JUDGE BARBARA MILANO KEENAN
Nominee to the Fourth Circuit Court of Appeals

On September 14, 2009, President Obama nominated Barbara Milano Keenan, a Justice on the Virginia Supreme Court, to the Fourth Circuit Court of Appeals, which covers the federal districts within Virginia, West Virginia, Maryland, North Carolina, and South Carolina.

Nominations to the federal courts of appeal are significant for obvious reasons, but the Fourth Circuit is unique. The Court has heard a significant number of cases involving the scope of executive power. And, a large number of civil rights claims related to race, gender, and employment discrimination are litigated within its districts. Although the Court has long been considered a bastion of ultraconservatism, after a series of departures it is now more evenly split. Thus, single additions to the bench—including Judge Keenan's—will very likely impact the Court's overall jurisprudential leanings.

Biography

Judge Barbara Keenan was born in Austria, but was raised in Northern Virginia. She received her undergraduate degree from Cornell University in 1971, and her law degree from George Washington University School of Law in 1974. In 1992, she received an L.L.M. from the University of Virginia School of Law.

Judge Keenan began her legal career as a county prosecutor in Fairfax County, Virginia, where she served from 1974 to 1976. Following this, she worked in private practice for the firm Keenan, Ardis and Roehrenbeck, where she made partner. In 1980, Keenan became a judge of the General District Court of Fairfax County. In 1982, she moved to the Circuit Court, and was the first woman to be elected to this position by the Virginia General Assembly. In 1985 she was one of ten judges elected to the Court of Appeals of Virginia, a newly created court. In so doing, she was the first woman to serve as a state appellate court judge in Virginia. In 1991 she was elected to the Supreme Court of Virginia, where she has remained since. She holds the distinction of being the only woman to have served on all levels of the Virginia court system. If confirmed to the Fourth Circuit, she will be the first woman from Virginia to attain such a position.

The American Bar Association's Standing Committee on the Federal Judiciary gave Judge Keenan its highest level of support bestowed upon a nominee, a rating of "well qualified." American Bar Association, Ratings of Article III Judicial Nominees

111th Congress, Oct. 1, 2009, http://www.abanet.org/scfedjud/ratings/ratings111.pdf.

Cases

Alliance for Justice has analyzed Judge Keenan's record as a state court judge. On matters relating to discrimination and access to justice, Keenan's rulings display a strong understanding of the legal issues at hand and a sensitivity to the real world consequences of court decisions. She dissented from a ruling denying standing to a fair housing organization that alleged racially discriminatory lending practices. She also rejected morality-based arguments in a Virginia Supreme Court ruling addressing LGBT parental rights.

However, some lawyers have raised concerns with her opinions in the employment and death penalty contexts. Judge Keenan issued a narrow ruling interpreting a state workers' compensation statute to exclude undocumented workers, the result of which resulted in their lack of access to medical coverage. And she has upheld the imposition of the death sentence for persons who committed criminal acts as a minor. The following sections address these and other rulings.

Discrimination

Justice Keenan has issued few rulings related to discrimination on the basis of race, sex, national origin, age, and disability. But in the cases she authored in this area, Keenan appears to broadly interpret causes of action to allow plaintiffs' suits to proceed. For example, in a case of first impression addressing a claim of sexual harassment, Keenan held that Virginia's Human Rights Act did not abrogate other common law causes of action for wrongful termination based on violation of public policy. *Mitchem v. Counts,* 523 S.E.2d 246 (Va. 2000). She also held that a violation of criminal statutes prohibiting fornication and lewd and lascivious behavior may support the claim of a public policy violation.

Further, in *Shaw v. Titan Corp.,* 498 S.E.2d 696 (Va. 1998), a race, sex, and age discrimination case, Keenan held that a plaintiff asserting a cause of action for wrongful termination based on discrimination in violation of public policy "is not required to prove that the employer's improper motive was the sole cause of the wrongful termination." *Id.* at 700. Further, Keenan held that punitive damages were permitted under wrongful termination suits.

Access to Justice

Overall, Justice Keenan's record on the bench shows sensitivity to access issues. For example, in *Nationwide Mut. Ins. Co. v. Housing Opportunities Made Equal*, 523 S.E.2d 217 (Va. 2000), she dissented from the Virginia Supreme Court majority holding that a fair housing organization, Housing Opportunities Made Equal ("HOME") lacked standing. HOME sought damages from Nationwide for alleged discriminatory practices "in the provision of homeowners insurance to African-Americans in the Richmond area" under Virginia's Fair Housing Law, VA. CODE ANN. § 36-96.1 (1991), *et seq*. A jury awarded HOME $500,000 in compensatory damages and $100,000 in punitive damages.

523 S.E.2d at 222. Keenan joined a dissent written by Justice Hassell arguing that the statute expressly granted standing to HOME and other similar organizations, and that HOME had proved "with overwhelming evidence that Nationwide engaged in intentional acts of racial discrimination against black citizens . . . ." *Id.* at 230. The judgment of the Court was later withdrawn and a rehearing granted. *See Nationwide Mut. Ins. Co. v. Hous. Opportunities Made Equal, No. 990733,* 2000 Va. LEXIS 56 (Va. Mar. 3, 2000).

In *State Water Control Bd. v. Crutchfield,* 578 S.E.2d 762 (Va. 2003), Justice Keenan affirmed the lower court ruling and interpreted standing requirements broadly by holding that riparian landowners challenging a permit allowing wastewater discharge into a neighboring waterway had standing. Writing for a unanimous panel, she held that the injury in fact "need not be a large one" and that "in 'environmental cases' it is generally sufficient if a plaintiff establishes that he uses the affected area, and that he is a person 'for whom the aesthetic and recreational values of the area will be lessened' by the defendant's actions." *Id.* at 768.

Recently, in *Philip Morris USA, Inc. v. Chesapeake Bay Found., Inc.,* 643 S.E.2d 219 (Va. 2007), Keenan joined a decision overturning a circuit court ruling denying standing to an environmental group challenging a wastewater permit. The decision held that a newly amended Virginia statute authorized both individual and representational standing for suits seeking judicial review of a State Water Control Board decision. Further, the Court held that the environmental organization in this case, the Chesapeake Bay Foundation, had both representational and individual standing to challenge the approval of a wastewater permit renewal issued to Philip Morris.

Additionally, Justice Keenan values providing remedies to aggrieved parties. In *Cowan v. Hospice Support Care, Inc.,* 603 S.E.2d 916 (Va. 2004), a suit involving the death of an elderly woman in Hospice care, Keenan held that while the doctrine of charitable immunity protects charities from suits based upon simple negligence, the doctrine does not prevent suits based on gross negligence and willful and wanton negligence. And in a case involving a plaintiff rendered quadriplegic while participating in a triathlon, *Hiett v. Lake Barcroft Community Ass'n,* 418 S.E.2d 894 (Va. 1992), Keenan held that a pre-injury release from liability for negligence was void as against public policy.

However, in 2004, she received the "Gatekeeper Award" from a pro-tort reform group, Common Good. The award was in honor of her decision in *Donna P. Thurmond v. Prince William Professional Baseball Club, Inc.,* 574 S.E.2d 246 (Va. 2003), which ruled that a spectator at a baseball event could not sue for injuries sustained from a foul ball. Part of Common Good's purpose is to further "civil justice reform" by limiting who can bring so-called frivolous claims in court.

Voting

In *In re Phillips,* 574 S.E.2d 270 (Va. 2003), Keenan upheld a statute allowing "a convicted felon to petition a circuit court for approval of a petition for restoration of the felon's eligibility to register to vote" as valid under the Constitution of Virginia. In *Phillips*, a woman convicted of a non-violent felony, making a false written statement in connection with a firearm purchase, petitioned the court to restore her eligibility to vote.

Virginia law, VA. CODE ANN. § 53.1-231.2 (2000), authorized such a petition. The trial court declined her request and held the law unconstitutional because it either violated separation of powers principles (giving trial courts power reserved to governor) or it was fundamentally flawed because it did not require notice to the commonwealth. Justice Keenan, writing for the unanimous court, reversed on both grounds.

Employment

Justice Barbara Keenan wrote a troubling opinion in *Jose Granados v. Windsor Dev. Corp.*, 509 S.E. 2d 290 (Va. 1999), in which the Supreme Court of Virginia held that undocumented workers were not covered under Virginia's workers' compensation law. Granados, a carpenter's helper, was injured on the job and sought coverage for his injuries. Keenan's ruling ensured that he, and all other undocumented workers injured in Virginia, would not have access to medical coverage.

In reaching this conclusion, Justice Keenan found that since the statute in question defined "employee" as "every person, including a minor, in the service of another under any contract of hire," and because illegal workers cannot contract under the Immigration Reform and Control Act of 1986, as a result they cannot be an "employee." *Id.* at 293. Applied broadly, this analysis could mean that illegal workers would not be entitled to pay for work performed because they are unable to lawfully contract for their jobs. Later, the Virginia Legislature overruled her statutory interpretation and amended the law to cover aliens. *See* Va. Code Ann. § 65.2-101 (1998).

Other courts throughout the country reached a different conclusion on the same issue. The Second Circuit in *Affordable Hous. Found., Inc. v. Silva*, 469 F.3d 219 (2d Cir. 2006), and a Maryland state court in *Design Kitchen and Baths v. Diego E. Lagos*, 882 A.2d 817 (Md. 2005), declined to follow Justice Keenan's reasoning. The Second Circuit noted that even the United States Supreme Court declined to totally deny pay to aliens. *Citing Hoffman Plastics v. NLRB,* 535 U.S. 137 (2002).

LGBT Rights

In *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995), Keenan authored a strong dissent in a child custody case. A grandmother sought custody of her daughter's two year old son in part due to her daughter's lesbian relationship. The majority's judgment-laden decision noted that "important considerations [in awarding custody] include the nature of the home environment and moral climate in which the child is to be raised." *Id.* at 107. While seeming to acknowledge "that a lesbian mother is not *per se* an unfit parent," the court reasoned that "[c]onduct inherent in lesbianism is punishable as a Class 6 felony," and, "thus, that conduct is another important consideration in determining custody." *Id.* at 108. Further, the court stated that it had "previously said that living daily under conditions stemming from active lesbianism practiced in the home may impose a burden upon a child by reason of the 'social condemnation' attached to such an arrangement, which will inevitably afflict the child's relationships with its 'peers and with the community at large.'" *Id.* Relying largely on this reasoning, the court awarded custody to the grandmother.

Judge Keenan disagreed. She wrote that "[t]he record plainly shows that the trial court made a *per se* finding of unfitness based on the mother's homosexual conduct." *Id.* at 109. She went on, "[a]lthough there is no evidence in this record showing that the mother's homosexual conduct is harmful to the child, the majority improperly presumes that its own perception of societal opinion and the mother's homosexual conduct are germane to the issue whether the mother is an unfit parent." *Id.*

Later, in *Davenport v. Little-Bowser*, 611 S.E.2d 366 (Va. 2005), Keenan joined in an opinion holding that Virginia law required the Commonwealth to issue new birth certificates to same-sex adoptive parents. The Court found that the statutes at issue did not prohibit listing the names of two mothers or two fathers when issuing new birth certificates because the statutes use the non-restrictive terms "adoptive parents" and "intended parents." However, the Court did not address any constitutional challenges made by the same-sex parents.

Additionally, while a trial judge, Keenan presided over a case which subsequently went to the Supreme Court of Virginia addressing the First Amendment rights of gay friendly bookstores. *Commonwealth v. Croatan Books, Inc.*, 323 S.E.2d 86 (Va. 1984). The Commonwealth sought to enjoin a bookstore as a nuisance because of alleged homosexual activity taking place in booths used for viewing erotic films. In an early hearing, Keenan ordered the bookstore to limit access to the movie booths and to hire bodyguards to ensure that only a single patron occupied each booth. When these precautions did not stop the conduct, Keenan later ruled that the store was a nuisance under Virginia law, which would have forced it to close. Yet, she also determined that the law was unconstitutional as applied to the bookstore because it would impose "a restriction on First Amendment freedoms greater than is essential to the furtherance of the governmental interest in abating the nuisance," and instead ordered that the movie booths be removed. *Id.* at 89. The Commonwealth appealed, and Keenan's opinion was subsequently reversed.

Death Penalty

Capital punishment is legal in the Commonwealth of Virginia. Since 1976, Virginia has executed 106 inmates, second only to Texas. Study after study show that a disproportionate percentage of African American defendants receive the death penalty in states where it is legal, especially if the victim was Caucasian.

Judge Keenan upheld the use of the death penalty in a handful of cases involving capital murder by a minor. In *Johnson v. Virginia*, 591 S.E.2d 47 (Va. 2004), Keenan wrote the opinion reviewing a death sentence imposed on a defendant who was sixteen at the time he committed the crimes of rape and capital murder. After exhausting his direct appeals, Johnson petitioned for *habeas* relief alleging ineffective "assistance of counsel during the penalty phase of his capital murder trial because his trial counsel failed to request an instruction informing the jury that Johnson would be ineligible for parole if sentenced to life imprisonment for capital murder." *Id.* at 49. Johnson's writ was granted, and his death sentence was vacated.

During his resentencing hearing before the circuit court, Johnson was prohibited from presenting evidence, cross examining witnesses, "or making any argument in

relation to his claim of innocence." *Id.* at 51. Johnson moved to have the court impose a life sentence on the ground that the jury in his first trial would have done so had it known that he was ineligible for parole. To support his position, Johnson submitted affidavits from two jurors stating that they did not know he was ineligible for parole based on this capital murder conviction, and had they known this would not have imposed the death penalty. Further, Johnson asked the circuit court to impose a life sentence because he was sixteen when he committed the crimes. He also alleged mental illness and mental retardation. The circuit court, however, denied these requests and Johnson was again sentenced to death.

On review, Keenan found no reversible errors in Johnson's resentencing hearing, and "directly reject[ed] Johnson's argument that [the Court] should anticipate that the United States Supreme Court may reexamine and reverse its holding in *Stanford* ." *Id.* at 60 (citing *Stanford v. Kentucky*, 492 U.S. 361 (1989) (holding that the Eighth Amendment's prohibition against cruel and unusual punishment does not forbid the imposition of the death sentence when a person commits capital murder at age sixteen or seventeen)). Ultimately, the United States Supreme Court overruled *Stanford* in *Roper v. Simmons*, 543 U.S. 551 (2005) and vacated and remanded Johnson's case back to the Supreme Court of Virginia to be reconsidered in light of *Roper*. *Johnson*, 544 U.S. 901 (2005). When *Roper* was decided, Virginia's then-Attorney General Judith W. Jagdmann said it was "unfortunate that five justices of the United States Supreme Court substituted their judgment for the will of the people of Virginia." Carol Morello, *Ruling Likely to Spare Va. Inmate*, WASH. POST, Mar. 2, 2005.

In *Roach v. Commonwealth*, 468 S.E.2d 98 (Va. 1996), Judge Keenan wrote the majority opinion upholding the death penalty sentence for a defendant convicted of capital murder who was seventeen at the commission of the crime. Virginia law provides that a person may be sentenced to death based upon their "future dangerousness," which was applied in this case. Keenan rejected the many arguments raised on appeal, including the lack voluntariness of a confession procured after a wavier of Miranda warnings. *Id.* at 107. She also rejected the claim that the Virginia Supreme Court should articulate standards by which it would determine an insufficiency of evidence of "future dangerousness," since at no prior time had it overturned a conviction on this ground. *See Thomas v. Commonwealth*, 419 S.E.2d 606 (Va. 1992) (joining opinion upholding death sentence for crime committed at seventeen years of age); *see also Wright v. Commonwealth*, 427 S.E.2d 379 (Va. 1993) (joining opinion finding that Constitution did not require additional procedural safeguards to transfer defendant from juvenile court to criminal justice system).

Conclusion

President Obama has nominated an experienced jurist to the Fourth Circuit. While a few of her cases raise concerns—especially in the employment and death penalty contexts—most of her rulings indicate that she will be a strong addition to the bench. Because of the Fourth Circuit's importance, the Alliance urges the President to take advantage of this historic opportunity and nominate judges to its remaining vacancies who will work to ensure the truly American ideal of equal justice for all.