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# WILL JUSTICE SOTOMAYOR BE KIND TO EMPLOYERS? MAGIC EIGHT BALL SAYS “OUTLOOK NOT SO BAD”

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It's likely that President Obama's recent nomination of Judge Sonia Sotomayor will be approved by the Democratic-controlled U.S. Senate, unless some unknown skeleton appears from her closet. Although Republicans may delay Sotomayor's confirmation hearings until the fall, and will most likely use the proceedings as a battleground to energize their base and generate fundraising, there are simply not enough Republicans in the Senate to mount a serious challenge. Moreover, many believe that individual Senators may not want to cast a vote against the first Hispanic nominee no matter how they feel about her judicial philosophy, which could lead to a landslide confirmation vote. Now the guessing game begins – how will Justice Sotomayor treat employers on the bench?

Sotomayor comes with a long history on the U.S. Court of Appeals for the 2nd Circuit (covering New York, Connecticut and Vermont), having served on that bench since 1998 and taken part in over 100 written decisions involving labor and employment law during that time. For the seven years prior, from 1992 to 1998, she was a federal trial court judge for the Southern District of New York, having been appointed by President George H.W. Bush, where she authored dozens more opinions on labor and employment cases. So it would seem that a review of her prior opinions would make the guessing game a lot easier to manage. But since judging a judge is never an exact science, we will also make use of another prognostication tool: a trusty Magic Eight Ball.

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**Richard R. Meneghello**

Chief Content Officer

**503.205.8044**

## **Should Businesses Be Happy With Sotomayor's Nomination? *Magic Eight Ball Says: "Outlook Not So Bad"***

It's easy to peg Judge Sotomayor as a liberal, pro-plaintiff type of judge. After all, her two most famous (or infamous) cases did not go so well for employer interests. In 1995, while a district court trial judge, she sided with the player's union and held that Major League Baseball owners were unfairly bargaining by trying to force a salary cap on the players, effectively ending the baseball strike. *Silverman v. MLBPRC*.

And just last year she upheld the City of New Haven's decision to toss out the promotion test results of a firefighters exam after determining that not enough minority applicants would have been promoted (a case which, ironically, is being reviewed by the Supreme Court). *Ricci v. DeStefano*. When you consider these opinions, along with the fact that she is the first person to be nominated by a Democratic President since 1994, you may conclude that her appointment will be bad news for employers.

But these two opinions perhaps belie a relatively moderate jurist who, more often than not, rules in favor of employers. In fact, in the 16 published opinions she has authored since joining the Court of Appeals in 1998, she has ruled for employers ten times (62.5%), while only ruling in favor of plaintiffs four times (25%), splitting the baby in two other opinions. This is in contrast to the average for other federal appeals court judges based on a sampling of cases from across the country in recent years, where judges cast their vote for employers an average of only 41% of the time. It also compares somewhat favorably to the Court of Appeals record of Justice Alioto, who ruled in favor of employers 78% of the time. In fact, ignoring the *Ricci* opinion (which seems to have been more of an attempt to sidestep the issue rather than address it), Judge Sotomayor had ruled in favor of defendant employers in her previous seven consecutive written opinions spanning back to 2004.

## **Will Sotomayor Give Employers the Benefit of the Doubt in Race Discrimination Cases? *Magic Eight Ball Says: "As I See It, Yes"***

One area where Sotomayor has demonstrated herself to be employer-friendly is in the category of race discrimination. Ignoring *Ricci* – where again, she actually ruled in favor of the employer by adopting its affirmative action plan – she has ruled in favor of the employer in three out of three cases. In *Washington v. County of Rockland*, Sotomayor

upheld the dismissal of a race-discrimination claim brought by African-American corrections officers who alleged that the county brought meritless disciplinary proceedings against them because of their race. In *Norville v. Staten Island Univ. Hosp.*, Sotomayor upheld the dismissal of another case, ruling against an African-American nurse who believed she was mistreated in a variety of ways.

And in *Williams v. R.H. Donnelly Corp.*, Sotomayor agreed with the trial court's rejection of the claim of an African-American woman who believed she was not promoted on account of her race. Judge Sotomayor ruled that the employee could not demonstrate that she was qualified enough to have deserved the promotion. If these cases are any indication, Sotomayor does not believe that federal courts should act as "super-personnel departments" in reviewing and second-guessing employment decisions, but instead should give the employer the benefit of the doubt – so long as credible evidence for those decisions exist.

### **Will Sotomayor Scrutinize Retaliation Claims Closely? *Magic Eight Ball Says: "Signs Point To Yes"***

Another area bound to provide comfort to employers is Judge Sotomayor's treatment of retaliation lawsuits. One of the most rapidly growing areas of litigation, often difficult to defeat in pretrial settings, retaliation claims are an ever-present threat in today's workforce. Judge Sotomayor has ruled in favor of the defense in three of four cases. In the *Washington* case noted above, the African-American corrections officers also alleged that they were unfairly disciplined after raising complaints of discrimination with their superiors. Sotomayor rejected these claims and ruled that there was not a sufficient causal connection between their complaints and the subsequent discipline.

In *Moore v. Consolidated Edison Co.*, an African-American employee brought claims of sex and race harassment against her supervisors, and also participated as a witness in other similar claims brought by co-workers. She was later given negative evaluations and ultimately terminated for poor performance, then brought a retaliation action seeking an injunction against her employer. Judge Sotomayor upheld the denial of this relief, focusing on the lack of evidence demonstrating a retaliatory motive on the part of her employer.

And in *Cruz v. Coach Stores, Inc.*, a female employee alleged that she was the victim of sexual harassment that

culminated in physical horseplay by her male co-worker. In response to egregious sexual comments directed towards her, the employee slapped a co-worker in the face and an altercation followed. The company terminated her employment, and she brought a retaliation claim, alleging that she was fired for defending herself against the sexual harassment. Judge Sotomayor ruled that, even if the slap could be considered self-defense, such conduct was not “protected activity” under Title VII, and therefore upheld the dismissal of her claim.

But Judge Sotomayor is not simply a rubber stamp when it comes to denying retaliation claims. She has demonstrated she is not afraid to make tough decisions to enforce Title VII's provisions. In *Raniola v. Bratton*, a female police officer in the NYPD claimed she had been subjected to years of abuse including derogatory remarks, overly burdensome assignments, sabotage and threats. She complained to her superiors that she believed the mistreatment was due to her gender; she was later suspended and terminated for violations of the police disciplinary code. The trial court dismissed her case, but Judge Sotomayor reversed that decision and reinstated the case. Sotomayor focused on specific examples where her superiors allegedly made negative comments to the employee that could have been considered retaliatory by a jury.

### **Will Sotomayor Give Employers A Fair Shake In Miscellaneous Employment Cases? *Magic Eight Ball Says: “You May Rely On It.”***

What is evident from Judge Sotomayor's track record is that she is certainly not afraid to rule against the little guy and in favor of the employer. In a series of other miscellaneous employment law cases authored in the past ten years, Sotomayor has demonstrated a willingness to agree with the employer's point of view in a variety of areas. In *Leventhal v. Knapek*, Sotomayor upheld an employer's right to monitor an employee's work computer and discipline the employee based on the search results. In that case, the employer was tipped off about an employee's potential neglect, and performed several computer searches. They revealed not only poor performance, but that he had violated the computer use policy by downloading personal software. After being disciplined, the employee sued for invasion of privacy, but Sotomayor dismissed the claim, ruling that the searches were reasonable.

In *Singh v. City of New York*, a group of fire alarm inspectors brought a Fair Labor and Standards Act (FLSA) wage claim, alleging that they should be compensated for commuting time because they were required to carry inspection documents with them during their commute. Noting that carrying such documents did not lengthen the time of their commute, Judge Sotomayor rejected their FLSA claims and ruled for the employer. And in *Hankins v. Lyght*, Sotomayor dissented from a ruling for a plaintiff which sent an age discrimination case back to the trial court. Instead, she wrote that the case should have been dismissed because the plaintiff waived his right to bring the claim, and also because the “ministerial exception” to the law forbids courts from interfering with certain decisions by religious organization employers.

### **Will Sotomayor Be Friendly To Employers In Disability Cases? *Magic Eight Ball Says: “My Sources Say No.”***

Despite this moderate – if not somewhat-conservative – track record in typical employment law claims, the one area that sticks out glaringly in Judge Sotomayor’s history is her handling of ADA (Americans with Disabilities Act) cases. From 1999 to 2003, during a time when federal courts were ruling in favor of defendants in ADA cases in overwhelming numbers, and after the U.S. Supreme Court had interpreted the ADA in an employer-friendly manner in a series of cases, Judge Sotomayor authored four ADA opinions. And she ruled in favor of the plaintiff in all of them.

In *Parker v. Columbia Pictures*, an employee who was fired after exhausting his medical leave allotment due to a back condition brought an ADA claim against his employer. Although the trial court dismissed the claim, Sotomayor reversed that decision and let the case proceed to trial. She held that the employee had raised material questions about: 1) whether he was qualified (despite the fact that when he applied for Social Security benefits he claimed he was precluded from performing any work); and 2) whether the company properly responded to his requests for accommodation.

In the *Norville* case cited above, the African-American nurse also brought an ADA claim, which proceeded to trial. The jury ruled in favor of the employer. On appeal, Judge Sotomayor vacated the jury decision and held that the trial court improperly instructed the jury on the ADA issues. She agreed with the employee that the jury should not have been told that a perceived demotion should be considered a

reasonable accommodation offer, even though no other positions were vacant and available at the time.

In *Brown v. Parkchester South Condominiums*, a security guard brought a lawsuit against his former employer without the use of an attorney, alleging disability, age and race discrimination. He failed to file his lawsuit within 90 days of receiving his right-to-sue notice from the EEOC, claiming his medical condition prevented him from timely filing the complaint because he was limited in his ability to perform complex tasks. Although the trial court dismissed his claim as untimely, Judge Sotomayor reversed the dismissal and reinstated the lawsuit. She ruled that the plaintiff raised sufficient evidence to demonstrate that his disability may have interfered with his ability to function, and sent the case for a formal evidentiary hearing to get to the bottom of the plaintiff's claim.

In *EEOC v. J.B. Hunt Transport, Inc.*, a 2nd Circuit panel of judges held that a group of truck drivers rejected from work because of their prescription-medication use, were not perceived to be substantially limited in their ability to work, and thus unable to proceed with an ADA claim. But Sotomayor dissented from this opinion, writing that she would have applied a much broader reading of the "regarded as" prong of the disability definition.

Cynical court observers may point to the fact that Judge Sotomayor herself has lived with diabetes her whole life, a condition which may or may not have been considered a disability by the Supreme Court prior to the ADA Amendments Act of 2008. Her own personal experience with the disease may have formulated her judicial philosophy in this area of the law. In fact, her sympathetic view towards disability discrimination plaintiffs extends back to her days as a District Court judge, when she ruled for a plaintiff in the only reported ADA case she handled during that time. In *Bartlett v. NYS Bd. of Law Examiners*, Judge Sotomayor allowed a law school graduate taking the bar exam to have considerable accommodations while taking the exam – including double the time to take the test – because she found the applicant to be disabled due to a learning disability.

**WILL SOTOMAYOR CURTAIL SEXUAL HARASSMENT CLAIMS? *MAGIC EIGHT BALL SAYS: "DON'T COUNT ON IT."***

Besides ADA cases, the other area where Judge Sotomayor seemingly has a liberal bent for plaintiffs is in the field of sexual harassment. She ruled on two cases involving claims of a hostile work environment while on the 2nd Circuit, and ruled for the plaintiff in both. In the *Cruz* case discussed above (employee fired after slapping her male co-worker who made sexual comments to her), Judge Sotomayor seemed to bend over backwards to overturn a dismissal of a sexual-harassment case. The employee did not plead a hostile-work-environment claim in her complaint, and at deposition, testified as to “vague and unspecified” incidents of harassment. Despite these shortcomings, Sotomayor ruled in the employee’s favor, focusing on the allegations that the male co-worker repeatedly backed the plaintiff against a wall while talking to her, although he was never alleged to have made contact with her.

In the *Raniola* case discussed above (female police officer subjected to a barrage of mistreatment), Judge Sotomayor reversed the trial court’s dismissal of the sexual-harassment claim. Although the trial court judged the evidence to have demonstrated a typical police precinct that may have lacked social niceties but was not a hostile environment, Judge Sotomayor disagreed and ruled that the evidence of vulgar and sexual language supported such a finding.

Her plaintiff-friendly attitude in sexual-harassment cases is nothing new; while serving as a trial court judge, she ruled in favor of plaintiffs in the two of three reported decisions she authored in this area. In *Seepersad v. D.A.O.R. Security, Inc.*, she held that the employer did not sufficiently respond to complaints of sexual harassment to warrant dismissal of the case; in *Zveiter v. Brazilian Superintendency*, she similarly denied an employer’s request to dismiss a sexual-harassment claim. In fact, Judge Sotomayor’s only reported ruling dismissing a sexual-harassment claim involved a very weak claim of same-sex harassment. In *Taylor v. NYC Transit Authority*, she dismissed a plaintiff’s claim that he was harassed and terminated for being a heterosexual, instead agreeing with the employer that he was properly fired for assaulting a co-worker.

### **Will Sotomayor Be A Friend Of The Unions? *Magic Eight Ball Says: “Not Necessarily.”***

Because Judge Sotomayor cut her judicial teeth in the heavily-unionized New York City area, it is not surprising that she has authored at least a dozen opinions in the traditional labor arena. A close review of these opinions

does not reveal any overarching judicial philosophy that would show her to be either overly-friendly or overly-hostile to unions. Her most famous decision – the Major League Baseball strike opinion – certainly demonstrates that she is not afraid to make bold decisions and to rebuke management if she believes that it is not bargaining in a fair manner. And in *Fisher Scientific Co. v. New York City*, Sotomayor refused to stop the city's attorney from proposing a city resolution aimed at expressing a negative view about the manner in which the company was conducting its labor negotiations with the Teamsters.

But she has also demonstrated that she is not afraid to stick her judicial neck out and rule against unions and their workers. In *White v. White Rose Food*, a trial court held that the employer breached an agreement settling a union strike by not paying its fair share of the settlement to unionized employees, and also ruled in favor of those employees in a duty-of-fair-representation case against the union. Judge Sotomayor reversed the court's decision and held that the company acted fairly in paying the agreement, as did the union in representing its workers.

In *Clarett v. National Football League*, she reversed a district court decision that would have stricken an NFL rule and allowed Ohio State University running back Maurice Clarett to enter the NFL Draft before he was eligible. In upholding management's right to bargain for such a restraint on trade, she held that federal labor law precluded the application of antitrust laws to the NFL eligibility rules, further solidifying the federal law favoring collectively-bargained-for work rules. She has also upheld the sanctity of arbitration agreements found in labor contracts, ruling that an employee's claim of improper termination (after placing an offensive ad in "Swinging Times" newspaper) was preempted by the LMRA. *Heaning v. NYNEX*. Overall, although she has sided with labor on several occasions, she has often attempted to forge common ground between labor and management.

### **Overall, Will Employers Be Satisfied With Justice Sotomayor? *Magic Eight Ball Says: "Ask Again Later"***

At times, it is difficult to predict with a high degree of certainty how a candidate for the high court will rule, as the candidates sometimes seem to betray initial expectations (see Justices Souter and Kennedy). Despite the fact that Judge Sotomayor has a relatively conservative track record in employment cases on the 2nd Circuit bench, employers

should not be dancing in the street. After all, while on the district court trial bench, she authored twelve employment-law decisions, and ruled in favor of the employer just twice. Perhaps she has grown more moderate in the past ten years. Or perhaps she is a judge who tries to rule down the middle and brings no great preconceived notions to the bench.

The best that employers can hope for is that Sotomayor joins Justice Kennedy in the “swing vote” position that Justice O’Conner held for the previous decade. Certainly the core bloc of conservative justices (Roberts, Scalia, Thomas and Alito) will remain, usually coming down on the side of employers; and undoubtedly the liberal justices usually coming down on the side of workers (Stevens, Ginsburg, Breyer) will remain. It is easy to envision Justice Sotomayor ruling more often with the liberal group but not being afraid to join the conservative group when the case calls for it.

Many pro-labor groups hope that Sotomayor falls more in line with the liberal bloc, leading that group of Justices because she is decidedly younger in age. Currently the liberal bloc has an average age of 76; after Sotomayor replaces Souter, and assuming she falls in line with that group more often than not, that will shrink to just over 72 years old. By contrast, the conservative bloc includes the three youngest Justices (Roberts, Alito and Thomas), and its average age is 61 years old. Since the two elder Justices (Stevens, 89, and Ginsburg, 76) have had rumored or reported health problems, it would not be a surprise to see either or the both of them replaced with younger Justices during President Obama’s term of office.

Remember that the Magic Eight Ball’s vision is not perfect, and Justice Sotomayor’s and the Supreme Court’s treatment of employers can only truly be judged once future cases are decided. Fisher Phillips will be there to analyze these cases and guide employers through this murky future. And will we be there the next time a Supreme Court Justice takes the bench to analyze his or her credentials through the eyes of employers? Magic Eight Ball says: “You may rely on it.”

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