

US Soccer Flouts 'Equal Pay For Equal Work,' 9th Circ. Told

By Rachel Scharf

Law360 (July 23, 2021, 6:29 PM EDT) -- Members of the U.S. women's national soccer team told the Ninth Circuit on Friday they had to far outperform male players in order to earn the same amount, kicking off a closely watched equal-pay appeal that one expert said raises novel legal issues.

The U.S. Women's National Team players are asking the appeals court to undo a California federal judge's dismissal of their \$67 million claims brought under the Equal Pay Act and Title VII of the Civil Rights Act.

U.S. District Judge R. Gary Klausner awarded summary judgment to the U.S. Soccer Federation in May 2020 after looking at both teams' total compensation and finding that, on average, the USWNT players actually earned slightly more per game than the men from 2015 to 2019.

But the soccer players said Friday that Judge Klausner ignored the fact that the women received consistently lower bonuses for winning games. Their pay only averaged close to the men's during those years, the USWNT players argued, because they won 30% more games than the men's team.

The Equal Pay Act requires "equal pay for equal work," the USWNT players said. Requiring women to perform better than men in order to make the same amount, they argued, is patently illegal.

"Under the court's approach, the women had to be the best in the world to achieve the same per-game pay as the much less successful men," the players wrote. "That is not an equal rate of pay."

The USWNT players also said Judge Klausner had overstepped his authority by discounting key evidence that a jury should have the chance to weigh. They cited an expert's finding that they would have earned \$64 million more if they'd received the same per-win bonuses as the men.

And while Judge Klausner said the players can't challenge bonus rates they expressly agreed to in a 2017 collective bargaining agreement, the women said union deals don't bar Equal Pay Act claims.

"Given that equal pay was never on the table, the USWNT's union agreed to the best deal that could be negotiated," the players wrote. "It is well-established that a union and an employer cannot bargain away employees' rights to equal pay under the Equal Pay Act and Title VII."

The brief offers the first in-depth look at the USWNT players' long-anticipated appeal, which was delayed for a year while the parties finalized a settlement on separate working-conditions claims.

The players' counsel told Law360 on Friday that they're confident the Ninth Circuit will find that U.S. Soccer flouted settled precedent by underpaying the women's team.

"We think it's a simple principle at issue: equal pay for equal work," said Nicole Saharsky of Mayer Brown LLP. "If you're doing the same job, you should get paid the same."

But some experts aren't so sure the issue is cut-and-dry. UCLA School of Law professor Steven Bank said Friday that the case could present some novel legal questions because it's rare for a single employer to maintain two separately negotiated contracts with distinct pay structures for male and female workers.

Bank, who's been closely following the litigation, pointed out that much of the case law cited in the brief is either out of circuit or unpublished.

"What stands out is there aren't cases for the proposition the players are making," Bank told Law360. "This is really a case of first impression. ... So it's a question of [whether] the Ninth Circuit [will] want to jump in and try to flesh out the law."

Counsel for U.S. Soccer told Law360 on Friday that while Judge Klausner's opinion should be upheld, they are still attempting to settle with the USWNT players ahead of a full-fledged appeal.

"U.S. Soccer will continue to seek a resolution to this matter outside of court so it can chart a positive path forward with the players to grow the game both here at home and around the world," said Jamie Wine of Latham & Watkins LLP.

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

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

The case is Alex 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 Zachary Zaggar and Max Kutner. Editing by Regan Estes.