

## **EEOC, US Men's Team Back Women's Soccer Pay Bias Appeal**

By **Alexis Shanes**

*Law360 (July 30, 2021, 4:12 PM EDT)* -- The U.S. Equal Employment Opportunity Commission and the union representing U.S. Men's National Team soccer players urged the Ninth Circuit on Friday to overturn a ruling that axed a high-profile equal pay lawsuit from members of the U.S. Women's National Team.

The filings from the federal workplace bias watchdog and the union were among a handful of amicus briefs lodged at the appeals court Friday. Civil rights groups, former federal officials and others argued that the U.S. Soccer Federation — a nonprofit the amici say has an effective monopoly on the sport — unfairly shorted the nation's top female soccer players to the tune of \$64 million, violating Title VII and the Equal Pay Act.

"Rather than rewarding the women's effort and success with equal compensation, the federation has spent more than three decades treating the women as an afterthought," the USMNT brief said.

The filings came just a week after the women's team filed an appellate brief urging the Ninth Circuit to undo a California federal judge's May 2020 ruling on their equal pay claims in the federation's favor.

The lower court ruling was finalized in April, when the court also greenlit a settlement on the players' claims that they receive worse travel accommodations and working conditions than their male counterparts. The parties met with a federal mediator in May in an apparent attempt to avoid the players' appeal.

The amici argued the trial court erroneously simplified the players' pay structure when it issued a finding that the women actually made more than the men between 2015 and 2019.

Instead of considering compensation for game appearances and success bonuses separately, the lower court consolidated the two pillars into a single amount and divided the total by the number of games played, the amici argued.

The lower court wrongly credited testimony from a federation-backed expert and rejected the players' expert, bypassing the parties' challenges to the experts' reports and overstepping its bounds, the EEOC argued.

Instead of allowing a jury to decide whether the women should have made more, the trial court simply said the women receive other benefits the men did not, such as severance pay, that made up for

unequal success bonuses, the EEOC said.

The compensation evened out only because the women had "extraordinary success" while the men didn't even qualify for a major tournament, according to the USMNT brief.

"Equal pay is not a competition between the women's team and the men's team," Arianna Scavetti, who helped develop the USMNT brief, told Law360 in a statement Friday. "It is about the U.S. Soccer Federation living up to its responsibility to treat all its players — male and female — fairly and equally."

The trial court's finding overlooks the federal Equal Pay Act's requirement that men and women receive an equal "rate" of pay and could exacerbate compensation disparities across the labor market, according to the amici.

Fifteen former officials previously responsible for enforcing anti-discrimination protections at the EEOC and the Office of Federal Contract Compliance Programs compared the players to salespeople who make commissions on top of their basic hourly rates.

"If not reversed, the decision would provide a misguided roadmap for other courts to bless unequal pay through an overly simplistic and cursory analysis in a wide range of common but complicated compensation agreements," the officials' brief said. "Congress demanded more."

The lower court also wrongly compared the women's pay, set in 2017, to the men's pay, established amid the 2011 financial crisis, according to the USMNT brief.

By around 2018, the federation's revenue had increased by nearly 300%, mostly because of the women's team, but it didn't pass off the benefits to female players, the USMNT brief said.

The court also wrongly interpreted the women's collective bargaining agreement as assenting to unequal pay, the civil rights groups added. The EEOC noted that the federation isn't allowed to underpay the women just because they're willing to work for less.

"U.S. Soccer is firmly committed to equal pay, just as the members of our senior national teams are," a spokesperson for the federation told Law360 in a Friday email. "We will continue working with both our Men's and Women's National Teams to equalize FIFA prize money and to chart a positive path forward to grow the game both here at home and around the world."

Jamie Wine, an attorney for the federation, also reiterated in a Friday statement that the group is committed to fair pay.

"The district court's opinion from last May rightly noted that the Women's National Team negotiated for a different pay structure than the Men's National Team, and correctly held that the Women's National Team was paid more both cumulatively and on an average per-game basis than the Men's National Team," Wine said.

In a statement Friday, Molly Levinson, a spokesperson for the players, called the support "overwhelming" and praised the male players for speaking out for their female counterparts.

Nicole Saharsky, counsel to the players, told Law360 in a statement Friday that the briefs added a layer of clarity to the case.

"We're pleased to see such strong support for the players' case," Saharsky said. "These briefs will underscore to the court of appeals that the federation's discrimination is clear and indefensible."

The USWNT players are represented by Nicole Saharsky, Carmen Longoria-Green, Michael Scodro and Minh Nguyen-Dang of Mayer Brown LLP, and David Feher, Jeffrey Kessler, Cardelle Spangler, Diana Leiden and Jeanifer Parsigian of Winston & Strawn LLP.

U.S. Soccer is represented by Michele Johnson and Jamie Wine of Latham & Watkins LLP.

The men's team union is represented by Zachary Tripp, Andrew Tulumello and Arianna Scavetti of Weil Gotshal & Manges LLP.

The civil rights groups are represented by Emily Martin, Sunu Chandy, Neena Chaudhry and Samone Ijoma of the National Women's Law Center, and Caitlin Halligan, Ester Murdukhayeva, Hannah Belitz and Anne Arcoleo of Selendy & Gay PLLC.

The federal officials are represented by Hyland Hunt and Ruthanne Deutsch of Deutsch Hunt PLLC.

The Institute for Constitutional Advocacy and Protection is represented by in-house attorneys Annie Owens and Mary McCord.

The EEOC is represented by in-house attorney Julie Gantz.

The case is Morgan et al. v. U.S. Soccer Federation Inc., case number 21-55356, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Max Kutner, Mike LaSusa, Rachel Scharf and Zachary Zagger. Editing by Roy LeBlanc.