Equal Pay for Equal Play: How the USWNT Battle for Equality Highlights the Shortcomings of Equal Pay Jurisprudence

> *[S]o many women can understand what this feeling is of going into a negotiation, knowing equal pay is not on the table . . . .*
>
> –Megan Rapinoe[1]

I. Introduction

U.S. Women's Soccer is, objectively, the best women's soccer team in the world. They are ranked number one internationally,[2] have won a record-setting four World Cup titles (no other nation has won more than two),[3] and brought home a total of six Olympic medals (four gold, one silver, and one bronze).[4] The U.S. Women's National Team (WNT) generates more revenue than the U.S. Men's National Team (MNT).[5] And yet, players on the women's team have historically been compensated less than players on the men's team.[6]

On International Women's Day 2019, members of the U.S. Women's Soccer Team filed a putative class action against their employer, the United States Soccer Federation (USSF), for wage discrimination in violation of the

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1. *US Women Equal Pay Case: Rapinoe and Morgan Say Team Will Appeal After Court Defeat*, BBC SPORT (May 4, 2020), https://www.bbc.com/sport/football/52538204; *see also* @GMA, TWITTER (May 4, 2020, 7:38 AM), https://twitter.com/GMA/status/1257288592176660480 (detailing Rapinoe's statement to GMA in the referenced quote beginning at 2:37 of the video).

2. *Women's Ranking*, FIFA, https://perma.cc/774V-G8SB (last visited Feb. 19, 2023).

3. *This Day in History [July 7, 2019]: U.S. Women's Soccer Team Wins Record 4th World Cup Title*, HISTORY (July 10, 2019), https://www.history.com/this-day-in-history/us-womens-soccer-team-wins-fourth-world-cup-title.

4. Amanda Prahl, *With an Olympic Bronze in Tokyo, the USWNT Add to Their Already-Impressive Medal Count*, YAHOO! (Aug. 5, 2021), https://news.yahoo.com/us-womens-soccer-team-could-214713019.html.

5. Abigail Johnson Hess, *US Women's Soccer Games Now Generate More Revenue than Men's—But the Players Still Earn Less*, CNBC (July 10, 2019, 9:43 AM EDT), https://www.cnbc.com/2019/06/19/us-womens-soccer-games-now-generate-more-revenue-than-mens.html. "Revenue" includes, for example, money generated by ticket sales and marketing and sponsorship deals as well as broadcast rights. *See id; see also* Rachel Bachman, *U.S. Women's Soccer Games Outearned Men's Games*, WALL ST. J. (June 17, 2019, 6:00 AM ET), https://www.wsj.com/articles/u-s-womens-soccer-games-out-earned-mens-games-11560765600.

6. Hess, *supra* note 5.

Equal Pay Act.[7] The Women's National Team (WNT) alleges the USSF paid the women less than "similarly situated" male players on the Men's National Team (MNT).[8] The USSF allegedly blamed the pay discrepancy on "market realities . . . such that women do not deserve to be paid equally to the men" after it had previously "conceded that the WNT outperformed the MNT in both revenue and profit the prior year."[9]

Professional soccer players' compensation is largely determined by their team's success and number of wins, yet the best soccer team in the world is paid the same as, or less than, the MNT, which has failed to even qualify for the Olympic Games in the last twelve years.[10] Compensation for both teams is determined by a collective bargaining agreement (CBA) entered with their employer, the USSF.[11] The CBAs are negotiated by their individual players' unions.[12] The women's union is called the Women's National Soccer Team Players Association (WNTPA).[13] Based on the compensation criteria in their CBAs, the men are paid the same as or more than the women, despite their lack of international success.[14] The WNT lawsuit alleges that the male players are paid at a higher rate than women on a per-game basis without a "legitimate, non-discriminatory reason" for the pay disparity.[15] WNT players have maintained that they were never offered equal compensation during CBA negotiations.[16]

This Comment uses the WNT's equal pay claims to examine the role of CBAs in Equal Pay Act violations. Part II explains the WNT and MNT

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7. Alexandra Svokos, *US Women's National Team Sues Soccer's Governing Body for Gender Discrimination on International Women's Day*, ABC NEWS (Mar. 8, 2019, 2:43 PM), https://abcnews.go.com/US/us-womens-national-team-sues-soccers-governing-body/story?id=61558748; *see also* Morgan v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635, 640 (C.D. Cal. 2020).

8. Complaint ¶ 51, *Morgan*, 445 F. Supp. 3d 635 (No. 19-CV-01717) [hereinafter Complaint].

9. *Id.* ¶ 55.

10. *See* Andrew Das, *U.S. Men Fail to Qualify for Olympic Soccer Tournament*, N.Y. TIMES (Aug. 8, 2021), https://www.nytimes.com/2021/03/28/sports/soccer/us-honduras-olympic-qualifying.html. In March 2022, the MNT qualified for the 2022 FIFA World Cup after missing the 2018 tournament, the first World Cup since 1986 in which the MNT did not compete. Andrew Keh, *U.S. Seals Its Return to World Cup*, N.Y. TIMES (Dec. 18, 2022), https://www.nytimes.com/2022/03/30/sports/usmnt-costa-rica-world-cup-qualifying.html.

11. *Morgan*, 445 F. Supp. 3d at 641.

12. *Id.*

13. *Id.* at 642.

14. *See id.* at 654.

15. Complaint, *supra* note 8, ¶¶ 65–66.

16. *Id.* ¶ 56.

collective bargaining agreements and the WNT claims against the USSF. Part III provides a background on the Equal Pay Act and how courts analyze claims under the Act with respect to CBAs. Part IV proposes that CBAs, on their own, do not establish an affirmative defense against a prima facie case for violation of the Equal Pay Act. Collective bargaining agreements reflect the bargaining power of each party; the existence of a CBA cannot conclusively demonstrate an employer is not engaging in wage discrimination in violation of the Equal Pay Act. Part V concludes.

II. U.S. Soccer Collective Bargaining Agreements and the USWNT Equal Pay Lawsuit

The USWNT Equal Pay lawsuit caught the attention of sports fans, sports industry experts, and legal scholars and practitioners alike.[17] The collective bargaining process for professional sports is complicated, and the compensation terms confusing. This Part explains the negotiation history leading up to the CBA that served as the basis for the players' Equal Pay lawsuit before delving into the lawsuit itself.

A. WNT and MNT Collective Bargaining Agreements

The background for the collective bargaining agreement at issue in the case is complicated, but an understanding of the negotiation history that culminated in the CBA is important for purposes of this Comment. If one looks only at the total compensation earned by each team, the compensation appears, at first glance, to be equal. Only by examining the details of the CBA and understanding the breakdown of each compensation scheme, can one truly understand the Equal Pay claims at issue in this case.

The United States Soccer Federation (USSF) oversees both the men's and women's national soccer teams in the United States.[18] The WNT and the MNT each have their own unions and are compensated according to separate collective bargaining agreements negotiated with the USSF.[19] The USSF is

17. *See generally* Sarah Carrick et al., *The Butterfly Effect? Title IX and the USWNT as Catalysts for Global Equal Pay*, 31 J. LEGAL ASPECTS SPORT 289 (2021) (providing reflections on the consequences of the USWNT's suit in an article written by professors of law, sports business, and sociology of sport); *Leveling the Playing Field: Lessons Employers Can Learn from U.S. Women's Soccer $24 Million Settlement of Equal Pay Dispute*, FISHER PHILLIPS (Mar. 1, 2022), https://www.fisherphillips.com/news-insights/employers-us-womens-soccer-24-million-settlement-equal-pay-dispute.html (providing an employment law firm's key takeaways from the case).

18. *Morgan*, 445 F. Supp. 3d at 641.

19. *Id.*

the entity that effectively employs both the WNT and the MNT and compensates the players.[20]

Compensation for each team is based, in part, on participation and success in matches and tournaments.[21] Both teams compete in "friendlies" or friendly matches against other nations, as well as in FIFA World Cup and Olympic qualifying matches.[22] In recent years, both teams have competed in the FIFA World Cup;[23] the WNT has also competed in the Olympic Games.[24] In total, the WNT has won four World Cup titles and four Olympic gold medals.[25]

The MNT CBA provides for a "pay-to-play" compensation structure.[26] Under a "pay-to-play" arrangement, male players are paid only if they participate in training camp or are selected for the team roster.[27] The male players do not receive an annual salary; instead, their compensation is determined by bonuses based on the team's performance in various matches.[28] The men's CBA does not obligate the USSF to hold a certain number of matches, tournaments, or events.[29]

The WNT CBA is more complicated than the one governing MNT compensation. Since 2005, the women's compensation structure has been

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20. *See* Adnan Ilyas, *Financial Context for the Fair Pay Fight between the USWNT and USSF*, STARS & STRIPES FC (Aug. 29, 2019, 7:00 AM PDT), https://www.starsandstripesfc.com/2019/8/29/20695405/uswnt-subsidizing-mls-other-economic-notes (contrasting the U.S. Soccer pay disparity from that of professional basketball, since the WNBA and NBA are two separate entities without a shared employer).

21. Most WNT and MNT players also play for professional soccer clubs, either in the United States or internationally. For the most part, this compensation is entirely separate from compensation derived from playing for the WNT or MNT. The CBA at issue in *Morgan*, however, provided that the USSF financially support the women's league, the NWSL. *Morgan*, 445 F. Supp. 3d at 644–45.

22. *Id.* at 641–42.

23. *How the U.S. Won the 2019 Women's World Cup, Game by Game*, WASH. POST (July 7, 2019), https://www.washingtonpost.com/graphics/2019/sports/world-cup-uswnt-every-game/; *USMNT World Cup 2022 Roster: Get to Know All 26 Players*, FOXSPORTS (Nov. 11, 2022, 3:19 AM ET), https://www.foxsports.com/stories/soccer/usmnt-world-cup-2022-roster-get-to-know-all-26-players. The USWNT has already qualified for the 2023 World Cup. Andrew Das, *Your Women's World Cup Questions, Answered*, N.Y. TIMES (May 2, 2023), https://www.nytimes.com/article/world-cup-womens.html.

24. *See Morgan*, 445 F. Supp. 3d at 642.

25. *Id.*; *see also* Prahl, *supra* note 4.

26. *Morgan*, 445 F. Supp. 3d at 641.

27. *Id.*

28. *Id.* at 642.

29. *Id.* at 641–42.

salary-based, at least in part.[30] The salary compensation structure resulted from the potential disparity in the number of games played by the men's and women's teams.[31] Because compensation is not directly tied to the number of games played, the salary structure provides more stability than the pay-to-play structure.[32] Although the salary structure may create more predictable and stable compensation, it effectively caps the compensation each player can earn. Because of the limitation on compensation and the increased revenue and attendance at women's soccer games in recent years, the CBA at issue in the case took a step away from the salary structure.[33]

The WNT fight for equal pay is by no means new; the women began strong demands for equal compensation in 2012. Negotiations for the 2013–2016 CBA began in November 2012, when the WNTPA, the women's union, provided a proposal to the USSF containing proposed terms for the new CBA.[34] The proposal requested certain terms not contained in the MNT CBA that would provide more stability for WNT players, including: a minimum of twenty-seven players under contract at all times; a minimum number of women's games, to be agreed upon at a later time; injury protection and severance pay; and daycare during matches.[35] The proposal also requested the per diem rate paid to the women be increased to match the per diem paid to the men, as well as increased bonuses related to friendlies and World Cup matches.[36] The proposal also contemplated that the USSF would help

30. Some female players are paid on a pay-to-play structure similar to the male players. Compensation for those women is "tiered," meaning players' compensation varies based on which tier they fall into. Caitlin Murray, *USWNT, USMNT Pay Gap Explained: Comparing Their U.S. Soccer Contracts as Both Sides Negotiate New CBAs*, ESPN (Feb. 10, 2022), https://www.espn.com/soccer/united-states-usaw/story/4589310/uswntusmnt-pay-gap-explained-comparing-their-us-soccer-contracts-as-both-sides-negotiate-new-cbas.

31. *Id.*

32. *Id.* Because women's soccer has historically been underrated, underattended, and undervalued generally, the number of women's games guaranteed each year has not always been certain. The USSF is arguably partly to blame. In 2017, the WNT announced it would take over marketing and sponsorship deals, which the USSF had previously managed, because it felt the USSF was not maximizing opportunities for the women's team. The USSF continues to handle marketing and sponsorship for the MNT. For more details on this change and other ways the WNT fought for equality, see CAITLIN MURRAY, THE NATIONAL TEAM: THE INSIDE STORY OF THE WOMEN WHO CHANGED SOCCER 284 (2019).

33. Murray, *supra* note 30.

34. *Morgan*, 445 F. Supp. 3d at 642.

35. *Id.* at 642–43.

36. *Id.* at 643.

establish and fund a new professional women's soccer club, the National Women's Soccer League (NWSL).[37]

The USSF countered with its own proposal, which provided for twenty-four players under contract (three less than the original proposal).[38] The USSF conceded to raising per diem rates equal to those paid to MNT players, increased compensation for Victory Tours after the World Cup and Olympics, and housing allowances for WNT players competing in the NWSL.[39] The WNTPA countered with twenty-five outstanding items not addressed by the USSF proposal.[40] This ultimately led to the agreement to pay players $1.20 per ticket sold for home friendlies, three months of severance pay, and up to one year of injury pay.[41]

In February 2013, negotiations for the new 2013–2016 CBA continued when the USSF sent a new proposal to the WNTPA "to reflect the priorities as expressed by the [WNTPA], namely to increase the guaranteed compensation at the expense of the non-guaranteed compensation (the bonus payments)."[42] The WNTPA and the USSF ultimately signed a "Memorandum of Understanding" on March 19, 2013.[43] The new CBA would contain the terms set out in the old CBA with certain modifications, including: a minimum number of contracted players; annual salaries for competing with the WNT and a separate salary for competing in the NWSL (with a guaranteed salary increase if the professional league dissolved, or if the USSF pulled support from the league); severance and injury pay; and childcare assistance.[44] The WNT unanimously approved the new CBA.[45]

In late 2015, the WNTPA and the USSF again began negotiations, this time for a new 2016–2018 CBA.[46] The WNTPA informed USSF representatives that the women wanted bonuses for participating in the World Cup equal to those paid to the men.[47] In 2016, the USSF presented a "pay-to-play" proposal which was structurally similar to the MNT CBA.[48] Under the USSF's proposal, WNT players would be paid the same per diem, receive

37. *Id.* at 643–44.
38. *Id.* at 643.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 644.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 644–45.
47. *Id.* at 645.
48. *Id.*

the same friendly-appearance fee and camp fee (paid to players appearing at training camp but not signed to the roster), and receive the same ticket-revenue-sharing payment as the men.[49] WNT players would, however, still receive lower bonuses for friendly matches and World Cup matches than those paid to the MNT.[50]

The WNTPA countered that players needed a minimum guaranteed total compensation, generally not guaranteed under pay-to-play structures.[51] The WNTPA requested a "Minimum Annual Guaranteed Compensation" system guaranteeing at least $5,000 per game, which was identical to that used in the MNT CBA.[52] Additionally, under this proposal each player would receive a minimum of $100,000 annual compensation should fewer than twenty women's games be scheduled.[53] In a subsequent meeting, the USSF characterized the WNT's proposal as "the MNT CBA, 'plus, plus, plus'" and proposed new terms via email.[54] The WNTPA replied, emphasizing a "literal" demand for equal pay: "[W]e want at least the same per game WNT Player compensation enjoyed by the MNT."[55]

Following this back and forth about what equal pay would look like in the WNT CBA, the USSF and WNTPA exchanged several counterproposals.[56] Each counterproposal saw variation in certain terms: the minimum number of contracted players, annual salaries for WNT and NWSL players, and bonuses for friendlies and World Cup matches.[57] Finally, in April 2017, sixteen months after negotiations began, the parties signed a new CBA.[58]

The final 2017–2021 WNT CBA[59] provided for a minimum of twenty contracted players with annual salaries of $100,000 plus bonuses for friendlies, World Cup matches, Olympic matches, and other international

49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 646.
53. *Id.*
54. *Id.* at 647 (citation omitted).
55. *Id.* (emphasis omitted).
56. *See id.* at 648–50.
57. *Id.*
58. *Id.* at 650.
59. During the litigation, the WNT and USSF agreed to extend the then-existing collective bargaining agreement through March 2022. Meg Linehan, *U.S. Soccer, USWNT Players' Association Extend Current CBA Through March*, THE ATHLETIC (Dec. 13, 2021, 12:41 PM CST), https://theathletic.com/news/us-soccer-uswnt-players-association-extend-current-cba-through-march/OwIWJWleIxDX/.

tournaments.[60] Bonuses for friendly matches were tiered, with the bonus paid to WNT players varying based on their opponent's rank.[61] The players also received a signing bonus, a ticket revenue share, severance and injury pay, childcare assistance, and bonuses tied to gross revenue and viewership.[62]

B. The Equal Pay Lawsuit

On March 8, 2019, almost two years after the CBA was signed, WNT players sued the USSF, alleging violations of the Equal Pay Act and Title VII of the Civil Rights Act of 1964.[63] The 2017 CBA was still in effect when the players filed suit[64] and remained in effect through March 2022.[65] Three months after filing suit against the USSF, the WNT won its fourth World Cup title; the crowd reacted by chanting "equal pay" while the players celebrated on-field.[66]

In a now-infamous move, one of the USSF's first public defenses to the WNT claims was to argue the pay differential was justified because the men's game requires more skill than the women's.[67] The USSF argued "certain physical attributes, such as speed and strength" demonstrate the men's game is more skillful and that, therefore, the job of the male players requires a higher level of athletic ability.[68] The USSF posited it was not a "'sexist'

60. *Morgan*, 445 F. Supp. 3d at 650.

61. *Id.*

62. *Id.* at 650–51. Under the previous CBA, the USSF profited $17 million following the WNT's 2015 World Cup win for merchandise and record-setting ticket sales. The players did not directly share in this revenue. Murray, *supra* note 32, at 243–44.

63. Complaint, *supra* note 8, ¶¶ 103, 112. The parties settled the Title VII claims in November 2020. *U.S. Soccer Federation, USWNT Settle Part of Lawsuit*, THE ATLANTIC (Dec. 1, 2020), https://theathletic.com/news/uswnt-ussf-lawsuit/obExK0KQUUAR/. The USWNT's Title VII claims are not related to the use of collective bargaining agreements in equal pay cases and, therefore, are not discussed in this Comment.

64. *See Morgan*, 445 F. Supp. 3d at 650.

65. Linehan, *supra* note 59. In May 2022, U.S. Soccer announced it had entered new CBAs with the WNT and MNT that contain "identical economic terms" for players on both teams. The new CBA will remain in effect through 2028. Press Release, U.S. Soccer, U.S. Soccer Federation, Women's and Men's National Team Unions Agree to Historic Collective Bargaining Agreements (May 18, 2022) [hereinafter New CBA Press Release], https://www.ussoccer.com/stories/2022/05/ussf-womens-and-mens-national-team-unions-agree-to-historic-collective-bargaining-agreements.

66. *See* 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.

67. Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Partial Summary Justice at 12, *Morgan*, 445 F. Supp. 3d 635 (No. 19-CV-01717).

68. *Id.* at 11 (citation omitted).

stereotype to recognize the different levels of speed and strength required," but a fact of "indisputable 'science.'"[69]

While the WNT was competing in the SheBelieves Cup, the USSF filed its brief containing this "higher male skill" argument with the court.[70] The WNT players responded by taking the field at their next game wearing their warm-up shirts inside out, hiding the USSF badge but showing the four stars representing their four World Cup wins.[71]

Following public backlash and loss of sponsorships,[72] then-USSF President Carlos Cordeiro issued an apology during the final match of the SheBelieves Cup.[73] The USSF hired new representation[74] and filed new motions with the court, officially withdrawing its argument that WNT players are less skillful than their male counterparts.[75]

On May 1, 2020, the District Court for the Central District of California granted summary judgment for the USSF on the players' equal pay claims.[76] The court based its conclusion on its finding that the USSF paid the women a higher total compensation than the men.[77] But, employers can still violate the Equal Pay Act by paying women less but allowing them to make up the difference by working more hours.[78] The court considered whether the WNT was required to work more than the MNT to receive equal pay; it found that factually the WNT played more games and earned more money compared to

69. *Id.*

70. Grant Wahl, *USWNT Invisible Crest Protest Becomes Hit T-Shirt–and Example of Players' Revenue Potential*, SI.COM (Mar. 16, 2020), https://www.si.com/soccer/2020/03/16/uswnt-protest-us-soccer-tshirt-crest-four-stars.

71. *Id.*

72. *Id.*

73. Meredith Cash, *US Soccer President Carlos Cordeiro Backpedaled Quickly After On-Field Protest from Women's Team and Apologized for 'The Offense and Pain' Caused by Equal Pay Lawsuit*, INSIDER (Mar. 11, 2020, 11:13 PM), https://www.insider.com/uswnt-lawsuit-us-soccer-president-apologizes-after-teams-protest-2020-3.

74. *USWNT Lawsuit Versus U.S. Soccer Explained: Defining the Pay Gaps, What's at Stake for Both Sides*, ESPN (June 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.

75. *Id.*; Meredith Cash, *US Soccer Officially Concedes Its Argument that Women's National Team Is Inferior in Skill to the Men's Team in Its Equal Pay Lawsuit*, INSIDER (Mar. 31, 2020), https://www.insider.com/uswnt-lawsuit-us-soccer-drops-less-skill-claim-against-women-2020-3.

76. Morgan v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635, 665 (C.D. Cal. 2020).

77. *Id.* at 656.

78. *See id.* at 653–54.

the MNT.[79] The women played 111 games for a total of $24.5 million ($220,747 per game on average), while the men played 87 games for a total of $18.5 million ($212,639 per game on average).[80] Despite the USSF's prior statements that the women had been treated unfairly,[81] the court found no pay differential existed because the women's total compensation was higher than the men's.

What the court failed to consider, however, was how the teams' success and wins factored into the teams' overall compensation. The reason the women's salaries were higher than the men's was not because they received similar rates of pay or compensation, but because they greatly outperformed the men's team. Under each CBA, the team's success is an incredibly important factor for determining compensation because both CBAs provide for bonuses per win.[82] The number of games played and the total compensation earned is only a small part of the context needed to understand player compensation. The expert testimony WNT presented at trial explained that, had the women's team been compensated under the MNT CBA, their compensation would have been much greater.[83] Notably absent from the court's consideration is what MNT compensation would have looked like had they enjoyed the same success as the women's team.

In recognizing that the two CBAs are substantially different, the court wrote that "merely comparing what each team would have made under the other team's CBA [] is untenable in this case because . . . the MNT and WNT bargained for different agreements which reflect different preferences."[84] The court correctly noted the significant differences between the two CBAs[85] but failed to consider what factors led to those differences. If the CBAs reflect different preferences, what were those preferences, and what considerations impacted the preferences of each team? These real-world considerations and preferences play important roles during CBA negotiations, but the court disregarded their impact on the WNT players' equal pay claims.[86]

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79. *Id.* at 654.

80. *Id.*

81. *Id.* at 656 ("That USSF agents said WNT players are paid less does not make it true . . . .").

82. *See id.* at 642, 650.

83. *Id.* at 652–53.

84. *Id.* at 655.

85. *See id.* at 654–55.

86. *See id.*

The court failed to analyze the WNT CBA negotiations for gender bias but granted summary judgment for the USSF, finding the women were ultimately paid more in total compensation than the men.[87] The case was set for oral argument before the Ninth Circuit on March 7, 2022,[88] but settled out of court only days before oral arguments.[89] The new CBA, heralded by many outlets as "historic,"[90] is the first-of-its-kind for international soccer, evenly sharing World Cup prize money between the teams.[91] For the first time in history, the women and men will earn *identical* monetary income. Regardless of the outcome of the USWNT's appeal and battle for equal pay, how courts analyze CBAs in the context of equal pay cases will matter for similarly situated plaintiffs in future cases.

III. The Equal Pay Act and Equal Pay Case Law

Bills in favor of equal pay for equal work first appeared in Congress in the 1940s,[92] but not until 1963 did the Equal Pay Act become law.[93] New York Congresswoman Winifred Stanley initially proposed equal pay for women in

87. *Id.* at 656.

88. *USWNT Players' Equal Pay Appeal Set for March 7*, SPORTS BUS. J. (Dec. 27, 2021), https://www.sportsbusinessjournal.com/Daily/Issues/2021/12/27/Leagues-and-Governing-Bodies/USWNT.aspx.

89. Press Release, U.S. Soccer, USWNT Players Reach Agreement to Resolve Longstanding Equal Pay Dispute (Feb. 22, 2022), https://www.ussoccer.com/stories/2022/02/us-soccer-uswnt-players-reach-agreement-to-resolve-longstanding-equal-pay-dispute. The parties made the settlement agreement contingent on agreeing to a new collective bargaining agreement. *Id.* On May 18, 2022, the parties agreed to a CBA through 2028, which provided "identical economic terms" for both teams. New CBA Press Release, *supra* note 65.

90. *See, e.g.*, Brian Straus, *U.S. Soccer Announces Historic CBA Agreement, Equal Pay Between USMNT, USWNT*, SPORTS ILLUSTRATED (May 18, 2022), https://www.si.com/soccer/2022/05/18/us-soccer-cba-equal-pay-uswnt-usmnt-world-cup-prize-money; Jessa Braun, '*A Dream Come True': USWNT Past and Present Celebrate Historic CBA*, JUST WOMEN'S SPORTS (May 19, 2022), https://justwomenssports.com/reads/uswnt-soccer-cba-equal-pay-becky-sauerbrunn-nwsl/; Dan Hajducky, *USWNT Players Association Celebrates Equal Pay, Historic CBA with Trailblazing New Collection*, ESPN (Aug. 23, 2022, 10:50 AM EDT), https://www.espn.com/soccer/united-states-usaw/story/4728700/uswnt-players-association-celebrates-equal-payhistoric-cba-with-trailblazing-new-collection; *see also* Meg Linehan, *The USWNT Make History with CBA Signing, but the Players Know There's More to Be Done*, THE ATHLETIC (Sep. 7, 2022), https://theathletic.com/3574110/2022/09/07/uswnt-cba-ussf/.

91. New CBA Press Release, *supra* note 65.

92. *See* BUREAU OF NAT'L AFFS., INC., EQUAL PAY FOR EQUAL WORK: FEDERAL EQUAL PAY LAW OF 1963, at 4 (1963).

93. *Equal Pay for Equal Work Bill*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, https://history.house.gov/Records-and-Research/Listing/lfp_031/ (last visited Jan. 28, 2022).

the House of Representatives in 1944.[94] The bill would have amended the National Labor Relations Act to protect women from wage discrimination as World War II ended and soldiers returned from overseas to re-enter the American workforce.[95] Introducing the bill for the first time, Stanley stated it has often been said "this is a 'man's world,'" but women's contribution to the workforce during the war had shown that the world "need[s] the best brains and ability of both men and women."[96] Stanley's bill was referred to the Committee on Labor but never became law.[97]

In 1945, three female congresswomen introduced the Pepper-Morse Bill, which became the first equal pay bill to be reported out of committee.[98] The bill was not considered by the Senate because opponents felt it "involve[d] a major interference with the freedom of American industry," and, therefore, should not be brought up for consideration at the end of the congressional session.[99] The bill, however, had been reported out of committee more than one month earlier.[100] For the next seven Congresses, equal pay bills gained no traction.[101] Seventy-two equal pay bills were introduced during the Eighty-Second to Eighty-Sixth Congresses; none were reported out of committee.[102]

In 1962, the House Labor Committee finally reported out an equal pay bill.[103] Two months later, after considerable debate and amendment, the bill was approved in the House.[104] The Senate approved the Equal Pay Act as a rider attached to a bill authorizing the construction of foreign embassies.[105] President John F. Kennedy signed the Equal Pay Act into law in 1963.[106]

The Equal Pay Act prohibits sex discrimination in employment compensation.[107] To state a claim under the Act, the plaintiff must show that

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94. *Id*.
95. *Id.*
96. *Id.*
97. *Id.*
98. BUREAU OF NAT'L AFFS., INC., *supra* note 92, at 4 (identifying three congresswomen, Chase Going Woodhouse, Mary Norton, and Clare Booth Luce, as sponsors of the Pepper-Morse bill in the U.S. House of Representatives).
99. *Id.*
100. *Id.*
101. *See id.*
102. *Id.*
103. *Id.* at 4–5.
104. *Id.*
105. *Id.* at 5.
106. *Equal Pay for Equal Work Bill*, *supra* note 93.
107. *See* 29 U.S.C. § 206(d). Because the Equal Pay Act uses the term "sex" to refer to discrimination in this context, this Comment uses the same term when discussing the statutory

the employee received lower compensation for equal work that required equal skill, effort, and responsibility.[108] The Supreme Court considered an equal pay claim for the first time in *Corning Glass Works v. Brennan* and laid out a burden-shifting framework for analyzing equal pay claims.[109] First, the plaintiff must show that an employer pays different wages to workers of different sexes doing substantially the same work under similar working conditions.[110] Next, if the plaintiff makes this prima facie showing, the employer-defendant can assert one of four affirmative defenses.[111] These affirmative defenses are found in the Equal Pay Act itself as exceptions to the blanket prohibition against paying different wages to employees of different sexes.[112] The four affirmative defenses are pay differentials resulting from: "(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."[113]

Corning Glass established the framework for equal pay claims in a collective bargaining setting, but it did not consider the CBA's relevance to the "factor other than sex"[114] affirmative defense. Prior to a change in state law that allowed women to work at night, all of Corning Glass's night-shift workers were male and all day-shift workers in the same position were female.[115] After the law changed, Corning Glass hired female night-shift workers,[116] but a collective bargaining agreement added a higher "red circle" rate for night-shift employees hired before the law change.[117] The effect was that male night-shift workers hired before the change continued to receive higher compensation than the new female employees.

The Supreme Court viewed the Corning Glass pay structure as a system that essentially "perpetuate[d] the differential" between male and female

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language or case law interpreting the Act. The EEOC defines "sex discrimination" as "treating someone (an applicant or employee) unfavorably because of that person's sex, including the person's sexual orientation, gender identity, or pregnancy." *Sex-Based Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/sex-based-discrimination (last visited May 18, 2023).

108. Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).
109. *See id.*
110. *Id.*
111. *Id.* at 196–97.
112. *Id.*
113. 29 U.S.C. § 206(d)(1).
114. *Id.*
115. *Corning Glass*, 417 U.S. at 191–92.
116. *Id.* at 192–94.
117. *Id.* at 194.

employees' compensation.[118] The Court rejected the affirmative defense argument that the pay differential was based on a factor other than sex.[119] Instead, the Court held Corning Glass had not proven the higher pay rate was "intended to serve as compensation for night work" rather than "an added payment based upon sex."[120]

The Court also explicitly rejected any argument that market conditions for male and female workers could justify a pay differential based on sex alone.[121] As the Court noted, "The differential arose simply because men would not work at the low rates paid women inspectors . . . [which] became illegal once Congress enacted into law the principle of equal pay for equal work."[122] Corning Glass's pay structure "took advantage of such a situation" allowing the employer to "pay women less than men for the same work."[123]

Corning Glass established the framework for analyzing equal pay claims and emphasized the "objective" of the Act: "to raise women to the levels enjoyed by men in cases where discrimination is still practiced."[124] *Corning Glass* does not consider, however, how a collective bargaining agreement should factor into the "factor other than sex" affirmative defense. Courts have dealt with *Corning Glass*'s silence on this matter in different ways. Some courts have allowed negotiated CBAs to serve as an affirmative defense for pay differentials, while others have rejected this approach.[125] Because many EPA claims are resolved at the district court level (and are not appealed), no majority approach regarding how a CBA factors into the affirmative defense has emerged.

A. Some Courts Have Allowed CBAs to Establish the "Factor Other Than Sex" Affirmative Defense

Various courts have held that a CBA is relevant to demonstrate a legitimate business purpose justifying a pay differential between male and

118. *See id.*
119. *Id.* at 204.
120. *Id.*
121. *See id.* at 205.
122. *Id.*
123. *Id.*
124. *See id.* at 207 (quoting 109 CONG. REC. 2714 (1963) (statement of Rep. Dwyer)).
125. *Compare* Cherrey v. Thompson Steel Co., 805 F. Supp. 1257, 1265 (D. Md. 1992) (accepting negotiated CBA as an affirmative defense), *with* Laffey v. Nw. Airlines, Inc., 567 F.2d 429, 447 (D.C. Cir. 1976) (rejecting negotiated CBA as an affirmative defense), *abrogated on other grounds by* McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988).

female employees.[126] For example, one Maryland district court concluded that a collective bargaining agreement could be used to show a "factor other than sex" justification for a pay differential.[127] In *Cherrey v. Thompson Steel Co.*, a female employee with CBA-governed compensation sued her employer after it eliminated her position and she was forced to take a lower-paying position.[128] The plaintiff alleged that the company hired another male employee at a higher salary to do substantially the same work she had done in her previous position.[129] The court determined the employer established the "factor other than sex" affirmative defense by showing that wages paid to the plaintiff were set by the CBA.[130]

The *Cherrey* court's equal pay analysis ended with its determination that the CBA justified the pay differential and established the "factor other than sex" affirmative defense.[131] The court made no inquiry as to whether or how gender bias played a role in negotiating the agreement or why the employer moved the plaintiff into a lower-paying position. The *Cherrey* court found the existence of the CBA alone to be sufficient to determine that the employer had not discriminated against its female employees.[132]

Thomas v. Community College of Philadelphia is another example of a court concluding that a CBA alone justified a sex-based pay differential.[133] In *Thomas*, a court granted summary judgment for an employer, based partially on the fact that the wages paid to the employee were determined by a CBA.[134] The *Thomas* plaintiff worked for the employer as a housekeeper.[135] The employer created a new housekeeper position with a higher base rate of pay and hired two males to fill the newly created positions.[136] A few months after the employer created this higher-paying housekeeper position, the employer promoted the plaintiff to that position.[137] Her hourly rate increased

126. *See, e.g.*, *Cherrey*, 805 F. Supp. 1257; Thomas v. Cmty. Coll. of Phila., 553 F. Supp. 2d 511 (E.D. Pa. 2008); Perkins v. Rock-Tenn Servs., Inc., 700 F. App'x 452 (6th Cir. 2017).
127. *See Cherrey*, 805 F. Supp. at 1263.
128. *Id.* at 1260.
129. *Id.*
130. *Id.* at 1263.
131. *See id.* at 1263–64.
132. *Id.* at 1265.
133. 553 F. Supp. 2d 511 (E.D. Pa. 2008).
134. *Id.* at 515.
135. *Id.* at 512.
136. *Id.* at 512–13.
137. *See id.* at 513.

according to a CBA that outlined the requirements for the rate of pay for a promoted employee.[138]

Three years after the plaintiff was promoted, the company hired another employee and promoted a third employee into the same higher-paying position.[139] The company gave both the new employee and newly promoted employee the same rate of pay as the plaintiff, even though she had more experience working in the position.[140]

The court granted summary judgment in favor of the employer,[141] rationalizing that the employer had carried its burden to "prove at least one affirmative defense so clearly that no rational jury could find to the contrary."[142] To win on summary judgment in the Third Circuit for equal pay claims, the employer must show the "proffered reasons *do in fact* explain the wage disparity."[143] The court held that two different justifications based on a "factor other than sex" existed: (1) the first employees hired into the new position were paid higher wages based on their prior experience, and (2) the CBA determined the plaintiff's compensation.[144]

Courts like *Cherrey* and *Thomas* have made the mere existence of a CBA into an affirmative defense. These courts stop their analysis at a factual finding of compensation under a CBA, and they do nothing else to ensure the compensation scheme is free of gender bias. Thus, the CBA itself becomes the affirmative defense. But some courts have taken the analysis further, looking more closely at the CBA itself rather than letting it stand alone as an affirmative defense.[145]

To establish the "factor other than sex" affirmative defense, the company must have adopted the pay differential for a legitimate business reason.[146] In *Perkins v. Rock-Tenn Services, Inc.*, a former employee of Rock-Tenn sued the company after discovering her male replacement earned a much higher wage than she had in the same position.[147] While the plaintiff held the position, she was a salaried employee whose compensation was not covered

138. *Id.*
139. *Id.* at 513–14.
140. *Id.*
141. *Id.* at 516.
142. *Id.* at 514 (quoting Stanziale v. Jargowsky, 200 F.3d 101, 107 (3d Cir. 2000) (internal quotation omitted)); *see also* EEOC v. Del. Dep't of Health & Soc. Servs., 865 F.2d 1408, 1414 (3d Cir. 1989).
143. *Id.* at 515 (quoting *Stanziale*, 200 F.3d at 108).
144. *Id.*
145. *See* Perkins v. Rock-Tenn Servs., Inc., 700 F. App'x 452, 458 (6th Cir. 2017).
146. *Id.* at 457.
147. *Id.* at 453.

by the CBA between the company and the union.[148] When her male replacement took over the position, the company kept him as an hourly employee, so his compensation was governed by the CBA.[149] Based on this compensation structure, he received overtime pay and holiday pay, benefits not available to the plaintiff and other salaried employees.[150]

The Sixth Circuit found the plaintiff had made a prima facie case for an equal pay claim because the positions were "fungible" and therefore required a finding of "equal work" under the Equal Pay Act.[151] The court then turned to the company's affirmative defenses and found the company had justified the pay differential based on a "factor other than sex."[152] Echoing the district court below, the court wrote that the "most persuasive justification" for the difference in compensation was the fact that the male employee who replaced the plaintiff was a union employee, while the plaintiff was not.[153] The court also opined that "[t]here is no question that the decisions made as a result of negotiations between union and employer are made for legitimate business purposes."[154]

Importantly, the court emphasized that there was no evidence in the record that Rock-Tenn's decision to transition the position from a salaried position to an hourly one governed by the CBA was based on the replacement employee's sex.[155] The replacement employee had been the plaintiff's "lead," essentially her assistant.[156] When Rock-Tenn promoted the male employee to take over the plaintiff's position, the company hired a female employee to replace him as "lead."[157] The company provided the new female employee the same compensation and benefits as had been enjoyed by her male predecessor.[158]

148. *Id.* at 454.
149. *Id.* at 454–55.
150. *Id.* at 454.
151. *Id.* at 456.
152. *Id.* at 457 (quoting 29 U.S.C. § 206(d)(1)).
153. *Id.* ("[A] wage differential resulting from status as a union member constitutes an acceptable 'factor other than sex' for purposes of the Equal Pay Act." (quoting 29 U.S.C. § 206(d)(1))).
154. *Id.*
155. *Id.* at 458.
156. *Id.* at 454.
157. *Id.* at 455.
158. *Id.* at 458.

In its holding, the *Perkins* court essentially stated that a CBA is always relevant for the "factor other than sex" affirmative defense.[159] This conclusion fails to consider that illegitimate business purposes and biases could impact the terms to which an employer is willing to agree. But the court did acknowledge another justification for the pay differential: the male employee was already a union employee, while the female plaintiff never was.[160]

The Perkins holding looks like a "CBA *plus*" analysis for purposes of the "factor other than sex" affirmative defense. The employer showed the pay differential was based on a factor other than sex because of the existence of a CBA *plus* some other factual reason why the employees' compensation differed. Here, the existence of the CBA was "the most persuasive justification"[161] for the pay differential, but other important factors also indicated a lack of bias in compensation.[162] These other factors included the plaintiff's status as a non-union employee[163] and the fact that the new female lead received the same compensation as the male employee who replaced the plaintiff.[164] Even though the court presumed that negotiations between a union and employer "are made for legitimate business purposes,"[165] the actual analysis done by the court provides an example of how courts can consider a CBA as just one factor for the "factor other than sex" affirmative defense.

B. Other Courts Have Held CBAs Do Not Establish the "Factor Other Than Sex" Affirmative Defense

Some courts have held that the existence of a collective bargaining agreement does not preclude bringing a claim under the Equal Pay Act.[166] In *Laffey v. Northwest Airlines*, a female flight attendant sued her employer, alleging the airline provided higher compensation to male cabin attendants in violation of the Equal Pay Act.[167] The airline created a male-only "purser" position for international flights in 1947, as well as a "flight service

159. *Id.* at 457 ("There is no question that the decisions made as a result of negotiations between union and employer are made for legitimate business purposes . . . .").
160. *See id.* at 458.
161. *Id.* at 457.
162. *Id.* at 458.
163. *Id.*
164. *Id.* at 459.
165. *Id.* at 457.
166. *See* Laffey v. Nw. Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976).
167. *See id.* at 437–38.

attendant" position to train male employees to be promoted to pursers.[168] Twenty years after the male-only position was created, a new CBA allowed women to apply to the position.[169] During CBA negotiations, the airline rejected a union proposal that would have allowed stewardesses to move into the purser position based on seniority, just as flight service attendants did, because the company "prefer[red] males and intend[ed] to have them" as pursers.[170] When the plaintiff moved from senior stewardess into the purser position, she was given the lowest available salary, an amount less than her stewardess income.[171] The airline argued stewardesses could be "denied credit for their stewardess seniority"[172] because the duties assigned to pursers were not equal to the duties of a stewardess.[173]

The court summarized the employer's argument as seeking estoppel of the plaintiff's claims on the grounds that the CBA terms had been negotiated by the union.[174] The court outright rejected this argument, holding that "union activity cannot strip individual employees of the opportunity to seek vindication of their statutory entitlements in court."[175] It went further to reject the argument that a CBA by itself could be used as an affirmative defense: "[A] collective bargaining agreement perpetuating prior pay discrimination affords the employer no defense to a charge under the Equal Pay Act."[176]

By rejecting a CBA as a justification for the pay differential, courts on this side of the split recognize that CBAs do not guarantee what the Equal Pay Act requires: equal pay for equal work. The *Laffey* court refused to allow the employer to escape liability simply because compensation had been negotiated by a union.[177] Whether an employee's compensation is negotiated by the employee themselves, or through a union's bargain, is irrelevant to

168. *Id.* The purser position was essentially the same as a stewardess, but the airline exclusively hired men as pursers and women as stewardesses. *Id.* (noting that the company adhered to an "undeviating practice of restricting purser jobs to men alone"). On appeal to the D.C. Circuit, the airline only challenged the finding that the purser and stewardess positions were "intrinsically equal," and not the lower court's finding that the sex-based criteria violated Title VII. *Id.* at 437 n.10.

169. *Id.* at 438.

170. *Id.* (quoting Laffey v. Nw. Airlines, Inc., 366 F. Supp. 763, 778 (D.D.C. 1973), *aff'd in part, vacated in part*, *Laffey*, 567 F.2d 429.

171. *Id.*

172. *Id.* at 443–44.

173. *Id.* at 446.

174. *Id.*

175. *Id.* at 447.

176. *Id.*

177. *See id.*

whether that employee's compensation is free of sex discrimination, as required by the Equal Pay Act.

The *Laffey* court is not alone in rejecting a CBA as evidence that an employer had a justifiable reason for a sex-based pay differential.[178] In *Brennan v. Board of Education*, the New Jersey Secretary of Labor brought suit against several public school boards of education for paying female custodians less than male custodians.[179] Each school's custodial staff consisted of a head custodian, at least one engineer, and both male and female custodians.[180] Custodians fell within two classes: "custodial workers" were all male and "custodial maids" were all female.[181] Compensation for both classes of custodians was based on a pay schedule determined by a CBA, which provided a higher base salary to the all-male class.[182]

The boards attempted to justify the pay differential by arguing that the two jobs were not substantially similar because male custodial workers performed additional duties not performed by the female custodial maids.[183] The boards based their defense on these "factors 'other than sex'" and the fact that the compensation paid to custodians was set by a CBA.[184] In examining whether the two classes of custodians performed substantially similar jobs, the court explained in detail the typical work performed by each and found that "cleaning involves for both males and females the same dusting, mopping, sweeping, washing and scrubbing."[185]

The *Brennan* court employed strong language to reject negotiated CBA terms as a justification for a sex-based pay differential.[186] The majority wrote that an employer "may not rely upon its union contract to justify [its] violation of the Equal Pay Act."[187] The court found the pay structure under the CBA violated the Act because it found "no relation between pay received and actual duties performed."[188] The *Brennan* court's holding means that employers cannot ignore their statutory obligations to create a compensation structure free of gender bias merely because they negotiated with their employees.

178. *See* Brennan v. Bd. of Educ., 374 F. Supp. 817, 832 (D.N.J. 1974).
179. *Id.* at 819.
180. *Id.* at 821.
181. *Id.*
182. *Id.* at 821–22.
183. *Id.* at 822.
184. *Id.* (quoting 29 U.S.C. § 206(d)(1)).
185. *Id.* at 823.
186. *See id.* at 832.
187. *Id.*
188. *Id.* at 830.

Going one step further than recognizing that CBAs do not constitute an affirmative defense on their own, at least one court has held that a CBA evidencing prior discrimination against women can be used to undermine an employer's affirmative defense.[189] In *Shultz v. Wheaton Glass Co.*, female employees of the glass company alleged an Equal Pay Act violation on the basis that Wheaton paid its female employees ten percent less than male employees in the same position.[190] The company argued that the jobs did not entail "equal work" under the Equal Pay Act because the male employees in the position sometimes performed the duties of "snap-up boys," a position paid two cents more per hour than female employees.[191] The court rejected this argument, holding, "[T]here would be no rational explanation why men who at times perform work paying two cents per hour more than their female counterparts should for that reason receive 21 1/2 cents per hour more than females for the work they do in common."[192]

The court further wrote that the pay discrepancy "take[s] on an even more discriminatory aspect when viewed in the light of [its] history."[193] The company historically only hired women out of necessity due to a shortage of male workers.[194] Because "the union insisted on conditions which would minimize their future competition against the men," the court wrote that the "motive" for the pay differential was apparently "to keep women in a subordinate role."[195]

In *Schultz*, not only did the CBA fail to establish the "factor other than sex" affirmative defense, it actually evidenced the company's past discrimination toward women. Rejecting this discrimination-evidencing CBA as a justifying "factor other than sex" is consistent with *Corning Glass*'s characterization of the Act's "objective."[196] The Supreme Court in *Corning Glass* emphasized an important point made during congressional debate of the Equal Pay Act that one objective of the Equal Pay Act was to "raise women to the levels enjoyed by men."[197] The *Shultz* court recognized the CBA in the case evidenced the employer's intent to pay its female

189. *See* Shultz v. Wheaton Glass Co., 421 F.2d 259, 261 (3d Cir. 1970).
190. *Id.*
191. *Id.* at 261–62.
192. *Id.* at 263.
193. *Id.* at 264.
194. *Id.* at 262, 264.
195. *Id.* at 264.
196. *See* Corning Glass v. Brennan, 417 U.S. 188, 207 (1974) (quoting 109 CONG. REC. 2714 (1963) (statement of Rep. Dwyer)).
197. *Id.* (quoting 109 CONG. REC. 2714 (1963) (statement of Rep. Dwyer)).

employees lower rates of pay to subordinate women.[198] By doing so, the *Shultz* court inherently acknowledged that terms negotiated in a CBA can be influenced by an employer's bias against its female employees.[199]These more open-minded courts held that the existence of a CBA cannot be used as an escape valve for failing to comply with statutory equal pay requirements.[200] They outright rejected that a CBA could establish an affirmative defense for an Equal Pay Act violation.[201] This approach is consistent with the Act's requirement of equal pay for equal work.[202] Whether two jobs involve equal work performed under similar working conditions is a fact-intensive inquiry; courts look closely at the nature of the work performed to see how the two jobs may be alike or distinct from each other.[203] This detailed factual inquiry would be unnecessary if CBAs could be used, on their own, as a justification for the pay differential. If CBAs, without more, could defend against equal pay claims, an employer could avoid the statutory requirements of equal pay for equal work.

IV. Collective Bargaining Agreements, Negotiation Bias, and the "Factor Other Than Sex" Affirmative Defense

The mere existence of a collective bargaining agreement should not preclude success on a claim under the Equal Pay Act. To establish the "factor other than sex" affirmative defense, the employer needs to show that a legitimate business reason justifies the pay disparity between male and female employees.[204] Some courts have allowed employers to use CBAs to establish the "factor other than sex" affirmative defense.[205] But the existence of a CBA alone does not prove the pay disparity among male and female employees results from a legitimate factor other than sex.

In fact, CBAs may even perpetuate gender discrimination. Studies have shown that negotiated employment compensation schemes may contribute to

198. *Shultz*, 421 F.2d at 264.

199. *See id.*

200. *See* Laffey v. Nw. Airlines, Inc., 567 F.2d 429, 447 (D.C. Cir. 1976); *Shultz*, 421 F.2d at 263–64; *Brennan*, 374 F. Supp. at 832.

201. *See Laffey*, 567 F.2d at 447 ("[A] collective bargaining agreement perpetuating prior pay discrimination affords the employer no defense to a charge under the Equal Pay Act."); *Shultz*, 421 F.2d at 263–64; *Brennan*, 374 F. Supp. at 832.

202. *See* 29 U.S.C. § 206(d).

203. *See, e.g.*, *Laffey*, 567 F.2d at 439–42; *Shultz*, 421 F.2d at 262–63; *Brennan*, 374 F. Supp. at 821–25.

204. *See, e.g.*, Perkins v. Rock-Tenn Servs., 700 F. App'x 452, 458 (6th Cir. 2017).

205. *See supra* Section III.A.

the pay disparity among men and women.[206] Researchers suggest two theories for why negotiations sometimes yield lower compensation for female employees.[207] The first is the so-called "tameness narrative:"[208]the idea that women are less assertive in negotiating their compensation and, therefore, are compensated less. The second theory suggests that even if women engage in assertive negotiation, they are compensated less because they face backlash for doing so.[209] Regardless of the reason, ample research supports the conclusion that negotiations do not yield the same compensation results for women as for men.[210]

Collective bargaining agreements, on their own, do not necessarily satisfy the "factor other than sex" affirmative defense because gender bias can and does influence negotiations.[211] If CBAs automatically establish the "factor other than sex" affirmative defense, the existence of a CBA makes all other evidence, even evidence of clear discrimination, unnecessary. The Equal Pay Act enumerates affirmative defenses to defeat a prima facie case;[212] the mere existence of a CBA is not listed among them.[213]

For industries using different CBAs for their male and female employees performing equal work (i.e., the professional sports industry), any differences in the CBAs must be the result of a "factor other than sex." If the CBA itself can serve as a legitimate business reason for paying female employees a lesser rate of pay, the agreement must be free of gender bias. To use a CBA to establish the "factor other than sex" affirmative defense, differences in the CBAs must be for legitimate business reasons.

Courts must look closely at CBAs and their terms to determine if gender bias limited the compensation and benefits available to the employee. If

206. Jennifer E. Dannals et al., *The Dynamics in Gender and Alternatives in Negotiation*, 106 J. APPLIED PSYCH. 1655, 1655 (2021). For a study finding female MBA graduates received lower compensation than their male counterparts following negotiations, see Barry Gerhart & Sarah Rynes, *Determinants and Salary Negotiations by Male and Female MBA Graduates*, 76 J. APPLIED PSYCH. 256 (1991).

207. Dannals et al., *supra* note 206, at 1655.

208. Kim Elsesser, *Why Women Fall Short in Negotiations (It's Not Lack of Skill)*, FORBES (Jan. 21, 2021, 2:18 PM EST), https://www.forbes.com/sites/kimelsesser/2021/01/21/why-women-fall-short-in-negotiations-its-not-lack-of-skill/?sh=7265ba3e5d02; *see also* Dannals et al., *supra* note 206, at 1656.

209. Dannals et al., *supra* note 206, at 1655.

210. *See id.* at 1668–69; *see also* Laura J. Kray & Leigh Thompson, *Gender Stereotypes and Negotiation Performance: An Examination of Theory and Research*, 26 RSCH. ORG. BEHAV. 103, 144 (2004).

211. Dannals et al., *supra* note 206, at 1655.

212. 29 U.S.C. § 206(d)(1); *see also* Corning Glass v. Brennan, 417 U.S. 188, 196 (1974).

213. *See* 29 U.S.C. § 206(d)(1).

courts permit the mere existence of a CBA to be a standalone affirmative defense, employers will use negotiated CBAs as a shield against equal pay claims while actively perpetuating gender bias. If employers can establish the "factor other than sex" affirmative defense simply by showing a CBA exists, the Equal Pay Act fails to protect employees against biased negotiations.

If the terms of a collective bargaining agreement can be the result of bias-impacted negotiations, the *Morgan* court should have inquired into whether the USSF took advantage of a market that pays female soccer players less than men for equal work in violation of the Equal Pay Act. Additional benefits—like a guaranteed minimum number of games—which the USSF argued made up for the pay differential,[214] are a direct result of bias within the sports industry. During CBA negotiations, the women repeatedly emphasized the need for a written guarantee they would play a minimum number of games during the season.[215] The men's team, on the other hand, is not concerned with guaranteeing a certain number of games.

Employees should prevail on an equal pay claim when they show that CBA terms disadvantaging women lack a legitimate business reason. The fact that terms are negotiated by employees does not prevent pay differentials resulting from gender bias.[216] Courts should scrutinize CBAs for gender bias and require a showing that CBAs disadvantaging women have a legitimate business reason. If there is no legitimate business reason for the sex-based pay differential, an affirmative defense is not established, and the employees should prevail on their equal pay claim[217] regardless of the existence of a CBA.

This Comment is not advocating the position that all CBAs for male and female employees must be identical to avoid violating the Equal Pay Act. Requiring identical compensation structures for male and female employees would go against the specific affirmative defenses established in the Equal Pay Act.[218] Collective bargaining agreements can account for revenue differences that arguably result from bias against the women's sports industry without violating the Equal Pay Act, if the difference in compensation can be legally justified by any legitimate business reason. Gender bias that exists in the real world, outside of collective bargaining negotiations, could conceivably create legitimate business reasons for differences in CBA terms. If the revenue generated by WNT games and merchandise justified paying

214. *See* Morgan v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635, 653 (C.D. Cal. 2020).
215. *Id*. at 646.
216. *See* Dannals et al., *supra* note 206, at 1655.
217. *See Corning Glass*, 417 U.S. at 196–97.
218. *See* 29 U.S.C. § 206(d)(1).

the women less, this would be a legitimate business reason justifying the pay differential. Providing lower compensation to the women based on lower revenue at women's games would potentially establish the "factor other than sex" affirmative defense. If the USSF had shown legitimate business reasons for failing to offer the same compensation *numbers* (in addition to the same compensation structure[219]) to the WNT as offered to the MNT, it might have successfully established the "factor other than sex" affirmative defense. During the litigation's lifetime, the USSF failed to do so.[220] If employers continue to rely on the pay differential established by the respective CBAs, as the USSF tried to do in *Morgan*, it must be made to show a legitimate business reason for paying the women less than the men.

V. Conclusion

In an appearance on Good Morning America, USWNT player Christen Press stated simply: "There is no social equality for women without financial equality."[221] The courts' failure to closely scrutinize collective bargaining agreements strips away the protection provided by the Equal Pay Act. If CBAs are not closely scrutinized, employees are not protected against biased negotiations. The Equal Pay Act recognizes that a "weaker bargaining position" can result in women receiving lower compensation than men for equal work.[222] Yet some courts' approach to analyzing equal pay claims ignores how gender bias impacts collective bargaining negotiations.

CBAs by themselves cannot demonstrate a compensation scheme free of gender bias. Gender bias can and does impact contract negotiations;[223] when these bias-impacted negotiations culminate in a CBA, the agreement itself reflects that bias. The USSF did not, and likely could not, justify the differences in the WNT and MNT collective bargaining agreements with any legitimate business reason. The CBA therefore should not have been used to

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219. During the litigation, WNT players maintained that, while the USSF may have offered a "pay-to-play" structure resembling the MNT's, the specific monetary bonuses offered were not the same. *See* Morgan v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635, 647-48 (C.D. Cal. 2020).

220. *See Morgan*, 445 F. Supp. 3d at 656.

221. Jacob Bogage, *As Talks Break Down, Megan Rapinoe Says USWNT 'Won't Accept Anything Less Than Equal Pay'*, WASH. POST (Aug. 15, 2019, 1:58 PM EDT), https://www.washingtonpost.com/sports/2019/08/15/talks-break-down-megan-rapinoe-says-uswnt-wont-accept-anything-less-than-equal-pay/.

222. *See Corning Glass*, 417 U.S. at 206 (quoting Hodgson v. Corning Glass Works, 474 F.2d 226, 234 (2d Cir. 1973), *aff'd sub nom.*, *Corning Glass*, 417 U.S. 188).

223. Dannals et al., *supra* note 206, at 1655.

disprove the USSF engaged in wage discrimination by paying the WNT less than the MNT. If employers wish to use a freely negotiated CBA to defeat claims of Equal Pay Act violations, those employers must be made to show that any resulting pay disparities among male and female employees are for legitimate business reasons.

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