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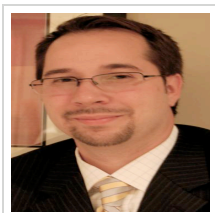
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Sizing Up Judge Sotomayor's Employment Law Decisions

Jeffrey Campolongo Contact All Articles

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Jeffrey Campolongo

In response to President Obama's nomination of Judge Sonia Sotomayor to the U.S. Supreme Court, the National Employment Lawyers Association, or NELA, issued a press release on May 27, expressing its support of her nomination, citing her "rich background, sharp and independent mind, [and] her record of excellence and integrity." NELA opined that, as both a district and circuit judge, she has enforced workers' rights from the bench.

In reviewing only cases Sotomayor actually authored, it seems shocking at first glance that the NELA so enthusiastically supports her nomination. After all, a summary view of about 10 cases she authored for the 2nd U.S. Circuit Court of Appeals from 1999 to 2006 shows many decisions that are partially or wholly in favor

of the employer. A closer look at her employment discrimination and harassment cases as follows, however, shows why the NELA cited her employment bench record as an example of her "impartiality and open mind."

In *Washington v. County of Rockland*, the plaintiffs were police officers alleging discrimination under Sections 1981 and 1983 and retaliation, all arising out of the sheriff's department's bringing allegedly meritless

disciplinary proceedings against the plaintiffs. The district court granted the defendant's motion for summary judgment, and Sotomayor wrote the opinion affirming the decision.

The officers had been accused of distributing contraband, such as cigarettes, to inmates. The officers were suspended without pay for 30 days during the pendency of the hearings. The contraband charges were ultimately dismissed. Focusing on the racial discrimination count, Sotomayor held that the claim, filed over three years following the filing of the disciplinary charges, was untimely. The plaintiffs argued that their claims were timely, despite being more than three years after the filing of the disciplinary charges, under a continuing violation theory or, alternatively, abstention principles. Sotomayor disagreed that the filing and subsequent prosecution of the administrative disciplinary charges, despite the charges' evidentiary problems, were "a series of separate acts that collectively constitute one unlawful employment practice," as set forth by the Supreme Court in *Nat'l R.R. Passenger Corp. v. Morgan*.

In *Williams v. R.H. Donnelley Corp.*, the plaintiff was an African-American female alleging Title VII discrimination on account of her race and sex because of the defendant's failure to promote her, denial of a lateral transfer and refusal to create a management position for her. The district court granted the defendant's motion for summary judgment, and, once again, Sotomayor wrote the opinion affirming the decision.

In analyzing the case, Sotomayor cited the prima facie case of discrimination, *McDonnell Douglas Corp. v. Green*:

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Plaintiff is a member of a protected class; she applied and was qualified for a job for which the employer was seeking applicants; she suffered an adverse employment action; and the circumstances surrounding that action permit an inference of discrimination. In a carefully organized opinion, Sotomayor divided the analysis into the individual employment actions: failure to promote to account manager; failure to create a management position; failure to transfer to account executive; failure to promote to DSM III; and failure to promote to DSM II. In a very methodical manner, Sotomayor eliminated each of the plaintiff's claims, while providing detailed reasons for doing so along the way, including plaintiff's failure to prove she was qualified for a particular position.

In *Brown v. Parkchester South Condominiums*, the pro se plaintiff brought suit for violations of Title VII, the Age Discrimination in Employment Act, or ADEA, and the Americans with Disabilities Act, or ADA. The district court granted the defendant's motion to dismiss for the plaintiff's failure to file his complaint within 90 days of receipt of a right to sue letter from the EEOC, and Sotomayor wrote the opinion vacating the decision and remanding.

The plaintiff prepared and served a timely summons on the defendant but failed to attach a copy of the complaint, and he attributed his error to certain medical and mental conditions that prevented him from following through on complex tasks. The issue was whether the court could apply principles of equitable tolling. Although a lack of diligence is not a reason for equitable tolling, the court noted, it could be appropriate when the plaintiff's failure to comply with the statute of limitations is due to a mental condition.

Noting that mental illnesses are as varied as physical ones, the court stated that it uses a case-specific approach. Sotomayor ultimately found, even given the limited record before the district court, that the plaintiff may have been inhibited by his mental condition. The court therefore remanded for an evidentiary hearing, suggesting that the district court seek a more extensive medical history and appoint counsel if it deemed necessary.

In another case under the ADA, Sotomayor reversed summary judgment for the employer and remanded for proper analysis of a mixed-motive case. In *Parker v. Columbia Pictures Industries*, the plaintiff alleged that his termination was in violation of the ADA. In March 1995, the plaintiff injured his back at work. A couple of days later, the plaintiff sought medical attention and continued to work from home. In mid-May 1995, the plaintiff decided to undergo back surgery and so informed the defendant that he would be out of work for an extended period. Following surgery, the plaintiff was released to return to work on a part-time basis. The plaintiff was eventually terminated, and he applied for Social Security disability benefits.

Sotomayor meticulously defined the elements for a prima facie case of discriminatory discharge under the ADA; namely, that the plaintiff must show he was an "individual who has a disability"; the employer had notice of his disability; he could perform the essential functions of the job with reasonable accommodation; and the employer refused to make such accommodation. The district court held that the plaintiff failed to establish the third and fourth elements, but Sotomayor disagreed.

Specifically, Sotomayor disagreed with the district court's determination that the plaintiff's statements on his Social Security application that he could not work would preclude his ADA claims. According to her opinion, unless the Social Security and ADA claims "involve directly conflicting statements about purely factual matters," the plaintiff should be given a chance to reconcile facially conflicting statements. The court noted the different contexts of both applications, finding that, in this case, the plaintiff's statements to the Social Security Administration were made in a forum unconcerned with the effect of reasonable accommodations as required under the ADA.

Another interesting part of the opinion came when Sotomayor disagreed with the district court's analysis of mixed-motive cases under the ADA. Unlike the Supreme Court's recent decision in *Gross v. FBL Financial Services Inc.*, involving the ADEA, Sotomayor noted that the same language "because of" is used in both Title VII and the ADA and concluded that a mixed-motive analysis could be applied. The court therefore held that an ADA plaintiff need not show that disability was the sole reason for the adverse employment action.

In a case involving a Hispanic female, Sotomayor once again demonstrated her propensity to carefully review the entire record. In *Cruz v. Coach Stores Inc.*, the plaintiff alleged race and sex discrimination in violation of Title VII. The district court dismissed her failure to promote, retaliation, termination and hostile work environment claims. Sotomayor wrote the opinion affirming in part and reversing in part.

The events leading up to the plaintiff's termination began when a non-Hispanic, male co-worker made a comment to the plaintiff in the lunchroom concerning her nipples. An argument ensued and the co-worker allegedly called her a "f--ing c--nt." The plaintiff then slapped her co-worker, who subsequently put her in a headlock. Both the plaintiff and her co-worker were terminated because of the employer's rule against "physical or verbal assault while on company premises."

Sotomayor carefully analyzed all of the plaintiff's claims and rejected all but her hostile work environment claim. In rejecting the termination and retaliation claims, Sotomayor noted that the non-Hispanic male involved in the altercation with the plaintiff was also terminated: "[t]he reasonable inference, therefore, is that Coach enforced the policy against Cruz not because she is Hispanic, but because she slapped [her co-worker]."

Sotomayor went on to analyze the plaintiff's hostile work environment claim based on the pleadings and the evidence of hostile work environment. With respect to the pleadings, the plaintiff did not specifically refer to "hostile

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work environment harassment" in her complaint. In Sotomayor's opinion, the plaintiff sufficiently described the harassment in her complaint, noting an HR manager's "discriminatory attitudes toward minorities" and other incidents of "Discriminatory Harassment and Violence." The opinion then reviewed the evidence of racial and sexual harassment. Stating that the harassment must be severe or pervasive based on the totality of the circumstances, the court noted that a plaintiff who experiences discriminatory harassment need not be the target of other incidents of harassment in order for them to support her claim. The court then cited incidents of harassment directed not only at plaintiff, but at other women and Hispanics. On that basis, Sotomayor vacated summary judgment and allowed the hostile work environment claims to proceed to trial.

In *Norville v. Staten Island University Hospital*, Sotomayor had an opportunity to evaluate a "pretext" case. In *Norville*, the plaintiff alleged disability, age and race discrimination. The district court granted judgment as a matter of law with respect to the age and race claims, which the 2nd Circuit affirmed. The jury returned a verdict for the defendant, with respect to the ADA claim, which Sotomayor vacated and remanded.

The plaintiff was a 56-year-old nurse who sought transfer to a different position because of her disability. She refused the available positions that would require her to forfeit all of her seniority rights under the collective bargaining agreement. She instead applied to be a radiology nurse and, after obtaining a note from her doctor that she could perform that job, she had an interview. A younger, Hispanic male was hired, and the plaintiff was subsequently terminated.

Sotomayor analyzed the case under the burden-shifting framework of *McDonnell Douglas* and held that the plaintiff failed to produce evidence sufficient to support a reasonable inference that her termination was the result of race discrimination. With respect to age discrimination, Sotomayor first noted that the plaintiff created a jury question of whether she was qualified for the job as radiology nurse. The plaintiff also provided circumstantial evidence that raised the inference of discrimination by showing that the defendant departed from its normal employment practices. The plaintiff's case failed, however, because the defendant provided legitimate, non-discriminatory reasons for not giving her the job. Although the reasons conflicted and this, in itself, can suggest pretext, the plaintiff did not produce evidence that the defendant's reasons served as pretext for discrimination.

In analyzing the ADA claim, for which the jury returned a verdict for the defendant, Sotomayor found that the jury instructions were in error because the jury should have been instructed that the defendant's offer of an inferior position, while a comparable position is open, is not a reasonable accommodation under the law. Sotomayor thus vacated the jury verdict and remanded.

Sotomayor's opinions are clear, well-organized and thoughtfully reasoned. Her opinions that support the employer are not without careful, fair consideration of the plaintiff's evidence and arguments. Of course, in some cases, she also just as thoughtfully and impartially finds for the plaintiff. It is no longer a wonder why NELA supports her nomination, and it is clear why Obama found her to have the necessary judicial temperament to be a justice of this nation's highest court. As her 2nd Circuit record demonstrates, she will treat employees fairly, as opposed to legislating from the bench or otherwise closing the courthouse doors to the underserved and disadvantaged segments of the population. •

Jeffrey Campolongo is the founder of the Law Office of Jeffrey Campolongo, a boutique firm focusing on employee rights and counseling aspiring and established entertainers. He can be reached at jjcamp@jcamp.com or 215-592-9293.

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