

RESULTS OF INDEPENDENT INVESTIGATION  
AS GATHERED BY SAM S. HARBEN, ATTY. AT LAW

RE: **SEXUAL HARASSMENT COMPLAINT** FILED AGAINST

RICHARD L. LATHEM

ON **SEPTEMBER 22, 2009**

**PLEASE SEE LINK:**

RICHARD L. LATHEM

PERFORMANCE EVALUATION

TO VIEW MR. LATHEM'S YEARLY PERFORMANCE EVALUATION AS  
PREPARED BY CHIEF APPRAISER, MICHAEL A. HENDERSON  
AND APPROVED BY LINDA PRYOR, DIRECTOR, HUMAN RESOURCES.

PLEASE NOTE:

NO ACTION HAS BEEN TAKEN AS IT PERTAINS TO THIS CHARGE.

# Memo

**To:** William H. Blalock, Jr.  
**From:** Sam S. Harben, Jr.  
**Date:** November 12, 2009  
**RE:** Investigation of Complaint filed by Ms. Pamela Dixon

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On September 25, 2009, you requested that I serve for the Hall County Government as an independent investigator of the complaint filed by Ms. Pamela Dixon, an auditor with the Tax Assessors Office, on September 22, 2009, in which she alleged she has been unlawfully, and contrary to County policy, discriminated against based upon her gender. I agreed to investigate Ms. Dixon's complaint and to submit a report to you with my findings and recommendations.

My investigation consisted of a review of all correspondence between Ms. Dixon and the County concerning her allegations and various documents in the personnel files of employees assigned to the Tax Assessors Office. I also interviewed the County's Human Resources Director, Ms. Linda Pryor; Ms. Dixon; Mr. Richard Lathem, Personal Property Auditor and Ms. Dixon's immediate supervisor; Mr. Mike Henderson, the Chief Appraiser in the Tax Assessors' office and the immediate supervisor of Mr. Lathem; and Mr. Kevin Pirkle, Auditor with the Personal Property Section. I also reviewed a chronology prepared by Ms. Dixon of the events that have transpired from September 2007 through September 2009, as seen from her perspective. All the individuals I interviewed were cooperative and apparently forthcoming, although their collective memories of the events that have transpired since September 2007 vary considerably. I have sufficient information to report to you as to my findings and recommendations.

On September 22, 2009, Ms. Dixon sent to Ms. Linda Pryor a memorandum in which she alleged that she had been the victim of sexual harassment by Mr. Richard Lathem, her immediate supervisor. She also alleged that Mr. Lathem and Mr. Mike Henderson had retaliated against her because she had verbally informed Ms. Pryor early in March 2009 that she had been sexually harassed. Ms. Dixon set out in her complaint and in a narrative she furnished to me the occasions when she has felt humiliated, intimidated, badgered and embarrassed by Mr. Lathem and to a lesser extent, Mr. Henderson.

Ms. Dixon was first employed as an administrative secretary for the Personal Property Section of the Tax Assessors' office in July 2002. At that time, Ms. Dixon's immediate supervisor was Mr. Lyman Martin, who announced in September 2006 that he intended to retire in December 2007. When the County advertised for applicants to fill the position held by Mr. Martin, Ms. Dixon applied. Ms. Dixon believed she was best qualified for the position. She contends that Mr. Lathem was selected for the position and reassigned from his previous position as a commercial appraiser of real estate because, as she claimed she was told by Mr. Henderson, "they could not handle him down in real estate anymore." Ms. Dixon also asserted that Mr. Emory Martin, then chair of the Board of Tax Assessors, did not want a woman in a supervisory position. Ms. Dixon did not offer any evidence to support these assertions and I found no corroboration to support the allegations.

Ms. Dixon alleged that initially Mr. Lathem was professional in working with her. However, in September 2007, Ms. Dixon contends that Mr. Lathem walked past her at work and ran his finger from the "bottom of [her] neck to about three quarters way down [her] back." Ms. Dixon said she was surprised by this behavior and reported it to Mr. Lyman Martin, who suggested she tell Mr. Lathem she did not want him to touch her, which she said she did. She said Mr. Lathem apologized to her and told her he would not touch her again. Mr. Lathem claims he does not recall whether or not the incident described by Ms. Dixon happened.

Ms. Dixon contended that in spite of Mr. Lathem's promise to the contrary, he repeated the same act in February 2008 and August 2008. On each occasion, Ms. Dixon was uncomfortable and felt she had been "abused" and "violated." She alleged that she told Mr. Lathem to stop and he stated, "Oops, I did it again." He apologized both times, according to Ms. Dixon. Mr. Lathem expressly denied that he touched Ms. Dixon in any manner on these two occasions. Ms. Dixon did not report these incidents of being touched by Mr. Lathem to anyone and stated to me that she was unaware of anyone in the office seeing Mr. Lathem touching her in the manner she contends. She said she did not know what to do and asked "a couple of ladies in the office but they had no answer." She claimed she lived in "agony, scared to tell anyone – afraid for [her] job."

Sometime in January 2009, Ms. Dixon contends that Mr. Lathem and Mr. Tim Barrett, a former Auditor assigned to the office of the Tax Assessors, were in Mr. Barrett's office when she entered to ask for some information. She claims Mr. Lathem was standing behind her and placed his hands on her shoulders to attempt to massage her shoulders, asking her if it felt good. Ms. Dixon stated that she pulled away and answered that it would feel good if it were her husband and Mr. Lathem should stop. She claimed the following week another employee told her about this incident and she confronted Mr. Lathem because she felt that the incident was obviously being discussed in the office. She said Mr. Lathem stated he did not think he had done anything wrong but apologized. Mr. Lathem admits he did place his hands on her shoulders and asked her if she wanted him to give her a massage but she pulled away. He agreed that he apologized for touching her.

Sometime in March 2009, Ms. Dixon, Mr. Lathem and Mr. Pirkle were working on a Saturday because it was an especially busy time of the year. When it was time for all of them to leave, Ms. Dixon stated that she went to the restroom and asked the two men not to leave without her. She stated she had been in the restroom for about one minute when the door to

the restroom came open and Richard announced that they were ready to go. She stated that he had pushed the automatic door opener, which caused the door to fully open. She said that because there were mirrors in the restroom, she was uncomfortable with his opening the door to make the announcement that they were leaving. She did not accuse Mr. Lathem of any improper conduct other than pressing the automatic door opener, which was designed for use primarily by individuals with disabilities. Mr. Lathem recalled the incident, claimed he stood outside the bathroom door and called to Ms. Dixon to tell her that he and Mr. Pirkle were ready to leave, but believed she had not heard him. He then said he pushed the door open only about five or six inches to make the announcement. However, Mr. Pirkle's recollection of the incident was consistent with that of Ms. Dixon.

Ms. Dixon contended that on March 24, 2009 Mr. Lathem "ran his finger down [her] back again" and when she moved away, he said, "oops, I did it again, didn't I." He told her that he had forgotten he wasn't supposed to touch her. He later told her that in another office, someone had patted him on the shoulder, which he did not find offensive. She said she told him that another person patting him on the shoulder was different from "running your finger down a female coworker's back below the bra line." She contends that he did not see a difference and apologized again for his behavior. Mr. Lathem acknowledges the incident and claims that he "ran his finger only four or five inches." He admitted this was "adolescent" and inappropriate behavior, and that he should not have touched her after she had asked that he not do so. He contends he has not touched her since, and Ms. Dixon agrees he has not touched her since this March 24<sup>th</sup> incident.

Ms. Dixon asked to speak with Mr. Henderson and he agreed to talk with her. Ms. Dixon met with Mr. Henderson, who brought in Mr. Don Elrod, another employee of the Tax Assessors office. When told that Mr. Lathem had touched her, contrary to her expressed statement not to touch her, Mr. Henderson assured her he would talk with Mr. Lathem, and that if he touched her again, he would accompany her to the Human Resources office so that appropriate disciplinary action could be taken. Ms. Dixon then spoke with Ms. Pryor, who, Ms. Dixon claims, told her also that any written report from her "would end up in the paper." Ms. Pryor denied making that statement; rather, she assured Ms. Dixon that she would promptly schedule classes for the Tax Assessors employees about appropriate behavior in the workplace and sexual harassment. Ms. Dixon stated she emphasized to Ms. Pryor that she wanted Mr. Henderson to have the opportunity to correct the problem. Ms. Pryor agreed and asked Ms. Dixon to inform her if there was any retaliation. Ms. Pryor did schedule the classes and employees in the Tax Assessors office, including Mr. Lathem and in a separate class Ms. Dixon, attended. Ms. Dixon has not reported any inappropriate touching since March 24<sup>th</sup>.

Ms. Dixon's current complaint, which is the complaint I was asked to investigate, is that she has been retaliated against, contrary to law and county policy, because she reported to Mr. Henderson and Ms. Pryor the behavior of Mr. Lathem, which Ms. Dixon believed was sexual harassment. Ms. Dixon's complaint is set out in a memorandum from her to Ms. Pryor, dated September 22, 2009, in which she outlines her grievances with both Mr. Lathem and Mr. Henderson. She claims, first, that Mr. Lathem was selected in 2007 for the position he currently holds for reasons she contends were unfair to her and the other applicants. She

asserts she was better qualified for the position and was denied the promotion due, in part, to her gender. She alleges also that she was denied another promotion to an auditor's position when a reorganization of the positions available at that time occurred. She believes that this reorganization occurred, in part, because another employee had been selected for the position and the reorganization took place, she contends, to discourage her from seeking the promotion. A fair reading of her complaint is that she asserts that she initially was denied promotions because of internal politics and her gender. I note that Ms. Dixon was promoted from Administrative Secretary to Personal Property Auditor effective August 2008, with the approval of Mr. Lathem and Mr. Henderson.

Ms. Dixon sets out in her memorandum to Ms. Pryor the instances in which she contends Mr. Lathem ran his finger down her back and the occasion when he either offered or attempted to massage her shoulders. She alleges, in essence, that after reporting the incident on March 24, 2009 to Ms. Pryor and Mr. Henderson, she has suffered retaliation in the following ways: she believes she received on her otherwise outstanding evaluation three notations to the effect that she had excessive absences from work due to illness and appointments with her doctors, that she had failed to follow the chain of command and that she lacked tact in communicating with other employees. She also contends that she was required on one occasion to use one of the cars that the county furnishes the Office of Tax Assessors, which she claimed was "nasty" and "filthy" because, as she was told, the car had been previously used by one of the deputy sheriffs and "you don't want to know what went on in the back seat," a comment she said made her want to "throw up." She sets out a number of other slights to her and errors in judgment that she believed were either evidence of retaliation or poor job performance on Mr. Lathem's part. She has charged Mr. Lathem with instances of inefficiency and ineffectiveness in his job performance. I have not investigated any of these allegations, as they are not relevant to her complaint of retaliation.

My investigation focused on two questions: (1) was Ms. Dixon the victim of sexual harassment by Mr. Lathem, and (2) did Mr. Lathem and Mr. Henderson retaliate against Ms. Dixon because she reported her claim of sexual harassment, as county policy provides?

As to whether Ms. Dixon was the victim of sexual harassment, I note that she has filed a complaint with the Equal Employment Opportunity Commission. That office will conduct an investigation and attempt to resolve the complaint satisfactory to both Ms. Dixon and the County. If unsuccessful, it will issue a "right to sue" letter, which will enable Ms. Dixon to pursue her complaint in the courts. I also note that Title VII, which prohibits workplace discrimination based on gender and other protected classes, requires a complaint with the Commission to be filed within 180 days from the alleged act or acts of discrimination. Title VII also prohibits any retaliation by an employer against a complainant, regardless of whether the particular acts alleged by the employee meet the definition of discrimination based on gender.

It is not within the purview of my investigation to draw legal conclusions as to the merit of Ms. Dixon's complaint under Title VII to the Equal Employment Opportunity Commission. However, the law is clear that in order to support a claim of sexual harassment, an employee

must show at a minimum that she was subjected to sexual advances or sexual favors by a supervisor, or that the environment in which she was required to work was hostile and abusive, as perceived not only by her but by a reasonable person in the same or similar circumstance. Ms. Dixon does not allege that she was subjected to requests from any person for sexual favors. She does contend that the four incidents in which she alleges her supervisor ran his finger down her spine from her neck to the middle of her back, together with the placement of his hands on her shoulders with an offer to provide a massage, constitute sexual advances. However, the U.S. Court of Appeals for the 11<sup>th</sup> Circuit has held that inappropriate touching of an employee by a supervisor, which clearly should not have occurred, does not constitute sexual advances in the absence of any verbal suggestions or advances. See, for example, Gupta v. Florida Board of Regents, 212 F.3d 571 (2000). In one case, the Court of Appeals for the 7<sup>th</sup> Circuit held: "It is not enough that a supervisor or coworker fails to treat a female employee with sensitivity, tact and delicacy, uses coarse language, or is a boor. Such failures are too commonplace in today's America, regardless of the sex of the employee, to be classified as discriminatory." Minor v. Ivy Tech State College, 174 F.3d 855, 858 (1999). A male supervisor who runs his finger down the spine of a female employee he supervises, especially when asked not to do it, and places his hands on her shoulders with the attempt to massage them, may be considered as engaging in rude, insensitive behavior that should not have occurred under any circumstance. However, this behavior can hardly be considered as sexual harassment as defined by the federal courts.

Ms. Dixon contends also that she must work in an abusive and hostile environment due to her gender and her fear of future maltreatment. She maintains that she is under almost unbearable stress being in the same workplace with Mr. Lathem and, now, Mr. Henderson as well.

Ms. Dixon is clear that she subjectively perceives her workplace as hostile and abusive. The courts require, however, that a reasonable person must have the same perception because of "severe and pervasive" hostility and abusive treatment of a sexual or gender-related nature. As the Supreme Court has held, Title VII is not a "general civility code" for the workplace, and innocuous statements or conduct, or boorish ones that do not relate to the sex of the actor or of the offended party are not counted. Faragher v. City of Boca Raton, 524 U.S. 775 (1998). Ms. Dixon does not contend that Mr. Lathem has touched her since the March 24, 2009 incident, nor has he behaved in any manner toward her in a sexual or gender related manner. Rather her anxiety, which I must assume is genuine, does not appear to be the result of severe and pervasive hostility and abusive treatment. Perhaps Mr. Lathem and Mr. Henderson should have been more reassuring and supportive. However, I do not find that either or both of them have treated Ms. Dixon in such a manner that would create a hostile work environment, as the courts use that term and as it applies to Title VII.

The second issue I considered is whether Mr. Lathem and Mr. Henderson retaliated against Ms. Dixon in her annual evaluation dated July 22, 2009 and in assigning to her on a single occasion the use of an older automobile that she contends was "nasty" and had an unpleasant odor.

Each employee in the Assessors' office is evaluated annually by use of a form that lists a number of Job Factors for the evaluator to rate the employee on a scale of Level 1 (performance unacceptable) to Level 5 (performance outstanding). Ms. Dixon complains that her July 22<sup>nd</sup> evaluation had three items out of 45 total items on which she was evaluated that demonstrate she was subject to unlawful retaliation. Ms. Dixon was rated on the item "observes work hours" as Level 2 (performance marginal) because, as her evaluation stated, "Employee should try harder to schedule doctor appointments that cause minimum disruption to regular work hours." Ms. Dixon acknowledged that she had 32 appointments during the workday with her physicians for the year she was being evaluated, but contends that she had "much needed emergencies that had to be dealt with immediately." She also pointed out that she lives in Dahlenega and is seen by physicians in Dahlenega who do not see patients at times other than during her regular working hours. She claimed she had a number of medical problems during the year that made it necessary to have an unusual number of appointments, which she could not avoid. She also contended that she made up the hours she lost by working during lunch or other hours, which she contends was the practice in her office. I did not attempt to determine if, in fact, she "made up" the hours lost or if her absences were warranted. Rather, I reviewed the performance evaluations for other employees Mr. Lathem supervised and noted that he had assigned a Level 2 rating to a male employee because of the excessive number of medical appointments he had, even though the male employee had made an effort to make up his lost time. I also read the evaluation of another male employee who was evaluated by Mr. Lathem; the employee had received a Level 3 rating under the item "Reports to work on time" with Mr. Lathem's notation that the employee should "Continue to work toward elimination of tardies." I concluded that Mr. Lathem's assignment of a Level 2 for excessive medical appointments was not based on Ms. Dixon's gender, nor did it constitute retaliation for complaining of unlawful harassment.

Ms. Dixon also complains that she received a Level 3 rating (performance average—meets standards—work overall acceptable and rarely needs improvement) to the item "Displays tact and consideration." Ms. Dixon responded to this rating by stating that she believed the rating was due to "someone that has a personal issue with me." She added: "On a side note, I will work on my wording, but was told in the absence of my supervisor, should I see something that needs attending, I should make sure it was done. Other than the previously mentioned 'someone' I feel I have a wonderful working relationship with my coworkers." Obviously, Ms. Dixon attributes the Level 3 rating to a personality conflict she has had with another employee. I do not find that a rating that Ms. Dixon "meets standards" and her work is "overall acceptable and rarely needs improvement" is an indication that Mr. Latham is retaliating against her.

Finally, Ms. Dixon points to the evaluation item that provides "Conforms to departmental rules and procedures." Ms. Dixon was rated as Level 2 with this comment: "Complaints should follow the chain of command as spelled out in the Civil Service Manual. (Per the Chief Appraiser)." Mr. Henderson acknowledged that he provided this rating because Ms. Dixon complained to Ms. Pryor that she was being harassed by Mr. Lathem immediately after she complained to him and without giving him the opportunity to resolve her complaint. Ms. Dixon wrote a response to this rating, in which she pointed out that County policy specifically

provides that if an employee believes he or she has been subjected to harassment, discrimination or improper conduct, the employee should report the conduct. If the employee believes that "circumstances warrant, [the employee] may bypass [his/her] supervisor and directly file a complaint with the Human Resources Department as provided for in this policy." (Hall County Employee Handbook & Policy Guidelines, Section 202.3). I conclude that Ms. Dixon did not receive a Level 2 rating based solely on her report to both Mr. Henderson and Ms. Pryor. I do not find that the Level 2 rating was due to a desire to retaliate against her because she had complained about sexual harassment; rather, his rating was due, in part, to his belief that Ms. Dixon had failed to give him a fair opportunity to resolve her complaint and also due to his lack of knowledge of this particular provision of the Hall County policy.

I am convinced also that Ms. Dixon's evaluation considered as a whole was not retaliatory. Ms. Dixon received an overall evaluation score of 4.60 out of a potential 5.0. Level 4 is awarded for a consistent meeting of acceptable standards and "frequently exceeding standards in quality and work performed." Ms. Dixon's overall score was the second highest score awarded by Mr. Lathem; the highest score was 4.69. Ms. Dixon's overall score for the previous year was 4.875, not significantly higher than her score for the current year. If the Level 2 rating for "Conforming to department rules and procedures" were removed, her overall rating would also be 4.69. Mr. Lathem informed me that Ms. Dixon was an excellent employee and did quality work. I must conclude that her evaluation was based on Mr. Lathem's opinion as to her effectiveness and not in response to her allegations that he wrongfully harassed her.

Ms. Dixon asserts also that she and a secretary in the office were assigned a car to use on one occasion that was "so dirty that [their] clothes actually got dirty sitting in it." She claims that a newer car was available and stayed in the garage all day. She said that when she complained about this car, Mr. Henderson and Mr. Lathem laughed and told her that the car had been a deputy's car and it had an unpleasant odor because "you don't want to know what happened in the back seat." Ms. Dixon was greatly offended by this remark and apparently attributes the assignment of the car as another example of retaliation.

I found that the Tax Assessors have the use of county owned vehicles, many of which, if not most, are vehicles formerly used by the sheriff's department. Mr. Henderson disagreed with Ms. Dixon's assertion that she was purposefully provided a disagreeable vehicle. While I believe Ms. Dixon has a reasonable expectancy that she and all other employees should be assigned vehicles based upon some reasonable procedure or protocol, I do not conclude that the assignment of this vehicle on one occasion was designed to punish Ms. Dixon for her claim that she is a victim of sexual harassment.

As noted previously, Ms. Dixon contends that Mr. Lathem is quick to blame her for some mistakes that he finds when, as she alleges, the mistakes were committed by others. She believes that Mr. Lathem is looking for opportunities to "write [her] up." Mr. Lathem denies such and stated that he believes Ms. Dixon is a valued, competent employee. However, he, in turn, believes Ms. Dixon is looking for opportunities to accuse him of sexism or

discrimination, or to find errors in his performance that would support her desire that he be terminated. For example, Ms. Dixon accused Mr. Lathem of suggesting the improper or unethical use of petty cash to buy lunch for another department because of their assistance to the Assessors office. Mr. Lathem admits he asked her whether petty cash could be used for this purpose and when she told him it could not, he accepted her understanding of the rule. My interviews, as well as Ms. Dixon's complaint, revealed other instances of misunderstandings and accusations of petty slights between Mr. Lathem and Ms. Dixon, illustrating the tension and guarded relationship between them. However, these occurrences do not support allegations of sexual harassment and retaliation for reporting such. I suggest that Ms. Pryor explore with both of them whether they would be willing to participate in mediation with the goal to develop a professional working relationship relatively free from suspicion, anxiety and recriminations. If not, Ms. Pryor may wish to consider whether either Mr. Lathem or Ms. Dixon would consider another position in county government. If neither of these suggestions is acceptable, then Mr. Henderson will have the responsibility to ensure that all the employees under his supervision perform their duties competently, professionally and free from rancor or discord. Ms. Dixon proposed as a solution to her dissatisfaction that both Mr. Lathem and Mr. Henderson be removed from their position--a solution, no doubt, but one that does not seem to me from my investigation to be reasonable. Finally, while I note that Ms. Dixon has not complained of any unwanted touching of her person since the March 24, 2009 incident, she, as well as all other employees, have the right to expect that the workplace will be free of inappropriate behavior from their supervisors and co-employees, regardless of whether such behavior rises to the legal definition of harassment or discrimination based on race, color, national origin, sex, religion, age or disability. Inappropriate behavior includes not only unwelcome touching, however innocuous, but also opening a bathroom door reserved only for the opposite sex, even when the motive was not for sexual gratification. I do recommend that Mr. Henderson reconsider his evaluation of Ms. Dixon's compliance with rules and procedures and to expunge from her last evaluation his rating of her performance on that particular item.

I hope I have been responsive to the task you asked me to perform. If I may be of further assistance in this matter, please let me know. Thank you for the opportunity to work with the County Government in this matter.