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Trials&TRIBULATIONS

Radical activism from the far left, or not?

When the U.S. Senate Judiciary Committee convenes July 13 to consider the nomination of Second Circuit Court Judge, Sonia Sotomayor to the U.S. Supreme Court bench, it is inevitable she will be questioned regarding her decision in *Ricci v. DeStafano,* 264 F2d 106 (Second Cir. 2008).

Known widely as the New Haven Firefighters' case, it has generated considerable publicity and notoriety. Conservative talk radio suggests the case reflects Judge Sotomayor's reverse discrimination views and her far left radical beliefs, which disqualify her from sitting on the Supreme Court.

By MICHAEL R. WOLFORD
Daily Record Columnist

Does Judge Sotomayor's role in *Ricci* really demonstrate some off-the-wall liberal bias or, rather, do we see a judge who exercises restraint and is guided by established precedents?

The case has garnered even greater significance since the U.S. Supreme Court on Monday reversed the Second Circuit's decision and, in a 5-4 ruling, laid out a new standard for federal courts to follow in the review of Title VII claims. The high court concluded that a race-based action is impermissible under Title VII of the Civil Rights Act of 1964 unless the employer: "[C]an demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute." 2009 WL 1835138, *4 (June 29).

The Supreme Court also provided that, even though a practice or policy — including a promotional exam — has a disparate impact result, it still may be defensible against liability by demonstrating that the practice or policy is job-related for the position in question, and consistent with business necessity.

If an employer meets that burden, a plaintiff still may succeed by showing that the employer refuses to adopt an available alternative employment practice with less disparate impact while still serving the employer's legitimate needs.

The firefighters' case arose out of a challenge to the City of New Haven's refusal to certify the results of two promotional exams held for the positions of lieutenant and captain in the city fire department. The plaintiffs were 17 white candidates and one Hispanic candidate who passed the exam but received no promotions since the New Haven Civil Services Board refused to certify the results.

The exams were prepared by an outside consultant, and 41 applicants took the captain's exam, while 77 took the lieutenant's exam. The lieutenant's exam pass rate for whites was 60.5 percent, compared to the African-Americans' rate of 31.6 percent and the Hispanics' rate of 20 percent. The passage rates were similar for the captain's exam. Seven promotions were available for the position of captain, and eight for lieutenant but, based on the results, none of the African-Americans were eligible to be promoted for either position.

The board held five hearings in January and March 2004 concerning whether the results should be certified. Testimony on the results was presented by expert witnesses and representatives of various labor organizations. New Haven's corporation counsel opposed certification, given the disparate impact the results reflected. After the hearings were conducted, the board refused to certify the results. Litigation was commenced soon thereafter by the 17 white firefighters and one Hispanic candidate who passed the test.

U.S. District Court Judge Janet Arterton was presented with motions and cross-motions for summary judgment. In a comprehensive 21-page opinion, the court granted summary judgment to the City of New Haven, concluding that the plaintiffs failed to demonstrate a violation of Title VII of the Civil Rights Act and the Equal Protection Clause of the Constitution.

It is evident the district court was of the opinion that, had the results been certified, the city would have been the subject of litigation by the minority firefighters challenging the results. Furthermore, the court concluded the city's concerns were legitimate, not a pretext for promoting the interests of the African-American firefighters.

A review of numerous articles written about the case shows scant reference to the EEOC guidelines relied upon by the district court and contained at 29 CFR §1607.4(D), and referred to as the "four-fifths rule." The district court concluded that the results of the promotional exams reflected an adverse impact on minorities, since the pass rate for African-American test takers was about half that of the pass rate for Caucasians.

The guidelines are a standard used by federal enforcement agencies as evidence of an adverse impact, therefore if they are not met, there is a presumption of a disparate impact.

It also appears that the district court relied on Second Circuit precedent that supported the decision not to certify the results, and buttressed the decision to grant summary judgment to the defendants.

In view of this week's Supreme Court decision, it is evident the

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cases cited by the district court are no longer reliable authority. For example, in *Bushey v. New York State Civil Service Commission,* 733 F2d 220 (Second Cir. 1984), the court reversed the lower court's grant of summary judgment to the non-minority officers, concluding that adjusting of the results and increasing the pass rate of minority candidates was appropriate since the test results demonstrated a *prima facie* adverse racial impact on those candidates. The court stated a familiar principle when it concluded: "By acting to eliminate the perceived adverse impact of the examination on minorities, the State sought anticipatorily to avoid litigation it assumed minority candidates would bring challenging reliance on the test to promote candidates to the position of Captain." (733 F2d at 223)

Similar to the district court in *Ricci,* the Second Circuit in *Bushey* gave considerable weight to the four-fifths rule and the demonstrated impact of the results on minorities.

Likewise, in *Kirkland v. New York State Department of Correctional Services,* 711 F.2d 1117 (Second Cir. 1983), the Second Circuit affirmed the district court's conclusion that a statistical demonstration of disproportionate racial impact in the test results established a *prima facie* case of Title VII discrimination, therefore the results should not be relied upon for promotions without risking employment discrimination litigation. Although *Kirk-land* has been a longstanding precedent in the Second Circuit and elsewhere, it is now evident the Supreme Court's decision in *Ricci* has undermined *Kirkland*'s authority, along with that of other, similarly reasoned decisions.

Based on the record and the district court's comprehensive decision, it is not surprising Judge Sotomayor agreed with her two colleagues, Judges Pooler and Sack, and affirmed the decision on Feb. 15, 2008. As we know now, that was not the end of the story.

The plaintiffs filed a motion to rehear the case. One active judge requested a poll to rehear the case *in banc,* and a poll of the court's active judges was taken, concluded June 13, 2008. In a rather lengthy set of opinions and dissents, seven judges voted to deny a hearing, and six voted to conduct the rehearing.

The most significant opinion was that of Judge Cabrenes, whose dissent is contained at 530 F3d 88 (Second Cir. 2008). Although Judge Cabrenes dissented from the denial of the motion, it is unclear whether he would have reversed the lower court. He simply believed more analysis should be done than a summary order. In essence, he said the appeal raised "novel questions of constitutional and statutory law," which justified a thorough opinion by the Second Circuit. (530 F3d at 101)

In view of established Second Circuit precedent on the subject, it is reasonable to conclude Judge Sotomayor's role in affirming the district court's decision was well within the mainstream of judicial reasoning and philosophy. I expect, however, that the criticism during her confirmation hearings will be directed at the decision not to write a lengthy opinion analyzing the "novel questions" presented, and whether the firefighters had a legitimate Title VII claim.

One can only speculate as to the commentators' reaction had the Second Circuit panel, which included Judge Sotomayor, adopted the majority opinion of Justice Kennedy establishing a new standard of review and, according to Justice Ginsburg's dissent, set at odds "the statute's core directives," namely disparate treatment and disparate impact. 2009 WL 1835138, *41. It is reasonable to expect Judge Sotomayor would have been criticized for being an activist judge who was legislating rather than judging by established precedents.

More often than not, the characterization of a judge's decision-making is influenced more by critics' view of how a decision should read, rather than the process by which a decision is reached.

In the case of Judge Sotomayor and the Second Circuit's decision in *Ricci,* it would appear she arrived at the decision by exercising restraint, guided by established precedents and not by the personal agenda of an activist judge.

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