

3 Takeaways From 4th Circuit's Equal Pay Act Wage Ruling

By **Max Kutner**

Law360 (December 7, 2021, 7:04 PM EST) -- A Fourth Circuit ruling that the metric for determining sex-based discrimination under the Equal Pay Act is pay rate, not total wages, clarifies how courts should analyze such claims, workers' attorneys said, though management-side attorneys questioned how applicable the ruling is to other cases.



Alex Morgan, left, and the rest of the U.S. women's soccer team may use last week's Fourth Circuit ruling to bolster their case. (AP Photo/David Vincent)

In a published opinion Friday, an **appellate panel revived** former Tactile Systems Technology employee Tracy Sempowich's Equal Pay Act claim that Tactile paid her less than a comparable male colleague. Even if Sempowich's combined salary and commission earnings were higher than those of the male colleague, her underlying pay rate was lower, the panel said.

The opinion vacated a North Carolina federal district court judgment in favor of Tactile, doing business as medical device company Tactile Medical. Counsel and a spokesperson for the company did not respond to requests for comment.

"It provides some much-needed clarity," said Katie Abernethy of Noble Law, which represents Sempowich, "that it is not just eyeballing how much Joe got paid versus how much Jane got paid. It requires breaking down and looking at the components that make up total comp."

Here, Law360 looks at three key takeaways from the ruling.

Higher Commissions Don't Provide An Out

The ruling that underlying rates, including for commissions, are the metric for pay discrimination claims means employers need to make sure they are paying equally across different types of compensation, attorneys said.

"Today, compensation programs include things like commission plans, bonus plans, equity plans," Abernethy said. "And what this ruling ensures is that the Equal Pay Act has teeth not just in assessing overall compensation, but in ensuring a level playing field on all of those various components."

"For example, it is not okay under the Equal Pay Act for a corporation to, say, pay men a higher base salary but then to occasionally throw the women some stock options to try to eliminate the gap," Abernethy said.

Employers can't avoid Equal Pay Act requirements based on what an employee makes when the underlying rates are unequal, attorneys said.

"An employer cannot pay a female employee a lower salary than a similarly situated male employee and then hope to avoid liability when the female employee works hard enough to earn extra money through commissions or bonuses," said Chauniqua Young, of Outten & Golden LLP, who represents workers in discrimination cases.

As the U.S. Equal Employment Opportunity Commission pointed out in an amicus brief in the Fourth Circuit case, Young said, "you can't give up your claim by being successful."

But management-side attorneys said the Fourth Circuit panel's ruling raises questions about what happens when the rate for one form of compensation, such as salary, is higher for employees of one sex, and the rate for another form, such as commissions, is higher for employees of another sex.

"Say a woman has a lower base salary but a higher bonus," said Felicia Davis of management-side firm Paul Hastings LLP. "Does that mean that the man with the lower bonus now has an Equal Pay Act claim on the bonus even though his base is higher?"

"Do they each have an Equal Pay Act claim, one on the base and one on the bonus? That doesn't make sense," she said.

The Ruling Follows the Sixth Circuit

The Fourth Circuit panel's opinion is consistent with previous rulings on what components form the basis of an Equal Pay Act claim, attorneys said.

"It contributes to the body of case law here," said Melinda Koster, of Sanford Heisler Sharp LLP, who represents workers in discrimination suits. "Now we have a Fourth Circuit decision that's definitively stating that the wage rates as opposed to total compensation is the relevant metric."

One of those previous decisions was in the Sixth Circuit in [Bence v. Detroit Health Corp.](#) , which the EEOC cited in its amicus brief in the Fourth Circuit case.

In *Bence*, a Sixth Circuit panel majority held in 1983 that a health spa could not pay female employees a lower commission rate than it paid to male employees and expect the former to make up the difference, saying the Equal Pay Act hinged on equal rates, not equal total remuneration.

The Fourth Circuit panel's holding is also consistent with the text of the Equal Pay Act and the EEOC's regulatory guidelines, Koster said.

The decision is in line with "the standards that are already laid out in the statute and the EEOC regulations and compliance manual," Koster said.

A Potential Impact for Women's Soccer Players

An Equal Pay Act issue is pending before the Ninth Circuit, where members of the U.S. women's national soccer team **have appealed a May 2020 ruling** that their pay discrimination claim failed because they earned more than the men's national soccer team players did.

The women's team players **argued in their opening appeal brief** in their case against the United States Soccer Federation that they received lower appearance fees and performance bonuses, regardless of total pay, and that Equal Pay Act claims hinge on underlying rates.

Worker-side attorneys said they expected the soccer players to cite the Fourth Circuit panel ruling in future arguments.

"If they're going to follow the Fourth Circuit, what the Ninth Circuit would be doing is pulling apart the various components that make up total compensation and comparing those," Abernethy said. "So they would compare bonuses to bonuses, they would compare base pay to base pay."

The analysis in the soccer case could be similar to the one in the Fourth Circuit case, said Koster from Sanford Heisler Sharp.

"If an employee earns more because they made more sales, or if, in the case of the women's soccer team, they won more games, there's still an EPA violation if their rate is lower," Koster said.

Jamie Wine, of Latham & Watkins LLP, who represents U.S. Soccer, said the Fourth Circuit ruling should have no bearing on the soccer case because of the different fact patterns, including when it comes to pay components she said were negotiated as part of the players' collective bargaining agreements.

"The facts of Sempowich are nowhere close to the facts of our case," Wine said.

The Fourth Circuit case involved only base salary and commissions, whereas the soccer case involves many different pay components, some of which had the women's team making less than the men's team, and others for which the men's team made less, Wine said. To apply the Fourth Circuit standard "would mean that U.S. soccer was discriminating against the women and the men at the exact same time," Wine said.

In a statement Monday, Nicole Saharsky of Mayer Brown LLP, which represents the women's team players, said, "We're glad to see the Fourth Circuit has affirmed what our clients have long understood: If a woman has to work more than a man and be much more successful than him to earn about the same pay, that is not equal pay and it violates the law."

The case is Tracy Sempowich v. Tactile Systems Technology, case number 20-2245, in the U.S. Court of Appeals for the Fourth Circuit.

--Additional reporting by Rachel Scharf. Editing by Roy LeBlanc.