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## Red Card on Wage Discrimination: US Soccer Pay Disparity Highlights Inadequacy of the Equal Pay Act

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# Red Card on Wage Discrimination: US Soccer Pay Disparity Highlights Inadequacy of the Equal Pay Act

## ABSTRACT

*In the months leading up to its latest World Cup win, the US Women's National Team sued its parent organization over income inequality in US soccer. Statements from high-profile players, like Megan Rapinoe and Alex Morgan, contributed to a national conversation about the gender pay gap that exists not just in soccer but across many professions. The claims of the Women's Team should make for a perfect Equal Pay Act claim, but all signs point to a loss. Instead, the women are far more likely to succeed on their claim arising under Title VII of the Civil Rights Act, despite the lack of evidence showing that the pay discrepancy is the result of discrimination. This Note examines the claims brought and how they highlight the inadequacy of the Equal Pay Act. The world's best women's soccer team isn't being paid equally with its far-less-successful male counterpart; if the women's team can't make out a successful Equal Pay Act claim, who can? This Note urges amending the Equal Pay Act in a few key ways to ensure that women are paid equally to men when performing the same work.*

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As the FIFA president handed out medals to the US Women's National Team for its fourth World Cup victory, the crowd broke out in an unusual chant.<sup>1</sup> Instead of the expected "USA" chant, an "equal pay" chant reverberated throughout the stadium.<sup>2</sup> Statements from the team, combined with media coverage of the wage disparity between men's and women's soccer at the national and global levels, inspired these chants.<sup>3</sup> The prize for the 2019 Women's World Cup was \$30 million; in contrast, the Men's World Cup prize was \$400 million.<sup>4</sup> This Note focuses on this issue at home: the disparity in wages the US Soccer Federation (USSF) pays to the US Women's National Team (USWNT) and the US Men's National Team (USMNT).

On March 8, 2019, International Women's Day, the twenty-eight members of the USWNT filed a class-action lawsuit against the USSF asserting violations of the Equal Pay Act (EPA) and Title VII.<sup>5</sup> The USWNT alleges that the USSF and its discriminatory policies pay members of the USWNT less than their male counterparts.<sup>6</sup> The alleged pay disparity, thirty-eight cents to the dollar, exists despite the fact that the USWNT has been much more successful than the men's team and has allegedly earned more profit and higher TV ratings.<sup>7</sup>

In August 2019, the two parties entered into mediation, but talks broke down within just a few days.<sup>8</sup> The two sides have been

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1. Graham Hays, *Chants of 'Equal Pay' Accompany U.S. Win*, ESPN (July 7, 2019), <https://www.espn.com/soccer/fifa-womens-world-cup/story/3895899/chants-of-equal-pay-accompany-us-win> [https://perma.cc/V3CE-67NM].

2. *Id.*

3. *Id.*

4. *Id.* In the next World Cup (in 2022), the women's prize will increase to \$60 million, and the men's will increase to \$440 million. Even with the women's prize doubling and the men's prize increasing by only 10 percent, the pay gap will widen. Sean Gregory, *You Will Not Silence Us: Megan Rapinoe Talks Equal Pay, World Cup Celebrations and Presidential Tweets*, TIME (July 10, 2019), <https://time.com/5623543/megan-rapinoe-world-cup-trump-equal-pay/> [https://perma.cc/B8JG-W4Y6].

5. Dinita L. James, *Women's World Cup Gives Header to Equal Pay Claims*, 26 ARIZ. EMP. L. LETTER 4, no. 3, Aug. 2019.

6. *Id.*

7. *Id.*; Lizzy Goodman, *The Best Women's Soccer Team in the World Fights for Equal Pay*, N.Y. TIMES (June 10, 2019), <https://www.nytimes.com/2019/06/10/magazine/womens-soccer-inequality-pay.html> [https://perma.cc/7Y4Y-BMDF].

8. Aimee Lewis, *Talks Break Down Between USWNT and US Soccer over Equal Pay*, CNN (Aug. 15, 2019, 7:57 AM), <https://www.cnn.com/2019/08/15/football/uswnt-us-soccer-equal-pay-spt-intl/index.html> [https://perma.cc/4QUH-786D].

unable to come to an understanding on a basic point: how to classify pay. The USSF contends that it has paid the women's team as a whole more than the men's team over the past few years and has paid some of the individual players more than any individuals on the men's team.<sup>9</sup> The USWNT essentially counters that the USSF is comparing apples to oranges: the USWNT plays more games than the USMNT, so of course the women take home more pay; however, their pay per game is less than that of their male counterparts.<sup>10</sup> The USWNT's spokesperson, Molly Levinson, explained: "This is a tired argument from USSF that women players must work twice as hard and win every time men lose in order to be paid and have the same working conditions as the men."<sup>11</sup>

This Note explores the arguments made by both sides, how those arguments affect the likelihood of success for the USWNT's claims under the EPA and Title VII of the Civil Rights Act, and the ways in which this case sheds light on the inadequacy of the current statutory scheme at ensuring equal pay for equal work, regardless of gender.

#### I. UNDERPAYING THE WORLD'S PREMIER WOMEN'S SOCCER TEAM: HOW DID WE GET HERE?

It seems counterintuitive that the world's leading women's soccer team would be paid far less—potentially as much as 62 percent less—than a men's team that has never been a major player on the world stage, especially in a country that enacted two statutes attempting to combat inequality in pay.<sup>12</sup> Though these statutes arguably indicate that the United States has a strong public policy in favor of treating men and women equally as it relates to their work, the wage gap has not closed, neither broadly nor in many specific lines of work.<sup>13</sup> And the USWNT is not the only US women's athletic team to publicly call for equal wages and treatment from its parent organization. This Part outlines the successes of the USWNT, the contours of the USWNT's suit against the USSF, and the background

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9. Andrew Das, *U.S. Soccer Says It Pays Women's Team More than Men's Team*, N.Y. TIMES (July 29, 2019), <https://www.nytimes.com/2019/07/29/sports/soccer/us-soccer-equal-pay.html> [https://perma.cc/K4PX-7W5C].

10. Lewis, *supra* note 8.

11. Anne M. Peterson, *US Soccer Opposes USWNT Request for Class Certification*, ASSOCIATED PRESS (Oct. 1, 2019), <https://apnews.com/c32352305c31440c84f881214ef239b9> [https://perma.cc/JN9K-XRRC].

12. Equal Pay Act, 29 U.S.C. § 206(d) (2018); Civil Rights Act of 1964, 42 U.S.C. § 2000e (2018).

13. Michelle A. Travis, *Disabling the Gender Pay Gap: Lessons from the Social Model of Disability*, 91 DENV. U. L. REV. 893, 894 (2014).

of the two statutes at issue in the USWNT complaint: the Equal Pay Act and Title VII.

*A. Background of the US Women's National Team and Its Suit  
Against the US Soccer Federation*

The USWNT and a number of its star players have risen to prominence over the last several years, due in large part to the team's back-to-back World Cup Wins (in 2015 and 2019).<sup>14</sup> Indeed, the US team has long been recognized as a dominant player on the world stage of women's soccer due to an unexpected advantage not many other countries have: Title IX.<sup>15</sup> Title IX is the federal legislation that prohibits educational institutions from excluding anyone from a given program or activity on the basis of sex.<sup>16</sup> This has broadened sports opportunities for women and girls in the United States beyond what many other countries provide.<sup>17</sup> More teams than just the USWNT benefited from this legislation in the last world cup; NCAA athletes competed for teams from all over the world.<sup>18</sup>

Many of these countries, like the United States, also suffer pay disparities and other forms of gender discrimination. The Nigerian women's team protested with a sit-in in 2016 due to overdue payments.<sup>19</sup> A past Golden Shoe winner quit international soccer in 2017 over poor treatment, including a wide pay gap, of female athletes in the Norwegian Football Federation.<sup>20</sup> In England, female players are paid twenty to twenty-five thousand pounds a year, plus

14. Rachel E. Greenspan, *All the Records the 2019 U.S. Women's Soccer Team Broke in This Year's World Cup*, TIME (July 8, 2019, 1:05 PM), <https://time.com/5621639/team-usa-2019-world-cup-records/> [https://perma.cc/3FMC-LRHT].

15. Liz Clarke & Steven Goff, *On Women's World Cup Rosters, the Global Impact of Title IX Is Clear*, WASH. POST (June 18, 2019), <https://www.washingtonpost.com/sports/2019/06/18/womens-world-cup-rosters-global-impact-title-ix-is-clear/> [https://perma.cc/J9NJ-UZRF].

16. 20 U.S.C. § 1681 (2018).

17. See Jeré Longman, *For Those Keeping Score, American Women Dominated in Rio*, N.Y. TIMES (Aug. 22, 2016), [https://www.nytimes.com/2016/08/23/sports/olympics/for-those-keeping-score-american-women-dominated-in-rio.html?\\_r=0](https://www.nytimes.com/2016/08/23/sports/olympics/for-those-keeping-score-american-women-dominated-in-rio.html?_r=0) [https://perma.cc/NB64-DQU7] (discussing the positive effects of Title IX and how it sets US athletes apart from other countries).

18. Clarke & Goff, *supra* note 15. Female athletes from around the world attend US higher-education institutions in order to benefit from the robust athletic programs afforded by Title IX and compete in the NCAA women's leagues. Frequently, they then go on to play for their home country's national team. *See id.*

19. Niall McCarthy, *The Gender Pay Gap at the FIFA World Cup Is \$370 Million*, FORBES (June 11, 2019, 6:33 AM), <https://www.forbes.com/sites/niallmccarthy/2019/06/11/the-gender-pay-gap-at-the-fifa-world-cup-is-370-million-infographic/#366e8f562751> [https://perma.cc/X3BE-UAK4].

20. *Id.*

accommodation; the men, in contrast, average three million pounds a year.<sup>21</sup> A 2017 report from FIFPro shows that the top 3,600 female players received about \$600 per month in wages; 50 percent of those players are not paid for playing at all.<sup>22</sup>

The USWNT broke, tied, and strengthened a number of world records in this year's World Cup tournament: most goals in a Women's World Cup match and in a tournament overall,<sup>23</sup> most consecutive World Cup wins, and, most impressively, most Women's World Cup wins.<sup>24</sup> In addition to their stellar World Cup record, the USWNT also won Olympic gold medals in 2004, 2008, and 2012.<sup>25</sup>

In contrast, the US Men's National Team's best result at the World Cup was third place at the first FIFA World Cup in 1930, when only four European teams competed.<sup>26</sup> In 2014, the men's team lost in the round of sixteen, and it did not qualify for the most recent Men's World Cup in 2018.<sup>27</sup> Also, the men's team has not earned an Olympic medal since 1904.<sup>28</sup> Despite this major discrepancy in performance, the USSF has paid the USWNT less.<sup>29</sup> The complaint for the USWNT's lawsuit calculates that if each team played and won twenty "friendlies,"<sup>30</sup> "female WNT players would earn a maximum of \$99,000," while male players "would earn an average of \$263,320" for that same

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21. Philip O'Connor, *Soccer: World Cup Shines Spotlight on Gender Pay Disparity*, REUTERS (May 15, 2019, 12:45 PM), <https://www.reuters.com/article/us-soccer-world-cup-disparity/soccer-world-cup-shines-spotlight-on-gender-pay-disparity-idUSKCN1SL270> [https://perma.cc/3VPL-KSFM].

22. *Id.*

23. Greenspan, *supra* note 14. The team can largely thank Alex Morgan, who tied the record for most goals in a game. She is now tied for five goals with Michelle Akers, a retired USWNT player. *Id.*

24. *Id.* The USWNT already held this title, but it solidified its lead over Germany (which has two wins). *Id.*

25. Alicia Jessop, *The U.S. Women's Soccer Team Is Better than the Men's. That'll Help Its Case.*, WASH. POST (Mar. 12, 2019, 2:22 PM), <https://www.washingtonpost.com/outlook/2019/03/12/us-womens-soccer-team-is-better-than-men-thatll-help-its-case/> [https://perma.cc/47H3-CMPV].

26. Clemente Lisi, *The US National Team at the 1930 World Cup*, U.S. NAT'L SOCCER TEAM PLAYERS (Jan. 28, 2013), <https://ussoccerplayers.com/2013/01/the-us-national-team-at-the-1930-world-cup.html> [https://perma.cc/U5EG-28H7].

27. Jessop, *supra* note 25.

28. *Id.*

29. Complaint at 8, *Morgan v. U.S. Soccer Fed'n, Inc.*, No. 2:19-CV-01717 (C.D. Cal. Mar. 8, 2019) [hereinafter Complaint].

30. "Friendlies" are essentially exhibition games played between national teams in the run-up to the World Cup. In the United States, pay for the national teams depends in part on how many friendlies a player competes in and how many they win.

number of games.<sup>31</sup> According to USSF data, the USWNT has made more in the aggregate than the men's team since 2016. However, from 2011 to 2015, the USWNT made between \$5 and \$10 million less than the men's team, closing the gap only in 2013—in which they made close to, but still slightly less than, the men.<sup>32</sup> The men's team has expressed support for the USWNT's suit, stating that the women “deserve equal pay and are right to pursue a legal remedy” and that the USSF has devalued the USWNT's “profound impact on the American sports landscape.”<sup>33</sup>

### *B. The USSF's Arguments*

The USWNT's basic claim against the USSF is that the USSF systematically pays the women less than their male counterparts even though (1) the expectations of the women on the team as they relate to practice and fitness are the same as the USMNT, (2) the USWNT has outperformed the USMNT in every sense of the word, and (3) the USWNT brings significant revenue to the USSF.<sup>34</sup> In response, the USSF has argued that any discrepancy in pay is due to the two different collective bargaining agreements (CBAs) that the USSF has with the women's team and with the men's team, as stated in USSF President Carlos Cordeiro's “Open Letter” of July 2019.<sup>35</sup> The Open Letter also states that the USSF guarantees the USWNT players a salary and certain benefits, like health care, but not the men.<sup>36</sup> The USSF also pays the USWNT players an additional salary if they play for the National Women's Soccer League, whereas the USSF does not pay men any kind of bonus for playing on a Major League Soccer team or any other professional league.<sup>37</sup> The members of the men's team are only paid for

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31. Complaint, *supra* note 29, at 11. These numbers are hypothetical; the number of friendlies played in a given year varies widely and is not always the same between the men's and women's teams. For the purposes of the Equal Pay Act, explored in detail in Section II.B., the complaint sets out the twenty friendlies hypothetical for the “equal work” component.

32. 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/B3WT-CE3H].

33. U.S. Soccer Players, *USNSTPA Statement in Response to 7/29/2019 Carlos Cordeiro Letter*, U.S. NAT'L SOCCER TEAM PLAYERS (July 30, 2019), <https://ussoccerplayers.com/2019/07/us-nstpa-statement-in-response-to-7-29-2019-carlos-cordeiro-letter.html> [https://perma.cc/JP7L-UEZ4].

34. Complaint, *supra* note 29, at 7, 8–9.

35. Letter from Carlos Cordeiro, President, U.S. Soccer, to Membership, U.S. Soccer (July 29, 2019), <https://www.ussoccer.com/governance/board-of-directors/us-soccer-president-cindy-parlow-cone/open-letter-july-29-2019-finding-common-ground> [https://perma.cc/2YUB-BF6K].

36. *Id.*

37. *Id.*

the training camps they attend, the games they play, and game bonuses.<sup>38</sup> From the time period between 2010 and 2018, the USSF paid the USWNT \$34.1 million in salaries and bonuses plus benefits, and it paid the men's team \$26.4 million.<sup>39</sup> Additionally, the USSF claims that it has paid some of the women (a few recognizable names: Megan Rapinoe, Alex Morgan, Carli Lloyd, and Becky Sauerbrunn) more than the highest-earning men's team player between 2014 and 2019.<sup>40</sup> The Open Letter also points to a difference in revenue for the pay differences; USWNT games bring in an average of \$425,446 per game, and men's games average at \$972,147.<sup>41</sup>

After the breakdown of mediation, the men's team refuted some of USSF's public claims, asserting that the revenues in the USSF's Open Letter did not include any revenue from "sponsorship, television, or marketing money the [USSF] generates from USWNT and USMNT players and their games."<sup>42</sup> This is because the USSF supposedly does not keep track of what sponsorship and broadcast revenues come from which teams or players.<sup>43</sup>

The USWNT moved to certify their class on September 11, 2019, and the USSF submitted a memorandum in opposition on September 30.<sup>44</sup> The judge granted the class certification motion on November 8.<sup>45</sup>

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38. *Id.*

39. *Id.*

40. Peterson, *supra* note 11.

41. Letter from Carlos Cordeiro to Membership, *supra* note 35.

42. U.S. Soccer Players, *supra* note 33.

43. Letter from Carlos Cordeiro to Membership, *supra* note 35. This would include things like Nike's sponsorship of US soccer and the royalties USSF earns from Nike sales of USMNT and USWNT merchandise. The USWNT home jersey from the last Women's World Cup is the top-selling soccer jersey ever sold in one season. See Lauren Thomas, *Nike Wins Big as the US Women's Soccer Team Takes the World Cup*, CNBC (July 10, 2019, 1:30 PM), <https://www.cnbc.com/2019/07/08/nike-wins-big-as-the-us-womens-soccer-team-takes-the-world-cup.html> [<https://perma.cc/6FNC-PQBN>]. Immediately after the USWNT win in March, a Nike commercial referencing the women's equal-pay fight aired: "A whole generation of girls and boys will . . . be inspired to talk and win and stand up for themselves . . . . Women will conquer more than just the soccer field, like breaking every single glass ceiling . . . and we will keep fighting not just to make history but to change it." Nike, *Never Stop Winning* | Nike, YOUTUBE (July 7, 2019), <https://www.youtube.com/watch?v=S29GZOR-k9U> [<https://perma.cc/6MXR-J2C7>]. This implies Nike is supportive of the USWNT equal-pay fight. See Kevin Draper, *Pushed by Consumers, Some Sponsors Join Soccer's Fight over Equal Pay*, N.Y. TIMES (Aug. 5, 2019), <https://www.ny-times.com/2019/08/05/sports/soccer/womens-soccer-nike-sponsors.html> [<https://perma.cc/U2SY-E37G>].

44. Memorandum in Opposition to Plaintiffs' Motion for Class Certification, *Morgan v. U.S. Soccer Fed'n, Inc.*, No. 2:19-cv-01717-RGK-AGR (C.D. Cal. Sept. 30, 2019); Motion for Class Certification, *Morgan v. U.S. Soccer Fed'n, Inc.*, No. 2:19-cv-01717-RGK-AGR (C.D. Cal. Sept. 11, 2019).

45. Order Re: Plaintiffs' Motion for Class Certification, *Morgan v. U.S. Soccer Fed'n, Inc.*, No. 2:19-cv-01717-RGK-AGR (C.D. Cal. Nov. 8, 2019).



The parties then filed cross-motions for summary judgment and, as this Note goes to press, still await the judge's ruling. Should any of the issues survive, a trial on the two claims—violations of Title VII and the Equal Pay Act—is tentatively set for May 2020.<sup>46</sup> To analyze how the USWNT's claims and the USSF's defenses come out, it is helpful to better understand the background of the statutory schemes under which the USWNT's claims arise.

### *C. History of the Equal Pay Act*

The Equal Pay Act was enacted in 1963 as an amendment to the Fair Labor Standards Act in order to prohibit pay differentials between men and women for equal work.<sup>47</sup> In particular, the statute prohibits sex-based wage discrimination for equal work in positions that require “equal skill, effort, and responsibility, and which are performed under equal working conditions.”<sup>48</sup> Congress passed the EPA during a moment in time in which women were becoming increasingly present in the workforce and were also subjected to a substantial gap in salary: fifty-nine cents to a man's dollar.<sup>49</sup> There are four built-in “exceptions” to the act's prohibition: seniority systems, merit systems, systems based on earnings or production, and systems in which “a differential based on any other factor than sex” exist.<sup>50</sup> These, of course, are not really exceptions as much as nondiscriminatory ways that might explain a pay differential. The fourth exception, while suspiciously broad, is necessarily so because Congress had to preserve employers' legitimate discretion in negotiating employment relationships; even so, it often serves to undercut equal-pay claims.<sup>51</sup>

When introducing the bill on the floor, the Senate Labor and Public Welfare Committee stated that the purpose of the bill was to “eliminate ‘any wage differentials based on sex.’”<sup>52</sup> With this stated purpose in mind, the Equal Pay Act is the obvious choice for the USWNT to pursue its claim of wage discrimination against the USSF. The EPA is a strict-liability statute, with no required showing of

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46. Order Re: Jury Trial, *Morgan v. U.S. Soccer Fed'n, Inc.*, No. 2:19-CV-01717 (C.D. Cal. Aug. 20, 2019).

47. 29 U.S.C. § 206(d) (2018).

48. *Id.*

49. Ellen M. Bowden, *Closing the Pay Gap: Redefining the Equal Pay Act's Fourth Affirmative Defense*, 27 COLUM. J.L. & SOC. PROBS. 225, 228 (1994).

50. 29 U.S.C. § 206(d).

51. Bowden, *supra* note 49, at 234–35.

52. Nina Joan Kimball, *Not Just Any 'Factor Other than Sex': An Analysis of the Fourth Affirmative Defense of the Equal Pay Act*, 52 GEO. WASH. L. REV. 318, 322 (1984).

discriminatory intent, and is thus a good fit for tightening the wage gap.<sup>53</sup> Employers are less likely now to engage in overt discrimination; indeed, they are often trained to avoid even the appearance of discrimination.<sup>54</sup>

However, since the enactment of the EPA, the wage gap has not improved to the extent one might have hoped. While women are no longer making the fifty-nine cents to a man's dollar that they used to, women's weekly wages have only increased to 81 percent of men's wages.<sup>55</sup> Female soccer players aren't alone in the fight; other female athletes have also complained of wage inequality.<sup>56</sup> Additionally, a number of popular actresses have called out Hollywood executives for their tendency to pay male stars more than female stars.<sup>57</sup> Indeed, in a variety of professions, women often come up through the ranks in their careers consistently making less than their male counterparts—unable to overcome the gap that they have had since they entered the workforce.<sup>58</sup> New job opportunities often offer salaries based on the previous salary received, and because women often start on a lower tier, their wages continue to fall behind even as they progress in their careers.<sup>59</sup> This, of course, is why the United States needed the Equal Pay Act in the first place.

The USWNT's high-profile wage-discrimination case means something more than just ensuring that the twenty-eight players on the team get paid equally to their male counterparts: it's a public test case that will demonstrate the inadequacy of the Equal Pay Act in carrying out its purpose of ensuring equal pay for equal work, regardless of sex.

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53. Peter Avery, *The Diluted Equal Pay Act: How Was It Broken? How Can It Be Fixed?*, 56 RUTGERS L. REV. 849, 856 (2004).

54. *Id.* at 857.

55. Bureau of Labor Statistics, U.S. Dep't of Labor, *Women Had Higher Median Earnings than Men in Relatively Few Occupations in 2018*, TED: THE ECONOMICS DAILY (Mar. 22, 2019), <https://www.bls.gov/opub/ted/2019/women-had-higher-median-earnings-than-men-in-relatively-few-occupations-in-2018.htm> [<https://perma.cc/82CF-78VW>] (comparing the overall wages of men and women, rather than the wages of men and women in the same positions).

56. Maya Salam, *The Long Fight for Pay Equality in Sports*, N.Y. TIMES (Mar. 11, 2019), <https://www.nytimes.com/2019/03/11/sports/us-womens-soccer-pay.html> [<https://perma.cc/ZKW6-TKWU>]. Female athletes have publicly called out wage inequality in tennis, basketball, and hockey. *Id.*

57. Jamie Doward & Tali Fraser, *Hollywood's Gender Pay Gap Revealed: Male Stars Earn \$1M More per Film than Women*, GUARDIAN (Sept. 15, 2019), <https://www.theguardian.com/world/2019/sep/15/hollywoods-gender-pay-gap-revealed-male-stars-earn-1m-more-per-film-than-women> [<https://perma.cc/93PT-XW5W>] (showing that male actors make, on average, \$1.1 million more per film than their female costars).

58. Jennifer Safstrom, *Salary History and Pay Parity: Assessing Prior Salary History as a "Factor Other than Sex" in Equal Pay Act Litigation*, 31 YALE J.L. & FEMINISM 135, 154 (2019).

59. *Id.*

### *D. History of Title VII*

Title VII is the employment provision of the Civil Rights Act of 1964.<sup>60</sup> The Civil Rights Act was enacted largely to end rampant racial discrimination, but sex was added in somewhat at the last moment.<sup>61</sup> There is an interesting history here: an opponent of the bill proposed the amendment that added sex as a prohibited ground of discrimination—supposedly to kill it.<sup>62</sup> Though enacting the Equal Pay Act just a year before may have indicated Congress's intent to equalize the workplace between the genders, the EPA was limited in scope. Title VII additionally requires employers not to discriminate against women in all realms of material employment decision-making, such as hiring, firing, and promoting.<sup>63</sup> Requiring employers to treat women equally in these situations was a major expansion from the protections provided by the EPA.

A conservative Democrat from Virginia, Congressman Howard W. Smith, proposed the amendment to add sex shortly before the bill moved from the House to the Senate.<sup>64</sup> This was shocking to the House, not only because of Smith's previously anti-civil rights stances but also because of what the amendment would mean for the scope of the bill.<sup>65</sup> The addition of sex as a protected class would expand the bill's coverage from seven million African Americans to twenty-one million women, and it would ensure job rights equal to men for the first time in history, with very little discussion or thought given to the matter.<sup>66</sup> Members of Congress predicted that this change would have huge implications for the makeup of the workforce. They were right. In 1950 women made up only a third of the work force, but by 1970 it had risen to over 40 percent.<sup>67</sup> Today, women make up nearly half of the workforce.<sup>68</sup> Additionally, though the workforce was changing, up until the bill was

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60. 42 U.S.C. § 2000e (2018).

61. See SUSAN M. OMILIAN & JEAN P. KAMP, SEX-BASED EMPLOYMENT DISCRIMINATION § 11:1 (Supp. 2019).

62. See *id.*

63. 42 U.S.C. § 2000e-2.

64. Robert C. Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 150 (1997).

65. *Id.* at 150–51.

66. *Id.*

67. Mitra Toossi, *A Century of Change: The U.S. Labor Force, 1950-2050*, MONTHLY LAB. REV. 15, 24 (May 2002); Status of Women in the U.S., *Women's Labor Force Participation*, INST. FOR WOMEN'S POL'Y RES., <https://statusofwomendata.org/earnings-and-the-gender-wage-gap/womens-labor-force-participation/> [<https://perma.cc/N8VU-LX2C>] (last visited Oct. 31, 2019).

68. Status of Women in the U.S., *supra* note 67.

passed, men and women had largely not been doing the same kinds of jobs. Liberal members of Congress opposed the amendment on the stated grounds that sex discrimination was so fundamentally different from discrimination based on the other protected classes in the act that it didn't make sense to pass the two as part of the same statutory scheme.<sup>69</sup> The political grounds to oppose the amendment were to ensure that the addition of sex didn't kill the entire bill.<sup>70</sup> Fortunately, the plans of those hoping to see Title VII fail were thwarted, and both the House and the Senate passed the bill with the sex provision, due in large part to female and feminist voices in both houses.<sup>71</sup> This seems particularly extraordinary considering that there were only two women in the Senate and twelve in the House at the time.<sup>72</sup>

Even with the addition of sex, Title VII was never meant to replace the Equal Pay Act.<sup>73</sup> Instead, Congress created different rights under Title VII than existed under the EPA and provided different remedies for violations.<sup>74</sup> Indeed, the EPA has such limited reach that it necessitated Title VII. Though the EPA had not been in effect long enough for Congress to be aware of its shortcomings, there is some evidence that Congress was concerned that without adding sex to Title VII, white women in particular would be left in the lurch for hiring and promotions.<sup>75</sup> The most important distinction is that while the EPA is a strict-liability statute that punishes only the actual act of paying employees unequally based on their gender, Title VII is a statute meant to punish discriminatory intent.<sup>76</sup> Regardless of whether a plaintiff pursues their disparate-treatment claim based on direct evidence or circumstantial evidence,<sup>77</sup> the plaintiff's burden is to prove that their employer intended to discriminate against them based on their membership in a protected class.<sup>78</sup>

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69. Bird, *supra* note 64, at 155.

70. *Id.* at 154–55.

71. See OMILIAN & KAMP, *supra* note 61; Bird, *supra* note 64, at 160.

72. JENNIFER E. MANNING & IDA A. BRUDNICK, CONG. RESEARCH SERV., RL30261, WOMEN IN CONGRESS, 1917-2019: SERVICE DATES AND COMMITTEE ASSIGNMENTS BY MEMBER, AND LISTS BY STATE AND CONGRESS (2019).

73. Bowden, *supra* note 49, at 230.

74. *Id.* at 230–31.

75. See Bird, *supra* note 64, at 157–58.

76. Bowden, *supra* note 49, at 231.

77. See *infra* Section II.A.

78. See Bowden, *supra* note 49, at 231. There are two causes of action under Title VII: disparate treatment and disparate impact. Disparate-impact claims do not require a showing of discriminatory intent but instead require that some facially neutral business practice negatively and disproportionately affects a protected class. The USWNT is suing under a disparate-treatment

Because of this requirement, Title VII is not as well suited to the USWNT complaint. As discussed above, there are many reasons for pay inequality, and frequently it is not motivated by animus towards women.<sup>79</sup> Though the USWNT has alleged that the USSF directly stated that it would not pay the USWNT the same as the men, it is unclear as to what its reasoning was.<sup>80</sup> Most likely, the USSF was not of the mind that the women did not deserve to be paid less simply because they were women; it is more likely to do with historical revenue from men's and women's sports. As salaries have increased, they have been built on past salaries that had the same gap.<sup>81</sup> This, of course, was not what Title VII was meant to protect against. In fact, Title VII may actually protect employers whose nondiscriminatory decisions lead to circumstances like a wage gap because the burden for employer-defendants to show the nondiscriminatory reason for the adverse employment action is very low. However, Title VII is the act of choice for most wage-discrimination plaintiffs due to the weaknesses of the EPA.<sup>82</sup>

## II. *USWNT v. USSF*: A 50-50 BALL

There are two statutes implicated in the USWNT complaint: Title VII and the EPA. This Part gives an overview of the mechanics of the two laws and how the USWNT's claims may come out under the applicable case law. Ultimately, it's a "50-50 ball."<sup>83</sup>

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theory; therefore, this Note refers only to the requirements of a Title VII disparate-treatment claim. *See id.*

79. *See* CLAUDIA GOLDIN, CTR. FOR AM. PROGRESS, HOURS FLEXIBILITY AND THE GENDER GAP IN PAY 1, 2 (Apr. 2015), [https://scholar.harvard.edu/files/goldin/files/goldin\\_equalpay-cap.pdf](https://scholar.harvard.edu/files/goldin/files/goldin_equalpay-cap.pdf) [<https://perma.cc/Q4LW-THJ9>].

80. *See* Das, *supra* note 9 (claiming that the "U.S.S.F. has repeatedly admitted that it does not pay the women equally and that it does not believe the women even deserve to be paid equally," while the USSF reasons that earnings from outside US soccer are largely a consequence of the men's team generating much greater revenues than the women's team).

81. *See supra* Section I.C; *see generally* Safstrom, *supra* note 58 (discussing the effect, generally, of past salaries on the wage gap).

82. Bowden, *supra* note 49, at 231.

83. "50-50 ball" is soccer jargon for "anyone's ball." The phrase refers to a ball in play that is about equal distance from opposing players; either player could get to it, and the play is likely to result in a challenge.

### A. Title VII Claim

#### 1. Making Out a Title VII Claim

There are two ways in which to prove a Title VII disparate-treatment claim: the direct method and the indirect method.<sup>84</sup> Plaintiffs utilize the direct method when they have direct evidence—generally some kind of “smoking gun” (e.g., a statement made by the plaintiff’s supervisor indicating that he thinks men should make more because they are the breadwinners of the family).<sup>85</sup> The more common way to prove a Title VII case is through the indirect method, utilizing circumstantial evidence.<sup>86</sup> To make out a case under the indirect method, courts employ a three-stage burden-shifting framework.<sup>87</sup>

Stage one: The plaintiff has the full burden of proof to establish their *prima facie* case, which has four components.<sup>88</sup> The plaintiff must prove that (1) she is a member of a protected class, (2) who experienced an adverse employment action, (3) with respect to a position for which she was qualified, (4) under circumstances that give rise to an inference of unlawful discrimination.<sup>89</sup> In the absence of direct proof of discrimination, the *prima facie* case serves to establish the inference of discriminatory intent required by Title VII claims. In wage-discrimination cases, the first two components of the *prima facie* case are satisfied in that (1) the plaintiff is a woman, and (2) she is being paid less.<sup>90</sup> The third component is generally easy to show in dispute in a wage-discrimination case.<sup>91</sup> The fourth component, circumstances that give rise to an inference of unlawful discrimination, is most

84. See, e.g., *Collins v. Am. Red Cross*, 715 F.3d 994, 999 (7th Cir. 2013).

85. See, e.g., *Nagle v. Vill. of Calumet Park*, 554 F.3d 1106, 1114 (7th Cir. 2009) (noting that “this evidence usually requires an admission from the decisionmaker about his discriminatory animus, which is rare indeed”).

86. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (explaining that in order to establish a *prima facie* Title VII case of discrimination, the complainant must make a showing of a variety of circumstantial facts of the alleged discrimination).

87. *Id.* at 802, 807.

88. *Id.* at 802.

89. *Id.*

90. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983) (describing that sex-discrimination cases are not limited to female plaintiffs because Title VII’s language is “on the basis of sex” rather than “on the basis of being female”). However, for the purpose of clarity, this Note considers the more typical gendering of wage-discrimination claims: female plaintiffs who are paid less than their male counterparts.

91. It is much more likely for the qualification component to be in dispute in cases in which the plaintiff has been fired, demoted, not hired, or not promoted, as the employer is likely to argue that the plaintiff was not qualified.

commonly demonstrated by a similarly situated comparator.<sup>92</sup> In a wage-discrimination case, this would be a male counterpart who is being paid more than the female plaintiff.

Stage two: Once a plaintiff has established her *prima facie* case, the burden of *production* shifts to the employer-defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action (namely, lesser wages).<sup>93</sup> This is a lighter burden than the defendant's burden under the Equal Pay Act, which is discussed in the next Section. Under the Equal Pay Act, the defendant must not only produce an articulable reason but also prove it.

Stage three: After the defendant articulates a nondiscriminatory reason for the adverse employment action, the full burden shifts back to the plaintiff to prove that the nondiscriminatory reason provided is merely pretext, a fake reason to cover up the true discriminatory reason.<sup>94</sup> In the absence of an early US Supreme Court ruling for a pretext standard, three standards for pretext percolated among the lower courts: (1) pretext only, (2) pretext plus, and (3) pretext may. Courts that adopt the pretext-only standard only requires the plaintiff to disprove the defendant's proffered reason at the pretext stage, compelling judgment for the plaintiff. On the opposite end of the spectrum, a pretext-plus court requires a plaintiff to disprove the legitimate, nondiscriminatory reason *and* prove that discrimination was the true reason for the adverse employment action in order to prevail. The vague pretext-may standard falls somewhere in the middle of those two.

The Supreme Court intervened in two cases, *St. Mary's Honor Center*<sup>95</sup> and *Reeves v. Sanderson Plumbing Products, Inc.*, to narrow down the pretext standard.<sup>96</sup> In *St. Mary's Honor Center*, the plaintiff sued under Title VII after being fired from his position.<sup>97</sup> He alleged that it was due to his race and was able to disprove the employer's proffered reason for the firing; however, the record illustrated bad blood between the plaintiff and his supervisor.<sup>98</sup> The Court found that though the plaintiff had disproved the legitimate, nondiscriminatory reason, he

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92. See, e.g., *Arendale v. City of Memphis*, 519 F.3d 587, 603 (6th Cir. 2008) (articulating the fourth step as showing that the plaintiff "was replaced by a person outside the protected class or treated differently than similarly situated non-protected employees").

93. *McDonnell Douglas*, 411 U.S. at 802. The plaintiff bears the burden of persuasion at all times. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993).

94. *McDonnell Douglas*, 411 U.S. at 804.

95. *St. Mary's Honor Ctr.*, 509 U.S. 502.

96. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

97. *St. Mary's Honor Ctr.*, 509 U.S. at 505.

98. *Id.* at 505, 508.

had not done enough to show that the true cause of his firing was due to his race.<sup>99</sup> Thus, he had not met his burden at the pretext stage.<sup>100</sup> This ruling effectively eliminated the pretext-only rule that the lower court had followed.

In *Reeves*, the plaintiff sued his employer under the Age Discrimination in Employment Act of 1967 (ADEA) after being fired.<sup>101</sup> On appeal with the US Court of Appeals for the Fifth Circuit, the court applied the pretext-plus rule, finding that though he had disproven his employer's proffered reason for the firing, the plaintiff had not proven that age-based animus was the true motivation.<sup>102</sup> The Supreme Court reversed, clarifying that evidence from the prima facie case, along with the plaintiff's evidence disproving the nondiscriminatory reasons given for his firing, was enough to establish pretext.<sup>103</sup> This holding effectively ruled out "pretext plus" as the rule. The Court articulated the pretext-may rule as requiring the plaintiff to show "a prima facie case and sufficient evidence to reject the employer's explanation," which "may permit a finding of liability."<sup>104</sup> This articulation indicates that the inquiry is fact specific and fact intensive.<sup>105</sup> The circuits have had difficulty uniformly applying the pretext-may rule, and the burden on the plaintiff remains unclear and, at times, incredibly difficult to surmount.<sup>106</sup>

## 2. The USWNT's Title VII Case

The USWNT has a fighting chance at a successful Title VII claim. The biggest hurdle, as in most Title VII cases, will be the pretext stage. The team can somewhat easily establish its prima facie case. The team members are members of a protected class (women), who experienced an adverse employment action (discriminatory pay), with respect to a position for which they were qualified (this requirement seems obviously met), under circumstances that give rise to an inference of unlawful discrimination. The similarly situated comparators that demonstrate the last component of the prima facie case are the members of the men's national team. If the USWNT can

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99. *Id.* at 508.

100. *Id.* at 508, 511.

101. *Reeves*, 530 U.S. at 138. For the purposes of the burden-shifting framework, ADEA, ADA, and Title VII litigation is coextensive.

102. *Id.* at 139–40.

103. *Id.* at 146–47.

104. *Id.* at 149 (emphasis added).

105. Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 324 (2010).

106. *Id.* at 335–36.



adequately prove that the USSF pays the men more for their work than it pays the women for an equal amount of work, it is likely enough to satisfy the fourth element of the *prima facie* case. The result will be an inference of discrimination, rather than a factual finding of discrimination.<sup>107</sup>

The USSF is likely to have a few arguments here to attack the *prima facie* case, many of which have been publicly stated in the ongoing proceedings. The crux of these arguments is not only that discrimination is nonexistent but that there is not even a foundation for the public (or the USWNT, for that matter) to infer discrimination. First, there is actually no pay discrepancy; in fact, the women at times make more than the men. This would attack the second element of the *prima facie* case (the adverse employment action). Whether the USSF succeeds in this argument will largely depend on the data that each side presents.

Next, the USSF might also argue that the men's team is not a similarly situated comparator to the USWNT. This argument will rely on the fact that the men play different numbers of games, are in a different league, and so on. However, the burden to prove a *prima facie* case is not meant to be onerous.<sup>108</sup> It thus follows that the standard for "similarly situated" is not an extremely high bar. The Ninth Circuit—which is where this case is filed—articulates the standard this way: "Individuals are similarly situated when they have similar jobs and display similar conduct."<sup>109</sup> For the purposes of Title VII, the two teams are probably situated similarly enough to qualify as comparators, and, thus, this argument will likely fail. Additionally, it is worth noting that while a similarly situated comparator is the gold standard for the fourth element of the *prima facie* case, there are other ways to satisfy the element. All it calls for are "circumstances which give rise to an inference of unlawful discrimination."<sup>110</sup> In addition to the comparison of the USWNT to the men's team, the USWNT alleges that the USSF directly denied pay equal to the men's team during pay negotiations.<sup>111</sup> The spokeswoman for the USWNT asserted that the USSF "has repeatedly admitted that it does not pay the women equally and that it does not believe the women even deserve to be paid equally."<sup>112</sup> If the USWNT has evidence substantiating these statements, it would

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107. See *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576–77 (1978).

108. OMILIAN & KAMP, *supra* note 61, § 11:10.

109. *Vasquez v. Cty. of L.A.*, 349 F.3d 634, 641 (9th Cir. 2003).

110. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

111. Jessop, *supra* note 25.

112. Das, *supra* note 9.

probably be enough to overcome any arguments by the USSF attacking the fourth element of the prima facie case.

Once the prima facie case is established, the burden shifts to the USSF to produce a legitimate, nondiscriminatory reason for the pay disparity. This is where some of its less publicized arguments will come out—by articulating a nondiscriminatory reason, the USSF is inherently admitting that it does in fact pay the USWNT less. The most public reason that it has put forward thus far is the fact that both teams are paid pursuant to collective bargaining agreements.<sup>113</sup> In 2017, the USWNT entered into a collective bargaining agreement with the USSF that included pay structure.<sup>114</sup> The USSF is likely to point out that during these negotiations, the USWNT would have been well aware of the men's pay and agreed to the CBA anyway.<sup>115</sup> Additionally, the USSF is likely to point out that the women will have a chance to change their pay structure if they are unsatisfied after this CBA expires in 2021.<sup>116</sup> Some have argued that policy arguments aside, this dispute is really a contract issue.<sup>117</sup> Indeed, the USSF filed for a preliminary injunction against the USWNT in an earlier suit in order to keep the USWNT from striking and therefore breaching their contract.<sup>118</sup> This argument stands on the idea that the CBAs are legally binding. However, employers cannot contract around discrimination. To argue that the USSF can bind the USWNT to its contract is to argue that employers can enforce inherently discriminatory contracts. It is well settled that contracts whose terms violate legally protected rights are void for illegality.<sup>119</sup> Therefore, the contract issues are inextricably linked to the equal-pay claims, and this proffered reason is unlikely to satisfy the legitimate, nondiscriminatory reason requirement.

The USSF might also argue that it pays the women less because they bring in less revenue. If this can be established, this is far more likely to satisfy USSF's burden than the CBA argument. The USSF has stated publicly that the USWNT has brought in \$101.3 million in gross revenue over the last ten years—a period that includes two

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113. Letter from Carlos Cordeiro to Membership, *supra* note 35.

114. Jessop, *supra* note 25.

115. *Id.*

116. *Id.*

117. See generally Dale Hutcherson, *Striker No Striking!* U.S. Soccer Federation, Inc. v. U.S. Women's National Soccer Team Players Ass'n: *A Clearance in the Courtroom*, 26 SPORTS L.J. 109 (2019).

118. *Id.* at 111–12.

119. “A contract is void ab initio if it seriously offends public policy.” *Void*, BLACK'S LAW DICTIONARY (11th ed. 2019).

Women's World Cup wins.<sup>120</sup> In contrast, the men's team has brought in \$185.7 million despite its lackluster performances at the World Cup.<sup>121</sup> During this period, the men have played fewer games than the women.<sup>122</sup> Additionally, the USSF has alleged that USWNT games have generated a net profit in only two of the last ten years.<sup>123</sup> It is worth noting that these numbers are limited to game revenues (i.e., ticket sales) rather than overall revenues.<sup>124</sup> Much of the revenue the USWNT brings

in is based on broadcast rights, corporate sponsorship rights, and merchandise sales; however, the USSF has not provided information about these revenues, stating "these revenues have not been attributed directly to either the women's or men's team alone."<sup>125</sup>

Because the burden for defendant-employers to produce a legitimate, nondiscriminatory reason is low, the revenue argument is likely enough to shift the burden back to the USWNT to prove pretext. Applying the pretext-may framework, a court *may* decide it is enough if the USWNT can definitively prove that the USSF's proffered reason is untrue. Alternatively, a court *may* decide that disproving the reason plus other evidence provided to prove the prima facie case is required to prove pretext and thus discrimination.<sup>126</sup> However, under *Reeves*, a court has the discretion to reject even this as sufficient for pretext; it may decide that enough innocuous factors surround the USSF's pay decisions and that the USWNT hasn't actually proven discriminatory intent. And this may be the right result.

As discussed in Section I.D, Title VII was passed to end overt discrimination in the workplace. Based on the information publicly available, it does not seem that the USSF has decided to pay the USWNT less because, either in whole or in part, they are women. There is unintentional, systemic sexism prevalent in athletics that pushes down the market value of the USWNT, both in the United States and abroad.<sup>127</sup> The USSF has negotiated salaries accordingly. Ultimately,

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120. Carlos Cordeiro (@CACsoccer), TWITTER (July 29, 2019, 5:23 PM), <https://twitter.com/CACsoccer/status/1155951910760796166> [<https://perma.cc/7N58-ZPGF>].

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. MARIA L. ONTIVEROS ET AL., EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 117 (The Labor Law Grp. ed., 9th ed. 2016). Courts are given great discretion here, and the Supreme Court's extremely vague standard for establishing pretext makes it difficult to predict how a court will come out in this particular case. *Id.*

127. *See supra* Section I.A.

this is not the problem that Congress enacted Title VII to solve; rather, this sort of facially neutral decision-making that systematically disfavors women in the workplace is what the Equal Pay Act should solve. The following Section explores how the USWNT's suit might fare under the EPA. It may also shed some light on why wage-discrimination plaintiffs favor Title VII claims over EPA claims when the latter's policy goals so clearly fit their situation.

### *B. Equal Pay Act Claim*

#### 1. Making Out an Equal Pay Act Claim

To make out a prima facie case under the EPA, the plaintiff has the burden to show that the plaintiff is (1) receiving unequal pay for the performance of (2) equal work (3) on the basis of sex.<sup>128</sup> The seminal case in Equal Pay Act jurisprudence is *Corning Glass Works v. Brennan*, in which the Court fleshed out the “equal work” requirement. In *Corning Glass*, the Court looked to the text of the statute to identify the four factors that matter in deciding whether work is equal, rather than just looking to a job title or description.<sup>129</sup> Those four factors are (1) skill, (2) effort, (3) responsibility, and (4) working conditions.<sup>130</sup> Courts have consistently held that in each of these criteria, the jobs must be substantially equal or substantially similar.<sup>131</sup>

The *Corning Glass* decision largely turned on the meaning of the fourth factor, working conditions.<sup>132</sup> The Court held that “working conditions” is an industrial term of art referring specifically to hazards or surroundings that affected the way in which employees performed their jobs.<sup>133</sup> As courts have interpreted the other factors, they have looked not to compare plaintiffs’ subjective abilities with their male counterparts but the objective skill and effort required to do the job.<sup>134</sup> Equal skill may come to be an important factor in the USWNT’s case. When courts assess whether equal skill is required, they look to factors like training, education, and ability.<sup>135</sup> These factors are measured in

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128. See, e.g., *Smith v. Janey*, 664 F. Supp. 2d 1, 12 (D.D.C. 2009); *Wildi v. Alle-Kiski Med. Ctr.*, 659 F. Supp. 2d 640, 657–58 (W.D. Pa. 2009).

129. *Corning Glass Works v. Brennan*, 417 U.S. 188, 200–01 (1974).

130. *Id.*

131. See, e.g., *Wildi*, 659 F. Supp. 2d at 658.

132. 417 U.S. at 202–03.

133. *Id.* at 202.

134. See, e.g., *Wildi*, 659 F. Supp. 2d at 658.

135. See, e.g., *Kling v. Montgomery Cty.*, 324 F. Supp. 3d 582, 589 (D. Md. 2018).

terms of performance on the job with an emphasis on the obligations of the job.<sup>136</sup>

The EPA also imposes an additional requirement: that the comparator be within the same “establishment.”<sup>137</sup> The EPA does not define “establishment” for the purposes of the statute, but the term is generally construed to refer to a single physical location rather than considering the organization or corporation to be an “establishment.”<sup>138</sup> This requirement ensures that employers are not required to provide the same salary in vastly different markets in order to avoid liability when they otherwise would not provide the same salary.

Once the plaintiff has established a *prima facie* case, the full burden of proof shifts to the defendant to prove one of the four affirmative defenses enumerated in the statute: (1) seniority, (2) merit, (3) incentive systems, or (4) a factor other than sex.<sup>139</sup> This fourth defense is a catchall with a very broad application.<sup>140</sup> Under the fourth option, defendants have successfully argued that prior salary, experience, and economic benefit for the employer were nondiscriminatory reasons for the wage disparity.<sup>141</sup> In *Corning Glass*, the Court held that the difference between day versus night shifts might fit under the fourth factor.<sup>142</sup> Defendants have the burden to persuade the court at this stage that its affirmative defense is the reason for the wage disparity.<sup>143</sup>

## 2. The USWNT's Equal Pay Act Claim

There are a few major hurdles that the USWNT will face in making this claim: the substantially equal requirement, particularly as it relates to skill; the establishment requirement; and the breadth of the fourth affirmative defense. Federal courts have applied the

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136. See, e.g., *id.*; *Lopez-Mendez v. Lexmark Int'l Inc.*, 680 F. Supp. 2d 357, 381 (D.P.R. 2010).

137. 29 U.S.C. § 206(d) (2018).

138. 29 C.F.R. § 1620.9 (2020).

139. See, e.g., *Warf v. U.S. Dep't of Veterans Affairs*, 713 F.3d 874, 881 (6th Cir. 2013).

140. See *Corning Glass Works v. Brennan*, 417 U.S. 188, 199–200 (1974) (analyzing the legislative history of the Equal Pay Act and determining that the bill was meant to give broad meaning to its exceptions to protect employers with “formal, systematic job evaluation plans”).

141. See, e.g., *Spencer v. Va. State Univ.*, 919 F.3d 199, 202–03 (4th Cir. 2019); *Black v. Barrett Bus. Servs.*, No. 1:18-CV-00096-CWD, 2019 WL 2250263, at \*7 (D. Idaho May 23, 2019).

142. 417 U.S. at 204. The defendant did not argue this—instead, the defendant argued that the day- versus night-shift distinction was a different “working condition” for the purposes of the act. The Court disagreed, and thus held for the plaintiff, but noted that the night shift may have been an acceptable defense had the defendant produced evidence of some disparate condition (like “psychological and physiological impacts”). *Id.*

143. *Id.* at 204–05.

substantially equal requirement fairly stringently, requiring all four factors enumerated in the statute—skill, effort, responsibility, and working conditions—to meet that high threshold.<sup>144</sup> Working conditions is likely to be a nonissue. Additionally, it seems unlikely that the USSF will argue that the USWNT does not exert substantially equal effort or have equal responsibilities. However, equal skill is a fact-intensive inquiry.<sup>145</sup> Additionally, arguments could get even more nitpicky than that—men run faster than women, they may run more miles in a game than the women, they may get more physical in game play than the women do.<sup>146</sup> It is not outlandish to think that the USSF will bring specific statistics to the table to prove that the skill the women have is not substantially equal to the skill the men have, and it may well win this argument. Additionally, while the women have played more games over the past number of years,<sup>147</sup> qualification for the Men’s World Cup requires more games over a longer span of time.<sup>148</sup> The USSF has previously argued that this is the reason for qualification bonus discrepancies.<sup>149</sup> Courts compare the objective skill required in the particular jobs, not the actual skill of individuals (or here, teams) on the job.<sup>150</sup> Because of this, the court is unlikely to consider the fact that the USWNT is far more successful than the men as compared to other nations’ teams.

Some states have worked to lessen the stringent “equal work” requirement (and the “substantially equal” interpretation of that requirement) by using different language in their state versions of the Equal Pay Act.<sup>151</sup> Some examples of broader language that has been enacted include “the same quantity and quality of the same classification of work”; “the same or substantially similar work”; “similarly employed”; “equivalent service” or “the same amount or class of work”; “the same kind, grade, and quantity of service”; “work of comparable character”; or “comparable work.”<sup>152</sup> Even with these changes, some of which are a significant departure from the federal

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144. See, e.g., *Wildi v. Alle-Kiski Med. Ctr.*, 659 F. Supp. 2d 640, 658 (W.D. Pa. 2009).

145. See, e.g., *Kling v. Montgomery Cty.*, 324 F. Supp. 3d 582, 593–96 (D. Md. 2018).

146. See generally Arve Vorland Pedersen, Ingvild Merete Aksdal & Ragna Stalsberg, *Scaling Demands of Soccer According to Anthropometric and Physiological Sex Differences: A Fairer Comparison of Men’s and Women’s Soccer*, FRONTIERS PSYCHOL. (Apr. 9, 2019), <https://doi.org/10.3389/fpsyg.2019.00762> [<https://perma.cc/4ADD-GS2T>].

147. Tate Royer, *A History of the USWNT*, SPORT AM. HIST. (June 11, 2019), <https://ussporthistory.com/2019/06/11/a-history-of-the-uswnt/> [<https://perma.cc/AHX4-ASV2>].

148. Das, *supra* note 32.

149. *Id.*

150. See, e.g., *Allender v. Univ. of Portland*, 689 F. Supp. 2d 1279, 1285 (D. Or. 2010).

151. Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581, 610 (2018).

152. *Id.* at 610–12.

language, state courts in most of these jurisdictions have interpreted state versions of the EPA as coextensive and have applied the standards from the federal legislation to the state law.<sup>153</sup> Three states, California, Massachusetts, and Oregon, have recently enacted new legislation to combat the pay gap.<sup>154</sup> Massachusetts and Oregon already had statutes with broader reach than the federal law, requiring equal pay for “work of like or comparable character or work on like or comparable operations” and equal pay for “work of comparable character,” respectively.<sup>155</sup> Both states amended their statutes to define “comparable work” and ensure a broader application than the federal statute enjoys.<sup>156</sup> Additionally, Massachusetts added a provision that prohibits employers from seeking salary history to avoid the kind of generational lower wages described in Section I.C.<sup>157</sup> California broadened its law from an equal-work requirement to “substantially similar work, when viewed as a composite of skill, effort, and responsibility . . . performed under similar working conditions.”<sup>158</sup> By viewing those factors as a composite, rather than the individual inquiries required by the federal law, the statute should reach more than just those workers in identical jobs.

Even if the court decides that the jobs are substantially equal in all four respects, the USWNT will still confront the “same establishment” requirement. The two teams operate independently; they have different leadership, play in different leagues, and train separately.<sup>159</sup> This is also evidenced by the fact that they are represented separately in collective bargaining and have different pay structures and budgets.<sup>160</sup> As the USSF stated in its answer to the USWNT complaint, “the USWNT and USMNT are physically and functionally separate organizations.”<sup>161</sup> Courts have generally construed the establishment requirement narrowly—referring to a physical place of business.<sup>162</sup> Employees are compared only to other employees within their own location, not even to employees of the same

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153. *Id.* at 611.

154. *Id.* at 623.

155. *Id.* at 624, 627.

156. *Id.* at 627–28.

157. *Id.* at 624.

158. *Id.* at 625.

159. Answer at 7, *Morgan v. U.S. Soccer Fed’n, Inc.*, No. 2:19-CV-01717-RGK-AGR (C.D. Cal. May 6, 2019).

160. *Id.*

161. *Id.*

162. See, e.g., *Price v. N. States Power Co.*, 664 F.3d 1186, 1194 (8th Cir. 2011).

company at another branch.<sup>163</sup> Because of this narrow construction, a court is likely to find that the USWNT and the USMNT operate within separate establishments for the purposes of the statute. All three of the amended state laws mentioned above lack any establishment requirement, but they do allow for a geographic-location defense.<sup>164</sup>

Finally, the breadth of the fourth affirmative defense is likely to be a significant hurdle for the USWNT, as it has been for many Equal Pay Act plaintiffs. The fourth defense, the most utilized and discussed, exempts wage disparities caused by “any factor other than sex.”<sup>165</sup> The breadth of the factor indicates Congress’s intent to protect employers from frivolous claims. However in practice, it has proven to be a catchall argument that has undermined the ability of the statute to hold employers accountable at all.<sup>166</sup> The fact that the EPA is a strict-liability statute inherently means it does not require a showing of intent, but the way in which courts have interpreted the fourth affirmative defense has essentially required just that.<sup>167</sup> Courts have frequently conflated the Equal Pay Act with Title VII disparate-treatment claims, allowing plaintiffs to show pretext and requiring a showing of discriminatory intent.<sup>168</sup> The fourth affirmative defense should be read in light of the other three affirmative defenses—seniority systems, merit systems, and systems that measure earnings by production quantity or quality—and thus should be construed as referring to some other kind of pay system that has to do specifically with some type of objective job or requirement-based factor.<sup>169</sup> The three preceding defenses are common examples of what the fourth affirmative defense encompasses.<sup>170</sup> The legislative history of the bill supports this: the Senate committee report described the exception as referring to “other valid classification programs.”<sup>171</sup> These classifications were likely to include things like education or training, skill, versatility, knowledge, and responsibility.<sup>172</sup>

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163. See, e.g., *id.*; *Bartelt v. Berlitz Sch. of Languages of Am., Inc.*, 698 F.2d 1003, 1005–07 (9th Cir. 1983).

164. Bornstein, *supra* note 151, at 643.

165. 29 U.S.C. § 206(d)(1) (2018).

166. Kimball, *supra* note 52, at 320–21.

167. *Id.* at 320.

168. *Id.*

169. *Id.* at 323–24.

170. *Id.* at 323.

171. *Id.* at 324.

172. *Id.*



However, generally speaking, courts have not construed the fourth affirmative defense in this way.<sup>173</sup> Rather, it is more like the legitimate, nondiscriminatory reason requirement under Title VII's burden-shifting framework. The burden is a little bit higher here; as an affirmative defense, both the burden of production and persuasion are on the employer for a showing of a "factor other than sex." However, it is still a much easier defense to satisfy than Congress intended. If the USSF were to produce its revenue argument as a factor other than sex defense, and the USWNT isn't able to show it to be untrue, the USSF will likely succeed on this claim. In contrast, under the interpretation suggested above, pay decisions based loosely off of historical revenue likely do not rise to the level of a classification program or an objective pay system. This aligns more closely with the original intent of the statute and separates the EPA's goals from those of Title VII.

The aforementioned Massachusetts equal-pay statute is unique in that it has never allowed for a "factor other than sex" defense.<sup>174</sup> California and Oregon did have broad affirmative defenses in that vein, but the legislatures limited the breadth of that factor by amending it to allow an employer only the defense of bona fide factors that are directly related to the position or work and consistent with business necessity, with no catchall factors.<sup>175</sup>

### III. A NEW PLAY: AMENDING THE EPA

While the USWNT has a real shot at prevailing on its Title VII suit, it is not likely to survive summary judgment on its EPA suit. This case exemplifies how flawed the current legal state is when it comes to ensuring equal pay for women and men and closing the wage gap. Title VII is an antidiscrimination statute, not one designed to remedy systemic, unintentional social ills. The Equal Pay Act, in contrast, was designed as a strict-liability statute. Congress meant the statute to combat the systemic devaluing of women in the workplace.

The United States needs this sort of strict-liability statute now more than ever. The wage gap has remained a wide gulf, and women continue to fall further behind their male counterparts over the years as their salaries build upon the last lower salary that they had. Or, in the case of women's soccer, female athletes have to combat a deep-rooted belief in sports fans that women's sports are just not as

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173. Bowden, *supra* note 49, at 226–27.

174. Bornstein, *supra* note 151, at 624.

175. *Id.* at 626, 628.

competitive, fun to watch, or worthwhile as men's. The USSF has internalized that mentality and paid its athletes accordingly.

Members of both the House and the Senate have introduced bills to remedy the pay inequality in US soccer. Senator Manchin of West Virginia and Representatives Matsui and DeLauro of California and Connecticut, respectively, introduced bills in their corresponding houses of Congress that would block federal funding for the 2026 Men's World Cup, some of which will take place in the United States.<sup>176</sup> The federal funding would only be released if the USSF paid the members of the USWNT equitably.<sup>177</sup> Additionally, Senators Feinstein (CA), Shaheen (NH), Klobuchar (MN), Gillibrand (NY), and Representative Speier (CA) introduced bills in their respective houses that would ensure equal pay, investment, and working conditions between female and male athletes under national governing bodies (including, but not limited to, the USSF).<sup>178</sup> While either of these approaches may be successful in ensuring the USWNT gets their due, the bills are limited in scope. That is, the bills will only ensure equal wages for a very small subset of women. Female athletes are clearly not the only women who suffer from wage discrimination in the United States. While the USWNT is a very public example of wage inequality and the ineffectiveness of the Equal Pay Act, it is just that—an example.

In order for the Equal Pay Act to effectively close the gender pay gap, it must be amended in several ways. First, the establishment requirement should be removed. Certainly, it is legitimate to pay a worker in New York City differently than one in Lincoln, Nebraska, but as the law stands, an employer is not required to pay its female store manager the same as its male store manager a town over. Some state laws have successfully ensured equal pay in these situations while also allowing for employers to pay differently based on cost of living. They have done this by removing the “establishment” language but allowing for a geographic-location defense. This way, if a company has a

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176. Des Bieler, *Senate Bill Would Block Federal Funds for 2026 World Cup Until USWNT Gets Equal Pay*, WASH. POST (July 10, 2019, 3:56 PM), <https://www.washingtonpost.com/sports/2019/07/10/senate-bill-would-block-federal-funds-world-cup-until-uswnt-gets-equal-pay/> [https://perma.cc/WRG6-MXMW]; Abigail Hess, *House Bill Would Block 2026 Men's World Cup Funding Until Women's Team Receives 'Equitable Wages'*, CNBC MAKE IT (July 24, 2019, 8:58 AM), <https://www.cnbc.com/2019/07/24/bill-would-block-world-cup-funds-until-womens-team-receives-fair-pay.html> [https://perma.cc/2RZP-A9XE].

177. Bieler, *supra* note 176.

178. *Women Senators Introduce Bill Requiring Equal Pay, Resources for U.S. National Teams*, COMMITTEE ON JUDICIARY (July 24, 2019), <https://www.judiciary.senate.gov/press/dem/releases/women-senators-introduce-bill-requiring-equal-pay-resources-for-us-national-teams> [https://perma.cc/XLX3-TC36].

pay-scale difference based on location or cost of living, it will not be liable under the statute. At the same time, such a modification will give plaintiffs a better chance to find a comparator to demonstrate the wage gap, rather than shutting their claims down before a court even reaches the merits.

Second, the equal-work standard must be changed. At this time, the standard is so high that jobs that look identical to a layperson (male soccer player and female soccer player, for example) do not meet the legal threshold. A combination of the approaches mentioned in Section II.B.2 should remedy the current legal situation without lowering the bar an unreasonable amount. Plaintiffs in state courts have come up against courts treating language in state statutes the same as in the federal statute, even where the language is much broader.<sup>179</sup> However, any change that lessens the standard from “equal” will signal to the courts Congress’s intention to broaden the statute’s application, so it is unlikely that plaintiffs in federal court will have to confront this issue. Though “equal pay for equal work” makes for a catchy rallying cry, language like “comparable work” or “similar work” better captures the breadth that the statute was intended to achieve. Additionally, California’s approach of treating the four inquiries (skill, effort, responsibility, and working conditions) as a composite inquiry rather than four separate requirements would allow courts to consider the positions as a whole and balance them against each other as opposed to the current rigorous point-to-point comparison.

The final change that needs to be made is to rein in the fourth affirmative defense—any factor other than sex—by limiting it to bona fide objective pay systems. There is more than one way that Congress could successfully go about this. One approach is Massachusetts’s decision to just eliminate that provision altogether. Another more business-friendly alternative would be to use the language in the California and Oregon statutes limiting the catchall to bona fide factors that are directly related to the position or work in question. A third way would be to just clarify Congress’s original intent for the fourth defense by rephrasing the section to “except where such payment is made pursuant to *a system based on any factor other than sex*, such as (i) a seniority system; (ii) a merit system; or (iii) a system which measures earnings by quantity or quality of production.”<sup>180</sup> Presenting the specific systems as examples of the kind of system the fourth factor was initially

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179. Bornstein, *supra* note 151, at 610–11.

180. For comparison, the current language is as follows: “[E]xcept 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.” 29 U.S.C. § 206(d)(1) (2018).

intended to contemplate will limit courts' application of the affirmative defenses. This very simple rewording should be enough for courts to remedy the way in which they have interpreted the fourth defense without making it needlessly difficult for an employer to raise an affirmative defense when there is a legitimate reason for a pay disparity.

With these changes, a case like that of the USWNT has a far greater likelihood of success, and the Equal Pay Act will be able to much more effectively confront the systemic pay gap that women face in the US workforce. This combination of amendments is likely to draw employer-side criticism that it will be far easier for plaintiffs to bring frivolous claims. Opposition to these amendments would stem from the fear that they would overcorrect the narrowness of the current EPA and would punish employers for all kinds of discrepancies, even when justified. These fears are unfounded; the language proposed leaves clear, enumerated ways for employers to avoid liability. The proposed amendments merely incentivize employers to structure their pay systems in a thoughtful way, keeping in mind the systemic depression of women's wages.

#### IV. CONCLUSION

US women have been working in an inequitable job market since it became socially acceptable for them to work. This was made only marginally better by the enactment of the EPA in 1963. Nearly sixty years later, it is long overdue for Congress to update the law to combat the systemic sexism still prevalent in the US workplace and clear the way for women to make economic progress and be rewarded in accordance with their work rather than their gender. The USWNT's suit has made the need for these changes abundantly clear, but they are only a few women out of many who have not had their right to equal pay vindicated by the EPA. Their suit is part of a larger fight. As Megan Rapinoe, USWNT captain, put it, "The conversation is no longer about 'should we have equal pay?' or 'should we be supporting women?' It's 'how do we support not only athletes but women in general?'"<sup>181</sup> It is time for Congress to step up and ensure women the support they are

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181. Gregory, *supra* note 4.

due in order to create an equitable workplace, regardless of sex.

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