

**Responses of Barbara Milano Keenan
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Written Questions of Senator Tom Coburn, M.D.**

- 1. In Senator Mark Warner’s introduction of your nomination, he mentioned that “many” of your letters of support were “unsolicited.” Did you or anyone else solicit any letters of support in connection with your nomination?**

Response: Yes.

If so, please list the names of the individuals who were solicited and provide copies of the letters, if any.

Response:

Vincent J. Mastracco, Jr., Esq. (copy of letter attached)

John A. Heilig, Esq. (copy of letter attached)

Thomas G. Johnson, Jr., Esq. (copy of letter attached)

The Hon. Owen B. Pickett and The Hon. Linda (Toddy) Puller also were asked to write letters of support on my behalf. I do not have copies of any letters that may have been sent by these two individuals. Of all the above-listed individuals, the only one I contacted personally was Ms. Puller.

The above requests were made before Senator Webb and Senator Warner sent their recommendation to the White House.

- 2. In *Conner v. National Pest Control Ass’n*, 257 Va. 286 (Va. 1999), a wrongful termination case, you joined a concurrence criticizing the policy outcome of the opinion but holding that your court could not “act as a super-legislative body” and reject the law the state legislature passed. That is an encouraging statement. It suggests that you understand the role of a judge or justice. However, the very next year in *Mitchem v. Counts*, 259 Va. 179 (Va. 2000), you wrote the majority opinion for a divided court, holding that a former employee could sue her former employer based on the claim that the employee rejected her supervisor’s sexual advances. *Mitchem* involved the same state law as the 1999 case I just mentioned. The dissent argued that your majority opinion went against your prior statement that the court could not act as a “super-legislative body.”**

- a. How do you respond to this criticism?**

Response: Although the decisions in Conner and Mitchem both addressed a 1995 amendment to the Virginia Human Rights Act (VHRA), the plaintiff in Mitchem asserted an additional claim not alleged in Conner. In Conner, the plaintiff alleged only that she was wrongfully

terminated from employment based on her gender in violation of public policy stated in the VHRA, the Constitution of Virginia, and various Virginia statutes. Conner, 257 Va. at 288, 513 S.E.2d at 399. The Court held that Connor's claim was barred by the 1995 amendment to the VHRA because the legislature, in enacting that amendment to former Virginia Code § 2.1-725, eliminated causes of action for wrongful termination of employment based on any public policy reflected in the VHRA, even when the same public policy was reflected elsewhere in Virginia law other than state civil rights statutes or local ordinances. Id., 257 Va. at 290, 513 S.E.2d at 400.

Although the pleadings filed by the plaintiff in Mitchem included a claim similar to the claim asserted in Conner, the plaintiff in Mitchem also raised an alternative common law claim alleging that she was wrongfully terminated from her employment in violation of Virginia's public policy against fornication and lewd and lascivious behavior, because the plaintiff refused to commit those crimes at her employer's request. Mitchem, 259 Va. at 183, 523 S.E.2d at 248. Therefore, Mitchem raised a question of first impression not presented in Conner, namely, whether the VHRA barred a common law action for wrongful termination of employment based on a violation of public policy not reflected in the VHRA, when the conduct at issue also violated a public policy contained in the VHRA. The Court held that former Virginia Code § 2.1-725 did not prohibit a common law claim for wrongful termination of employment based on the public policies prohibiting fornication and lewd and lascivious behavior, because those policies are not reflected in the VHRA. Mitchem, 259 Va. at 190-91, 523 S.E.2d at 252-53.

b. How did the law support your conclusion in the *Mitchem* case?

Response: As previously stated, Mitchem presented a case of first impression for the Court to consider. The Court's holding was supported by existing legal precedent.

First, because former Virginia Code § 2.1-725 was enacted by the legislature in derogation of the common law, Virginia law required that the Court strictly construe the plain language of that statute. Chesapeake & O. Ry. Co. v. Kinzer, 206 Va. 175, 181, 142 S.E.2d 514, 518 (1965). Former Virginia Code § 2.1-725(D) stated, in relevant part: "causes of action based upon the public policies reflected [in the VHRA] shall be exclusively limited to those actions, procedures and remedies . . . afforded by applicable federal or state civil rights statutes or local ordinances." The plain language of this statute restricted causes of action relating only to the public policies reflected in the VHRA.

Second, Court precedent recognized a common law cause of action for wrongful termination of employment for violation of public policies underlying existing laws designed to protect the property rights, personal

freedoms, and the health, safety, or welfare of the general public. See City of Virginia Beach v. Harris, 259 Va. 220, 232-33, 523 S.E.2d 239, 245 (2000); Miller v. SEVAMP, Inc., 234 Va. 462, 468, 362 S.E.2d 915, 918 (1987); Bowman v. State Bank of Keysville, 229 Va. 534, 540, 331 S.E.2d 797, 801 (1985). The Virginia statutes prohibiting fornication and lewd and lascivious behavior embodied public policies designed to protect the welfare of the general public.

c. Do you think that it is ever proper for judges to indulge their own policy preferences in determining what the law means?

Response: No.

i. If so, under what circumstances?

ii. Please identify any cases in which you've done so.

Response: There are no cases in which I have acted in such a manner.

If not, please discuss an example of a case where you have had to set aside your own policy preferences and rule based solely on the law.

Response: In Chandler v. Graffo, 268 Va. 673, 604 S.E.2d 1 (2004), the majority opinion held that Virginia Code § 8.01-581.20, which sets forth qualifications for testifying as an expert witness in a medical malpractice case, did not permit either party to retain a former malpractice panel member as an expert in the case. Id. at 680, 604 S.E.2d at 4. I joined Justice Agee's dissent, which stated that while such a prohibition might be "preferred public policy," a prohibition of this kind did not appear within the written statute and, thus, the inclusion of such a provision in the statute was a matter for future legislative action, not for "judicial amendment" by the Court. Id. at 684, 604 S.E.2d at 6.