



# Employment Law Alert

## Legal developments affecting human resource management

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### President Obama's Supreme Court nominee federal judge Sonia Sotomayor and labor and employment law

By *Randy S. Gidseg and Robert A. Cirino*

President Obama today announced his intention to nominate Sonia Sotomayor, a federal appeals court judge, to the Supreme Court. Judge Sotomayor would replace outgoing Supreme Court Justice David Souter, who had earlier this month announced his intention to retire after more than 18 years on the court.

If confirmed, Judge Sotomayor, who is of Puerto Rican descent, would be the first Hispanic, and third female, member in the court's history. Judge Sotomayor grew up in a public housing project in the Bronx and went on to attend Princeton University and Yale Law School. Before her appointment to the bench, Judge Sotomayor served as an assistant district attorney for New York County and subsequently worked in private practice in a New York City law firm, where she focused on commercial litigation.

Judge Sotomayor's original nomination to the federal bench by President George H.W. Bush (at the recommendation of Democratic Senator Patrick Moynihan) as a U.S. District Court judge in the Southern District of New York in 1992 was confirmed by the U.S. Senate by unanimous consent. Her subsequent nomination to the Second Circuit by President Bill Clinton was opposed by most Senate Republicans and the confirmation process took nearly a year. She was eventually confirmed by a vote of 67–29.

Although some regard Judge Sotomayor as a likely “liberal” vote on the court, she is not considered one of the federal bench's more left-leaning judges. Indeed, although she has participated in a number of high-profile decisions on the bench, her rulings in labor and employment cases do not necessarily tip heavily in favor of employers or employees. A review of Judge Sotomayor's decisions reveals numerous summary judgment decisions in favor of both employees and employers.

For example, in February 2008, Judge Sotomayor was part of a three-judge panel in *Ricci v. DeStefano*, a well-publicized “reverse discrimination” case involving the firefighters in the City of New Haven Connecticut. In that case, a civil service examination for fire department promotions produced racially disproportionate results, favoring Caucasian candidates over African-American candidates. As a result, New Haven did not certify the examination and no employees were promoted. Ricci and other Caucasian candidates who scored higher on the examination and, thus, were eligible for

promotion sued New Haven, claiming racial discrimination. The district court granted summary judgment for New Haven and dismissed the employees' claims, and the Second Circuit (with Judge Sotomayor joining an unsigned opinion of a three-judge panel) affirmed. Judge Sotomayor subsequently joined the full appeals court in a decision to deny a rehearing of the case by the full court. The Supreme Court subsequently granted certiorari to review the Second Circuit's decision and held oral argument in April 2009. The case is still pending.

Judge Sotomayor has written several decisions affirming summary judgment for employers, including in cases involving allegations of discrimination and wage and hour violations. For example, in *Williams v. R.H. Donnelley Corp.*, Judge Sotomayor authored the Second Circuit's decision affirming the decision of the district court to grant summary judgment to an employer, in response to an employee's claim that she had been discriminatorily denied various promotions and a lateral transfer, and that the employer refused to create a management position for her, on the basis of her race and sex. In *Singh v. City of New York*, the Second Circuit, in a decision authored by Judge Sotomayor, affirmed the decision of the district court to grant summary judgment to the City of New York in a case brought by fire alarm inspectors who alleged that the city had failed to pay them properly under the Fair Labor Standards Act. Specifically, the Second Circuit held that the inspectors were not entitled to be compensated for their commuting time, despite the city requiring them to carry inspection documents during their commutes, as any increase in commuting time was *de minimis* as a matter of law.

Of course, Judge Sotomayor has also ruled in favor of employees in a number of employment cases and written several decisions in that regard. For example, in *Raniola v. Bratton*, the Second Circuit, in a decision authored by Judge Sotomayor, reversed the district court's decision, in the midst of a jury trial, to dismiss a police officer's hostile work environment and retaliation claims as a matter of law, and remanded those claims for retrial, along with her pendent state and municipal law claims. In doing so, the Second Circuit held that the evidence presented was legally sufficient for a reasonable jury to find that Raniola was subjected to a hostile work environment because she was a woman, and that retaliation was a substantial or motivating factor behind Raniola's suspension, probation, and termination.

Judge Sotomayor has taken a particularly generous reading of the anti-discrimination statutes in the context of disability cases. For example, in *Bartlett v. N.Y. State Bd. of Law Exam'rs*, after a 21-day bench trial and upon remand from the Second Circuit, she held that an individual with dyslexia was substantially limited in the major life activities of reading and working and, therefore, entitled to the protections of the Americans with Disabilities Act, including a reasonable accommodation in taking her bar exams and compensatory damages.

Within the labor arena, Judge Sotomayor has a similarly balanced record, although she sided with labor in arguably her most famous decision. Specifically, in *Silverman v. Major League Baseball Player Relations Comm.*, she issued an injunction that forced baseball team owners to restore certain terms and conditions to the players, thereby ending the longest strike in the history of major league baseball. In issuing the injunction, Judge Sotomayor determined that the National Labor Relations Board had reasonable cause to believe that the baseball team owners had engaged in unfair labor practices, in violation of the National Labor Relations Act, during collective bargaining negotiations with the Major League Baseball (MLB) players' association.

While some will undoubtedly view Judge Sotomayor's decisions as suggesting that she will be an "employee friendly" voice on the court, the history of the court is replete with politically appointed

justices who have failed to conform to expectations. Justice Souter, Judge Sotomayor's potential predecessor, serves as a notable example.

Judge Sotomayor must still be confirmed by the Senate Judiciary Committee and the full Senate.

If you would like more information about the topics covered in this *Alert*, please contact your Nixon Peabody attorney or:

- Randy S. Gidseg at 212-940-4037 or [rgidseg@nixonpeabody.com](mailto:rgidseg@nixonpeabody.com)