

Comments

Superior Play, Unequal Pay: U.S. Women's Soccer and the Pursuit for Pay Equity

By HONEY CAMPBELL*

Introduction

THE YEAR 2016 has proven to be a monumental year for women: The United States witnessed its first female Presidential candidate from a major party; women currently occupy fifty-one percent of management and professional related positions in the labor force; and a growing number of women are occupying CEO positions at the Standard & Poor's 500 Index, "S&P 500 Companies."¹ "S&P" 500 is a market value weighed index and has become one of the most preferred indexes for US stocks.² While these statistics reflect the growing work force equality among men and women, unequal pay equity remains a serious problem for women. In 2015, women working full-time in the United States were paid only eighty percent of what male full-time workers were paid.³ In addition to the eighty percent national pay gap, pay gaps were also calculated for each state. In 2015, New York had the smallest pay gap, where female full-time workers were paid eighty-nine percent of what male full-time workers were paid. The

* Juris Doctor candidate, Class of 2017, University of San Francisco, School of Law; B.A., 2014, University of Georgia. Special thanks to Professor Maria L. Ontiveros for her guidance and support in developing this article. Also, many thanks to Crystal M. Pizano and the University of San Francisco Law Review for their assistance.

1. *Statistical Overview of Women in the Workforce*, CATALYST, (Apr. 6, 2016), http://www.catalyst.org/knowledge/statistical-overview-women-workforce#footnote30_4hkxu80 [<https://perma.cc/RUX4-2QK6>].

2. *Standard & Poor's 500 Index—S&P 500*, INVESTOPEDIA, <http://www.investopedia.com/terms/s/sp500.asp>. (last visited Feb. 23, 2017) [<https://perma.cc/KN3G-9979>].

3. Kevin Miller, *The Simple Truth About the Gender Pay Gap*, AAUW, <http://www.aauw.org/research/the-simple-truth-about-the-gender-pay-gap/> (last visited Dec. 3, 2016) [<https://perma.cc/22RN-R5FK0>].

largest pay gap was in Wyoming where women there earned just sixty-four percent of what men earned.⁴ While these numbers are very discouraging, gender pay inequity is even more startling in professional sports. In 1993, the amount earned by female professional athletes was remarkably lower than that received by male professional athletes.⁵ Additionally, wage discrimination between male and female professional athletes is widespread among all sports and affects athletes who compete both in an individual capacity and on a team. In 2014, the Professional Golf Association (“PGA”) awarded over \$340 million in prize money for the PGA tour, which was over five times that of the \$61.6 million awarded for the 2015 Ladies Professional Golf Association (“LPGA”) tour.⁶ In 2015, the Women’s National Basketball Association (“WNBA”) had a minimum salary of \$38,000 and a maximum salary of \$109,500.⁷ The WNBA team salary cap for 2012 was \$878,000.⁸ The National Basketball Association (“NBA”) had a minimum salary of \$525,093 in the 2015-2016 season and a maximum salary of \$16.4 million.⁹ In the 2015-2016 season the NBA team salary cap reached a historic high of \$70 million.¹⁰

Despite these concerning statistics, efforts to eliminate pay inequality for female professional athletes have been largely unsuccessful. This lack of success is due to the fact that most female professional athletes are not employed by the same associations as their male counterparts.¹¹ Because the athletes do not share the same employer, they cannot claim that the employer is discriminating among its employees. Furthermore, the associations and teams have been able to justify disproportionate wages by arguing that male athletes generate more revenue than female athletes, and that the skills required by male and

4. *Id.*

5. Syda Kosofsky, *Toward Gender Equality in Professional Sports*, 4 HASTINGS WOMEN’S L.J. 209 (1993).

6. Andrew Brennan, *Which Sports Have the Largest and Smallest Pay Gaps?*, FORBES (May 5, 2016), <http://www.forbes.com/sites/andrewbrennan/2016/05/05/the-pay-discrimination-in-sports-we-wish-didnt-exist-will-only-dissipate-with-womens-leadership/#1cad3f2e41d6> [https://perma.cc/98FF-MSZ8].

7. John Walters, *Taking a Closer Look at the Gender Pay Gap in Sports*, NEWSWEEK (Apr. 1, 2016), <http://www.newsweek.com/womens-soccer-suit-underscores-sports-gender-pay-gap-443137> [https://perma.cc/LCS8-97UR].

8. Brennan, *supra* note 6.

9. *Id.*

10. *Id.*

11. Gabriella Levine, *Analysis: The Law and Legal Standing of U.S. Women’s National Team EEOC Complaint, Explained*, EXCELLE SPORTS (Apr. 1, 2016), [http://www.excellesports.com/news/analysis-unique-legal-standing-underpinning-u-s-womens-national-te . . .](http://www.excellesports.com/news/analysis-unique-legal-standing-underpinning-u-s-womens-national-te...) [https://perma.cc/7FR8-9DE7].

female athletes are not equal.¹² Unequal pay equity between male and female athletes is discouraging, and the futile efforts to eliminate the disparities are even more discouraging. However, due to the efforts of the United States' Women's National Soccer team ("WNT"), this stalemate female athletes face will likely change in the near future.

On March 29, 2016, five key players from the U.S. WNT filed a complaint with the Equal Employment Opportunity Commission ("EEOC") accusing the U.S. Soccer Federation ("USSF") of wage discrimination.¹³ In their complaint, the women allege that the WNT is paid nearly four times less than the U.S. Men's National Team ("MNT"), despite generating almost 20 million dollars of revenue for the USSF in 2015.¹⁴ The WNT claims that they are discriminated against because of their sex, violating Title VII of the Civil Rights Act of 1964 and the Equal Pay Act ("EPA")¹⁵ In its response, USSF argues that it did not violate Title VII or the EPA, and that the wage disparities between the WNT and the MNT are justified for multiple reasons.¹⁶ Specifically, USSF claims that (1) the MNT generates more revenue than the WNT, (2) the WNT negotiated a different salary structure than the MNT, and (3) the WNT and the MNT's collective bargaining agreements were negotiated at different times.¹⁷ Additionally, the USSF argues that it has continuously been a strong supporter of women's soccer, further illustrating that it has not discriminated on the basis of gender, and has thus not violated Title VII or the EPA.¹⁸

At first glance, the WNT's case may seem like the "classic" pay equity case in professional athletics: a case in which female athletes are paid substantially less than their male counterparts, yet the dispar-

12. *Id.*

13. Juliet Spies-Gans, *USWNT Files Lawsuit Against U.S. Soccer In Fight For Equal Pay*, HUFFINGTON POST (Mar. 31, 2016), http://www.huffingtonpost.com/entry/uswnt-wage-discriminatory-suit-us-soccer_us_56fd33c3e4b0a06d5804ecac (scroll down on webpage to find link for complaint) [<https://perma.cc/9J7H-XQH6>]. Due to EEOC procedures, case citations for ongoing investigations are not made public, though a version of the complaint is available online. *See id.*; see also Attachment A, GOOGLE DOCS, <https://docs.google.com/viewerng/viewer?url=ftp://big.assets.huffingtonpost.com/EEOCCharge.pdf> (last visited Apr. 23, 2017) [hereinafter Complaint] [<https://perma.cc/2Q6W-CFK6>].

14. Grant Wahl, *USWNT Stars Accuse U.S. Soccer of Wage Discrimination in EEOC Filing*, SPORTS ILLUSTRATED (Mar. 31, 2016), <http://www.si.com/planet-futbol/2016/03/31/uswnt-eeoc-wage-discrimination-equal-pay> [<https://perma.cc/82NA-97JK>].

15. Complaint, *supra* note 13.

16. Stephanie Yang, *Understanding USSF's Response to the USWNT Wage Complaint*, STARS-ANDSTRIPESFC (June 1, 2016), <http://www.starsandstripesfc.com/2016/6/1/11827482/understanding-us-soccer-response-uswnt-eeoc-wage-complaint> [<https://perma.cc/4FYJ-7YS8>].

17. *Id.*

18. *Id.*

ity is justified because the women's leagues aren't as profitable or as popular as the men's leagues.¹⁹ However, this is not the case for the WNT. The WNT currently generates more revenue than the MNT, has a larger fan base than the MNT, and has been more successful than the MNT.²⁰ Additionally, the WNT and MNT are both employed by the USSF. These factors make the WNT's case extremely unique and, for the first time ever, a professional female sports team could succeed in an EPA case. If the WNT prevails in its case, the outcome will undoubtedly impact the entire professional sports industry. Even if the women do not prevail in their case, their efforts to achieve equal pay will nevertheless have a profound impact on professional athletics.

This Comment will examine gender pay inequity in professional sports. More specifically, it will address the WNT's pay equity case and the likelihood that the women will prevail. Part I discusses gender inequality in professional sports and the lack of opportunities that have been available to female athletes. This portion also describes the world of soccer and the unique characteristics attributable to the league. Part I concludes by introducing the WNT's complaint, which was filed with the EEOC, and the USSF's response to the claim. Part II discusses the EPA and the necessary elements a plaintiff must prove in order to establish a *prima facie* case against an employer, as well as the affirmative defenses available to an employer. Part III presents an analysis of the WNT's EPA claim. This section applies the facts of the case to each element of the EPA in order to determine if the WNT will establish a *prima facie* case. This section also analyzes the USSF's response to the claim and whether or not the wage differences will be justified through one of the enumerated defenses. Finally, this Comment concludes that the WNT has a very strong case, and that the WNT will likely prevail in future proceedings. This section also discusses the impact that the case's outcome will have on the professional sports industry and what this means going forward.

I. Description of Controversy

Throughout history, professional female athletes have had limited opportunities compared to their male counterparts.²¹ Very few professional women's sports leagues featuring team sports have been

19. Levine, *supra* note 11.

20. See Complaint, *supra* note 13, at 1. See generally *Annual General Meeting Book of Reports*, U.S. SOCCER FED'N (Feb. 29, 2016), <http://resources.ussoccer.com/images/160127-AGM-PDF-FINAL.pdf> [<https://perma.cc/TR49-2ZSH>].

21. Kosofsky, *supra* note 5, at 210.

founded, and of those have, many of them have not survived.²² Thus, most opportunities for female professional athletes have been in individual sports.²³ While individual sports do provide more opportunities to female professional athletes, even these opportunities have still been limited.²⁴ In addition to the lack of career opportunities available to women in professional team sports and the relatively few opportunities available in individual sports, pay inequality has also prevented female professional athletes from enjoying the same opportunities as male professional athletes.²⁵ Although the EPA was enacted in 1963 to eliminate gender based wage disparities, female athletes have continuously been compensated less than their male counterparts.²⁶ For example, in 1998 the LPGA Player of the Year won four tournaments and received \$1,092,748.²⁷ If she had been playing on the men's tour, this salary would have landed her in 24th place for earnings.²⁸ In 2015, the U.S. Women's Open tournament had a total purse of \$4.5 million, and the winner received \$810,000, but the Men's U.S. Open had a total purse of \$10 million, and the winner received \$1.8 million.²⁹ Although some organizations have taken steps to eliminate the wage gap, these statistics demonstrate that the gender pay inequity remains a serious issue in professional sports.

Countless factors contribute to the wage disparities. For instance, when a separate division is established for women in a professional sport, the amount paid to the female winner is often lower than the amount paid to the winner of the men's division.³⁰ The pay differentials have been justified by citing to the differences between male and female athlete's skills and/or the quality of their performances.³¹ The professional sports industry has also justified paying lower wages to female athletes by arguing that female athletes generate less revenue than male athletes.³² The highest paid WNBA player makes approxi-

22. *Id.*

23. *Id.* at 211.

24. *Id.*

25. *Id.* at 211–12.

26. John Gettings, *The Wage Gap in Pro Sports: Will Equal Pay for Women Arrive in the Sports World?*, INFOPLEASE <http://www.infoplease.com/spot/sptwagegap1.html> (last visited Jan. 31, 2017) [<https://perma.cc/QZ8V-QV54>].

27. *Id.*

28. *Id.*

29. Brennan, *supra* note 6.

30. Kosofsky, *supra* note 5, at 213.

31. *Id.* at 210.

32. Levine, *supra* note 11.

mately one-fifth of what the lowest paid NBA player makes.³³ However, the NBA generates billions of dollars' worth of revenue annually, while the WNBA barely breaks even.³⁴ ESPN and Turner Sports pay the NBA \$2.6 billion annually to televise the NBA, but only pays the WNBA \$12 million annually for rights fees.³⁵ The lack of media coverage for female athletes further contributes to the wage disparity. If the media were to treat female athletes with the same respect as their male counterparts, and provide them with equal time in the spotlight, it would foster a new socialization process in which male and female athletes are considered equal. As a result, female athletes would receive equal opportunities and pay.³⁶

A. Description of the World of Soccer

The professional soccer industry in the United States is quite different than other professional sports leagues, and the unique characteristics attributable to the league contribute to the viability of the WNT's EPA claim. Unlike other professional sports leagues, the USSF employs both the WNT and the MNT. Other professional associations, such as the NBA and the WNBA, are treated as two separate legal entities because they do not share employers. Thus, unlike the WNT, WNBA players would not have any basis to sue in an EPA case against the NBA.³⁷

Additionally, the WNT has earned unparalleled success in international soccer.³⁸ Overall, the team has won three World Cup titles and four Olympic gold medals.³⁹ This accomplishment is one that no other men or women's team in any other country has earned in Olympic competition.⁴⁰ Furthermore, the WNT has achieved numerous first place wins in other prestigious international tournaments.⁴¹ The team is currently ranked number one in the world, and it has remained in this position on a near continuous basis for the past

33. Brennan, *supra* note 6.

34. *Id.*

35. *Id.*

36. Kosofsky, *supra* note 5, at 226.

37. Gabriella Levine, *ANALYSIS: The Law and Legal Standing of U.S. Women's National Team EEOC Complaint, Explained*, EXCELLE SPORTS (Apr. 1, 2016), <http://www.excellesports.com/news/analysis-unique-legal-standing-underpinning-u-s-womens-national-team-eoc-complaint/> [https://perma.cc/TGS6-4HY8].

38. *See* Complaint, *supra* note 13.

39. *Id.*

40. *Id.*

41. *Id.*

seven years.⁴² While the men's national team has also been successful, its success has been relatively minimal in comparison to the women's. The closest that the MNT has come to winning the World Cup was in 1930, when it finished in third place.⁴³

While male professional athletes generally enjoy a larger fan base and occupy more media attention than female athletes, the same cannot be said for professional soccer players. When the WNT won its third World Cup title on July 5, 2015, approximately 25.4 million viewers tuned in to the game, making it the most watched soccer game in the history of American television.⁴⁴ After winning the 2015 World Cup, the women's team commenced a post-cup victory tour, which attracted tens of thousands of fans to soccer stadiums across the United States and generated tens of millions of dollars' worth of revenue.⁴⁵ Additionally, the women's team built an extremely large fan base via social media throughout the tournament.⁴⁶ For instance, the WNT's Twitter audience increased seventy-one percent during this time, from 286,000 followers to 490,000.⁴⁷ Currently, the WNT's Twitter account has more followers than the WNBA, the LPGA, and the WTA accounts.⁴⁸ Furthermore, U.S. Soccer's Facebook profile increased twenty percent during the tournament, from 2 million to 2.4 million followers, and generated over 545 million impressions.⁴⁹

In addition to enjoying a large fan base, the WNT also generates millions of dollars in revenue for the USSF.⁵⁰ According to the USSF's

42. *Id.*

43. Colin Jose, *Where It All Began: The Story of the 1930 U.S. World Cup Squad*, "The Shot-Putters", U.S. SOCCER (Jan. 9, 2002), <http://www.ussoccer.com/stories/2014/03/17/11/25/where-it-all-began-the-story-of-the-1930-us-world-...> [https://perma.cc/7WUY-EBFJ].

44. Richard Sandomir, *Women's World Cup Final Was Most-Watched Soccer Game in United States History*, N.Y. TIMES (July 6, 2015), <https://www.nytimes.com/2015/07/07/sports/soccer/womens-world-cup-final-was-most-watched-soccer-game-...> [https://perma.cc/Q48G-AXXW].

45. Andrew Das, *Pay Disparity in U.S. Soccer? It's Complicated*, N.Y. TIMES (Apr. 21, 2016), <https://www.nytimes.com/2016/04/22/sports/soccer/usmnt-uswnt-soccer-equal-pay.html> [https://perma.cc/52AE-PFA8].

46. U.S. SOCCER FED'N, *supra* note 20, at 55.

47. *Id.*

48. Compare U.S. Soccer WNT (@ussoccer_wnt), TWITTER, https://twitter.com/ussoccer_wnt?ref_src=TWsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor (last visited Nov. 30, 2016) [https://perma.cc/L86D-6PNY], with LPGA (@LPGA), TWITTER, <https://twitter.com/lpga> (last visited Mar. 25, 2016) [https://perma.cc/JX5R-PSY2], and WNBA (@WNBA), TWITTER, <https://twitter.com/wnba?lang=EN> (last visited Mar. 25, 2016) [https://perma.cc/8PL5-6KMP], and WTA (@WTA), TWITTER, <https://twitter.com/wta> (last visited Mar. 25, 2016).

49. U.S. SOCCER FED'N, *supra* note 20, at 55.

50. Complaint, *supra* note 13, at 1.

2016 Annual Report, it originally estimated a combined net loss for the men's and women's national teams of \$429,929 for the 2016 fiscal year (April 1, 2015 – March 31, 2016).⁵¹ However, at the U.S. Soccer 2016 Annual General Meeting, the USSF projected a \$17.7 million profit in connection with the teams, due largely to the success of the WNT.⁵² Furthermore, the USSF projects a net profit from the WNT of nearly \$5 million for the 2017 fiscal year, and a net loss of approximately \$1 million for the MNT.⁵³

B. The WNT's Equal Pay Act Claim

On March 29, 2016, Alex Morgan, Hope Solo, Carli Lloyd, Megan Rapinoe, and Rebecca Sauerbrunn—five of the WNT's most prominent players—filed a complaint with the EEOC alleging that the USSF engaged in wage discrimination based on sex in violation of Title VII of the Civil Rights Act of 1964 and the EPA.⁵⁴ In their complaint, the women claim that, despite their on-field accomplishments and revenue generation, neither they nor their fellow teammates have received equal or better pay than MNT players.⁵⁵ Moreover, they state that they are strikingly undercompensated in comparison to MNT players, despite the fact that the USSF is bound by federal law to compensate the two teams equally.⁵⁶ The women argue that the USSF's obligation to pay them at least equally stems from the fact that the men and women perform the same job duties; have jobs that require equal skill, effort, and responsibilities; and perform their jobs under similar working conditions.⁵⁷ According to the women, there are no legitimate non-discriminatory reasons for the gross disparity of wages, and it cannot be justified by a bona fide seniority system, merit or incentive system, or any other factor other than sex.⁵⁸

C. The USSF's Response to the Equal Pay Act Claim

In response to the WNT's complaint, the USSF asked the EEOC to dismiss the complaint, stating that there was no evidence that USSF

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 3–4.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 3.

had acted with a discriminatory motive or was in violation of the law.⁵⁹ According to USSF, the differences in wages between MNT players and WNT players are due to the fact that: (1) the MNT generates more revenue than the WNT; (2) the WNT chose to negotiate for a guaranteed salary, rather than the MNT's paid-by-appearance model; and (3) the MNT and WNT negotiated their respective collective bargaining agreements at different times, so one team's compensation may sometimes lag behind the other's.⁶⁰ Additionally, the USSF claims that compensation between MNT and WNT players differs because of the allocation of World Cup bonuses, which are awarded by FIFA.⁶¹ The USSF argues that these compensation factors, in addition to the fact that it has continuously been a "strong supporter" of women's soccer, is evidence that it is not discriminating on the basis of gender and has thus not violated Title VII or the Equal Pay Act.⁶²

II. Equal Pay Act

The Equal Pay Act, which was enacted in 1963 as an amendment to the Fair Labor Standards Act ("FLSA"), prohibits sex-based wage differentials and requires employers to provide equal pay for equal work.⁶³ In order to establish a prima facie case against an employer, a plaintiff must prove that (1) in the same establishment, (2) the employer pays different wages to employees who are of the opposite sex, (3) who perform equal work on jobs requiring equal skill, effort, and responsibility, and (4) the jobs are performed under similar working conditions.⁶⁴ Unlike a Title VII claim of disparate treatment, proof of an employer's discriminatory intent is not required to prove a violation under the EPA.⁶⁵ Once a plaintiff establishes a prima facie case for relief, the burden shifts to the employer to justify the wage differ-

59. Anne M. Peterson, *U.S. Soccer Asks EEOC to Dismiss Wage Discrimination Complaint*, THE BIG STORY (May 31, 2016), <http://bigstory.ap.org/article/48a059bbda5c4c07adbeff6bea5379ff/us-soccer-files-response-eeoc-claim-wage-discrimination> [https://perma.cc/4272-ZD82].

60. Yang, *supra* note 16.

61. Melissa Isaacson, *U.S. Soccer Federation says USWNT Earns Only 2.2 Percent Less Than Men*, ESPN (Apr. 21, 2016), <http://www.espn.com/espnw/sports/article/15277241/us-soccer-federation-says-uswnt-earns-only-22-percent-less-men> [https://perma.cc/4AAR-63V5].

62. Yang, *supra* note 16.

63. Kosofsky, *supra* note 5, at 210.

64. MARIA L. ONTIVEROS, ROBERTO L. CORRADA, MICHAEL SELMI, & MELISSA HART, *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE* (2016).

65. *Id.* at 379.

ence through one of the affirmative defenses identified in the Act.⁶⁶ An employer may escape liability where the wage differentials are made pursuant to (1) a seniority system, (2) a merit system, (3) a system which measures earnings by quantity or quality of production, or (4) a differential based on any other factor other than sex.⁶⁷

A. Plaintiff's Prima Facie Case

1. In the Same Establishment

The EPA provides that an employer must not pay different wages to employees of the opposite sex, only when the employees are employed in the same “establishment.”⁶⁸ The FLSA does not specifically define the term establishment, but in a case interpreting the FLSA, the Supreme Court held that establishment means what it normally means in business and government—a distinct physical place of business.⁶⁹ However, under the EPA, courts have construed this requirement quite broadly.⁷⁰ For example, where an employer maintains centralized control and administration of separate job sites, it will usually be considered a single establishment under the EPA.⁷¹ The EEOC has also sought to clarify the term establishment. According to the EEOC, absent evidence of unusual circumstances, it is presumed that establishment is a distinct physical place of business rather than an entire business or “enterprise,” which may include several separate places of business.⁷² However, the EEOC further suggests that unusual circumstances may call for two or more distinct physical portions of a business enterprise to be treated as a separate establishment.⁷³

2. Unequal Pay to Employees of the Opposite Sex

Under the EPA, the term “wages” is construed quite broadly, and it typically includes all payments made to, or on behalf of, an employee as remuneration for employment.⁷⁴ Thus, the term wages includes all forms of compensation, regardless of the time of payment and whether it is referred to as wages, salary, profit sharing, expense

66. Mel Narol & Joseph A. Martin, *A New Defense to the Old Defenses*, 9 MARQ. SPORTS L.J. 175, 177 (1998).

67. 29 U.S.C. § 206(d) (2016).

68. *Id.* § 206(d)(1).

69. A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 496 (1945).

70. *Id.*

71. Mulhall v. Advance Sec., Inc., 19 F.3d 586, 591–92 (11th Cir. 1994).

72. 29 C.F.R. § 1620.9(a) (2016).

73. *Id.* § 1620.9(b).

74. *Id.* § 1620.10 (2016).

account, monthly minimum, bonus, uniform cleaning allowance, hotel accommodations, use of a company car, gasoline allowance, or some other alternative name.⁷⁵ When interpreting the term wages under the EPA, courts have held that wages include the value of goods or services that employees receive, such as lodging or uniforms that are not provided predominately for the benefit or convenience of the employer.⁷⁶ Furthermore, to establish a prima facie case, a plaintiff need only prove an unequal rate of pay, not unequal total remuneration.⁷⁷

Selecting an appropriate opposite-sex comparator is a crucial step in establishing a prima facie case under the EPA.⁷⁸ When determining whether a comparator is appropriate, the focus is on the employee's actual job requirements and duties and not the job's classification or title.⁷⁹ Courts have held that a plaintiff establishes a prima facie case by comparing the jobs occupied by the male and female employees and by illustrating that the jobs are substantially equal.⁸⁰ The court determines a case by comparing the skills and qualifications of the individual employees occupying those jobs.⁸¹ Furthermore, when the plaintiff proves that she earned less than comparators she selected, but there is evidence that she earned more than comparators she failed to include, some courts have held that the plaintiff will nevertheless satisfy this element.⁸²

3. Equal Work

In order to establish a violation of the EPA, a plaintiff must prove that different wages are paid for equal work.⁸³ However, a plaintiff does not need to show that the employee's work is identical in every aspect. Instead, a plaintiff only needs to prove that the work requires substantially equal skill, effort, and responsibility.⁸⁴ In determining whether two positions are substantially equal, courts will consider the

75. *Id.*

76. *Laffey v. Northwest Airlines, Inc.*, 642 F.2d 578, 588 (D.C. Cir. 1980).

77. *Bence v. Detroit Health Corp.*, 712 F.2d 1024, 1027-28 (6th Cir. 1983).

78. *Id.* at 1029.

79. *Beck-Wilson v. Principi*, 441 F.3d 353, 362 (6th Cir. 2006).

80. *Id.*

81. *Id.*

82. *Hutchins v. Int'l Bhd. Of Teamsters*, 177 F.3d 1076, 1081 (8th Cir. 1999).

83. 29 U.S.C. § 206(d)(1) (2016).

84. 29 C.F.R. § 1620.14(a) (2016).

duties actually executed in each job, not the title or job description used by the employer.⁸⁵

“Skill” must be measured in terms of the performance requirements of the job, and a variety of factors must be considered when evaluating whether two jobs require equal skill. Such factors include experience, training, education, and ability.⁸⁶ Additionally, if an employee must have essentially the same skill in order to perform either of the two positions, the positions will satisfy the equal skill requirement, even if the employee may not exercise the required skill as frequently as the other employee.⁸⁷

“Effort” concerns the measurement of the mental or physical exertion needed for the performance of a job and it also encompasses the total requirements of a job.⁸⁸ Job factors which create mental fatigue and stress, as well as those that alleviate fatigue, are considered in determining the effort required by a job.⁸⁹ Furthermore, where a job is otherwise equal under the EPA, and there is no substantial difference in the degree or amount of effort which must be exerted in performing the two jobs, it will likely be found that the two require equal effort in their performance even though the effort may be exerted in different ways.⁹⁰

“Responsibility” concerns the degree of accountability that is required in the performance of a job, with emphasis on the importance of the job obligation.⁹¹ Differences in the amount of responsibility required in the performance of jobs cover a wide variety of situations.⁹²

4. Jobs Performed Under Similar Working Conditions

In order to determine whether working conditions are similar, the EPA applies a flexible standard of similarity.⁹³ Additionally, a practical judgment is necessary to determine whether the differences in working conditions are the type customarily taken into consideration in setting wage levels.⁹⁴ For a plaintiff to establish that she and her

85. *Cullen v. Ind. Univ. Bd. of Trs.*, 338 F.3d 693, 700 (7th Cir. 2003) (quoting *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1461 (7th Cir.1994)).

86. 29 C.F.R. § 1620.15 (2016).

87. *Id.*

88. *Id.* § 1620.16.

89. *Id.*

90. *Id.*

91. *Id.* § 1620.17.

92. *Id.*

93. *Id.* § 1620.18(a).

94. *Id.*

male counterpart work under “similar working conditions,” she must prove that the jobs are performed in the same surroundings and expose employees to the same hazards.⁹⁵ “Surroundings” encompass the frequency and intensity of elements that employees regularly encounter, such as fumes or toxic chemicals.⁹⁶ “Hazards” include the physical hazards that employees encounter, their frequency, and the severity of injury that they can cause.⁹⁷ Typically, jobs that require equal skill, effort, and responsibility are likely to be performed under similar working conditions.⁹⁸

B. Employer’s Defenses

Once a plaintiff establishes a prima facie case for relief, the burden of proof shifts to the defendant to show that one of the Act’s enumerated affirmative defenses justifies the difference in pay.⁹⁹ An employer may escape liability where the wage differentials are made pursuant to (1) a seniority system, (2) a merit system, (3) a system which measures earnings by quantity or quality of production, or (4) a differential based on any other factor other than sex.¹⁰⁰

An employer may pay different wages to employees of the opposite sex, provided that the wages are paid pursuant to a nondiscriminatory seniority system.¹⁰¹ In order to satisfy this requirement, an employer must prove that under the system pay standards are objective and that sex provides no basis for the difference in pay to employees.¹⁰²

Additionally, an employer may defend itself upon the grounds that the different wages were paid to male and female employees pursuant to a bona fide, nondiscriminatory merit system.¹⁰³ To establish that a merit system is legitimate, an employer must prove that the system provides terms and criteria by which the employee merit is rewarded.¹⁰⁴ To satisfy this, an employer is not required to create a

95. *Corning Glass Works v. Brennan*, 417 U.S. 188, 202 (1974).

96. 29 C.F.R. § 1620.18(a) (2016).

97. *Id.*

98. *Id.* § 1620.18(b).

99. *Id.* § 206(d)(1).

100. *Id.*

101. *Brennan*, 417 U.S. at 204.

102. *Brennan v. Victoria Bank & Tr. Co.*, 493 F.2d 896, 901 (5th Cir. 1974) (quoting *Hodgson v. Brookhaven General Hosp.*, 436 F.2d 719, 726 (1970)).

103. *Ryduchowski v. Port Auth. of N.Y. & N. J.*, 203 F.3d 135, 142 (2000).

104. *Id.* at 143.

formal, written evaluation system.¹⁰⁵ However, there must be an organized and structured procedure whereby employees are systematically evaluated according to predetermined criteria.¹⁰⁶ The employer must show that the employees were aware of the evaluation procedure if it is not in writing.¹⁰⁷

Under the EPA, an employer may pay different wages to male and female employees who are doing equal work provided that the pay discrepancy is a result of a system which measures earnings by quantity or quality of production.¹⁰⁸ For purposes of this defense, it is presumed that the productivity of both male and female employees will be measured by the same criteria and that both will be paid equally for equal production.¹⁰⁹ In addition, if employees of one sex are required to produce more in order to receive the same pay as employees of the opposite sex, the system will not qualify as a bona fide, non sex-based pay system.¹¹⁰

Even if an employer cannot prove that a difference in pay between male and female employees is based on a seniority system, merit system, or system of production, they may still escape liability under the EPA if the difference in pay is based on a factor other than sex.¹¹¹ This fourth defense has been susceptible to various interpretations, and the courts have struggled to develop appropriate standards for the defense.¹¹² For instance, the federal courts have developed conflicting approaches in cases involving pay disparities based on prior salaries, market demand, and legitimate business considerations.¹¹³ In *Wernsing v. Department of Human Services*,¹¹⁴ the Seventh Circuit held that the EPA does not authorize federal courts to establish their own standards of acceptable business practices. According to Judge Easterbrook, the statute asks whether the employer has a reason other than sex and not whether the employer has a “good” reason.¹¹⁵ Thus, the

105. *Equal Emp't Opportunity Comm'n v. Aetna Ins. Co.*, 616 F.2d 719, 725 (4th Cir. 1980).

106. *Id.*

107. *Id.*

108. 29 U.S.C. 206(d)(1) (2016).

109. *Bence v. Detroit Health Corp.*, 712 F.2d at 1027 (6th Cir. 1983).

110. *Id.* at 1029.

111. 29 U.S.C. 206(d)(1).

112. ONTIVEROS, ET. AL., *supra* note 64, at 380.

113. *Id.* at 383.

114. *Wernsing v. Dept. of Hum. Servs., of Illinois*, 427 F.3d 466, 468 (7th Cir. 2005).

115. *Id.*

Seventh Circuit would not prohibit an employer from relying on competitive markets to set salaries.¹¹⁶

Although some courts allow an employer to rely on competitive markets to set salaries, an employer may not escape liability by merely pointing to the existence of a collective bargaining agreement.¹¹⁷ Per Title 29 Section 1620.23 of the Code of Federal Regulations, the establishment of unequal pay rates by collective bargaining, or the inclusion of unequal pay rates in a collective bargaining agreement, does not constitute a defense for employers or labor organizations.¹¹⁸ Moreover, provisions in a collective bargaining agreement, which provide for unequal rates of pay in conflict with the EPA, are null and void.¹¹⁹

An employer's success with satisfying its burden of proof largely depends on the facts of the case and on the federal circuit in which the employer is located. If the employer can establish that one of these enumerated defenses justifies the wage disparities, then the plaintiff's EPA claim will fail.¹²⁰

III. Analysis of the WNT's Case Under the EPA

A. Prima Facie Case

1. In the Same Establishment

In order to succeed on its EPA claim, the WNT players first must prove that they are employed in the same establishment as the MNT players. In the case at hand, the women have been employees of the USSF since each of them were selected to play on the WNT.¹²¹ At all times relevant to their charge of discrimination, the USSF has also employed and continues to employ individuals selected to play on the MNT.¹²² Because courts generally construe "in the same establishment" broadly under the EPA, and because it is not disputed that the USSF employs both MNT players and WNT players, this element will likely be satisfied.

116. *Id.* at 469.

117. 29 C.F.R. § 1620.23 (2016).

118. *Id.*

119. *Id.*

120. *Id.* § 1620.10.

121. Complaint, *supra* note 13, at 1.

122. *Id.*

2. Unequal Pay to Employees of the Opposite Sex

Once it is determined that both teams are under the same establishment, the WNT must prove that the USSF pays different wages to MNT players who are of the opposite sex.¹²³ As noted above, the term “wages” is construed broadly under the EPA, and it typically includes all payments made to, or on behalf of an employee as remuneration for employment.¹²⁴ Additionally, when determining whether a comparator is appropriate, the focus is on the employee’s actual job requirements and duties and not the job’s classification or title.¹²⁵

In their complaint, the women explain that the USSF’s compensation structure for the MNT and WNT can generally be divided into four categories. These categories include: (1) compensation for Friendlies; (2) World-Cup-related compensation; (3) Olympics-related compensation; and (4) compensation for appearances, ticket revenue, and other monies.¹²⁶ According to the complaint, the USSF pays top tier WNT players between thirty-eight percent and seventy-two percent of what the MNT players earn on a per-game basis.¹²⁷ More precisely, the women state that the USSF pays top tier WNT players a base salary of \$72,000 per year to play a minimum of twenty Friendlies that year.¹²⁸ Additionally, the WNT players receive a bonus of \$1,350 for each Friendly won, but they do not receive additional compensation if they tie or lose the game.¹²⁹ Therefore, if they lose all twenty games, then each player receives \$72,000 for the year, or only \$3,600 per game. However, if the women win all twenty games, then they receive \$99,000 for that year, or \$4,950 per game.¹³⁰ The MNT is also required to play a minimum of twenty Friendlies per year, but regardless of the outcome, they receive a minimum of \$5,000 to play in each game.¹³¹ More specifically, MNT players receive compensation ranging from \$6,250 to \$17,625 per game depending on the level of their opponent and whether they win or tie the game.¹³² Thus, a MNT player will receive \$100,000 if he loses all twenty Friendlies, which is \$27,000 more than similarly situated WNT players, and \$1,000 more

123. 29 U.S.C. § 206(d)(1) (2016).

124. 29 C.F.R. § 1620.10 (2016).

125. Beck-Wilson v. Principi, 441 F.3d 353, 362 (6th Cir. 2006).

126. Complaint, *supra* note 13, at 2.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

than WNT players who win all twenty of their Friendlies.¹³³ MNT players would likely earn an average of \$13,166 per game, or \$263,320 per year, if they win all of their games. A similarly situated WNT player would earn thirty-eight percent of this compensation if she were to win all twenty Friendlies.¹³⁴ Moreover, each game over twenty played by a WNT player earns that player a maximum amount of \$1,350 and no additional compensation for a tie or loss.¹³⁵ However, MNT players earn between \$5,000 for a loss, and as high as \$17,625 for a win, for each additional game over twenty.¹³⁶

With regards to World Cup compensation, the complaint alleges that the compensation received by WNT players is even more strikingly disparate than compensation for the Friendlies.¹³⁷ For example, WNT players earn a total of \$30,000 per request to try out for the World Cup team and for making the roster.¹³⁸ Contrarily, MNT players earn \$68,750 for making their team's roster.¹³⁹ In 2015, the MNT earned \$9,000,000 for losing in the sixteenth round, while the women earned only \$2,000,000 for winning the tournament.¹⁴⁰ Regarding Olympic compensation, each WNT and MNT player earns \$15,000 for qualifying for the Olympic team and an additional \$15,000 for making the team's roster.¹⁴¹ According to the women, the USSF's decision to pay MNT players and WNT players equal compensation for Olympic play highlights the unjustified and discriminatory animus underlying its decision to compensate women less than men.¹⁴²

Additionally, the women claim that the disparity in pay is illustrated in almost every aspect of the WNT player/USSF employment relationship. For instance, the USSF pays MNT players a per diem of \$62.50 for domestic venues and \$75 for international venues, yet only pays WNT players \$50 for domestic venues and \$75 for international venues.¹⁴³ Furthermore, the Federation pays MNT players \$3,750 for each sponsor appearance but only pays WNT players \$3,000 per appearance.¹⁴⁴

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 3.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

Conversely, the USSF has pointed to figures showing that, since 2008, it has paid twelve players at least \$1 million dollars, six of whom were women.¹⁴⁵ More specifically, they illustrate that the highest paid MNT player made \$1.4 million from 2008 to 2015, while the highest paid WNT player made approximately \$1.2 million from 2008 to 2015.¹⁴⁶ According to the USSF, some of the top ten highest paid WNT players made more than their male counterparts during that period.¹⁴⁷

On the other hand, the figures also illustrate that the wage discrepancies between MNT players and WNT players are even more alarming between lower ranked players.¹⁴⁸ For instance, the twenty-fifth ranked female player earned \$341,721, while the twenty-fifth ranked male player earned \$580,522; the fiftieth ranked male player earned \$246,238, while the fiftieth ranked female player earned just \$25,516.¹⁴⁹

The USSF argues that many of the top ranked WNT players have received nearly the same compensation as top MNT players and that some WNT players earn more than their male counterparts. However, a court will likely find that MNT players are an appropriate comparator and that the USSF has not paid MNT players and WNT players equal wages. Because the term “wages” is construed quite broadly under the EPA, and it typically includes all payments made to, or on behalf of, an employee as remuneration for employment,¹⁵⁰ each category of compensation listed in the WNT’s complaint will be classified as “wages.” Since courts have previously held that perfect diversity of the sexes is not necessary when comparing the two groups,¹⁵¹ a court may likely find that perfect diversity does not have to exist regarding a few outlying salaries in the groups. This conclusion is further strengthened by the fact that some courts have found that a plaintiff may establish this element with evidence that just one opposite-sex comparator receives a higher wage.¹⁵² For these reasons, the WNT will likely meet this element.

145. Das, *supra* note 45.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. 29 C.F.R. § 1620.10 (2016).

151. Beck-Wilson v. Principi, 441 F.3d 353, 362 (6th Cir. 2006).

152. Mitchell v. Jefferson Cty. Bd. Of Educ., 936 F.2d 539, 547 (11th Cir. 1991).

3. Equal Work

Although the USWNT will undoubtedly establish that they are employed in the same establishment as MNT players and that the USSF pays different wages to MNT and WNT players, the women must still prove that the different wages are paid for equal work.¹⁵³ In order to meet this requirement, the women do not necessarily need to prove that their work is identical to the men's in every aspect. Instead, they only need to prove that the work requires substantially equal skill, effort, and responsibility.¹⁵⁴

In their complaint, the women allege that their pre-game, game, and post-game duties, as well as their skills, efforts, responsibilities, and working conditions, are substantially the same or greater than those of MNT players.¹⁵⁵ For example, the USSF requires both male and female players to:

(1) maintain their conditioning and overall health by participating in rigorous training routines and adhering to specific physical therapy, nutrition, and other regimens; (2) maintain their skills by attending training camps and practices, participating in skills drills, and playing scrimmages and other practice events; (3) travel nationally and internationally for games, those of which are the same in length, mental and physical demand, and playing environment and conditions; and (4) promote a positive image for soccer through media and other appearances.¹⁵⁶

Additionally, the women claim that their recent success requires them to spend more time in training camp, play significantly more games, travel more, and participate in more media sessions than MNT players.¹⁵⁷

In contrast, the USSF will likely argue that the two positions do not require substantially equal skill, effort, and responsibility. In order to illustrate this point, the USSF will likely point to World Cup qualification procedures. For example, to qualify for the Women's World Cup, the WNT plays five games in a two-week tournament.¹⁵⁸ To qualify for the Men's World Cup, MNT players compete in sixteen games throughout a two-year period across North and Central America and the Caribbean.¹⁵⁹

153. See 29 U.S.C. 206(d)(1).

154. 29 C.F.R. § 1620.15 (2016).

155. Complaint, *supra* note 13, at 1.

156. *Id.* at 1–2.

157. *Id.*

158. Das, *supra* note 45.

159. *Id.*

While it may be true that MNT players are required to compete in more games to qualify for the World Cup, it is also true that, overall, WNT players have competed in more games than MNT players in three out of the past four years and again during the first part of 2016.¹⁶⁰ Furthermore, the women sometimes play in forty to fifty percent more games than the men during this period, while also winning twice as many victories as the men.¹⁶¹

A court is likely to agree with the WNT and find that the women and men are performing equal work because the jobs require substantially equal skill, effort, and responsibility. In addition, it will also find that the required skills are substantially equal because both jobs require similar experience, training, education, and ability. For instance, both the MNT and WNT are required to maintain their skills by attending training camps and practices, participating in skills drills, and playing in scrimmages.¹⁶² A court will find that the jobs require substantially equal effort because both the mental and physical exertion required by MNT players and WNT players is substantially similar. For example, MNT players and WNT players are both expected to maintain their conditioning and overall health by undergoing rigorous training routines and adhering to certain nutrition plans, physical therapy, and other miscellaneous regimens.¹⁶³ Lastly, a court will likely find that the jobs require equal responsibility because MNT players and WNT players are held to similar levels of accountability. Both MNT players and WNT players are expected to maintain their skills, conditioning, and overall health, as well as promote a positive image for soccer through media and other appearances.¹⁶⁴ For these reasons, a court will likely find that the women are performing equal work.

4. Jobs Performed Under Similar Working Conditions

The last element that the WNT must prove in order to establish a *prima facie* EPA case against the USSF is that their jobs and the MNT players' jobs are performed under similar working conditions.¹⁶⁵ Thus, the women must prove that the jobs are performed in the same

160. *Id.*

161. *Id.*

162. Complaint, *supra* note 13, at 1.

163. *Id.* at 1–2.

164. *Id.*

165. 29 U.S.C. § 206(d)(1).

surroundings and expose both the MNT and WNT to the same hazards.¹⁶⁶

In their complaint, the women allege that MNT players and WNT players are both expected to travel nationally and internationally for games that are the same length, require the same mental and physical demand, and have the same playing environment and conditions.¹⁶⁷ The WNT asserts that they perform in the same surroundings as MNT players, and that they are exposed to the same hazards as MNT players, if not more, due to the often poor conditions of their fields.¹⁶⁸

The USSF may try to maintain that the WNT and MNT are not performing in the same surroundings and are not exposed to the same hazards because the men's games generally have larger viewing audiences.¹⁶⁹ They may also note that the MNT is required to travel more and play in more games to qualify for the World Cup and are thus exposed to more hazards than the WNT. If these arguments are put forth by the USSF, they will not likely be successful. A court is likely to agree with the WNT and find that the men and women are performing under similar working conditions because they are generally performing in the same surroundings and exposed to the same hazards. Additionally, a court will typically find that if the jobs require equal skill, effort, and responsibility, then they are likely performed under similar working conditions.¹⁷⁰ Because the WNT will likely prove that the jobs require equal skill, effort, and responsibility, a court will likely find that they meet this requirement as well.

B. Defenses

1. Seniority System

In order to justify paying WNT players less than MNT players, the USSF could argue that the difference in pay is based on a nondiscriminatory seniority system. However, the USSF has not yet claimed that the players are paid pursuant to a seniority system so this defense will not likely be relevant.

2. Merit System

The second defense available to the USSF is the merit system defense. Under this defense, the USSF could justify the different wages if

166. 29 C.F.R. § 1620.18(a).

167. Complaint, *supra* note 13, at 2.

168. *Id.* at 1.

169. *See* Das, *supra* note 45.

170. 29 C.F.R. § 1620.18(b).

the wages were paid pursuant to a bona fide, nondiscriminatory merit system.¹⁷¹ In order to satisfy this element, the USSF would have to prove that the players were systematically evaluated according to pre-determined criteria and that the players were aware of the system.¹⁷² The USSF has not argued that the difference in pay was based on a bona fide merit system, therefore, this defense will not likely be relevant.

3. System That Measures Earnings by Quantity or Quality of Production

Pursuant to the EPA, the USSF may justify paying different wages to male and female players, even if equal work is established, provided that the pay discrepancy is the result of a system that measures earnings by quantity or quality of production.¹⁷³ For purposes of this defense, it is presumed that the productivity of both male and female employees will be measured by the same criteria and that both will be paid equally for equal production.¹⁷⁴

In the case at hand, the USSF claims that to qualify for the World Cup, MNT players play in more games than WNT players.¹⁷⁵ According to the USSF, the higher roster bonuses for successful qualification for male players reflect this difference.¹⁷⁶

Although MNT players are required to play in more games than WNT for World Cup qualifications, over the past few years, the total number of games played by the WNT has been much higher than the MNT.¹⁷⁷ Furthermore, the WNT has also been much more successful than the MNT. In addition to numerous first place wins in other prestigious international tournaments, the WNT has won three World Cup titles and four Olympic gold medals.¹⁷⁸ The WNT is currently ranked number one in the world, and has remained in this position on a near continuous basis for the past seven years.¹⁷⁹ The closest that

171. 29 U.S.C. § 206(d)(1).

172. *Ryduchowski v. Port Auth. of N.Y. and N. J.*, 203 F.3d 135, 143 (2000).

173. *Id.*

174. *Bence v. Detroit Health Corp.*, 712 F.2d 1024, 1027 (6th Cir. 1983).

175. *Das*, *supra* note 45.

176. *Id.*

177. *Id.*

178. Anne M. Peterson, *Things to Know About the Women's Soccer Team's Complaint*, THE BIG STORY (Apr. 1, 2016), <http://bigstory.ap.org/article/0281e4662f27418c83786c7415d30771/things-know-about-us-womens-soccer-t>. . . [<https://perma.cc/7EBA-XAFE>].

179. *USA Remains Atop Latest FIFA World Rankings*, U.S. SOCCER (Mar. 26, 2016), <http://www.ussoccer.com/stories/2016/03/26/18/10/160326-wnt-us-womens-national-team-remains-in-top-s>. . . [<https://perma.cc/KAC3-Z2NX>].

the MNT has come to winning the World Cup was in 1930, when they finished in third place.¹⁸⁰

Because the WNT has been more successful than the MNT, and because they have played in more games than the MNT, this will not be a viable defense for the USSF. In fact, pointing to this defense would only strengthen the WNT's case.

4. Any Other Factor Other than Sex

To justify the different wages and successfully escape liability under the EPA, the USSF must prove that the discrepancies were based on any factor other than sex.¹⁸¹ Thus far, nearly every defense that the USSF has provided in its response lies at the core of this defense.

The USSF's first defense is that the MNT generates more revenue than the WNT.¹⁸² More specifically, the USSF contends that the short period that the WNT players rely on to show that they generate more revenue does not accurately portray total revenue because it does not include the men's World Cup in the time frame.¹⁸³ The USSF's 2016 Annual Budget Report originally predicated an estimated combined net loss for the men and women's national teams of \$420,929.¹⁸⁴ However, instead the USSF generated revenues of \$17.7 million, due largely to the success of the WNT.¹⁸⁵ The USSF also projects a net profit from the WNT of a little over \$5 million for the 2017 fiscal year and a net loss of approximately \$1 million for the MNT.¹⁸⁶ However, the USSF argues that these figures only represent a short time frame, and that overall the MNT has generated more revenue.¹⁸⁷ To highlight this point, the USSF referred to attendance figures for MNT and WNT matches from 2011 to 2015, which showed that the men averaged 29,751 fans while the women averaged 16,229.¹⁸⁸ Additionally, USSF claims that although MNT players have been compensated with

180. See Ryan Rosenblatt, *United States World Cup history: What's the farthest the USMNT have progressed?*, SB NATION (July 1, 2014), <http://www.sbnation.com/soccer/2014/7/1/5861212/usa-belgium-2014-world-cup-history> [https://perma.cc/2ABB-UWHJ].

181. 29 U.S.C. § 206(d)(1).

182. Yang, *supra* note 16.

183. Peterson, *supra* note 59.

184. Section IV—Proposed Budget-FY '17, in U.S. Soccer Federation 2016 Annual General Meeting Agenda, Feb. 27, 2016, at 54 (on file with author).

185. *Id.*

186. *Id.* at 57–58.

187. Letter from Kathryn H. Ruemmler, Counsel for USSF, Latham & Watkins LLP, to Greg Mucha, EEOC (May 31, 2016) (on file with author).

188. Peterson, *supra* note 178.

more total game revenue, WNT players receive a larger portion of their game revenue, as negotiated in their Collective Bargaining Agreement (“CBA”).¹⁸⁹ Whether or not a court accepts this defense will depend on how they classify and calculate revenue generated by the WNT. If a court accepts the USSF’s method of viewing revenue over a longer time period, and not in terms of the most recent cycle, then it could possibly find this to be a valid defense. However, for reasons explained below, it is not likely that a court will accept this proposal.

The USSF’s second defense is that the WNT *chose* to negotiate for a guaranteed salary rather than the MNT’s paid-by-appearance model.¹⁹⁰ According to the USSF, the terms of the CBA are binding until the agreement’s expiration on December 31, 2016.¹⁹¹ The USSF stated that following expiration, it will be committed to negotiating a new CBA that addresses compensation.¹⁹² A court will not likely find this to be a valid defense, since federal regulations provide that a prior CBA is not a defense to an EPA claim.¹⁹³ CBAs that provide for unequal rates of pay in conflict with the EPA are null and void.¹⁹⁴

The USSF’s third explanation for the difference in wages is that the MNT and WNT negotiated their CBAs at different times; therefore, one team’s compensation may sometimes lag behind the other team’s compensation.¹⁹⁵ According to USSF, “disparities in ticket revenue shares and per diem are the result of these different CBA cycles.”¹⁹⁶ For instance, MNT players currently receive \$1.50 per ticket and WNT players receive \$1.20 per ticket.¹⁹⁷ “The current [MNT’s] CBA covers two, four-year cycles (each a ‘quad’) from 2011 to [20]18, whereas the [WNT’s] CBA covers one cycle from 2013 to [20]16.”¹⁹⁸ The USSF claims that when the WNT’s agreement went into effect in 2013, the women’s per diem was equal to the men’s at that time; “however, as part of the [MNT’s] agreement, financials such as per diem increased from the first quad . . . to the second quad, [thus] creating

189. Yang, *supra* note 16.

190. *Id.*

191. Das, *supra* note 45.

192. Adam Kilgore, *U.S. women’s soccer players raise stakes in debate over how pay scales are set*, THE WASH. POST (Mar. 31, 2016), [https://www.washingtonpost.com/sports/dcunited/us-womens-soccer-players-raise-stakes-in-debate-over-. . . \[https://perma.cc/B4E3-U4TV\]](https://www.washingtonpost.com/sports/dcunited/us-womens-soccer-players-raise-stakes-in-debate-over-. . . [https://perma.cc/B4E3-U4TV]).

193. 29 C.F.R. § 1620.23.

194. *Id.*

195. Yang, *supra* note 16.

196. Isaacson, *supra* note 61.

197. *Id.*

198. *Id.*

the discrepancy.”¹⁹⁹ Although on its face this may appear to be a valid justification for the differences in wages, a court will not likely find this to be a valid defense under the EPA. An employer may not point to a CBA as a defense to an EPA claim, and it is highly unlikely that a court will allow an employer to point to the timing of the negotiations as a defense.

In addition to the previously mentioned defenses, the USSF also argues that compensation between MNT players and WNT players differ because of the allocation of World Cup bonuses, which are awarded by FIFA.²⁰⁰ For example, Germany’s MNT was awarded \$35 million for winning the 2014 World Cup, and FIFA only awarded the U.S. WNT \$2 million for winning the World Cup.²⁰¹ The USSF claims, “the majority of that money was passed along to the players.”²⁰² On the other hand, the WNT’s attorney, Jeffrey Kessler, claims that the USSF “can allocate the money however it wishes.”²⁰³ If this is true, then a court will likely not find this justification to be a valid defense. However, if a court does find it to be a valid defense, it is likely that it will be limited to the differences in World Cup compensation, and the USSF will not be able to point to this defense to justify the differences in other forms of compensation.

Conclusion: Going Forward

The WNT has a very strong case against the USSF, and it is highly probable that a court will rule in their favor. If the WNT prevails in this case, the outcome will tremendously impact professional soccer and the professional sports industry in general. Not only will it result in the WNT players finally receiving the pay that they deserve, it could also lay the foundation for pay equality in team sports overall. Because the WNT and MNT are both employed by the same organization, the decision would not be binding for other leagues where male and female athletes do not share the same employer. Although the outcome would not make pay equality mandatory in those leagues, it is certainly a step in the right direction. A ruling in the WNT’s favor, coupled with the advancements made by the WTA and the LPGA, could result in pay equality for female professional athletes at both the individual and team sports level.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

Even if the WNT's claim is unsuccessful legally, their fight for equal pay will not prove to be unsuccessful. Throughout their fight, the WNT has captured the media's attention, the legislature's attention, and the hearts of millions of Americans who now stand behind them in their support for equality. With this public support, the WNT and other female professional athletes are now more equipped than ever to continue their fight. Individuals who are not familiar with pay inequality in professional sports are now becoming familiar with it, and there has even been discussion of proposing new remedies for such violations.²⁰⁴ An unsuccessful outcome for the WNT would highlight the fact that it is extremely hard to prove EPA violations in professional sports, and that a new course of action is necessary to successfully provide female athletes with an available remedy. Furthermore, no matter what the outcome, the WNT will enjoy more bargaining power as it begins negotiating the terms of its upcoming CBA. The WNT's case will also likely influence the way that other female professional athletes negotiate their salaries and CBAs to advance pay equality.

The WNT has clearly earned unparalleled success on the soccer field, and despite the outcome of this case, it will achieve unparalleled success off the field as well. The unprecedented dedication that the women have shown in their fight for equal pay has been monumental, and their efforts will have a tremendous impact on the professional sports industry and the role of female athletes.

204. Travis Waldron, *Senate Passes Equal Pay Resolution For U.S. Women's Team Soccer Stars*, HUFFINGTON POST (May 26, 2016, 02:40 PM), http://www.huffingtonpost.com/entry/womens-soccer-equal-pay-senate_us_57472042e4b0dac7ad42b01 [https://perma.cc/K62N-YT4L].