

# New Haven Register

---

## Federal jurists urge high court to hear firefighters' bias suit

Monday, June 16, 2008 3:00 AM EDT

By William Kaempffer

NEW HAVEN - In what observers describe as a highly unusual development, six judges from a polarized 2nd U.S. Circuit Court of Appeals have urged the U.S. Supreme Court to hear a reverse discrimination lawsuit filed by 20 city firefighters, calling the uncharted legal questions it raises of potential national significance.

The case involves 19 white firefighters and one Hispanic firefighter who sued the city, Mayor John DeStefano Jr. and other city officials in 2004 after the results of two promotional exams were thrown out because too few minorities scored high enough to get promoted.

The city asserted that the exams for lieutenant and captain had a disparate impact on minority firefighters and if the city proceeded with the promotions it would open itself up to potential employment discrimination lawsuits from minorities under Title VII of Civil Rights Act of 1964.

The lawsuit, *Ricci v. DeStefano*, filed in 2004, asserted that it was race-based politics, and not altruistic motives, that scuttled the exams, and that in doing so, the city instead violated the civil rights of the white firefighters who would have otherwise been promoted.

The case was dismissed in district court, and that decision was upheld in February by a three-judge panel of the 2nd Circuit, which generated the unsuccessful effort by other circuit judges to have the case heard before the entire group of 13.

>From a legal standpoint, the dissension at the 2nd Circuit doesn't change the status of the case, but legal observers say it could bolster the firefighters' chances to have the case heard by the Supreme Court, which accepts only a minute fraction of petitioned cases.

While the dissenting circuit judges did not take a position on the merits of the firefighters' claims, they did take issue with what they described as short-shrift attention the appeal got from their colleagues on the panel, which issued a short, unpublished order that "tersely adopted" the district court finding in a case in which lawyers from both sides filed nearly 2,000 pages of documentation and lengthy legal arguments.

"What is not arguable ... is the fact that this Court has failed to grapple with the questions of exceptional importance raised in this appeal," stated 2nd Circuit Judge Jose A. Cabranes, who wrote the dissenting opinion that was signed by five other judges "in the hope that the Supreme Court will resolve the issues of great significance raised by the case."

The judges in the majority countered that some characterizations in Cabranes' opinion were unfair and mistaken. While Judge Barrington D. Parker agreed the firefighters deserved a thoughtful and careful review of their claims, he said the three-judge panel concluded U.S. District Judge Janet Bond Arterton in New Haven had given them just that in her 48-page decision.

"Nothing more is required," he wrote.

The firefighters attorney, Karen Torre, called the break by the six judges a remarkable and healthy development in a case of import to first responders across the country.

"No matter what the outcome of this case on its legal merits, the judges call for full judicial review, in a responsible and transparent manner, has done much to help restore my clients and the public's confidence in the courts," she said. "We hope the Supreme Court will agree with the dissenters that this case deserves consideration by the nation's highest court."

Cabranes, who wrote the dissenting opinion, is a well-respected and experienced jurist known as an intellectual judge and not an ideologue, said Hartford-based lawyer Steven Ecker, who specializes in appellate work.

Further, he said, the judge makes a viable argument that the Ricci case, named after lead plaintiff Frank Ricci, warranted more than a summary order, which typically is reserved for clear-cut and uncomplicated cases, which Ricci's case is not.

"From a purely legal perspective, Ricci is an important case," Ecker said. "It raises complicated, difficult issues that really have not yet been answered by any settled body of existing legal precedent."

The key question to be answered in Ricci is this: Can a municipality disregard the results of a civil service exam, crafted to be race-neutral, on the grounds that the exam yielded too many qualified applicants of one race and not enough of the other.

City spokeswoman Jessica Mayorga declined comment, citing the pending litigation.

The sharply worded dissent is highly unusual in a court generally known for its cohesiveness, observers said.

The last case that generated sharp language, recalled Chester, N.Y., lawyer Stephen Bergstein, who works extensively before the 2nd Circuit, was a Vermont campaign finance case that did, in fact, end up before the Supreme Court. He recalled less than a handful of cases in his 15 years before the court that a circuit judge requested an en banc hearing without either party requesting it.

New Haven-based civil rights attorney John Williams viewed the 2nd Circuit development as unusual, although not unprecedented, and boded well for the plaintiffs that the case might not yet be dead.

"I think it's highly likely that Karen is going to be going to Washington," he said.