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## The End “Goal” to the U.S. Women’s Soccer Team Equal Pay Lawsuit: Proposing a Resolution for Gender Equality by Examining the Equal Pay Laws for Male and Female Sports

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# The End “Goal” to the U.S. Women’s Soccer Team Equal Pay Lawsuit: Proposing a Resolution for Gender Equality by Examining the Equal Pay Laws for Male and Female Sports

Veronica Adams<sup>1</sup>

*In March 2019, on International Women’s Day, 28 women on the U.S. Women’s Soccer Team filed a lawsuit against The U.S. Soccer Federation claiming gender discrimination, specifically in unequal payment between the men’s team and the women’s team. Players based the lawsuit on two grounds: (1) that U.S. Soccer violated the Equal Pay Act by paying the WNT less than the MNT; and (2) that the federation discriminated against the WNT under Title VII of the Civil Rights Act in regard to workplace conditions. The Federation claims that the men and women are paid equally and the discrepancy in pay lies in the way the payment is broken down for each respective team, since the WNT did not agree to a collective bargaining agreement as the MNT did. Additionally, the Federation points to the language of the Equal Pay Act to show that the men and women are distinctive in accordance with the language in the statute.*

*On May 1, federal Judge Klausner in California rejected the players claims that the WNT was paid less than the MNT. In his decision, he stated that other unequal working conditions such as travel conditions and medical support were issues that could be presented at trial. Ultimately Judge Klausner concluded that the WNT did not prove wage discrimination under the Equal Pay Act*

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*because the women’s team played more games and received more money than the men. Though, the fight has not stopped there. The WNT players have appealed the decision for which the trial has been asked to be pushed back to January 2021 due to the COVID-19 pandemic.*

*This article will examine whether the WNT can prevail with an equal pay claim under the current lawsuit and propose solutions to deter future pay disparity claims. Part I will discuss the WNT equal pay lawsuit in its entirety. Part II will analyze the WNT’s chance of prevailing under the claims brought. Part III will study both effective and ineffective pay structures in other sports. Part IV will analyze pay structure for both men and women and propose an equal business structure to ensure that there is no discrimination based on gender, specifically in United States professional soccer.*

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## I. INTRODUCTION

“Each time a woman stands up for herself, without knowing it possibly, without claiming it, she stands up for all women.”<sup>2</sup> Women have made positive steps towards equality in recent years. The number of women CEOs in Fortune 500 companies went from zero to 33<sup>3</sup> in just 20 years.<sup>4</sup> In 2016, Hilary Clinton was the first female nominee to run for President of the United States, making a huge leap toward women’s equality and power. Though women have endured a treacherous journey and made significant advances towards equality and equal rights amongst genders, the fight is far from over.

In many professional sports, women are paid less than men for performing the same job that requires the same skills, responsibility, and effort.<sup>5</sup> Just a couple years ago, “in 1993, the amount earned by female professional athletes was significantly lower than the earnings of professional male athletes.”<sup>6</sup> Moreover, the pay gap between men and women is prominent not just in soccer, but in many individual and team-based sports.<sup>7</sup> For example, in 2014, the Professional Golf Association (“PGA”) awarded \$340 million in prize money to the winner, “five times that of the new-high for the 2015 Ladies Professional Golf Association (“LPGA”) which was \$61.6 million.”<sup>8</sup> Similarly, “the Women’s National Basketball Association (“WNBA”) had a minimum salary of \$38,000 and a maximum salary of \$109, 500 and the 2012 team salary cap was

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<sup>2</sup> Juston Jones, *When It Comes to Politics, Friendship Has Its Limits*, N.Y. TIMES, <https://www.nytimes.com/2007/07/23/us/politics/23oprah.html> (July 23, 2007) (quoting Maya Angelou from a video which appeared on Hillary Clinton’s website in 2007).

<sup>3</sup> Courtney Connley, *The number of women running Fortune 500 companies is at a record high*, CNBC (May 16, 2019, 12:30 PM), <https://www.cnbc.com/2019/05/16/the-number-of-women-running-fortune-500-companies-is-at-a-record-high.html>.

<sup>4</sup> Mia Bush, *US Women Make Strides Towards Equality, But Work Remains*, VOA (March 8, 2016, 12:01 AM), <https://www.voanews.com/usa/us-women-make-strides-toward-equality-work-remains>.

<sup>5</sup> Syda Kosofsky, *Toward Gender Equality in Professional Sports*, 4 HASTINGS WOMEN’S L.J. 209, 213 (1993).

<sup>6</sup> *Id.* (noting that “the female winner of the 1989 world triathlon championship received \$11,000, while, that same year, the male winner received \$12,000 and a Jeep. In 1992, the winner of the United States Women’s Open golf tournament won \$130,000, while the winner of the United States Open (the men’s tournament) won \$275,000. Women’s professional basketball league were between \$5,000 and \$15,000, while men in the National Basketball Association (NBA) that year were paid, on average, \$143,000”).

<sup>7</sup> Honey Campbell, *Superior Play, Unequal Pay: U.S. Women’s Soccer and the Pursuit for Pay Equity*, 51 UNIV. OF SAN. FRAN. L. REV. 546, 546 (2017).

<sup>8</sup> Andrew Brennan, *Which Sports Have The Largest and Smallest Pay Gaps?*, FORBES (May 5, 2016, 2:09 AM), <https://perma.cc/98FF-MSZ8>.

\$878,000.”<sup>9</sup> Conversely, the 2015-2016 National Basketball Association (“NBA”) season had a minimum salary of \$525,093 and a maximum salary of \$16.4 million.<sup>10</sup> Such data is evidence of the significant discrepancy in pay between males and females in various professional sports.

More recently, on March 29, 2016, five players from the United States Women’s Soccer Team (“WNT”) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”) alleging pay discrimination against the United States Soccer Federation (“USSF”).<sup>11</sup> The WNT<sup>12</sup> alleges that they are paid four times less than the United States Men’s National Team (“MNT”), despite generating higher amounts in revenue for the USSF in 2015 and winning the World Cup in 2019, when the MNT did not even qualify to compete.<sup>13</sup> The USSF claimed that it did not violate Title VII or the Equal Pay Act (“EPA”) and that the disparity in wages are justified for three reasons.<sup>14</sup> The USSF claimed that, “(1) MNT generates more revenue than the WNT; (2) the WNT is paid on a different salary structure than the MNT; and (3) the WNT and the MNT’s collective bargaining agreements were negotiated at different times.”<sup>15</sup> This article will analyze the pay structures in place for both the MNT and the WNT, while proposing an overarching change in the Equal Pay laws as it applies to male and female sports.

In May 2020, the WNT faced a setback when a federal judge in California ruled in favor of the Federation on most of the key points based on gender and wage discrimination.<sup>16</sup> Judge Klausner granted the Federation’s motion for summary judgment with regard to the Equal Pay

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Plaintiffs’ Collective Action Complaint for Violations of the Equal Pay Act and Class Action Complaints of the Title VII Civil Rights Act of 1964 at 17 para. 70, Alex Morgan, et al., v. U.S. Soccer Fed’n Inc. (filed Mar. 8, 2019) (No. 2:19-CV-01717).

<sup>12</sup> Going forward, the term “WNT” will refer to the players on the Women’s National Team who brought the lawsuit against the USSF.

<sup>13</sup> Grant Wahl, *USWNT Stars Accuse U.S. Soccer of Wage Discrimination in EEOC Filing*, SPORTS ILLUSTRATED (Mar. 31, 2016), <https://www.si.com/soccer/2016/03/31/uswnt-eecoc-wage-discrimination-equal-pay>.

<sup>14</sup> Stephanie Yang, *Understanding USSF’s Response to the USWNT Wage Complaint*, STARSANDSTRIPESFC (June 1, 2016, 7:32 AM), <https://www.starsandstripesfc.com/2016/6/1/11827482/understanding-us-soccer-response-uswnt-eecoc-wage-complaint>.

<sup>15</sup> *Id.*

<sup>16</sup> Graham Hays, *Judge sides with U.S. Soccer in USWNT’s equal pay lawsuit*, ESPN (May 1, 2020), [https://www.espn.com/espnw/sports/story/\\_/id/29125363/judge-sides-us-soccer-uswnt-equal-pay-lawsuit](https://www.espn.com/espnw/sports/story/_/id/29125363/judge-sides-us-soccer-uswnt-equal-pay-lawsuit).

Act, finding that the players had not provided enough evidence to suggest that the WNT were being paid less than the MNT.<sup>17</sup> His ruling was based on the idea that women's players were paid more in total and on a per-game basis than the men.<sup>18</sup> He cited that from "2015 to 2019 the WNT averaged \$220,747 per game in total payments, totaling \$24.5 million while the men's national team averaged \$212,639 per game totaling \$18.5 million."<sup>19</sup> However, Klausner concluded that differences in payment structure were the result of the pay discrepancies and not discrimination by the federation.<sup>20</sup>

## II. EQUAL PAY LAWSUIT

### A. Background

Women have been subjected to prejudice, discrimination, and bias for decades. It is no surprise that such treatment transcended to the athletic industry. Throughout history, professional female athletes have had limited opportunities compared to men.<sup>21</sup> Women's sports have not been accepted in society nor given the same respect that men's sports enjoy as exhibited through the cancellation of women's sports and a limited sense of opportunity.<sup>22</sup> For example, "a women's professional tennis circuit did not exist until the players themselves sought sponsorship and created a professional tour."<sup>23</sup> Moreover, "prior to 1972, women were banned from competing in marathons in the United States."<sup>24</sup>

Pay inequality has also posed as a barrier for equal opportunities for female athletes in comparison to men.<sup>25</sup> Even with the EPA's enactment in 1963, which was created to end gender discrimination, women are still being discriminated against and paid significantly less than men.<sup>26</sup> Oftentimes, the first-place prize money for female sports is closer to the

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Kosofsky, *supra* note 5, at 210 (noting that many women's sports were not accepted until much later than the men's sports and that most women's sports were individual rather than team-based due to lack of interest for women's sports).

<sup>22</sup> *Id.* at 211 (a women's professional football league was formed in 1972 and a professional women's softball league was formed in 1975. Neither exist today).

<sup>23</sup> *Id.*

<sup>24</sup> See *Id.*

<sup>25</sup> See *Id.* at 211-12.

<sup>26</sup> See 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 Nov. 1, 2019).

lowest paid for male participants.<sup>27</sup> For example, the “Ladies Professional Golf Association 1988 Player of the Year . . . won four tournaments and then a record amount of \$1,092,748 in 1988.”<sup>28</sup> Had she been on the men’s PGA tour, she would have been put in 24<sup>th</sup> place for earnings.<sup>29</sup> Similarly, “in 2015 the U.S. Women’s Open tournament had a total purse of \$4.5 million and the champion took home \$810,000 . . . .”<sup>30</sup> However, the Men’s “U.S. Open had a total purse of \$10 million and the winner . . . took home \$1.8 million of it”.<sup>31</sup> While laws combating gender discrimination have been enacted, they are more for show than enforcement.

So, what creates a wage disparity? First, the pay gap between men and women has been justified by citing the differences in male versus female skill and quality of performance.<sup>32</sup> In the professional sports industry, employers justify paying women less by suggesting that the women’s game is “less exciting, less profitable, and therefore less compensable.”<sup>33</sup> If women were treated equally not only in salary but also in media coverage and spotlight, society as a whole would recognize women’s sports with the same prominence men’s sports hold today.<sup>34</sup>

### B. *WNT and MNT Together but Apart*

The United States soccer industry is unique in the sense that the USSF employs both the WNT and the MNT.<sup>35</sup> Associations like the NBA and WNBA do not share the same employer and, as such, are treated as separate legal entities.<sup>36</sup> This division prevents WNBA players from suing the NBA under the EPA because the WNBA players are not employed by the WNBA rather than the NBA.<sup>37</sup> The WNT is also unique because they

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Brennan, *supra* note 8.

<sup>31</sup> *Id.*

<sup>32</sup> Kosofsky, *supra* note 5, at 209. Many argue that the reason for the pay gap is due to the fact that women have unequal opportunity. They believe women do not have the same opportunity because they do not have the same skill level and the corresponding lack of public interest in women’s sports.

<sup>33</sup> Gabriella Levine, *Analysis: The Law and Legal Standing of U.S. Women’s National Team EEOC Complaint, Explained*, EXCELLE SPORTS (Apr. 1, 2016), <https://perma.cc/7FR8-9DE7>. Revenue is usually generated through advertisements, ticket sales, and TV programming which has a lower quantity than men’s sports.

<sup>34</sup> See Campbell, *supra* note 7, at 550-51.

<sup>35</sup> *Id.* at 550.

<sup>36</sup> *Id.*

<sup>37</sup> See *id.*

have won three World Cup titles and four Olympic gold medals.<sup>38</sup> This accomplishment is one that no other **men** or **women's** team has earned in an Olympic competition in any other country.<sup>39</sup> Moreover, the WNT reigned as number one in the world for seven consecutive years.<sup>40</sup> The MNT's success does not come close to the WNT's success.<sup>41</sup> In the most recent World Cup, the MNT did not even qualify; the WNT won first place.<sup>42</sup> Moreover, the WNT enjoys a large fan base and occupies a larger media attention as demonstrated by the 25.4 million viewers who tuned in to watch the 2015 World Cup, "a record for any soccer game, men's or women's, shown on English-language television in this country."<sup>43</sup> Furthermore, after winning the 2015 World Cup, the WNT commenced a post-cup victory tour which attracted thousands of fans to soccer stadiums across the United States bringing "\$23 million in game revenue, about \$16 million more than the federation had projected."<sup>44</sup> The WNT also adapted to the social media norms by joining social media platforms that increased their fan base to over 2.4 million followers, more than doubling the Twitter followers of the WNBA, the LGPA, and the WTA who each hold under a million followers.<sup>45</sup> Due to such a large following both on and off the field,

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<sup>38</sup> 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-wagediscriminatory-suit-ussoccer\\_us\\_56fd33c3e4b0a06d5804ecac](http://www.huffingtonpost.com/entry/uswnt-wagediscriminatory-suit-ussoccer_us_56fd33c3e4b0a06d5804ecac) (citing remarks made in complaint that is attached in article, due to EEOC procedures, case citations for ongoing investigations are not made public).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> 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-u-s-world-...> "The U.S. was scheduled to play semifinal losers Yugoslavia in a third-place consolation match prior to the final, but the Europeans refused to play. Consequently, the U.S. was awarded third place in the 1930 World Cup without kicking the ball. To this day, it is the best-ever finish for a CONCACAF team at a World Cup Tournament. . . ."

<sup>42</sup> Scott Davis, *Here Is the Giant Pay Disparity Between the U.S. Women's National Team Winning the World Cup vs. The Men*, BUSINESS INSIDER (July 7, 2019), <https://www.businessinsider.com.au/us-womens-national-team-world-cup-pay-vs-men-2019-7>.

<sup>43</sup> 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-in-united-states-history.html>.

<sup>44</sup> 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-equalpay>.

<sup>45</sup> *Compare* U.S. Soccer WNT (@USWNT), TWITTER (last visited Nov. 30, 2016), [https://twitter.com/ussoccer\\_wnt?ref\\_src=TWsrc%5Egoogle%7C7Ctwcamp%5Eserp%7C](https://twitter.com/ussoccer_wnt?ref_src=TWsrc%5Egoogle%7C7Ctwcamp%5Eserp%7C)



it is no surprise that the WNT has gained extreme support in their equal pay lawsuit as they fight for pay equality for women's sports.

### C. *Equal Pay Laws in America*

The lawsuit alleges claims under the following laws: (1) The Equal Pay Act of 1963 and (2) Title VII of the Civil Rights Act of 1984.<sup>46</sup> The Equal Pay Act ("EPA") is codified within United States Minimum Wage statute and in parts of the Fair Labor Standards Act ("FLSA").<sup>47</sup> The EPA prohibits employers from discriminating between employees based on sex by paying lesser wages to one sex versus the other when the employees are said to perform equal work on the jobs that require equal skill, effort, and responsibility.<sup>48</sup> Under the EPA, the term "wages" is defined broadly as all payments made to the employee as compensation for employment.<sup>49</sup> For example, wages include amounts for uniform cleaning allowances and hotel accommodations.<sup>50</sup>

The EPA was motivated by concern for equal rights for women, although men and women are equally protected under the Act.<sup>51</sup> A plaintiff bringing an EPA claim must show that "the employer paid different wages to an employee of the opposite sex for substantially equal work."<sup>52</sup> The employee-plaintiff does not need to prove that the employee's work is identical in nature.<sup>53</sup> Instead, a plaintiff only needs to prove that the same skill, effort, and responsibility are required.<sup>54</sup> "Skill" is measured based on the "performance requirements of the job" and factors such as experience,

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7Ctwgr%5Eauthor, with LPGA (@LPGA), TWITTER (last visited Mar. 25, 2016), <https://twitter.com/lpga>, and WNBA (@WNBA) (last visited Mar. 25, 2016), TWITTER, <https://twitter.com/wnba?lang=EN>, and WTA (@WTA) (last visited Mar. 25, 2016), TWITTER, <https://twitter.com/wta>.

<sup>46</sup> See Amy Steketee Fox, *U.S. Women's Soccer Team's EEOC Charge Spotlights Wage Discrimination Issues*, HRDAILYADVISOR (Jun. 19, 2016), <https://hrdailyadvisor.blr.com/2016/06/19/u-s-womens-soccer-teams-eEOC-charge-spotlights-wage-discrimination-issues/>.

<sup>47</sup> See 29 C.F.R. § 1620.1 (2017) (discussing basic applicability of Equal Pay Act as it is part of Fair Labor Standards Act under 29 U.S.C. § 206(d)). The Fair Labor Standards Act is codified at 29 U.S.C. §§201-219 (2012).

<sup>48</sup> 29 U.S.C. § 206(d)(1) (prohibiting sex discrimination against employees in workplace).

<sup>49</sup> 29 C.F.R. § 1620.10 (2016).

<sup>50</sup> *Id.*

<sup>51</sup> 29 C.F.R. § 1620.1(c) (2003) ("Men are protected under the Act equally with women. While the EPA was motivated by concern for the weaker bargaining position of women, the Act by its express terms applies to both sexes.").

<sup>52</sup> *Byrd v. Ronayne*, 61 F.3d 1026, 1033 (1st Cir. 1995) (citing *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1994)).

<sup>53</sup> 29 C.F.R. § 1620.14(a) (2016); see also Campbell, *supra* note 7, at 555.

<sup>54</sup> 29 C.F.R. § 1620.14(a) (2016); see also Campbell, *supra* note 7, at 555.

training, and ability are taken into consideration.<sup>55</sup> Moreover, the skill requirement can be satisfied even if the employee does not exercise the required skill as frequently as the other employee.<sup>56</sup> This means that the skill requirement looks to other factors besides the frequency of the skill performed.<sup>57</sup> “Effort” involves the mental and physical exertion needed to perform the job.<sup>58</sup> Additionally, the effort requirement may still be satisfied even if the effort is exerted in different ways by each employee.<sup>59</sup> “Responsibility” concerns the degree of accountability involved in the job.<sup>60</sup>

Once a plaintiff establishes a prima facie case, the burden shifts to the employer, who can raise affirmative defenses under Section 206(d)(1).<sup>61</sup> The defenses include when an employer pays an employee based on: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity and quality of production; or (4) a difference based on any other factor other than sex.<sup>62</sup> First, an employer may pay different wages to employees of the opposite sex as long as the wages paid are made in accordance with the nondiscriminatory seniority system.<sup>63</sup> To satisfy this requirement, the employer has the burden of proving that “its ‘merit system’ is administered, if not formally, at least systematically and objectively.”<sup>64</sup> Second, an employer may defend itself under the merit system by proving that the system provides terms and criteria where employee merit is rewarded.<sup>65</sup> However, there must be a system with predetermined criteria where the employer must show that employees were aware of the evaluation procedure if the procedure was not in writing.<sup>66</sup> Third, an employer may be excused from liability for paying different wages if the pay discrepancy is a result of a system which

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<sup>55</sup> 29 C.F.R. § 1620.15 (2016); *see also* Campbell, *supra* note 7, at 556.

<sup>56</sup> 29 C.F.R. § 1620.15 (2016); *see also* Campbell, *supra* note 7, at 556.

<sup>57</sup> 29 C.F.R. § 1620.15 (2016); *see also* Campbell, *supra* note 7, at 556.

<sup>58</sup> 29 C.F.R. § 1620.16(a) (2016); *see also* Campbell, *supra* note 7, at 556.

<sup>59</sup> 29 C.F.R. § 1620.16(a) (2016); *see also* Campbell, *supra* note 7, at 556.

<sup>60</sup> 29 C.F.R. § 1620.17(a) (2016).

<sup>61</sup> *See* 29 U.S.C. § 206(d)(1) (listing affirmative defenses).

<sup>62</sup> *Id.*; *see also* Daniel B. Abrahams, et al., *Fair Labor Standards Handbook for States, Local Government, and Schools* 710-14 (1998) (noting that EPA fails to define what constitutes “any other factor other than sex,” which have inhibited defendants from prevailing when invoking this defense).

<sup>63</sup> *See* *Corning Glass Works v. Brennan*, 417 U.S. 188, 204 (1974); *see also* Campbell, *supra* note 7, at 557.

<sup>64</sup> *Brennan v. Victoria Bank & Tr. Co.*, 493 F.2d 896, 901 (5th Cir. 1974) (citing *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719, 726 (5th Cir. 1970)).

<sup>65</sup> *Ryduchowski v. Port Auth. of N.Y. & N. J.*, 203 F.3d 135, 143 (2d Cir. 2000).

<sup>66</sup> *Campbell supra* note 7, at 558; *see also* *Equal Emp. Opportunity Comm’n v. Aetna Ins. Co.*, 616 F.2d 719, 725 (4th Cir. 1980).

measures earnings by the quality and quantity of production.<sup>67</sup> Lastly, even if an employer cannot prove that a difference in pay is based on the seniority, merit, or production system, they may prevail if the difference in pay is attributable to a factor besides that of sex.<sup>68</sup>

42 U.S.C. Section 2000(e), the Prohibition Against Discrimination or Segregation in places of Public Accommodation, encompasses Title VII of the Civil Rights Act and provides an opportunity for bringing additional gender-discrimination claims.<sup>69</sup> The same statute also created the EEOC, the governmental agency where the WNT filed their wage discrimination complaint.<sup>70</sup> While the Civil Rights Act and the EPA often refer to similar issues, the main difference between both claims is that Title VII requires a showing of intent to discriminate while the EPA claim does not.<sup>71</sup>

#### D. *The Lawsuit*

In March 2016, prominent members of the WNT such as Alex Morgan, Hope Solo, Carli Lloyd, Megan Rapinoe, and Rebecca Sauerbrunn filed a complaint with the EEOC alleging that the USSF discriminated against them based on sex in violation of Title VII of the Civil Rights Act of 1964 and the EPA.<sup>72</sup> The players alleged that despite their exceptional performance and revenue generation, they were not being paid equal or more than the MNT.<sup>73</sup> They allege that they are undercompensated in comparison to the MNT despite the USSF's obligation to pay both teams equally because they are both employed by the USSF.<sup>74</sup> Moreover, the WNT alleges that the USSF violated the EPA because 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.<sup>75</sup>

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<sup>67</sup> 29 U.S.C. § 206(d)(1) (2016).

<sup>68</sup> Campbell, *supra* note 7, at 558; *see also* 29 U.S.C. § 206(d)(1) (2016).

<sup>69</sup> *See* 42 U.S.C. §§ 2000e-1 to 17.

<sup>70</sup> *See* 42 U.S.C. § 2000e-4(a).

<sup>71</sup> *See, e.g.,* County of Washington v. Gunther, 452 U.S. 161, 170 (1981) (holding Title VII's prohibition of discrimination is to be read broadly, and incorporation of EPA's affirmative defenses into Title VII do not limit claims brought under it to those based equal pay for "equal work"). The majority opinion in *County of Washington v. Gunther* also cited past interpretations of Title VII as "prohibiting all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of religion, sex, or national origin." *Id.* at 180.

<sup>72</sup> Complaint, *supra* note 11, at 2.

<sup>73</sup> *Id.*; *see also* Campbell, *supra* note 7, at 552.

<sup>74</sup> Complaint, *supra* note 11, at 2-5; *see also* Campbell, *supra* note 7, at 548.

<sup>75</sup> Complaint, *supra* note 11, at 7-8; *see also* Campbell, *supra* note 7, at 552.

The USSF moved to dismiss the complaint due to a lack of evidence suggesting a discriminatory motive.<sup>76</sup> In its motion to dismiss, the USSF argued that the difference in wages between the MNT and the WNT are not discriminatory, but rather because (1) the MNT generates more revenue; (2) the WNT negotiated a guaranteed salary, compared to the MNT, who opted for a paid-by-appearance model; and (3) the MNT and WNT negotiated the collective bargaining agreements at different times, so it only makes sense that one team's compensation may sometimes fall behind the other.<sup>77</sup> Furthermore, the USSF proffered additional support for the pay disparity through bonuses awarded to the teams; the USSF has no control over such disbursements.<sup>78</sup> The case is now set for trial, but even assuming the WNT does not prevail, the players have set a precedent for women around the world to stand up for equal rights.<sup>79</sup>

### III. A CHANCE AT THE GOAL: ODDS OF WINNING THE LAWSUIT

#### A. *The "Same Establishment"*

The WNT has made a huge impact in women's professional sports around the world through the media attention, support, and global recognition gained as a result of this lawsuit.<sup>80</sup> For the WNT to succeed in their EPA claim, it must prove that they are employed in the "same establishment" as the MNT.<sup>81</sup> Federal regulations provide guidance on the meaning of "establishment."<sup>82</sup> According to the EPA, each physically separate place of business is usually considered a separate or distinct establishment.<sup>83</sup>

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<sup>76</sup> Anne M. Peterson, *U.S. Soccer Asks EEOC to Dismiss Wage Discrimination Complaint*, THE ASSOCIATED PRESS (May 31, 2016), <https://apnews.com/48a059bbda5c4c07adbef66bea5379ff/us-soccer-files-response-eoc-claim-wage-discrimination>.

<sup>77</sup> Yang, *supra* note 14; *see also* Campbell, *supra* note 7, at 553.

<sup>78</sup> 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/ussoccer-federation-says-uswnt-earns-only-22-percent-less-men>.

<sup>79</sup> Campbell, *supra* note 7, at 570.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 554.

<sup>82</sup> 29 C.F.R. § 1620.9(a) (2016).

<sup>83</sup> *Id.*

The Ninth Circuit's decision in *Winther v. City of Portland*<sup>84</sup> defined the geographical and operational factors and interpreted the meaning of "the same establishment" by assessing whether one is employed in the same establishment per the EPA.<sup>85</sup> There, the plaintiff worked for the Portland Bureau of Emergency Communication (the "BOEC") and contended that she was underpaid in comparison to the male employees of the Portland Fire Alarm Dispatch ("FAD"), who were in charge of handling emergency calls relating to the Portland Fire Department.<sup>86</sup> The *Winther* court analyzed what constitutes an "establishment" under the EPA by considering "the nature of the services provided and the degree of central administration, including budgeting, hiring, and day-to-day management, as well as the extent of physical separation."<sup>87</sup> The court characterized the physical component by analyzing whether the offices were physically contiguous.<sup>88</sup> In this case, because the BOEC and the FAD were not located in contiguous buildings, they were deemed physically separate.<sup>89</sup>

For the operational considerations, the court found that the BOEC and the FAD shared a central administration at the most general level.<sup>90</sup> Despite the central determination of job classifications and collective bargaining agreements, the BOEC and FAD had separate budgets, independent management, separate hiring authority, and were trained separately.<sup>91</sup> Additionally, the departments served different functions with no interchange between them.<sup>92</sup> These distinct characteristics led the court to conclude that the BOEC and FAD were separate establishments and, therefore, the disparity in salaries between genders in two different departments was insufficient to serve as the basis for an EPA claim.<sup>93</sup>

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<sup>84</sup> See *Winther v. City of Portland*, 1994 WL 118167, 21 F.3d 1119 at \*1 (9th Cir. 1994).

<sup>85</sup> Haile, Andrew J., *An Even Playing Field: The Goal of Gender Equity in World Cup Soccer*, 98 OR. L. REV. 427, 456 (2020).

<sup>86</sup> See *Winther*, 21 F.3d at \*1; see also Haile, *supra* note 85, at 454.

<sup>87</sup> See *Winther*, 21 F.3d at \*1; see also Haile, *supra* note 85, at 454.

<sup>88</sup> *Winther*, 21 F.3d at \*2; see also Haile, *supra* note 85, at 454.

<sup>89</sup> *Winther*, 21 F.3d at \*2; see also Haile, *supra* note 85, at 454.

<sup>90</sup> *Winther*, 21 F.3d at \*2; see also Haile, *supra* note 85, at 454.

<sup>91</sup> *Winther*, 21 F.3d at \*3; see also Haile, *supra* note 85, at 454.

<sup>92</sup> *Winther*, 21 F.3d at \*3; see also Haile, *supra* note 85, at 454.

<sup>93</sup> Haile, *supra* note 85, at 454-55; see also *Foster v. Arcata Assocs. Inc.*, 772 F.2d 1453, 1465 (9th Cir. 1985) (holding that separate officers of a business did not constitute an establishment under the Equal Pay Act where the office had separate budgets, independent management, and served different functions); *Price v. Northern States Power Co.*, 664 F.3d 1186, 1195 (8th Cir. 2011) (holding that officers who were 75 miles apart and under separate supervision did not constitute an establishment); *but see Brennan v. Goose Creek Consolidated Indep. School Dist.*, 519 F.2d 53, 58 (5th Cir. 1975) (holding that eleven elementary schools within a single district were an "establishment" under the Equal Pay Act because a central authority was responsible for wages and employment).

There are similarities between the WNT and the MNT in comparison to the *Winther* case.<sup>94</sup> Like the BOEC and FAD, the two teams are subject to separate management (their respective coaches and administrators) and each have their own collective bargaining agreements.<sup>95</sup> Additionally, the players are not selected by the USSF, but by separate individual coaches representing each team.<sup>96</sup> The USSF also claims that the two teams have separate budgets that take into account different revenues that the teams generate.<sup>97</sup> Thus, despite being controlled by the USSF, many of the lower-level decisions for the WNT and MNT are made individually and respective to each team without consideration for its counterpart.<sup>98</sup>

Nevertheless, the WNT is employed by the USSF.<sup>99</sup> Moreover, during the time of the alleged discrimination, the USSF has and continues to employ those who have been selected to play on the MNT.<sup>100</sup> Additionally, courts generally construe “in the same establishment” broadly under the Equal Pay Act because physically different places of establishments for men and women do not mean that they are not classified under “the same establishment.”<sup>101</sup> Yet, the court here may follow the Ninth Circuit in determining that the WNT and the MNT are not in the same establishment due to their distinct organizational and structural nature.<sup>102</sup>

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<sup>94</sup> Haile, *supra* note 85, at 455.

<sup>95</sup> *Id.* (citing Gregg Berhalter to Be Head Coach of USA Men’s National Soccer Team, GLOBAL TEAM EVENTS, <https://globalteamevents.com/gregg-berhalter-head-coach-usa-mens-national-soccer-team/> [<https://perma.cc/9EZ7-GVC6>] (last visited Feb. 9, 2020); Vlatko Andonovski Named Head Coach of U.S. Women’s National Team, U.S. SOCCER (Oct. 28, 2019), <https://www.ussoccer.com/stories/2019/10/vlatko-andonovski-named-head-coach-of-us-womens-national-team> [<https://perma.cc/K6T6-9M69>]).

<sup>96</sup> *Id.* (citing Alicia Rodriguez, *Why Has the USMNT Struggled? Start with How It Selects Players*, SBNATION (Jan. 29, 2019, 1:00 PM), <https://www.sbnation.com/2019/1/29/18199509/usmnt-roster-pool-demographics-latinx-foreign-born-players> [<https://perma.cc/MMX4-S9HL>] (discussing how the coach identifies the players he would like in the USMNT player pool)).

<sup>97</sup> Defendant United States Soccer Federation’s Answer and Affirmative Defenses to Plaintiff’s Complaint ¶ 37, *Morgan v. U.S. Soccer Fed’n, Inc.* (C.D. Cal. 2019) (No. 2:19-cv-01717-RGK-AGR, 2019 WL 6140478).

<sup>98</sup> See Haile, *supra* note 85, at 453-55.

<sup>99</sup> *USWNT lawsuit versus U.S. Soccer explained: Defining the pay gaps, what’s at stake for both sides*, ESPN (Jun. 3, 2020), <https://www.espn.com/soccer/united-states-usaw/story/4071258/uswnt-lawsuit-versus-us-soccer-explained-defining-the-pay-gapswhats-at-stake-for-both-sides>.

<sup>100</sup> Complaint, *supra* note 11, at 1.

<sup>101</sup> Campbell, *supra* note 7, at 559.

<sup>102</sup> Haile, *supra* note 85, at 454-55.

### B. Unequal Pay Rate

If the court finds that the teams are under the same establishment, the WNT will have to prove a pay disparity amongst the WNT and MNT based on sex.<sup>103</sup> This is a difficult obstacle for the WNT to overcome because game bonuses, tournament bonuses, and victory tour payments are all contingent on how the teams perform.<sup>104</sup> The WNT explains that the USSF's compensation structure for the WNT and MNT can be divided into four categories: (1) compensation for Friendlies; (2) World-Cup related compensation; (3) Olympics-related compensation; and (4) compensation for appearances, ticket revenue, and other monies.<sup>105</sup>

"According to the complaint, the USSF pays the top WNT players 38-72% of what the MNT players earn per game."<sup>106</sup> "The WNT players receive a maximum salary of \$72,000 per year to play a minimum of twenty Friendlies a year."<sup>107</sup> Moreover, the WNT players also receive a bonus of \$1,350 of each Friendly they win but do not receive additional compensation when they tie or lose games.<sup>108</sup> This means that if the WNT loses all twenty games, each player receives the base salary of \$72,000, equal to \$3,600 per game.<sup>109</sup> On the other hand, "if the WNT wins all twenty games, they receive \$99,000 for that year or \$4,950 per game."<sup>110</sup> Yet, unlike the WNT players, the MNT players receive a minimum of \$5,000 to play each game, regardless of the outcome.<sup>111</sup> More explicitly, "the MNT receive compensation ranging from \$6,250 to \$17,625 per game depending on the level of their opponent and the outcome of the game . . . ."<sup>112</sup> Therefore, "a MNT player will receive \$100,000 if he loses all twenty games, which is \$27,000 more than WNT players, and \$1,000 more than a WNT player who wins all twenty Friendlies."<sup>113</sup> A WNT player who plays more than twenty games "earns a maximum amount of \$1,350 per

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<sup>103</sup> 29 U.S.C. § 206(d)(1) (2016); *see also* Campbell, *supra* note 7, at 560.

<sup>104</sup> Haile, *supra* note 85, at 449-452.

<sup>105</sup> Campbell, *supra* note 7, at 560; *see also* Complaint, *supra* note 11, at 11.

<sup>106</sup> Campbell, *supra* note 7, at 560; *see also* Complaint, *supra* note 11, at 11.

<sup>107</sup> Campbell, *supra* note 7, at 560; *see also* Complaint, *supra* note 11, at 11.

<sup>108</sup> Campbell, *supra* note 7, at 560.

<sup>109</sup> *Id.*

<sup>110</sup> Campbell, *supra* note 7, at 560; *see also* Complaint, *supra* note 11, at 11.

<sup>111</sup> Campbell, *supra* note 7, at 560; *see also* Complaint, *supra* note 11, at 10.

<sup>112</sup> Campbell, *supra* note 7, at 560; *see also* Complaint, *supra* note 11, at 10.

<sup>113</sup> Campbell, *supra* note 7, at 560; *see also* 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](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-XQHJ>].

game and no additional compensation for a tie or loss.”<sup>114</sup> In contrast, “a MNT player can earn between \$5,000 for a loss, and as high as \$17,625 for a win for each additional game over twenty.”<sup>115</sup>

The WNT allege that World Cup compensation is another factor in USSF’s discriminatory practices.<sup>116</sup> The complaint alleges that compensation received by the WNT is even more contrasting than those of the Friendlies.<sup>117</sup> The WNT players earn a total of \$15,000 for trying out for the World Cup and for making the roster.<sup>118</sup> On the other hand, the MNT players could have earned \$68,750 for making the World Cup roster in 2018.<sup>119</sup> However, World Cup compensation remains a complicated subject due to the WNT’s success in the most recent World Cup’s in comparison to the MNT.<sup>120</sup> It is true that if the MNT had won the 2018 Men’s World cup, each player would have received significantly more than the WNT based on the provided numbers.<sup>121</sup> But, the MNT did not qualify for the 2018 Men’s World Cup, while the WNT qualified and *won* the 2019 Women’s World Cup.<sup>122</sup> Consequently, the WNT received significantly higher compensation for their most recent victory as compared to the MNT.<sup>123</sup> Hence, while there is a possibility that the MNT will be paid more than the WNT, the WNT has received higher payments in some years based on their team’s success and the MNT’s lack thereof.<sup>124</sup>

The USSF argues against the WNT by referencing how the WNT has high paid players.<sup>125</sup> According to its figures, The USSF also highlighted that “since 2008, it has paid twelve players at least \$1 million dollars, six of whom were women.”<sup>126</sup> The forms sent to the IRS have demonstrated that in the most recent years, the highest-paid players were from the WNT, including Christen Press, Rebecca Sauerbrunn, Kelly O’Hara, and Samantha Lewis.<sup>127</sup> The figures illustrate the prevalence of a wage

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<sup>114</sup> Campbell, *supra* note 7, at 560-61.

<sup>115</sup> Campbell, *supra* note 7, at 561; *see also* Complaint, *supra* note 11, at 10.

<sup>116</sup> Campbell, *supra* note 7, at 561; *see also* Complaint, *supra* note 11, at 10.

<sup>117</sup> Campbell, *supra* note 7, at 561; *see also* Complaint, *supra* note 11, at 11.

<sup>118</sup> Complaint, *supra* note 11, at 12.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 8-11.

<sup>121</sup> *Id.* at 11-12.

<sup>122</sup> Jennifer Calfas, *Why the U.S. Isn’t Competing in the 2018 World Cup*, TIME (Apr. 30, 2018, 2:55 p.m. EDT), <https://time.com/5258984/is-the-us-in-the-2018-world-cup/>; *see also* Campbell, *supra* note 7, at 562.

<sup>123</sup> *Id.*

<sup>124</sup> *See id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*; *see also* Das, *supra* note 44.

<sup>127</sup> *See* U.S. Soccer Federation, Inc. (Feb. 15, 2019), *Financial Information*, <https://www.ussoccer.com/governance/financial-information> (follow “FY2018 Form 990” hyperlink).



disparity between lower-ranked players.<sup>128</sup> To illustrate, the twenty-fifth ranked female player earned \$341,721 while the equal ranked player on the men's team earned \$580,522.<sup>129</sup> Additionally, President Carlos Cordeiro of the USSF contends that from 2010-2018 the USSF paid WNT players \$34.1 million in salaries and bonuses, while paying MNT players \$26.4 million.<sup>130</sup> Cordeiro justifies not including FIFA prize money by stating that money is "separate and apart from any funds controlled by U.S. Soccer."<sup>131</sup>

While the USSF argues that many of the top-ranked WNT players receive the same or more compensation than top MNT players, a court will likely find that MNT players are an appropriate comparator.<sup>132</sup> Additionally, because courts have previously held that perfect diversity is not necessary when comparing the two groups,<sup>133</sup> certain disparities in salaries will not make a difference, and the WNT will likely meet this element.<sup>134</sup>

### C. "Equal Work"

Even if the WNT players prove that they are in the same establishment as the MNT and are paid different wages, they must still show that different wages are paid for "equal work."<sup>135</sup> To meet this requirement, the WNT players are not necessarily required to prove the work is identical in every regard.<sup>136</sup> Rather, they need only prove that the work requires substantially equal skill, effort and responsibility.<sup>137</sup> The WNT players alleged that their "pre-game, post-game duties, skills, efforts, responsibilities and working conditions were substantially the same or greater than those of MNT players" because they have performed better than the MNT in many tournaments.<sup>138</sup> 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

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<sup>128</sup> Campbell, *supra* note 7, at 568.

<sup>129</sup> *Id.*

<sup>130</sup> Graham Hays, *USSF says USWNT has made more than men*, ESPN (July 29, 2019), <https://www.espn.com/soccer/united-states/story/3908663/ussf-says-uswnt-has-made-more-than-the-men>.

<sup>131</sup> Carlos Cordeiro, *Open Letter to Our Membership From U.S. Soccer President Carlos Cordeiro*, US SOCCER (July 19, 2019).

<sup>132</sup> Campbell, *supra* note 7, at 562.

<sup>133</sup> Beck-Wilson v. Principi, 441 F.3d 353, 362 (6th Cir. R. 2006).

<sup>134</sup> Campbell, *supra* note 7, at 562.

<sup>135</sup> *Id.*; see also Minimum Wage, 29 U.S.C. § 206(d)(1) (2016).

<sup>136</sup> Campbell, *supra* note 7, at 555; see also Minimum Wage, 29 U.S.C. § 206(d)(1) (2016).

<sup>137</sup> Campbell, *supra* note 7, at 555; see also 29 C.F.R. § 1620.15 (2016).

<sup>138</sup> Campbell, *supra* note 7, at 563; see also Complaint, *supra* note 11, at 8.

therapy, nutrition, and other regimes; (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 appearances.”<sup>139</sup>

The women also claim they are required to spend more time in training, travel, and game time due to their recent success and victories.<sup>140</sup> Yet, the USSF does not believe that the two teams are substantially equal because of the World Cup’s qualification procedures.<sup>141</sup> To qualify for the Women’s World Cup, the WNT “plays five games in a two week tournament.”<sup>142</sup> In contrast, to qualify for the Men’s World Cup, the MNT plays in sixteen games throughout a two-year period.<sup>143</sup> However, different procedural requirements for the men and women does not necessarily mean they are not engaging in substantially equal work.<sup>144</sup> The WNT allege that both teams are expected to travel nationally and internationally for games, require the same mental and physical strength, and have the same playing conditions.<sup>145</sup> The WNT argues these aspects of the job satisfy the “equal work” requirement.<sup>146</sup>

#### D. Defenses

Even if the WNT establishes a claim, the USSF may still raise one of the various defenses which may absolve itself from any liability. First, the USSF may argue that the difference in pay is due to a seniority system.<sup>147</sup> This defense, however, is weak because there is no claim that the players are paid under a seniority system.<sup>148</sup> Second, the USSF may raise the merit system defense, but it would have to prove that the players were systematically evaluated and that the players themselves were aware of it.<sup>149</sup> Third, the USSF could argue that the pay discrepancy is due to a system that measures earnings by quality or quantity of production.<sup>150</sup> But,

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<sup>139</sup> Campbell, *supra* note 7, at 563; *see also* Complaint, *supra* note 11, at 8-9.

<sup>140</sup> Complaint, *supra* note 11, at 9.

<sup>141</sup> *See generally* *USWNT lawsuit versus U.S. Soccer explained: Defining the pay gaps, what’s at stake for both sides*.

<sup>142</sup> Das, *supra*, note 44, at 3.

<sup>143</sup> *Id.*

<sup>144</sup> Campbell, *supra* note 7, at 564.

<sup>145</sup> Complaint, *supra* note 11, at 9.

<sup>146</sup> *Id.*

<sup>147</sup> Campbell, *supra* note 7, at 565.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 566.

<sup>150</sup> 29 U.S.C. § 206(d)(1); *see also* *Ryduchowski v. Port Auth. of N.Y. and N. J.*, 203 F.3d 135, 142 (LR 2000) (citing *Minimum Wage*, 29 U.S.C. § 206(d)(1) (2016)).

since the WNT has played more games than the MNT and has been more successful in doing so, this will likely not be a viable defense for the USSF.<sup>151</sup>

Lastly, to escape liability under the EPA, the USSF would have to prove that the pay discrepancies were based on other factors besides that of sex.<sup>152</sup> Most of the defenses raised by the USSF involve this prong of the EPA.<sup>153</sup> First, the USSF claims that the MNT generates more revenue than the WNT.<sup>154</sup> Specifically, the USSF contends that, “U.S. soccer paid the women’s team a greater share of the revenue generated by its games than the share it paid the men’s team of its revenue generated by the game.”<sup>155</sup> According to the USSF, it generates revenues around \$17.7 million per year, which is largely due to the success of the WNT when they won their third World Cup title in 2015.<sup>156</sup> The USSF claims that although the MNT has been compensated with more total game revenue, the WNT receives a larger portion of the game revenue due to the Collective Bargaining Agreement that leaves one team’s compensation lagging behind the other.<sup>157</sup> For the court to find this to be a valid defense, it would have to accept the USSF’s contention of analyzing revenue over a long term period rather than a short term cycle, which would then lean the numbers in favor of the USSF’s argument.<sup>158</sup>

#### *E. Business and Political Involvement*

The WNT’s equal pay lawsuit has reached millions of Americans who support the women fighting for an end to wage and gender discrimination.<sup>159</sup> The lawsuit has gained a great amount of attention from many supporters who stand for equal pay between gender, specifically in sports.<sup>160</sup> Multiple publications have praised the women for fighting and standing up for themselves. For example, the Harvard Business Review published *7 Lessons from the U.S. Women’s Soccer Team’s Fight for Equal Pay*, which applauded the WNT for how they have gone about

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<sup>151</sup> Campbell, *supra* note 7, at 564.

<sup>152</sup> 29 U.S.C. § 206(d)(1) (2016).

<sup>153</sup> Campbell, *supra* note 7, at 567.

<sup>154</sup> Yang, *supra* note 14.

<sup>155</sup> Peterson, *supra* note 76.

<sup>156</sup> See U.S. Soccer Federation, Inc., *Governance*, <https://www.usoccer.com/governance> (follow “Previous AGM Locations” hyperlink to “2016 Annual General Meeting” to “2016 AGM Book” to “Proposed Budget-FY ‘17”).

<sup>157</sup> Yang, *supra* note 14.

<sup>158</sup> Campbell, *supra* note 7, at 568.

<sup>159</sup> *Id.* at 570.

<sup>160</sup> *Id.*

bringing the lawsuit.<sup>161</sup> The article emphasized the importance of a strong leader.<sup>162</sup> Specifically, the article mentions Megan Rapinoe, one of the WNT players named on the equal pay complaint, who has spoken relentlessly about the pay gap and the effect on other industries as well.<sup>163</sup> Rapinoe has also been very vocal about race and sexuality which has led to vigorous discussions on politics where she addressed her hatred for the president and her disinterest in attending the White House when the WNT won the World Cup.<sup>164</sup>

The lawsuit has gained major traction, and as such, Rapinoe can use the lawsuit as a platform to advocate for political reform. While strong leaders are encouraged for a trend toward a strong movement such as this one involving equal pay, Rapinoe has also dissuaded many who have disagreed with her views.<sup>165</sup> While many of her views had nothing to do with the lawsuit specifically, her association has left many with a negative attitude towards the lawsuit due to her association with Colin Kaepernick, who received significant backlash for kneeling during the national anthem to draw attention to the police brutality and racial inequality in the United States.<sup>166</sup> For example, the sports drink BodyArmor released an ad starring Rapinoe, who knelt in solidarity for Kaepernick during the national anthem.<sup>167</sup> This caused the same controversy and business ramifications

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<sup>161</sup> See Ruchika Tulshyan, *7 Lessons from the U.S. Women's Soccer Team's Fight for Equal Pay*, HARVARD BUSINESS REVIEW (Sep. 25, 2019), <https://hbr.org/2019/09/7-lessons-from-the-u-s-womens-soccer-teams-fight-for-equal-pay>.

<sup>162</sup> *Id.* at 5.

<sup>163</sup> *Id.*

<sup>164</sup> E.J. Schultz, *Sports Drink BodyArmor's New Megan Rapinoe Ad Looks Like a Rebuke to Trump*, ADAGE (Jul. 1, 2019), <https://adage.com/article/cmo-strategy/sports-drink-bodyarmors-new-megan-rapinoe-ad-looks-rebuke-trump/2181081>.

<sup>165</sup> Marc A. Theissen, *Rapinoe's Anthem Protests Hurt the Fight for Gender Equity*, MYSA

(Jul. 10, 2019), <https://www.mysanantonio.com/opinion/commentary/article/Rapinoe-s-anthem-protests-hurt-the-fight-for-14086532.php> (“Rapinoe is dividing Americans with her anthem protests. Untold numbers of Americans who might have been inspired to support the team’s cause have been alienated by its leader.”).

<sup>166</sup> Amir Vera, *How national anthem protests took Colin Kaepernick from star QB to unemployment to a bold Nike ad*, CNN (Sep. 4, 2018, 9:00 a.m.), <https://www.cnn.com/2018/09/04/us/colin-kaepernick-controversy-q-and-a/index.html>.

<sup>167</sup> Ewan Palmer, *‘Now that’s America:’ BodyArmor Release New Megan Rapinoe Ad Praising Soccer Star After Trump Accused Her of Disrespecting Country*, NEWSWEEK (Jul. 2, 2019, 5:46 a.m. EDT) <https://www.newsweek.com/megan-rapinoe-bodyarmor-ad-world-cup-usa-1447050>.

that ensued for many companies, including Nike, from Kaepernick kneeling for the flag.<sup>168</sup> Furthermore, some expressed their dissatisfaction with Rapinoe, a member of the United States Women's Soccer Team, and her hatred towards the President and attending the White House.<sup>169</sup>

While every American is entitled to their own opinion and their own voice, many have distinguished this situation from the one of Kaepernick because Rapinoe wears the stars and stripes for her job, yet does not support the United States off the field by criticizing the President publicly.<sup>170</sup> The main issue many have with Rapinoe's outrage towards the United States is the fact that it is dividing Americans with her protest instead of unifying Americans behind the WNT equal pay lawsuit.<sup>171</sup>

While Rapinoe's words and support have offended many, some businesses have been hurt due to the support they have for these athletes. For example, Nike decided to have Kaepernick represent the brand.<sup>172</sup> This, in turn, caused many to boycott Nike, burn their Nike products, and advocate on social media for others to join in.<sup>173</sup> Thus, Megan Rapinoe's vocal support of Colin Kaepernick raised concerns amongst many, affected business reputations that endorsed her, and turning many Americans away from supporting the WNT's lawsuit.<sup>174</sup>

#### IV. EFFECTIVE AND INEFFECTIVE PAY STRUCTURES IN SPORTS

Outrage within the sports community stems in part from discriminatory pay structures and practices. While the WNT players have a chance of prevailing in their lawsuit, the discrimination that thrives in women's sports does not end with a judgment favoring the WNT. A simple solution that could significantly close the pay gap between the MNT and the WNT is to follow "the tennis model" and have the men and women play together in the same major tournaments, including the World Cup.<sup>175</sup> Allowing both teams to play in the same tournaments during the same time

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<sup>168</sup> Schultz, *supra* note 164.

<sup>169</sup> *Id.*

<sup>170</sup> Theissen, *supra* note 165, at 3.

<sup>171</sup> *Id.* at 4.

<sup>172</sup> Clay Travis, *Why I'm Boycotting Nike: Get Woke and Go Broke*, USA TODAY (Sept. 4, 2018), <https://www.usatoday.com/story/opinion/voices/2018/09/04/colin-kaepernick-ad-boycotting-nike-column/1189989002/>.

<sup>173</sup> *Id.*

<sup>174</sup> See Theissen, *supra* note 165.

<sup>175</sup> Cork Gaines, *There is An Easy Path to Equal Pay for Women's Soccer Players, and Tennis has Already Shown it Can Work at the Highest Levels*, BUSINESS INSIDER (Jul. 8, 2018) <https://www.businessinsider.com/womens-soccer-players-footballers-equal-pay-fifa-world-cup-2019-7>.

would increase the viewers for the women and in turn increase their total revenue, since views make up the revenue that sports teams receive.<sup>176</sup>

To illustrate, in tennis, women have achieved equal pay at the biggest events by playing in tournaments with men.<sup>177</sup> With the major sources of revenue such as broadcasting and advertising pooled together, it is unclear whether the men or the women generated a larger share of the revenue.<sup>178</sup> Allowing both the men and women to play in the same tournaments would surely increase the views for the women's team, thereby increasing their total revenue and leading to a more fair pay system.<sup>179</sup> In contrast, in golf, the women's game still lags far behind the men because they play in different tournaments, resulting in the women taking home less than half of what the men take.<sup>180</sup>

## V. WHAT NEXT? SOLUTION AND STEPS TO GENDER EQUALITY IN SPORTS

### A. *Investing in Women*

Broadcasting and advertising are linked to the revenue that is generated by sports teams.<sup>181</sup> Unsurprisingly then, men have been more likely to be broadcasted in part because they have been playing sports longer than women, since it was not many years later that women were allowed to participate in sporting events.<sup>182</sup>

Mia Hamm, a two-time Olympic gold medalist and two-time World Cup Champion for the WNT has chimed in and expressed that the USSF ought to invest the same amount into the women's team as they do in the men's.<sup>183</sup> According to Hamm, the men's team has historically been given priority in hiring the best coaches and developing the best talent through programs across the country.<sup>184</sup> Hamm emphasizes the issue is not solely

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<sup>176</sup> TJ Matthewson, TV is biggest driver in global sport league revenue, GLOBAL SPORT MATTERS, (Mar. 7, 2019)<https://globalsportmatters.com/business/2019/03/07/tv-is-biggest-driver-in-global-sport-league-revenue/>.

<sup>177</sup> Gaines, *supra* note 175.

<sup>178</sup> *Id.*

<sup>179</sup> *See id.*

<sup>180</sup> *Id.*

<sup>181</sup> *See* Matthewson, *supra* note 176.

<sup>182</sup> Bonnie Morris, Ph.D., *A Heritage of Mixed Messages*, Women's Sports Hist., NAT'L WOMEN'S HIST MUSEUM (Aug. 4, 2016), <https://www.womenshistory.org/articles/womens-sports-history>.

<sup>183</sup> Rachel Greenspan, 'I Applaud the Women for What They're Doing,' Mia Hamm on How to Close the Wage Gap On and Off the Field, TIME (June 25, 2019), <https://time.com/5613132/mia-hamm/>.

<sup>184</sup> *Id.* at 4.

with the pay gap but also with the lack of investment within the WNT.<sup>185</sup> For example, men's sports engage in deals such as the ABC/ ESPN \$8 million annual deal where the men are able to boost their visibility and audience.<sup>186</sup> In contrast, women's sports, including the WNT do not generate as large of an audience since the deals are being offered to men's sports and thus leads to a decline in viewership.<sup>187</sup>

To allow women to stand on the same pedestal as men and foster a movement towards equal pay, the public must start investing in women's sports.<sup>188</sup> The public today does not give women's sports the resources, time, or exposure to reach a sizeable audience that would allow them to compete at the same level from a viewership perspective with the men's team.<sup>189</sup> This lack of viewership skews the public's perception that women's sports are inferior to men's.<sup>190</sup> Rather, 84% of sports fans stated being interested in women's sports with 51% being men.<sup>191</sup>

If the public and businesses start to invest in the WNT, the team would see gains in revenue that would allow for a smaller gap between the MNT and the WNT.<sup>192</sup> As mentioned above, the views for women sports can increase if they participate in the same tournaments as the men.<sup>193</sup> Since male sports usually receive more views due to a larger fan base, allowing the women to participate in the same tournaments or competitions would increase the views for women sports by association.<sup>194</sup> Some companies have already begun to invest in the WNT in support of the lawsuit in place. For instance, Adidas announced that it would compensate World Cup winners equally to their male counterparts.<sup>195</sup> There is no doubt that despite not being viewed as much as the MNT before, the views for the WNT will increase as America wants to see the WNT succeed in an equal and non-discriminatory system. This will in turn increase revenue for the WNT and promote a future of equal pay between men and women's soccer.

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<sup>185</sup> *Id.*

<sup>186</sup> Rachel Allison, *It's Time to Invest in Women's Soccer*, The Society Pages (Apr. 2, 2019), <https://thesocietypages.org/engagingsports/2019/04/02/its-time-to-invest-in-womens-soccer/>.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Gaines, *supra* note 175.

<sup>194</sup> *Id.*

<sup>195</sup> Allison, *supra* note 186.

*B. Amending “In the Same Establishment”*

Increasing the views for the women’s team and investing more in the team may help the WNT to increase their revenue and close the pay gap between men and women.<sup>196</sup> Yet, taking a closer look at the root of the issue by amending and analyzing the statutory language of the Equal Pay Act can promote gender equality in sports for future cases.

To start, the “same establishment” requirement presented within the Equal Pay Act should be more malleable and perhaps changed to “similar establishment.”<sup>197</sup> This would change the statute to read:

No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which [similar employers pay] wages to employees of the opposite sex in [similar establishments,] for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working condition.<sup>198</sup>

Currently, the “same establishment” requirement allows employees to compare pay only with people who work in their same office or facility.<sup>199</sup> Because of this, many employees are left trapped when bringing EPA claims to the strict language within the statute.<sup>200</sup> For example, in a 2001 case between a female employee and employer, the court denied the employee’s EPA claim in part because the male counterpart worked in the Fresno office, while the female employee bringing the claim worked in the San Francisco office.<sup>201</sup> The court found that despite both employees working for the same company, they worked in different offices and as such were considered “different establishments” under the EPA.<sup>202</sup> This amendment to the Equal Pay Act would allow female employees to challenge their male counterparts when working in a similar establishment

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<sup>196</sup> Gaines, *supra* note 175.

<sup>197</sup> Nicole Zerunyan, Note, *Time’s Up: Addressing Gender-Based Wage Discrimination in Professional Sports*, 38 LOY. L.A. ENT. L. REV. 229, 252 (2017).

<sup>198</sup> See 29 U.S.C. § 206(d) (2018) (emphasis added).

<sup>199</sup> See Halima Kazem, *California Equal Pay Bill Shields Women from Retaliation for Discussing Wages*, GUARDIAN (Apr. 21, 2015, 10:59 AM), <https://www.theguardian.com/us-news/2015/apr/21/california-fair-pay-act-wage-gap-women-men>.

<sup>200</sup> See *id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*



where they are being paid less than the men, despite being in a different physical place of business.<sup>203</sup>

The statute's language and interpretation of the "same establishment" requirement has served as an obstacle for bringing claims under Equal Pay Act.<sup>204</sup> Therefore, the language should be changed from "same establishment" to "similar establishment" to give women the chance of bringing claims and to encourage future equal pay between men and women.<sup>205</sup> This language would be broad enough for female athletes to challenge her employer for paying less than a male athlete<sup>206</sup>, yet narrow enough to prevent a female basketball player from alleging pay disparity between her wages and the National Football League.<sup>207</sup> California has already taken the initiative in eliminating the "same establishment" language.<sup>208</sup> The state realized that under the "same establishment" principle, a woman working at a department store could not sue a similarly situated male who got paid more at another branch for the same department store.<sup>209</sup> California's original Equal Pay Act of 1949 read:

"No employer shall pay any individual in the employer's employ at wage rates less than the rates paid to employees of the opposite sex in the *same establishment* for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."<sup>210</sup>

As amended the statute now reads:

"An employer shall not pay any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort and responsibility, and performed under similar working conditions."<sup>211</sup>

Changing the language under the EPA in the same way as California has done would provide recourse that is not currently accessible to women

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<sup>203</sup> *Id.*

<sup>204</sup> *See* Zerunyan, *supra* note 197, at 252.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 254.

<sup>209</sup> *Id.*

<sup>210</sup> *See id.* at 253 (citing *Jones v. Tracy Sch. Dist.*, 611 P.2d 441, 442-43 (1980)(emphasis added)(quoting the statute's original language)).

<sup>211</sup> *Id.*; CAL. LAB. CODE §1197.5 (West 2018).

discriminated against based on gender.<sup>212</sup> Therefore, changing the language would allow for women to have a voice for equal pay lawsuits without opening up the doors for abuse or excessive litigation.

### C. *Similar Sports as the Same Entity*

Furthermore, a provision should be included in the EPA treating similar sports as the same entity. The Equal Pay Act explicitly states that employers are prohibited from discriminating between employees based on sex by paying lesser wages to one sex versus the other, when the employees are said to perform equal work on the jobs that require equal skill, effort, and responsibility.<sup>213</sup> Thus, it should be no question that the same sport, with the only difference being a men's team and women's team, are subject to the same skill, effort, and responsibility.<sup>214</sup>

Congress should make a strict provision making it illegal to pay athletes different wages based on gender when those athletes are engaged in work that involves similar skill, effort, and responsibility.<sup>215</sup> In other words, it should not be so difficult to conclude that women's professional soccer requires the same skill, effort, and responsibility as men's professional soccer.<sup>216</sup> A provision like this one would also eliminate the argument that male and female teams for the same sport are different because they perform in different tournaments, or practice on different fields.<sup>217</sup> Such an argument has no merit, for it is obvious that men and women playing the same sport exert the same skill, effort, and responsibility.<sup>218</sup> Thus, this provision would allow women to bring an equal pay claim against their employer for gender discrimination within the same sport without question or hesitation.<sup>219</sup> The provision that should be added to the Equal Pay Act should read:

“For purposes of wage and gender discrimination, a professional sport shall be considered as of the same entity and establishment for both the men and women's team. The “same establishment” criteria shall be met when the same sport is involved regardless of whether it is played by men or women.”<sup>220</sup>

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<sup>212</sup> See Zerunyan, *supra* note 197, at 253.

<sup>213</sup> Zerunyan, *supra* note 197, at 243; 29 U.S.C. § 206(d)(1) (2018).

<sup>214</sup> See Zerunyan, *supra* note 197, at 256; 29 U.S.C. § 206(d)(1) (2018).

<sup>215</sup> See Zerunyan, *supra* note 197, at 256; 29 U.S.C. § 206(d)(1) (2018).

<sup>216</sup> See Zerunyan, *supra* note 197, at 256; 29 U.S.C. § 206(d)(1) (2018).

<sup>217</sup> See Zerunyan, *supra* note 197, at 256-57; 29 U.S.C. § 206(d)(1) (2018).

<sup>218</sup> See Zerunyan, *supra* note 197, at 256-57; 29 U.S.C. § 206(d)(1) (2018).

<sup>219</sup> See Zerunyan, *supra* note 197, at 256; 29 U.S.C. § 206(d)(1) (2018).

<sup>220</sup> See Zerunyan, *supra* note 197, at 251-59; 29 U.S.C. § 206(d)(1) (2018).

This amendment would allow to women bring a claim against her employer for gender discrimination within the same sport without having the “in the same establishment” language be an unnecessary obstacle.<sup>221</sup> If Congress truly wants to end gender discrimination in sports, this would be an opportunity for men and women to challenge their employers when playing the same or similar sports.<sup>222</sup>

*D. Equal Pay Structure for MNT and WNT*

Next, the pay structure for the MNT and MNT should be the same, especially since they are both governed under the same federation, the USSF.<sup>223</sup> The WNT pay structure is a mix of a base salary plus game bonuses for games that are won.<sup>224</sup> In contrast, “men operate on a pay-for-play system.”<sup>225</sup> While initially they thought separate collective bargaining agreements would be more appropriate it has only made analyzing the WNT equal pay lawsuit more complicated.<sup>226</sup> Having an equal revenue-producing structure, whether it be play for pay, a set salary, or a mix, it should be identical for both teams. This will not mean that the women have to get paid exactly what the men make, for the men may produce more revenue for one year than the other. However, it will instill a non-discriminatory practice where the numbers line up and can be analyzed across teams. For example, tennis is one of the sports that is the closest to achieving complete pay equality between men and women.<sup>227</sup> Tennis athletes have battled gender discrimination for some time now, but have been satisfied for receiving equal prize money for the tournaments they are invited to compete in.<sup>228</sup> Currently, the MNT and WNT are awarded inconsistent prize money for the tournaments they win.<sup>229</sup> Thus, if the WNT and the MNT were to receive equal prize money for the World Cup, Olympics, or other tournaments they are invited to attend, the pay gap between them would significantly decrease.<sup>230</sup>

An equal pay structure would benefit both the WNT and the MNT because the WNT will likely be satisfied in receiving payment in the same

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<sup>221</sup> See Zerunyan, *supra* note 197, at 251-59; 29 U.S.C. § 206(d)(1) (2018).

<sup>222</sup> See Zerunyan, *supra* note 197, at 251-59; 29 U.S.C. § 206(d)(1) (2018).

<sup>223</sup> See Complaint, *supra* note 11.

<sup>224</sup> Das, *supra* note 44.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Battle of the Sexes: Charting How Women in Tennis Achieved Equal Pay*, THE GUARDIAN (Sept. 11, 2015), <https://www.theguardian.com/sport/2015/sep/11/how-women-in-tennis-achieved-equal-pay-us-open>.

<sup>228</sup> *Id.*

<sup>229</sup> See Part II(B).

<sup>230</sup> *Battle of the Sexes: Charting How Women in Tennis Achieved Equal Pay*, *supra* note 227.

way that the MNT receives payment. If there was any doubt in paying the men and women equally, the USSF would now be required to record revenue in the same way for both teams. For example, had the Collective Bargaining Agreements between the two teams been the same, the WNT would be in a very different position because the USSF would be able to point to exact numbers without being distracted or confused with earnings from bonuses and prizes. Rather, an equal pay structure would eliminate any confusion as to who made more one year than the other.

## VI. CONCLUSION

Even if the WNT may have a slim chance at prevailing under their equal pay lawsuit based on the strict language within the statute that needs to be met, they have won in many American's hearts as they have provided a voice for American women in advocating gender equality, especially in sports. This outpour of love and support from Americans is only the beginning. With continuous support, investing in women, changes in both the statutory language of the Equal Pay Act, and equalizing the pay structure between both teams, the WNT will get the remedy they seek while simultaneously promoting a future that encourages women acceptance in all aspects of life.