

Women's National Team Misses Goal in Equal Pay Act Claims

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A federal judge has dismissed the Equal Pay Act (EPA) claims filed by 28 members of the U.S. Senior Women's National Soccer Team (WNT) against the United States Soccer Federation (USSF), finding the WNT players were actually paid *more* than their males counterparts on the Men's National Team (MNT) and the pay differences of which they complained were a result of the application of the collective bargaining agreement (CBA) between the U.S. Women's National Soccer Team Players Association (WNTPA) and the USSF. *Alex Morgan et al. v. United States Soccer Federation, Inc.*, No. 2:19-cv-01717-RGK-AGE (C.D. Cal. May 1, 2020).

The court granted the USSF's motion for summary judgment on the EPA claims, by far the most important part of the lawsuit in which the players sought \$67 million in back pay and compensation, but allowed the WNT's claims of alleged sex discrimination in violation of Title VII of the Civil Rights Act related to charter flights, travel conditions, and support services to continue.

The WNT players alleged that during the class certification period (Feb. 2015 through Nov. 2019), the USSF discriminated against them in terms of compensation and working conditions due to their sex in violation of the EPA. The EPA prohibits such wage discrimination: for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

The WNT players must prove that, as compared to the MNT players, they (1) perform substantially equal work, (2) under similar working conditions, and (3) are paid less. If the WNT players did this, the USSF would need to prove the difference in wages ("wages" is interpreted broadly to include all remuneration for employment) is the result of one of the four factors listed above. The court did not get that far.

The court's analysis began with the third factor, whether the MNT players were paid more than the WNT players during the 2015-19 comparative period ("the class period"). The court noted the USSF has a separate CBA with the players' representative of each team. The MNT CBA has a "pay for play" arrangement; meaning, players are not paid unless they are invited to a training camp or play in

a game. The WNT CBA includes lower per game bonuses compared to those in the MNT CBA, but that CBA includes guaranteed salaries and minimum number of players under contract, various insurances, severance pay, and child care assistance.

The WNT player's core allegation was that the bonus amounts available to them were less than the bonuses available to MNT players for identical events, such as winning a "friendly" (an exhibition or non-competitive game) against a national team with a certain international rank. The USSF countered that during the 2015-19 class period, the *total* compensation of WNT players was higher than that of MNT players on both a per game and cumulative basis. The record showed that during the class period, (1) the WNT averaged compensation of \$220,747 per game, compared to \$212,639 for the MNT; (2) the WNT players was paid \$24.5 million cumulatively over the class period, while the MNT players received \$18.5 million; and (3) the four highest paid WNT players averaged more pay per game than the four highest paid MNT players. The court acknowledged that the bonus amounts available to WNT players were lower than those paid to MNT players for the same type of game (a friendly, World Cup, and the like), but that the WNTPA bargained for those lower bonus amounts in a CBA that also included salary and roster guarantees that are not included in the MNT CBA. The court decided it would be wrong to find an EPA violation based on just one element of a compensation package, when the EPA definition of wages is broad. Rather, total compensation, including all of the economic provisions in the CBA, must be compared.

The WNT players also argued that they *would have been paid* more than the MNT players had the MNT CBA, including its higher bonus provisions, applied to them. The court rejected the argument, noting the CBAs for the WNT and the MNT contain different provisions that reflected the different priorities each had during contract negotiations. The court stated that the different benefits in the WNT CBA have distinct economic value, even if that value cannot be quantified exactly to yield a neat, apples- to-apples comparison of the compensation the two CBAs yielded. The judge also noted that during the negotiations leading to the WNT CBA, the USSF offered the WNTPA the same pay-for-play structure in the MNT CBA and the union rejected the proposal. Consequently, the judge decided the WNT players could not now argue the CBA to which its union could have agreed is better than the one to which the WNTPA did agree.

The WNT players have said they will appeal the judge's decision, and the portion of the lawsuit that alleges Title VII claims will continue, with trial scheduled for June 16.

Perhaps signaling a settlement is possible on the Title VII claims (particularly if an appeal of the EPA claim is unsuccessful), the USSF was conciliatory after the decision, stating "[W]e are committed to continuing [to] work to ensure our Women's National Team remains the best in the world and sets the standard for women's soccer."

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National Law Review, Volume X, Number 126

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