

Federal Judge Calls 2nd Circuit's Approach to Calculation of Attorney Fees 'Condescending'

LAW.COM

Mark Fass, New York Law Journal , On Wednesday January 27, 2010, 3:02 am EST

A federal judge in Brooklyn has launched another volley in the ongoing dispute between the judges of the Eastern District of New York and the 2nd U.S. Circuit Court of Appeals regarding the standards for calculating awards of attorney fees.

Faced with a remand of an award ordering him to "apply a presumption in favor of" the prevailing fee rate for attorneys in the Eastern District, Judge Frederic Block has affirmed in *Luca v. County of Nassau*, 04-CV-4898 (FB), his earlier award of \$400 per hour for Hempstead litigator Frederick K. Brewington.

In a critical and cutting 16-page decision, Block wrote that "numerous recent cases in the Eastern District convince the Court that a reasonable paying client would gladly pay \$400 per hour for an attorney of Brewington's caliber."

The decision, as well as the dispute between the Eastern District and the 2nd Circuit, center on last August's circuit decision in *Simmons v. New York City Transit Authority*, 575 F.3d 170, which held that "when faced with a request for an award of higher out-of-district rates, a district court must first apply a presumption in favor of" the district's own prevailing rates.

In what has become a widely quoted sentence from that decision, Judge John M. Walker wrote that defendants "should not be required to pay for a limousine when a sedan could have done the job."

The holding in *Simmons*, which the 2nd Circuit reiterated a month later in *Lochren v. County of Suffolk*, 08-2723-cv, was widely criticized by civil rights groups.

In an amicus brief filed in *Lochren*, more than two dozen public interest organizations argued that "the standards for out-of-district fees, adopted in [*Lochren* and *Simmons*] unfairly deprive victims of civil rights violations of access to civil rights expertise that is unavailable, or in short supply, where their case is venued."

Eastern District of New York judges have been similarly critical.

In October, in *Gutman v. Klein*, 03 Civ. 1570, Judge Brian M. Cogan wrote, "[T]he border between the Eastern and Southern Districts of New York is uniquely permeable. Imposing the *Simmons* burden on litigants ignores the geographic reality and its economic consequences in New York City." (NYLJ, Oct. 22, 2009)

In the present Title VII action, plaintiff Patricia Luca alleged sexual and gender discrimination on the part of Nassau County for its failure to hire her as a police officer more than a decade after she ranked 20th on the county's Civil Service list. Luca claimed that the county's failure was, in part, retaliation for her filing a previous discrimination claim while serving as a corrections officer.

A jury awarded Luca \$150,000 in compensatory damages and Judge Block awarded an additional \$604,000 for lost future wages and benefits.

The judge also awarded in June 2008 attorney fees of \$179,722.

FEE QUESTION REMANDED

Last August, two weeks after issuing *Simmons*, the circuit remanded the fee award for reconsideration in light of *Simmons*.

In Monday's decision, Judge Block criticized the rule in *Simmons*, as well as the way it was expressed -- i.e., Judge Walker's suggestion that Manhattan attorneys are "limousines" and Brooklyn lawyers are "sedans."

"In conjuring this metaphor, the circuit court presumably did not intend to suggest that there was a qualitative difference in the competency of counsel between the two districts, yet it regrettably may be perceived by lawyers whose offices are in the Eastern District as having a condescending tone," Block wrote. "To be sure, the Court has throughout the years presided over trials with Eastern District lawyers -- such as Brewington -- who deserved to drive in limousines, and has had trials with some Southern District lawyers who should have been driving clunkers."

The judge stated that although his earlier fee award, issued pre-*Simmons*, referenced the prevailing rates in both the Eastern and Southern districts, the \$400 hourly fee he awarded Brewington was also supported solely by reference to Eastern District rates.

Judge Block reinstated the original fee award for Brewington, then awarded the plaintiff additional attorney fees of \$127,060 for contesting Nassau County's appeal of the fees.

The second award will go to Brewington, the principal of a Hempstead-based litigation firm specializing in plaintiffs-side civil rights, as well as Scott Korenbaum and Jill Shellow, Manhattan practitioners, who also represented Luca on appeal.

Reached for comment, Brewington noted that the 2nd Circuit, not the county, raised the issue of *Simmons*.

"*Simmons* came down after the matter was fully briefed," Brewington said. "It wasn't raised by the county in their brief. It was prompted by the 2nd Circuit. We're happy that Judge Block had the opportunity to fully air his evaluation of the case."

Ralph J. Reissman appeared on behalf of the Nassau County attorney's office. The office did not return calls for comment.