NOTES & COMMENTS

TAKING THE GAME BACK: A RESPONSE TO THE DISTRICT COURT RULING AGAINST THE UNITED STATES WOMEN'S NATIONAL SOCCER TEAM UNDER THE EQUAL PAY ACT

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I. INTRODUCTION

As the United States Women's National Soccer Team (WNT) carries on its lawsuit under the Equal Pay Act[1] against the United States Soccer Federation ("USSF"), the employer of the WNT and men's national team (MNT), there has been much legal discussion of the WNT's claim on both sides of the issue.[2] For the most part, this discussion pre-dates the opinion of the United Stated District Court for the Central District of California,[3] which granted summary judgment to the USSF on the WNT's EPA claim.[4] This decision is currently on appeal.[5]

One article pre-dating the district court's opinion appears to be most on point with the district court's conclusion and does an exceptional job of laying out the law.[6] This article ultimately concludes that, while the law may not be in the WNT's favor, the current dispute presents a perfect opportunity for better negotiations and communication between the WNT and the USSF.[7] Further, this would be a great time for the USSF to do what it has promised the WNT—promote gender equality—and for the WNT players to achieve their goals in seeking that equality.[8] The article itself then offers some fruitful options for both parties to achieve these goals.[9]

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[1] *See* Caitlin Murray, *USWNT to Fight U.S. Soccer in Equal Pay Row: Appeal Says Judge's Decision 'Defies Reality'*, ESPN (July 23, 2021), https://www.espn.com/soccer/united-states-usaw/story/4437227/uswnt-to-fight-us-soccer-in-equal-pay-row-appeal-judges-decision-as-it-defies-reality.

[2] *E.g.*, Andrew J. Haile, *An Even Playing Field: The Goal of Gender Equity in World Cup Soccer*, 98 OR. L. REV. 427 (2020); Honey Campbell, Comment, *Superior Play, Unequal Pay: U.S. Women's Soccer and the Pursuit for Pay Equity*, 51 U.S.F. L. REV. 545 (2017); Megan Musachio, Note, *Shooting for Equality: The U.S. Women's National Team and Their Struggle for Equal Pay*, 19 J. INT'L BUS. & L. 258 (2020).

[3] *E.g.*, Haile, *supra* note 2; Campbell, *supra* note 2; Musachio, *supra* note 2.

[4] Morgan v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635, 641, 665 (C.D. Cal. 2020).

[5] *See* Graham Hays, *USWNT Players File Appeal Against Ruling that Quashed Equal Pay Claims*, ESPN (May 8, 2020), https://www.espn.com/soccer/united-states-usaw/story/4093248/uswnt-players-file-appeal-against-ruling-that-quashed-equal-pay-claims; *see also* Jeff Carlisle, *U.S. Soccer Files Response to Women's Equal Pay Appeal*, ESPN (Sept. 22, 2021), https://www.espn.com/soccer/united-states-usaw/story/4481131/us-soccer-files-response-to-womens-equal-pay-appeal.

[6] Haile, *supra* note 2, at 452–69.

[7] *Id.* at 475.

[8] *Id.*

[9] *Id.* at 469–75.

Realistically, this article is dead-on in its two conclusions.[10] First, the WNT faces an uphill battle in succeeding on its EPA claim, as there is case law which supports the USSF's position that the WNT will have to overcome in order to prevail.[11] Second, however, this dispute presents a great opportunity for better negotiations between the parties.[12] The WNT's current collective bargaining agreement with the USSF expires at the end of this year, and the USSF should be prepared to take intentional steps to better bridge the gap between the parties after facing this lawsuit and the public scrutiny which has come along with the WNT's claims.[13]

Nonetheless, while the WNT may face an uphill battle on its EPA claim, the claim currently sits on appeal, and there are important, legitimate legal and policy arguments to be made in support of the WNT on this issue.[14] I intend to make these arguments in direct response to the district court's opinion, which granted summary judgment to the USSF on the WNT's EPA claim.[15] This note will, therefore, make legal arguments about where I believe the district court's opinion went wrong and, where the opinion finds its most legal support, policy arguments as to why the WNT's case is distinguishable from this legal support. This analysis has yet to be done.[16]

I argue the district court improperly held that the WNT failed to show the team was paid at a rate less than the MNT and, thus, failed to establish a prima facie case for an EPA claim, when the district court based this conclusion on findings that were really affirmative defense issues.[17] Consequently, the district court improperly granted the USSF summary judgment based on the wage rate element under the EPA in the prima facie stage of the case. On the affirmative defense issue, under which the district court's analysis *does* find solid legal support,[18] the WNT's case is distinguishable from similar case law based on a long history of inequality between the MNT and WNT, supported by objective evidence, which was

[10] *Id.* at 475.

[11] *Id.*

[12] *Id.* at 475.

[13] *See id.* at 448, 475.

[14] Hays, *supra* note 5.

[15] Morgan v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635, 641, 665 (C.D. Cal. 2020).

[16] The only law review article that even cites the most relevant case discussed in this note, *Schleicher v. Preferred Sols., Inc.*, 831 F.3d 746 (6th Cir. 2016), takes a different position on the WNT's claim than this note. *See* Haile, *supra* note 2, at 468–69.

[17] *See Morgan*, 445 F. Supp. 3d at 652–54.

[18] *See infra* Part III.A.ii.

violative of EPA policy in and of itself. Further, when such a history of inequality exists under an institution, as in this case,[19] allowing that institution to overcome an EPA claim on the basis of this distinguishable case law sets bad precedent in light of EPA policy. As a result, the affirmative defense under which the district court's decision finds support should also fail in this case.

Part II will first lay out the requirements to establish an EPA claim. It then sets forth the history of inequality between the two teams, including the background that led to the current litigation, the district court's factual findings, and a summary of the district court's opinion. Part III will analyze the district court's decision under the wage rate element and, based on EEOC guidelines, argue that the district court incorrectly applied the law to the facts of this case under that element. Part IV will then discuss where the district court's opinion actually finds support under the affirmative defense to an EPA claim termed a "factor other than sex." It then distinguishes the WNT's case from case law which has held that this affirmative defense applies on similar facts. Finally, Part V will conclude that, based on this analysis, the WNT should succeed on its EPA claim and receive some amount of back pay as compensation for the history of inequality the team has endured.

II. BACKGROUND

A. Legal Requirements for Establishing an EPA Claim

To establish an EPA claim, the plaintiff has the burden of showing that the same employer paid "different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.'"[20] This requirement can be broken down into three elements: (1) the employees were employed within the "same establishment," and (2) that establishment paid opposite-sex employees at unequal wage rates (3) for equal work.[21]

Once a plaintiff shows these elements and establishes a prima facie case, the burden shifts to the defendant to show that the wage differential

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[19] *See infra* Part II.B.
[20] Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).
[21] *See* Haile, *supra* note 2, at 453.

is justified by one of the EPA's four exceptions.[22] These four exceptions, which operate as affirmative defenses with the burden-shifting structure of EPA claims, allow the defendant to avoid liability under the EPA if the defendant can show that the "different payment to employees of opposite sexes 'is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.'"[23]

As the topic of this note is narrowly intended to analyze the WNT's current position and provide ways the team may be able to move forward with its EPA claim in direct response to the district court's decision, I will only discuss those elements on which the district court based its opinion and provide possible responses to the district court's decision under those elements.[24]

B. History Leading to the Current Litigation[25]

The origins of the WNT began only in 1985, when the USSF first fielded a women's team to represent the United States on the international stage.[26] As amateurs, in the WNT's first tournament, the players wore oversized hand-me-downs with "USA" ironed on the uniforms.[27] Just six short years later, in 1991, the WNT went on to win its first Women's

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[22] *Id.* at 196.

[23] *Id.*

[24] As stated, the district court granted the USSF summary judgment because the WNT failed to establish a prima facie case under the wage rate element. Morgan v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635, 656 (C.D. Cal. 2020). Consequently, the district court did not discuss the same establishment or equal work elements of the WNT's prima facie case, so those elements will also not be analyzed here. *Id.* at 651–56. However, these elements have been thoroughly analyzed by numerous law review articles in the context of the WNT's claim. For a thorough analysis of all three elements, see Haile, *supra* note 2. In addition, the same establishment and equal work elements are less likely to be a hurdle for the WNT in making its prima facie case than the wage rate element. *See id.* at 453–63. Finally, the only affirmative defense relevant to the WNT's case is the "other than sex" defense, which I also analyze as a result of my argument that the district court's opinion was really an affirmative defense issue, rather than a decision to be made in the prima facie stage of the case. *See id.* at 463–69.

[25] This history has been thoroughly discussed in many legal articles on the WNT's current lawsuit. For a thorough rendition of this history, see Haile, *supra* note 2, at 432–52. Consequently, rather than re-hashing this entire backdrop, I summarize the most relevant pieces here.

[26] *Id.* at 432.

[27] *Id.* For a picture of the team, see Travis Yoesting, *The USWNT Debuted in 1985. This Is What They Looked like*, THE 18 (Jan. 26, 2018), https://the18.com/soccer-photos/first-uswnt-team-1985.

World Cup.[28] The World Cup is the biggest tournament in soccer, both men's and women's, and takes place every four years.[29] Nonetheless, women's soccer was not very developed yet in 1991, and, as a result, the USSF treated the WNT and MNT as vastly different.[30] For example, while the USSF paid each individual men's player a $10,000 bonus for qualifying for the 1990 World Cup, the USSF gave each WNT player two t-shirts for qualifying for the 1991 Women's World Cup.[31] When the WNT went on to win the 1991 Women's World Cup, the USSF paid each player a $500 bonus.[32]

Flash forward to the 1999 Women's World Cup, taking place only about 20 years ago.[33] At this time, most of the WNT players still had to work second jobs because there was no domestic professional women's soccer league to play in, and the players' WNT wages were too little alone to make ends meet.[34] Despite these hurdles, the country became invested in the 1999 Women's World Cup, and the WNT went on to win the tournament, playing the final in front of a sold-out Rose Bowl crowd of 90,000 spectators.[35] Much improved from the 1991 Women's World Cup, each player received an approximate bonus of $50,000 for winning the 1999 tournament.[36] However, only $12,500 of that bonus came from the USSF; the remainder came from the tournament's organizing committee after the committee earned an unexpected profit from the public interest surrounding the team over the course of the tournament.[37] In comparison, the MNT players received $25,000 each just for qualifying for the 1998 Men's World Cup.[38] The MNT then failed to make it past the group stage—the earliest stage of the tournament.[39]

After the 1999 Women's World Cup, the WNT negotiated a collective bargaining agreement (CBA) with the USSF, under which, for

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[28] Haile, *supra* note 2, at 432–33.

[29] *World Cup*, ENCYC. BRITANNICA, https://www.britannica.com/sports/World-Cup-football (last updated Aug. 19, 2021).

[30] Haile, *supra* note 2, at 432–33.

[31] *Id.*

[32] *Id.* at 433.

[33] *Id.* at 434.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* at 435.

[39] *Id.*

the first time, the USSF provided guaranteed compensation for the players.[40] Since then, the WNT has re-negotiated its CBAs every few years, all in the face of this backdrop.[41] The first CBA ended in only 2004.[42] A second CBA lasted from 2005 through 2012.[43] From 2012 to 2013, the WNT and USSF negotiated a new CBA that lasted until 2016 and consisted of the 2005 CBA modified by a memorandum of understanding.[44] Finally, the parties negotiated the 2016/2017 CBA, which is the CBA currently in existence and only the fourth ever for the WNT.[45] The current CBA expires at the end of 2021.[46]

Due to the recency of this history and the WNT's progress in bridging the gap between itself and the MNT with the USSF, it is understandable that, in negotiating these CBAs, which have only been in existence since after all of the current players were born, one of the most important items on the WNT's agenda would be security and guaranteed compensation.[47] Other factors which strongly influence the WNT's need for this security include the fact that (1) the international market for women's soccer is generally smaller than the market for men's soccer due to the relative newness of women's soccer, and (2) there has only been a stable domestic women's professional league in the United States since 2013.[48] In contrast, the men's domestic professional league, Major League Soccer (MLS), was created in the United States in the 1990s.[49]

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[40] *Id.*

[41] Morgan v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635, 642–50 (C.D. Cal. 2020).

[42] *Id.* at 642.

[43] *Id.*

[44] *Id.* at 642–44.

[45] *See id.* at 642–51.

[46] Haile, *supra* note 2, at 448.

[47] *See* Haile, *supra* note 2, at 446; *Players: Tierna Davidson*, US SOCCER, https://www.ussoccer.com/players/d/tierna-davidson (last visited June 27, 2021) (noting that the youngest player currently on the roster is Tierna Davidson, born in 1998); Tom Beck, *USA Women's Soccer Roster Revealed for Rio 2016 Olympics*, BLEACHER REP. (July 12, 2016), https://bleacherreport.com/articles/2651667-usa-womens-soccer-roster-revealed-for-rio-2016-olympics (stating that the youngest player on the WNT roster in 2016 was Mallory Pugh); *Players: Mallory Pugh*, US SOCCER, https://www.ussoccer.com/players/p/mallory-pugh (last visited June 27, 2021) (noting that Pugh was also born in 1998).

[48] Haile, *supra* note 2, at 436, 440.

[49] *Timeline of Major League Soccer's 25 Years*, THOMSON REUTERS (Feb. 29, 2020, 6:19 PM), https://www.reuters.com/article/us-soccer-usa-mls-timeline/timeline-of-major-league-soccers-25-years-idUSKBN20N13E.

While the USSF helped fund the MLS to the tune of millions of dollars in order to get the league up and running, prior to 2013, two attempts at a domestic women's professional league folded due to a lack of funding after the USSF refused to provide these women's leagues substantial financial assistance.[50] While the USSF has since contributed millions to the current domestic women's professional league, the National Women's Soccer League (NWSL), including paying the NWSL salaries for most of the WNT members playing in the league,[51] it appears that this change was only a result of the WNT players directly demanding such assistance from the USSF in CBA negotiations.[52] While the MLS and NWSL are separate entities from the MNT and WNT, the USSF's funding of the MLS and NWSL has proven to be a vital source for providing players on the MNT and WNT further opportunities to earn money.[53] Yet, the USSF did not provide funding for a women's domestic professional league until the WNT contracted for this funding by making NWSL financial assistance from the USSF a part of the WNT's CBAs with the USSF.[54] In contrast, the MLS funding from the USSF is not part of the MNT's CBA because the MNT did not have to demand this funding in its negotiations with the USSF, who was, on its own accord, already providing funding to the MLS.[55]

This difference in funding provides just one factor, in addition to the discussed history of inequality during the WNT's development, which likely went into the WNT's decision to set up its current CBA the way the players did. This history is vital to understanding the WNT's reasons for making certain demands when negotiating its CBAs with the USSF, which the MNT did not have to consider or demand in setting up their own CBAs.[56] This context should be kept in mind when reviewing the teams' CBAs and the district court's decision.

C. The WNT's CBAs

Understanding the terms of the WNT's CBAs from both 2013 and 2017 is important for two reasons. First, the class period in this case is

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[50] Haile, *supra* note 2, at 435–36.

[51] *Id.* at 436.

[52] *See* Morgan v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635, 643–50 (C.D. Cal. 2020).

[53] *See* Haile, *supra* note 2, at 435–36.

[54] *See Morgan*, 445 F. Supp. 3d at 643–50.

[55] *See id.* at 644; Haile, *supra* note 2, at 435–36.

[56] *See supra* Part II.B.

from 2015 to 2019 and, thus, contemplates both the 2013 and 2017 CBAs.[57] Second, understanding the history behind the differences in the WNT's CBAs, as compared to the MNT's CBAs, and how that history lines up directly with those differences provides the basis for this note's arguments that the district court erred in granting the USSF summary judgment in this case, and the decision sets bad precedent in violation of EPA policy.

Keeping in mind the background discussed above, when negotiating the 2013 CBA with the USSF, the WNT requested and received the following fringe benefits not included in the MNT's CBA: (1) a minimum number of players on contract receiving an annual salary; (2) annual salaries for participation in the WNT; (3) annual salaries for participation in the NWSL; (4) a guaranteed 15% increase in the WNT's salary if there is no professional league or if the USSF pulls support from the league; (5) certain severance benefits; (6) continued salaries during injuries; (7) medical, dental, and vision insurance; and (8) childcare assistance.[58] In exchange, the WNT took less pay-per-game than the MNT.[59]

The 2017 CBA currently in existence does not directly incorporate any of the fringe benefits from the 2013 CBA, though many of the fringe benefits in the 2017 CBA are similar to those in the 2013 CBA.[60] The 2017 CBA provides fringe benefits different from the MNT's CBA in the form of severance benefits; injury protection; health, dental, and vision insurance; pregnancy pay; guaranteed rest time; child care assistance; partnership bonuses; an annual payment in exchange for the USSF's commercial use of player likeness; and a clause that the USSF shall use good faith efforts to schedule a minimum number of WNT games.[61] There are also twenty contracted players and guaranteed NWSL salaries, again not existing in the MNT's CBA.[62] Finally, there are, of course, provisions for bonuses for wins in friendlies and tournaments, which exist in both

[57] *Morgan*, 445 F. Supp. 3d at 640–41. In a class action lawsuit, the class period is the specific time period the defendant (here, the USSF) was allegedly committing the injury against the class (here, the WNT players). *What Is a Class Period*, SARRAF GENTILE LLP, https://www.sarrafgentile.com/class-actions/class-action-resources/what-is-a-class-period/ (last visited Sept. 20, 2021).

[58] *Morgan*, 445 F. Supp. 3d at 644.

[59] *See id.* at 642, 647–50.

[60] *See id.* at 642–51.

[61] *Id.* at 651.

[62] *Id.* at 650.

teams' CBAs.[63] Ultimately, the WNT receives less pay-per-game than the MNT in exchange for the fringe benefits the WNT receives which the MNT does not receive.[64] While the WNT initially asked to receive the same pay-per-game as the MNT in negotiating the 2017 CBA, the USSF explained that, to do so, the USSF could not provide the fringe benefits and guarantees mentioned.[65] Because the WNT players were insistent on having a number of these guarantees, the parties continued negotiations until they reached their current agreement.[66]

D. The District Court's Findings of Law

Because the WNT negotiated its own CBA and received a number of fringe benefits under the CBA that the MNT did not receive under its CBA, the district court held that the WNT failed to establish a prima facie case of wage discrimination and granted summary judgment to the USSF.[67] Specifically, the district court found that the WNT failed to meet the "wage rate" element of its EPA claim because the team failed to show that it was paid at a rate less than that of the MNT.[68] This holding is based on the fact that "the term 'wages' generally includes all payments made to [or on behalf of] an employee as remuneration for employment."[69] Thus, "[w]ages also include fringe benefits, which include 'medical, hospital, accident, life insurance and retirement benefits; profit sharing and bonus plans; leave; and other such concepts.'"[70] Put simply, then, the WNT failed to establish a prima facie case of wage discrimination because the WNT receives a number of fringe benefits the MNT does not receive, those fringe benefits are included in the wage rate calculation, and the WNT failed to establish that it receives less total compensation than the MNT when considering all of these forms of wages.[71]

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[63] *Id.*
[64] *See id.* at 647–51.
[65] *See id.* at 645–50.
[66] *Id.* at 645–51.
[67] *Id.* at 656.
[68] *Id.*
[69] *Id.* at 652 (citing 29 C.F.R. § 1620.10 (2020)).
[70] *Id.* (citing 29 C.F.R. § 1620.10 (2020); 29 C.F.R. § 1620.11(a) (2020)).
[71] *Id.* at 651–56.

III. ARGUMENT IN RESPONSE TO THE DISTRICT COURT'S DECISION

A. Wage Rate Element

i. The District Court's Improper Wage Rate Analysis

The district court held that the WNT failed to establish a prima facie case that the WNT made less than the MNT over the class period (2015 to 2019) due to the fringe benefits the women's teams received that the men's team did not receive.[72] This holding is incorrect.

The district court was correct in noting that fringe benefits are included in the total calculation of wages,[73] and the district court found that the WNT received fringe benefits that the MNT did not, while the MNT received higher pay rates per game under the terms of its CBA than the WNT.[74] However, the EEOC compliance manual for EPA guidance provides that equal wages must be in the same form.[75]

For example, in the context of hourly wages, males and females "who are paid on an hourly basis for substantially equal work must receive

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[72] *Id.* at 655–56.

[73] *Id.* at 652; U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-915.003, EEOC COMPLIANCE MANUAL § 10-IV COMPENSATION DISCRIMINATION IN VIOLATION OF THE EQUAL PAY ACT (2000) [hereinafter EEOC COMPLIANCE MANUAL].

[74] *Morgan*, 445 F. Supp. 3d at 641–42, 650–51. Note that, as will be discussed, the district court found that, over the class period, the WNT earned more total compensation per game than the MNT. *Id.* at 654. The way the district court presents this finding is misleading, as this per-game difference is based on the significant difference in success between the two teams – the WNT won two Women's World Cups during the class period, while the MNT failed to qualify for the last World Cup. Girish Sanwal, *FIFA Women's World Cup Winner: All-Time World Cup Winners List*, FIFA NEWS, https://www.fifaworldcupnews.com/fifa-womens-world-cup-all-time-world-winners-list/ (last updated July 5, 2021); Haile, *supra* note 2, at 429. Despite this significant difference in success, the difference in total compensation per game between the MNT and WNT is nominal; actually, the compensation the two teams earned per game is substantially similar despite the great difference in success. *See Morgan*, 445 F. Supp. 3d at 654 (noting that, over the class period, the WNT earned $220,747 per game as compared to the MNT's $212,639 per game). However, to clarify, the sentence attached to this citation does not refer to this difference in total compensation between the two teams but, rather, to the difference in the specific bonuses the WNT had the opportunity to earn per game under its CBAs in contrast to the specific bonuses the MNT had the opportunity to earn per game under its CBAs. *See id.* at 647–48. This difference is in exchange for the WNT's fringe benefits which the MNT does not receive. *See id.* at 641–42, 650–51.

[75] EEOC COMPLIANCE MANUAL, *supra* note 73.

the same hourly wage. The employer cannot pay a higher hourly wage to one of those employees and then attempt to equalize the difference by periodically paying a bonus to the employee of the opposite sex."[76] To further explain this "same form" requirement, the EEOC provides an example in which a male and female tennis instructor give substantially equal tennis lessons at a health club: "The male instructor is paid a weekly salary, but the female instructor is paid by the lesson. *Even if the two instructors receive essentially the same pay per week*, there is a violation because the male and female are not paid in the same form for substantially equal work."[77] To drive this point home, the EEOC further states,

> "Wage rate" is the measure by which an employee's compensation is determined. It encompasses rates of pay calculated on a time, commission, piece, job incentive, profit sharing, bonus, or other basis. An employer that pays different wages to a male than to a female performing substantially equal work does not violate the EPA if the wage rate is the same. For example, if a male and a female employee performing substantially equal sales jobs are paid on the basis of the same commission rate, then a difference in the total commissions earned by the two workers would not violate the Act. Conversely, if the commission rates are different, then a prima facie violation could be established even if the total compensation earned by both workers is the same.[78]

Thus, the fact that the WNT and MNT are paid in different *forms* should be enough for the WNT to establish a prima facie case of an EPA violation and meet the "wage rate" element, even if the two teams received essentially the same pay. According to the EEOC compliance manual, there is nothing more to the analysis under this element.[79]

Instead of doing the "same form" analysis for the wage rate element, however, the district court used the total compensation the WNT received as compared to that the MNT received as the relevant measure under the wage rate element in this case.[80] The court decided to use the teams' respective total compensation as the relevant measure due to the fact that fringe benefits are included in the total amount of "wages" under the EPA, and the WNT received a number of fringe benefits the MNT did not receive, making direct comparison of the wages the two teams earned difficult.[81] In support of the total compensation approach, the district court

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[76] *Id.*

[77] *Id.* (emphasis added).

[78] *Id.*

[79] *See id.*

[80] *See id.*; Morgan v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635, 653–54 (C.D. Cal. 2020).

[81] *Morgan*, 445 F. Supp. 3d at 653–54.

cites *Huebner v. ESEC, Inc.*—a single, unreported opinion from a different jurisdiction which also uses the "total compensation" approach.[82]

However, *Huebner* acknowledges that there is differing case law on this specific issue.[83] When there is differing case law on an issue, EEOC guidance on the direct issue should be strong persuasive authority given deference by the court.[84] This total compensation approach used by the district court and *Huebner* is inconsistent with EEOC guidance and, thus, is improper in this case.[85] Under the EEOC guidance, rather, what is determinative for purposes of the WNT meeting this element and establishing its prima facie case is simply the fact that the WNT and MNT were paid in different forms.[86]

Further, in support of the "same form" requirement, the EEOC guidance cites *Bence v. Detroit Health Corp.*[87] In *Bence*, the employer operated a chain of health spas, which were divided into a men's division and a women's division that operated on alternate days.[88] Men operated the men's division, while women operated the women's division.[89] The employer paid managers and assistant managers by commissions based on gross sales of memberships.[90] The employer paid male managers 7.5% of the individual spa's gross sales of memberships to men, and paid male assistant managers 4.5% of gross sales to men.[91] In contrast, the employer paid female managers 5% of gross sales of memberships to women, and paid female assistant managers 3% of gross sales to women.[92] However, over the course of the employer's life, the gross volume of membership sales to women was 50% higher than the gross volume of membership

[82] *Id.* (citing Huebner v. ESEC, Inc., No. CV 01-0157-PHX-PGR, 2003 WL 21039345, at *2 n.8 (D. Ariz. Mar. 26, 2003)).

[83] *Huebner*, 2003 WL 21039345, at *2.

[84] *See, e.g.*, Equal Emp. Opportunity Comm'n. v. Shell Oil Co., 466 U.S. 54, 74 n.28 (1984) ("The EEOC's interpretation of its own rules is entitled to deference."). Where the Supreme Court has given deference to the EEOC's interpretation of its own rules, the court should apply the law the way the EEOC Compliance Manual does to this case.

[85] *See* EEOC COMPLIANCE MANUAL, *supra* note 73.

[86] *See id.*

[87] 712 F.2d 1024 (6th Cir. 1983).

[88] *Id.* at 1025.

[89] *Id.* at 1025–26.

[90] *Id.* at 1026.

[91] *Id.*

[92] *Id.*

sales to men.[93] Thus, the total remuneration the male and female managers and assistant managers received was substantially equal, although the females made more sales than the males.[94]

The United States Court of Appeals for the Sixth Circuit found that the female employees in *Bence* established a prima facie case of wage discrimination under the EPA, meeting the wage rate element despite the fact that male and female employees received substantially equal total compensation.[95] Because the employer paid the male and female employees at different rates for doing equal work, the fact that the male and female employees received substantially equal total compensation could not overcome the female employees' prima facie case of wage discrimination under the EPA.[96]

While the wage rate analysis in *Bence* is more simplistic than the wage rate analysis for the WNT, given the lack of fringe benefits to contemplate in *Bence* but which exist in the WNT's case, a major fact nevertheless ringing through both cases is that the female employees are putting in more work to earn substantially equal pay as compared to the male employees.[97] In *Bence*, the female employees were making more sales than the male employees to earn the same pay as the male employees.[98] In the WNT's case, during the class period, the WNT won two Women's World Cups, while the MNT failed to even qualify for the last World Cup.[99] Consequently, the WNT was playing in more, higher-stakes games than the MNT over the relevant class period to which the district court looked when comparing the two teams' compensation.[100]

Nonetheless, the district court found that, because the WNT earned slightly more than the MNT during the class period, the total compensation the two teams made failed to establish that the WNT earns less than the

[93] *Id.*

[94] *Id.*

[95] *Id.* at 1027–28.

[96] *Id.*

[97] *Id.*; *see also* Sanwal, *supra* note 74 (noting that the WNT has won two Women's World Cups during the class period); Haile, *supra* note 2, at 429 (noting that the MNT failed to even qualify for the most recent Men's World Cup in 2018 and has not progressed past the quarterfinal round of the Men's World Cup since the inaugural men's tournament in 1930).

[98] *Bence*, 712 F.2d at 1027–28.

[99] *See* Sanwal, *supra* note 74; Haile, *supra* note 2, at 429.

[100] *See* Sanwal, *supra* note 74; Haile, *supra* note 2, at 429.

MNT.[101] Thus, the WNT failed to meet the wage rate element.[102] But the WNT should not have to play in more, higher-level games to earn as much as the MNT, and the fact that the WNT made slightly more than the MNT as a result of the WNT's unparalleled success in a short time period[103] does not mean the two teams were being paid equally under the EPA.[104] The WNT would not earn more or have more game opportunities in a typical year.[105] Using the total compensation calculation to compare wages for games and years in which the WNT was winning the biggest tournament which exists in the sport,[106] for which the MNT failed to even qualify during that time frame,[107] is not requiring substantially equal pay for equal work. Rather, the district court's analysis is really requiring greater work for substantially equal pay. Thus, like in *Bence*, where the employer was also requiring greater work for substantially equal pay, and the total compensation earned by male and female employees in that case was not determinative to establish that the male and female employees were being paid equally under the EPA,[108] the total compensation the WNT received over the class period is not determinative here for purposes of the wage rate element under the EPA.[109]

No other case which the district court cites under its wage rate analysis contemplates the female employees having more success in their respective field and, thus, putting in more work to earn the same or marginally more than their male competitors when, in reality, if paid in the same form as the male employees, the female employees would earn substantially more.[110] These are the circumstances the WNT faces.[111] *Bence*, on the other hand, does contemplate these same circumstances which confront the WNT, and *Bence* is consistent with the EEOC guidance discussed.[112] Consequently, as in *Bence* and under the EEOC guidance, the fact that the WNT and MNT were paid in different forms should be

[101] Morgan v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635, 653–54 (C.D. Cal. 2020).

[102] *Id.* at 656.

[103] *See id.*, at 653–54; Haile, *supra* note 2, at 429, 459.

[104] *See* EEOC Compliance Manual, *supra* note 73.

[105] *See* Haile, *supra* note 2, at 447.

[106] *World Cup*, *supra* note 29.

[107] Haile, *supra* note 2, at 429.

[108] Bence v. Detroit Health Corp., 712 F.2d 1024, 1027–28 (6th Cir. 1983).

[109] *See* EEOC COMPLIANCE MANUAL, *supra* note 73.

[110] *See* Morgan v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635, 652–54 (C.D. Cal. 2020) (citing Hein v. Or. Coll. of Educ., 718 F.2d 910 (9th Cir. 1983)).

[111] Sanwal, *supra* note 74; Haile, *supra* note 2, at 429.

[112] *See Bence*, 712 F.2d 1024, 1027–28; EEOC COMPLIANCE MANUAL, *supra* note 73.

sufficient for the WNT to establish a prima facie case under the wage rate element of the EPA.[113]

ii. The District Court's Improper Conflation of the Affirmative Defense Issue in the Prima Facie Stage of the Case

To further support its holding under the wage rate element, the district court strongly emphasized the fact that the Federation offered the WNT the same pay structure as the MNT have under their CBA, but the WNT players turned down that pay structure and asked explicitly for the fringe benefits they receive under their current CBA instead.[114] However, the fact that the WNT rejected the same form of payment as the MNT and instead asked for the payment structure that the WNT currently receives is not relevant *under this element* nor is that fact a *prima facie case issue*.[115] Rather, as will be discussed, this fact *is* relevant and may be determinative under the "other than sex" affirmative defense.[116]

This analytical structure makes sense. Allowing the USSF to defend its method for paying the WNT differently from the MNT, based on the fact that the WNT asked for the difference in pay structure, is clearly fair. However, allowing the USSF to do so at the stage where the WNT is establishing its prima facie case is pre-mature, as the prima facie stage is simply one in which the plaintiff, the WNT, has the burden of showing that there is a difference in pay at all.[117]

The affirmative defense stage is the stage where the burden is shifted on to the defendant, the USSF, to say, well, the reason for this difference in pay is because of your actions, WNT.[118] An affirmative defense is "a defense in which the defendant introduces evidence, which, if found to be credible, will negate criminal liability or civil liability, even if it is proven that the defendant committed the alleged acts."[119] Even though the USSF

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[113] *See Bence*, 712 F.2d at 1027–28; EEOC COMPLIANCE MANUAL, *supra* note 73.

[114] *Morgan*, 445 F. Supp. 3d at 655–56.

[115] *See, e.g.*, Haile, *supra* note 2, at 456–60, 463, 468–69.

[116] *See, e.g.*, Schleicher v. Preferred Sols., Inc., 831 F.3d 746 (6th Cir. 2016) (holding that a female employee who rejected the male employee's pay structure and asked to receive a different pay structure instead made a "personal choice," which was a sufficient factor other than sex for the employer to pay the female employee differently from the male employee).

[117] *See* Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).

[118] *See id.* at 196.

[119] Cornell Law School, *Affirmative Defense*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/affirmative_defense (last visited June 27, 2021).

did pay the WNT at a different rate than the MNT, the USSF tried to justify their actions by providing evidence to negate liability, such as the WNT rejecting the MNT's pay structure in favor of the pay structure that currently exists between the WNT and USSF.

As will be discussed, the district court was not necessarily wrong in its ultimate decision to find for the USSF based on this evidence of the WNT's negotiations of its CBAs with the USSF.[120] However, the court did this analysis pre-maturely. As a result, the district court improperly applied this affirmative defense analysis in the prima facie stage of the case. The court, therefore, should not have awarded summary judgment to the USSF on this basis under the wage rate issue.

IV. FACTOR OTHER THAN SEX AFFIRMATIVE DEFENSE

You may be asking an obvious question at this point: if the district court simply applied this part of its analysis at an earlier stage than was proper, but the analysis would be correct at a later stage, will the result not just end up being the same? Even if the court of appeals finds that the WNT has established a prima facie case for its EPA claim, the USSF can successfully present its affirmative defense, right? The answer is maybe. As will be discussed, the court may ultimately find that the "other than sex" affirmative defense applies in this case and allow the USSF to avoid liability as a result.[121] However, I argue that, for policy reasons, the court should find that the WNT's decision to request a different pay structure than the MNT in this case is an insufficient basis for the "other than sex" affirmative defense to apply here.

A. Case Law Supporting the District Court's Conclusion

The case which most supports the district court's decision to grant the USSF summary judgment due to the WNT choosing its current pay structure over the MNT's pay structure is *Schleicher v. Preferred Sols., Inc.*[122] In *Schleicher*, the employer paid its male salesperson almost $700,000 more than its female salesperson who performed the same work over the course of four years.[123] However, the employer had offered the female salesperson the exact same compensation model as her male co-

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[120] *See infra* Part IV.A.

[121] *See, e.g.*, *Schleicher*, 831 F.3d 746.

[122] *Id.*

[123] *Id.* at 748.

worker received, but the female salesperson declined the offer because she preferred a safer base salary as compared to the riskier "profit-pool-only" basis her male co-worker received.[124] Consequently, the United States Court of Appeals for the Sixth Circuit held that the employees' disparate salaries were because of a factor other than sex, and, thus, the employer did not violate the EPA.[125] This factor other than sex was the female employee's "personal choice" to accept a different pay structure from her male counterpart after she was offered the same structure as the male employee but declined the offer based on a desire for more security in the pay she received.[126]

This analysis is really what the district court did in the WNT's case: after finding that the WNT was offered the same pay structure as the MNT but declined the offer in favor of a more secure payment plan, the district court held that the WNT could not then turn around and claim an EPA violation against the Federation with whom the WNT negotiated the plan.[127] Game, set, and match then, right? Even if the WNT makes it past the prima facie stage, the case law appears to support the ultimate conclusion of the district court under an affirmative defense, defeating the WNT's claim in the end.[128] While true that the court could very well hold this way, the WNT's case is distinguishable from *Schleicher* because the WNT did not have a "personal choice" when negotiating the CBAs in the same way the plaintiff in *Schleicher* had in negotiating her own payment plan.

B. Distinguishing the WNT's Case from Schleicher

In *Schleicher*, the choice to take a more secure pay structure was made by an individual.[129] While she may have had legitimate personal reasons for desiring more security, those reasons were not clear from the

[124] *Id.* at 749–50.

[125] *Id.* at 755–56.

[126] *Id.* at 754–55.

[127] Morgan v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635, 655 (C.D. Cal. 2020) ("This history of negotiations between the parties demonstrates that the WNT rejected an offer to be paid under the same pay-to-play structure as the MNT, and that the WNT was willing to forgo higher bonuses for other benefits, such as greater base compensation and the guarantee of a higher number of contracted players. Accordingly, Plaintiffs cannot now retroactively deem their CBA worse than the MNT CBA by reference to what they *would have made* had they been paid under the MNT's pay-to-play structure when they themselves rejected such a structure.").

[128] *Schleicher*, 831 F.3d 746.

[129] *Id.* at 750.

case.[130] First, the male salesperson negotiated for himself a new compensation model which differed from the female salesperson's compensation model.[131] The employer then offered the female salesperson the same compensation model as the male salesperson, but the female salesperson declined the offer because she felt the male salesperson's model was too risky.[132] At no point during the employees' tenure did the female salesperson complain to the employer or ask to change her compensation model.[133]

Rather, a few years later, the employer modified the male salesperson's compensation model so that it matched the female salesperson's compensation model.[134] The *male salesperson* then sued the employer, claiming the employer violated the EPA by paying the male salesperson more than the female salesperson for three years before lowering the male salesperson's compensation so that it matched the female's compensation.[135] There was no clear, objective evidence or reason for the female salesperson to reject the pay structure with less security under which she would have had the opportunity to make more money in the long run other than the fact that she personally felt the male salesperson's profit-pool-only basis was too risky.[136] Further, she never complained about her pay or asked for her plan to change and, thus, appeared satisfied with her payment plan and personal choice to accept her payment plan.[137]

For the WNT, on the other hand, the fact that the women's team has, throughout the course of history, made significantly less than the men's team and been treated unequally[138] likely triggered the WNT players' decision for a more secure pay structure that guaranteed support. The decision was not likely a simple personal preference. Rather, the team's decision appears to have come from a history of inequality, backed by objective evidence, making this choice much less of a "personal" one and

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[130] *See id.*
[131] *Id.* at 749.
[132] *Id.* at 750.
[133] *Id.*
[134] *Id.* at 748.
[135] *Id.*
[136] *Id.* at 755.
[137] *Id.* at 750.
[138] *See* Haile, *supra* note 2, at 432–51.

much more a decision based on a guarantee the players felt they needed in the face of this history of inequality.[139]

There is clear, objective evidence of a long history of inequality in which the WNT's income was uncertain and unsecure.[140] As discussed, when the WNT negotiated its very first CBA with the USSF only about 20 years ago, the players never had guaranteed compensation, with many working second jobs to make ends meet; there was no domestic professional league for the players to play in and earn extra compensation; and, despite winning two Women's World Cups already, the players had only two t-shirts, $500 per player, and a bonus not much higher than the MNT's bonus for simply qualifying for the World Cup to show for these achievements.[141] In the face of this backdrop, it is a no-brainer that the WNT would seek security and guaranteed compensation in its first CBA. At this point, the players were seeking sufficient compensation so that they would not have to work second jobs in addition to being professional athletes.[142] Further, the MNT's payment structure was not offered to the WNT at this point and likely not practically on anyone's minds due to a lack of feasibility.[143] Due to the newness of the WNT and women's soccer, the WNT still needed to garner the fan base and have the opportunity to play in enough games to amass the financial support which would be needed to support the WNT players under the MNT's structure at that time.[144] This first CBA only ended in 2004.[145]

Then, in negotiating the most recent two CBAs at issue, despite the great success and growth of the WNT, the WNT was forced to demand benefits from the USSF *which the USSF already provided for the MNT players outside of their CBAs*.[146] These benefits included, for example, a minimum number of games to be played yearly and funding for the women's domestic professional league so that the NWSL did not fold as the other two previous women's professional leagues had folded from lack of funding.[147] As discussed, the USSF provided significant funding to get the men's domestic professional league, MLS, going without the MNT

[139] *Id.*

[140] *See supra* Part II.B.

[141] *Id.*

[142] *See* Haile, *supra* note 2, at 434.

[143] *See id.* at 432–36.

[144] *See id.* at 437–38.

[145] Morgan v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635, 642 (C.D. Cal. 2020).

[146] *See supra* Part II.B.

[147] *Id.*

players asking.[148] Further, the MNT already had a sufficient number of games to play yearly to make their pay structure more than sufficient.[149] The WNT, in contrast, had to demand a guaranteed number of friendlies per year or, in the alternative, an equivalent payment for the number of games less than this guaranteed minimum the USSF decided to provide to the WNT.[150]

Then, when the WNT requested the comprehensive bonus compensation structure as currently exists in the MNT's CBA in negotiating the WNT's most recent CBA, the USSF told the WNT that, in order to be paid under the same payment structure as the MNT, the WNT would have to drop the fringe benefits it received.[151] These fringe benefits included guarantees that the USSF would continue supporting the NWSL and that the WNT would have a minimum number of games per year.[152] But if the USSF was not providing these benefits for the WNT either at all or in the same way the USSF provided such benefits for the MNT until the WNT negotiated these benefits into the WNT's CBAs, why would the WNT have any reasonable grounds to believe that the USSF would continue to provide these necessary benefits if not under contractual obligation to provide them? Without specified, guaranteed compensation for the WNT players and fringe benefits the MNT players already received without having to contract for them, the WNT players were working second jobs, did not have a guaranteed number of games to play in, and received bonuses for winning World Cup tournaments laughable in the face of what the MNT players received for simply qualifying for World Cup tournaments.[153]

Under these circumstances, the women's players understandably felt the need to find a pay structure under which they could be better compensated as compared to the MNT to make up for the failure of the powers outside of the WNT's control to provide equal opportunity to make money.[154] Having the guarantees which currently exist in the WNT's CBA is the only way the WNT has successfully made up for these

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[148] *Id.*

[149] *See supra* Part II.C.

[150] *Id.*

[151] *See, e.g.*, Morgan v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635, 645–47 (C.D. Cal. 2020).

[152] *See id.*

[153] *See supra* Part II.B.

[154] *See generally id.*

discrepancies.[155] Consequently, keeping at least some of these guarantees would have felt necessary for the WNT players. For instance, making a guaranteed salary and, thus, having a certain number of contracted players; having professional league funding; and having a minimum number of game opportunities would all qualify as benefits which would feel reasonably necessary for the WNT players in light of the benefits the MNT historically received in contrast to those the WNT historically received.

The matters just listed cover many of the "fringe benefits" the WNT players receive from their CBAs which do not exist in the MNT's CBA.[156] Again, such fringe benefits have never been necessary for the MNT players to contract for in order to make more than enough money to live; rather, these fringe benefits have simply been provided to the MNT players without the MNT contracting for them.[157] The other fringe benefits, such as insurance and pregnancy pay,[158] were smart and practical for the WNT players to bargain for after deciding they needed to go a different route than the MNT based on the history of inequality between the two teams. But the basis for the WNT's decision to go this different route was not likely as much of a "personal choice" as it was a necessity in order for the WNT players to receive important benefits the MNT players already received in addition to MNT's CBAs that greatly contribute to the players' livelihoods.[159]

In addition to objective evidence supporting this history of inequality which led to the current dispute, further contrasting this case from *Schleicher* is the fact that the WNT asked to be paid the same way as the MNT.[160] The WNT is clearly dissatisfied with being paid differently from the MNT, as evidenced by this request and the current litigation.[161] Ultimately, however, the WNT players felt they could not accept the same structure while dropping guaranteed fringe benefits which the MNT players had already been receiving in addition to their CBAs for most of the WNT's existence but which were not given to the WNT until the WNT players negotiated for the same benefits in their CBAs.[162] The WNT

[155] *See generally supra* Part II.B; *see also supra* Part II.C.

[156] *See supra* Part II.C.

[157] *See supra* Part II.B.

[158] Morgan v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635, 651 (C.D. Cal. 2020).

[159] *See* Haile, *supra* note 2, at 442–56, 468–69.

[160] *Morgan*, 445 F. Supp. 3d at 646.

[161] *See id.*

[162] *See supra* Part II.B.

seeking to be paid the same way as the MNT is different from the female employee in *Schleicher* who never wanted and never asked for a payment structure like the male salesperson received.[163]

C. EPA Policy Supporting the WNT's Claim

Finally, this history of inequality leading to the creation of the WNT's current CBA is violative of EPA policy in and of itself. The EPA was enacted in 1963[164] in order to assure men and women equal remuneration for equal work.[165] Yet, despite the WNT's incredible success and the fact that the EPA has existed longer than the WNT itself, the WNT has, throughout its entire history, struggled to be on equal footing with the MNT.[166] When the decision to take a more secure pay option, then, is based on a history of inequality in violation of EPA policy, this "personal choice" defense should not apply as a sufficient "factor other than sex" for the employer to defeat an EPA claim.

To hold that this "personal choice" application of the "other than sex" defense defeats the WNT's EPA claim would be to set a precedent that, even when a plaintiff has taken a certain pay structure based on a clear, objective history of inequality and unequal bargaining power, the "choice" to take that pay structure defeats the plaintiff's EPA claim. But when that "choice" is based on a history of inequality violative of EPA policy in and of itself, setting such a precedent would truly "run afoul" the EPA.[167] Thus, based on the history of inequality the WNT has endured, it is reasonable for the WNT to succeed on its EPA claim and receive some form of back pay in this case as compensation.[168]

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[163] Schleicher v. Preferred Sols., Inc., 831 F.3d 746, 750 (6th Cir. 2016).

[164] Campbell, *supra* note 2, at 553.

[165] 29 C.F.R. § 1620.10 (2020).

[166] *See supra* Part II.B.

[167] *See* Morgan v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635, 654 (C.D. Cal. 2020) (claiming that considering the bonus provisions the WNT receives in isolation from the fringe benefits the WNT receives "would run afoul of the EPA").

[168] Further strengthening this argument that the WNT's decision to take a different route than the MNT's CBA should not qualify as a "personal choice" "factor other than sex" to defeat the WNT's EPA claim is federal regulation providing that a prior CBA is not a defense to an EPA claim. 29 C.F.R. § 1620.23 (2020) ("Any and all provisions in a collective bargaining agreement which provide unequal rates of pay in conflict with the requirements of the EPA are null and void and of no effect."). In and of itself, this regulation is likely too simplistic to defeat the USSF's "other than sex" affirmative defense in this case, as the regulation does not clearly contemplate male and female employees negotiating their own, separate CBAs. *See id.* Nonetheless, the regulation does strengthen the argument that the "personal choice" application

D. Note About the "Other Than Sex" Affirmative Defense

It should be noted that this "personal choice" application of the "factor other than sex" affirmative defense to an EPA claim is not the only way that the "factor other than sex" defense could apply in this case.[169] Thus, even if the court of appeals finds that the WNT successfully established a prima facie case that the USSF violated the EPA, and the WNT ultimately is successful in arguing that the "personal choice" application of the "other than sex" affirmative defense does not apply in this case, the WNT could still lose on its EPA claim.[170] As stated, the WNT faces an uphill battle on its EPA claim.[171] Nonetheless, no other "factor other than sex" was directly relevant to the district court's opinion,[172] and the arguments provided in this article provide one way the WNT might go about responding directly to the district court's opinion as the case moves

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of the "other than sex" affirmative defense should not apply here, as "[t]he establishment by collective bargaining or inclusion in a collective bargaining agreement [alone] of unequal rates of pay does not constitute a defense available to either an employer or to a labor organization." *Id.* Thus, the fact that the WNT agreed to the terms of its CBAs alone should not be a valid defense for the USSF in this case.

[169] *See* Haile, *supra* note 2, at 463–68. Another way courts have applied the "factor other than sex" affirmative defense which is relevant to the WNT's EPA claim is based on economic market. *Id.* In this case, that would be the economic market for the WNT as compared to the MNT and the difference in revenue that the two teams generate. *Id.* While the USSF will try to argue that the MNT generates more revenue, and that difference in revenue is the basis for paying the two teams differently, the revenue generated by the two teams during the class period as a result of their respective success tells a different story. The Wall Street Journal reports that, from 2016 to 2018, WNT games generated about $50.8 million in revenue, while MNT games generated about $49.9 million, according to U.S. soccer's audited financial statements. Rachel Bachman, *U.S. Women's Soccer Games Outearned Men's Games*, WALL STREET J. (June 17, 2019, 6:00 AM), https://www.wsj.com/articles/u-s-womens-soccer-games-out-earned-mens-games-11560765600. In 2016 specifically, the women generated $1.9 million more from games than the men. *Id.* In the years 2015 and 2016, the WNT also generated more net revenue than the MNT. *See* Haile, *supra* note 2, at 467. While the MNT generated more net revenue in 2017 and 2018, much of this revenue resulted from the USSF serving as a major tournament host as opposed to the MNT's performance. *Id.* at 467–68. Further, in 2019, the WNT won yet another Women's World Cup, likely generating more revenue than the MNT once again. *See id.* at 429. The WNT also currently holds the record for the two most-watched soccer games in U.S. history, the 2015 and 2019 Women's World Cup finals. *Id.* at 443. Thus, an argument based on the difference in the economic markets of the MNT as compared to the WNT is at least rebuttable when looking specifically at the revenue generation of the two teams over the class period, even acknowledging that there is a larger economic market for men's soccer in general than for women's soccer. *See id.* at 463.

[170] *See* Haile, *supra* note 2, at 463–68.

[171] *Id.* at 469.

[172] *See* Morgan, 445 F. Supp. 3d at 651–56.

forward. Additionally, the issues discussed here appear to be the WNT's biggest hurdles in winning on its EPA claim, given they were the basis of the district court's opinion.[173] Finally, as shown, while the WNT faces an uphill battle, the WNT also has legitimate arguments available on every issue of its EPA claim on which the team could and, based on EPA policy, should, prevail.[174]

V. CONCLUSION

The WNT's EPA claim still has life. Based on the law and EEOC guidance,[175] the district court erred in granting summary judgment to the USSF based on its finding that the WNT failed to show that it was paid less in total compensation during the class period than the MNT. In addition, the district court improperly considered the fact that the WNT rejected the MNT's pay structure and instead requested the WNT's current pay structure as relevant to the wage rate element of the WNT's prima facie case.

Instead, this decision by the WNT to take a different pay structure from the MNT is relevant under the "other than sex" affirmative defense the USSF may present.[176] However, the USSF should not prevail on this

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[173] *See id.*

[174] If successful on its EPA claim, then the WNT players should be entitled to back pay, or compensation they would have earned had the USSF complied with the law. *See Remedies for Employment Discrimination*, EEOC, https://www.eeoc.gov/remedies-employment-discrimination (last visited Sept. 23, 2021). These damages could be argued in a couple of ways. One way is the difference between what the WNT would have earned under the MNT pay structure and what the WNT earned under their actual pay structure. Argument for such damages could be made on the idea that, if the USSF had followed the law, the USSF would have paid the two teams in the same form/under the same structure. Another way is the difference between what the WNT would have earned under the MNT's structure minus only those benefits which the WNT received that the MNT did not receive in any form (in the MNT's CBA or otherwise). Thus, the argument would be that the NWSL funding and guaranteed minimum number of games at least would not be subtracted from the amount the WNT would have earned under the MNT's structure. Damages in this form could be based on the argument that, if the USSF followed the law, it would have paid the WNT and MNT in the same form/under the same pay-per-game pay structure *and* provided benefits to the WNT players which it provided to the MNT players outside of the MNT's CBA. Thus, the USSF should have funded the women's domestic professional league as it did the men's domestic professional league and provided the WNT a minimum number of games per year similar to that of the MNT *in addition to* the WNT's CBA, since the MNT was provided these benefits in addition to its CBA.

[175] *See* Bence v. Detroit Health Corp., 712 F.2d 1024 (6th Cir. 1983); EEOC COMPLIANCE MANUAL, *supra* note 73.

[176] *See* Schleicher v. Preferred Sols., Inc., 831 F.3d 746, 754–56 (6th Cir. 2016).

"personal choice" application of the "other than sex" affirmative defense. The WNT's decision to take a different pay structure in this case was not really a "personal choice" as much as it was a decision based on a need for guarantees from the USSF in light of the history of inequality the WNT endured in which it did not receive many of the benefits the MNT received until the WNT contracted for them.[177] This history of inequality violates EPA policy.[178] Thus, holding that the "personal choice" application of the "other than sex" affirmative defense defeats the WNT's EPA claim in this case sets a dangerous precedent that a defendant can violate the EPA for years and get away with it by claiming the plaintiff "chose" to be paid unequally, when, in reality, that plaintiff's decision was based on a history of inequality and unequal bargaining power violative of EPA policy. Such a decision is not simply a personal preference. This precedent would clearly be inconsistent with the goals of the EPA to assure both sexes receive equal remuneration for equal work.[179]

Nonetheless, even if the WNT does not succeed on its EPA claim, the success the WNT has had both on and off the field in helping progress women's sports should be celebrated. The WNT's incredible headway in gaining respect and working towards equality can be seen over the course of its history in, retrospectively, a very short amount of time—from the $500 bonus for winning the 1991 World Cup just 30 years ago to where the team stands today, holding records for the most World Cup wins of any team ever, men or women's, with two of those final games holding the record for the two most-watched soccer games in U.S. history.[180] This progress is remarkable, win or lose on the EPA claim. The WNT has made incredible progress for women's sports with this success rate and fan base, exhibited further by the incredibly high participation rates for women's soccer in the United States, starting at the youth level.[181] Thanks to the WNT, these young girls now have the option of making a living out of being a professional athlete.[182]

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[177] *See supra* Part II.B.

[178] *See* 29 C.F.R. § 1620.10 (2020) (noting that the purpose of the EPA is to assure men and women equal remuneration for equal work).

[179] *Id.*

[180] Haile, *supra* note 2, at 429, 433, 443.

[181] *See id.* at 438–39 (noting that, based on a 2006 FIFA survey, at that time, the U.S. had the highest number of registered female soccer players of any nation).

[182] *See generally id.*

Finally, the WNT's current CBA ends at the end of 2021,[183] and the WNT is in a much better bargaining position now than it has been in years past to negotiate the terms of its next CBA to achieve its goals in this case. Due to both the WNT's recent success and the public scrutiny this case has garnered, the USSF has more pressure to do the right thing and follow through with what it has promised the WNT it would do—promote gender equality—than ever before.[184] For some effective ways both parties may be able to better achieve this goal and overcome the discord which has existed between the parties for far too long outside of court, the article *An Even Playing Field: The Goal of Gender Equity in World Cup Soccer* by Andrew J. Haile provides some notable ideas.[185]

The goal of this note and this litigation is to promote gender equality between the WNT and MNT. In doing so, it is important to understand the backdrop to the case and the circumstances in which this litigation arose in order to appreciate the WNT's argument. Without this context, it is easy to dismiss the WNT's EPA claim the way the district court did. Win or lose on its EPA claim, however, the WNT has much to be proud of and multiple avenues to reach their goals in bringing this litigation going forward.[186] Thus, the WNT continues to have success both on and off the field, and that success is something to be celebrated by athletes and sports fans, male and female alike.

[183] *Id.* at 448.

[184] *See id.* at 470.

[185] *Id.* at 470–75.

[186] *See id.*