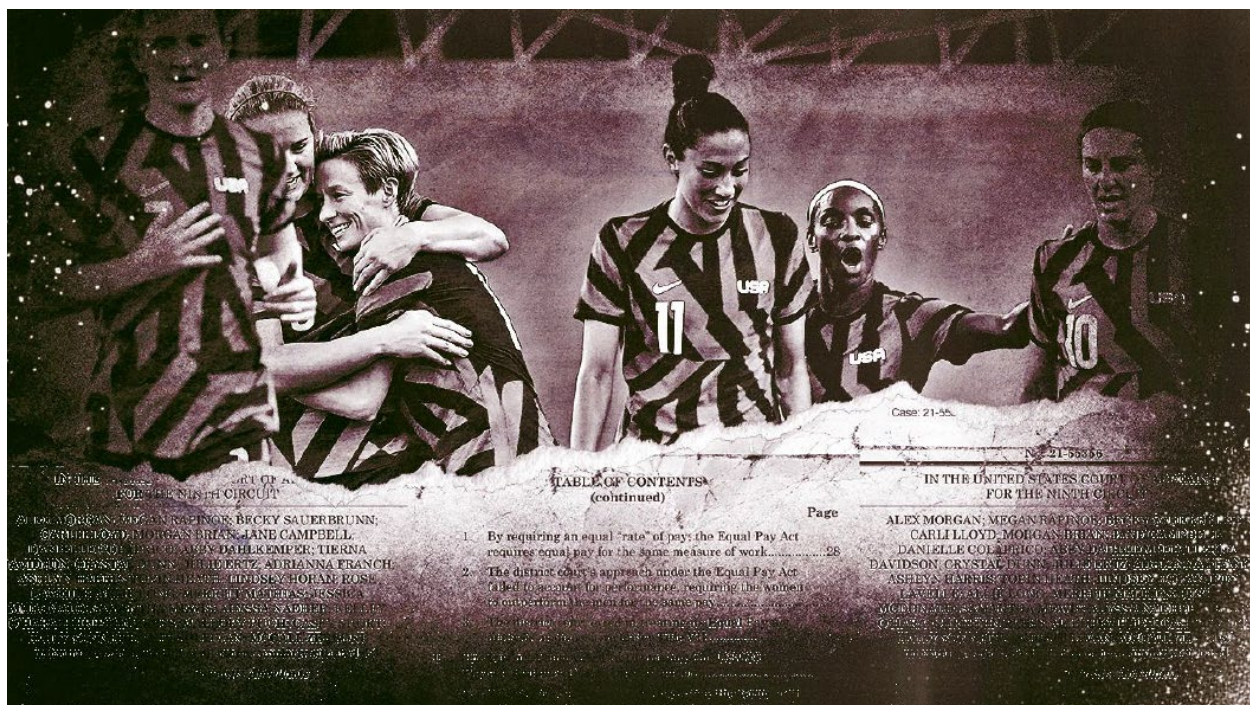


After Settling for Bronze, U.S. Soccer's Golden Generation Faces Its Final Battle in Court

BY MICHAEL MCCANN, LUKE CYPHERS

AUGUST 6, 2021



The U.S. Women’s National Team began making its case for equality in earnest more than a decade ago, on a patch of grass in Germany, in the 122nd minute of a quarterfinal game against Brazil in the 2011 Women’s World Cup. Trailing 2-1, with the final whistle due any second, a little-known substitute winger named Megan Rapinoe took a pass down the left side, made a long, purposeful dribble and launched a left-footed, 45-yard, curling cross to the far corner of the 6-yard box, an inch beyond the outstretched fingers of the Brazilian goalkeeper. There, U.S. star Abby Wambach rose, snapped her neck forward and headed the ball,

rocketing it into the back of the net to tie the score. The goal sent the crowd into a frenzy, the game on to penalty kicks and the Americans to eventual victory. Named as the best goal in Women's World Cup history by FIFA in 2015, it's a highlight so transcendent people often forget the U.S. later lost to Japan in the tournament final. But it's the moment when the public took notice of a wildly successful cohort of players, who went on to win the 2012 Olympics and the 2015 and 2019 World Cups, and the moment when people began to take interest in what they had to say.

Which turned out to be quite a lot.

In the decade since, the USWNT and its players have become a cultural force, reaping not only press coverage but massive followings on social media. They've been endorsers, investors and entrepreneurs. And for the past five years, they've been activists engaged in a legal fight against their employer, U.S. Soccer. In 2016, USWNT players, among them 2020 Olympians Rapinoe, Alex Morgan, Carli Lloyd and Becky Sauerbrunn, filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission. Two years ago, those players joined others in filing suit in a Los Angeles federal district court, *Morgan et al v. U.S. Soccer*, and after having their case dismissed in May 2020, the women are now litigating it in the U.S. Court of Appeals for the Ninth Circuit.

With the end of the Olympics, and the USWNT's exit with a bronze medal—disappointing, by their standards, to say nothing of public expectations—there's an end-of-an-era feeling surrounding the team. In the courtroom, meanwhile, the American women's case continues, and though they have much of the public on their side, they're currently losing and could be down to their final chance.

This may surprise fans of the women's team. The billboard for their case is simple: The USWNT players are underpaid given their success, especially when compared with the U.S. Men's National Team, which has never won a World Cup and didn't even qualify for the last one. In a recent amicus brief, even the men's national team union supported that claim, saying the women should have received "*higher pay*" than the men but have instead been subjected to "inferior wages and working conditions," while achieving "unparalleled dominance on the international soccer stage."

Likewise, the villain in the story has been easy for the public to spot: U.S. Soccer, the sport's national federation, which, critics say, would rather spend money on attorneys' fees than pay the women what they deserve. But the legal record in the USWNT case paints a muddier picture, and some salient points often get lost:

- Last year in Los Angeles, federal District Court Judge R. Gary Klausner found that women players earned more, not less, than men's players in terms of cumulative and average per-game pay.
- The judge reasoned that the women players' union agreed in collective bargaining to the terms they are now trying to change.
- The women's team was offered the same pay structure as then men in CBA negotiations but turned it down.
- Much of the discrepancy in men's and women's team earnings can be laid at the feet of FIFA, the world governing body for soccer, which gives far less in prize money to women, and which is the source of bonus money for both the women's and men's teams.

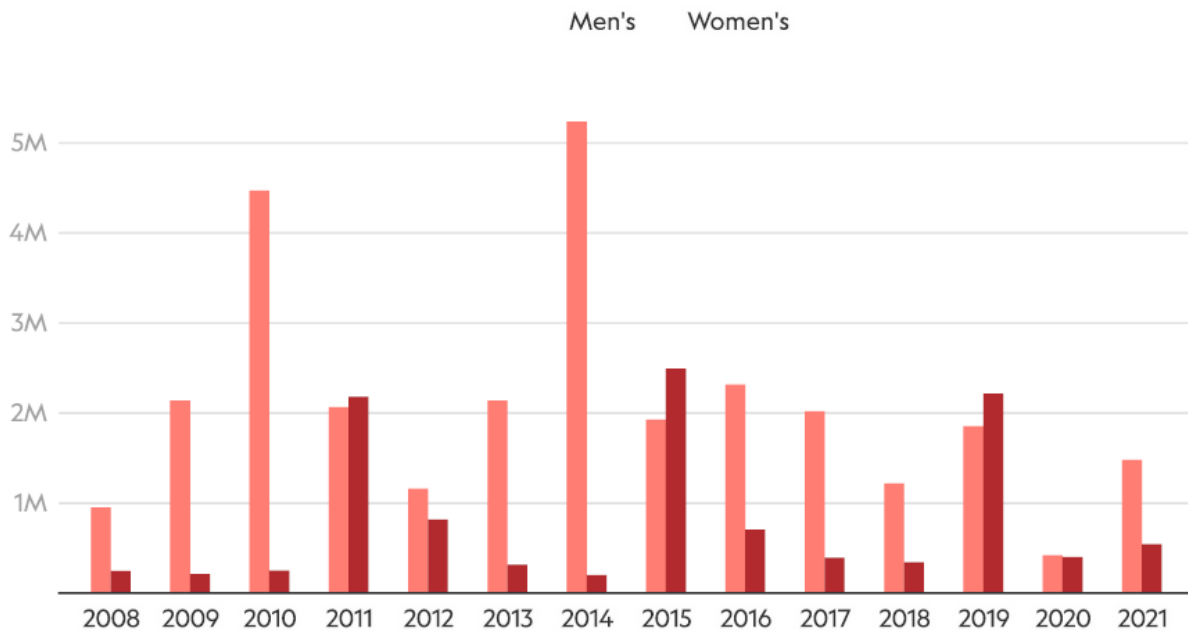
Still, U.S. Soccer's arguments haven't found purchase in the court of public opinion. Many politicians, from President Joe Biden to Senator Elizabeth Warren, have unabashedly sided with the players. So too have prominent

journalists, broadcasters and influencers, with U.S. Soccer often ridiculed as sexist and out-of-touch.

“The women have a very likeable slogan,” acknowledged Jamie Wine, one of the lead attorneys for U.S. Soccer in the litigation. “Everybody, all of us, would agree to it: Equal pay for equal work. They’ve done a very effective job of going out and saying that.” But Wine argues the case, from U.S. Soccer’s perspective, is about two groups of players whose unions negotiated their own collective bargaining agreements and accompanying pay systems. “U.S. Soccer should not be the target,” she said.

Yet U.S. Soccer has at times put a bullseye on its back, struggling to raise legal arguments without coming across as misogynistic. “The job of a USMNT player,” one U.S. Soccer court filing, submitted by a different group of attorneys, claimed last year, “carries more responsibility within U.S. Soccer than the job of USWNT player, from an Equal Pay Act standpoint.” Also, while Judge Klausner sided with U.S. Soccer on pay issues, he found for the women’s team on other workplace topics, including “the gross disparity in money spent on airfare and hotels for the teams.” USWNT and U.S. Soccer recently settled legal claims relating to travel, hotel accommodations, venue selection and staff size.

Average U.S. Soccer Match TV Viewership



2021 numbers do not include the Olympics.

Chart: Lev Akabas • Source: U.S. Soccer

The appeal of the pay ruling centers on a seemingly straightforward assertion: U.S. Soccer pays USWNT players a lower rate of pay than USMNT players because of sex discrimination.

"We are arguing for equal rates of pay," USWNT players' attorney Jeffrey Kessler told *Sportico* in an interview. "It would be a fallacy to say otherwise."

Unpacking this assertion, however, reveals many pieces to a puzzle that remains unsolved. For example, deciding which types of compensation count as "pay," determining who is responsible for pay rates, and landing on the appropriate method for comparing two different systems of compensation have sparked fervent and contrasting responses in the litigation.

Kessler and attorney Nicole Saharsky are leading the players' case. They acknowledge USWNT's union and U.S. Soccer negotiated a CBA but insist unions and managements can't bargain around legal protections from sex discrimination in pay rates. "It's not just case law that says that," Saharsky emphasizes. "Look at the legislative history."

Saharsky was the lead attorney for the players' opening appellate brief, which offers detail on passage of the Equal Pay Act, signed into law in 1963. Prior to the signing, a Congressman from New York named Charles Goodell—father of future NFL commissioner Roger Goodell—avowed that the Equal Pay Act obliges employers to change CBAs if they violate the Act by allowing men and women to be paid different rates for the same work.

One U.S. Supreme Court case repeatedly mentioned by USWNT is *Corning Glass Works v. Brennan*. The 1974 ruling involved a union that had agreed to a CBA, wherein male plant inspectors were paid a higher hourly rate than female plant inspectors. Justice Thurgood Marshall's opinion held that a union agreeing to pay-rate disparities did not insulate those disparities from scrutiny under the Equal Pay Act.

In court filings, U.S. Soccer agrees blatant discrimination can't be shielded by a CBA. But it says the situation in *Corning Glass*, where a single union represented both men and women, is fundamentally different from the situation in the USWNT case, where men's and women's unions negotiated different pay rate structures in separate CBAs.

"The women are represented by a union that is fighting hard to protect their interests and priorities," said Wine, a partner at Latham & Watkins in New York City. "They prioritized the things that they wanted. This isn't a situation where a

pay structure was forced on them.” Wine adds that USWNT players “were offered the men’s structure,” which supplies higher bonuses but much lower guarantees, and opted for a system where they are paid higher guarantees and lower bonuses.

There are good economic reasons for this. USMNT members earn six- and seven-figure salaries from club soccer teams—men’s star Christian Pulisic, for instance, earns \$11.5 million a year from English powerhouse Chelsea. They aren’t reliant on national team payments as their primary source of income, allowing them to negotiate for higher national- team bonuses with fewer guarantees. USWNT players face a different environment. Domestic and international club leagues for women are far less mature than the 150-year-old men’s club system in Europe, or even 25-year-old MLS, and pay far less. The women’s national team income and benefits, which run into the six figures, offer WNT contract players financial security they can’t find elsewhere.

USWNT eschewing bonuses for guarantees proved astute last year. “Look at what happened with COVID,” Wine said. “There were no games played, [so] the men didn’t earn anything [while] the women earned their full salary and benefits.”

If the courts rule for USWNT, U.S. Soccer has suggested it could become precedent for employees in other unions to challenge agreements with management.

Kessler doesn’t buy it. “Unions support this,” he said of the case, adding, “It doesn’t undermine bargaining.” He also noted that U.S. Soccer’s own sponsors have openly advocated for the equal pay-rate demands. In 2019, Procter & Gamble purchased a full-page ad in a Sunday edition of *The New York Times*, with the message: “Inequality is about more than pay and players. It’s about values.”

As Kessler sees it, U.S. Soccer has badly misread the room. Having to “fight” for equal pay rates, he adds, “is like from a prior time in our history.”

Saharsky, who has argued more cases in the U.S. Supreme Court than any other woman in the past decade and is co-head of Mayer Brown's Supreme Court and appellate practice, is similarly mystified by U.S. Soccer's approach. “I don't understand their strategy,” Saharsky said. “The amount of money they have spent on this case and attorneys' fees,” she contends, could have been spent resolving the case.

Earlier this year, *Sportico* reported that in tax filings, U.S. Soccer calculates it spent nearly \$19 million on outside legal expenditures, involving three major cases, including the USWNT suit, between April 1, 2019 and March 31, 2020.

So far, U.S. Soccer has had the edge in the USWNT litigation. In granting summary judgment, Judge Klausner bluntly rejected USWNT's legal theory. He reasoned that “comparing what each team would have made under the other team's CBA is untenable in this case because it ignores the reality that the MNT and WNT bargained for different agreements, which reflect different preferences, and that the WNT explicitly rejected the terms they now seek to retroactively impose on themselves.” Judge Klausner also found that USWNT players earned more, not less, than USMNT players both cumulatively and on an average per-game basis.

Kessler and Saharsky aim to persuade a yet-to-be-named panel of three Ninth Circuit judges. They stress the panel will review the case “de novo”—a standard of review that will not be deferential to the ruling from Judge Klausner. They contend the judge erred by focusing on U.S. Soccer's total payments to the two teams, without taking into account differences in appearance fees and performance bonuses.

U.S. Soccer will file a reply brief by Sept. 22, but it could be well into the spring of 2022 or later before a panel hears oral arguments, and several months beyond that before ruling. The litigation could also settle at any point.

The wild card in the legal case could be upcoming CBA negotiations. The agreement between USWNT and U.S. Soccer expires on Dec. 31 of this year, and the labor talks could potentially resolve some of the conflicts in the court case. Wine said U.S. Soccer would like to settle and “lock arms with the women’s players” to fight together on issues such as better payouts from FIFA.

Kessler, who recently led Shawne Alston’s class action to a historic 9-0 Supreme Court victory against the NCAA, is no stranger to cases involving players in a union who use the courts to challenge the league. Five years ago, he litigated on behalf of Tom Brady in the Deflategate case. Kessler persuaded the district court that the NFL’s process was fundamentally unfair but lost on appeal. He’s also familiar with U.S. Soccer. Kessler was one of the attorneys on the losing side in U.S. Soccer’s recent victory against Relevent Sports, a soccer promotion company owned by Miami Dolphins owner Stephen Ross.

The USWNT’s appellate brief leads off by saying the team “is the best women’s soccer team in the world and one of the best sports teams in history.” None of the attorneys interviewed by *Sportico* believe the team’s Olympic disappointment will impact the case. But could the lackluster performance impact public support for USWNT?

“I hope that support for equality,” Kessler maintains, “is not so shallow that it depends on how a team performs in a tournament.”

This week in Japan, the USWNT’s run of on-field success ended in a fashion eerily reminiscent of how it began in 2011. In the waning minutes of the Olympic

semifinal against Canada, with the U.S. trailing 1-0, Rapinoe once again had the ball on the left side of the field, on her trusted left foot, and launched a perfect cross into the box in front of the net. Once again, a veteran star, Lloyd, made a well-timed leap for a header and directed it goalward. This time, though, the ball caromed off the crossbar, extinguishing the Americans' gold-medal hopes in what may be the last major competition for many of these players—Lloyd and Rapinoe among them.

As this history-making generation leaves the field, though, there are still some battles left, in court and at the negotiating table, awaiting the final whistle.