008 to M. O'Neal which was inaccurate and accused Plaintiff of misconduct. Plaintiff never had an opportunity to "rebut" Rosemond's allegations.

Rosemond's Declaration omits the fact that Plaintiff was told that Modified Duty could not be discussed until De Leon returned from vacation on May 6, 2008. On May 6, 2008 Plaintiff was told to return to work on May 7, 2008. On May 6, 2008 Rosemond told Plaintiff that he had been telling De Leon to prepare a Modified/Light Duty Agreement for weeks and De Leon had failed to prepare one so he had to leave and return on May 7.

> Volume III-Exhibit 3, Letter to M. O'Neal from Rosemond dated May 9, 2008, Exhibit D-3; Volume I-Exhibit 63, Dr. Maywood's Clearance for Modified Duty 4-22-08

45. Rosemond's concern about Plaintiff's side effects is misleading when he stated that he just wanted further clarification regarding the side effects of the medication that Plaintiff was taking. Rosemond's concern about Plaintiff's driving a state car is <u>not</u> plausible because he allowed Plaintiff to drive home without any assistance. If Rosemond was that concerned, he should have another employee drive the Plaintiff home. The doctor's orders did not state that Plaintiff could not drive, or that he was a danger to himself or others. Plaintiff faxed the medication information to De Leon's Office per his request on May 2, even though De Leon is not a medical professional capable of making medical judgments about Plaintiff.

Additionally, the pharmaceutical information faxed to De Leon shows that the medications had "possible side effects." Plaintiff never complained of dizziness. The Declarations of Rosemond and De Leon fail to state that Plaintiff voluntarily had the doctor change the medication regime in order to be allowed to work Modified/Light Duty without further delay.

Volume III-Exhibit 3, Declaration of K. Rosemond, Letter to M. O'Neal from Rosemond dated May 9, 2008, Exhibit D-3; Volume I-Exhibit 65, Fax to De Leon for medication information on May 2, 2008

46. It was impossible to have done what De Leon states. He says that Plaintiff advised De Leon and Rosemond on May 5, 2008 that he was no longer taking the medication. De Leon was not on duty May 5, 2008. He had taken that day off. Plaintiff could not have "advised" De Leon or Rosemond on May 5 because Plaintiff returned to work on May 6, per Rosemond's direction, as De Leon was off for Cinco de Mayo. *Plaintiff did not return to Dr. Maywood for "clarification" regarding the effects of the medication. Plaintiff's real intent was to return to Dr. Maywood, get his medication schedule changed so he could satisfy Rosemond and De Leon and begin his Light Duty Assignment.*

Volume III-Exhibit 3, Declaration of K. Rosemond, Letter to M. O'Neal from Rosemond dated May 9, 2008, Exhibit D-3; Volume I-Exhibit 63, Dr. Maywood's Clearance for Modified Duty dated 4-22-08

47. De Leon's, Rosemond's, and Castaneda's statements regarding a "Standard Form" that Plaintiff was provided is misleading because there is no CDCR "Standard Form" for Light Duty. Plaintiff was ordered to return to work on May 7, 2008 and they provided him with what they call a "Standard Form Limited Duty Agreement." It included only the restrictions from Plaintiff's doctor. Not only does CDCR not have a "Standard Form" as they claim, their "Standard Form Limited Duty Agreement" violates DOM which states that Modified/Light Duty Agreement is an "interactive" process by which an agreement is reached between the RTWC, Employee and Supervisor. There was no

discussion or interactive process in the development of the purported Light Duty Agreement. The form did not specify the duties that Plaintiff was going to perform while on Limited Term Light Duty. Plaintiff made it clear that he could not sign a "blank check" because it did not specify the duties expected of him while on Light Duty and did not waive any of the "essential functions" of the job. Based on his previous experience of the egregious violation of his previous Light Duty Agreement of 1-17-07, he was very concerned that it may be happening again. In fact, he was told verbally by Rosemond that he would be O.D. every day and carry a caseload. Plaintiff said that was unreasonable and would not be considered "Light Duty."

> Volume II-Exhibit 19, CCR Title 15 Section 3436, Limited Term Light Duty Assignments; Volume II-Exhibit 19, DOM 31040.3.1, Light Duty Assignments; Volume II-Exhibit 19, DOM 31040.3.3, Waiving of Essential Functions; Volume II-Exhibit 19, DOM 31040.3.5, Light Duty Determination; Volume I-Exhibit 24, Light Duty Agreement dated 1-17-07; Volume II-Exhibit 18, DOM 31020.7.5.1.1, Supervisor's Responsibility; Volume II-Exhibit 19, DOM 31020.7.6.3 and DOM 31020.7.7.9, RTWC Responsibilities

48. When Plaintiff said that he could not sign a "blank check" because no light duties were named on this document, he was told to return on May 8, 2008. On that day, he was handed a white sheet of paper with the heading "Light Duty Assignment for David Tristan" and was asked again to sign the purported "Light Duty Agreement."
There was no signature block on this document only on the "Standard Form." However, this list of duties was consistent with the duties of an Agent on Full-Duty. In fact, Rosemond stated in his Declaration that he obtained these duties off of an internet site, which means that they were not tailored to Plaintiff's disabilities.

The Limited Term Light Duty Agreement dated May 8, 2008, included in De Leon's Declaration as Exhibit K-1, is a false and misleading Exhibit. He was never presented with the Limited Term Light Duty Agreement of May 8, 2008, Exhibit K-1. He has only ever been asked to sign the one given on May 7, which is dated May 6, 2008. The Agreement dated May 6, 2008 has no statement at the bottom that there is any

attachment. The Agreement dated May 8 does, but it was never given to Plaintiff. When he had complained the day before that he would be signing a "blank check," he was given only a list of duties on May 8, which is Exhibit K-2. He was not given Exhibit K-1.

On May 8, 2008, Plaintiff was told to sign the May 6, 2008 document because he had now been given a list of duties. However, as stated, the majority of the duties listed in this document are expected to be performed only by an agent working full-duty.

The list of duties given as Exhibit K-2 in De Leon's Declaration is almost identical to those listed in Exhibit B-1 in Castaneda's Declaration which lists the duties of a full-time Parole Agent. In fact, some of the duties in Exhibit K-2 are in addition to those outlined in Exhibit B-1. In Rosemond's Declaration he admits that when he was given the assignment by De Leon to come up with a list of duties for Plaintiff, all he did was go to the SPB website and get a list of the duties for a full time Parole Agent.

Since Castaneda states in her Declaration on Page 2, "I am familiar with the job duties of each CDCR employee classification held by employees working in Parole Region IV, including the Parole Agent series (Parole Agent I, Parole Agent II Specialist, Parole Agent III)…" However, Castaneda supported her subordinate De Leon on May 8, 2008 in expecting Plaintiff to perform the entire full-duty job duties of a Parole Agent I listed on the plain paper document presented to Plaintiff on that day.

> Volume II-Exhibit 19, CCR Title 15 Section 3436, Limited Term Light Duty Assignments; Volume II-Exhibit 19, DOM 31040.3.3, Waiving of Essential Functions; Volume III-Exhibit 4, Declaration by C. De Leon, Exhibits J-1 and K-2; Volume III-Exhibit 6, Declaration by Castaneda, Page 2, Lines 10-12 and Exhibit B-1; Volume III-Exhibit 3, Declaration by Rosemond, Page 5 Lines 1-2

The May 6, 2008 document and the May 8, 2008 document are illegal documents. The language in the documents contradicts the language in the CCR and the DOM. The

RTWC Office added Plaintiff's limitations noted by the doctor onto the Light Duty Agreement letter. However, the Limited Term Light Duty Assignment letter includes misstatements and misrepresentations of CCR Section 3436. The letter says, "Limited Term Light Duty provides that a light duty assignment may be provided as long as medical restrictions outline a reasonable expectation that an employee will be returning to their regular assignment within 60 days. *Only when the employee is expected to return work (sic) within the 60 day period is light duty considered."* The RTWC Office has incorrectly paraphrased this regulation and the expectations of the employee.

> Volume II-Exhibit 19, CCR Title 15 Section 3436, Limited Term Light Duty Assignments; Volume III-Exhibit 4, Declaration by C. De Leon, Exhibit J-1

No where in this regulation language does it say that the employee is *expected to return to work within the 60 day period*. In fact, the language in both in CCR 3436 and in DOM 31040.3.7 specifically states, "*Limited Term Light Duty for any one employee shall not extend beyond 60 days in a 6 month period* for any medical condition." There is *no provision to require that the employee return to work after the 60 day light duty period expires.*

Plaintiff pled with Mr. Rosemond and Mr. De Leon to specify the Light Duties that he would not be required to perform but they only prepared and presented duties expected of a Parole Agent working Full Duty.

The following duties included in the proposed "Light Duty Assignment for David Tristan" are identical to those expected of a Parole Agent working Full Duty. Plaintiff's supervisor, K. Rosemond admitted in his Declaration that he "devised" Plaintiff's duties by downloading them off of the SPB website for Parole Agent I.

These are the duties assigned to the Agent of Record (AOR) and cannot be expected of someone on Light Duty, especially someone who has already been assigned to OD Duty every day of the week and given a caseload and cannot leave the office:

- Prepares reports to the Board of Prison Terms
- Attends Parole Revocation Hearings

- Maintains supervision records
- Supervises parolees/releasees
- Works with parolees' friends and relatives, community service agencies, and law enforcement agencies
- Answer telephone calls for the unit and your caseload (this assumes that the Parole Agent on Light Duty will also have an assigned caseload)
- Complete CDCR1502(b) Initial Charge Reports
- Complete Pre-parole packages
- Arranges for services for parolees who have identified needs in such areas as employment, housing, medical care, counseling, education, and social activities.
- Testifies in administrative hearings and judicial proceedings
- Conducts investigations when parole violation or criminal behavior is alleged which includes interviewing
- Complete Discharge Reviews
- Conduct Initial interviews with parolees
- Conduct interviews with parolees and witnesses
- Participates in the assessment of parolees risk to the community and the type of services required.

The language in this document also includes the assignment as OD duty every day of the month and being assigned a caseload.

Although Plaintiff reported the misuse and misapplication of the DOM and CCR by the RTWC Office to M. O'Neal, Region IV, he received a response from De Leon's supervisor, M. Castaneda. In her e-mail to Plaintiff on May 8, 2008 at 11:00 a.m. was a statement, "I've reviewed the 'Limited Term Light Duty Agreement' and the attachment 'Light Duty Assignment for David Tristan' dated May 8, 2008, by Cheyenne De Leon, RTWC. Under 31040.3.5 Determination 'Discuss the prospective LD assignment with the employee and document the agreement or refusal of LD in writing,' I believe we have met all the criteria set forth in this section. If you do not agree, please provide in writing your comment/concerns and we will work together to resolve them." This disingenuous

e-mail omitted major portions of the DOM section from which she was quoting and other sections of the DOM that applied to Plaintiff's situation. She also chose not to look at CCR 3436 or to the May 23, 2007 which applied to Plaintiff's situation. She states in her Declaration, on Page 7, Lines 23 and 24 that "the May 23rd memo is the current policy in effect in Parole Region IV and reiterates substantively the practice utilized by Parole Region IV since January 2007." However, it is clear from her actions on May 8 that she was not observing this policy. She quoted one bullet in DOM 31040.3.5 and omitted two others in the same section which state, "Review the medical documents for details of the medical limitations affecting the essential functions of the employee's position" and "Initiate the interactive process by discussing the limitations with the employee." Nothing was discussed. Plaintiff was presented these job duties and that was it. DOM section 31040.3.3 and the May 23, 2007 memo clearly state that it is the policy of the CDCR to provide light duty assignments to those employees who cannot perform the essential functions of their job and those "essential functions" will be "temporarily waived." Neither she nor De Leon complied with this policy requirement. It is clear from the list of duties proposed by De Leon and Rosemond, a list of duties that she states in her Declaration on Page 2 that she is familiar with, that those duties are the duties of a full-time Parole Agent. Not only could most of those duties not have been performed in the Parole Office, the list of duties was so extensive they could not have been performed in conjunction with performing as the OD Duty every day and carrying a caseload. She stated in her e-mail she found nothing wrong with it. Plaintiff did respond to her e-mail and told her that he had forwarded his concerns to M. O'Neal. Ms. Castaneda made no further effort to resolve this egregious wrongdoing.

The RTWC Office continues to act outside of the scope of the DOM, the CCR, and the May 23, 2007 memo that Castaneda states they are adhering to. Attached to her subordinate De Leon's Declaration is an Exhibit O-2. The RTWC Office has continued to use the document with illegal language that De Leon had presented to Plaintiff approximately 2 years earlier. Plaintiff signed this document on March 23, 2010. No where in this document are any duties listed let alone light duties listed or addressed. Also, the language continues to misquote the CCR 3436 and tells the person signing the

form that they would be expected to return to work full duty after the 60-day light duty expires. Nothing in the CCR 3426 says that. Plaintiff had no choice but to sign the document in order to return to work. This illegal document has never been corrected by Castaneda or De Leon and contradicts what they say in their Declarations about their Region IV RTW Office abiding by the regulations.

The purported Light Duty Agreement included Plaintiff preparing Violation Reports and presenting cases before the Parole Board. These duties cannot be done by an Agent assigned only to the Office. These duties are performed only by The Agent of Record (AOR) not another agent assigned to the office. The Agent of Record is the one who writes the Parole Violation Report and presents the case before the Parole Board.

These duties could not be performed by someone who was not involved in the arrest of the parolee, who would not know the circumstances of the arrest, the force used and the parolee's reactions to the arresting agent or agents.

Mr. Rosemond told Plaintiff verbally that in addition to being OD everyday of the week and performing the duties outlined in the proposed purported Limited Term Light Duty Assignment that he might have to perform other duties as required.

Mr. Rosemond and Mr. De Leon refused to enter into an interactive process in an effort to resolve the issues regarding Light Duty as required by DOM. Plaintiff was requesting that Mr. Rosemond and Mr. De Leon adhere to the policy regarding Light Duty as required by CDCR DOM. Their refusal to appropriately apply the DOM regulations was for no legitimate, independent business reason.

> Volume III-Exhibit 4, Declaration by C. De Leon, Exhibits J-1, K-1, and K-2; Volume II-Exhibit 19, CCR Title 15 Section 3436, Limited Term Light Duty Assignments; Volume II-Exhibit 19, DOM 31040.3.1, Light Duty Assignments; Volume II-Exhibit 19, DOM 31040.3.3, Waiving of Essential Functions; Volume II-Exhibit 19, DOM 31040.3.5, Light Duty Determination;

Volume II-Exhibit 19, DOM 31040.3.7, Duration; Volume I-Exhibit 24, Light Duty Agreement dated 1-17-07; Volume II-Exhibit 18, DOM 31020.7.5.1.1, Supervisor's Responsibility; Volume II-Exhibit 19, DOM 31020.7.6.3 and DOM 31020.7.7.9, RTWC Responsibilities; Volume VI-Exhibit 1-First Amended Complaint, Pages 26 and 27; Volume I, Exhibit 64, Proposed Limited Light Duty Assignment dated 5-6-08 and Light Duty Assignment for David Tristan; Volume III-Exhibit 6, Declaration of Castaneda, Exhibit B-1 (Duty Statement, Parole Agent I, Region IV Parole Unit); Volume III-Exhibit 4, Declaration of De Leon, Exhibit O-2

49. Rosemond's Declaration is factually incorrect and omits relevant facts as it relates to the CDCR DOM Policy regarding Light Duty when he states in his Declaration that specific duties cannot be articulated because "Parole Agents hours and duties are flexible." A good supervisor can easily make a determination regarding those duties that can be performed in the confines of an office. Especially since the assignment of OD every day also includes added duties that arise from being the OD. Anytime a Parole Agent acts as OD, it frees up the other agents in the Unit to perform those duties that he or she would otherwise by unavailable for. If in addition to OD duty, the Parole Agent assigned to Light Duty has to complete other types of paperwork for the agents, it provides even more time for those agents to complete their necessary work.

Rosemond claims that specific duties cannot be articulated because "Parole Agents hours and duties are flexible," but the purported Standard Light Duty Form and its Attachment indicate that Plaintiff was going to be assigned OD everyday of the week. This means that Plaintiff's hours would not be "flexible," because he would be restricted to working 8:00AM to 5:00PM, and the duties would not be "flexible" because they would be restricted to those that he could perform in the office. Additionally, the purpose of a Light Duty agreement per the DOM is to specify the duties that an employee will be required to perform.

De Leon's, Castaneda's and Rosemond's declarations are misleading regarding Light Duties, because Plaintiff was given a list of duties, the majority of which could only be performed by Parole Agents who work Full Duty. This is in violation of CDCR DOM Section 31040.3.3 and the CCR Section 3436 which state that when an employee is given a Light Duty Assignment that the *"essential functions of the job" are temporarily waived.*

This constitutes dishonesty and discrimination against a disabled Employee because the CDCR does permit Light Duty in DOM 31040.3.1; DOM 31040.3.3; and DOM 31040.3.5, and neither Region IV Parole, nor the Parole Division can have a policy separate from the CDCR.

Rosemond told Plaintiff that he would also be required to carry a Parolee Caseload. Although it was not included specifically in the Modified/Light Duty Agreement that Plaintiff was expected to sign, it was implied in the last bullet of the duty list he was given which stated, "Answer telephone calls for the unit and your caseload,"

> Volume II-Exhibit 19, CCR Title 15 Section 3436, Limited Term Light Duty Assignments; Volume II-Exhibit 19, DOM 31040.3.1, Light Duty Assignments; Volume II-Exhibit 19, DOM 31040.3.3, Waiving of Essential Functions; Volume II-Exhibit 19, DOM 31040.3.5, Light Duty Determination; Volume III-Exhibit 6, Declaration by Castaneda, Exhibit B-1; Volume III-Exhibit 4, Declaration by De Leon, Exhibit K-2; Volume III-Exhibit 3, Declaration by Rosemond, Page 5, Lines 7-9

50. Plaintiff did not refuse to sign the amended Light Duty Agreement. He was desperately trying to get the RTW Office to comply with the DOM and the CCR. He requested to meet with Mr. De Leon and a union representative. De Leon refused. He claimed, and continues to claim in his Declaration, that Plaintiff was only entitled to representation if he was facing "disciplinary" action. This is incorrect and De Leon violated Plaintiff's rights. The Ralph C. Dills Act states that *employees have a right to*

union representation if working conditions, pay or benefits are being impacted. Additionally, the Unit 6 Union Contract, Employee Rights, Section 6.06 states "*Each employee retains all rights conferred by Section 3512, et seg., of the Ralph C. Dill Act.*"

Additionally, Plaintiff was never asked to sign an "amended" Light Duty Agreement. The Declarations by De Leon, Rosemond and Castaneda are misleading. The document included as Exhibit K-1 with De Leon's Declaration is misleading and false. It implies that it was presented to Plaintiff to sign and it was not.

When Plaintiff returned to the Chula Vista Office on May 8, his supervisor Rosemond handed him the sheet of paper with the duties of a Parole Agent on it with the title "Light Duty Assignment for David Tristan." He did not hand him any new document to sign as portrayed in Exhibit K-1. De Leon works in Diamond Bar, California in the Region IV Office. The discussion that he had with De Leon was over the phone with Rosemond present in the Chula Vista Office. This Exhibit misrepresents what De Leon presented to Plaintiff that day.

Plaintiff never refused to work light duty. The Declarations fail to note that Plaintiff had to provide Rosemond and De Leon with the CDCR policy, in an effort to work light duty. Plaintiff kept stating that he was not refusing to sign the Light Duty Agreement, but he wanted it clarified so that he would not be faced with the same excessive, abusive and hostile work environment he faced during his first Light Duty Assignment in January, February and March of 2007, after the October 21, 2005 injury.

Mr. Rosemond kept stating that Plaintiff was "refusing" to sign the Light Duty Agreement and Plaintiff kept stating that he was not but that it needed further clarification or specificity.

What Rosemond portrays as a "request" was really an "ultimatum" because Plaintiff knew if he did not sign it, and Rosemond mischaracterized it as a refusal, Plaintiff was going to lose his pay and benefits. Plaintiff did lose his pay and benefits until he

Whistleblew to Kathy Costner in CDCR Headquarters and only then was his pay and benefits restored.

De Leon and Castaneda claim in their Declarations that Plaintiff did not respond to Castaneda's request that Plaintiff put his concerns in writing. He did explain in his E-Mail to O'Neal, Castaneda's supervisor, what was happening. He sent copies to Castaneda and De Leon and Rosemond. However, they omit in their Declarations the fact that Plaintiff had provided an example of a Light Duty Agreement to Rosemond and De Leon, that he expressed his concerns to M. O'Neal because Rosemond and De Leon RTWC were not being responsive to his concerns, and that he called Castaneda on the phone in her office and left a message and she never returned the call. Neither O'Neal nor Castaneda responded to his pleas to discuss the matter any further.

> Volume III-Exhibit 4, Declaration by C. De Leon, Exhibits J-1, K-1, and K-2; Volume I-Exhibit 25, Excessive Workload during Light Duty Status; Volume I-Exhibit 66, E-Mails to O'Neal, Castaneda, De Leon, and Rosemond dated 5-8-08; Volume II-Exhibit 20, BU 6/LBFO section 2.02, Access to Employees; Volume II-Exhibit 20, BU 6/LBFO section 6.06, Employee Rights; Volume II-Exhibit 20, Public Employee Relations Board (PERB) Chapter 10 Section 3512, Right to a Union representative; Volume I-Exhibit 24, Light Duty Agreement dated 1-17-07; Volume I-Exhibit 87, Internal Affairs Investigation Report pages 18 and 19 of 51; Volume I-Exhibit 76, E-Mails dated 5-22-08 and 5-29-08 to K. Costner, De Leon, Castaneda, T. Hoffman, S. Kernan, R. Harvey re: denial of pay

51. As already stated in this report, De Leon was incorrect in his statement that he was not required to allow Plaintiff to have a union representative present because this was not a disciplinary matter and that Plaintiff refused to put his concerns in writing. De Leon violated the Unit 6 Contract and the Ralph C. Dills Act when he refused to meet with Plaintiff and his representative. De Leon could have asked a CDCR Employee Relations Officer whether Plaintiff was entitled to a union representative, but he apparently did not.

If he did, he does not state that he did in his Declaration. De Leon is factually incorrect when he states that Plaintiff was not entitled to a representative because this was not a "disciplinary matter." Plaintiff's workload and working conditions were being impacted and De Leon and Rosemond were violating the CDCR regulations regarding Modified/Light Duty, which was creating an adverse situation for Plaintiff. De Leon's decision to refuse to allow Plaintiff to be represented during these discussions was made for no legitimate, independent business reason.

It was and is Plaintiff's opinion that he was facing an "adverse" matter because he was being threatened by Mr. Rosemond that his request for clarification was going to be classified/characterized as a refusal to sign the Light Duty Agreement. A refusal to sign the Light Duty Agreement would in essence be a "refusal" to work Light Duty. A refusal to work Light Duty would result in the "cancellation" of the employee's pay and the employee's benefits for him and his family such as health, dental and vision insurance, retirement contributions etc.

> Volume I-Exhibit 65, Copy of Fax of DOM sections to De Leon dated 5-8-08; Volume I-Exhibit 25, Excessive Workload during Light Duty Status; Volume II-Exhibit 19, DOM 31040.3.9, Refusal of Light Duty Assignment; Volume II-Exhibit 20, BU 6/LBFO section 2.02, Access to Employees; Volume II-Exhibit 20, BU 6/LBFO section 6.06, Employee Rights; Volume II-Exhibit 20, Public Employee Relations Board (PERB) Chapter 10 Section 3512, Right to a Union representative.

52. De Leon and Castaneda's Declarations are factually incorrect and omit relevant facts. They are misleading when they state that Plaintiff refused to place his concerns in writing and instead wrote an E-Mail to Mr. O'Neal. De Leon and Castaneda's Declarations omit the fact that Plaintiff had already provided a copy of the CDCR DOM Policy to Mr. De Leon and Mr. De Leon's response to Plaintiff was that Region IV Parole did not recognize the CDCR DOM Policy. Their Declarations omit the fact that Plaintiff had already provided a copy of an acceptable Light Duty Agreement that Mr. De Leon and Mr. Rosemond could use as a "template" to form their Light Duty Agreement. De

Leon's Declaration omits the fact that Mr. Rosemond had already decided that Plaintiff's request to meet and have an "interactive" process was in essence a "refusal to sign" the Light Duty Agreement.

Plaintiff did place his concerns in writing but because his "legitimate" concerns were ignored by Rosemond and De Leon in the RTW Office and they were unresponsive he sent his concerns in writing directly to Mr. O'Neal the Regional Administrator.

> Volume II-Exhibit 19, CCR Title 15 Section 3436, Limited Term Light Duty Assignments; Volume II-Exhibit 19, DOM 31040.3.1, Light Duty Assignments; Volume II-Exhibit 19, DOM 31040.3.3, Waiving of Essential Functions; Volume II-Exhibit 19, DOM 31040.3.5, Light Duty Determination; Volume I-Exhibit 24, Light Duty Agreement dated 1-17-07; Volume II-Exhibit 18, DOM 31020.7.5.1.1, Supervisor's Responsibility; Volume II-Exhibit 19, DOM 31020.7.6.3 and DOM 31020.7.7.9, RTWC Responsibilities; Volume I-Exhibit 65, Copy of Fax of DOM sections to De Leon dated 5-8-08

53. Castaneda's Declaration is incorrect and omits relevant facts when it states that Ms. Castaneda contacted Plaintiff and sent an e-mail asking him to submit his concerns in writing. She fails to include the fact that Plaintiff placed a telephone call to Ms. Castaneda and left a message and Ms. Castaneda did not return his phone call. Castaneda's e-mail to Plaintiff basically stated that she did not see any problem with the manner in which Plaintiff's Light Duty was being handled. Therefore, any response from Plaintiff to her was going to be useless. The Plaintiff did express his concerns in writing to Mr. O'Neal, because Plaintiff was not getting any cooperation from the Return to Work Office which was and is under the direction of Ms. Castaneda and no one responded to the concerns that Plaintiff expressed to O'Neal.

> Volume I-Exhibit 66, Copy of E-Mails to M. O'Neal, Castaneda, De Leon and Rosemond dated 5-8-08

54. Plaintiff sent his concerns to Mr. Marty O'Neal the Regional Administrator who was Mr. Castaneda's second line supervisor and Mr. Rosemond's third line supervisor. Castaneda responded by stating that she did not see any problems with the purported Light Duty Agreement which was presented to Plaintiff in what De Leon and she refer to as a "Standard Form," when in reality the CDCR does not have any such standard form. The CDCR always has number that identifies a form as a CDCR Form. This purported form is in memorandum format, as it is not a form.

Volume I-Exhibit 66, Copy of E-Mails to M. O'Neal, Castaneda, De Leon and Rosemond dated 5-8-08

55. Plaintiff was told by Rosemond that Plaintiff's attempts to discuss and reach an agreement regarding Light Duty was going to be "characterized as a refusal" to sign the purported Light Duty Agreement which was not true. Plaintiff was under tremendous stress because Rosemond's mischaracterization was going to adversely impact Plaintiff's pay and benefits. He was not refusing to work Modified Duty and Plaintiff was aware that this was not a Light Duty Agreement as it included duties that he could not reasonably perform while OD everyday of the week. He would not have been the Agent of Record for some of the work that the purported Light Duty document was going to require of him. The OD does not prepare Board Reports and attend Board Hearings, the AOR does.

Plaintiff was not given all of the SCIF Injury Report. The "Reviewers" page was missing. Rosemond stated that Rodriguez told him not to give it to Plaintiff, that he would get it later. Plaintiff has not received a copy of this page to date. In Rosemond's and De Leon's Declarations they state that the injury report had to be re-written by Rosemond because the supervisor has to complete it. However, a review of what Plaintiff documented and what Rosemond documented and sent to SCIF are different and dishonest. This may have caused SCIF to initially deny Plaintiff's claim and caused Plaintiff additional stress while he tried to obtain the appropriate documentation from his clinicians regarding the work-related stress that was caused by Rosemond, De Leon and

Castaneda. What Rosemond wrote on the SCIF form, which omitted facts written by Plaintiff on his SCIF form, occurred for no legitimate, independent business reason.

Plaintiff had tried numerous times to get Parole to recognize that there was a CDCR Policy regarding Light Duty and that Parole did not have the authority to create its own policy which contradicted CDCR policy as articulated in CDCR's DOM. This was in *retaliation* for Plaintiff's attempts to get Parole to adhere to CDCR policy.

Plaintiff had been victimized by his previous supervisors when he was working Light Duty by assigning him additional excessive workload while he was OD everyday of the week. Plaintiff's peers, other Parole Agents in Chula Vista #1, and an agent in the FUNA position, also noticed this egregious workload that had been assigned to him.

The excessive workload that he had been assigned in January, February and March of 2007 created tremendous stress because it was unreasonable and he was denied overtime to complete the casework even though he was told to "get it done." He was ignored by his supervisors when he tried to talk to them about it.

All that Garcia and Ayala had done was in violation of the Bargaining Unit 6 Contract/LBFO and Parole Policy regarding workload and overtime per Memorandum by T. Hoffman dated 2-1-08.

When Plaintiff realized that Rosemond, the Unit Supervisor, and De Leon, the RTWC, and Castaneda, supervisor of the RTW Office were refusing to abide by the DOM and the CCR, and he received no reply from the phone call placed to Castaneda or from the e-mail he had sent to their supervisor M. O'Neal, Plaintiff was convinced that if he signed the "Standard Form" with the additional list of Full Duties included, he was convinced that the same thing was going to happen to him again.

> Volume II-Exhibit 19, DOM 31040.7, Refusal of Light Duty Assignment; Volume I, Exhibit Excessive Workload during Light Duty Status; Volume I-

Exhibit 24, Light Duty Agreement dated 1-17-07; Volume I-Exhibit 87, Internal Affairs Investigation Report pages 18 and 19 of 51; Volume I-Exhibit 67, SCIF Form Workers' Comp Claim dated 5-8-08 and SCIF Form Employer's Report of Injury dated 5-8-08; Volume I-Exhibit 68, Dr. T. Robinson's Evaluation and Diagnosis dated 5-8-08; Volume II, Exhibit 20, Bargaining Unit 6 Contract/LBFO section 19.06, CDC Parole Agent Workload; Volume I-Exhibit 94, Memo from T. Hoffman re: Authorizing Overtime and Modifying Cases with Excess Points; Volume I-Exhibit 91, Plaintiff's Caseload Roster dated 3-20-07; Volume I-Exhibit 29, Excessive Workload after return to Full Duty 3-14-07.

56. Rosemond's, De Leon's and Castaneda's Declarations are an inaccurate portrayal of the events that occurred. They fail to include relevant facts regarding the CDCR purported good faith effort to reach an agreement regarding Light Duty.

Rosemond's and RTWC De Leon's interactions with Plaintiff were "*ultimatums*" under the threat of cancelling Plaintiff's benefits, which is *retaliation against the Plaintiff and discrimination of a disabled employee.*

Plaintiff's issues were that Parole had to abide by the CDCR DOM regulations regarding Light Duty and RTWC De Leon was not being forthright regarding a "Standard Light Duty Agreement" because this would violate the intent of an "interactive" process between Plaintiff and RTWC and Supervisor.

Plaintiff had to provide DOM sections regarding Light Duty to Rosemond and RTWC De Leon and they both stated that they did not recognize it or abide by it which is *discrimination against a disabled employee.*

Either RTWC De Leon and/or Castaneda communicated to SCIF that Plaintiff was refusing to work Light Duty and had Plaintiff's pay and benefits cancelled.

Volume II-Exhibit 18, DOM 31020.7.5.1.1, Supervisor's Responsibility; Volume II-Exhibit 19, DOM 31020.7.6.3 and DOM 31020.7.7.9, RTWC Responsibilities; Volume I-Exhibit 65, Copy of Fax of DOM sections to De Leon dated 5-8-08; Volume II-Exhibit 19, DOM 31040.3.9, Refusal of Light Duty Assignment; Volume I-Exhibit 76, Copy of E-mails dated 5-22-08 and 5-29-08 to K. Costner, C. De Leon, M. Castaneda, T. Hoffman, S. Kernan, R. Harvey re: Denial of Pay; Volume I-Exhibit 69, Letters from SCIF Canceling Plaintiff's Workers' Comp Benefits dated 5-14-08 and 5-15-08; Volume I-Exhibit 79, Letter from SCIF Restoring Plaintiff's Workers' Comp Benefits dated 5-28-08

57. De Leon's, Rosemond's and Castaneda's Declarations are factually incorrect and they omits relevant facts when they state that the Light Duty Agreement had been "amended" to account for duties that Plaintiff could perform with his medical restrictions.

The purported Standard Form was not "amended." The day following Plaintiff's complaint that he would not sign a "blank check," a page was presented to him that listed the Full Duties of an Agent. Plaintiff's copy of the Standard Form dated May 6, 2008 did not refer to the attachment which cause Plaintiff additional concern. In an effort to resolve the issue, Plaintiff provided an example of a Light Duty Agreement and it was not considered by Mr. De Leon. De Leon's Proposed Light Duty Agreement did not have the appropriate level of detail, nor did it describe the waiving of *"essential functions"* and the waiving of essential functions is required by CDCR policy.

The purported Light Duty Agreement in the "Standard Form" with the "Attachment" could have been easily used to subject Plaintiff to the same abuse he suffered in 2007 under Ayala, Garcia and Rodriguez. Rodriguez was still the District Administrator. Finally, Plaintiff was given "ultimatums" and there was never any meaningful interactive process as required by CDCR DOM.

Volume I- Exhibit 24, Light Duty Agreement 1-17-07; Volume III-Exhibit 4, Declaration C. De Leon, Exhibit J-1 and Exhibit K-2; Volume I, Exhibit

Excessive Workload during Light Duty Status; Volume II-Exhibit 20, BU 6/LBFO section 2.02, Access to Employees; Volume II-Exhibit 20, BU 6/LBFO section 6.06, Employee Rights; Volume II-Exhibit 20, Public Employee Relations Board (PERB) Chapter 10 Section 3512, Right to a Union representative; Volume II-Exhibit 18, DOM 31020.7.5.1.1, Supervisor's Responsibility; Volume II-Exhibit 19, DOM 31020.7.6.3 and DOM 31020.7.7.9, RTWC Responsibilities; Volume I-Exhibit 69, Letters from SCIF Canceling Plaintiff's Workers' Comp Benefits dated 5-14-08 and 5-15-08; Volume I-Exhibit 79, Letter from SCIF Restoring Plaintiff's Workers' Comp Benefits dated 5-28-08

58. The time to resolve the issues was <u>before</u> the Light Duty Agreement was signed, not after the fact. Whether Plaintiff could have resolved issues regarding excessive workload in the future or not, and whether he had avenues by which to address this concern, Plaintiff had already experienced the harassment, discrimination and retaliation from the CDCR and he had every reason to want specifics in the Light Duty Agreement.

De Leon would not even agree to meet with the Plaintiff and the Plaintiff's union representative regarding workload issues in the Modified/Light Duty Agreement. If De Leon was going to refuse to meet with Plaintiff and his union representative beforehand regarding the proposed light duty agreement, Plaintiff did not have any confidence that De Leon and Rosemond grant him the same access to a union representative in the future.

Plaintiff had tried a variety of avenues in the past when Mr. M. Ayala and Mr. A.J. Garcia had assigned him excessive workload and he was not provided any relief. Plaintiff not only complained to Garcia, but also Rodriguez and wrote a Letter to Fagot without any relief or protection. Plaintiff had been denied overtime when he complained that the workload was excessive and Rodriguez was the District Administrator who had failed to attempt to resolve Plaintiff's issues in the past.

Due to the stress caused by Rosemond and De Leon regarding this issue, Plaintiff immediately went to Kaiser for treatment that same day, May 8, due to the stress to which he was subjected. Dr. T. Robinson saw Plaintiff at 3:45 p.m. and he was evaluated. Dr. Robinson stated, "He has experienced retaliation in the form of greatly increased workload over the years which he did. He has seen several Kaiser providers and has been treated for anxiety and Bell's palsy. He has not been treated for depression." Plaintiff had no expectation that he would be treated fairly by Rosemond or the RTW Office. He had experienced severe stress when working Light Duty in 2007 and he had no expectation that it would be any different because of the unreasonable list of duties that he was given on May 8. Since Plaintiff had to fax those DOM sections to De Leon on May 8 that defined Light Duty, and since De Leon did not recognize the Light Duty Agreement letter dated January 17, 2007 as a legitimate document, and the list of duties that he was given by De Leon and Rosemond on May 8 were a description of a Parole Agent working full duty, he had no expectation that he would be able to work in a reasonable Light Duty Assignment under their direction.

> Volume I-Exhibit 24, Light Duty Agreement dated 1-17-07; Volume I-Exhibit 87, Internal Affairs Investigation Report pages 18 and 19 of 51; Volume I, Exhibit Excessive Workload during Light Duty Status; Volume I-Exhibit 65, Copy of Fax of DOM sections to De Leon dated 5-8-08; Volume I, Exhibit 68, Dr. T. Robinson's Evaluation and Diagnosis dated 5-8-08

59. De Leon is misleading in his Declaration when he states that the Plaintiff's Workers' Compensation stress claim was "processed without delay." That is not true.
Plaintiff completed the injury report and gave it to Rosemond in the morning on May 8, 2008. However, De Leon states in his Declaration that although Plaintiff gave the SCIF Form to Rosemond on May 8, that he did not receive the complete form with the completed Manager's Review page from Rosemond until May 12, four days later. De Leon told Rosemond to complete a new form because the Employer's Form was originally filled out by Plaintiff. Four days later, on May 16, De Leon said that he received this new form. Eight days is not "processed without delay."

A review of Plaintiff's statement as compared to Rosemond's statement indicates that Rosemond's document is different than Plaintiff's document. Rosemond in essence falsified the reason that Plaintiff had filed the injury report. Rosemond could have copied Plaintiff's statement word for word but he decided not to. Rosemond's decision to leave out pertinent facts stated by Plaintiff was made for no legitimate, independent business reason. This type of falsification of a document that is critical to Plaintiff should have resulted in disciplinary action against Rosemond. To Plaintiff's knowledge, no action was taken.

Under normal circumstances, if an employee is injured, the Worker Compensation form is filed, signed by the supervisor and reviewed by the administrator and then forwarded to the Return to Work Coordinator on the same or next day, because the *Injury Report is to be filed by the supervisor within 24 hours of the date of the injury*. This was 8 days late which is not dissimilar to what happened in October 2005 when Garcia refused to complete the injury report until Plaintiff demanded it.

The CDCR Regulations and Workers Compensation regulations state that even if the supervisor does not agree with the Plaintiff's claim it is to be processed immediately, therefore, it should have been filed within 24 hours.

Rosemond gave Plaintiff a copy of the SCIF Employee's Claim Form to him on the same day, but at Rodriguez's direction Rosemond did not give him the completed "Manager's Review" section which was to be completed by Rodriguez. Rodriguez told Rosemond that Plaintiff would get it later. He has not received a copy of this page to date, even though it is included in the De Leon's Declaration as an Exhibit. The Manager's Review section is not signed by Rodriguez; it is signed by Contreras and is <u>undated.</u>

> Volume II-Exhibit 3, DOM 31020.7.5.1, Workers' Comp Benefits; Volume II-Exhibit 3, DOM 31020.7.5.1.1, Supervisor's Responsibility; Volume I-

Exhibit 67, SCIF Form Employer's Report of Injury dated 5-8-08; Volume III-Exhibit 4, Declaration C. De Leon, Exhibits L-2 and M-2

60. The Declarations of De Leon, Castaneda and Rosemond omit relevant facts as to what communications occurred between the CDCR and SCIF that caused SCIF to originally deny Plaintiff's claim, which supports Plaintiff claim that he was harassed and treated in a discriminatory manner:

Plaintiff was entitled to, asked for, but never received the SCIF Form Employer's Report after it was redone by Rosemond and reviewed by Ms. Contreras. Additionally, as stated above, Rosemond's injury report mischaracterizes what Plaintiff wrote in his injury report.

SCIF cancelled the Plaintiff's pay based upon false information from the CDCR, from RTWC De Leon, or Castaneda regarding Plaintiff's request that the light duty agreement be properly documented. Instead, Plaintiff's request was mischaracterized as a "refusal" to sign instead of an "interactive" process as required by CDCR DOM. One letter that cancelled Plaintiff's pay and benefits indicated that Plaintiff had refused to accept an "offer" of full time employment which was an absolute fabrication by someone in CDCR, because the SCIF adjuster would not have had any other way of knowing of the interaction between Rosemond, De Leon, Castaneda and Plaintiff. Another letter from SCIF stated something similar. Again, SCIF could have only received this information from CDCR.

It was only after Plaintiff Whistleblew to Ms. Kathy Costner, CDCR Headquarters, that Plaintiff's pay and benefits were restored. After that, Plaintiff received a letter from SCIF stating that his pay and benefits had been cancelled in error. However, the SCIF letter did not identify who in CDCR provided SCIF with the fabrication. This series of events were totally unnecessary and were by design created to harass Plaintiff and they were discriminatory against an injured worker.

Volume III-Exhibit 4, Declaration C. De Leon, Exhibit L-2; Volume I-Exhibit 69, Letters from SCIF Canceling Plaintiff's Workers' Comp Benefits dated 5-14-08 and 5-15-08; Volume I-Exhibit 79, Letter from SCIF Restoring Plaintiff's Workers' Comp Benefits dated 5-28-08

61. Plaintiff was not able to request Light Duty from May 8, 2008 until March 2010. Plaintiff's clinician recommended that Plaintiff not return to work because of the work-related Post Traumatic Stress Disorder from which he was suffering during a significant portion of this time period.

The purported Light Duty Agreement that Plaintiff was ordered to sign by Rosemond and De Leon or forfeit his pay and benefits contributed to the Plaintiff's stress. Plaintiff had made a good faith effort to return to work, even providing Rosemond and De Leon with copies of the CDCR policy and modifying his medication in order to return to work on Light Duty, only to be met with a resistance and an unwillingness from Rosemond and RTWC De Leon to be specific with the duties he was going to be required to perform.

Volume II-Exhibit 19- DOM 31040.3.9, Refusal of Light Duty Assignment; Volume I-Exhibit 65, Copy of Fax of DOM sections to De Leon dated 5-8-08, Copy of Fax of medication information to De Leon dated 5-2-08;Volume I-Exhibit 68, Dr. T. Robinson's Evaluation and Diagnosis dated 5-8-08; Volume I-Exhibit 80, Off-Work Orders/Notices of Treatment from 5-27-08 thru 11-19-08

62. De Leon's, Castaneda's and Rosemond's Declarations omit relevant information when they state that SCIF denied Plaintiff's benefits during the month of May. The only reason that SCIF denied Plaintiff's pay and benefits during the month of May was because De Leon and/or Castaneda provided SCIF with false information regarding Plaintiff's attempts to return to work on Light Duty. SCIF did not have independent sources on which SCIF could rely for this type of information.

Therefore, it is clear from the SCIF documents that the RTW Office, De Leon and Castaneda, contacted SCIF and had Plaintiff's Workers' Comp Benefits cancelled. It is obvious from the SCIF letters Plaintiff received that canceled his benefits that SCIF received false information from De Leon and or Castaneda. Additionally, Plaintiff's benefits should not have been cancelled to begin with as indicated in the SCIF letter that stated that Plaintiff's benefits were cancelled in error.

Additionally, De Leon claims in his Declaration that Exhibit N-1 was the document that caused Plaintiff's pay and benefits to be canceled. That is not true because it is not related to the 1-28-08 injury that he was receiving SCIF benefits for. Exhibit N-1 is related to the 5-8-08 injury. As a RTWC he should have been able to accurately identify the information in a letter from SCIF. The SCIF letters that canceled Plaintiff's benefits and the one that re-instated them are included in the Exhibit listing below.

Shortly after May 8, 2008, De Leon contacted SCIF to report that Plaintiff was refusing a Light Duty Assignment. He knew that SCIF would then discontinue Plaintiff's benefits and pay. He then wrote a disingenuous letter, with illegal language, to Dr. Maywood on 5-15-08. De Leon wrote this letter asking for Plaintiff's limitations, although he had already been given Plaintiff's limitations by Dr. Maywood, and he had already included them on the proposed Limited Term Light Duty Assignment letter dated 5-6-08. The letter to Dr. Maywood said, "*although a Parole Agent (PA) may be assigned to work in the office, assigned as Officer of the Day, and/or perform duties in a supervisory/lead capacity,* ***the PA is required at all times to be capable of performing all essential functions of their Peace Officer classification to ensure personal and public safety because a PA at any level may be called at a moments notice to apprehend/subdue a parolee, inmate or ward."*** The language in this letter is contradictory to the DOM and the CCR. Also, De Leon included a list of "Essential Functions" that were those of a full-time Parole Agent with no medical restrictions. This language included in De Leon's letter to Dr. Maywood, plus the attached list of "Essential Functions," completely contradicts CCR 3436 which states in part, *"or allow the employee to* ***continue working in their current position, while temporarily waiving the essential functions of the job.***

It also contradicts DOM section 31040.3.3, which states in part, "*LD (light duty) assignments enable the Hiring Authority* ***to allow employees with documented temporary medical limitations to continue working, either in their current position while temporarily waiving the essential functions*** *or in a vacant budgeted position within their BU.*

It appears that this letter, written by De Leon to Dr. Maywood, was meant to "set up" Plaintiff to be unable to perform in a light duty assignment and confirm and validate what De Leon had already done. Plaintiff had already been cleared to return to a light duty assignment by Dr. Maywood on April 22, 2008. De Leon had already prepared a document dated May 6, 2008 that he expected Plaintiff to agree to, even though there were no duties on the document. However, when Plaintiff was afraid to sign the document, as it did not specifically outline his duties, De Leon decided to send a letter to Dr. Maywood with the question, "After reviewing the enclosed essential functions, is Mr. Tristan able to perform the essential functions of his PA position?" After reviewing the "Essential Functions" list attached, Dr. Maywood would have to answer "No," because of Plaintiff's limitations. De Leon could then justify denying Plaintiff a light duty assignment. It should also be noted that the "Essential Functions" list attached to this May 15, 2008 letter was not the official list of Essential Functions of the Parole Agent I. The Essential Functions of the Parole Agent I are included in a document signed by the Hiring Authority, Assistant Deputy Director, Marilyn Kalvelage and is dated March 16, 2007, which was given to the Parole Division one year earlier.

> Volume III-Exhibit 4, Declaration of C. De Leon, Page 8 Lines 26-28 and Page 9 Lines 1-2 and Exhibit N-1; Volume I-Exhibit 69, Letters from SCIF Canceling Plaintiff's Workers' Comp Benefits dated 5-14-08 and 5-15-08; Volume I-Exhibit 79, Letter from SCIF Restoring Plaintiff's Workers' Comp Benefits dated 5-28-08; Volume I-Exhibit 71, Letter to Dr. Maywood from De Leon dated 5-15-08, with attached "Essential Functions" list; Volume I-Exhibit 72, Essential Functions of a Parole Agent I per CDC HQ authored by M. Kalvelage dated 3-16-07.

63. De Leon's and Castaneda's Declarations omit relevant facts when it states that SCIF approved Plaintiff's benefits. That mistake was corrected only because Plaintiff had called CDCR Headquarters and speak to Ms. Kathy Costner and explain the termination of his benefits before CDCR was willing to contact SCIF to reinstate Plaintiff's benefits. None of the Declarations reveal any communications between CDCR and SCIF that caused SCIF to cancel and then reinstate Plaintiff's benefits. None of the Declarations admit that a SCIF Letter was sent to Plaintiff that indicated that his benefits were cancelled in error. The SCIF Letter does not explain to Plaintiff what caused the error that cancelled his benefits.

> Volume I-Exhibit 76, E-Mails dated 5-22-08 and 5-29-08 to Kathy Costner, C. De Leon, M. Castaneda, T. Hoffman, S. Kernan, R. Harvey re: denial of pay; Volume I-Exhibit 69, Letters from SCIF Canceling Plaintiff's Workers' Comp Benefits dated 5-14-08 and 5-15-08; Volume I-Exhibit 79, Letter from SCIF Restoring Plaintiff's Workers' Comp Benefits dated 5-28-08

64. The actions of Cheyenne De Leon, Martha Castaneda, and Keith Rosemond were not based upon rules and regulations pertaining to Disability Benefits nor Region IV policy regarding Light Duty. Region IV cannot have its own Return to Work Policy, Modified/Light Duty Policies and its own policies regarding Off Work Orders. Unless these policies are in complete accord with CDCR Policies as stated in the California Code of Regulations Title 15, the CDCR's DOM, and applicable California Government Codes, they are underground regulations and out of compliance with the expectation from employees that Region IV abide by the appropriate authority regarding rules and regulations. The facts in evidence which indicate that Defendants and the CDCR were not incompliance with the appropriate regulations and that they occurred for no legitimate, independent business reason include but may not be limited to:

1. The fact that Plaintiff was told by Garcia to seek medical attention from his own doctor instead of filing a SCIF Injury Report.

Volume VI-Exhibit 1-First Amended Complaint, Page 7 Lines 1-4; Volume VI-Exhibit 3-Amended Responses to Special Interrogatories, Page 4, Lines 6-13

2. The Accident Report that Plaintiff was ordered to complete by Garcia in lieu of the Injury Report.

   Volume I-Exhibit 4, Accident Report dated 10-24-05

3. The Injury Report which was only submitted after Plaintiff insisted on one and which Garcia refused to sign.

   Volume I-Exhibit 6, SCIF Workers' Comp Claim dated 10-25-05; SCIF Employer's Report of Injury dated 10-25-05

4. Garcia failed to submit the Injury Report within 24 hours as required by CDCR DOM policy.

   Volume I-Exhibit 6, SCIF Workers' Comp Claim dated 10-25-05; SCIF Employer's Report of Injury dated 10-25-05

5. Garcia later rewrote the Injury Report and indicated that Plaintiff was assaulted in the re-write.

   Volume I-Exhibit 18, SCIF Employer's Report dated 1-9-06 written and submitted by Garcia

6. The information from Castaneda that he was not eligible for EIDL.

   Volume VI-Exhibit 1, First Amended Complaint, Page 9, Lines 9-17; Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, Page 5, Lines 21-27

7. The Plaintiff's Supplemental Report dated 10-26-05 which was altered by Garcia.

   Volume I-Exhibit 8, Plaintiff's Supplemental Report with Garcia's handwritten changes

8. The refusal of Garcia and Fowler to allow Plaintiff to submit an Incident Report.

   Volume VI-Exhibit 3, Amended Reponses to Special Interrogatories, Page 7, Lines 16-21

9. The fact that Plaintiff had to by-pass the Chain of Command and call Mr. Jeff Fagot, Mr. Fowler's supervisor before he was allowed to submit the Incident Report.

   Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, Page 8 Lines 3-6

10. The fact that Ayala was aware that Plaintiff had to submit an Incident Report but refused to provide Plaintiff with the password so that Plaintiff could access his computer even though Ayala knew the password and that the password had been changed.

    Volume VI-Exhibit 1, First Amended Complaint, Page 12 Lines 7-28 and Page 13 Lines 1-6; Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, Page 8 Lines 7-28 and Page 9 Lines 1-4

11. The fact that Ayala told Plaintiff to contact the computer repair person, Mr. Stevenson, instead of giving Plaintiff the new password to his computer.

    Volume VI-Exhibit 1, First Amended Complaint, Page 12 Lines 7-28 and Page 13 Lines 1-6; Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, Page 8 Lines 7-28 and Page 9 Lines 1-4

12. Plaintiff was not facing any discipline and he was not a threat to the office or the computer system so that he could not be given his password.

13. The Incident Report which was submitted by Ayala after the 72 hour CDCR DOM policy requirement.

    Volume I-Exhibit 11, M. Ayala's Field Incident Report Cover Sheet dated 11-14-05

14. The Charge Report submitted by AOR Larry Ferguson which included Plaintiff in the arrest of Parole Estrada.

    Volume I-Exhibit 3, Ferguson's Charge Report

15. The Parole Violation Report submitted by AOR Larry Ferguson which was approved by Ayala, after the Plaintiff had reported his involvement in the arrest and his injury to Garcia and Ayala during the Parole Unit Meeting.

    Volume I-Exhibit 5, Ferguson's Board Report dated 10-24-05; Volume I, Exhibit 7, Unit Meeting Agenda for Chula Vista #1 dated 10-25-05

16. The fact that Plaintiff was informed by Ms. Contreras, Parole Agent III, that Plaintiff's request for Light Duty was not going to be approved and that he was going to be involuntarily transferred out of his unit.

    Volume VI-Exhibit 1, First Amended Complaint, Page 15 Lines 23-28 and Page 16 Lines 1-2

17. The fact that he had to contact Mr. Fagot before the involuntary transfer was cancelled and his Light Duty was approved.

    Volume I-Exhibit 22, Letter to Fagot requesting Light Duty 1-5-07

18. Region IV cannot have a policy that overrides or ignores CDCR Policy.

19. The fact that the actions of the Defendants and others were not in compliance with Region IV policy regarding Light Duty because the CDCR Policy cannot be overridden by a memorandum from a lower ranking employee than that the Director of Corrections.

    Volume III-Exhibit 6, Declaration of Castaneda, Exhibit C, Memo from L'Etoile; Volume II-Exhibit 19, CCR Title 15, Section 3536, Limited Light Duty Assignments; Volume II-Exhibit 19 DOM 31040.3.1, Light Duty Assignments; Volume II-Exhibit 19 DOM 31040.3.3, Light Duty waiving of essential functions

20. The fact that Defendants Ayala and Garcia retaliated against Plaintiff for a number of Plaintiff's actions which were "Protected Activities." The Protected Activities include but are not limited to the: right to file for workers compensation; the right to report misconduct of his supervisors (Whistleblowing); the right to request those privileges or conditions of employment per the Unit 6 Contract; the right to request that his supervisors and the Return to Work Office adhere to CDCR Policy as articulated in DOM; the right of Plaintiff to have his supervisors to adhere to the various Government Codes that were violated; the right of the Plaintiff to testify truthfully in CDCR Investigations whether Fact Finding or Internal Affairs; the right of the employee to seek redress through the Employee Grievance Process or through the State Personnel Board Appeal's process; the right to seek protection and relief to Plaintiff's Chain of Command in the CDCR up to

and including the Deputy Director of Parole and the Director of Parole and the Undersecretary of Adult Operations.

Volume II-Exhibit 33, California Labor Code 1102.5(b)(c)(d), Prohibits Employer Retaliation for Protected Activities; Volume II-Exhibit 33, California Insurance Code 1871.4, Unlawful to discourage an injured worker from pursuing a claim; Volume II-Exhibit 33, California Government Code 8547.8, Retaliation for having made a protected disclosure is misdemeanor; Volume II-

21. Additionally, these "Protected Activities" occurred while he was disabled due to the work-related injuries that he suffered.
22. This does not include all of the violations regarding the purported Standard Form, De Leon's refusal to accept an off-work order from two of Plaintiff's doctors, Rosemond and De Leon's refusal to document the Light Duty, the cancellation of Plaintiff's benefits by SCIF based upon dishonesty by CDCR's Return to Work Office, and the mischaracterization of Plaintiff's stress claim by Rosemond.
23. Additionally, Plaintiff's supervisors and the CDCR's misconduct were misdemeanor violations of Government Codes and their misconduct was serious enough to warrant "termination" from state service if the CDCR had conduct timely and thorough investigations.

Volume II-Exhibit 33, California Government Code 8547.8, Retaliation for having made a protected disclosure is misdemeanor; Volume II-Exhibit 30, DOM 33030.9, Causes for Employee Adverse Action; Volume II-Exhibit 31, DOM 33030.19, Employee Discipline Matrix

24. The CDCR Chain of Command, all the way to the Assistant Regional Administrator Fowler; Regional Administrator Fagot; Deputy Director Kalvelage; Director of Parole, Hoffman; and Undersecretary, Scott Kernan all failed to provide Plaintiff with "Relief" and or "Protection" from the harassment, discrimination and retaliation of Plaintiff's Supervisors and the RTWC Office.

Volume II-Exhibit 35, Functional Organizational Chart

65. It is incorrect to conclude that Plaintiff does not believe that Tara Heller discriminated against Plaintiff, because the fact is omitted that Tara Heller was "relaying a message" from the RTW Office; she was not the decision-maker regarding the denial of "Light Duty." Additionally, Plaintiff did not have the document which Tara Heller signed regarding what she believed were inconsistencies in Plaintiff's account of the October 21, 2005 incident. Plaintiff is not aware of where Tara Heller obtained the information in the request for investigation that was submitted to Tim Fowler; however, this document is replete with errors as indicated in Plaintiff's Declaration in response to Fowler's Declaration.

Additionally, Tara Heller was working for Martha Castaneda. Castaneda was the decision-maker regarding the denial of Plaintiff's request for EIDL in 2005 and denial of Light Duty in 2007. Martha Castaneda states in her Declaration that she decided that Plaintiff was not eligible for EIDL. However, Martha Castaneda contradicts herself in her Declaration when she states that Jeff Fagot was the decision-maker regarding Light Duty. Nonetheless, she took it upon herself to tell Plaintiff that he was not eligible for EIDL.

> Volume III-Exhibit 6, Declaration of M. Castaneda, Page 5 Lines 5-27, Page 6 Lines 1-6; Volume III-Exhibit 6, Declaration of M. Castaneda, Page 6 Lines 7-9; Volume II-Exhibit 18, DOM 31020.7.5.1 EIDL; Volume I-Exhibit 10, Plaintiff's Request for EIDL dated 11-7-05

66. The language used in Plaintiff's request to FEHA was made based on the form available to him on the FEHA website. A review of the FEHA form that was available to Plaintiff on the FEHA website provides very limited space, making it impossible to include all of the various forms of discrimination and harassment that Plaintiff was subjected to by his "Supervisors" and the CDCR.

Plaintiff was aware that the misconduct against him took the form of harassment and disparate treatment/discrimination as opposed to other injured/disabled employees and

that the workload that he was forced to complete on Light Duty was more than that which was required of Agents on full duty. Additionally, “retaliation” can take many forms, including but not limited to harassment and discrimination which leads to a hostile work environment when it becomes a pattern and practice.

“Harassment” and “discrimination” can be as a result of denial of “reasonable accommodation” for a disabled employee. “Harassment” and “discrimination” of a disabled employee can be through “disparate and excessive workload.”

“Retaliation” against a disabled employee can be through “disparate workload” and “a hostile work environment.” “Reporting misconduct” is a “protected activity” and “retaliation” can take many forms which include, but are not limited to a pattern and practice of excessive workload, denial of overtime, manipulation of vacation time, and a hostile work environment.

Filing a Workers’ Compensation Claim is a “protected activity” and an attempt to prevent the Plaintiff from filing a claim, or retaliating for filing a claim, is a misdemeanor.

- Plaintiff’s supervisors included Assistant Unit Supervisor, Michael Ayala; Unit Supervisor, A.J. Garcia; and District Administrator, Maritza Rodriguez and that they were the ones that began the “pattern and practice” of discrimination, retaliation and harassment that continued after Garcia retired and Ayala was promoted.
- The Plaintiff’s supervisors were at all times working for the CDCR and had authority over Plaintiff’s work, workload, working conditions, response to Plaintiff’s request for relief, and adherence to CDCR Policy and Government Regulations.
- The Plaintiff’s intent by marking “retaliation” on the form was that this covered all of the forms of retaliation/discrimination/retaliation/and “failure to protect” and to provide plaintiff “equal protection” by his supervisors’ and the CDCR. As Plaintiff was not and is not attorney, he articulated it as best he could.

- Plaintiff's facts, as evidenced in numerous documents, electronic mails, deposition testimony, Government Codes, and CDCR's Regulations, support that the Whistleblowing involved numerous "Protected Activities" against supervisors and administrators over a number of years and Plaintiff's intent was that this one statement "Whistleblowing" covered all of the reporting of misconduct by Plaintiff's Supervisors to CDCR's Administration up to and including the number two person in CDCR's chain-of-command, Mr. Scott Kernan.
- The CDCR Office of Civil Rights, mislead the Plaintiff regarding his rights because they did not accept Plaintiff's claim of discrimination, even though they knew that he was being discriminated against when he was and injured worker and a disabled worker while he was subjected to the harassment, discrimination and retaliation.
- The CDCR Office of Civil Rights mislead Plaintiff when they told Plaintiff that he was not eligible to claim discrimination because of race or national origin because he was Hispanic and his supervisors were Hispanic. However, this is not true as evidenced by the fact that Hispanics did not tolerate Plaintiff, who is an Hispanic, from breaking ranks and Whistleblowing.

  Volume I-Exhibit 10, Plaintiff's Request for EIDL dated 11-7-05; Volume I-Exhibit 22, Letter to Fagot requesting Light duty dated 1-5-07; Volume I-Exhibit 27, Letters to M. Rodriguez dated 2-10-07 and 3-13-07; Volume I-Exhibit 33, Letter to Fagot re: Disparate Treatment/Hostile Work Environment; Volume I-Exhibit 35, Letter to M. Rodriguez from Plaintiff dated 4-12-07; Volume I-Exhibit 38, Letter to G. Richie, EEO Investigator, dated 4-30-07; Volume I-Exhibit 40, Letter to M. Hoshino, Director of OIA, from Plaintiff dated 6-3-07; Volume I-Exhibit 44, Letter to S. Kernan, Undersecretary of Operations, from Plaintiff; Volume IV-E.Vann's Declaration Exhibit Documents, Exhibit 2, Plaintiff's Whistleblower Retaliation Complaint dated 12-20-07; Volume V-Plaintiff's Grievance and CDCR's Grievance Responses

As stated in Plaintiff's Opposition to Defendants Motion for Summary Judgment, Plaintiff's Second Cause of Action in his Complaint before the Court does have merit as the harassment that took place was pervasive over an approximate five-year period. It is an attempt to minimize the seriousness of the harassment by focusing on a piece of an act of harassment instead of the totality of the misconduct supported by Plaintiff's claims. The Plaintiff's Response to the Form and Special Interrogatories and Plaintiff's Opposition to the Motion for Summary Judgment and Plaintiff's Deposition, as well as supporting documents, support the Plaintiff's Second Cause of Action. The following are some examples of the facts in support of Plaintiff's Second Cause of Action:

- The pattern and practice of "harassment" by Ayala, Garcia, Rodriguez and the Return to Work Coordinator's Office under the supervision of Castaneda is more than adequately evidenced by Plaintiff's documentation.
- The fact that Plaintiff "Whistleblew" (reported) the misconduct of his co-worker, supervisors and Return to Work Coordinators to their supervisors, including but not limited to Ms. Rodriguez, Mr. Fowler, Mr. Fagot, Ms. Kalvelage, Mr. Hoffman, and Mr. Kernan; and in CDCR's Chain of Command and Investigators, George Ruiz, Gail Richie and Gene Pettit and he suffered "retaliation" does not mean that the "retaliation" did not take the form of "harassment."
- The facts support Plaintiff's claim of "harassment" by Garcia, Castaneda, Rodriguez and Fowler while he was disabled and off-work recovering from injuries through an "involuntary transfer" and denial of a "reasonable accommodation" on Modified Duty, denial of EIDL and subjecting Plaintiff to an Investigation.
- Plaintiff was further harassed while off-work after his second injury by Rosemond, De Leon, and Castaneda when he was denied his ability to be treated by a doctor of his choice for a period of time, denial of reasonable accommodation/Modified Duty, refusal to provide Plaintiff with an appropriate Modified Duty Agreement and cancelling his pay and benefits.
- The facts support Plaintiff's claim that his supervisors, Ayala, Garcia and Rodriguez "harassed" him while he was an injured/disabled employee on Modified Duty through excessive workload and hostile working conditions.

- The facts support the fact that Plaintiff suffered “harassment” because it continued in the form of discrimination, through excessive workload and a hostile work environment while he was on Full-Duty.
- The facts support that Plaintiff continued to suffer “harassment” because of the “deliberate indifference” through the CDCR’s “failure to protect” even though he continued to report the misconduct of his supervisors to his CDCR Chain of Command and utilized the Administrative Remedies available to him as best he knew how, up to and including the Employee Grievance Process and an Appeal to the State Personnel Board, which the CDCR ignored through their delays, postponements and “Refusal to enter into Mediation” and “Refusal to cooperate with Discovery Requests.”
- The fact that the Plaintiff is Hispanic and did not participate in the cover-up by Hispanic supervisors (Hispanic Clique) gave rise to even “greater harassment through retaliation” because members of his own race no longer viewed him as “trustworthy” as he had betrayed their trust by reporting their misconduct.

67. As stated in numerous responses by Plaintiff to Defendants’ Motion for Summary Judgment and in Plaintiff’s Separate Statement of Facts:

- Defendant M. Ayala’s and A.J. Garcia’s Declarations submitted as facts in support of the Motion for Summary Judgment, omit relevant facts, are factually incorrect and are misleading and disputed in Plaintiff’s Declaration in Opposition to the Motion for Summary Judgment.
- Also, the CDCR’s Declarations of Tim Fowler, Terry R. Price, Edward L. Cervera, Cheyenne De Leon, Martha Castaneda, and Keith Rosemond, omit relevant facts, are factually incorrect and are misleading and disputed in Plaintiff’s Opposition to the Motion for Summary Judgment.
- Plaintiff’s Exhibits factually dispute Defendants’ Motion for Summary Judgment and Declarations of Defendants and other CDCR Declarations.
- Plaintiff’s Exhibits factually dispute the fact that relevant facts in Plaintiff’s Complaint before the Court were omitted in Defendant’s Motion for Summary Judgment.

- Defendants' Exhibits in the Opposition to the Motion for Summary Judgment, evidence the fact that the Defendants' facts as set forth in the MSJ are not factually correct, and are disputed in Plaintiff's Opposition to the Motion for Summary Judgment.

68. It is incorrect to conclude that the only cause of action against individual defendants, Michael Ayala, A.J. Garcia and Maritza Rodriguez is the Second Cause of Action for "Harassment" under FEHA:

Plaintiff's FEHA Form indicates that Plaintiff alleges Harassment and Retaliation by his "supervisors." Plaintiff's harassment and retaliation began with "individually" named Defendants Ayala, Garcia and Rodriguez.

As stated in Plaintiff's Opposition to the Motion for Summary Judgment and Plaintiff's Separate Statement of Facts, harassment take place in the form of discrimination. *Plaintiff was discriminated against as an "injured worker" which is a violation of the Government Code when he was trying to submit injury and incident reports for his workers' compensation benefits. He was again discriminated against by De Leon when he was again an injured worker in 2008. Plaintiff was also discriminated against as a disabled employee once the doctors determined that his injuries resulted in a temporary disability and he was attempting to return to work on Modified/Light Duty and when he was actually working on Modified/Light Duty. FEHA and the CDCR OCR describe a disability as either permanent or temporary.* Plaintiff's and Defendants' Exhibits are evidence that Plaintiff was an injured worker and that he was also temporarily disabled.

Ayala, Garcia and Rodriguez as individuals, empowered by the CDCR, had authority over Plaintiff's workload and working conditions and used their authority to harass, discriminate and retaliate for various "Protected Activities" while Plaintiff was either on injured status or disabled status or as a Whistleblower.

Plaintiff, to the best of his ability in the limited space proved by the FEHA form, states, "I was retaliated against and harassed for participating in a Whistleblowing Investigation, where my supervisors knowingly attempted to have me terminated for refusing to be involved in a 'code of silence.'"

Plaintiff goes on to state in the FEHA form "I have sought relief from my administration regarding the on-going harassment and retaliation" meaning relief by CDCR Administrators who had the authority to provide him with protection and relief from the misconduct by Ayala, Garcia and Rodriguez.

Plaintiff tried to the best of his ability to state that the harassment and retaliation was "on-going" as his Complaint before the court claims it has continued to the "present" time.

The retaliation continued under Ayala after Garcia retired. However, Rodriguez was still Plaintiff's third tier supervisor and had she also had authority over Rosemond. Plaintiff submitted numerous documents in the form of Letters etc., in which Plaintiff alerted his CDCR Chain of Command of the retaliation and discrimination/disparate treatment that he suffered at the hands of the CDCR's agents, (Plaintiff's supervisors) and Return to Work Coordinators Office.

The CDCR Chain of Command was non-responsive to Plaintiff's pleas for relief from the retaliation, harassment and discrimination which he suffered while he was both an injured/disabled employee and when he returned to full duty whether it was Plaintiff's Grievance or the Appeal to the State Personnel Board.

> Volume VI-Exhibit 1, Plaintiff's First Amended Complaint; Volume I-Exhibit 82, DFEH re: Right to Sue Notice/Case Closure dated 1-29-09; Volume IV-E. Vann's Declaration Exhibit Documents, Exhibit 2, Whistleblower Retaliation Complaint; Volume V-Plaintiff's Grievance and CDCR's Grievance Responses

69. Plaintiff received a Right to Sue Letter against Plaintiff's supervisors. Plaintiff's supervisors were employed by the CDCR, and in their capacities were empowered to impact Plaintiff's working conditions, workload, work hours, performance evaluations, training, special assignments, overtime pay and benefits. The Named Defendants, M. Ayala, A.J. Garcia and M. Rodriguez were Plaintiff's supervisors during the genesis of the harassment, discrimination and retaliation that Plaintiff was subjected to and this misconduct became a pattern and practice. Additionally, those within the CDCR chain of command that authorized their capacities as Plaintiff's supervisors, after Garcia retired and Ayala was promoted, continued the pattern and practice of harassment, discrimination and retaliation as a result of the actions of the Return to Work Office under the supervision of Martha Castaneda. Plaintiff disputed many of the acts of discrimination that Castaneda and De Leon perpetrated against him through his Whistleblowing to Fagot and later O'Neal. Plaintiff's Exhibits demonstrate that the CDCR Chain of Command did not take Plaintiff's Whistleblowing or his request for relief and protection seriously to the point that it could be constructed as 'deliberate indifference.' Therefore, it is Plaintiff's position that the FEHA Right to Sue Letter allowed him to file a Complaint before the court to include Named Defendants and the CDCR.

Additionally, the claim that the fact that Plaintiff did not file with EEOC somehow negatively impacts his ability to file a Complaint with the Court against named defendants and the CDCR is without merit. For example:

- The FEHA form states "I understand that if I want a "federal" notice of right-to-sue, I must visit the U.S. EEOC to file a complaint…."
- The Plaintiff has not pursued a Complaint in Federal Court, but does not waive his right to do so because the FEHA form states Plaintiff has a right to file with EEOC "within 30 days of receipt of the DFEH 'Notice of Closure….'" The FEHA form states that the complaint will be closed on the basis of "Complainant Elected Court Action." This has yet to occur and Plaintiff reserves the right to pursue this matter in Federal Court.

- The FEHA Right to Sue Letter did not exclude Plaintiff's allegations in the Right to Sue Letter against Plaintiff's supervisors.
- Defendant's Right to Sue Letter authorizes Plaintiff to submit his claims against his "supervisors" which includes Named Defendants in his Complaint before the Court and Plaintiff does not waive his ability to file an amended complaint to include other named defendants.
- In Defendants Ayala's and Garcia's Declarations, submitted by the Attorney General in the Motion for Summary Judgment, Defendants Ayala and Garcia declare that they were Plaintiff's supervisors.

  Volume III-Exhibit 1, Declaration of Ayala, Page 1 Lines 27-28, Page 2 Lines 1-20; Volume III-Exhibit 1, Declaration of Garcia, Page 2 Lines 10-13
- Defendants Ayala, Garcia and Rodriguez's Personnel Files will reveal that they were all employed by the CDCR as Plaintiff's supervisors.
- The documents requested through Discovery will demonstrate that the CDCR empowered Defendants Ayala, Garcia, and Rodriguez through their job descriptions and duty statements that they had authority over Plaintiff.
- Plaintiff's Complaint names Defendants Michael Ayala, A.J. Garcia and Maritza Rodriguez who were Plaintiff's supervisors.
- Harassment, discrimination, retaliation in the CDCR began with named Defendants, Ayala, Garcia and Rodriguez.
- Plaintiff named Defendants Ayala, Garcia and Rodriguez in various letters to the CDCR in which he tried to summarize the harassment, discrimination and retaliation that he was subjected to by named defendants.
- The Complaint, the Plaintiff's Responses to the Interrogatories, Plaintiff's Deposition, Volumes I thru VII, and the Plaintiff's Opposition to the Motion for Summary Judgment and the Plaintiff's Exhibits all point to the fact that Assistant Unit Supervisor Michael Ayala, Unit Supervisor A.J. Garcia and District Administrator, Maritza Rodriguez were Plaintiff's supervisors.
- The Defendants' Motion for Summary Judgment names Plaintiff's supervisors as Assistant Unit Supervisor, Michael Ayala; Unit Supervisor, A.J. Garcia; and District Administrator, Maritza Rodriguez. Therefore, it is incorrect to

conclude that the Right to Sue Letter only gave Plaintiff the right to sue the CDCR and not the individually named Defendants.

Volume VI- Exhibit 1, First Amended Complaint; Volume VI-Exhibit 2, Amended Responses to Form Interrogatories; Volume VI-Exhibit 3, Amended Responses to Special Interrogatories; Volume VII-Exhibits 1-7, Plaintiff's Deposition Testimony, Volume III-Exhibit 1, Declaration by M. Ayala; Volume III-Exhibit 2, Declaration by A.J. Garcia

70. The FEHA Right to Sue Letter, authorization did not exclude Plaintiff's allegations in the Right to Sue Letter against Plaintiff's supervisors. As reflected in their Personnel Files and in their duty statement/job descriptions, Ayala, Garcia and Rodriguez were Plaintiff's supervisors.

- Defendant's Right to Sue Letter permits Plaintiff to submit his claims against Plaintiff's "supervisors" in his Complaint before the Court.
- Defendants' "Declarations" submitted by the Attorney General in the Motion for Summary Judgment, Defendants Ayala and Garcia, declare that they were "Plaintiff's supervisors."

  Volume III-Exhibit 1, Declaration of Ayala, Page 1 Lines 27-28, Page 2 Lines 1-20; Volume III-Exhibit 1, Declaration of Garcia, Page 2 Lines 10-13
- The Personnel documents requested through Discovery will demonstrate that Defendants Ayala, Garcia and Rodriguez were all "employed" by the CDCR as "Plaintiff's supervisors" and various documents in evidence will demonstrate that they were Plaintiff's supervisors. They include, but may not be limited to, signatures on Injury Reports, Incident Reports, approval of Board Reports, casework assignments, as well as memos and other documents.
- The documents requested through Discovery will demonstrate that the CDCR empowered Defendants Ayala, Garcia and Rodriguez through their "job descriptions" and "duty statements" that they had authority over Plaintiff.

- Plaintiff's Complaint names Defendants Michael Ayala, A.J. Garcia and Maritza Rodriguez who were Plaintiff's supervisors by the authorization given Plaintiff to in FEHA's Right to Sue Letter.
- Harassment, discrimination, retaliation in the CDCR began with named Defendants, Ayala, Garcia and Rodriguez as demonstrated in Plaintiff's Complaint and Plaintiff's Exhibits.
- Plaintiff named Defendants Ayala, Garcia and Rodriguez as supervisors and administrators in various letters to the CDCR in which he tried to summarize the harassment, discrimination and retaliation that he was subjected to by named defendants.
- The Defendant's Motion for Summary Judgment names Plaintiff's supervisors as Assistant Unit Supervisor, Michael Ayala; Unit Supervisor, A.J. Garcia; and District Administrator, Maritza Rodriguez.

(70-A) It is incorrect to conclude that in the Interrogatories, Plaintiff did not establish his ability demonstrate to which particular protected class he belonged to.

- The fact that the Plaintiff listed several "Classes" that he belonged to reflects the "on-going" harassment and retaliation that Plaintiff indicated in his FEHA Right to Sue Letter.
- Being a member of one class does not exclude Plaintiff from being a member of another class.
- The fact that Defendants and CDCR were involved in different acts of harassment, retaliation and discrimination is accurately reflected in Plaintiff's Complaint that he belonged to different classes.
- Plaintiff's actions were all "Protected Activities", whether it was reporting misconduct, seeking disability benefits, reporting discrimination/disparate treatment, and reporting harassment and retaliation.
- Plaintiff sought relief through the avenues of redress within the CDCR Chain of Command, to the best of Plaintiff's abilities, whether in letters to administrators, investigations, an employee grievance, and an SPB Appeal. The following are some examples of why Plaintiff claims that he belonged to

different Protected Groups and the activities that he was involved were Protected Activities as defined in Government Codes and CDCR's DOM.

- Injury Worker – California Labor Code 1322 prohibits discrimination against an injured worker. This occurred more than once when Plaintiff was injured.
- Disability Discrimination – Defendants failed to submit the appropriate documentation for Plaintiff's work-related injury, then attempted to cover-up the incident and failed to submit the appropriate request for EIDL, knowing the full-facts of the incident, which was discrimination against an injured employee, as he was not treated as an injured employee under CDCR DOM regulations, Workers Comp Regulations and California Government Codes.
- Whistleblower Retaliation and Disability - The fact that Plaintiff suffered harassment and retaliation because he reported his supervisors' misconduct (Whistleblower a Protected Activity and Class) in their attempt to Cover-Up the October 21, 2005 Incident while he was "disabled." This created two Protected Classes that the Plaintiff belonged to at that time, Disabled and Whistleblower.
- Injured Worker Discrimination – De Leon refused to accept legitimate doctor's off work orders and then claimed that Plaintiff did not have a Pre-Designated doctor's form in his Personnel File. O'Neal found the form and apologized to Plaintiff. De Leon made a determination that Plaintiff's 2008 knee injury was not a re-injury but rather a new injury and he prevented Plaintiff from being treated by Dr. Hanson.
- Disability Discrimination – RTWC Castaneda and De Leon as well as Rosemond tried to prevent Plaintiff from returning to work Modified Duty (reasonable accommodation) by claiming that Parole did not abide by the CDCR's Regulations in Title 15 and DOM.
- Whistleblower Retaliation – Plaintiff was retaliated against through continued harassment after he returned to work Full-Duty because of his continued Whistleblowing activities against his supervisors.
- Harassment – Defendants continued to harass and retaliate after he returned to work Full-Duty and at this point he was no longer disabled, but Defendants'

misconduct continued, which due to the duration, created a Hostile Work Environment.

- Disabled Discrimination - Plaintiff was not allowed to work Light Duty and Dr. Hanson had to modify the Return to Work Order to include Office Duty, which was then not accepted by the RTWC.
- Disabled Discrimination – Region IV refused Plaintiff Light Duty because Region IV Parole chose to ignore CDCR policy claiming that an (A) Deputy Director L'Etoile could override the California Code of Regulations, Title 15 and CDCR's DOM, which can only be approved by the Office of Administrative Law.
- Whistleblower Retaliation - Plaintiff was retaliated and discriminated against by the CDCR when it subjected Plaintiff to a Fact Investigation. The CDCR investigated the Whistleblower.

(70-B) The claim that Plaintiff stated in his deposition testimony that he did not hear slurs or derogatory remarks it factually eliminates discrimination is without merit, because FEHA does not limit discrimination to slurs or derogatory remarks. Discrimination in the work place can be rejection of employment, promotion, special assignments and/or giving preferential treatment to one employee over another. Plaintiff for example, as an injured worker, was treated in accordance with CDCR or Workers' Compensation regulations. Plaintiff had an expectation that his injury report and accompanying incident reports would be processed as those of other injured employees or similar to other times when Plaintiff was injured in a prison setting as a result of inmate assaults.

Plaintiff was also treated in a discriminatory manner when he tried to work Modified Duty. The CDCR's Return to Work Office discriminated against Plaintiff when they chose to ignore CDCR policy and institute their own policy and rejected Plaintiff's request to work modified duty. When he successfully challenged it by providing his supervisors and the Return to Work Office copies of the CDCR policy, Plaintiff was retaliated against through an inappropriate "Standard Form" Light Duty document.

Plaintiff’s supervisor, Rosemond, and De Leon retaliated against Plaintiff again when they inappropriately cancelled Plaintiff’s Workers’ Compensation benefits.

Additionally, Plaintiff was discriminated against by members of his own race, because when he Whistleblew, he betrayed the trust of members of his own race, who were involved in Dishonesty, a Cover-Up and the Code of Silence and Plaintiff did not cooperate. The discrimination was at the hands of a “Hispanic Clique/Group” who felt betrayed by Plaintiff’s Whistleblowing.

Plaintiff Whistleblew on Supervisors Ayala, Garcia and Rodriguez and RTWC Castaneda and De Leon, who to the best of his knowledge are Hispanic.

Plaintiff was initially subjected to retaliation, harassment and discrimination by Ayala and Garcia, for his Whistleblowing who to the best of his knowledge are all Hispanic. Plaintiff was initially denied his EIDL benefits by Castaneda, whom Plaintiff believes is Hispanic and later his pay and benefits by De Leon and Castaneda, both whom he believes are Hispanic.

Plaintiff again had to go to non-Hispanics Jeff Fagot for EIDL and Kathy Costner, RTWC Headquarters to get his pay and benefits restored. The fact that Plaintiff was going to be “involuntarily” transferred in violation of his seniority by Hispanic Supervisors, Ayala and Garcia and it was approved by an Hispanic Administrator, Maritza Rodriguez.
George Ruiz, an Hispanic Investigator was given evidence by Plaintiff of misconduct, falsification of documents and a false Board Report during the Fact Finding Investigation and Investigator Ruiz failed to interview Plaintiff’s witnesses.

Ayala and Garcia (Hispanics) discriminated when they retaliated against Plaintiff through excessive workload while he was on Light Duty and Full-Duty.

Rodriguez discriminated against Plaintiff when she refused to provide Plaintiff with relief or investigate Ayala and Garcia and instead told Plaintiff that maybe he "was not cut out for Parole" even though Plaintiff received positive comments before and after Plaintiff's Whistleblowing against Hispanics.

The RTWC De Leon, who is supervised by Castaneda, discriminated against Plaintiff through their denials of Light Duty, refusing to let Plaintiff see his own doctor, including Dr. Hanson and the Plaintiff's doctor at Kaiser by claiming, in error, that this was a "new" injury and then claiming that Plaintiff did not have a "doctor pre-designation form" when in reality there was one on file in Plaintiff's personnel file. This is further evidence of Plaintiff's continuing to suffer harassment and discrimination as a disabled employee.

The RTWC De Leon and Castaneda discriminated against Plaintiff. Their Declarations are factually incorrect when they tried to force Plaintiff to sign a "Standard Light Duty Agreement" when there cannot be any such document because each Light Duty Agreement has to be tailored to the employee's limitations and each has to be tailored to the specific essential functions/duties that are going to be waived.

> Volume VI-Exhibit 1, First Amended Complaint; Volume VI-Exhibit 2, Amended Responses to Form Interrogatories; Volume VI-Exhibit 3, Amended Responses to Special Interrogatories; Volume I-Exhibit 27, Letters to Rodriguez dated 2-10-07 and 3-13-07; Volume I-Exhibit 33, Letter to Fagot re: Disparate Treatment/Hostile Work Environment dated 4-2-07; Volume I-Exhibit 40, Letter to M. Hoshino, Director of OIA, from Plaintiff dated 6-3-07; Volume I-Exhibit 44, Letter to S. Kernan, Undersecretary of Operations; Volume I-Exhibit 24, Light Duty Agreement dated 1-17-07;

Plaintiff's claim before the Court under Government Code 1102.5 (b) does have merit as it states: "An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency where the employee has reasonable cause to

believe that the information discloses a violation of state or federal statute, or a violation of noncompliance with state or federal rule or regulation." It is clear that Plaintiff was retaliated against by his supervisors and others in the CDCR as demonstrated in Plaintiff's Complaint, Responses to Form Interrogatories and Responses to Special Interrogatories, Plaintiff's Motion in Opposition to Defendant's Motion for Summary Judgment, Plaintiff's Separate Statement of Facts, Plaintiff's Declaration and Exhibits.

In addition to Government Code 1102.5(b), Government Code 1102.5 (c) states: "An employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation state or federal statute, or a violation or noncompliance with a state or federal rule or regulation."

The claim that Plaintiff cannot legally pursue his Complaint before the Court because he did not file a Tort Claim with the California Government Claim and Victim Compensation Board is disputed.

Plaintiff's claims against the Defendants do not fall under the purview of the Victim Compensation Board which specifically states that victims, or the families of the victims of murder, assault or other acts of violent crimes are eligible for claims to the Victim Compensation Board. Therefore, Plaintiff's claims in his Complaint against named Defendants and the CDCR are not under the purview of the Victim Compensation Board and are appropriately filed with the Court.

A Tort Claim against a government entity is typically a claim of negligence against a government agency which results in an employee injury. Examples may be, but are not limited to, stairs in disrepair, faulty chairs, and/or faulty construction. Plaintiff's claims in his Complaint do not fall under the California Government Codes for Tort Claims and are appropriately filed with the Court.

72. The claim that Plaintiff did not file a Tort Claim with the California Government Claim and Victim Compensation Board is without merit and Plaintiff's Complaint was

appropriately filed with the Court. Plaintiff's claims against the Defendants do not fall under the purview of the Victim Compensation Board which specifies that it applies to victims or their families who were the victims of crimes such as murder, assault, battery, etc.

73. Relevant facts are omitted when it is claimed that Plaintiff claims he was subjected to retaliation for Whistleblowing and engaging in a "Code of Silence Investigation. Plaintiff engaged in numerous Whistleblowing activities as evidenced by his letters to Rodriguez, Fagot, Hoshino, and Kernan. Plaintiff also Whistleblew in phone conversations with Fagot, Kalvelage, and O'Neal.

Plaintiff also filed an employee grievance and reported misconduct of his supervisors, the RTWC Castaneda, and his Chain of Command in the Fact Finding Investigation against him by George Ruiz, the CDCR, OCR Intake Interview by Gail Richie, and the OIA Investigation by Gene Pettit.

Defendants Ayala and Garcia were actively involved in a Cover-Up/Code of Silence regarding the October 21, 2005 incident as evidenced by Plaintiff's testimony in the Region IV Fact Investigation against Plaintiff. Defendants Ayala and Garcia were aided by Fowler in their Code of Silence when Fowler refused to allow Plaintiff to submit his report. Defendants Ayala and Garcia were aided in their Code of Silence by the RTWC Office, under the direction of Castaneda, when Plaintiff was subjected to an investigation instead of subjecting Garcia and Fowler to an investigation. In addition to Ferguson and Ayala, the investigation should have been conducted by an OIA Special Agent, instead of a Parole Agent III from Region IV.

Plaintiff was then subjected to retaliation by Ayala and Garcia and Rodriguez. Rodriguez, Fowler, Fagot, Kalvelage, Hoffman and Kernan failed to provide Plaintiff with relief and protection from further retaliation as evidenced by the lack of response to his letters and when Rodriguez and Fowler did respond, they failed to protect or provide Plaintiff any relief.

74. Fowler should have submitted Plaintiff's complaints to the Office of Internal Affairs due to the retaliation by Defendants Ayala and Garcia for Plaintiff's Whistleblowing against them and the Office of Civil Rights. The two investigative units could have conducted separate investigations. CDCR DOM states that Whistleblowing allegations will be investigated by OIA. Additionally, the Whistleblower Statute as well as CDCR Regulations define the reporting of violations of Regulations as Whistleblowing.

Plaintiff's letter to Fagot states that he was being retaliated against because of his reporting misconduct in addition to his complaint that he was being treated in a disparate manner. Fowler failed to refer Plaintiff's complaints to OIA. Instead, he referred the entire matter to CDCR's Office of Civil Rights. Due to Fowler's inappropriately forwarding some of the issues to the Office of Civil Rights, the investigative process was delayed and OIA did not conduct a timely investigation into Plaintiff's complaints because the CDCR OIA regulations prevent action being taken after one year from the date of the complaint of misconduct. Plaintiff had initially reported the misconduct of Ayala and Garcia on November 14, 2005 to Fagot and he failed to have the allegations investigated.

Gail Richie of the CDCR's Office of Civil Rights, failed to investigate Plaintiff's claims that while he was discriminated against and harassed while he was a disabled worker even though her letter to Plaintiff states that she will identify discrimination issues. Gail Richie of the CDCR's Office of Civil Rights failed to investigate Plaintiff's claims that he was being discriminated against by an "Hispanic Clique" because he, being Hispanic, betrayed their trust and Whistleblew against members of his own race.

The actions and indifference by Fowler and Richie toward Plaintiff's allegations of retaliation for Whistleblowing and discrimination prevented Plaintiff from obtaining any relief and neither Fowler nor Richie provided Plaintiff with any offer of protection.

Volume I-Exhibit 33, Letter to Fagot re: Disparate Treatment/Hostile Work Environment dated 4-2-07; Volume I-Exhibit 34, Letter to Plaintiff from T.

Fowler dated 4-3-07; Volume I-Exhibit 38, Letter to G. Richie from Plaintiff, EEO Investigator dated 4-30-07; Volume I-Exhibit 39, Letter to Plaintiff from G. Richie dated 5-16-07; Volume VI-Exhibit 1, First Amended Complaint, Page 20, Lines 2-11; Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, Page 16 Lines16-27, Page 17 Lines 1-11 and 25-28, Page 18 Lines 1-8; Volume I-Exhibit 88, Internal Affairs Investigation Report Pages 2-3, 5-8 of 51

75. Plaintiff was a Witness in an investigation against David Ayala, Michael Ayala's brother, prior to Michael Ayala becoming Plaintiff's supervisor. Plaintiff testified against David Ayala at the request of W. Contreras, Parole Agent III and Region IV was aware of Plaintiff's testimony against David Ayala. As a result of Plaintiff's testimony, David Ayala was moved from the Chula Vista Unit to another unit. Plaintiff did not have any personal feelings against David Ayala, he testified honestly; but because of this testimony, Plaintiff advised Garcia of his testimony against Michael Ayala's brother and that Plaintiff was concerned that Ayala would take the opportunity to retaliate against Plaintiff. Garcia assured Plaintiff that this would not happen.

A.J. Garcia and other administrators involved in the hiring process should not have allowed Michael Ayala to supervise Plaintiff. Even if the appointment was within regulations, it was a poor and dangerous administrative error to allow this to happen.

The CDCR used the investigation as a means of retaliating against Plaintiff because Plaintiff had Whistleblown to Fagot on November 14, 2005 and on or about the same time to Kalvelage regarding Ayala and Garcia's misconduct. Under CDCR DOM, applying for workers' comp benefits, testifying in an investigation, and Whistleblowing are "Protected Activities" and as of October 21, 2005 Plaintiff was an injured disabled employee and therefore included in two Protected Groups. The Discriminating against an injured worker is a violation of Labor Code 132a, misdemeanor law violation. California Insurance Code 1871.4 states that it is unlawful to discourage an injured worker from pursuing a claim. California Government Code 1102.5(b)(c)(d) prohibits employer

retaliation for participating in Protected Activities. Fowler and Richie were indifferent to Plaintiff's allegations because he was being discriminated against as an injured worker and he was being retaliated against by Garcia and Ayala for seeking to file his workers' compensation claim.

> Volume II-Exhibit 9, DOM 31010.8, Protecting Employees from Retaliation; Volume II-Exhibit 33, California Government Code 8547.1;Volume II-Exhibit 33, California Labor Code 1102.5(b)(c)(d); Volume II-Exhibit 29, DOM 33010.25, Nepotism/Fraternization – where relationships negatively impact morale; Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, Page 2 Lines 17-24, Page 3 Lines 4-6

76. As stated earlier, Plaintiff's complaints are in fact "misdemeanor" violations of Government Codes and "serious misconduct" as defined by CDCR's Employee Discipline Matrix which would warrant terminations of those involved in misconduct against Plaintiff. Defendants' misconduct includes dishonesty, code of silence, retaliation, other failure of good behavior, failure to protect an employee who was a member of a Protected Class engaged in "Protected Activities" as defined by both the California Government Code and CDCR's DOM Regulations.

> Volume II-Exhibit 33, California Government Code 8547.8; Volume II, Exhibit 33, California Labor Code 132a; Volume II-Exhibit 33, California Government Code 19572(x); Volume II-Exhibit 31, DOM 33030.19, Employee Discipline Matrix; Plaintiff's dispute of the MSJ Item #2

77. The fact that Plaintiff was not demoted or disciplined does not exclude the fact that Plaintiff was subjected to retaliation, harassment, discrimination, a hostile work environment and deprived of the opportunity to participate in training that would have enhanced his career. He was denied payment of overtime worked at the direction of Defendants Ayala and Garcia. The misconduct of Region IV's Return to Work Office prevented a disabled employee from working Modified/Light Duty when he was injured in 2005 and requested to work light duty immediately after his injury. While he was

eventually granted EIDL by Fagot, Plaintiff had to use his leave credits to supplement his pay.

Additionally, the misconduct of Castaneda and De Leon against an injured worker delayed Plaintiff's medical treatment for his injuries, especially as it related to the January 2008 injury. This caused Plaintiff to have to use more of his Leave Credits in order to supplement his two-thirds pay than he would have had, had he been treated by Dr. Hanson instead of being bounced around from doctor to doctor. The misconduct of Castaneda, De Leon and Rosemond against an injured and disabled worker prevented Plaintiff from working Modified/Light Duty and again Plaintiff had to use more of his Leave Credits in order to supplement his pay. The misconduct of Castaneda, De Leon and Rosemond against a disabled worker caused the Plaintiff to become so stressed to the point that he filed a stress claim and then their dishonesty caused Plaintiff's benefits to be inappropriately cancelled. The misconduct of Castaneda, De Leon and Rosemond was in *violation of California Labor Code 132a, which states that it is a misdemeanor to discriminate against an injured worker; California Insurance Code 1871.4 states that it is unlawful to discourage an injured worker from pursuing a claim and California Labor Code 1102.5 (b)(c)(d) prohibits employer retaliation for participating in Protected Activities.* Due to Castaneda's, De Leon's and Rosemond's dishonesty to SCIF about Plaintiff refusing to work Modified Duty, Plaintiff's pay was short for about 9 months. Finally, with some assistance Plaintiff had to count every hour of every pay period in order to demonstrate to CDCR's Headquarters that his pay was continually short each month which was creating a hardship for Plaintiff.

Plaintiff had passed every promotional examination prior to the harassment, retaliation and discrimination that he suffered. However after this, Plaintiff was unable to study and concentrate, and for the first time in his career, he was not able to successfully compete in the Parole Agent II and Parole Agent III promotional examinations. Plaintiff has not had the opportunity to participate in other promotional examinations. After his Whistleblowing, Defendant Garcia refused to give Plaintiff his Annual Performance Evaluation in violation of DOM sections 85010.9 and 85010.10 which are required to be

written at least every 12 months during the employee's birth month. Plaintiff's birth month is November and the Annual Appraisal was due November 2005. It was never written. As a result, Plaintiff was not allowed to compete for Range Master Training. Garcia's refusal to prepare and submit Plaintiff's Annual Appraisal was for no legitimate, independent business reason.

The fact of the matter is not that he was guaranteed a slot in Range Master training at the CDCR Academy, the fact of the matter is that he could not even compete in the process because of Garcia's retaliation. Defendants Ayala and Garcia ordered Plaintiff to write reports on parolees that were not on Plaintiff's caseload and he gave parolees instructions after his normal 8-hour work day without any compensation for the overtime worked. This also occurred for no legitimate, independent business reason.

When Plaintiff complained to Defendant Rodriguez, she tried to drive Plaintiff out of the Parole Division, or at the very least the Units she supervised, because Plaintiff raised legitimate complaints regarding the discrimination and retaliation that he was subjected to by Defendants Ayala. Prior to Plaintiff raising issues to Rodriguez, Rodriguez had not told Plaintiff that he needed to get out of Parole. It was only after he complained about Ayala that Rodriguez was involved in this misconduct against Plaintiff. Rodriguez's actions were in *violation of California Government Code 8547.3 which states that employees may not directly or indirectly use or attempt to use official authority to influence, intimidate, threaten, coerce, or attempt to intimidate, threaten or coerce any person for the purpose of interfering with the Whistleblower article.*

> Volume VI-Exhibit 3, Amended Response to Special Interrogatories, Page 11 Lines 9-15; Volume I-Exhibit 31, Letter to Plaintiff from M. Rodriguez dated 3-29-07; Volume II-Exhibit 24, DOM 85010.9 and 85010.10 Annual Appraisal Reports are required by SPB to be written by the Unit Supervisor, Parole Agent III

78. Defendant Garcia was required to give Plaintiff a Performance Evaluation and he had promised Plaintiff an excellent evaluation and this is supported by Garcia's excellent comments on Plaintiff's Caseload Rosters and Garcia's refusal to give Plaintiff a Performance Evaluation which was in retaliation for Plaintiff's Whistleblowing. Garcia violated *California Government Code 8547.8 which states that any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a state employee for having made a protected disclosure, is subject to a fine not exceed $10,000.00 and imprisonment in the county jail for a period not to exceed one year.* As a result of Garcia's misconduct and act of retaliation, Plaintiff was denied the opportunity to even compete for Range Master Training because he did not have a Performance Evaluation. Plaintiff would have been able to use Ranger Master Training to become more competitive in interviews in future promotional examinations. Garcia's refusal and failure to provide Plaintiff with an Annual Appraisal occurred for no legitimate, independent business reason.

> Volume VI-Exhibit 3, Amended Response to Special Interrogatories, Page 11 Lines 9-15; Volume II-Exhibit 24, DOM 85010.9, Annual Performance Appraisals Required; Volume II-Exhibit 24, DOM 85010.10 Unit Supervisor Required to Complete the Appraisals

79. An employee's Performance Evaluation is an evaluation for work performed during the past year and Performance evaluations are due on the employee's birth month, which for Plaintiff is November. The fact that Defendant Garcia refused to give Plaintiff a Performance Evaluation was retaliation because Plaintiff was requesting adherence to policy regarding the October 21, 2005 arrest and he Whistleblew to Kalvelage and then on November 14, 2005 to Fagot. Because Range Master Training is a highly competitive process, as stated in Cervera's Declaration, if selected, Parole Agents who are Range Masters can add this to their resume to become more competitive in future interviews for promotions. However, Cervera's Declaration is incorrect because Plaintiff would not have been on Light Duty at the time that he would have competed in the Range Master

selection process or attended Range Master Training. Additionally, Cervera's Declaration is misleading because while Range Masters may not receive overtime for the actual training, they do receive overtime because sometimes they cannot complete their work and conduct the training; and other times, they have to work their normal work day and then perform range training in the evening.

> Volume II-Exhibit 24, DOM 85010.9, Annual Performance Appraisals Required; Volume II-Exhibit 24, DOM 85010.10 Unit Supervisor Required to Complete the Appraisals

80. Plaintiff never claimed that Range Master Training is a pre-requisite for promotions or a stepping stone. The fact that Parole Agent Cervera, a Range Master, has not promoted after being a Range Master for 20 years is not evidence that Range Master Training is not a positive addition to a Parole Agent's resume and can make a Parole Agent more competitive in promotional interviews. The fact the Cervera has not promoted is not evidence that he could have promoted but did not for other reasons.

> Volume VI-Exhibit 3, Amended Response to Special Interrogatories, Page 11 Lines 9-15; Volume II-Exhibit 24, DOM 85010.9, Annual Performance Appraisals Required; Volume II-Exhibit 24, DOM 85010.10, Unit Supervisor Required to Complete the Appraisals

81. Plaintiff had demonstrated all of the skills that Cervera claims are required of a candidate, including knowledge of 9mm and .38 handguns, range safety, and leadership skills, as demonstrated in his experience as a Sergeant and Lieutenant. Plaintiff had been a trainer and had successfully completed the Correctional Officers' Academy, Sergeant's training and the Parole Agent Academy. He is interested in public safety and has knowledge of other CDCR weapons such as the Mini 14 rifle, the shotgun, and 17 mm baton launcher. He had received numerous compliments from Defendant Garcia and positive performance evaluations during his entire career. Because Plaintiff Whistleblew, he was refused a Performance Evaluation that he was promised, and that was required

from Garcia by CDCR DOM, and this prevented Plaintiff from even competing for Range Master Training.

> Volume VI-Exhibit 3, Amended Response to Special Interrogatories, Page 11 Lines 9-15; Volume I-Exhibit 1, Plaintiff's Parole Caseload 2004, prior to 10-21-05 incident – includes positive comments by Contreras PAIII; Volume I-Exhibit 2, Plaintiff's Parole Caseload 2005, prior to 10-21-05 incident – includes positive comments by Garcia PAIII; Volume II-Exhibit 24, DOM 85010.9, Annual Performance Appraisals Required; Volume II-Exhibit 24, DOM 85010.10, Unit Supervisor Required to Complete the Appraisals

82. Plaintiff Whistleblew and the Performance Evaluation that was promised and required was not given to him on his birth month per CDCR Parole regulations in DOM. Plaintiff was not even given an opportunity to compete because Defendant Garcia refused to give him a performance evaluation. Cervera cannot speak to Plaintiff's qualifications because he does not know Plaintiff's skill or ability to compete.

> Volume VI-Exhibit 3, Amended Response to Special Interrogatories, Page 11 Lines 9-15; Volume II-Exhibit 24, DOM 85010.9, Annual Performance Appraisals Required; Volume II-Exhibit 24, DOM 85010.10, Unit Supervisor Required to Complete the Appraisals

83. It is incorrect to assume that Plaintiff would not have been able to pass the tests required for Range Master and that he would not have been able to attend and pass Range Master Training. The only reason that Plaintiff was not allowed to compete for Range Master Training was that he did not have the Performance Evaluation that Defendant Garcia refused to give him which was in retaliation for Plaintiff's Whistleblowing.

> Volume II-Exhibit 24, DOM 85010.9, Annual Performance Appraisals Required; Volume II-Exhibit 24, DOM 85010.10, Unit Supervisor Required to Complete the Appraisals

84. It is wrong to conclude or assumes that the Plaintiff would not have been competitive for Range Master Training. He was denied the opportunity by Garcia.

> Volume II-Exhibit 24, DOM 85010.9, Annual Performance Appraisals Required; Volume II-Exhibit 24, DOM 85010.10, Unit Supervisor Required to Complete the Appraisals; Volume I-Exhibit 1, Plaintiff's Parole Caseload 2004, prior to 10-21-05 incident – includes positive comments by Contreras PAIII; Volume I-Exhibit 2, Plaintiff's Parole Caseload 2005, prior to 10-21-05 incident – includes positive comments by Garcia PAIII;

85. The fact remains that Plaintiff was prevented from applying for Range Master Training, because Defendant Garcia had refused to provide Plaintiff with his Annual Performance Evaluation which was in retaliation for Plaintiff's Whistleblowing to Fagot and Kalvelage. There is a clear nexus between Defendant Garcia's refusal to give Plaintiff his performance evaluation because this occurred shortly after Plaintiff Whistleblew to Fagot. Garcia was required by CDCR DOM Parole regulations to provide Plaintiff with a Performance Evaluation. As stated earlier, Defendant Garcia refused to give Plaintiff his performance evaluation after giving Plaintiff numerous positive comments regarding his performance.

> Volume VI-Exhibit 3, Amended Response to Special Interrogatories, Page 11 Lines 9-15; Volume II-Exhibit 24, DOM 85010.9, Annual Performance Appraisals Required; Volume II-Exhibit 24, DOM 85010.10, Unit Supervisor Required to Complete Annual Appraisals; Volume I-Exhibit 1, Plaintiff's Parole Caseload 2004, prior to 10-21-05 incident – includes positive comments by Contreras PAIII; Volume I-Exhibit 2, Plaintiff's Parole Caseload 2005, prior to 10-21-05 incident – includes positive comments by Garcia PAIII;

86. Ferguson's Parole Violation Report is factually incorrect and is not supported by Ferguson's Charge Report. This misconduct involved Dishonesty and the Code of

Silence by Ferguson who wrote the report and Ayala who approved the report. It was a violation of DOM regulations regarding the requirements for Parole Violation Reports. Agent Ferguson's Parole Violation Report omitted the fact that Plaintiff was the arresting agent, that Plaintiff had to use force to apprehend and restrain and place the parolee in handcuffs, and most importantly that Plaintiff was assaulted and sustained an injury. All of these facts were required to be included per CDCR's DOM Regulations. Additionally, Ayala states in his Declaration that Plaintiff did not need any additional reports because Ferguson had already included Plaintiff in the Charge Report. This is absolutely incorrect because the Charge Report basically has one or two sentences that deal with the "probable cause" to violate a parolee. There is no way that a Charge Report can substitute for a Parole Violation Report. If the Board had only a Charge Report to use to violate parole for a parolee and send him/her back to prison, disciplinary action would be taken against the Parole Agent. The Charge Report says absolutely nothing about Plaintiff's involvement in the arrest or injury. A Charge Report can never substitute for a Parole Violation Report. That is why one is required by DOM.

> Volume I-Exhibit 3, Ferguson's Charge Report; Volume I-Exhibit 5, Ferguson's Board Report; Volume II-81040.14, Parole Violation Report Format/Supporting Evidence

87. The Plaintiff was correct when he requested that Ayala, Garcia and Fowler allow him to submit reports regarding the October 21, 2005 incident. The CDCR DOM regulations require that Parole Violations report all of the facts involved in an arrest including who made the arrest and any force used in the arrest. The omission of the facts in a Parole Violation Report is Dishonesty and the Code of Silence. According to the CDCR Employee Discipline Matrix that level of misconduct can result in the termination of the employee. In this case, it would have been both Ferguson and Ayala. Ferguson wrote in the Parole Violation Report that he ordered Parolee Estrada to halt at "gun point" which would have required an Unholstered Firearm Report. It is important to note that the only time that a lethal weapon can be used is if there is the "imminent threat of great bodily injury or the loss of life." In this case there was a fleeing parolee who posed no danger to

either Ferguson or Plaintiff. Agent Ferguson's Probable Cause Charge Report states that Plaintiff was involved in the arrest. However, Agent Ferguson's Parole Violation Report omits the fact that Plaintiff made the arrest and omits the force used by Plaintiff to stop, subdue, restrain and place the parolee in handcuffs. Further, Ayala refused to allow Ferguson to correct his Parole Violation Report and to Plaintiff's knowledge it was never corrected. Additionally, an Incident Report was not going to be written as required by CDCR DOM regulations until Plaintiff Whistleblew to Fagot. Garcia's, Ayala's, and Fowler's failures and acts occurred for no legitimate, independent business reason.

> Volume I-Exhibit 3, Ferguson's Charge Report; Volume I-Exhibit 5, Ferguson's Board Report; Volume II-81040.14, Parole Violation Report Format/Supporting Evidence; Volume II-DOM 51030.7.2.1, Altercation/Unholstered Firearm Report; Volume II-Exhibit 8, DOM 81040.12.1, Violation Report Procedures; Volume II-Exhibit 6, DOM 51030.5, Formal Incident Reports; Volume II-Exhibit 6, DOM 51030.3, Reportable Incidents; Volume II-Exhibit 6, DOM 51030.5.1, Supplemental Incident Reports

88. On October 28, 2005, Plaintiff discovered that Ferguson's Board Report omitted him from the incident and Plaintiff requested that Ayala allow him to submit a report to correct parolee Estrada's Parole Violation Report. Ayala refused, telling Plaintiff not to worry about his Injury Report because "they had his back." Plaintiff was not aware that an Incident Report had not been written because an Incident Report is the responsibility of the Parole Agent III. Plaintiff was aware prior to October 28, 2005, as a result of Parole Agent Academy training, that Parole Violation Reports had to include all of the information as to who made the arrest, what happened during the arrest and how the arrest was made and that is part of the reason he requested from Ayala that he be allowed to correct the information in Ferguson's Board Report. Prior to October 28, 2005 Plaintiff did not have any reason to believe that he had been "deliberately excluded" from any participation in the arrest of Parolee Estrada even though Defendant Garcia had

already tried to prevent Plaintiff from submitting his SCIF Injury Report on October 21, 24 and 25, 2005.

> Volume I-Exhibit 3, Ferguson's Charge Report; Volume I-Exhibit 5, Ferguson's Board Report; Volume II-81040.14, Parole Violation Report Format/Supporting Evidence; Volume II-DOM 51030.7.2.1, Altercation/Unholstered Firearm Report; Volume II-Exhibit 3, Amended Responses to Special Interrogatories, Page 5 and Page 7 Lines 3-21

89. On or about November 1, 2005 Castaneda informed Plaintiff that he was not eligible for EIDL because there was no documentation to support his verbal claim that Parole Estrada assaulted him. However, Castaneda was dishonest with Plaintiff when she told Plaintiff that that a "police report" had to be filed, that he had to be "punched or kicked by the parolee" and the "district attorney" had to file criminal charges against the parolee in order for him to be eligible for EIDL. Plaintiff became aware of the CDCR's policy regarding EIDL and that Castaneda was incorrect. As a result, Plaintiff wrote a letter to that effect dated November 7, 2005 and tried to give it to Garcia to forward to Fagot. Garcia was on the phone with Fowler on November 9, 2005, which was after Plaintiff's conversation with Castaneda, and according to Garcia, Fowler refused to let Plaintiff submit his report and refused to have Garcia accept the letter requesting EIDL. Garcia handed it back to Plaintiff. Garcia was not supportive of Plaintiff's request to submit documents, because he already knew that he had failed to submit the appropriate reports regarding the incident. His misconduct and that of Ferguson and Ayala would also be exposed. Plaintiff gave the letter requesting EIDL to Investigator Ruiz at the conclusion of his interview with Ruiz at the Fact Finding Investigation and Ruiz informed Plaintiff that he would walk the letter to Fagot. Plaintiff's EIDL was approved after that. However, the evidence that Ferguson, Ayala, Garcia and Fowler were involved in a cover-up of the October 21, 2005 is evident by the sequence of events.

> Volume I-Exhibit 10, Plaintiff's Request for EIDL 11-7-05; Volume I-Exhibit17, Transcript of Interrogation, Page 30 Lines 18 – 25 and Page 31

Lines 1 – 3; Page 35 Lines 17 – 23; Volume II-Exhibit 3, DOM 31020.7.5.1, How to Request EIDL

90. Plaintiff did tell Garcia, during what Garcia termed a mini-debrief, that Parolee Estrada assaulted him. He told him on October 21, 24, and on the 25 during the Parole Unit meeting. Plaintiff described the assault as the parolee "charging" him in an attempt to evade the arrest. In the course of charging Plaintiff, the parolee struck Plaintiff in the chest with his shoulder. Plaintiff had to use physical strength to overcome the parolee and to keep from being knocked backwards and Plaintiff then shoved/pinned the parolee against the fence. Shortly after the mini-debrief, Plaintiff told Garcia that he had injured his knee, asked for an Injury Report, which Garcia did not provide. Garcia told Plaintiff to go home and he did not complete an Injury Report. Plaintiff described the incident to Garcia, including the assault and injury, several times prior to November 1, 2005. Tara Heller told him that he was eligible for EIDL. On November 1, 2005 Castaneda told Plaintiff that he was not eligible for EIDL because there was no documentation to support his account of the assault. However, she was dishonest regarding the requirements for EIDL, because the CDCR DOM does not require that a Police Report be filed or that the District Attorney file charges in order for a an Agent to be eligible for EIDL. As a result of this conversation with Castaneda, Plaintiff drove to the office on November 1, 2005 even though he was Off-Work injured and again told Garcia what appropriate documentation/incident report was needed for him to get his EIDL benefits and again Garcia denied his request. On November 9, 2005 Plaintiff again made the request for documentation and both Garcia and Fowler denied his request. Shortly thereafter, in November, Garcia refused to give Plaintiff his Performance Evaluation.

Volume I-Exhibit 4, Accident Report dated 10-24-05; Volume I-Exhibit 6, SCIF Forms dated 10-25-05; Volume I-Exhibit 8, Plaintiff's Supplemental Report dated 10-26-05; Volume I-Exhibit 12, Plaintiff's Incident Report Part C dated 11-14-05; Volume II-Exhibit 3, DOM 31020.7.5.1, How to Request EIDL; Volume VI-Exhibit 3-Amended Responses to Special Interrogatories, Page 4 Lines 21-23; Volume II-Exhibit 24, DOM 85010.9, Annual

Performance Appraisals Required; Volume II-Exhibit 24, DOM 85010.10, Unit Supervisor Required to Complete Annual Appraisals;

91. Plaintiff requested that Garcia submit his Supplemental Incident Report, prior to November 4, 2005 because on October 28, 2005 Plaintiff had requested that Ayala allow him to submit an incident report to correct the lack of information in Ferguson's Parole Violation Report regarding Plaintiff's involvement in the October 21, 2005 incident. After Plaintiff submitted his report to Garcia, Garcia altered it to reduce the level of force used by Plaintiff and then Garcia told Plaintiff that he was not going to submit it. After Plaintiff continued to request its submittal, Garcia warned Plaintiff that if it was submitted it would result in possible disciplinary action against Plaintiff and Ferguson. When Plaintiff still insisted, Plaintiff was in Garcia's office on November 9, 2005 when Fowler told Garcia that Plaintiff was not going to be allowed to submit his report. Plaintiff became very concerned that he was not going to be allowed to submit any documentation regarding the incident. Plaintiff did not understand why there was this resistance to the submittal of the appropriate documentation because by this time Ferguson had agreed that he had omitted Plaintiff from the incident and agreed that the information needed to be corrected. Therefore, it was beginning to be clear to Plaintiff that Ayala, Garcia and Castaneda who were being aided by Fowler were involved in a Cover-Up and that he needed to break the Chain of Command, Whistleblow to Fagot and submit his report despite their opposition.

Volume I-Exhibit 8, Plaintiff's Supplemental Report 10-26-05, Supplemental Report with Garcia's Handwritten Changes; Volume VI-Exhibit 1, First Amended Complaint, Page 9 Lines 18-23; Volume VI-Exhibit 1, First Amended Complaint, Page 8 Lines 24-28; Volume I-Exhibit 3, Ferguson's Charge Report dated 10-21-05; Volume I-Exhibit 5, Ferguson's Board Report dated 10-24-05

92. Garcia's "edits" were not minor because the changes by Garcia were a falsification of Plaintiff's report. During the Use of Force Training that all supervisors were required to attend after the Madrid Court decision, supervisors were told not to change a Peace Officer's report or order a peace officer to change their report especially as it related to

the use of force. During the training, supervisors were trained that if changes were needed they were to give it back to the writer with instructions to include more information or details. Supervisors were told that they could only correct misspelling or direct the writer to correct the grammar. However, Garcia made substantial changes regarding Plaintiff's use of force, most likely so that he, Garcia would not have to write a use of force report; and this may be why Plaintiff was told by Garcia that if Plaintiff insisted on submitting his report that Plaintiff and Ferguson were going to be in trouble. Plaintiff did not understand the warning about being in trouble because Plaintiff felt that he used only the force necessary to prevent the parolee from evading arrest, subdue him and place him in restraints. The "edits" made by Garcia were not made for any legitimate, independent business reason.

> Volume I-Exhibit 8, Plaintiff's Supplemental Report 10-26-05, Supplemental Report with Garcia's Handwritten Changes;

93. As stated in Plaintiff's testimony during his deposition, Castaneda, from the Return to Work Office, told Plaintiff that the RTW Office did not have the documentation to support Plaintiff's belief that he may be eligible for EIDL. However, Castaneda should have, but did not request an Incident Report from Garcia after Tara Heller spoke to Plaintiff on October 28, 2005. Plaintiff's problem regarding the fact that Garcia had not completed an injury report was compounded by the fact that Ferguson had deliberately omitted Plaintiff in Estrada's Parole Violation Report. By November 1, 2005, Ayala had refused to allow Plaintiff's request to submit a report to correct Ferguson's Parole Violation Report. On November 1, Ferguson and Plaintiff approached Garcia to ask Garcia permission to submit a Supplemental Report. Garcia stated he would review the request. On November 4, 2005, Plaintiff wrote a Supplemental Report regarding the incident and submitted it to Garcia. Garcia agreed to accept it and instructed Plaintiff to return on November 7, 2005. On November 7, Plaintiff returned to the Parole Office and Garcia proceeded to alter Plaintiff's report and told him to retype the report and then he would accept the Supplemental Report. In a telephone conversation with Garcia on November 9, 2005, Fowler refused to allow Plaintiff to submit his report.

Volume I-Exhibit 4, Accident Report dated 10-24-05; Volume I-Exhibit 6, SCIF Form Workers' Comp Claim dated 10-25-05, SCIF Form Employer's Report of Injury dated 10-25-05; Volume I-Exhibit 8, Plaintiff's Supplemental Report 10-26-05, Supplemental Report with Garcia's Handwritten Changes; Volume I-Exhibit 11, M. Ayala's Field Incident Report dated 11-14-05; Volume I-Exhibit 12, Plaintiff's Incident Report Part C dated 11-14-05; Volume I-Exhibit 13, Ferguson's Incident Report Part C dated 11-14-05; Volume VI-Exhibit 1, First Amended Complaint, Page 9 Lines 18-23; Volume VI-Exhibit 1, First Amended Complaint, Page 8 Lines 24-28; Volume II-Exhibit 18, DOM 31020.7.5.1 How to Request EIDL; Volume II-Exhibit 19, DOM 31020.7.7.9, RTWC Responsibilities; Volume VI-Exhibit 3, Amended Reponses to Special Interrogatories, Page 7 Lines 16-21

94. Plaintiff reported the misconduct of his supervisors numerous times. For example, Plaintiff not only reported the misconduct of Ayala and Garcia on November 14, 2005. Plaintiff reported that Garcia inappropriately altered his incident report, when Plaintiff testified in the Fact Finding Investigation conducted by Investigator George Ruiz. Garcia's misconduct was obviously ignored by Region IV administrators including Fowler and Fagot. Plaintiff also wrote a letter to Fagot in 2007 which should have been investigated by OIA and OCR; however, Fowler referred the letter to CDCR's OCR. Fowler did not refer Plaintiff's complaints to OIA as he should have. Plaintiff provided testimony to CDCR's OCR, Gail Richie during the Intake Interview with her. However, Gail Richie failed to investigate Plaintiff's claims even though he was retaliated against when he was a disabled employee and she apparently decided that a Hispanic could not be discriminated against by other Hispanics. Gail Richie apparently ignored Plaintiff's belief that Ayala, Garcia, Castaneda and Rodriguez were all Hispanics and all were involved in misconduct against Plaintiff and that this misconduct occurred after Plaintiff Whistleblew on Ayala and Garcia, and then Castaneda, and Rodriguez supported Ayala and Garcia through their misconduct against Plaintiff. Plaintiff wrote letters to Tom Hoffman, Director of Parole and Scott Kernan, Undersecretary of Adult Operations in hopes that someone would investigate his claims, but they didn't even acknowledge

receipt of his letter. Additionally, Plaintiff wrote a letter to Martin Hoshino, Director of the Office of Internal Affairs in hopes that there would be an investigation. But, OIA informed Plaintiff that Region IV did not have a copy of the EEO Investigatory Interview and Plaintiff had to have his tape transcribed and sent to OIA. Plaintiff also testified in an OIA Investigation conducted by Gene Pettit regarding the misconduct by Ayala and Garcia, however, by this time Garcia had retired, and the one-year time frame had expired for the CDCR to take any action against Ayala. Therefore, even if Pettit had found evidence of misconduct, the fact that Rodriguez, Fowler, Fagot, Ruiz and Richie were all aware of Plaintiff's allegations of misconduct against his supervisors and they took no action against Ayala or Garcia, it prevent the CDCR from taking any action against Garcia who was now retired or Ayala who had by this time been promoted to Parole Agent III. The CDCR had exhausted its timeframes and the CDCR did not have any reason that they could point to to toll the timeframes.

Additionally, it is an untrue statement that Plaintiff never told anyone he was asked to submit a false report. All of Plaintiff's facts listed above indicate a concerted effort by Plaintiff's supervisors to cover-up the incident and once they were forced to reveal the incident, Garcia minimized his changes as "edits" and then ordered the Plaintiff to sign it. However, Plaintiff's Part C of the Incident Report indicates that his report was being written because he was omitted from the Parole Violation Report. Ayala omitted Plaintiff's language from his Part A of the Incident Report which is to accurately summarize Plaintiff's Part C.

There was an obvious cover-up because Plaintiff was asked by Garcia if Plaintiff had destroyed his original report, making Plaintiff aware that he could not complain to Garcia because it was now evident to Plaintiff that Garcia and Ayala were involved in a Cover-Up. Plaintiff testified during the Region IV Fact Finding Investigation in which he was a "Subject" of the investigation that Garcia had altered his report and Plaintiff provided Investigator Ruiz a copy of the altered report. Plaintiff also testified during the OIA Investigation conducted by Investigator Gene Pettit that Garcia had altered his report. Plaintiff had to provide OIA with a copy of the Region IV Fact Finding Investigative

Interview Transcript because Region IV told OIA that the transcript was either lost or that the interview was not taped. Plaintiff is unaware why OIA asked him for a copy of his investigatory interview tape with George Ruiz or why Region IV stated that they did not have a copy of it stored as required by CDCR regulations.

> Volume I-Exhibit 17, Transcript of Interrogation, Page 62 Lines 1-20; Volume I-33, Letter to Fagot re: Disparate Treatment/Hostile Work Environment; Volume I-Exhibit 34, Letter to Plaintiff from T. Fowler dated 4-3-07; Volume I-Exhibit 39, Letter to Plaintiff from G. Richie, EEO Investigator dated 5-16-07, Volume I-Exhibit 40, Letter to M. Hoshino, Director of OIA, from Plaintiff dated 6-3-07; Volume I-Exhibit 44, Letter to S. Kernan, Director of CDCR; Volume I-Exhibit 88, Internal Affairs Investigation Report Pages 2-3, 5-8 of 51; Volume II, Exhibit 15, DOM 31140.42, Maintenance of Investigative/Inquiry Record/Files

95. Plaintiff's reporting of the misconduct of his supervisors and the CDCR was ineffective because the CDCR did not respond to his Whistleblowing even when Plaintiff demonstrated that he was being harassed and retaliated against. His Whistleblowing was not responded to by CDCR in that the CDCR failed to thoroughly investigate the reporting of misconduct. Plaintiff reported to Fagot the fact that Ayala refused to allow Ferguson to correct parolee Estrada's Parole Violation Report. However, neither Ferguson nor Ayala were disciplined regarding Plaintiff's report of their misconduct. Garcia was not investigated to Plaintiff's knowledge and Fowler did not subject himself or recuse himself from the investigative process even though he was the administrator that refused to allow Plaintiff to submit his report. Plaintiff Whistleblew to Fagot when he reported the fact that Castaneda gave him false information regarding the requirements for EIDL. Castaneda was not investigated regarding her attempts to deprive Plaintiff of his EIDL benefits. Plaintiff Whistleblew when he reported the misconduct of Ayala and Garcia to Marilyn Kalvelage, Deputy Director of Parole regarding Ayala's and Garcia's Cover-Up of the October 21, 2005 incident. He reported their refusal to allow him to

document the incident and that they should have communicated it to Castaneda the RTWC.

96. When Plaintiff expressed concerns to Ayala regarding the lack of documentation for his SCIF Claim and his EIDL request, he was "Whistleblowing" because he was reporting a violation of CDCR's rules and regulations regarding the required accuracy of a Parole Violation Report. Additionally, he was Whistleblowing because this lack of documentation was preventing him from being able to document the true nature of the incident and his injury. Plaintiff was reporting Ferguson's misconduct to Ayala. Ferguson deliberately omitted him, the Plaintiff, as the Agent who actually made the arrest of parolee Estrada. Ayala refused to allow Plaintiff to submit a report to correct Ferguson's Board Report. The Plaintiff testified to the fact that he Whistleblew regarding this issue and that Ayala was involved in the cover-up of the incident because he refused to let Plaintiff correct Ferguson's Board Report. Ayala retaliated by trying to prevent Plaintiff from having access to his computer to write the report that he had already refused to let Plaintiff write on October 28, 2005.

> Volume I-Exhibit 3, Ferguson's Charge Report, Volume I-Exhibit 5, Ferguson's Board Report; Volume I-Exhibit 11, M. Ayala's Field Incident Report

97. Plaintiff was involved in Whistleblowing because he was reporting Ferguson's misconduct to the Return to Work Coordinator, the person responsible for processing his request for EIDL. Ferguson's omission of Plaintiff in the Board Report as the arresting agent who was assaulted and injured was a violation of the CDCR's rules and regulations. Plaintiff also challenged Castaneda's false interpretation of the CDCR regulations regarding EIDL. Castaneda, as the supervisor of the Return to Work Office, had authority over Plaintiff's benefits and therefore he considered the reporting of Ferguson's misconduct that was affecting his benefits "Whistleblowing" and "Discrimination against a Disabled Employee" as he was not going to receive the same benefits as other disabled employees. Ferguson failed to follow Parole Violation Report

requirements in CDCR's DOM; Ayala refused to allow Ferguson to correct the report; Castaneda did not report these failures to Garcia, the supervisor over Ferguson and Ayala; Castaneda did not report Garcia's failures to Fowler; and Fowler did not report his own failures to Fagot. Instead, the Whistleblower, Plaintiff was investigated. Castaneda had an obligation to contact Garcia and Ayala regarding Plaintiff's information about Ferguson's omission, but to Plaintiff's knowledge, she did not.

> Volume I-Exhibit 3, Ferguson's Charge Report, Volume I-Exhibit 5, Ferguson's Board Report; Volume I-Exhibit 8, Plaintiff's Supplemental Report 10-26-05, Supplemental Report with Garcia's Handwritten changes; Volume I-Exhibit 11, M. Ayala's Field Incident Report; Volume II-Exhibit 7, DOM 51030.7, P&CSD Incident Report Policy;

98. Plaintiff reported the misconduct of Ayala and Garcia to Assistant Deputy Director of Parole, Marilyn Kalvelage and she failed to take any action to have Garcia and Ayala investigated. While Ferguson and Ayala were investigated, Garcia was not. Plaintiff reported the misconduct of Ferguson, Ayala, and Garcia during his telephone conversation with Ms. Kalvelage. However, it appeared to Plaintiff that Kalvelage was not interested in the misconduct of Ayala and Garcia, only the misconduct of Ferguson. Plaintiff's reporting misconduct of his supervisors was Whistleblowing according to the Whistleblower Statute in California Government Code and CDCR DOM regulations. It was not long after that, Plaintiff's reporting of Ayala and Garcia's misconduct to Kalvelage and Fagot, that the retaliation against Plaintiff began. CDCR DOM regulations required that Kalvelage have the report of misconduct of Ayala, Garcia and Fowler investigated but Kalvelage did not have any of the reported misconduct investigated. Jeff Fagot did contact Plaintiff, but did not have the misconduct of Garcia and Fowler investigated but instead the Plaintiff (Whistleblower/Disabled employee) was investigated.

> Volume II-Exhibit 1, DOM 31140.4.11, Supervisor and Managers shall be responsible for reporting misconduct; Volume II-Exhibit 2, DOM 31140.10, Reporting Misconduct; Volume II-Exhibit 2, DOM 31140.5, Employee

Expectations and Reporting Misconduct; Volume I-Exhibit 16, Investigatory Interview Notice to Plaintiff dated 12-9-05

99. Kalvelage was required by CDCR regulations to have Plaintiff's complaints investigated even if Plaintiff did not mention the altered report. However, instead of Garcia being investigated, Plaintiff, the Whistleblower was investigated. Kalvelage failed in her responsibility to have the matter investigated and to offer Plaintiff any protection against retaliation. Additionally, as stated, Plaintiff testified during the Fact Finding Investigation, to which he was subjected, that Garcia altered his report and Plaintiff produced a copy of the altered report during the investigation. Garcia was not the "Subject" of an investigation; instead, Garcia was used as a witness against Plaintiff. To Plaintiff's knowledge the CDCR did not take any action against Garcia for altering Plaintiff's report or any other misconduct by Garcia against Plaintiff.

Volume II-Exhibit 1, DOM 31140.4.11, Supervisor and Managers shall be responsible for reporting misconduct; Volume II-Exhibit 2, DOM 31140.10, Reporting Misconduct; Volume II-Exhibit 2, DOM 31140.5, Employee Expectations and Reporting Misconduct; Volume I-Exhibit 16, Investigatory Interview Notice to Plaintiff dated 12-9-05; Volume I-Exhibit 15, Investigatory Interview Notice to Garcia-Witness dated 12-8-05; Volume I-Exhibit 17, Transcript of Interrogation of Plaintiff 12-15-05, Page 62 Lines 9-20

100. Plaintiff's Whistleblowing to Regional Administrator Fagot required that Plaintiff's allegation of misconduct be investigated because California Government Code 8547-8547.12 and CDCR DOM 31140.10 regulations state that when an employee reports the misconduct of a supervisor, which include the violations of Government Code or Regulations that it is Whistleblowing and CDCR DOM 31140.11, required that allegations of misconduct reported to administrators "shall" be investigated. Plaintiff not only reported the misconduct (Cover-Up/Code of Silence) of Ferguson, Ayala and Garcia to Fagot but also reported Castaneda, the Return to Work Coordinator. She had been

dishonest with Plaintiff regarding the EIDL requirements and she had stated that Parole did not have any Modified/Light duty. She had authority over the processing of Plaintiff's Workers' Compensation claim and his EIDL benefits and Modified Duty. As stated, Fagot was required to have Plaintiff's complaints against Garcia and Castaneda investigated and he did not. Instead Fagot had the Plaintiff/Whistleblower investigated. Fagot had Plaintiff investigated on false and inaccurate information which Tara Heller allegedly provided to Fowler. Fowler instead of removing himself from the request for investigation process, because he had denied Plaintiff's request to submit his report, recommended to Fagot that Plaintiff be investigated.

> Volume II- Exhibit 33, California Government Code 8547.1; Volume II-Exhibit 2, DOM 31140.10, Protecting Employees from Retaliation; Volume II-Exhibit 19, DOM 31020.7.6.3 and DOM 31020.7.7.9, RTWC Responsibilities; Volume I-Exhibit 16, Investigatory Interview Notice to Plaintiff dated 12-9-05; Volume VI-Exhibit 1, First Amended Complaint, Page 12, Lines 1-7

101. Plaintiff testified that he believed the filing of his Workers' Comp claim was "untimely", because Garcia did delay it; however, Garcia tried to prevent Plaintiff from filing a Workers Compensation claim on October 21, 2005 because Plaintiff requested an Injury Report and Garcia instead told him to go home. Garcia a supervisor, with probably more than 25 years experience, had Plaintiff submit an "Accident" report instead of an "Injury Report." Taken in a vacuum it may seem like a mistake or incompetence. However, coupled with the fact that Garcia did not complete an Incident Report until Fagot ordered one to be completed and Ayala had to submit one and Garcia's refusal to allow Plaintiff to submit his own report or have Ferguson correct his report, indicates that this was not just a mistake or oversight. This was a cover-up. As a result, Garcia's misconduct was a violation of regulations per CDCR DOM 31020.5.3, which requires an Injury Report to be filed within 24 hours of the injury and a misdemeanor per Government Code Regulation.

> Volume II-Exhibit 33, California Insurance Code 1871.4; Volume I-Exhibit 4, Accident Report dated 10-24-05; Volume II-Exhibit 4, DOM 31020.5.3

102. While it is true that Plaintiff signed the document that Garcia altered, Plaintiff's actions have to be taken in context of what was transpiring at the time. By this time Plaintiff was aware that if he did not have documentation supporting his workers comp claim at best, it would be denied and he could be charged with Workers' Comp fraud even though Ayala told him not to worry about it that "they had his back." At this point the only document that even mentioned him in the arrest of Parole Estrada was Ferguson's one line in the Charge Report. However, the Charge Report did not indicate that Plaintiff made the arrest, that he was assaulted and that he had to use force to apprehend and restrain the parolee.

By this time, Plaintiff was under duress when he signed the document because Ferguson had omitted him from the arrest, Ayala had refused to allow Plaintiff to submit a report that would have corrected Ferguson's Board Report, Garcia initially did not allow Plaintiff to file an Injury Report, but had Plaintiff submit an Accident Report, and Garcia finally allowed Plaintiff to submit an Injury Report after Plaintiff told Garcia that Kaiser would not make an appointment to treat his knee without an Injury Report. Plaintiff was not allowed by Garcia and Fowler to submit even the altered report on November 9, 2005. Plaintiff was not allowed to submit his report until after he Whistleblew to Fagot on November 14, 2005.

As stated before, Plaintiff reported that Garcia altered the report during the Fact Finding Investigation conducted by Investigator Ruiz and to Plaintiff's knowledge no action was taken against Garcia. Plaintiff's report of Garcia's misconduct to Fagot was followed by retaliation from Garcia because Garcia refused to give Plaintiff his Annual Performance Evaluation. Additionally, Plaintiff's testimony in the Fact Finding Investigation with Ruiz was within the one (1) year timeframe required by CDCR to take action against an employee for misconduct. Plaintiff also reported during the OIA investigation conducted by Gene Pettit that Garcia altered his report, but by this time Garcia had retired and the one year timeframe had elapsed. This was as a result of Fagot, Kalvelage, Fowler and

Ruiz's failure to properly investigate initial reports of misconduct by Plaintiff against Garcia.

> Volume I-Exhibit 3, Ferguson's Charge Report, Volume I-Exhibit 5, Ferguson's Board Report; Volume I-Exhibit 8, Plaintiff's Supplemental Report 10-26-05, Supplemental Report with Garcia's Handwritten changes; Volume I-Exhibit 11, M. Ayala's Field Incident Report; Volume II-Exhibit 7, DOM 51030.7, P&CSD Incident Report Policy; Volume I-Exhibit 17, Transcript of Interrogation of Plaintiff 12-15-05, Page 62 Lines 9-20; Volume VI-Exhibit 3-Amended Responses to Special Interrogatories, Page 7 Lines 16-21; Volume VI-Exhibit 3-Amended Responses to Special Interrogatories, Page 8 Lines 3-6; Volume I-Exhibit 88, Internal Affairs Investigation Report Pages 2-3, 5-8 of 51 ;Volume II-Exhibit 24, DOM 85010.9, Annual Performance Appraisals Required; Volume II-Exhibit 24, DOM 85010.10 Unit Supervisor Required to Complete the Appraisals

103. Fowler is incorrect in his Declaration that Plaintiff did not submit a report within 24 hours after the incident per DOM regulations. DOM regulation 51030.5 requires that Garcia or Ayala, who were the supervisors, not Plaintiff, submit an Incident Report within 72 hours of the incident, to include "Part A" by the supervisor and "Part C's" by involved staff or staff witnesses. Fowler fails to note that the Agent of Record, Ferguson failed to submit an accurate Parole Violation Report as required by DOM regulations 81040.14 and Plaintiff tried to get that corrected on October 28, 2005 by trying to submit his own report. However, that request was denied by Ayala. Fowler fails to state in his Declaration that when Plaintiff discovered that an Incident Report had not been written, he tried to submit a report on November 9, 2005 and again on November 14, 2005. Fowler fails to state in his Declaration that he denied Plaintiff's request to submit his report on November 9, 2005 when Plaintiff was in Garcia's office attempting to get permission to document the incident. Fowler in his Declaration fails to state that

Plaintiff's efforts were rejected by Ayala, Garcia and himself until he Whistleblew to Fagot.

> Volume II-Exhibit 8, DOM 81040.14, Parole Violation Format; Volume II-Exhibit 51030.5, Formal Incident Reports; Volume I-Exhibit 3, Ferguson's Charge Report, Volume I-Exhibit 5, Ferguson's Board Report; Volume I-Exhibit 8, Plaintiff's Supplemental Report 10-26-05, Supplemental Report with Garcia's Handwritten changes; Volume I-Exhibit 11, M. Ayala's Field Incident Report; Volume I-Exhibit 12, Plaintiff's Incident Report Part C dated 11-14-05; Volume I-Exhibit 13, Ferguson's Incident Report Part C dated 11-14-05

104. While this was already addressed, it is not a minor issue when Plaintiff had "trouble" logging on to his computer when the facts support Plaintiff's claim that Ayala "prevented" him from logging on to his computer because Ayala was the person who "knew the password" but "refused to provide it" to Plaintiff. Ayala's attempts to prevent Plaintiff from submitting his report in support of his workers' comp claim was gross misconduct and was a misdemeanor because he was discriminating against an injured worker in violation of Labor Code 132a. Plaintiff stated numerous times in investigations that Ayala was dishonest when he told Plaintiff to contact the CDCR computer repair person Jan Stevenson instead of giving Plaintiff the "new password." Plaintiff testified in investigations Ayala was dishonest when he allowed Plaintiff to go home believing that his computer was broken when in reality Ayala could have provided Plaintiff with the new password. As stated Ayala was preventing Plaintiff from accessing the information he needed to write his report which he needed to support his claim Workers Comp benefits and Ayala committed a misdemeanor violation of the California Government Code 1102.5 (b)(c)(d), and Insurance Code 1871.4 and Labor Code 132a. There was no legitimate, independent business reason for Ayala to have done this to Plaintiff.

> Volume VI-Exhibit 1, First Amended Complaint, Page 12 Lines 7-28 and Page 13 Lines 1-6; Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, Page 8 Lines 7-28 and Page 9 Lines 1-4; Volume II-Exhibit 18, DOM 31020.7.5.1, How to Request EIDL; Volume II-Exhibit 33,

California Insurance Code 1871.4; Volume II-Exhibit 33, California Labor Code 132a; Volume II-Exhibit 33, California Government Code 1102.5 (b)(c)(d)

105. Ayala's Declaration that a report had already been written that included Plaintiff is "not plausible" because the date on the Incident Report is November 14, 2005, the same day that Plaintiff was told by Fagot to go to the office to write his report after Plaintiff Whistleblew that he was not being allowed to submit his report. Ayala states in his Declaration that because a Charge Report mentions Plaintiff being at the home of the parolee that no other documentation was necessary. This is contradicted by Castaneda's statement to Plaintiff that there was no Incident Report to support the fact that he was involved in the incident. Additionally, the Charge Report that Ayala refers to in his Declaration does not state that Plaintiff pursued the parolee and jumped over the fence. The Charge Report does not state that Plaintiff was assaulted by the parolee when the parolee was trying to evade arrest. The Charge Report does not describe any force that the Plaintiff used to subdue and place the parolee in mechanical restraints/handcuffs. Ayala totally mischaracterized the nature and purpose of a Charge Report in his attempt to intentionally mislead the Court that he was not remiss in his duties to have Ferguson write a complete and accurate Board Report and that he and Garcia were involved in serious misconduct in their attempt to cover-up the incident. The Plaintiff has testified and documented that he requested that he be allowed to submit his own report to correct Ferguson's Parole Violation Report which excluded him, the Plaintiff, as being involved in the arrest. Plaintiff's request was denied by Ayala on October 28, 2005 and Plaintiff's request to submit his report was denied by Garcia on the November 4, 2005 and on November 9, 2005 by Fowler.

All of the Declarations submitted in support of the Motion for Summary Judgment omit CDCR DOM regulations that require a Supervisor in Parole to submit an Incident Report within 72 hours of the incident and that Supervisors complete a complete Incident Report with "Part A" completed by the supervisor and the supervisor will have staff involved complete "Part C" of the incident report. The Incident Report that was eventually

submitted as a result of Plaintiff's Whistleblowing included Ayala's Part A and Ferguson's Part C and Plaintiff's Part C. While this report was in compliance with CDCR policy it was only generated as a result of Plaintiff's Whistleblowing. It is important to note that during this time Plaintiff was injured and, as such, was covered by Labor Code 132a which states that it is unlawful to discriminate against an injured worker and Government Code 1102 which states that it is unlawful to retaliate against an employee for participating in Protected Activities. Plaintiff had been already retaliated against by Ayala when he denied Plaintiff access to his computer, also in violation of Labor Code 132a. Garcia was also in violation of Labor Code 132a and soon after Plaintiff's Whistleblowing Plaintiff was subjected to more retaliation as he was not provided his Annual Performance Evaluation after Garcia had promised an excellent performance evaluation. Plaintiff's claims that Garcia was going to provide him with an excellent performance evaluation, is supported by the notes that Garcia made on Plaintiff's casework rosters.

> Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, Page 5 Lines 9-19; Volume VI-Exhibit 3, Amended Responses to Special Interrogatories, Page 7 Lines 16-21; Volume II-Exhibit 8, DOM 81040.14, Parole Violation Format; Volume II-Exhibit 51030.5, Formal Incident Reports; Volume I-Exhibit 3, Ferguson's Charge Report, Volume I-Exhibit 5, Ferguson's Board Report; Volume I-Exhibit 8, Plaintiff's Supplemental Report 10-26-05, Supplemental Report with Garcia's Handwritten changes; Volume I-Exhibit 11, M. Ayala's Field Incident Report; Volume I-Exhibit 12, Plaintiff's Incident Report Part C dated 11-14-05; Volume I-Exhibit 13, Ferguson's Incident Report Part C dated 11-14-05; Volume II-Exhibit 18, DOM 31020.7.5.1, How to Request EIDL; Volume I-Exhibit 1, Plaintiff Parole Caseload 2004 prior to 10-21-05 Incident; Volume I-Exhibit 2, Plaintiff Caseload 2005 prior to 10-21-05 Incident; Volume II-Exhibit 24, DOM 85010.9, Annual Performance Appraisals Required; Volume II-Exhibit 24, DOM 85010.10 Unit Supervisor Required to Complete the Appraisals

106. Plaintiff did not back-date his portion of the Incident Report Part C. Plaintiff wrote the incident report on November 14, 2005 and did not "backdate" it to October 21, 2005. Plaintiff's Part C was correctly completed by Plaintiff. The form is very clear in asking for the "Incident Date" in a specific box and the "Incident Time" in a specific box. The incident date was October 21, 2005. The Part C was correctly completed by Plaintiff. It also asks for the "Date Reported" and "Time Reported." Plaintiff indicated that the date reported/form completed was November 14, 2005. Ayala completed the Part A of the report with the same dates as Plaintiff. Defendants Ayala and Garcia omit the fact that DOM required that one of them submit the Incident Report within 72 hours of the incident, which was October 21, 2005 and it was not completed until November 14, 2005. However, a review of Ayala's Part A indicates Plaintiff's statement that the report was being submitted because he was omitted from Ferguson's Board Report is omitted by Ayala in his Part A of the Incident Report. While Ayala did not alter Plaintiff's report, he omitted a significant fact as to why the report was being prepared.

> Volume II-Exhibit 6, DOM 51030.5, Formal Incident Reports; Volume I-Exhibit 11, M. Ayala's Field Incident Report; Volume I-Exhibit 12, Plaintiff's Incident Report Part C dated 11-14-05; Volume I-Exhibit 13, Ferguson's Incident Report Part C dated 11-14-05;

107. Ayala's Part A of the Incident Report is not more similar to the Plaintiff's report after it had been altered by Garcia. Plaintiff's Part C of his report stated that the "parolee's shoulder hit" Plaintiff's chest and "hitting" a Parole Agent in the performance of his duties, is an assault of a peace officer by a parolee. Ayala's Declaration fails to point out that Ayala's report minimized the assault by stating that the parolee "placed his shoulder" on Plaintiff's chest. Ayala's version makes it seem as though the parolee hugged Plaintiff instead of hitting Plaintiff. Additionally, and just as serious, is that Ayala's Part A of the Incident Report fails to address the information in Plaintiff's Incident Report Part C which states "On 10-14-05 a BPT report was submitted with the omission of Agent Tristan's presence during the arrest. Subsequently, a report clarifying the involvement of Agent Tristan's presence is being submitted." Ayala's Part A, which

is supposed to summarize the Part C's submitted to him, misrepresents Plaintiff's Incident Report Part C.

> Volume II-Exhibit 6, DOM 51030.5, Formal Incident Reports; Volume I-Exhibit 11, M. Ayala's Field Incident Report; Volume I-Exhibit 12, Plaintiff's Incident Report Part C dated 11-14-05; Volume I-Exhibit 8, Plaintiff's Supplemental Report 10-26-05, Supplemental Report with Garcia's Handwritten changes

108. Ferguson's Part C of the Incident Report also indicates that it was reported and completed on November 14, 2005, identical to Plaintiff's date and Ferguson's report also indicates that the incident occurred on October 21, 2005. Ferguson's report also indicates that Plaintiff had caught the parolee and that he did not see the force used by Plaintiff because he was focused on the family. Therefore, Plaintiff's account of the parolee charging him, the parolee striking Plaintiff in the chest with his shoulder as he was trying to avoid being arrested, and Plaintiff's use of force cannot be contested. Tara Heller's statement in the request for investigation that Plaintiff injured his shoulder was obviously a misunderstanding on Tara Heller's part because Plaintiff was consistent regarding the fact that his knee was injured not his shoulder. Plaintiff told Ferguson that he injured his knee, he told Garcia that he injured his knee and neither Ferguson, Ayala, or Garcia ever state that Plaintiff said that his shoulder was injured.

> Volume I-Exhibit 11, M. Ayala's Field Incident Report; Volume I-Exhibit 12, Plaintiff's Incident Report Part C dated 11-14-05; Volume I-Exhibit 13, Ferguson's Incident Report Part C dated 11-14-05;

109. Plaintiff complained to Maritza Rodriguez regarding his excessive workload while on a Light Duty assignment and his excessive workload after he returned to Full Duty. Plaintiff was Whistleblowing on the misconduct of Ayala, his supervisor, to Maritza Rodriguez verbally in the office and also in two letters to her in which he complained about Ayala's misconduct through "excessive workload" and "disparate" treatment. However, Rodriguez failed to have Plaintiff's allegations against Ayala investigated as required by CDCR DOM 31140.4.11 which states that allegations of misconduct "shall"

be referred for investigation. If Plaintiff's claims had been investigated and Plaintiff's workload prior to October 21, 2005 had been compared to his workload after he Whistleblew and returned to work, it would have revealed the disparate amount of work Plaintiff was being assigned in retaliation for his Whistleblowing. Additionally, a review of Monahan's workload prior to October 21, 2005 and Plaintiff's workload after he returned to work in January 2007 clearly demonstrates the excessive workload and disparate workload that Plaintiff was subjected to as compared to Monahan. Plaintiff also provided examples of other forms of disparate treatment by Ayala in the letter to Rodriguez. As stated, Rodriguez failed to investigate Plaintiff's allegations as required by CDCR DOM 31140.4.11.

> Volume II-Exhibit 1, DOM 31140.4.11; Volume II-Exhibit 2, DOM 31140.5, Supervisors and Managers shall report misconduct; Volume II-Exhibit 2, 33030.5.3, Refer misconduct and request an investigation; Volume I-Exhibit 27, Letters to Rodriguez dated 2-10-07 and 3-13-07; Volume I-Exhibit 86, Caseload Roster for M. Monahan dated 1-29-04; Volume I-Exhibit 1, Plaintiff Parole Caseload 2004 prior to 10-21-05 incident; Volume I-Exhibit 1, Plaintiff Parole Caseload 2004 prior to 10-21-05 incident; Volume I-Exhibit 25, Excessive Workload during Light Duty Status; Volume I-Exhibit 29, Excessive Workload after return to Work Full Duty 3-14-07; Volume I-Exhibit 24, Light Duty Agreement dated 1-17-07; Volume I-Exhibit 87, Internal Affairs Investigation Report pages 18 and 19 of 51; Volume II, Exhibit 20, Bargaining Unit 6 Contract/LBFO section 19.06, CDC Parole Agent Workload; Volume I-Exhibit 94, Memo from T. Hoffman re: Authorizing Overtime and Modifying Cases with Excess Points

110. The disparate workload that Plaintiff was assigned by Ayala and Garcia was harassment, discrimination and retaliation against Plaintiff. Plaintiff had Whistle blown against Ayala and Garcia and they were going to retaliate against him. Therefore, the workload was not for "legitimate, non-discriminatory reasons." As stated, a review of Agent Monahan's workload prior to Plaintiff assuming her cases was significantly less than that of Plaintiff while he was on Light Duty and assumed her caseload. For

example, Agent Monahan was not required to complete all of the Pre-Paroles for the Unit even though she was Full-Duty and Plaintiff was Light Duty. This was no legitimate reason for this extra work. Additionally, Agent Monahan was only required to make "one collateral contact" per High Control Parolee-at-Large per month. Plaintiff was required by Garcia to make "two collateral contacts" per month per Parolee at Large, as compared to Monahan which doubled his workload requirements. Agent Monahan was not required to perform as OD every day of the month. Agent Monahan was not required to complete all of the "Oral RPS's" for the unit and this was required of Plaintiff while he was on Light Duty. A review of Plaintiff's workload prior to his Whistleblowing regarding the October 21, 2005 incident will demonstrate that his workload was similar to that of other agents in the office. A review of Plaintiff's workload when he returned to Full Duty was significantly greater than that of other agents in the office. CDCR's DOM and the Bargaining Unit 6 Contract require that supervisor ensure that workload is equally distributed among all the agents in the office. This excessive workload was assigned to Plaintiff for no legitimate, independent business reasons.

Ayala's Declaration in which he asserts that RPS's or Pre-Releases do not count as points is misleading. Ayala is correct that a caseload is assigned points, but the assignment of completing Pre-Releases is not. Pre-Releases, Initials, Oral RPS's, and OD Duty, as well as other miscellaneous duties, all add to a Parole Agent's workload and detract from the time that an Agent has available to them to complete their casework. Therefore a more accurate reflection of an Agent's workload would include all of the duties that an Agent is required to perform. In Plaintiff's case, the workload assigned by Ayala was designed to harass and retaliate against him.

> Volume I-Exhibit 86, Caseload Roster for M. Monahan dated 1-29-04; Volume I-Exhibit 1, Plaintiff Parole Caseload 2004 prior to 10-21-05 incident; Volume I-Exhibit 1, Plaintiff Parole Caseload 2004 prior to 10-21-05 incident; Volume I-Exhibit 25, Excessive Workload during Light Duty Status; Volume I-Exhibit 29, Excessive Workload after return to Work Full Duty 3-14-07; Volume I-Exhibit 24, Light Duty Agreement dated 1-17-07; Volume I-Exhibit 87, Internal Affairs Investigation Report pages 18 and 19 of 51; Volume II-

Exhibit 21, DOM 85030.24, Work Schedule; Volume II-Exhibit 20, BU 6/LBFO section 19.05, Caseload Audits; Volume II-Exhibit 20, BU 6/LBFO section 19.06, Volume I-Exhibit 94, Memo from T. Hoffman re: Authorizing Overtime and Modifying Cases with Excess Points

111. Plaintiff's workload while on Light Duty was excessive. While Plaintiff was within 20 points of other Agents, he was the only Agent in the Unit that was OD everyday of the week and the other Agents did not have any OD duty at all. In addition to the casework that Plaintiff was responsible for, and being OD, he was ordered to complete all of the RPS's for the entire unit, all Oral RPS's for the entire Unit. He had 50 Pre-Paroles which was the entire Pre-Parole workload for the entire unit. Other agents had as few as 3 to as many as 10. The collateral contacts for his High Control Parolee-at-Large caseload were doubled from one a month to two a month as soon as the cases were assigned to him. Per the DOM, Light Duty provided to ease the injured/disabled employee back into the workplace instead of trying to drive the employee out of the workplace. There was no legitimate work-related reason for assigning Plaintiff all of this extra work. Additionally, what Plaintiff was given was in violation of the Light Duty Agreement signed by Garcia and Plaintiff. Ayala's statement that assigning Plaintiff all of this extra work "freed up" other agents to do field work is without merit because Plaintiff was not told to assign field work on the caseload that he was assigned to other agents. Plaintiff was told by Ayala, and Ayala states it in his Declaration, that all of Plaintiff's casework was to be done in the office via phone calls. However, the duties of a High Control Parolee-at-Large Parole Agent, is to locate and arrest High Control Parolees. Therefore, Plaintiff had to work before work hours, during his lunch breaks and after his normal work hours to communicate with other law enforcement agencies in order to find and arrest these parolees. Plaintiff shared what he was doing with Ayala and Garcia and they did not offer to compensate Plaintiff with overtime for the extra hours worked but they did authorize overtime to other agents. This was discriminatory and in retaliation for Plaintiff's Whistleblowing and these acts occurred for no legitimate, independent business reason.

Ayala and Garcia were discriminatory in that they authorized overtime for other agents but they denied Plaintiff's requests for overtime. This was in violation of the Director Hoffman's February 1, 2008 Memorandum in which he reiterates the provisions of the July 1, 2001 Unit 6 Contract/MOU which outlines provisions for overtime.

> Volume I-Exhibit 24, Light Duty Agreement dated 1-17-07; Volume I-Exhibit 87, Internal Affairs Investigation Report pages 18 and 19 of 51; Volume I-Exhibit 25, Excessive Workload during Light Duty Status; Volume III-Exhibit 1, Page 5 Lines 1-3; Volume II, Exhibit 20, Bargaining Unit 6 Contract/LBFO section 19.06, CDC Parole Agent Workload; Volume I-Exhibit 94, Memo from T. Hoffman re: Authorizing Overtime and Modifying Cases with Excess Points

112. The fact that Plaintiff was not disciplined for failing to complete his work is because Plaintiff worked before and after normal work hours and during his lunch in order to complete the excessive workload that he was given. Also, Plaintiff was not paid any overtime for work completed. Plaintiff was told by Ayala that he would be documented if he failed to complete his assigned work. Plaintiff obtained relief from the workload from Ms. Tryna Woods after he complained to her. In his Declaration, Ayala says, "The RPSs assigned to Agent Tristan did decrease to 25 and 19 in April and May, 2007 respectively." That is only because he had reported Ayala to Tryna Woods, who then divided up the RPS count amongst the other Agents. Plaintiff was under tremendous stress trying to complete the work assigned to him while knowing that he was being treated in a disparate manner.

> Volume I-Exhibit 25, Excessive Workload during Light Duty Status; Volume I-Exhibit 24, Light Duty Agreement dated 1-17-07; Volume I-Exhibit 87, Internal Affairs Investigation Report pages 18 and 19 of 51; Volume III-Exhibit 1, Page 9 Lines 20-21; Volume II, Exhibit 20, Bargaining Unit 6

Contract/LBFO section 19.06, CDC Parole Agent Workload; Volume I-Exhibit 94, Memo from T. Hoffman re: Authorizing Overtime and Modifying Cases with Excess Points

113. Ayala asserts in his Declaration that Plaintiff was not given an excessive workload. However, Ayala attempts to mislead the Court by excluding the workload that Plaintiff had been assigned. Ayala fails to include the excessive number of Pre-Paroles that Plaintiff was assigned as compared to other agents and tries to justify it by stating that he knew that this workload would go down. However, Ayala did not reduce Plaintiff's workload until after Plaintiff complained to Tryna Woods. Additionally, because Ayala omits relevant facts in his Declaration, he is incorrect when he purports that Plaintiff's workload was not excessive when he had 194 points and the next lowest was 180 points in March 2007 when Plaintiff returned to Full Duty:

- In March, Plaintiff had 204 points and the lowest was Agent Don Davis with 177 points a difference of 27 points, not 20 points as Ayala purports.
- Additionally Plaintiff had 64 Pre-Paroles and Don Davis had 5 Pre-Paroles.
- Every Agent in the Unit had 6 or less Pre-Paroles and Plaintiff had 64.
- Plaintiff had as many as 209 Points on 4-11-2007 and 29 Pre-Paroles which was about 30% of the entire Pre-Parole workload for the entire unit.
- The Unit Workload Summaries clearly demonstrate the excessive workload that Plaintiff was assigned while Plaintiff was under the supervision of Ayala. However, Ayala incorrectly asserts that he was within his rights to assign this type of workload to Plaintiff because he was technically not violating the union contract. However, the union contract only speaks to caseload points. However, the underlining principal that workload be equally distributed has its foundation in California Labor Codes which state that workers will not be discriminated against and clearly Plaintiff was being discriminated against. Additionally, the California Government Code prohibits retaliation against employees who report supervisor's violations of regulations and clearly Plaintiff had Whistleblown and he was being retaliated against by Ayala.

On 2-15-07, Ayala divided a caseload belonging to S. Whittaker, PA I, who had left the Unit, to the remaining agents for coverage. Agent Monahan had been injured in PAST training in early February. Because the Unit was short two agents, Ayala assigned Whittaker's caseload to Monahan (in name only) and the agents were approved for overtime in order to complete all of the required casework on this caseload during the months of February and March. Ayala told Plaintiff that when he returned to full duty status that he would assume this caseload and he promised that all of the casework would be up to date when he received these cases. Five parole agents assumed the responsibility of between 12 and 13 cases apiece. Ayala told Plaintiff that agents had been given overtime to complete the casework prior to those cases being transferred to him. He was told that the High Control parolee caseload would be up to date as of 3-15-07. However, when Plaintiff received the caseload as shown on the Caseload Roster dated 3-20-07, he found that many cases had inappropriate levels of supervision, many had not had required case reviews, many had not been UA testing and had not been reporting, but that information was not noted. When Plaintiff reported the problems with the caseload that he had just received, Ayala told Plaintiff he had to complete the casework before the end of March and that he would not be given overtime. Ayala incorrectly states in his Declaration that "the monthly specifications had already been met by other agents on at least ten of the High Control cases assigned to Agent Tristan, *meaning he was not required to perform any work on them in March.*" This statement is contradicted by the information below.

These are samples of the problems that Plaintiff found; this is not a comprehensive list which would be too burdensome to include:

- Parole Agent Davis had been assigned 13 parolees in alphabetical order, parolee Cook K11236 thru parolee Guzman T41483 on 2-15-07. When those parolees appeared on the Caseload Roster assigned to Plaintiff on 3-20-07, <u>none</u> of the required casework on the High Control cases had been done, despite Ayala's Declaration that they had been done. On Davis's other cases, the required Home Visits had not been done, the Collateral Contacts had not

been done, the UA testing had not been done, and Office Visits had not occurred. Five case reviews were due when assigned to Davis and he had completed none of them. He also had a Discharge Review due that he ignored (see information below). All of this overdue casework was assigned to Plaintiff, it was not up-to-date in spite of what Ayala had promised, and he was denied overtime to complete it.

- Davis had been assigned Parolee Munice Garza X10526 on 2-15-07 and she was due for a Discharge Review when the case was assigned. The Caseload Roster dated 2-14-07 shows that it was assigned to Davis on 2-15-07, the Discharge Review was due to the Board on 3-2-07, also with a Case Review due within 30 days. Davis told Plaintiff nothing about it. Plaintiff reported it to Ayala and Ayala told Plaintiff to get it done without overtime. Plaintiff had to evaluate the case factors on the parolee, and prepare and write the Discharge Review for the Board. Plaintiff received the case on 3-20-07, completed the report on 3-21-07, it was signed by the PA III (A) T. Woods on 3-21-07 and it was forwarded to the Board. If this type of review is not completed on time, the parolee automatically discharges from parole by rule of law thirteen months after his/her parole date and is no longer available for supervision by the Parole Division. If Plaintiff had not been diligent to immediately evaluate this new caseload, as Davis had said nothing to him about this case, it is likely that parolee Garza would have discharged automatically on 4-2-07. Davis's cases were not up-to-date when they were assigned to Plaintiff, in spite of what Ayala had promised and he received no overtime to complete them.
- Also, Parole Agent Lamar had been assigned 13 cases to complete. When Plaintiff received the cases that he had been assigned to Parole Agent Lamar, he saw that parolee Matthew Magnuson F03614 was listed as an "active case." He found out, however, that Magnuson been in the county jail since 11-27-06. Lamar had not done any work on this case before it was assigned to Plaintiff in spite of what Ayala had promised.

- On March 2, 2007, Plaintiff ran a Caseload Roster listing for those cases that had been assigned to the other agents. He knew that he was going to receive these cases in a few weeks and he knew that most of these parolees had not been coming in to the office for their required urinalysis (UA) testing. He had been OD every day for weeks and had not seen them come into the office. He asked Ayala if he could mail out the form letter that he had used before and mail it to these parolees to advise them that he was going to be their new Parole Agent and give them instructions beforehand, and Ayala said, "Knock yourself out!"
- Agent Castillo had been assigned 12 of these cases and authorized overtime in order to complete the casework on these cases. Parolee Shannon Bradfield X11581 was one of those cases. Plaintiff received a phone call from the sister of parolee Bradfield. The sister had received Plaintiff's letter because parolee Bradfield's last known address was with her sister. Her sister said that Bradfield had died of an overdose on February 8, 2007 and that Castillo had conducted a home visit and had a copy of the death certificate. Nothing further had been done. Castillo was required to reduce the supervision level from EX to MS and was required to submit an Activity Report to the Board for discharge. When Plaintiff received the Caseload Roster of 3-20-07, Bradfield's name was still on the roster.

All of the parole agents had been authorized overtime to complete their assigned cases, but when Plaintiff received cases in which required casework had not been done and needed to be done, he was denied overtime by Ayala, even though he only had less than two weeks to bring the cases current. He still had Home Calls to do, Case Reviews to complete, Discharge Reviews to complete, Activity Reports to complete on those parolees who had failed to report for UA testing, and High Control Case Reviews. Although Ayala and Garcia state that "specs can be waived," that is misleading, and omits the fact that it applies only to the "Control Service" level of supervision. As listed above, Plaintiff had been given many overdue cases for which "specs could *not* be waived." As noted on the "Waiver of Specs" form, the work to be done on High Control

and High Service cases is never waived. The initial home visit on any case is not waived and MS (Mininum Supervision) specs are not waived unless specifically stated and Discharge Reviews and 6-month case reviews are never waived.

Not only was Plaintiff not allowed any overtime to complete these cases, he was told by Ayala that before he received this new caseload on 3-20-07 that all of his existing cases that he had been assigned during Light Duty had to be current and he was not allowed overtime on those either. He also continued to carry pre-paroles; the count was now 64. His workload was now 204.

Ayala was discriminatory in his refusal to authorize Plaintiff overtime in accordance with the July 1, 2001 Unit 6 Contract/MOU which was in effect in 2007 as reiterated in Director Hoffman's February 1, 2008 Memorandum, because Plaintiff is aware that Ayala authorized overtime for other agents in Ayala's unit but refused to authorize overtime for Plaintiff even though he had more that the 154 points on his caseload. Plaintiff points were as high as 204 and he had High Control Cases that had not been completed and he was refused overtime by Ayala.

These acts of retaliation, harassment and discrimination occurred for no legitimate, independent business reason.

> Volume I-Exhibit 29, Excessive Workload after return to Full Duty 3-14-07; Volume I-Exhibit 30, Plaintiff's Final March 2007 Caseload Roster; Volume III-Exhibit 1, Pages 7, 8 and 9; Volume III-Exhibit 1, Declaration by M. Ayala, Page 8 Lines 15-27; Page 9 Lines 12-13; Volume I-Exhibit 89, Memo re: Case Coverage for Monahan and Caseload Roster dated 2-14-07; Volume I-Exhibit 90, Authorization for Extra Hours for Monahan's Caseload – J. Silva; Volume I-Exhibit 91, Plaintiff's working Caseload Roster dated 3-20-07; Volume I-Exhibit 92, Discharge Review for parolee dated 3-21-07; Volume I-Exhibit 93, Waiver Form; Volume II, Exhibit 20, Bargaining Unit 6 Contract/LBFO section 19.06, CDC Parole Agent Workload; Volume I-

Exhibit 94, Memo from T. Hoffman re: Authorizing Overtime and Modifying Cases with Excess Points

114. Plaintiff was given excessive workload regardless of the excuse that Ayala tries to assert. He states that these were cases on which Plaintiff did Pre-Paroles so that he could ease into the workload. Ayala should be aware of the fact that the most intensive work for an Agent on a new case is after the Pre-Parole when the parolee is released and the Agent has to do an Initial and make the initial home visit and/or obtain housing or drug/alcohol/family counseling for the parolee as well as ensuring that the parolee registers if he is a Sex Offender. Ayala was not "easing" Plaintiff into his caseload. For example, Plaintiff was given a caseload in the middle of March in which the casework had not been completed and Plaintiff was told by Ayala that he had to complete it by the end of the month which gave Plaintiff about two weeks to complete it. Plaintiff tried the very best that he could to do as much as he could however it was an impossible task. However, Ayala tries to claim that he waived the specs for Plaintiff, when the reality is that Plaintiff worked day and night to try to accomplish the work before any specs were waived and Ayala refused to pay Plaintiff overtime, when he was paying other Agents overtime that had less work than Plaintiff. Ayala fails to state in his Declaration that any case that is transferred from one agent to another is supposed to have all of the casework up-to-date; therefore, nothing special was done for Plaintiff by having the casework up-to-date. Therefore, the mere fact that Ayala transferred a caseload to Plaintiff in which the casework was not completed was in itself discriminatory, harassment and in retaliation for Plaintiff's Whistleblowing. Plaintiff's Pre-Parole workload was as much as 10 times higher than that of any other agent in the Unit and Gwen Parker, Plaintiff's former office partner, indicates in the investigative report by Gene Pettit that it can take from 30 minutes to as much as an hour and a half to complete a Pre-Parole. Ms. Parker also indicates that she thought the workload that Plaintiff was given was excessive.

Volume I-Exhibit 29, Excessive Workload after return to Full Duty on 3-14-07; Volume I-Exhibit 30, Plaintiff's Final March 2007 Caseload Roster;

Volume I-Exhibit 87, Internal Affairs Investigation Report S-11-OIS-310-07-A(2346), Pages 18 and 19 of 51 – G. Parker's testimony supports excessive workload; Volume I-Exhibit 90, Authorization for Extra Hours for Monahan's Caseload – J. Silva; Volume I-Exhibit 91, Plaintiff's Caseload Roster dated 3-20-07; Volume II, Exhibit 20, Bargaining Unit 6 Contract/LBFO section 19.06, CDC Parole Agent Workload; Volume I-Exhibit 94, Memo from T. Hoffman re: Authorizing Overtime and Modifying Cases with Excess Points

115. While it is true that Plaintiff was not disciplined or counseled for not completing work in March, it does not address the number of hours in excess of the normal work day that Plaintiff had to work in order to get as much of the work done as possible. Plaintiff was aware that he was being discriminated against and it was causing him a tremendous amount of stress knowing that he went from being viewed as an excellent Parole Agent to one that Rodriguez thought might not be cut out for Parole. Plaintiff completed the work assigned and therefore, he should not have been disciplined for work not completed. Therefore, even though Ayala knew that the workload that he had assigned to Plaintiff was excessive, he watched the Plaintiff struggle to get the unreasonable workload done and waited before offering to waive any specs. As shown earlier, the Waiver Form confirms that the work to be done on High Control and High Service cases is <u>never</u> waived. The initial home visit on any case is <u>not waived</u> and MS (Mininum Supervision) specs are <u>not waived</u> unless specifically stated and Discharge Reviews and 6-month case reviews <u>are never</u> waived. Plaintiff was not allowed to claim any overtime and be paid for any overtime that he worked as compared to other agents who were allowed to work overtime and were paid for the overtime during the same time period. Plaintiff had to work before and after normal work hours and through lunches in order to complete the assigned work. Again, these acts occurred for no legitimate, independent business reason.

Ayala was in violation of Director Hoffman's February 1, 2008 Memorandum which reiterated the provisions of the July 1, 2001 Unit 6 Contract/MOU regarding the authorization of overtime for Parole Agents with caseload of over 154 points. This

policy was in effect in 2007 during which Plaintiff was denied overtime by Ayala even though Ayala had assigned caseload of up to 204 points to Plaintiff.

Ayala was discriminatory in that he authorized overtime for other agents as evidenced by Parole Agent Silva's overtime request for High Control Cases but he denied Plaintiff's request for overtime. This was in violation of the Director Hoffman's February 1, 2008 Memorandum in which he reiterates the provisions of the July 1, 2001 Unit 6 Contract/MOU which outlines provisions for overtime.

> Volume I-Exhibit 29, Excessive Workload after return to Full Duty on 3-14-07; Volume I-Exhibit 30, Plaintiff's Final March 2007 Caseload Roster; Volume I-Exhibit 91, Plaintiff's Caseload Roster dated 3-20-07; Volume I-Exhibit 93, Waiver Form; Volume I- Exhibit 90, Authorization for Extra Hours for Monahan's Caseload – J. Silva; Volume II, Exhibit 20, Bargaining Unit 6 Contract/LBFO section 19.06, CDC Parole Agent Workload; Volume I-Exhibit 94, Memo from T. Hoffman re: Authorizing Overtime and Modifying Cases with Excess Points

116. Ayala incorrectly asserts in his Declaration that he was within policy when he forced Plaintiff to work through his lunch break, even though Plaintiff had arranged for OD coverage during that one hour. The only reason that Ayala made Plaintiff work during his lunch hour instead of allowing him to take a lunch was in retaliation. Ayala states in his Declaration that he knew of no policy that required that he give Plaintiff a one hour lunch break. Ayala was incorrect as CDCR's DOM 85030.21 and the Unit 6 Union Contract states that the Agent can have "at his/her discretion a ½ or 1 hour lunch break." Additionally, the Officer of the Day Procedures (PIT 0452) received during discovery states, "Lunch coverage will generally be one hour, between 1100hrs and 1400hrs." The date of this procedure is July 6, 2006, and is signed by A.J. Garcia. It is apparent that this procedure was in place when Ayala was supervising Unit #1 in March 2007 when Plaintiff was required to attend training. Therefore Plaintiff was entitled to a one (1) hour lunch break or ½ hour overtime pay and Plaintiff received neither. As a

supervisor, Ayala should have made appropriate arrangements for coverage. Ayala assumed that Plaintiff could have exited the building, gotten in his car, driven the 19 miles, found parking, gotten out of the car and into the training and that Plaintiff would not have encountered any traffic conditions that would have slowed him down, and therefore all he needed was 30 minutes to get to the training and a 30 minute lunch. Ayala's refusal to provide for coverage for Plaintiff's lunch hour and travel to his required training occurred for no legitimate, independent business reason.

> Volume II-Exhibit 21, DOM 85030.21, Parole Agent Lunch Hours; Volume II-Exhibit 22, Bargaining Unit 6/LBFO Section 19.03 (A)

117. The MSJ is disputed because Plaintiff's Fourth Cause of Action for Whistleblowing does have merit as indicated in Plaintiff's Separate Statement of Facts in Opposition to the Motion for Summary Judgment and Plaintiff opposes Defendants' attempt to incorporate every preceding material fact as if fully set forth.

118. Because the CDCR OCR failed to conduct an investigation is not evidence that Plaintiff's allegations of misconduct by his supervisors' did not have merit. The fact that CDCR OCR did not conduct an investigation was not because Plaintiff's complaints did not have merit. Plaintiff had evidence that he was discriminated against as an injured worker, a disabled worker, and had reported the misconduct of an "Hispanic Clique" who was retaliating against him. This is evidence of CDCR OCR's failures and not evidence that Plaintiff's complaints did not have merit. Plaintiff's exhibits, which include letters to Rodriguez, Fagot, Hoffman, Kernan, his Employee Grievance, his letters to Hoshino and Richie and the SPB Appeal, are all evidence of Plaintiff's Whistleblowing. Additionally, he reported misconduct to Ayala regarding Ferguson's Board Report, he spoke to Garcia about the misconduct regarding the lack of an Incident Report, he spoke to Kalvelage regarding the misconduct of Ayala and Garcia, wrote a letter to Fagot regarding his denial of EIDL by Castaneda based upon her misinformation to him as to what constituted an assault, he Whistleblew to Kathy Costner regarding the termination of his pay and benefits by Castaneda and De Leon, and he Whistleblew to O'Neal regarding De

Leon's dishonesty regarding a doctor pre-designated form. OCR inappropriately failed to investigate Plaintiff's claims that he was treated in a disparate manner and discriminated against as a disabled employee who was also a Whistleblower. The letter from OCR to Plaintiff stated that they were going to refer the Whistleblowing matter to the Office of Internal Affairs. OIA contacted the Plaintiff and stated that he had a "prima facie" case of being retaliated against for Whistleblowing. OIA stated to Plaintiff that they were contacting him as a result of his letter to the Director of the Office of Internal Affairs, Mr. Martin Hoshino and at that point in time, they did not have a referral from the Office of Civil Rights. At the time of Plaintiff's letter to OIA, OIA advised Plaintiff that the Office of Civil Rights informed them that Plaintiff's "Intake Interview" was not audio tape recorded when in fact it had been tape recorded. It was not until Discovery that Plaintiff became aware that OCR had provided information to OIA. Plaintiff was trying to get relief from the harassment, retaliation and discrimination when he filed a complaint with the SPB. Mr. Bob Gaultney from CDCR's Legal Office advised SPB that the CDCR would not enter into mediation with Plaintiff. CDCR never complied with Plaintiff's request for Discovery in his Appeal to go before the SPB. CDCR postponed the SPB Hearing and refused to set a date for the SPB Hearing, by simply stating that the CDCR needed more time.

> Volume III-Exhibit 8, Declaration of T. Price, Exhibit C, Complaint to SPB dated 6-7-07; Volume III-Exhibit 8, Declaration of T. Price, Exhibit D, Whistleblower Retaliation Complaint; Volume I-Exhibit 39, Letter to Plaintiff from G. Richie, EEO Investigator, dated 5-16-07; Volume I-Exhibit 40, Letter to M. Hoshino, Director of OIA, from Plaintiff dated 6-3-07; Volume I-Exhibit 48, SPB Letter re: Combining of Complaints and scheduled SPB hearing dated 1-31-08; Volume I-Exhibit 88, Internal Affairs Investigation Report Pages 2-3, 5-8 of 51

119. The fact that Plaintiff's Discrimination and Whistleblower complaints to the SPB were combined into one complaint by SPB is irrelevant in this matter. The relevant fact is that the SPB accepted Plaintiff's complaints regardless of whether they were going to be heard together or separately. The Plaintiff had provided enough evidence of

retaliation for Whistleblowing that CDCR's OIA accepted Plaintiff's complaints as meeting OIA "Prima Facie" requirement. The burden of proof that the Discrimination, Retaliation did not occur lies with the CDCR and not the Plaintiff. The Plaintiff's evidence demonstrated harassment, discrimination and retaliation. Deputy Director of Parole Marilyn Kalvelage agreed that "SPB's Mediation Offer" may have been the best way to settle the matter. Plaintiff is unaware of an discussion that may have taken place between Kalvelage and others including Bob Gualtney, but Bob Gualtney from CDCR's Legal, advised SPB that the CDCR refused to enter into mediation when Plaintiff agreed to the SPB suggestion/offer that mediation may be the most effective and timely manner in which to settle the matter. Ayala's Declaration omits relevant facts and is misleading when it states that "one" of the parties requested a continuance, when in reality it was Ayala that asked for a continuance and then the CDCR asked for additional continuances because they told SPB that they were not ready and needed more time to prepare for a hearing. The "party" that refused mediation and then requested that the SPB Hearing be postponed was the CDCR, not the Plaintiff. CDCR refused to cooperate with Plaintiff's Discovery request and never provided any documents he requested. The CDCR refused to calendar a hearing date, stating that they needed more time and SPB advised the Plaintiff that CDCR could request indefinite continuances.

> Volume III-Exhibit 8, Declaration of T. Price, Exhibit C, Complaint to SPB dated 6-7-07; Volume III-Exhibit 8, Declaration of T. Price, Exhibit D, Whistleblower Retaliation Complaint; Volume I-Exhibit 45, SPB Letter re: Receipt of Appeal and Request for more information; Volume I-Exhibit 48, SPB Letter re: Combining of Complaints and scheduled SPB hearing dated 1-31-08; Volume I-Exhibit 54, SPB Letter dated 2-13-08 re: witness subpoenas for SPB Hearing; Volume I-Exhibit 88, Internal Affairs Investigation Report Pages 2-3, 5-8 of 51

120. Plaintiff withdrew his Appeal before the SPB after he was told by the SPB that they could not compel CDCR to agree to a Hearing date, because the CDCR had stated that it needed more time to prepare. Plaintiff's attorney at the time, Mr. Denis Hayashi had submitted Discovery requests to the CDCR which CDCR chose to ignore. It was

apparent to Plaintiff that the CDCR had no intention of agreeing to a Hearing because the CDCR had intentionally delayed the hearing, refused to cooperate with Plaintiff's Discovery Request, refused to enter into "Mediation", and refused to set a date for a Hearing. After SPB cancelled the Hearing at CDCR's request, CDCR did not reschedule the SPB Hearing. Plaintiff was not aware until he received Price's Declaration in this matter that the SPB Hearing was cancelled because Ayala had a scheduled vacation. Price does not state in his Declaration that Ayala or the CDCR gave SPB alternate Hearing dates.

Additionally, SPB told Plaintiff that the only way that he could compel CDCR to have a Hearing was to file a Right to Sue Letter with FEHA. Plaintiff then contacted FEHA who told him that before he would be granted a Right to Sue Letter, he had to withdraw his SPB Appeal. Plaintiff then withdrew his SPB Appeal. However, when he withdrew his SPB Appeal he was not advised by SPB that he needed to complete any other forms or make another other requests.

The Price Declaration omits these facts which were relevant to Plaintiff's decision to withdraw his SBP Appeal. It was apparent to Plaintiff that to the best of his knowledge, he had exhausted his avenues of redress within the CDCR and was powerless to compel the CDCR to appear before the SPB. The Price Declaration fails to include the fact that Plaintiff wanted a speedy resolution to his complaints, but because the CDCR knew that it had to provide the evidence that they and Plaintiff's supervisors did not harass, discriminate and retaliate against Plaintiff that they were going to delay the matter as long as possible. Plaintiff had been told that he had what he believed to be a "preponderance" of evidence that he had been discriminated against and retaliated against and that the CDCR was avoiding the Hearing because the "burden of proof" was going to be on the CDCR to prove that they did not discriminate or retaliate against Plaintiff. That is according to Government Labor Code Section 1102.6 which states "*If there is a preponderance of evidence regarding violations of Labor Code 1102.5, then the Burden of Proof is on the employer to present clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons.*"

Additionally, Plaintiff has been consistent in his testimony regarding the on-going harassment, retaliation and discrimination to which he was subjected beginning in October 2005. Plaintiff was required to undergo 7 days of testimony in deposition. There are 7 volumes of testimony given and the Deputy Attorney General has presented no arguments to contest the testimony given. Also, the chronology of documents presented by Plaintiff supports his testimony. The Declarations presented to the Court by the Deputy Attorney General are replete with misrepresentations, dishonesty and contradictions.

> Volume I-Exhibit 48, SPB Letter re: Combining of Complaints and scheduled SPB hearing dated 1-31-08; Volume I-Exhibit 54, SPB Letter dated 2-13-08 re: witness subpoenas for SPB Hearing; Volume I-Exhibit 81, Letter to Attorney D. Hayashi re: having exhausted his administrative remedies with CDCR 9-18-08