Background on the Retaliation Against Whistleblower Leroy J. Pletten, Dept of the Army

1. **Employment Background**: August 1969, Pletten was hired at the GS-7 level in the Department of Army, Tank-Automotive Command (TACOM) in Michigan. Pletten had a B.A., 33 credits toward a master's degree, and now has, over the years, a number of Army human resources courses. Due to Pletten's excellent performance, TACOM rapidly promoted him five grades, to GS-9 and GS-11 (Ph.D. equivalent), then to GS-12 level, June 1974. Pletten's positions were in Human Resources and as a Crime Prevention Officer. At the relevant time, the start of the retaliation pattern, Pletten was age 33 with flawless performance/attendance record, and awards for same.

2. Repotted Injury or Violation(s): Pletten blew the whistle on a combination of hazardous activity toxic emissions gateway drug use. Same was occurring in violation of, e.g., 5 U.S.C. § 7902(d), 29 U.S.C. § 651 et seq, 29 C.F.R.§1910.1000.Z, 32 C.F.R. § 203; Army Reg. 1-8, MCL § 750.27, MSA § 28.216, etc. The subject matter is an underlying factor in the money trail supporting terrorism. TACOM's safety office management was falsifying records regarding the legal maximum limit (like a speed limit). For example, 42,000 would be reported as 4.2. Coworkers were complaining; at least one in Pletten's work area was injured and received worker compensation; another died. Michigan's then Governor advised that some 15,000 Michiganders were being killed.

Army Reg. 385-10 is "emphasizing personnel responsibility for" "reporting unsafe or unhealthful conditions." Compliant thereto, Pletten blew the whistle within the Army system (i.e., Supervisor, Safety, Inspector General, Army Civilian Appellate Review Office (USACARO), Medical, EEO, Police, and Commanding General 'open door' policy). Pletten was supported by his immediate supervisor, Jeremiah H. Kator (who was planning a speedy transfer out of TACOM). Pletten developed a proposed list of actions to bring TACOM into the direction of initiating

compliance. Pletten's said supervisor, Mr. Kator, forwarded the list to Higher Management, who refused to implement same. Some months later, January 1980, the aforesaid USACARO ruled in Pletten's favor, directed TACOM to come into compliance. (See parallel decision in another agency under parallel rules, *Dept of HEW, Soc Sec Admin* v *AFGE Local 1923*, 82-1 Lab Arb Awards (CCH) § 8206 (Jan 1982).) Under Army regulations, e.g., Civ. Pers. Reg. 700.771, upheld in *Spann* v *McKenna*, 615 F2d 137 (CA 3, 1980), compliance with USACARO Report is mandatory. However, TACOM higher management up to and including the Commanding General, did NOT agree with the regulations, thus refused to initiate compliance actions.

3. Reprisal/Retaliation:

Instead, TACOM management subjected Pletten to a pattern of attacking the messenger. The bulk of this paper details said retaliations and references including case law verifying unlawfulness.

a. Initial harassment of denouncing Pletten in the TACOM newspaper (incident later cited by an EEOC decision).

b. Extortion in the form of demanding that Pletten cease and desist blowing the whistle (extortion violates Michigan criminal law, *People* v *Atcher*, 65 Mich App 734; 238 NW2d 389 (1975) on witness intimidation, and federal, *U.S.* v *Welford*, 710 F2d 439 (CA 8, 1983). Significantly, extortioners refuse "to process grievances." *United States* v *Russo*, 708 F2d 209, 212 (CA 6, 1983). In law, "flight [from review] has probative value to guilt . . . *United States* v. *Crisp* (7th Cir. 1970), 435 F.2d 354. This is the general rule followed in the criminal law. 29 Am. Jur. 2d Evidence secs. 278-80 (1967)." *Wangerin* v *State*, 73 Wis.2d 427, 243 NW2d 448, 453 (1976). See also *Bowles* v *State*, 58 Ala 335, 339 (Dec 1877) and *People* v *Luster*, 2003 WL 21509182 (Cal App, 2003).

c. TACOM suspended Pletten from duty without pay, imposed enforced leave retroactively, without providing notice of charges nor opportunity to reply. The Dept of Army itself subsequently admits, via Capt Scott D. Cooper in *Military Law Review*, vol. 118, pp 143 et seq. (Fall 1987), footnote 206, that TACOM's action "is no longer good law; after *Valentine* v. *Department of Transportation*, 31 M.S.P.B. 358 (1986), enforced leave is now an adverse action)," yet refuses to correct its self-admitted error, refuses to file a "confession of error" pursuant to case law, e.g., *U.S. v Graham*, 688 F2d 746 (CA 11, 1982). Note also case law such as *Agostini* v *Felton*, 521 US 203 (1997) (reversal when after intervening decisions, prior decision is no longer good law); and "intervening change in the legal atmosphere that it renders the bar of collateral estoppel inapplicable in this case," a concept from *Texaco Inc* v *U.S.*, 217 Ct Cl 416; 579 F2d 614 (1978), cited in *Wilson* v *Turnage*, 791 F2d 157 (CA Fed, 1986), another federal employee case.

d. TACOM placed Pletten on forced LWOP in violation of TACOM Reg. 600.5-14.

e. TACOM ordered Pletten to submit to an involuntary psychiatric examination, contrary to medical advisory, anti-reprisal rules and case law, e.g., *Standard Knapp Div* v *IAM*, 50 Lab Arb Rpts (BNA) 833 (1968). TACOM chose the subject matter of the examination,

f. The results of same in Pletten's favor (medical report saying to return Pletten to duty) were summarily overruled by TACOM, notwithstanding TACOM having chosen the examination subject matter, and notwithstanding TACOM lacking medical basis to do so. See, e.g., *Landess* v *Weinberger*, 490 F2d 1187, 1190 (CA 8, 1974); *Allen* v *Weinberger*, 552 F2d 781, 786 (CA 7, 1977); and *Veal* v *Califano*, 610 F2d 495, 497 (CA 8, 1979).

g. TACOM effected the pay cancellation/ouster without providing Pletten advance notice (30 days) of charges. Refusing an employee a statement of charges violates federal law 5 U.S.C. § 7513,

and constitutional due process, *Cleveland Bd. of Ed.* v *Loudermill*, 470 US 532 (1985); *Pittman* v *Army and MSPB*, 832 F2d 598 (CA Fed, 1987). Notice consists of, e.g., a "statement or citation of the written regulations . . . said to have been violated [&] detailed statement of the facts," *Boilermakers v Hardeman*, 401 US 233, 245 (1971). When no notice is provided, "jurisdiction" for the action is lacking, the action (here, ouster) is void and cannot be ratified, as per the definition of "*void*," *Black's Law Dictionary* (6th ed, 1990), p 1573. "*Quod ab initio non valet in tractu temporis non convalescet*." That which is bad in its commencement improves not by lapse of time. "*Quod initio non valet, tractu temporis non valet*." A thing void in the beginning does not become valid by lapse of time.—*Black's Law Dictionary* (St. Paul: West Pub, 5th ed, 1979), pp 1126-1127. An employee remains on the rolls until proper administrative steps effecting ouster is done correctly. *Hanifan* v *U.S.*, 173 Ct Cl 1053; 354 F2d 358, 364 (1965); and *Sullivan* v *Dept of Navy*, 720 F2d 1266, 1273-4 (Fed, 1983). Compare similar case law, e.g., *New Orleans* v *Texas & P Ry Co*, 171 US 312 (1898), "the obligation is suspended until" (the ouster effort "is suspended until" notice actually is issued, which it has not been as of now over 28 years later), and *Siemering* v *Siemering*, 95 Wis 2d 111, 115; 288 NW2d 881, 883 (Wis App, 1980), the "condition precedent not having been met, the action was never commenced." Here, the "condition precedent" is notice of charges. Absent same, the ouster "was never commenced." Just as a divorce does not go in effect unless/until done correctly, likewise an ouster does not go into effect unless/until effected properly. The spouse remains married; the employee remains an employee.

h. The ouster was for certain managers' personal reasons (dangerous activity they caused and themselves engaged in), not for official reasons. Action for personal vs. official reasons is contrary to basic civil service case law, e.g., *Knotts v U.S.*, 128 Ct Cl 489; 121 F Supp 630 (1954). And,

personal preferences in EEO law likewise lack legal standing, the *Diaz v Pan Am Airways, Inc*., 442 F2d 385 (CA 5, 1971) cert. denied 404 US 950 (1971), and similar line of cases.

i. "The presence of danger [in law] cannot bring the [personal behavior reasons] within the scope of . . . employment; it tends rather to exclude it." *Jefferson v Derbyshire Farmers. Ltd.*, 2 K.B. 281, 284 (K.B., 1921).

j. TACOM refused to allow Pletten onto, barred Pletten from entering, TACOM premises.

k. TACOM refused to notify Pletten of his appeal/review rights, contrary to rules and precedent, e.g., *Miyai* v *D.O.T.*, 32 MSPR 15, 20 (8 December 1986).

l. TACOM cancelled Pletten's access to the EEOC review process (verified by EEOC decisions)–despite the fact that discharge, "the most serious sanction an employer can impose," requires "special care in handling" review, *Tenorio* v *N.L.R.B.*, 680 F.2d 598, 602 (9th Cir., 1982).

m. TACOM denied Pletten's right to EEO counseling (fact verified by EEOC).

n. TACOM denied Pletten's right to EEO investigation (fact verified by EEOC).

o. The one investigation that did begin some almost two years after the reprisal pattern began, was summarily cancelled by a TACOM lawyer, Emily S. Bacon, who falsely claimed an EEOC hearing would be held (without an investigation nor investigation report no less! – something the EEO regulations do not allow). No such hearing has ever been held, with or without investigation.

p. TACOM refused Pletten a copy of the witness affidavits that had been collected in the aforesaid aborted, however belated, investigation process.

q. TACOM refused to obey EEOC processing orders which directed review on merits, starting in February 1982, both directly and via the later M.S.P.B. forum, e.g., at 83 FEOR 3046. For a federal agency to defy EEOC processing orders is not permitted, *Moore* v *Devine*, 780 F2d

1559, 1560 (CA 11, 1986); *Haskins* v *Department of Army*, 808 F2d 1192, 1199 (CA 6), cert denied, 484 US 815 (1987); *Anthony* v *Bowen*, 270 US App DC 246, 250, 848 F2d 1278, 1282 (1988). (Even if TACOM were trying to comply, which it is not, in law, mere trying (a "glacial pace") to schedule review is not constitutionally adequate. *White* v *Mathews*, 559 F.2d 852 (CA 2, 1977), cert. denied, 435 US 908 (1978).

r. TACOM management filed an application to involuntarily force Pletten into retirement, and promoted two co-workers who aided and abetted management in this.

s. O.P.M. correctly rejected the TACOM application by ruling in Pletten's favor. Such a ruling thereby brings into place rules and case law that would direct TACOM to forthwith return Pletten to duty. See, e.g., Comptroller General precedents, e.g., 38 Comp Gen 203 (1958), 39 Comp Gen 154 (1959), and 41 Comp Gen 774 (1962). However, in retaliation, TACOM disregarded said O.P.M. ruling and applicable precedents, refused/refuses to reinstate Pletten to duty.

t. TACOM opposed Pletten's claim for unemployment benefits. His claim was based on TACOM having stopped paying him–a non-pay status continuing since March 1980 to present. TACOM's opposition to Pletten's unemployment claim caused a denial of benefits for some six months. The denial decision was later overturned, and ruling entered in Pletten's favor once a state-examiner hearing was held by a Michigan unemployment judge, Michael Baldwin. At that hearing one agency witness (a prior supervisor of his, Helen F. Cochran, by then retired) dared to attend to testify in Pletten's favor.

u. TACOM later claims to have separated, terminated, or removed Pletten (its terms vary, whereas correct terms are essential, *Jones* v *J. J. Security*, 767 F Supp 151, 152 (ED Mich, 1991)).

v. Later, TACOM changed position to declare Pletten retroactively forced out on "retirement"

on the ex parte pretext that Pletten had applied to retire himself! whereas Pletten refused and refuses to do so. (Pletten doing so he deems a violation of O.P.M. guidance, e.g., 5 C.F.R. § 831.1206(a)).

w. TACOM based Pletten's ouster on approved leave, even though federal employers cannot base discipline/removal on "approved leave." *Bond* v *Vance [Army]*, 117 US App DC 203, 204; 327 F2d 901, 902 (1964); *Washington* v *Dept of Army*, 813 F2d 390, 394 (CA Fed, 1987). (Indeed, as aforesaid, forced LWOP is prohibited by the TACOM's own regulation 600-5.14-27 and 28).

x. No investigation was conducted prior to TACOM initiating the ouster process, though absence of pre-ouster investigation is legally unacceptable, *NAACP v Levi*, 418 F Supp 1109, 1114-1117 (D DC, 1976) (not investigating before acting); *Boddie v Connecticut*, 401 US 371; 91 S Ct 780, 786; 28 L Ed 2d 113 (1971) (must be due process in advance at the crucial meaningful time). Here, none of the various employee investigation standards or criteria were met:

(i) neither the seven point private sector criteria of *Grief Bros Coop Corp*, 42 Lab Arb (BNA) 555 (1964) and *Combustion Eng, Inc*, 42 Lab Arb (BNA) 806 (1964),

(ii) nor the twelve point civil service criteria of *Douglas v Veterans Admin*, 5 MSPR 280, 305-306 (1981),

(iii) nor the five point civil service criteria of *Yorkshire v MSPB*, 746 F2d 1454, 1456 (CA Fed, 1984). (The latter case also notes when contradictions exist in the record, as here, the employee is to be sustained).

y. TACOM in essence is upholding custom as distinct from the rule of law, is blaming the victim, Pletten, contrary to case law, e.g., *Biafore* v *Baker*, 119 Mich App 667; 326 NW2d 598 (1982); *The T. J. Hooper*, 60 F2d 737, 740 (CA 2, 1932); *Shelley v Kraemer*, 334 US 1 (1948), and *Browder v Gayle*, 142 F Supp 707 (MD Alab, 5 June 1956) aff'd 352 US 903 (1956).

z. TACOM obstructs Pletten's obtaining Inspector General review on merits, re which Pletten's' requests for same began in 1980 and continue to present. Note that Pletten had blown the whistle to the Dept of Army Inspector General during its on-site inspection at TACOM in late 1979, shortly before the formalized ouster process began–showing further retaliation basis due to TACOM hostility to Pletten having blown the whistle

aa. TACOM refuses Pletten review on merits of his EEO claims in violation of 29 C.F.R. § 1614.

bb. TACOM disregarded and refused to process Pletten's first forum choice (EEOC), despite rules and case law that a complainant's first forum choice is binding and must be honored, *Carreno* v *Dept of Army*, 22 MSPB 515, 518 (1984).

cc. After being refused EEO review (a refusal EEOC verified), Pletten then subsequently sought M.S.P.B. review. TACOM ex parte arranged for M.S.P.B. to falsify its decision, 6 MSPB 626; 7 MSPR 13, i.e., to copy the list of proposed actions that Pletten and his supervisor Mr. Kator had drawn up to bring TACOM into the direction of compliance but which Higher Management refused to, to pretend that the listed actions TACOM had refused to take were done by TACOM, and to further falsely claim that Pletten had refused to accept them!! Falsification and mail fraud to obstruct review violates laws such as 18 USC §§ 1001, 1341, and 1961 et. seq. In law, adjudicator duty is to "enforce constitutional liberties even when denied through spurious findings of fact," *Milk Wagon Drivers Union* v *Meadowmoor Dairies*, 312 U.S. 287, 299 (1941).

dd. When the aforesaid falsification was called to M.S.P.B. attention, TACOM ex parte arranged for M.S.P.B. to disregard its own words, a disregard continuing to present.

ee. TACOM denied Pletten's request for a stay of its actions until after completion of review.

TACOM refused, notwithstanding a line of case law, e.g.,*Piccone v U.S.*, 186 Ct Cl 752; 407 F2d 866 (1969);*People* v *George*, 399 Mich 638; 250 NW2d 491 (1977); and *Family Independence Agency* v *Kucharski*, 468 Mich. 202; 661 NW2d 216; Lexis 939 (20 May 2003).

ee. TACOM subjected Pletten to long term refusal to comply with promulgated regulations. Same "must go through a considerable vetting process before they take effect [hence, non-compliance] may be viewed as intentional discrimination." *Ass'n for Disabled Americans, Inc* v *Concorde Gaming Corp*, 158 F Supp 2d 1353, 1362 n 5 (SD Fla, 2001).

ff. TACOM subjected Pletten to the foregoing actions outside the rule of law notwithstanding that federal law 5 USC § 522(a)(1)(C)-(D) bans agencies from adversely affecting persons by actions outside the rule of published law. *Hotch* v *U.S.*, 212 F2d 280 (1954); *Bowen* v *City of New York*, 476 US 467 (1986), and similar line of cases. Such outside-the-law actions are "void" and cannot be ratified, as per definition of "*void*," *Black's Law Dictionary* (6th ed, 1990), p 1573.

gg. TACOM has a duty to correct its errors and misconduct but refuses, notwithstanding that "A tortfeasor has a duty to assist his victim. The initial injury creates a duty of aid and the breach of the duty is an independent tort. See Restatement (Second) of Torts, § 322, Comment c (1965)"), *Taylor v Meirick*, 712 F2d 1112, 1117 (CA 7, 1983).

4. Current Status of Review Requests: TACOM and the Dept of Army refuses to follow the rule of law above cited. Such compliance should be automatic, without necessity for requesting same. Moreover, TACOM refuses to allow Pletten's EEO review requests to be heard on merits, i.e., refuses to assign counselor, allow investigation, allow hearing. And re Pletten's most recent (August 2004) review request to the Dept of Defense Inspector General, same was promised review by February 2005. Nothing has been heard since, and in view of the notorious federal-wide pattern

of hostility to whistle blowers, Pletten expects that said effort to secure review in the Inspector General forum will likewise come to nought–unless and until an Order from the Secretary of Defense directs same.

5. <u>Suggested Remedial Action</u>:

An Order directing compliance with the herein cited rules of law and precedents.

Respectfully,

1 August 2008

Leroy J. Pletten
Human Resources/Crime Prevention
8401 18 Mile Road #29
Sterling Heights MI 48313-3042
(586) 354-4320 fax (419) 574-6145
lpletten@tir.com

8401 18 Mile Road #29
Sterling Heights, MI 48313-3042
(586) 354-4320 fax (419) 574-6145
lpletten@tir.com

1 August 2008

SUBJECT: Thank You and Request for Assistance

Honorable Robert M. Gates, Ph.D.
Secretary of Defense
1000 Defense
Pentagon
Washington DC 20301-1000

Dear Secretary Gates:

Thank you for taking action on improving working conditions, e.g., housing for troops, as reported in the news, e.g., at http://www.foxnews.com/wires/2008May07/0,4670,BadBarracks,00.html, and for taking other corrective and remedial actions during your tenure . You are a breath of fresh air as Secretary of Defense, resolving situations that had dragged on for years even decades.

Related to working conditions, and solving longstanding issues, I became a whistle blower in the Department of Army. Army's reaction was not to do resolution, but to retaliate, including extortion to force me to change anticipated testimony, via cutting off my pay since early 1980 to coerce me.

Over the last 28 years, I have repeatedly pleaded for review on merits, but the Army has cut me off from access to review except what it can wholly, by *ex parte* communications, control.

My seeking review includes doing so in the Inspector General process, including as recently as Summer 2004 (promised review by the DoD IG by February 2005). All is to no avail.

Perhaps you can direct the DoD Inspector General to review my case on merits. Your doing so would be much appreciated, I am suffering terribly from the pay cut-off, delay, retaliation incidents, and the Army's protracted, repeated, and continuing refusal to live up to the high standards of the Department.

Respectfully,

Leroy J. Pletten

Enclosure: Background Summary of Pertinent Events