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Firefighter case may keep Sotomayor in hot seat

By Joan Biskupic, USA TODAY

WASHINGTON — The most attention-grabbing case of Supreme Court nominee Sonia Sotomayor's began when a Connecticut city rejected the results of a firefighter-promotion test because whites outscored blacks and Hispanics.

In the case, likely to be a hot-button issue at her confirmation hearings, city officials said they tossed the 2003 test results fearing bias lawsuits from minorities who did not qualify for elevation. Sotomayor endorsed New Haven's action. The terse opinion she joined appeared to minimize the significance of the "reverse discrimination" claim from white firefighters denied promotions.

The case offers a test of overlapping anti-discrimination laws, as well as of how judges handle incendiary disputes over racial policies. Federal law bars both intentional discrimination and indirect bias from seemingly neutral exams that disproportionately hurt women or minorities.

Six of Sotomayor's appeals court colleagues who urged further review of the dispute said the Sotomayor majority was failing "to grapple with ... questions of exceptional importance."

More scathingly, since her nomination last week by President Obama, critics such as the Cato Institute's Ilya Shapiro say the case suggests Sotomayor takes a different tack toward whites who allege bias than she does to minorities. "The lead plaintiff in this case is dyslexic," said Shapiro, referring to Frank Ricci, a white firefighter who says he spent \$1,000 on study aids for the exam. Shapiro said if anyone deserved the "empathy" Obama has said he wants in a Supreme Court jurist, it's Ricci.

Yet the case, coming at the nexus of dual laws against discrimination, has multiple dimensions, and the Sotomayor panel expressed some sympathy for Ricci. A key question in the case of *Ricci v. DeStefano*, now before the Supreme Court, is how governments might take account of individuals' races.

"Where that line is drawn," Notre Dame law professor Barbara Fick says, can have a great impact on hiring policies.

When 17 white candidates and one Hispanic candidate who took the promotional exam sued, saying their equality rights were violated, a district judge dismissed the claim. Judge Janet Bond Arterton said New Haven had grounds to try to avoid any claim of indirect bias arising from the exam, which city officials said was flawed. She noted that cases from the 2nd Circuit allowed employers to take steps to remedy the uneven racial impact of a test.

When Ricci and the other firefighters appealed to the U.S. Court of Appeals for the 2nd Circuit, Sotomayor was on a three-judge panel that reviewed the challenge. The panel issued a brief order in February 2008 summarily upholding Arterton's decision. In June 2008, the panel added a one-paragraph opinion saying it was affirming, based on her grounds.

"The (New Haven) Civil Service Board found itself in the unfortunate position of having no good alternatives," the Sotomayor panel said. "We are not unsympathetic to the plaintiff's expression of frustration. Mr. Ricci, for example, who is dyslexic, made intensive efforts that appear to have resulted in his scoring highly on one of the exams, only to have it invalidated. "

No single judge signed the order. Also on the panel were Rosemary Pooler and Robert Sack.

The full 2nd Circuit voted 7-6 against a rehearing. Writing for the dissent, Judge Jose Cabranes upbraided the majority for sidestepping an important question and said, "The Ricci plaintiffs ... must now look to the Supreme Court. Their claims are worthy of that review."

University of North Carolina law professor Bill Marshall, a supporter of Sotomayor's nomination, said her action in the case reflected a sense of restraint and was an effort to read the law narrowly.

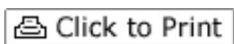
During Supreme Court arguments in April, it appeared that a majority might be ready to reverse the 2nd Circuit decision.

Justice David Souter, whom Sotomayor would replace, was among the justices expressing sympathy for New Haven. He said cities end up in a "damned-if-you-do, damned-if-you-don't situation." A ruling is likely by the end of this month.

Sotomayor has said nothing publicly about the Ricci case since her nomination. Her backers say it is getting disproportionate attention, and the liberal-leaning Constitutional Accountability Center will attempt to counter that with a new blog series, *Beyond Ricci*, today.

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