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Record Shows Rulings Within Liberal Mainstream: Despite Democratic Bent, Judge Has Sided With Corporate Defendants; Court's Frequent 5-4 Split Likely to Remain

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WASHINGTON -- Judge Sonia Sotomayor has built a record on such issues as civil rights and employment law that puts her within the mainstream of Democratic judicial appointees.

Among the cases she has heard during her 15 years on the federal bench -- and one that will be examined closely through her confirmation process -- is one now pending before the Supreme Court.



U.S. Appeals Court Judge Sonia Sotomayor was announced Tuesday as President Obama's pick to replace retiring Supreme Court Justice David H. Souter on the Supreme Court. See other notable Supreme Court firsts.

Judge Sotomayor was on a three-judge panel at the Second U.S. Circuit Court of Appeals that upheld a decision by the city of New Haven, Conn., to invalidate a firefighter promotional exam after no black applicants scored high enough to qualify. Those who ached the exam said it was unfair to penalize them because others didn't do as well.

"We are not unsympathetic to the plaintiffs' expression of frustration," the panel said in an unsigned opinion, referring to white firefighters who accused the city of reverse discrimination. "But it simply does not follow" that they have a claim under the 1964 Civil Rights Act.

In recent Supreme Court arguments, liberals expressed sympathy for the Second Circuit's ruling, while conservatives questioned it. A ruling is expected soon. Judge Sotomayor would be succeeding Justice David Souter, generally a liberal vote on social issues, and her selection isn't likely to change the outcome on cases where the Supreme Court typically splits 5-4.

The question is whether Judge Sotomayor would, like Justice Souter, be a solid judicial craftsman, or emerge as a leader who can mold majorities. Liberals have long sought such a jurist since the departures of William Brennan and Thurgood Marshall nearly two decades ago.

Judge Sotomayor's most famous ruling benefited a labor union. As a district judge in March 1995, she was assigned a case that pitted the National Labor Relations Board against Major League Baseball's owners. The owners, fighting a players' strike, had unilaterally changed the game's rules on free agency and salary arbitration. Then they hired replacement players.

The players association complained to the labor board, which sued to prevent the owners from making such changes outside the negotiating process.

Judge Sotomayor ruled on the board's side. That essentially ended the strike, because players voted to return to work under the terms of their expired contract. Since that ruling, no major sports leagues' owners have unilaterally tried to change basic labor guidelines during work stoppages.

A 2001 Sotomayor opinion could suggest the kind of empathy that President Barack Obama said he wanted in a Supreme Court justice. A federal prisoner confined to a halfway house for securities fraud sued the contractor running the facility because the contractor allegedly made the man climb stairs, knowing he had a heart condition. The man later had a heart attack.

Citing a 1971 Supreme Court opinion that allows suits against federal officials for violating constitutional rights, Judge Sotomayor found that the contractor could bear the same liability as federal employees. Chief Justice William Rehnquist, writing for himself and four other conservatives, reversed Judge Sotomayor. Justice Souter and three other liberals dissented.

In another pro-plaintiff ruling, Judge Sotomayor allowed a shareholder class-action suit against Merrill Lynch that alleged fraud. A unanimous Supreme Court in 2006 overruled Judge Sotomayor's Second Circuit opinion. The high court found that federal law assigned enforcement to the Securities and Exchange Commission, leaving no room for lawsuits under state fraud laws.

Reporter Jonathan Weisman discusses President Obama's choice for the Supreme Court, including controversy over Sonia Sotomayor's statements about the role of the Court of Appeals in a video circulating on YouTube.

Her record in more than 4,000 cases, including those from 11 years on the Second Circuit, shows her occasional siding with corporate defendants or diverting from a standard liberal position.

The judge has favored corporate defendants in suits that test when cases can be brought as class actions. Judges often must determine whether plaintiffs' claims should be pre-empted by more defense-friendly federal and international laws.

"There is no reason for the business community to be concerned" about Judge Sotomayor, said Lauren Rosenblum Goldman, a partner at Mayer Brown LLP who has represented businesses including Wachovia Corp. and Dow Chemical Co.

In *King v. American Airlines Inc.*, Judge Sotomayor ruled against an African-American couple who claimed they were bumped from a flight because of their race. The judge concluded their case was pre-empted by international law that governs air travel. "We urged a different interpretation, but her decision was in conformity with what other courts were doing," said Robert Isseks, a New York attorney who represented the plaintiffs. "We were paddling upstream."

Executive Washington editor Jerry Seib discusses how Republicans will need to consider President Obama's Supreme Court nominee Sonia Sotomayor if they hope to gain a larger share of Hispanic voters.

In 2006, the judge was part of a Second Circuit panel that ruled investors couldn't proceed with a class-action suit accusing Wall Street banks of fraudulently pricing initial public offerings. The ruling negated settlements that would have yielded investors more than \$1 billion. "That ruling demonstrated that in securities litigation, she is in the judicial mainstream," said Barry Ostrager, a partner at Simpson Thacher LLP who represented a unit of J.P. Morgan Chase & Co. in the matter.

Although Judge Sotomayor has had a number of her decisions overturned by the Supreme Court, Judge Guido Calabresi -- who taught Judge Sotomayor at Yale Law School and is today her colleague on the Second Circuit -- said such reversals are typical. "It's standard for what we do because most of the cases that go up [to the Supreme Court] are difficult," he said.

Judge Sotomayor often has sided with employees who claimed they were victims of discrimination or a hostile workplace. In 2000, she ruled partially in favor of Yvette Cruz, a Hispanic woman who claimed she had been subjected to lewd remarks and sexual harassment by a co-worker at Coach Stores Inc.



A lower court dismissed Ms. Cruz's hostile-work-environment claim on the grounds that her complaint was too vague. Judge Sotomayor overturned that ruling. But the judge upheld a lower court's dismissal of some of Ms. Cruz's claims, including that she had been fired because of her race. Counsel to Coach Stores didn't return a call for comment. Judge Sotomayor isn't always a reliable vote for employees. In 1999, she ruled against a black nurse who claimed she had been fired from a New York hospital due to her race and age, as well as a debilitating injury. Judge Sotomayor ruled that the plaintiff, Wendy Norville, could move ahead on her disability claim, but tossed out the race and age claims.

"There was ample evidence that the hospital had accommodated white nurses with similar disabilities," said Glenn Greenwald, who represented Ms. Norville and is now a columnist for Salon.com. "She rather coldly dismissed what I thought were good claims."