

Development Officer Loses Gender Bias Case

Jack Stephens was hired as a development officer at Auburn in 2005. He worked in a unit that was responsible for raising funds for the Jule Collins Smith Museum of Fine Arts. From 2005 through 2007 he was evaluated by his supervisors and received generally low marks due to his lack of success in raising funds, in making solicitations, and in entering relevant data into Auburn's prospect management system (PM2). In late 2007, he was placed on probation for 90 days and given a performance improvement plan. His probation was extended for another 90 days, after which he was terminated.

The reasons given for the termination included failure to reach campaign goals, failure to adequately document his work through the PM2 system, and an inappropriate complaint he made about his treatment at Auburn to a donor couple. Stephens subsequently filed suit against Auburn for "disparate" (*i.e.*, discriminatory) treatment on the basis of gender in violation of Title VII, Civil Rights Act of 1964. In reviewing Auburn's motion for summary judgment (judgment before and without the necessity of a trial), the court focused on the requirement that Stephens have presented some evidence (typically done through a pre-trial deposition) that he was treated differently and less favorably than a similarly situated female employee, generally referred to as a "comparator".

Stephens identified a number of proposed female comparators, that is, female development employees with an allegedly comparable employment record who were not terminated. The court, however, distinguished these individuals from Stephens. Some had not previously been placed on probation, some had no history of PM2 problems, and none of them had been disciplined for misconduct (as Stephens had for his unprofessional comments to donors). The court also noted that no comparator had the same supervisor as Stephens. Even one female employee who had previously been placed on probation for poor fund-raising results and who had resigned was not regarded as "similarly situated," because she had a different supervisor, she had not been cited for PM2 problems, and she had no record of previous misconduct.

In dismissing Stephens' claims, this Alabama federal court took a relatively strict view of what was required to be a comparator in a disparate treatment case. *Stephens v. Board of Trustees of Auburn University*, 774 F.Supp.2d 1202 (M.D.Ala. Mar. 2, 2011). Another court might take a broader view and allow the case to go to trial. Nevertheless, a case such as *Stephens* provides at least one clear message: when an employer terminates or disciplines an employee, it is important to first look carefully at other employees in a "similar situation," in terms of their position and performance, to ensure that they have not been treated more leniently. To ignore such an analysis is to invite a discrimination claim.