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Mediating the U.S. Women's Soccer Pay-Equity Dispute

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While the U.S. Women’s National Team (USWNT) battles on the soccer pitch for World Cup glory, it is in the midst of another battle – this one in the courtroom – for equal pay rights.

The USWNT has filed suit against its employer, the U.S. Soccer Federation (USSF), for violation of gender pay-equity laws. In the complaint, the USWNT alleges that it is paid less than the members of the men’s team, and that it also has inferior working conditions in the form of lower-quality travel accommodations and training facilities, solely on account of gender.

Last week the parties agreed to mediate their dispute after the conclusion of the World Cup. Here are my thoughts about mediating the dispute from the mediator’s perspective.

Timing of Mediation

As a mediator, one of the first things I think about when mediating a dispute is the timing of the mediation. The timing of the mediation can reveal much about the parties’ motives and posture. In this case, the mediation comes at a very early stage of the litigation. There has likely been little or no pre-trial discovery, which means that the parties have limited information to test their factual assertions and legal theories.

In an early mediation, a party facing costly litigation may be motivated to resolve the case quickly due to financial hardship. On the other hand, a party may be motivated to minimize its exposure if its case has major weaknesses (in other words, damage control).

In this case, the most glaring aspect of the timing of the mediation is that it was announced during the World Cup tournament. This was probably no coincidence. The USWNT has maximum exposure and goodwill while it is playing on the global stage. On the other hand, the USSF is on record with its disappointment over the timing of the announcement, characterizing it as an unwelcome distraction from the World Cup. If the USSF wants to avoid negative publicity, the USWNT may have significant leverage at the moment.

There is no right or wrong when it comes to the reasons for an early mediation. The most important thing is that the parties have had some dialogue about it, and that they have a general understanding about their expectations going in.

Key Legal Issues

Next, the mediator should have an understanding about the key legal issues in the dispute. In this case, unequal pay, by itself, does not establish a violation of the law. Rather, the USWNT must prove that the pay disparity between its players and the men is the result of intentional gender discrimination.

In response, the USSF argues that any pay disparity is the result of factors other than sex that are beyond its control. For example, the USSF contends that player compensation is based on prize money from soccer tournaments governed by FIFA (soccer's international governing body), and there is no dispute that the prize pool for the men's team dwarfs that of the USWNT. (Ironically, the USWNT is a dominant force in world soccer, whereas the men's team has always been an also-ran.)

The USSF also argues that compensation and working conditions were negotiated between the USSF and the players' union and memorialized in a collective bargaining agreement. Thus, a key threshold issue is whether the USWNT's claims are preempted by the terms of the collective bargaining agreement based on federal labor law. If the preemption argument has merit, the USWNT could be under significant pressure to resolve the case while it can.

Elements of the Settlement

Lastly, the mediator should be giving thought to the potential terms and conditions of a settlement. Here, the dispute is primarily over compensation. Thus, the negotiations will probably start with money. However, it's more complicated than that. Will there be a lump-sum payout, or changes to the pay scale over time? Must the terms of the collective bargaining agreement be modified? If so, how?

Even if the dispute is largely monetary in nature, there may still be non-monetary

components to consider. In this case, the USWNT alleges unequal working conditions. Accordingly, it may try to negotiate over things like the class of hotels the players stay in during road trips, the types of flights they take to away matches and the amenities available at training sessions. The mediator should be ready to explore the possibilities regarding such ancillary terms.

Conclusion

The lights are shining brightly on the USWNT as it competes at the Women's World Cup. For better or for worse, the USWNT's pay-equity lawsuit is also in the spotlight. However, if the USWNT can bring home the trophy and resolve its case against the USSF, it will be a win-win for everyone.

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