82-1229

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD WEISBERG,

Appellant/Cross-Appellee,

v.

U.S. DEPARTMENT OF JUSTICE,

Appellee/Cross-Appellant.

AND CONSOLIDATED Nos. 82-1274,
83-1722 and 83-1764

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR THE APPELLEE/CROSS-APPELLANT

RICHARD K. WILLARD
Acting Assistant Attorney General

STANLEY S. HARRIS
United States Attorney

LEONARD SCHAITMAN
JOHN S. KOPPEL
Attorneys, Appellate Staff
Civil Division, Room 3617
Department of Justice
Washington, D.C. 20530

Telephone: (202) 633-5459

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 82-1229

HAROLD WEISBERG,

Appellant/Cross-Appellee,

v.

U.S. DEPARTMENT OF JUSTICE,

Appellee/Cross-Appellant.

AND CONSOLIDATED Nos. 82-1274,
83-1722 and 83-1764

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR THE APPELLEE/CROSS-APPELLANT

Defendant-appellee/cross-appellant Department of Justice takes this opportunity to respond to plaintiff's supplemental brief concerning Blum v. Stenson, Supreme Court No. 81-1374 (March 21, 1984).[1]

---

[1] We have already brought the Blum decision to the Court's attention in our letter of April 10, 1984. Page references in that letter were to the decision as published in U.S. Law Week. Since plaintiff has seen fit to attach a copy of Blum to his supplemental brief, however, all page references in this brief will be to the Blum slip opinion, for the sake of convenience.

In reversing a 50% multiplier as an abuse of discretion in Blum, the Supreme Court discussed the issue of multipliers, but declined to determine whether a multiplier for risk would ever justify an upward adjustment to a fee award (slip op. at 13 n. 17).[2] The Court did indicate strongly, however, that it would be the rare case indeed where an adjustment to the lodestar should be authorized. Slip op. at 14 n. 18. The Court stressed that when "the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product [i.e., the lodestar rate] is presumed to be the reasonable fee contemplated by § 1988" (slip op. at 10) (emphasis added). The Court placed a heavy burden on a fee applicant attempting to overcome this presumption. The Department submits that plaintiff in the instant case did not meet this heavy burden and thus the 50 percent multiplier the district court awarded cannot be sustained.[3]

By no stretch of the imagination can plaintiff's evidence be said to meet the stringent Blum standard. His "evidence" consists largely of his failure to obtain compensation in other

---

[2] We note that this issue is pending before this Court in Laffey v. Northwest Airlines, Inc., D.C. Cir. Nos. 83-1838 et al. (argued April 12, 1984).

[3] It is, of course, the Department's vigorous submission that plaintiff is not entitled to any fees for this case.

FOIA cases (J.A. 642-43), a matter of no conceivable relevance to the case at bar. Plaintiff adduces no valid extraordinary factors above and beyond the risk of failure present in every case to justify a contingency adjustment to the lodestar.[4] Plaintiff therefore has failed to sustain his heavy burden to overcome the presumptive validity of the lodestar.[5]

Respectfully submitted,

RICHARD K. WILLARD
Acting Assistant Attorney General

STANLEY S. HARRIS
United States Attorney

LEONARD SCHAITMAN
JOHN S. KOPPEL
Attorneys, Appellate Staff
Civil Division, Room 3617
Department of Justice
Washington, D.C. 20530

Telephone: (202) 633-5459

---

[4] As the Supreme Court stated in Blum, "[n]either complexity nor novelty of the issues * * * is an appropriate factor in determining whether to increase the basic fee award." Slip op. at 11. This is particularly true in the instant case, the "complexity" of which is due solely to plaintiff's ceaseless barrage of repetitive motions to reopen matters already resolved.

[5] Plaintiff also contends that the district court abused its discretion is setting the fee rate at $75 per hour. This assertion is devoid of merit. Contrary to plaintiff's claim (Pl. Supp. Br. at 3), the district court did not "exclude" his evidence or rely solely on a rate that he had negotiated "years" earlier. Instead, the court considered plaintiff's fee application and decided that $75 was an appropriate hourly rate, noting that plaintiff had settled two similar cases at this rate in 1978 and 1982. J.A. 728. The court also observed that "[o]ther fee awards cited by plaintiff are not relevant because they did not involve FOIA cases and contained no description of the attorneys' background." Ibid. Clearly, the court did not abuse its discretion in making this "inherently difficult" determination. Blum, supra, slip op. at 8 n.11.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD WEISBERG,	)	
	)	
Appellant/Cross-Appellee,	)	
	)	
v.	)	Nos. 82-1229 et al.
	)	
U.S. DEPARTMENT OF JUSTICE,	)	
	)	
Appellee/Cross-Appellant.	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of May, 1984, I served the foregoing by causing a copy of the Supplemental Brief for the Appellee/Cross-Appellant to be hand delivered, to:

James H. Lesar, Esquire
1000 Wilson Blvd., Suite 900
Arlington, Virginia 22209

JOHN S. KOPPEL
Attorney, Appellate Staff
Civil Division
(202) 633-5459