

2-1-1997

The Civil Opinions of Judge Phyllis A. Kravitch: A Tribute

Stephen J. Wermiel

Follow this and additional works at: <https://readingroom.law.gsu.edu/gsulr>

 Part of the [Law Commons](#)

Recommended Citation

Stephen J. Wermiel, *The Civil Opinions of Judge Phyllis A. Kravitch: A Tribute*, 13 GA. ST. U. L. REV. (1997).
Available at: <https://readingroom.law.gsu.edu/gsulr/vol13/iss2/12>

This Article is brought to you for free and open access by the Publications at Reading Room. It has been accepted for inclusion in Georgia State University Law Review by an authorized editor of Reading Room. For more information, please contact mbutler@gsu.edu.

THE CIVIL OPINIONS OF JUDGE PHYLLIS A. KRAVITCH: A TRIBUTE

Stephen J. Wermiel[†]

Judge Phyllis Kravitch's tenure on the Eleventh Circuit truly mirrors the society in which she served, with many of the most interesting, important and often difficult legal questions of the day passing through her courtroom. From issues of gay rights to free speech, employment discrimination to liability for environmental cleanup, Judge Kravitch has left her mark as a good judge, neither shying away from the hard issues that came before her nor reaching out to decide questions that were unnecessary to the resolution of the case. Throughout her opinions, her commitment is a clear one—to make certain that the judicial system operates in a manner that is fair and that fosters justice. This commitment is not expressed with the fiery passion of a political leader but with the careful rhetoric and analysis of a judge. She has never hesitated to dissent on occasions when she believes her colleagues have gone awry. Among 548 majority opinions and more than 100 additional dissents and concurrences that Judge Kravitch has authored, it is difficult to pick a representative handful; however, a few examples of the more controversial issues that Judge Kravitch has faced, and her sense of fairness and justice in handling them, are outlined in this essay.

In *Caro-Galvan v. Curtis Richardson, Inc.*,¹ she ruled that seasonal workers who harvested ferns on a farm in Florida and were housed year-round in cramped and unsanitary trailers were entitled to the protections of federal labor laws designed to protect migrant workers against unfair working conditions. Even though the workers here did not migrate from site-to-site, but were instead permanently housed, Judge Kravitch construed the statutory definition of “seasonal or temporary housing” to depend “on the nature of the relationship between the workers’ employment and housing, not on the duration of the workers’

[†] Associate Professor of Law, Georgia State University.

1. 993 F.2d 1500 (11th Cir. 1993) (en banc).

stay."² Her decision for the *en banc* Court overruled a district judge's dismissal of the case.

On the subject of affirmative action, Judge Kravitch decided one of the pressing issues of the day according to the prevailing law at the time, although the Supreme Court later went in a different direction. In *South Florida Chapter of Associated General Contractors of America Inc. v. Metropolitan Dade County, Florida*,³ she upheld a "set aside" program to benefit minority-owned companies bidding on county contracts. Judge Kravitch ruled that the county was capable of making legitimate findings of past discrimination and of narrowly tailoring the program to correct the problem. Judge Kravitch's approach to this volatile issue was the predominant view in federal circuit courts for much of the decade of the 1980's until the Supreme Court decided *City of Richmond v. Croson Co.*,⁴ which concluded that state and local governments were not generally competent to adopt "set-aside" programs unless there was extensive, documented evidence of past discrimination and unless the program was designed to benefit the actual victims of that past discrimination.

Throughout her tenure on the Eleventh Circuit, Judge Kravitch has faced difficult cases alleging employment discrimination in violation of federal law. In *Walker v. Ford Motor Co.*,⁵ she found that the repeated use of racial epithets by employees at a Tampa, Florida, car dealership was sufficient to create a racially discriminatory work environment for a black employee, even if many of the comments were not specifically directed at one individual. In the same decision, however, she said that federal law limited the amount of back pay to which the employee was entitled when he was fired for complaining about the racial harassment. In *Sparks v. Pilot Freight Carriers*,⁶ she reinstated a sexual harassment lawsuit by a trucking company worker in Duluth, Georgia, ruling that a district judge gave short shrift to the evidence of a hostile working environment and of *quid pro quo* harassment when he granted summary judgment for the employer. In *Byrd v. Lakeshore Hospital*,⁷ Judge Kravitch

2. *Id.*

3. 723 F.2d 846 (11th Cir. 1984).

4. 488 U.S. 469 (1989).

5. 684 F.2d 1355 (11th Cir. 1982).

6. 830 F.2d 1554 (11th Cir. 1987).

7. 30 F.3d 1380 (11th Cir. 1994).

ruled that a district court imposed too great a burden of proof on a worker who said she was fired because of absences from the job due to her pregnancy. Judge Kravitch found that the employer had violated the federal Pregnancy Discrimination Act.⁸

In *Severino v. North Fort Myers Fire Control District*,⁹ Judge Kravitch dissented from a panel decision upholding the discharge of a firefighter who was reassigned to light duty after he was diagnosed as HIV-positive. She said that under federal law prohibiting discrimination on the basis of handicap,¹⁰ the firefighter's HIV-positive condition could not serve as a major reason for his dismissal.¹¹ The trial record, she said, showed that he was improperly dismissed because of his HIV status.¹²

Immunity for government employees is another issue Judge Kravitch has faced. In *Jenkins v. Talladega City Board of Education*,¹³ Judge Kravitch found that there was no qualified immunity from damages under federal civil rights law for two Alabama teachers who strip-searched two eight-year-old girls in search of seven dollars reported missing by another student. In a decision that is otherwise free of strong rhetoric or broad pronouncements, Judge Kravitch said the two teachers acted in "blatant disregard" of the students' rights to be free from unreasonable searches.¹⁴ The full Eleventh Circuit has vacated Judge Kravitch's opinion and granted *en banc* rehearing in the case.¹⁵

Judge Kravitch had a long involvement with the Eleventh Circuit's struggle over the treatment of Haitian refugees, ruling in *Jean v. Nelson*¹⁶ that the government could not discriminate because of national origin in deciding whether to parole Haitian refugees from detention camps where they were being held pending a determination of their immigration status. When the Eleventh Circuit reversed in an *en banc* decision,¹⁷ Judge

8. 42 U.S.C. § 2000e(k) (1994).

9. 935 F.2d 1179 (11th Cir. 1991).

10. 29 U.S.C. § 794(a) (1994) (Rehabilitation Act).

11. *Severino*, 935 F.2d at 1183.

12. *Id.*

13. 95 F.3d 1036 (11th Cir.), *vacated, reh'g granted* 1996 WL 606638 (11th Cir. 1996) (*en banc*).

14. *Id.* at 1047.

15. *Id.* at 1036.

16. 711 F.2d 1455 (11th Cir. 1983).

17. *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (*en banc*), *aff'd* 472 U.S. 846 (1985).

Kravitch dissented,¹⁸ chiding that the majority “unnecessarily and incorrectly eroded those few rights to which the courts have determined excludable aliens are entitled under either Congressional statutes or the Constitution.”¹⁹

She was involved in numerous cases under the First Amendment, sometimes in dissent. In *Nationalist Movement v. City of Cumming, Georgia*,²⁰ she upheld a local ordinance banning parades on Saturday mornings, rejecting a challenge by a group that wished to protest against celebration of Dr. Martin Luther King, Jr.’s birthday. In *Fulani v. Krivanek*,²¹ she invalidated a Florida law that barred minor-party political candidates from being able to take advantage of a waiver of the processing fee for certifying signatures needed to get on the ballot. In *Daniel v. City of Tampa, Florida*,²² she upheld a Florida trespass statute that was used to prosecute an individual for distributing leaflets and posting signs at a public housing project. She concluded that the law was content-neutral and allowed other means of communication for persons who were not lawfully on housing project property.

When a panel of the Eleventh Circuit refused a request for a preliminary injunction that would have placed candidate David Duke on the 1992 Republican presidential primary ballot, *Duke v. Cleland*,²³ Judge Kravitch dissented.²⁴ She wrote:

The Republican Party of Georgia and the state seek to exclude Duke from the primary ballot because they believe that the Party will suffer embarrassment and adverse publicity by virtue of his candidacy for the Republican nomination. No political body, however, has a constitutional right to freedom from embarrassment or adverse publicity.²⁵

Judge Kravitch has also taken part in two of the more significant gay rights cases to come before any court in recent years. When the Eleventh Circuit decided the case of *Hardwick v. Bowers*,²⁶ the panel found that the Georgia sodomy law

18. *Id.* at 986.

19. *Id.*

20. 92 F.3d 1135 (11th Cir. 1996).

21. 973 F.2d 1539 (11th Cir. 1992).

22. 38 F.3d 546 (11th Cir. 1994).

23. 954 F.2d 1526 (11th Cir. 1992).

24. *Id.* at 1532.

25. *Id.* at 1538.

26. 760 F.2d 1202 (11th Cir. 1985), *rev'd sub nom.* *Bowers v. Hardwick*, 478 U.S.

infringed the constitutional rights of homosexuals and remanded the case to see if the state could provide sufficient justification for the statute. Judge Kravitch filed a separate concurring and dissenting opinion,²⁷ concluding that the Georgia statute was clearly valid under *Doe v. Commonwealth's Attorney*,²⁸ an established Supreme Court precedent that she said the panel tried improperly to dismiss. She wrote, "Whatever our personal views about the constitutionality of a law that permits the state to regulate the most private human behavior within the confines of the home, unless and until the Supreme Court clearly indicates otherwise, we are bound by that Court's decision in *Doe v. Commonwealth's Attorney*."²⁹

In *Shahar v. Bowers*,³⁰ the panel reversed a grant of summary judgment for Georgia Attorney General Michael Bowers in a lawsuit alleging that he violated the constitutional rights of a woman by withdrawing a job offer to her when he learned that she planned a marriage ceremony to her lesbian companion. The panel found that the right of intimate association protected the actions of the woman and sent the case back to trial to determine if the state could provide a compelling interest for its actions. Judge Kravitch wrote a separate concurring and dissenting opinion,³¹ concluding that by requiring strict scrutiny the panel had struck the wrong balance between the state's interests as an employer and the woman's right to intimate association. Nevertheless, while striking the balance differently, Judge Kravitch still concluded that summary judgment should have been granted to the woman on her claim of a violation of her freedom of intimate association.³² The full Eleventh Circuit has vacated the opinion and granted *en banc* rehearing in the case.³³

Her record also includes a number of significant statutory cases. In *Teper v. Miller*,³⁴ she found that federal election laws preempt a Georgia statute that prohibits state legislators during

1039 (1986).

27. *Id.* at 1212.

28. 425 U.S. 901 (1976).

29. 760 F.2d at 1216.

30. 70 F.3d 1218 (11th Cir. 1995), *vacated, reh'g granted* 78 F.3d 499 (11th Cir. 1996) (*en banc*).

31. 70 F.3d at 1228.

32. *Id.* at 1234.

33. *Id.* at 1218.

34. 82 F.3d 989 (11th Cir. 1996).

the annual legislative session from accepting campaign contributions to run for Congress or other federal office. In *U.S. v. Fleet Factors Corp.*,³⁵ Judge Kravitch ruled that a secured creditor may incur liability for environmental cleanup of hazardous wastes if the creditor participated in financial management of a company to a degree sufficient to influence its hazardous waste disposal plan. The decision interpreted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (the Superfund law).³⁶

35. 901 F.2d 1550 (11th Cir. 1990).

36. 42 U.S.C. § 9607(a)(2) (1994).