Brooklyn Law Review

Volume 86 | Issue 2 Article 11

9-22-2021

An Uneven Playing Field: Remedying the Professional Sports Wage Gap by Revising the Equal Pay Act

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An Uneven Playing Field

REMEDYING THE PROFESSIONAL SPORTS WAGE GAP BY REVISING THE EQUAL PAY ACT

INTRODUCTION

As Megan Rapinoe (Rapinoe) stood in the penalty box and valiantly secured America's championship in the 2019 Women's World Cup, she became the "oldest player to ever score in a Women's World Cup final."[1] Not only did Rapinoe's triumphant goal make history, but this win marked the fourth World Cup championship for the United States Women's National Soccer Team (USWNT, alternatively the women's team).[2] With such exceptional players, including Rapinoe, Alex Morgan and Julie Ertz,[3] the USWNT has become an American "powerhouse."[4] In fact, the USWNT, currently sitting comfortably as FIFA's number one women's soccer team worldwide,[5] has surpassed its male counterpart, the United States Men's National Soccer Team (USMNT, alternatively the men's team), which currently sits twenty-second in the world.[6] While the USWNT has created a legacy of its own, athletic accomplishments are not the only way in which the team members are impacting history.

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[1] Roger Gonzalez, *Women's World Cup Final: USWNT's Megan Rapinoe Opens the Scoring, Makes History with Penalty Kick Goal*, CBS SPORTS (July 7, 2019, 12:39 PM), https://www.cbssports.com/soccer/world-cup/news/womens-world-cup-final-uswnts-megan-rapinoe-opens-the-scoring-makes-history-with-penalty-kick-goal/ [https://perma.cc/A9XR-72Z6].

[2] Drew Kann, *Yes, the US Women's Soccer Team is Dominant. That's Because Most of the World is Playing Catch-Up*, CNN (July 5, 2019, 8:27 AM), https://www.cnn.com/2019/06/16/us/uswnt-dominance-womens-soccer-world-cup-history-explained/index.html [https://perma.cc/WR8E-MQWQ]; Kalhan Rosenblatt, *U.S. Woman's Soccer Team Wins 2019 World Cup Over the Netherlands in 2-0 Final*, NBC NEWS (July 7, 2019, 4:59 PM), https://www.nbcnews.com/news/us-news/u-s-women-s-soccer-team-win-2019-world-cup-n1027206 [https://perma.cc/UX3J-BJD8].

[3] Seth Vertelney, *Power Rankings: The USWNT's Top 20 Most Important Players*, GOAL (July 18, 2019, 3:00 PM), https://www.goal.com/en-us/lists/power-rankings-the-uswnts-top-20-most-important-players/tgpxdexpefx61j90hiw6e33ns#1qelhuzu3iy141ncf586n0d2oa [https://perma.cc/5DLK-VJLC].

[4] *See* Kann, *supra* note 2.

[5] *Women's Ranking*, FIFA (Aug. 14, 2020), https://www.fifa.com/fifa-world-ranking/ranking-table/women/ [https://perma.cc/LS2G-242B].

[6] *Men's Ranking*, FIFA (Feb. 18, 2021), https://www.fifa.com/fifa-world-ranking/ranking-table/men/ [https://perma.cc/DX67-3YY3].

On March 8, 2019, the USWNT filed a lawsuit against the United States Soccer Federation (USSF or the Federation)—the single employer[7] of both the USWNT and the USMNT.[8] The complaint alleged that the USSF discriminated against the women's team with regard to wages and opportunities on the basis of gender.[9] More specifically, the USWNT brought claims under the Equal Pay Act, (EPA),[10] arguing that "the female players [are] consistently paid less money than their male counterparts" despite similar job responsibilities.[11]

The women's team alleged that the USSF created separate compensation structures for the gendered teams and, regardless of how each team performed and how much revenue they generated, the women were to be paid less than their male counterparts.[12] The USWNT argued that, in doing so, the USSF "utterly failed to promote gender equality"[13] and continuously put the women's team at a disadvantage.

In response, the USSF initially argued that the pay disparities were not due to discrimination, but rather resulted in part from the differences in the "physically and functionally separate organizations."[14] Specifically, the USSF argued that "market realities [were] such that the women [did] not deserve to be paid equally to the men."[15] The USSF later amended their approach, abandoning the "market realities" assertion in favor of a "total compensation" defense.[16] Based on the fact that the

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[7] As used in this note, the term "single employer" refers to an employer that fully operates and controls the management of separate sports teams, which are generally separated by gender.

[8] Complaint at 1, Morgan et al. v. United States Soccer Fed'n, Inc., 445 F. Supp. 3d 635 (C.D. Cal. 2020) (No. 2:19-cv-01717-RGK-AGR) [hereinafter USWNT Complaint].

[9] *Id.*

[10] 29 U.S.C. § 206(d); *see also* USWNT Complaint, *supra* note 8, at 14–19 (The team also brought claims under Title VII of the Civil Rights Act of 1964, arguing that the Federation has a "[p]olicy and [p]ractice of [d]iscriminating [a]gainst [m]embers of the [USWNT] . . . on the [b]asis of [g]ender.").

[11] *See* USWNT Complaint, *supra* note 8 at 1.

[12] *See id.* at 10–11 (explaining that the USMNT receives "a minimum amount (currently $5,000) to play in each game, regardless of the outcome" but the USWNT is compensated on a salary basis and players can "earn a maximum salary of $72,000 plus bonuses for winning non-tournament games") Regardless of which team wins more games, these differences amount to the men's team being paid almost three times as much as the women's team. *Id.* at 11.

[13] *Id.* at 1.

[14] Defendant's Answer to Plaintiff's Complaint at 7, Morgan et al. v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635 (C.D. Cal. 2020) (No. 2:19-cv-01717-RGK-AGR) [hereinafter USSF Answer].

[15] *See* USWNT Complaint, *supra* note 8, at 10.

[16] Morgan et al. v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635, 653 (C.D. Cal. 2020) (The USSF's total compensation approach considered all benefits received by each team, including annual salaries, severance and bonuses.); *see also* Jenna Greene, *Soccer Federation Litigators Discuss Recent Ruling in Equal Pay Case*, LAW J. NEWSL. (June 2020), https://www.lawjournalnewsletters.com/2020/06/01/soccer-federation-litigators-discuss-recent-

USWNT "played more games and made more money than the [USMNT] per game,"[17] the district court was persuaded by this "total compensation" line of reasoning and granted summary judgment for the USSF without conducting an EPA analysis.[18]

While the USSF's refocused argument allowed the district court to avoid a full EPA analysis, this case highlights the problems inherent in applying the EPA to the world of professional sports.[19] Specifically, if the USSF argued that market realities prevented the USWNT from receiving the same pay as the USMNT, this unfair contention may still have been an acceptable argument under the EPA.

The EPA allows employers to assert certain affirmative defenses to a charge of gender-based wage discrimination.[20] For example, an employer can assert that gendered wage disparities are due to a "differential based on any other factor other than sex"[21] This is often referred to as the "factor other than sex"[22]

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ruling-in-equal-pay-case/?slreturn=20210209122918 [https://perma.cc/CZ5A-WT2P] ("[USSF's] prior counsel . . . argued in court papers that the players did not have a claim because the men's and women's teams 'do not perform equal work requiring equal skill, effort, and responsibility under similar working conditions. [However, the USSF] promptly kicked that argument to the curb and refocused the case on the nitty-gritty of actual compensation.").

[17] Morgan et al., 445 F. Supp. 3d at 654 ("Plaintiffs ask the Court to find an EPA violation because the [USWNT] CBA provides for lower bonuses in these categories of compensation than the [USMNT] CBA. But this approach ignores other benefits received by [USWNT] players, such as guaranteed annual salaries and severance pay—benefits that [USMNT] players do not receive. To consider these bonus provisions in isolation would run afoul of the EPA, which expressly defines 'wages' to include all forms of compensation, including fringe benefits.").

[18] *Id.*

[19] On Tuesday December 1, 2020, the USWNT announced that it reached a partial settlement agreement with the USSF regarding the team's claims of disparate working conditions, including discrimination in the travel conditions for the women's team. *See* Graham Hays, *USWNT, U.S. Soccer Settle Part of Equality Suit; Equal Wages Still Unresolved*, ESPN (Dec. 1, 2020), https://www.espn.com/soccer/united-states-usaw/story/4251125/uswntus-soccer-settles-part-of-equality-suit-equal-wages-still-unresolved [https://perma.cc/TXP8-TDPJ]. However, with a settlement agreement now reached on the working conditions not addressed by the court's decision, the USWNT is free to appeal the district court's decision regarding the team's EPA claims. After the settlement was announced, a spokesperson for the USWNT stated, "[w]e now intend to file our appeal to the [c]ourt's decision which does not account for the central fact in this case that women players have been paid at lesser rates than men who do the same job. We remain as committed as ever to our work to achieve the equal pay that we legally deserve." Meg Linehan, *What the USWNT Lawsuit Settlement Means for the Ongoing Equal Pay Fight*, THE ATHLETIC (Dec. 1, 2020), https://theathletic.com/2233201/2020/12/01/uswnt-lawsuit-settlement/ [https://perma.cc/YP88-88K8]; *see also* Zachary Zagger, *US Soccer Bias Case Headed to Extra Time Despite Deal*, LAW 360 (Dec. 3, 2020, 10:14 PM), https://www.law360.com/articles/1334482/us-soccer-bias-case-headed-to-extra-time-despite-deal [https://perma.cc/TS2P-9L26].

[20] 29 U.S.C. § 206(d)(1).

[21] *Id.*

[22] Sabrina L. Brown, Note, *Negotiating Around the Equal Pay Act: Use of the "Factor Other Than Sex" Defense to Escape Liability*, 78 OHIO ST. L.J. 471, 473 (2017).

defense and it is this defense that the USSF relied upon in its initial "market realities" argument.[23]

Troublingly, the EPA does not define the term "factor other than sex," and circuit courts are split in how they interpret the defense.[24] Some courts apply the standard leniently[25] and ultimately dismiss a plaintiff's claim on the mere showing by the employer that it has designed its pay structures according to "literally any factor—legitimate or not—other than sex."[26] Others read the defense more narrowly and allow for an employer to evade liability only if the employer suggests a "legitimate business purpose" for the discrepancy in wages.[27]

Under either approach, the defense becomes much more complex when applied in the context of gendered professional sports. While compensation in traditional work environments is generally determined by highest level of education or overall training,[28] an athlete's compensation is often determined by the general market success of the team or the individual player.[29] The issue of pay equity in gendered professional sports is exacerbated when, as is the case with the USSF, a single employer governs the compensation of both the women's team and the men's team. While separating sports teams by sex enables women's athletic achievements and results in fairer and greater competition, fan engagement, and fan loyalty, the biological differences and resulting differences in popularity between male and female

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[23] *See* USSF Answer, *supra* note 14, at 17.

[24] *See, e.g.*, Brown, *supra* note 22, at 483 (explaining that the affirmative defense that often leads to the most "confusion and inconsistency," thereby being the greatest barrier to entry for plaintiffs seeking relief under the EPA, is the "factor other than sex" defense); *see also* Claire Saba, *Employment Law Violations*, 56 AM. CRIM. L. REV. 759, 778 (2019).

[25] *See, e.g.*, Covington v. S. Ill. Univ., 816 F.2d 317, 321–22 (7th Cir. 1987) (holding that, in the Seventh Circuit, the factor other than sex defense does not need to be related to a business justification or the employee's specific position).

[26] NAT'L WOMEN'S LAW CTR., CLOSING THE "FACTOR OTHER THAN SEX" LOOPHOLE IN THE EQUAL PAY ACT 3 (2011), https://www.nwlc.org/sites/default/files/pdfs/4.11.11_factor_other_than_sex_fact_sheet_update.pdf [https://perma.cc/9RNK-G9M4]; *see also* Fallon v. Illinois, 882 F.2d 1206, 1211 (7th Cir. 1989) (noting that the factor other than sex defense "embraces an almost limitless number of factors, so long as they do not involve sex").

[27] *See* Riser v. QEP Energy, 776 F.3d 1191, 1198 (10th Cir. 2015) (citing Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 525 (2d Cir. 1992)).

[28] *See, e.g.*, *Covington*, 816 F.2d at 321 (explaining differences in compensation due to higher level training).

[29] *See* USWNT Complaint, *supra* note 8, at 10; *see also* Bill Shea, *Are Professional Athletes Paid Too Much? The Answer May Surprise You*, ATHLETIC (Aug. 24, 2020), https://theathletic.com/2014283/2020/08/24/are-professional-athletes-paid-too-much-the-answer-may-surprise-you/ [https://perma.cc/W383-VMTN] ("The standard economic answer to this question is that in a market system a worker's wage is determined by the amount of revenue the worker creates.").

athletes is often used as justification—albeit wrongly, as this note argues—to pay female athletes less than their male counterparts.[30]

Even under the most restrictive circuit court analysis of the factor other than sex defense, a single employer only needs to assert a legitimate business justification for its differences in wages between male and female players and show that the decision was motivated by a business decision.[31] If a single employer can show that one team's market is smaller due to factors such as fan engagement and game attendance, the employer can successfully articulate a proper business justification to defend its compensation structures.[32] This might motivate a single employer to spend less money on its women's team for "marketing,"[33] or to give the team's fans less notice of its games and less opportunity to contribute to its market.[34] Accordingly, a single employer in professional sports can assert arbitrary justifications for a disparate compensation structure in a way that mischaracterizes the sport's market and ultimately prejudices its women's team. Even if the women's team is, for example, winning more championship tournaments than its male counterpart, the women may still be paid a lower salary due to a compensation structure that is dependent on market success.[35]

While the EPA allows a plaintiff to rebut the employer's justification by demonstrating that the justification is "merely a

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[30] This note does not argue that men and women should compete together in the same league, but merely discusses the mechanisms by which male and female athletes in the same sport could be similarly and fairly compensated. For an in-depth discussion on the utility and appropriateness of separating sports leagues by gender, see Elad De Piccioto, *Should Women Compete Against Men in Sports?*, PERSPECTIVE (2020), https://www.theperspective.com/debates/living/women-compete-men-sports/ [https://perma.cc/G3FN-T67J]; David Epstein, *How Much Do Sex Differences Matter in Sports?*, WASH. POST (Feb. 7, 2014), https://www.washingtonpost.com/opinions/how-much-do-sex-differences-matter-in-sports/2014/02/07/563b86a4-8ed9-11e3-b227-12a45d109e03_story.html [https://perma.cc/WHH5-V4DC]; Matt Foley, *Should All Sports Go Gender-Neutral?*, OZY (July 7, 2018), https://www.ozy.com/opinion/should-all-sports-go-gender-neutral/87899/ [https://perma.cc/KZ44-6SKD].

[31] *Riser*, 776 F.3d at 1198 (explaining that an employer must proffer legitimate business-related justifications for its differences in pay).

[32] *Id.*

[33] *See* USWNT Complaint, *supra* note 8, at 14 (explaining that the USWNT is substantially "under-marketed" when compared to the USMNT).

[34] *See id.* at 13–14 (explaining that the USSF allegedly provides insufficient notice to USWNT fans "to allow for maximum attendance" at the women's games).

[35] *See id.* at 7 (explaining that the USWNT is still being paid less than the USMNT "even though the [US]WNT has achieved unmatched success in international soccer leading to world championships and substantial profits for the USSF"); *see also* Leah Asmelash & Brian Ries, *These Stats Show How The USWNT Leads In Soccer—And How Far It Lags In Compensation*, CNN, (July 8, 2019, 3:15 PM), https://www.cnn.com/2019/07/08/sport/uswnt-btn-equal-pay-trnd/index.html [https://perma.cc/6ALC-UBFS] (emphasizing that the USWNT has won four World Cup championships while the USMNT has yet to win a World Cup, the USWNT has won four Olympic gold medals while the USMNT has not won any Olympic gold medals ,and the USWNT generated $900,000 more in revenue than the USMNT from 2016 to 2018).

pretext for discrimination,"[36] proving that an employer's decisions are pretextual is a heavy burden. In the professional sports context, teams are intentionally separated by sex and, if an employer can influence the market realities of each team, a plaintiff might not be able to prove a discriminatory intent by simply pointing to the differences in treatment of the male and female teams.[37] Under the EPA, if a plaintiff cannot prove that the defendant's justifications were pretextual, the case will end in a defendant's verdict.[38]

This EPA burden-shifting mechanism presents two troubling obstacles for professional sports plaintiffs: (1) the nation's circuit split makes it unclear whether employers are required to assert business-related justifications for their wage discrepancies, or if other arbitrary justifications are sufficient; and (2) even if legitimate business justifications are required, the burden shifting scheme does not account for the disparate impact that this affirmative defense has on plaintiffs and only perpetuates this unique industrial wage gap.

To tackle this industry-specific wage gap, courts should draw from doctrines in neighboring areas of law, such as antitrust law,[39] and modify the EPA burden-shifting mechanism in the professional sports context. This new mechanism will: (1) properly resolve our nation's circuit split and require employers to provide business related justifications for their wage discrepancies, (2) allow for plaintiffs to show alternative pay structures that would have put the teams on equal footing, and (3) authorize courts to weigh the disparate impact of the compensation structure with its benefits to ensure a more equitable result.

Part I of this note provides essential background of the EPA and explains the exceptions to the its blanket rule against wage discrimination based on sex. Part II explores the varying

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[36] Christiana v. Metro. Life Ins. Co., 839 F. Supp. 248, 252–53 (S.D.N.Y. 1993); *see also* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993) ("Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." (quoting Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981))).

[37] *See* 29 U.S.C. § 206(d)(1) (so long as the asserted affirmative defenses are supported by "any other factor other than sex," the defense has met its burden).

[38] *See, e.g.*, Riser v. QEP Energy, 776 F.3d 1191, 1201 (10th Cir. 2015) ("The district court dismissed Ms. Riser's discriminatory discharge claims on the grounds that she had not established a prima facie case, and that even if she had, QEP had supplied a legitimate, non-discriminatory reason for the discharge that Mr. Riser did not show to be pretextual.").

[39] PAUL C. WEILER ET AL., SPORTS AND THE LAW, 256–57 (6th ed. 2019) (emphasizing how antitrust law plays a unique role in the sports industry and requires a specific analysis since "leagues have the freedom to adopt restraints on competition for player services that can be justified as reasonably necessary to produce a sporting competition that maximizes fan appeal" that are usually unacceptable in traditional industries).

judicial interpretations of the "factor other than sex defense."[40] It explores both the broad and narrow readings adopted by different circuits and the potential limitations of both approaches. Using the USWNT's lawsuit as a case study, Part III of this note illustrates the impacts that the factor-other-than-sex exception has on professional sports and how the loophole adversely affects this particular industry. Finally, using antitrust law as a comparable field of law, Part IV proposes an improved, sports-specific EPA burden-shifting mechanism that resolves our nation's circuit split, takes the intricacies of the professional sports industry into account and ultimately provides a more even playing field for female athletes.

I. THE EPA AND ITS LIMITATIONS

Before the enactment of the EPA, "wage discrimination based on sex was blatant"[41] in America and initially, "women made up less than 24% of the U.S. workforce."[42] During World War II, more women entered the working world to mend an apparent labor shortage and "by 1945, women made up 37% of the [] workforce."[43] Despite the increase in female workers, women's jobs were tainted with a flagrant and deliberate "double standard pay scale"[44] leaving them trailing behind their male counterparts. As women began to make their presence known in a traditionally male arena, early labor unions initiated movements challenging the blatant and intentional pay disparities.[45] Yet, early efforts to correct the status quo, such as the Women's Equal Pay Act of 1945,[46] failed to pass in Congress. Essentially, American women were left without any legal redress.[47]

Recognizing that "[t]he right of equal opportunity is one of the great pledges of this country,"[48] and responding to calls for "equal pay for equal work,"[49] Congress codified an amendment to the Fair

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[40] *See* Brown, *supra* note 22, at 473.

[41] Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. REV. 17, 29 (2010).

[42] *Equal Pay Act of 1963*, NAT'L PARK SERV. (Apr. 1, 2016), https://www.nps.gov/articles/equal-pay-act.htm [https://perma.cc/3LRU-2UEP].

[43] *Id.*

[44] *See* Eisenberg, *supra* note 41, at 29 (quoting 109 CONG. REC. 9199 (1963) (Statement of Rep. Green)).

[45] *See Equal Pay Act of 1963*, *supra* note 42.

[46] *Equal Pay Act*, HISTORY (Apr. 2, 2019), https://www.history.com/topics/womens-rights/equal-pay-act [https://perma.cc/FKF8-QRLG] (explaining that the Women's Equal Pay Act of 1945 "would have made it illegal to pay women less than men for work of 'comparable quality and quantity'").

[47] *Id.*

[48] 109 CON. REC. 9212 (1963) (statement of Rep. Cohelan).

[49] 109 CON. REC. 9193 (1963) (statement of Rep. Bolton).

Labor Standards Act,[50] which today is known as the EPA. The EPA prohibits employers from discriminating "between employees on the basis of sex" by paying employees of one sex less than employees of another sex.[51] In prohibiting such behavior, the EPA has been interpreted to implement a "three-step burden-shifting scheme."[52]

In *Corning Glass Works v. Brennan,*[53] the Supreme Court stated that the purpose of the EPA was a means to address the "ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same."[54] The Court explained that, under the EPA, a plaintiff must first establish that its employer pays its male and female workers different wages "for equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions."[55]

However, the EPA provides for "four affirmative defenses" that "'authorize[]' employers to differentiate in pay on the basis of seniority, merit, quantity or quality of production, or any other factor other than sex, even though such differentiation might otherwise violate the act."[56] Once the plaintiff makes a prima facie showing of gender discrimination, the burden shifts to the employer to "justify the disparity" based on one of these four accepted defenses.[57] Lastly, under the EPA's burden shifting mechanism, if an employer successfully justifies the wage disparity using one of the EPA's exceptions, the "burden of persuasion shifts back to the plaintiff to prove that the reason for the pay disparity was a pretext."[58]

At first blush, a case brought under the EPA might appear rather simple. Each party has a designated burden of proof and, if they fail to meet that burden, the case concludes.[59] However,

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[50] *See* Fair Labor Standards Act, 29 U.S.C. §§ 201–19; *see also* UNITED STATES DEP'T OF LABOR: WAGE & HOUR DIV., HANDY REFERENCE GUIDE TO THE FAIR LABOR STANDARDS ACT ("The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and in federal, state, and local governments.").

[51] 29 U.S.C. § 206(d)(1).

[52] *See, e.g.*, Schleicher v. Preferred Sols., Inc., 831 F.3d 746, 752–53 (6th Cir. 2016) (explaining that the first step of the burden-shifting scheme requires the plaintiff to "establish a prima facie case of wage discrimination under the EPA," the second step shifts to the defendant to prove that "the wage differential is justified under one of the four affirmative defenses" stated in the EPA, and the third step shifts back to the plaintiff to show "evidence demonstrating the existence of a triable issue of fact regarding pretext" (internal quotations omitted)).

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

[54] *Id.* at 195 (quoting S. Rep. 176, 88th Cong. (1963)).

[55] 29 U.S.C. § 206(d)(1).

[56] Cty. of Washington v. Gunther, 452 U.S. 161, 169 (1981); *see also* 29 U.S.C. § 206(d)(1).

[57] *See* Saba, *supra* note 24, at 778.

[58] *Id.*

[59] *See, e.g.*, Riser v. QEP Energy, 776 F.3d 1191, 1201 (10th Cir. 2015) (dismissing plaintiff's complaint based on failure to meet burden).

precedent shows that the EPA's affirmative defenses have been a source of confusion for many courts.[60] While the first three defenses appear facially clear, the EPA does not define the contours of the fourth and final "factor other than sex" defense and leaves little guidance to both litigating parties and the courts on its content.[61]

In analyzing the EPA, the Supreme Court has explained that the "factor other than sex" defense was intended to confine the EPA to "wage differentials attributable to sex discrimination"[62] and therefore, EPA litigation "has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of 'other factors other than sex.'"[63] However, deciphering what exactly qualifies as a "bona fide use" has created a divide among our nation's circuits.[64]

II. THE "FACTOR OTHER THAN SEX" DEFENSE IN THE COURTROOM

As the "factor other than sex" defense is not defined in the EPA, courts have had many opportunities to interpret the defense as they see fit. In analyzing an employer's justification for gendered wage disparities, some courts are inherently more skeptical than others and choose to follow "a looser definition of factor[s] other than sex."[65] Others take a narrower approach and require that "'any other factor other than sex' must be tied to a legitimate business purpose."[66]

A. Broad Interpretations of "Factor[s] Other than Sex"[67]

The Seventh and Eighth Circuits have taken a broader approach to the "factor other than sex" defense and emphasize that such an interpretation "is necessary due to the impossibility of predicting and listing each and every exception."[68]

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[60] *See* Brown, *supra* note 22, at 479.

[61] *See id.*; *see also* Ellen M. Bowden, Note, *Closing the Pay Gap: Redefining the Equal Pay Act's Fourth Affirmative Defense*, 27 COLUM. J.L. & SOC. PROBS. 225, 226 (1994) ("[T]he Act's clarity and efficacy have been undercut by its four affirmative defenses . . . . [i]n particular, the fourth affirmative defense, exempting wage disparities 'based on any other factor other than sex' from the requirements of the Act, has generated confusion and disagreement among courts.").

[62] Cty. of Washington v. Gunther, 452 U.S. 161, 170 (1981).

[63] *Id.* (quoting Corning Glass Works v. Brennan, 417 U.S. 188, 198 (1974)).

[64] *Id.*

[65] *See* Saba, *supra* note 24, at 778.

[66] *Id.* (quoting Rizo v. Yovino, 887 F.3d 453, 462–65 (9th Cir. 2018)).

[67] 29 U.S.C. § 206(d)(1).

[68] Taylor v. White, 321 F.3d 710, 718–19 (8th Cir. 2003) (noting that "wisdom or reasonableness of the asserted defense" is irrelevant); Covington v. S. Ill. Univ., 816 F.2d 317, 321–22 (7th Cir. 1987) (holding that, in the Seventh Circuit, the factor other than sex defense does not need to be related to a business justification or the employee's specific position);

Specifically, these circuits have consistently held that, so long as an employer can articulate a bona fide justification for the disparity in wages, regardless of whether or not that justification is rooted in an "acceptable business reason," the courts will accept the defense.[69] The Seventh Circuit's holding and reasoning in the seminal case *Covington* illuminates the extensive leeway these circuits give to employers that admittedly perpetuate gendered wage gaps.

In 1987, the Seventh Circuit first articulated this approach in *Covington v. Southern Illinois University*.[70] Southern Illinois University hired Patricia Covington as an art advisor after reassigning her male predecessor to another department at the university.[71] When Covington began her new job, the University paid her a starting salary of $800 per month despite hiring her male predecessor at a rate of $1,080 per month.[72] Covington excelled at her position and, although she received multiple merit raises over the years, she continued to make less than her male counterpart. Dissatisfied with her salary, Covington brought claims against the university under Title VII and the EPA, arguing that the university discriminated against her by paying her less than her male predecessor when they first entered the exact same position.[73] She claimed that the university paid her less than her male colleagues "for performing the same work,"[74] and thereby "discriminated against her on the basis of sex."[75]

The district court found that, while Covington "established a prima facie case under the EPA," her employer sustained its "burden of proving that the differential in pay between Covington's initial salary and [her male predecessor's] salary during his term as art advisor was due to a factor other than sex."[76] The employer argued that, unlike Covington, the male predecessor had a "terminal degree in his field" and had "a certain local notoriety as a high school band director, while plaintiff's prior experience was quite limited."[77]

On appeal to the Seventh Circuit, Covington argued that her employer did not meet its burden in justifying its disparity

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Wernsing v. Dep't of Human Servs., 427 F.3d 466, 470 (7th Cir. 2005) (reaffirming *Covington* and the Seventh Circuit broad interpretation of the EPA defense).

69 *See, e.g.*, *Wernsing*, 427 F.3d at 470.

70 *Covington*, 816 F.2d at 322–24.

71 *Id.* at 319–20.

72 *Id.* at 321.

73 *Id.* at 320–21.

74 *Id.* at 318.

75 *Id.*

76 *Id.* at 321.

77 *Id.*

in pay since "factors other than sex for the purposes of the EPA . . . are limited either to business-related reasons, or more narrowly, to factors that relate to the requirements of the job or to the individual's performance of that job."[78] The court, having rejected arguments similar to Covington's in prior cases,[79] dismissed Covington's position and reiterated that, in the Seventh Circuit, factors other than sex did not need to relate to the employee's particular position or be business related.[80]

The Seventh Circuit has repeatedly reaffirmed the approach articulated in *Covington*.[81] Furthermore, in *Wernsing v. Dep't of Human Servs.*, the Seventh Circuit recognized the "disagreement between [the Seventh Circuit] (plus the Eighth) and those [circuits] that require an 'acceptable business reason'" but made clear that it was "not even slightly tempted to change sides."[82] The court explained that it did not need to change its view as its interpretation was supported by the text of the EPA, interpretations of other equal pay laws, and Eighth Circuit decisions.[83]

Essentially, under the Seventh and Eighth Circuit's broad interpretation of the EPA's "factor other than sex" defense, an employer can more easily escape liability under the EPA since it is not restrained by a business-related requirement, unlike the circuits discussed in Part B.[84] However, this view has been critiqued as allowing "literally any factor—legitimate or not—other than sex" to prevail.[85]

B. Narrow Interpretations of "Factor[s] Other than Sex"[86]

On the opposite end of the spectrum, some circuit courts have disagreed with the Seventh and Eighth Circuits and have taken a more structured approach to the "factor other than sex" defense. The

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[78] *Id.*

[79] *See* Patkus v. Sangamon-Cass Consortium, 769 F.2d 1251, 1261–62 (7th Cir. 1985) (finding an employer's "factor other than sex" defense of "legitimate organizational planning" to be sufficient despite the defense not relating to the performance of the employee).; Ende v. Bd. of Regents of Regency Univs., 757 F.2d 176, 182–83 (7th Cir. 1985) (upholding an employer's "factor other than sex" defense where the employer increased an employee's salary as a result of past discrimination rather than as a result of the performance of the employee).

[80] *Covington*, 816 F.2d at 323–24.

[81] *See, e.g.*, Dey v. Colt Const. & Dev. Co., 28 F.3d 1446, 1462 (7th Cir. 1994) ("The factor [other than sex] need not be 'related to the requirements of the particular position in question,' nor must it even be business-related." (quoting Fallon v. Illinois., 882 F.2d 1206, 1211 (7th Cir. 1989)).

[82] Wernsing v. Dep't of Human Servs., 427 F.3d 466, 470 (7th Cir. 2005).

[83] *Id.*

[84] *Id.*

[85] *See* NAT'L WOMEN'S LAW CTR., *supra* note 26, at 3; *see also Fallon*, 882 F.2d at 1211 (holding that the factor other than sex defense "embraces an almost limitless number of factors, so long as they do not involve sex").

[86] 29 U.S.C. § 206(d)(1).

Second, Sixth, Ninth, Tenth and Eleventh Circuits hold that, in order for an employer to sufficiently meet its burden of proof and persuasion, its factor other than sex "must be tied to a legitimate business purpose."[87] Their approach differs from the broad reading of the Seventh and Eighth Circuits as employers cannot assert a "limitless number of factors,"[88] but rather are expected to produce justifications within the guidelines of these courts.

A recent pronouncement by the Tenth Circuit articulates this narrow view. In *Riser v. QEP Energy,* Kathy Riser, an administrative services assistant at QEP Energy Company (QEP), was considered a valued employee.[89] Although Riser was technically an administrative assistant, she "logged 541 hours of overtime" while performing her assistant tasks and extra managerial duties.[90] However, despite taking on additional responsibilities, QEP's compensation system was "based on QEP's knowledge of the tasks that administrative assistants typically perform" and Riser's "actual job responsibilities were not considered."[91] In other words, QEP tailored their compensation structure to the standard tasks that an employee's position typically requires, rather than evaluating the work of the individual employee.[92] Under this scheme, the company paid Riser only $22.78 per hour.[93] Later, the company brought on a male employee, Matthew Chinn, who not only took over Riser's management duties, but was trained by Riser.[94] Notwithstanding, QEP paid Matthew Chin an initial salary of $29.81 per hour.[95] When the company subsequently fired Riser, she brought suit against the company alleging, among other things, pay discrimination under the EPA, Title VII and the Age Discrimination in Employment Act

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[87] *See* Saba, *supra* note 24, at 778; *see also* Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 526 (2d Cir. 1992) (requiring a "bona fide business-related reason"); E.E.O.C. v. J.C. Penney Co., 843 F.2d 249, 253 (6th Cir. 1988) (holding that the EPA defense "does not include literally any other factor, but a factor that, at a minimum, was adopted for a legitimate business reason" (emphasis omitted)); Rizo v. Yovino, 950 F.3d 1217, 1225 (9th Cir. 2020) ("Because all of the enumerated exceptions are job-related, the general exception that follows—'any other factor other than sex'—is limited to job-related factors."); Glenn v. Gen. Motors Corp., 841 F.2d 1567, 1571 (11th Cir. 1988) (the defense applies "when the disparity results from unique characteristics of the same job; from an individual's experience, training or ability; or from special exigent circumstances connected with the business"); Riser v. QEP Energy, 776 F.3d 1191, 1198 (10th Cir. 2015) (an employer can only assert a factor other than sex that is legitimately based upon business-related factors such as "differences in work responsibilities and qualifications") (quoting Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 525 (2d Cir. 1992)).

[88] *See* Fallon v. Illinois, 882 F.2d 1206, 1211 (7th Cir. 1989).

[89] *Riser*, 776 F.3d at 1194.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

(ADEA).[96] Although the district court dismissed Riser's claim for her inability to show a prima facie case of discrimination, the court noted that, even if she could demonstrate a prima facie case, "her claim would fail because the wage disparity was the product of QEP's gender-neutral pay classification system, a factor other than sex."[97]

Nevertheless, on appeal, the Tenth Circuit reversed and held that district court erred in its analysis of the employer's affirmative defense.[98] In order to meet its burden, "an employer must submit evidence from which a reasonable factfinder could conclude not merely that the employer's proffered reasons *could* explain the wage disparity, but that the proffered reasons *do in fact* explain the wage disparity."[99] The court acknowledged that a gender-neutral pay classification technically constitutes a factor other than sex, but limited its use as a defense to situations where said system is legitimately based upon business-related factors such as "differences in work responsibilities and qualifications."[100] The employer had not articulated facts to prove that the "proffered reasons *[did] in fact* explain the wage disparity"[101] and the court therefore declined to adopt the defense since it was not directly tied to a "legitimate business-related" justification.[102]

The Tenth Circuit reiterated this view in *Casalina v. Perry*, where it held that an employer must proffer "legitimate business-related differences in work responsibilities" to properly meet its burden of proof and persuasion.[103] Additionally, the District Court of New Mexico, is bound by Tenth Circuit precedent, held that even if "a plaintiff agreed to a lesser wage than her counterparts," the employer "only [has] a defense to a sex discrimination charge if the defendant can demonstrate that the wage differential is based on legitimate business purposes."[104]

While the Tenth Circuit has consistently reaffirmed its view that an employer must assert a factor other than sex that is tied to a legitimate business-related purpose, other circuits have found support for this position in different canons of construction.[105]

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[96] *Id.* at 1195.

[97] *Id.* at 1195–96.

[98] *Id.* at 1195–96, 1199.

[99] *Id.* at 1198 (internal quotations omitted).

[100] *Id.* (quoting Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 525 (2d Cir. 1992)).

[101] *Id.* (quoting Mickelson v. N.Y. Life Ins. Co., 460 F.3d 1304, 1312 (10th Cir. 2006).

[102] *Id.*

[103] Casalina v. Perry, 708 F. App'x. 938, 941 n.1 (10th Cir. 2017).

[104] Dolin v. ThyssenKrupp Elevator Corp., No: 2:16-cv-00529-MCA-GBW, 2017 WL 1551990, at *11 (D. N.M. Mar. 31, 2017).

[105] *See, e.g.*, Rizo v. Yovino, 950 F.3d 1217, 1224 (9th Cir. 2020) (interpreting the "factor other than sex" defense to only refer to job-related justifications using the "*noscitur a sociis* canon—a word is known by the company it keeps"); *see also* James J. Brudney & Cory Distlear, *Canons of Construction and the Elusive Quest for Neutral*

In *Rizo v. Yovino*, the Ninth Circuit refused to adopt the broad interpretation employed by the Seventh and Eighth Circuits in explaining that the "fourth affirmative defense comprises only job-related factors."[106] The court looked to the other three exceptions of the EPA and concluded that, since all of the other "enumerated exceptions are all job-related . . . Congress' use of the phrase 'any *other* factor other than sex' signals that the fourth exception is also limited to job-related factors."[107] Referencing the canon of *noscitur a sociis*[108] and understanding that "a word is known by the company it keeps,"[109] the court concluded that the defense was not intended to be a broad and untethered defense, but was intended to have "similar or related meaning" to the other enumerated exceptions and therefore, concluded that defense should be limited to "job-related" reasons.[110]

This view has been seen as "correctly" holding employers to a higher standard when asserting their defense in order to ensure that they do not easily escape liability under the EPA.[111] However, some critique this view as resting on an idea of intent that has been "manufactured by the judges" and "lacks any footing in enacted texts" or in "legislative debates."[112] In essence, critics of this narrower reading argue that the legislature intended for this to be a catchall phrase that "embraces an almost limitless number of factors" and a business related justification is not required under the EPA.[113]

In sum, the opposing views of these circuit courts create both tension and confusion for plaintiffs.[114] Depending on the circuit in which their case is heard, plaintiffs' claims may face different and substantial challenges. If evaluated under the broad, employer-friendly approach adopted by the Seventh and Eighth Circuit, plaintiffs may find themselves in a losing battle against their employer.[115] Yet, even under the narrower business justification approach articulated by the Second, Sixth, Ninth,

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Reasoning, 58 VAND. L. REV. 1, 7 (2005) (defining "canons of construction" as "a set of background norms and conventions that are used by courts when interpreting statutes").

106 *Rizo*, 950 F.3d at 1224 (emphasis in original).

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.*

111 *See* NAT'L WOMEN'S LAW CTR., *supra* note 26.

112 Wernsing v. Dep't of Human Servs., 427 F.3d 466, 470 (7th Cir. 2005).

113 Fallon v. Illinois, 882 F.2d 1206, 1211 (7th Cir. 1989).

114 *See* Brown, *supra* note 22, at 483 (explaining that the affirmative defense that often leads to the most "confusion and inconsistency," thereby being the greatest barrier to entry for plaintiffs seeking relief under the EPA, is "the 'factor other than sex' defense").

115 *See* NAT'L WOMEN'S LAW CTR., *supra* note 26 (explaining that the Seventh and Eighth Circuit approach allow "literally any factor—legitimate or not—other than sex" to prevail).

Tenth and Eleventh Circuit, plaintiffs are left without much direction on how to satisfy their burdens, as the business justification approach "embraces an almost limitless number of factors."[116] Ultimately, regardless of the chosen approach, this unresolved circuit split presents a confusing line of precedent for plaintiffs, often leaving them without proper redress.

III. THE "FACTOR OTHER THAN SEX" DEFENSE IN PROFESSIONAL SPORTS

While our nation's circuits have analyzed the "factor other than sex" exception differently, these distinct approaches typically apply to cases involving traditional workplace environments.[117] However, professional athletes are not conventional employees and the professional sports industry is not a traditional workplace setting.[118] The professional sports environment and resulting pay discrepancies present complex and novel issues not yet addressed by our circuits.[119]

While some women competing in individual sports, such as tennis, have been able to "rank among the overall top earners" for both male and female athletes, women participating in team sports face a different reality.[120] For instance, the maximum WNBA salary reported in 2018 was $117,500, which pales in comparison to the highest NBA salary of $37.4 million.[121] Additionally, the USWNT alleged in its complaint that if the men's team and the women's team both played and won twenty nontournament games, otherwise known as "friendlies," the female players "would earn a maximum of $99,000" while the male players "would earn an average of $263,320" for all twenty friendlies.[122]

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[116] *See* Saba, *supra* note 24, at 778; *Fallon*, 882 F.2d at 1211.

[117] *See e.g.,* Riser v. QEP Energy, 776 F.3d 1191, 1194 (10th Cir. 2015) (involving a plaintiff employed as an administrative assistant in the energy industry); Covington v. S. Ill. Univ., 816 F.2d 317, 319–21 (7th Cir. 1987) (involving a plaintiff employed as an art administrator at a local university).

[118] *See* PAUL C. WEILER ET AL., *supra* note 39, at 256.

[119] *Id.*

[120] Olivia Abrams, *Why Female Athletes Earn Less Than Men Across Most Sports*, FORBES (June 23, 2019, 8:00 AM), https://www.forbes.com/sites/oliviaabrams/2019/06/23/why-female-athletes-earn-less-than-men-across-most-sports/#460c7dfb40fb [https://perma.cc/B8EX-RMP3] (reporting that athletes such as "Serena Williams, Maria Sharapova and Li Na have all appeared multiple times on Forbes' [overall top earners] list").

[121] *Id.; see also* Howard Megdal, *W.N.B.A. Makes 'Big Bet on Women' With a New Contract*, N.Y. TIMES (Jan. 16, 2020), https://www.nytimes.com/2020/01/14/sports/basketball/wnba-contract-collective-bargaining-agreement.html [https://perma.cc/2FAQ-BPTA] (explaining that "[t]he NBA, which created the W.N.B.A. in 1996 and shares ownership with the women's team" reached a new collective bargaining agreement with W.N.B.A. player's association that increased the maximum women's salary to $215,000, even though their male counterparts are receiving "multimillion-dollar salaries").

[122] *See* USWNT Complaint, *supra* note 8, at 11.

Although outside media and television partnerships do often contribute to distinctions in salary,[123] the crux of the problem arguably falls on the internal structure of the professional organizations.[124] Single employers, such as the USSF, that own and operate gendered sports leagues, like the USWNT and the USMNT, are given wide latitude to structure each league's compensations as they see fit, subject to labor rules in a unionized workplace.[125] It is this apparent, yet unnoticed, structure that a material cause of wage discrepancies in professional sports.[126]

Although the USSF and other single employers must still collectively bargain with the official bargaining unit for each team,[127] such a process does not by itself eliminate the problems that might arise once the agreement is signed. For gendered leagues in professional sports, market factors such as differences in performance, media attention and fan engagement,[128] can have an impact on how a team negotiates its salaries and bonuses. However, because these factors have the potential to be influenced by an employer's efforts ahead of time, a team like the USWNT may not be negotiating with the same leverage as its male counterpart.[129] If a women's team realizes that its contract is inferior to a men's team's contract, it might try to bring an action under the EPA to abate any unequal treatment. However, even under the most restrictive reading of the EPA's "factor other than sex" defense, an employer can point to the effects of its manufactured market differences as a legitimate business justification and circumvent liability, all while maintaining disparate compensation agreements.[130] With such a loophole, it is therefore not enough to say that the inequities between gendered professional sports teams can be collectively bargained away.

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[123] *See* Abrams, *supra* note 120.

[124] *See* USWNT Complaint, *supra* note 8, at 6.

[125] *Id.*; *see also* Shea, *supra* note 29 (explaining the different ways in which professional sports leagues structure the compensation of players based on market success, revenue and other contributing factors).

[126] *See, e.g.*, Megal, *supra* note 121 (emphasizing the discrepancies in salary structure between the NBA and WNBA, despite both teams existing under the single ownership of the NBA).

[127] *Our Mission*, USWNT PLAYERS, https://uswntplayers.com [https://perma.cc/4ALT-K5BL]; *USNSTPA FAQ*, U.S. NAT'L SOCCER TEAM PLAYERS, https://ussoccerplayers.com/usnstpa-faq [https://perma.cc/7G58-ZB6W].

[128] *See* USWNT Complaint, *supra* note 8, at 13–14 (alleging that the USSF set lower ticket prices for USWNT games and provided insufficient notice to USWNT fans "to allow for maximum attendance" at the women's games); *see also* Shea, *supra* note 29 (explaining that in market systems like professional sports leagues "a worker's wage is determined by the amount of revenue the worker creates" and the more successful and marketable players will often have higher salaries).

[129] *See infra* Section III.A.

[130] *See supra* Section II.B.

A. Case Study: Morgan et al. v. United States Soccer Fed'n, Inc.

The USWNT's lawsuit against the USSF exemplifies the unique problems created by the "factor other than sex" defense in the professional sports context. In its complaint against USSF, the USWNT alleged that as the "single, common employer" of both the USWNT and the USMNT, the USSF has "utterly failed to promote gender equality" and has "refused to treat its female employees . . . equally to its male employees."[131] Although the USWNT and the USMNT "perform the same job responsibilities on their teams and participate in international competitions for their single common employer," the female players allegedly "have been consistently paid less money than their male counterparts."[132] The USWNT alleged that, as the single employer of both teams, the USSF "manages and controls every aspect" of the national team program for both the male and female employees.[133] For example, the USSF, among other things, selects and hires members of the team, sets and provides employees with compensation, decides the number of games both teams will play, and sets ticket prices for home games.[134]

Furthermore, the USWNT emphasized that this gender discrimination endures despite the team's world-renowned success in professional soccer.[135] The team has won four World Cup titles, received four Olympic gold medals, is a "three-time winner of the U.S. Olympic Committee's Team of the Year Award," and is currently "ranked number one in the world, a position it has held ten out of the last eleven years."[136] The women's team's success has allegedly been able to reverse the USSF's revenue loss projections, as the revenue brought in by the women's team turned a "combined net loss" for both national teams of $429,929 into a "$17.7 million dollar profit."[137] However, when viewed in light of the substantial revenue that the USWNT has brought to its employer, the females are paid far less under the team's current compensation structure as determined by the collective bargaining agreement than what they could be paid under a more equitable system.[138]

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131 *See* USWNT Complaint, *supra* note 8, at 1.

132 *Id.*

133 *Id.* at 6.

134 *Id.*

135 *Id.* at 7.

136 *Id.*; *see* Kann *supra* note 2.

137 *See* USWNT Complaint, *supra* note 8, at 7–8.

138 *Id* at 10.; *see also* Meg Kelly, *Are U.S. Women's Soccer Players Really Earning Less Than Men?*, WASH. POST (July 8, 2019, 3:00 AM), https://www.washingtonpost.com/po

Under the pay structure developed by the USSF and the teams' respective collective bargaining units, each USMNT player receives "a minimum amount (currently $5,000) to play in each game, regardless of the outcome."[139] The men's team can have its minimum amount increased "from $6,250 to $17,625 per game, depending on the level of their opponent . . . and whether they win or tie the game."[140] Notably, the men's team operates on a "pay-for-play" basis where they are paid "only when they are called onto the team" and "if they get injured with their club teams and miss a national team game, they do not get paid."[141] On the other hand, from 2013 to 2016, the women's team was compensated on a salary basis and players could "earn a maximum salary of $72,000 plus bonuses for winning non-tournament games called 'friendlies,' for World Cup-related appearances and victories, and for placement at the Olympics."[142] To illustrate, based on these figures, if each team played and won the same amount of friendlies in a year, members of the women's team "would earn a maximum of . . . $4,950 per game"[143] while the men would earn "$13,166 per game."[144] Most of the women on the team also received "benefits such as parental leave" and were "paid whether or not they [were] called up for a game or training camp, even if they [were] injured," while the other members of the team were "non-contract players" and only were paid "when they [were] called up to the team."[145]

Not only did the USWNT take issue with the differences in salaries between the men's and women's team, but it also complained of the USSF's disparate treatment of its gendered teams.[146] For instance, the USWNT argued that the USSF "arranged for natural grass to be installed temporarily . . . for 8 [men's] domestic matches" but it did not install natural grass for the women in those same venues.[147] Furthermore, the USSF allegedly put the USMNT on more chartered flights than the USWNT, which provided the women with less "physical comfort" and less

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litics/2019/07/08/are-us-womens-soccer-players-really-earning-less-than-men/ [https://perma.cc/L2RV-KF9Y] (explaining that under the team's collective bargaining agreements, revenue from games accounts for "only one-quarter of USSF revenue" while sponsorships and other market factors "make up half").

139 *See* USWNT Complaint, *supra* note 8, at 10.

140 *Id.*

141 ESPN Staff, *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 [https://perma.cc/UXH5-4SVK].

142 USWNT Complaint, *supra* note 8, at 11.

143 *Id.*

144 *Id.*

145 *See* ESPN Staff, *supra* note 141.

146 *See* USWNT Complaint, *supra* note 8, at 13.

147 *Id.*

opportunities "for rest before and after games."[148] The USWNT also alleged that the USSF "allocated [fewer] resources promoting [USWNT] games" than it did in promoting USMNT games.[149] In fact, the "former President of Soccer United Marketing," the marketing company that used to market USSF teams, acknowledged that "the [USWNT] has been under-marketed."[150] These marketing tactics include setting lower ticket prices for USWNT games and providing insufficient notice to USWNT fans "to allow for maximum attendance" at the women's games.[151]

In its answer, the USSF initially admitted to these compensation disparities, but argued at the outset that the gendered teams are separate and distinct organizations that perform independent employment responsibilities in physically different locations.[152] Therefore, it argued that it could not be discriminating against the women's team since it is a workplace that is wholly unconnected to the men's team.[153] Although it acknowledged the USWNT's success,[154] it contended that "no pay comparison can be made between the USWNT players, who earn guaranteed salaries and benefits, and the USMNT players, who are paid strictly under a 'pay-for-play' structure."[155] Finally, the USSF asserted that the pay gap can be attributed to the market differences reflected in the collective bargaining agreements.[156]

With regard to the disparity in resources for its gendered teams, the USSF attributed the discrepancy to "many factors . . . beyond [the USSF's] control" and explained that these differences reiterate the notion that the teams play in "physically separate locations, some of which have different field surfaces," and are functionally separate entities.[157] Additionally, the USSF denied all other allegations related to the under-marketing of its women's team and merely reiterated that the two teams are functionally separate, do not perform the same job and "no pay comparison can be made between the USWNT players . . . and the USMNT players."[158]

More importantly, the USSF made clear in its first affirmative defense that, even if the teams performed the same job

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148 *Id.*

149 *Id.*

150 *Id.* at 14.

151 *Id.* at 13–14.

152 *See* USSF Answer, *supra* note 14, at 7.

153 *Id.*

154 *Id.* at 8.

155 *Id.* at 10.

156 *Id.* at 11; *see also* Kelly, *supra* note 138 (explaining that differences in the team's collective bargaining agreements include bonuses for game attendance, commercial appearances, and fan engagement).

157 *See* USSF Answer, *supra* note 14, at 13.

158 *Id.* at 12.

responsibilities and engaged in equal effort, "any alleged pay differential between [the USWNT] and allegedly comparable USMNT players [was] based on differences in the aggregate revenue generated by the different teams and/or any other factor other than sex."[159] Essentially, the USSF made a similar argument to the defendant's argument in *Covington*[160] and stated that any distinction in wages was not attributed to the sex of each team, but rather to the market realities and "aggregate revenue" of the employees.[161] Although this was not the ultimate argument USSF made at summary judgment, it exemplifies a persistent challenge for EPA claimants that work in professional sports.

B. Behind the USSF's "Factor Other than Sex" Defense[162]

At first glance, the USSF's initial argument might make sense. As the gendered teams are separate entities, it is understandable that the teams would face unique market exposures and potentially different ticket pricing strategies. However, the market conditions which purportedly keep gendered teams from receiving equal pay can arguably be created by the employer's manipulation of its employees' compensation structures, as opposed to the market itself.

At the collective bargaining table, an employer has the ability to structure its employee's compensation in such a way that puts even its most successful team at a disadvantage. First, an employer can structure its gendered teams' compensation differently, providing for each team to be paid different wages at separate times and providing each team with a different number of total games to play each year.[163] Functionally, this makes comparing the compensation of the two teams almost impossible.[164] Additionally, an employer can structure the compensation in such a way where revenue brought in by each team serves as an inconsequential contribution to overall

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159 *Id.* at 17.

160 Covington v. S. Ill. Univ., 816 F.2d 317, 321 (7th Cir. 1987).

161 *See* USSF Answer, *supra* note 14, at 17.

162 29 U.S.C. § 206(d)(1).

163 *See* Kelly, *supra* note 138 (explaining that the women's team makes a salary each year with possible bonuses, while players on the men's team are "paid when they play, but not when they sit" and that "[t]he teams play different numbers of games each year and earn different bonuses depending on the game type, their opponents' FIFA rank and the game's outcome").

164 *See* USWNT Complaint, *supra* note 8, at 10 (alleging that the USSF has rejected many attempts by the USWNT to create a compensation structure that would resemble the structure of the USMNT); *see also* Kelly, *supra* note 138 (explaining that "[i]t's tough to make a straightforward comparison of the earnings for men and women players, because the two teams have different collective bargaining agreements that outline different pay structures").

compensation when compared to sponsorships and other market factors.[165] Therefore, even if the contributing factors for compensation were the same for both teams, a team that is generating more game revenue from wins and championships may be at a disadvantage when compared to the larger percentage coming from market factors such as sponsorships, advertisements, fan engagement and ticket sales. Such discrepancies open the door for potential liability under the EPA.

Since an employer, at most, needs to be able to articulate a "legitimate business purpose" to escape EPA liability,[166] the employer can easily mold the market realities and cite those as the legitimate business purposes for paying its male and female employees differently. By creating separate and unequal opportunities for both teams,[167] it ensures that each team, regardless of its success, will perform differently than the other.

For instance, the women's team might earn more revenue from game wins or World Cup tournaments, but if the employer gives fans less notice to attend games or does not provide the team with the same sponsorship and marketing opportunities, it can effectively put a team's market success at a disadvantage and ultimately provide them with less compensation based on the compensation percentages. These manipulations allow for an employer, such as the USSF, to reiterate its initial statement that the teams play in different professional spaces which warrants different compensational structures.[168] In essence, regardless of what is agreed to at collective bargaining, employers of gendered teams in professional sports can build themselves a "legitimate business purpose" to justify a gendered wage disparity through their own skewed market realities and disparate treatment of male and female teams. While there are benefits to maintaining gendered sports leagues,[169] employers should not abuse these gender divides in professional sports to create an operational structure that effectively perpetuates a societal wage gap. Whether or not an employer intends to discriminate, the disparate effect is apparent.

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[165] *See* Kelly, *supra* note 138 (explaining that under the team's collective bargaining agreements, revenue from games accounts for only "one-quarter of USSF revenue" while sponsorships and other market factors "make up half").

[166] *See* Saba, *supra* note 24, at 778.

[167] *See* USSF Answer, *supra* note 14, at 12.

[168] *Id.*

[169] David Epstein, *How Much Do Sex Differences Matter in Sports?*, WASH. POST (Feb. 7, 2014), https://www.washingtonpost.com/opinions/how-much-do-sex-differences-matter-in-sports/2014/02/07/563b86a4-8ed9-11e3-b227-12a45d109e03_story.html [https://perma.cc/AH34-CDKT].

The factor other than sex defense has become a way for employers in professional sports to mischaracterize the markets of their gendered employees, regardless of their successes, and thereby lawfully pay their employees differently based on their own contrived business narrative and structure.[170] To make matters worse, in the circuits that take a narrow approach to the defense, an employer can still hide behind its business justifications so long as they are reasonable enough.[171] While this view may create a different result in traditional labor markets, the professional sports industry has developed an unfortunate wage gap that,[172] without further restraint, will continue to persist and grow through the "factor other than sex" defense of the EPA.[173]

IV. REMEDYING THE WAGE GAP IN PROFESSIONAL SPORTS BY MODIFYING THE EPA

A. A Three-Tiered Approach to Reducing the Wage Gap in Professional Sports

It is evident that in its current form, the EPA does not take into consideration the unique structure of the professional sports industry, especially when gender-specific professional sports teams are controlled by a single employer. In order to mitigate this disparity, courts should utilize an approach that not only resolves our nation's "factor other than sex" circuit split,[174] but also accounts for the disparate effects that the professional sports wage gap has on plaintiffs.[175] As will be explained in this Part, courts can implement a three-tiered solution which specifically tackles these two legal issues and can ultimately reduce the wage disparity present in professional sports, especially for teams governed by a single employer structure.

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[170] Bridget Gordon, *The USWNT's Equal Pay Lawsuit is a Fight For All of Women's Sports*, SBNATION (June 7, 2019, 3:01 PM), https://www.sbnation.com/2019/6/7/18653950/uswnt-pay-equality-lawsuit-gender-discrimination-us-soccer [https://perma.cc/J9NQ-JPAS] (noting that the difference in compensation structures between the USWNT and the USMNT is "[n]othing personal, it's just business").

[171] *See, e.g.*, Glenn v. Gen. Motors Corp., 841 F.2d 1567, 1571 (11th Cir. 1988) (the defense applies "when the disparity results from unique characteristics of the same job; from an individual's experience, training or ability; or from special exigent circumstances connected with the business"); *see also* Saba, *supra* note 24, at 778.

[172] *See* Daniel Akst, *What's Behind the Gender Pay Gap in Sports?*, WALL STREET J. (Oct. 27, 2020 10:00 AM), https://www.wsj.com/articles/whats-behind-the-gender-pay-gap-in-sports-11603807200 [https://perma.cc/B5ZG-NVXC] ("[T]he financial distance between today's female pros and their male counterparts, whose earnings have soared into the stratosphere, is probably larger than ever").

[173] 29 U.S.C. § 206(d)(1).

[174] *See supra* Sections II.A–B.

[175] *See* Akst, *supra* note 172.

First, although not a complete solution standing alone, courts should adopt the narrow interpretation of the "factor other than sex" defense utilized by the Second, Sixth, Ninth, Tenth and Eleventh Circuits,[176] which requires the defendant to show a "legitimate business justification" when professional sports plaintiffs make a prima facie showing of discrimination.[177] Second, in order to completely address the inequities within the professional sports industry, courts should utilize a burden-shifting mechanism that is similar to the one implemented by antitrust law.[178] Under this mechanism, a professional sports plaintiff bringing an EPA claim would not only have the right to prove that the defendant's justifications were pretextual, but would also have the opportunity to show that the employer could have chosen alternative compensation strategies that would have put the gendered teams on an equal footing. In doing so, an employer would be unable to hide behind a claimed inability to compare the market realities of the gendered teams and would need to address their disparate efforts in creating the market realities for each team.

Third, similar to the rule of reason test applied when analyzing violations of the Sherman Act,[179] the court should be permitted to ultimately balance the prejudicial effects that the compensation structure causes to the plaintiff with the benefits that the arrangement brings to the employer.[180] While there might be certain limited circumstances where a single employer may circumvent these proposed protections afforded to a plaintiff, this three-tiered approach is a much more equitable method to reduce the prolific wage disparity in professional sports.

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[176] *See supra* Section II.B.

[177] *See, e.g.*, Riser v. QEP Energy, 776 F.3d 1191, 1198 (10th Cir. 2015) ("[A]ny resulting difference in pay [must be] 'rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue." (quoting Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 525 (2d Cir. 1992))).

[178] *See* WEILER ET AL., *supra* note 39, at 257 (citing Mackey v. NFL, 543 F.2d 606, 620 (8th Cir. 1976).

[179] *Id.* at 252; Am. Needle, Inc. v. Nat'l. Football League, 560 U.S. 183, 203–4 (2010) (utilizing the Sherman Act's "rule of reason" analysis in the professional sports context).

[180] *See* Robert B. Terry, *Application of Antitrust Laws to Professional Sports' Eligibility and Draft Rules*, 46 MO. L. REV. 797, 815 n.143 (1981) (explaining that a rule of reason analysis "looks only at the impact the restraint has on competitive conditions" and compares "the restraint's short-term anticompetitive effect with its long-term procompetitive effect" (citing Nat'l. Soc'y. of Prof'l. Eng'rs. v. United States, 435 U.S. 679, 690 (1978))).

1. Tier One: Resolving the "Factor Other than Sex" Circuit Split[181]

With regard to our nation's circuit split on the "factor other than sex"[182] defense, merely siding with one of the approaches may not be enough to remedy the potential inequities.

If the broad approach enforced by the Seventh and Eighth Circuits were adopted, single employers in professional sports, such as the USSF, could operate gendered teams and pay them differently based on "literally any factor—legitimate or not—other than sex."[183] This would allow the employer to offer any arbitrary justification under this broad approach, even one that does not relate to the success of the team, the engagement of the team or any other important professional factor, and ultimately avoid liability under EPA.[184] The approach embraced by the Seventh and Eighth Circuits would offer a single employer too much latitude and would allow the wage gap in professional sports to perpetuate without any guardrails.

Conversely, legitimate business justifications, such as those permitted by the Tenth Circuit,[185] can often be important in certain professional sports contexts. If one gendered team is in fact performing worse than its counterpart, has less fan engagement and is simply not as successful, there might be legitimate business justifications on the part of the employer that warrant discrepancies in pay.[186] Therefore, the first tier of this solution proposes that courts should affirmatively adopt the narrow interpretation of the Second, Sixth, Ninth, Tenth and Eleventh circuits and require a defendant to proffer legitimate business justifications for its wage discrepancies.[187] This narrow interpretation limits the justifications that the employer can offer and does not allow for the employer to assert arbitrary and unrelated justifications for paying its employees unequally. By adopting this approach, the courts would directly address the first main issue built into the current EPA burden-shifting

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[181] 29 U.S.C. § 206(d)(1).

[182] *Id.*

[183] *See* NAT'L WOMEN'S LAW CTR., *supra* note 26, at 3.

[184] *See* Fallon v. Ill., 882 F.2d 1206, 1211 (7th Cir. 1989) (holding that the "factor other than sex" defense "embraces an almost limitless number of factors, so long as they do not involve sex").

[185] *See, e.g.*, Riser v. QEP Energy, 776 F.3d 1191, 1198 (10th Cir. 2015).

[186] *See* Casalina v. Perry, 708 F. App'x. 938, 941 n.1 (10th Cir. 2017) (holding that, under the narrow interpretation of the "factor other than sex" defense an employer can provide "legitimate business-related differences in work responsibilities" to properly meet its burden of proof and persuasion).

[187] *See supra* Section II.B.

scheme, namely, that the current case law does not adequately account for the unique context of sports environments.

While requiring a legitimate business justification would avoid the arbitrary defenses asserted under the broad approach, the professional sports industry presents multifaceted problems that create challenges when accepting traditional business justifications. For instance, in traditional labor markets, factors affecting pay other than sex and business justifications are often educational degrees[188] or differences in hours worked by the company's employees.[189] Yet for single employers in professional sports, compensation and legitimate business justifications, often have nothing to do with the training and development of the individual players. Fan engagement, market attention and tournament participation often dictate the compensation of the individual sports teams and can be the reason for differences in compensation.[190] These justifications present different issues that deserve a unique analysis, as comparing fan attendance at home games to an employee's overtime hours in a factory is "akin to comparing apples and oranges."[191]

Moreover, unlike traditional employment settings, a single employer in professional sports can wittingly, or unwittingly, structure both its organization and available media exposure so that the investment in one gender appears more legitimate. In doing so, single employers that operate gendered professional sports teams, such as the USSF, can have an endless number of manipulated legitimate business justifications that could explain discrepancies in wages. Therefore, merely siding with one approach in our nation's circuit split is not sufficient to adequately address this problem—it is only the first step.

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[188] *See, e.g.*, Covington v. S. Ill. Univ., 816 F.2d 317, 323–24 (7th Cir. 1987) (holding that an additional degree could be a business related justification, but under the Seventh Circuit approach, an employer's defense does not have to be business-related).

[189] *See, e.g.*, *Riser*, 776 F.3d at 1198 (holding that business justifications can take into consideration the job responsibilities of the employee and the hours worked by the employee).

[190] *See* Shea, *supra* note 29 (explaining that in market systems like professional sports leagues "a worker's wage is determined by the amount of revenue the worker creates" and more successful and marketable players and teams will often have higher salaries).

[191] *See* WEILER ET AL., *supra* note 39, at 256 (discussing antitrust law in professional sports and the inability to compare the professional sports market to traditional markets).

2. Tier Two: Utilizing the Antitrust Burden-Shifting Mechanism Within the EPA

a. Antitrust Law and Professional Sports

As a whole, antitrust law has recognized that the professional sports industry presents challenging issues that often do not arise in the context of traditional markets and, based on certain industrial tensions, it is a labor market that deserves individualized attention. Initially, antitrust laws were "designed to promote competition" in professional markets[192] and as such, "any contract or conspiracy that illegally restrains trade and promotes anti-competitive behavior" is explicitly prohibited.[193]

Nevertheless, applying federal antitrust laws to the professional sports industry often "gives rise to competing interests."[194] Striking a balance between the quality of competition within the four major professional sports leagues[195] while simultaneously maintaining protections afforded to the individual players and teams has proven difficult for courts.[196] If the laws are interpreted to protect players, such as by allowing them to secure unlimited salaries, "then competition among the teams will lessen" because the highest earning teams in the better markets would be able to secure the best players.[197] Conversely, if the laws are interpreted to protect the leagues and teams, there may be a decrease in the "quality of competition" among the league since, for example, the highest performing players would struggle to earn a larger salary than their teammates and the league's self-administered salary limitations would have a chilling effect on recruitment of competitive players.[198] Understanding this tension, courts have developed certain professional sports exceptions to antitrust doctrines in order to maintain an appropriate balance.[199]

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[192] Claudia G. Catalano, Annotation, *Application of Federal Antitrust Laws to Professional Sports*, 79 A.L.R. Fed. 2d 1, § 2 (2013).

[193] *Antitrust Labor Law Issues in Sports*, US LEGAL, https://sportslaw.uslegal.com/antitrust-and-labor-law-issues-in-sports/ [https://perma.cc/ZW8S-PZYQ].

[194] *See* Catalano, *supra* note 192.

[195] *See* Cork Gaines, *The Four Major Sports Leagues Have Very Different Ideas on Geography*, BUS. INSIDER (Jan. 16, 2013, 3:49 PM), https://www.businessinsider.com/four-major-sports-leagues-have-very-different-ideas-on-geography-2013-1 [https://perma.cc/9RY6-JDES] (explaining that the four major sports leagues are the NFL, MLB, NHL, and the NBA).

[196] *See* Catalano, *supra* note 192.

[197] *Id.*

[198] *Id.*

[199] *See e.g.*, Brown v. Pro Football, Inc., 518 U.S. 231, 250 (1996) (holding that, for professional sports, there is an "implicit ('nonstatutory') antitrust exemption" for conduct that arises out of "the lawful operation of the bargaining process" and such conduct will not be brought under federal antitrust laws.); Fed. Baseball Club of Balt. v. Nat'l League of Prof'l. Baseball Clubs, 259 U.S. 200, 208 (1922) (explaining that there is

b The Antitrust Burden-Shifting Mechanism Versus the EPA Burden-Shifting Mechanism

Under the Sherman Act, certain anticompetitive market restrictions are prohibited.[200] Based on the powerful, capitalizing nature of sports leagues, antitrust disputes in professional sports often fall within the purview of section one of the Sherman Act, which references forming conspiracies in restraint of trade,[201] and section two of the Sherman Act, which targets the formation of monopolies to control the market.[202]

Under section one, courts analyze potential antitrust violations through either a per se analysis or a rule of reason balancing test,[203] which focuses on balancing an "agreement's effects on economic competition."[204] Due to the unique structure of professional sports leagues and the difficulties that emerge when balancing league competition with individual needs, courts almost exclusively apply a rule of reason analysis when analyzing antitrust claims in the professional sports context.[205] For these reasons, courts have found that antitrust law is well suited to grapple with the unique nature of the professional sports industry.[206] Therefore, analyzing anticompetitive sports league restraints must be done with reference to the underlying tensions built into the professional sports industry.

Traditionally, in an effort to balance a restraint's anticompetitive effects with its procompetitive benefits, courts

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a specific antitrust exemption for activities that qualified as being in the "business" of baseball and that such activities were "purely state affairs" and therefore, baseball was exempt from the application of federal antitrust laws).

[200] *See The Antitrust Laws*, FED. TRADE COMMISSION, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/7VUB-6AVL] (the Sherman Act aims to preserve "free and unfettered competition as the rule of trade"). *See generally* 15 U.S.C. §§ 1–38 (the Sherman Act prohibits "every contract, combination . . . or conspiracy, in restraint of trade . . . . ").

[201] *See* 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

[202] *See* 15 U.S.C. § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . . ").

[203] *See* WEILER ET AL., *supra* note 39, at 252.

[204] *Id.* at 256.

[205] Based on the unique nature of the sports industry, certain restraints on the market are acceptable and the Supreme Court has overruled many of its opinions applying a *per se* analysis and instead, has moved to an analysis that focuses on the rule of reason. Certain anticompetitive practices that are prohibited by professionals in traditional service industries are "justified by sports leagues as improving the quality of the overall product for the benefit of consumers" and therefore comparing professional sports to traditional markets is "akin to comparing apples and oranges." *Id.* at 252–56.

[206] *Id.*

employ a three-step burden-shifting framework under an antitrust rule of reason analysis.[207] Although the two doctrines address different aspects of law, the EPA's burden-shifting mechanism resembles the scheme implemented in the antitrust rule of reason analysis. Both structures begin with the plaintiff demonstrating a threshold inquiry. Under antitrust doctrine, the plaintiff must demonstrate that the defendant's restriction has a "significant anticompetitive effect" on the market.[208] Under the EPA, the plaintiff must proffer evidence of a discrepancy in wages based on gender among employees for work that requires equal skill and effort.[209]

Next, both frameworks shift the burden to the defendant to come forward with justifications to explain its potentially unlawful behavior.[210] However, with respect to the defendant's burden of proof, antitrust law not only requires that the justifications be business related, but also recognizes that business decisions in professional sports are unique.[211] Therefore, antitrust law allows an employer to proffer industry specific "legitimate business purposes," such as "protecting the club's investment in scouting expenses and player development costs."[212]

In its current form, the EPA, does not take into consideration the unique structure of the professional sports industry. Specifically, those circuits that require a professional sports single employer to assert a legitimate business justification erroneously compare the legitimate business justifications that are usually acceptable in traditional labor markets to the unique market of professional sports.[213] Requiring that the business justification be legitimate while also allowing for sports-specific justifications would help strike a proper balance in the EPA between an employer's need to make smart business decisions and an employee's right to avoid arbitrary manipulations by the employer in creating such justifications.

After the defendants have met their burdens in both the antitrust and EPA contexts, both mechanisms shift back to the

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[207] *Id.* at 257.

[208] *Id.* (emphasis omitted).

[209] Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974) (quoting 29 U.S.C. § 206(d)(1)).

[210] *See* WEILER ET AL., *supra* note 39, at 257 (noting that if the plaintiff can prove such an anticompetitive effect, the burden shifts to the defendant to demonstrate that the "restraint imposed is justified by legitimate business purposes" (citing Mackey v. NFL, 543 F.2d 606, 620 (8th Cir. 1976)); *See* Saba, *supra* note 24, at 778 (once the plaintiff makes a prima facie showing of gender discrimination under the EPA, the burden shifts to the employer to "justify the disparity" based on one of these four accepted defenses).

[211] *See* WEILER ET AL., *supra* note 39, at 252–56.

[212] *Id.*

[213] *Id.* at 256 (similarly discussing professional sports and the inability to compare the professional sports market to traditional markets).

plaintiff and provide one more opportunity to disprove the employer's purported justification.[214] Notably, the mechanisms diverge here as well, based on the nature of the evidence that a plaintiff must present. Under antitrust law, the rule of reason analysis places a lighter burden on plaintiffs and provides the plaintiff with an opportunity to show that there were other, less restrictive alternatives that the defendant could have adopted.[215] Under this analysis, a plaintiff could, theoretically, provide the court with many different ways in which the defendant could have executed the same goal with fewer restrictions on the market.

Conversely, under the EPA's burden-shifting scheme, the court places a difficult burden on the plaintiff to prove that the defendant's actions were pretextual.[216] As mentioned previously, single employers in professional sports who employ gendered teams might set up different compensation structures based on certain market factors.[217] In order to support these compensation structures, the employer might contrive a legitimate business justification by dumping different resources into the teams so that each team demonstrates differences in market success.[218] Although there might be many pathways by which a plaintiff can attempt to show pretext,[219] the employer's manipulations described above[220] make it difficult for gendered professional sports teams to prove that the justifications are, in fact, pretextual since their fixed, yet manipulable, market realities might reflect an apparent difference.

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[214] *See* WEILER ET AL., *supra* note 39, at 257 (citing *Mackey*, 543 F.2d at 620) (explaining that the third and final step in an antitrust rule of reason analysis under the Sherman Act is to examine "whether the restraint 'is no more restrictive than necessary'" by looking "both at other alternatives" and "whether the scope of the restraint was broader than necessary"); Saba, *supra* note 24, at 778 (under the EPA's burden-shifting mechanism, if an employer successfully justifies the wage disparity using one of the EPA's exceptions, the "burden of persuasion shifts back to the plaintiff to prove that the reason for the pay disparity was a pretext").

[215] *See* WEILER ET AL., *supra* note 39, at 257 (citing *Mackey*, 543 F.2d at 620).

[216] *See* Saba, *supra* note 24, at 778; *see also* Riser v. QEP Energy, 776 F.3d 1191, 1201 (10th Cir. 2015) (dismissing plaintiff's claim under the EPA since she did not show the defendant's justifications to be pretextual).

[217] *See e.g.*, USSF Answer, *supra* note 14, at 17 ("[A]ny alleged pay differential between Plaintiffs and allegedly comparable USMNT players is based on differences in the aggregate revenue by the different teams and/or any other factor other than sex."); *see also* Shea, *supra* note 29 (explaining that in market systems like professional sports leagues "a worker's wage is determined by the amount of revenue the worker creates" and more successful and marketable players and teams will often have higher salaries).

[218] *See* USSF Answer, *supra* note 14, at 13.

[219] *See* Conforto Law Group, *Inferring Pretext in Employment Discrimination Cases: A Baker's Dozen*, BOS. EMP. ATT'Y BLOG (Feb. 1, 2016), https://www.bostonemploymentattorneyblog.com/inferring-pretext-in-employment-discrimination-cases-a-bakers-dozen/ [https://perma.cc/W44T-NPLB] (listing multiple pathways by which plaintiffs can proffer evidence to prove pretext in employment discrimination cases but explaining the evidence is often "circumstantial").

[220] *See supra* Part III.B.

If EPA professional sports plaintiffs were provided the same opportunity as antitrust professional sports plaintiffs to show the court that the employer had other more equitable compensation structures to choose from, such a showing could prevent an employer's intentional manipulation of the market from standing as a legitimate business justification. This second tier suggests that, under the EPA, after a defendant employer has proffered its legitimate business justifications, the burden should then shift to the plaintiff to prove that the justifications were pretextual and/or come forward with alternative compensation structures, marketing efforts or business strategies that the defendant employer could have employed which would have put the gendered teams on an equal footing.

Drawing from this antitrust structure, a plaintiff would be able to show that the employer could have provided more equal opportunities for the teams to generate market success, that the differences in success of the teams warrants a different compensation arrangement, or that there is in fact a way to pay the teams equally.[221] Allowing a plaintiff to suggest more balanced operational structures could lessen their burden, ensure that the defendant's business justifications are in fact legitimate, and that the current operational system was the only plausible way to appropriately compensate the teams.

c. Tier Three: Using the Rule of Reason Analysis Within the EPA to Balance the Equities of the Parties

Lastly, the sports-specific mindset of the antitrust law burden-shifting scheme provides additional guidance to the EPA. Under the EPA, if a plaintiff cannot prove that the defendant's actions were pretextual, the case is dismissed and the defendant prevails.[222] However, under antitrust law, plaintiffs are given an extra procedural safeguard: Even if all three previous steps of the rule of reason analysis are met, the court continues the analysis as a neutral third party by balancing the harms and the benefits of the restraint to determine whether "the scope of the restraint [is] broader than necessary to achieve the [league's] stated goals."[223] Not

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[221] *See, e.g.*, USWNT Complaint, *supra* note 8, at 13 (arguing the USSF could have provided different, more equitable opportunities for the USWNT).

[222] *See, e.g.*, Riser v. QEP Energy, 776 F.3d 1191, 1201 (10th Cir. 2015) (dismissing plaintiff's claim since she did not show the defendant's justifications to be pretextual).

[223] *See* WEILER ET AL., *supra* note 39, at 257; *see also* Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998) (holding that the fourth and final step of the rule of reason burden shifting framework in professional sports is to weigh "the harms and benefits . . . against each other in order to judge whether the challenged behavior is, on balance, reasonable"); Michael A. Carrier, *The Four-Step Rule of Reason*, 33 ANTITRUST

only does this test prevent a plaintiff's case from hinging on the ability to show less restrictive alternatives, but this fourth element allows for a plaintiff to show how a restraint affects the professional sports market while also providing the defendant with an opportunity to explain why the restraint is necessary for business.[224] Essentially, this final step can function as a protection to the plaintiff since the court can step in and evaluate whether a defendant's proffered procompetitive justifications for a restriction truly do outweigh its anticompetitive effects or if the restriction is simply too detrimental to the market.[225]

If courts adopted this final antitrust burden shift for an analysis under the EPA, the decision as to liability would ultimately involve a balancing test initiated by the court. This added step would provide EPA plaintiffs with an additional safeguard to guarantee that the single employer has not fictitiously mischaracterized the market. A court would be able to balance the defendant's "factor other than sex" defenses with the pretextual nature of the difference in wages and ultimately determine whether the proffered defenses truly outweigh the disparate treatment faced by the employee. Additionally, this last shift would allow the court as a neutral party to evaluate whether there was in fact a better way to compensate the teams without overly prejudicing the employer.

3. Limits to the New EPA Burden-Shifting Mechanism

While the proposed EPA burden shifting scheme would prove to be effective in professional sports, it is not without faults. This new mechanism might provide a perverse incentive to single employers in the professional sports industry, such as the USSF, to create a new corporation that oversees the employment of one of its gendered teams. In essence, if a single employer knows that it could be subjected to a more flexible EPA standard, it might want to create a different structure for its teams, where different employers oversee the different teams. However, while a possibility, this is likely to be a far-fetched reality for many single employers, as their operational revenue is much higher with both teams under their umbrella.[226]

IN THE SUPREME COURT 50, 51 (2019) (as a fourth step in the rule of reason analysis, "the court balances the restraint's anticompetitive and procompetitive effects").

[224] *See Law*, 134 F.3d at 1019.

[225] *See* Carrier, *supra* note 223, at 51.

[226] *See* Kelly, *supra* note 138 (explaining that in 2015 "women's games generated $1.9 million more [in revenue to the USSF] than the men's games").

Additionally, this mechanism might be seen as too plaintiff-friendly since not every single employer is going to have the opportunity to mischaracterize the market in this fashion. One might argue that, under the EPA, congress did not require courts to balance the equities of a compensation structure and only required that wage discrepancies not be based on the sex of the employees.[227] Under this argument, one might say that since professional sports teams benefit from being separated by gender, the USSF is not discriminating based on the sex of the employees and should not be subjected to a higher standard.[228] However, based on the persistent wage gap in professional sports, the fact that the teams are intentionally kept separate is not a sufficient justification for the discrepancies in wages between the teams. Because a professional sports employer can so easily mischaracterize or influence the market that supports its legitimate business justifications, courts must be more discerning when evaluating these justifications in order to avoid disparate effects based on gender.

Lastly, it could be argued that the antitrust rule of reason burden-shifting scheme was developed for the specific aspects of antitrust law and should not be applied to the EPA. On this view, one might say that the concept of less restrictive alternatives has no place within the determination of wages since, ultimately, it is up to the employer and the union to collectively bargain for the team's compensation structure. Arguably, if the teams wanted to create a different compensation structure, they could have collectively bargained for it.[229] However, this argument is unavailing since, as the USWNT contends, the USSF allegedly rejected proposed arrangements that would have put the teams on equal footing with regards to their compensation.[230] Although there are weaknesses to this note's proposed approach, the benefits of using antitrust law's rule of reason burden-shifting test overwhelmingly support its adoption for claimants that allege gendered wage disparities in the professional sports context.

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[227] Congress ended the EPA analysis with an employer's ability to assert enumerated defenses, rather than a balancing test. *See* 29 U.S.C. § 206(d)(1).

[228] *See, e.g.*, Elad De Piccioto, *Should Women Compete Against Men in Sports?*, PERSPECTIVE (2020), https://www.theperspective.com/debates/living/women-compete-men-sports/ [https://perma.cc/G3FN-T67J] (mixing gendered teams "would reduce the uncertainty of outcomes and potentially change the nature of the games the world has [] come to know and love").

[229] *See* Morgan et al. v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635, 655 (emphasizing that the differences in wages between the USWNT and the USMNT were collectively bargained by both teams and comparing the differences in compensation between the teams "fails to account for the choices made during collective bargaining").

[230] *See* USWNT Complaint, *supra* note 8, at 12.

CONCLUSION

Despite that it is the best women's soccer team in the world,[231] the USWNT has struggled to reach the top of the notoriously profitable sports compensation hierarchy. The team is in a unique position in that its market successes, business strategies and compensation structures are ultimately controlled by the same employer that operates and favors its male counterpart. This structure has created disparate effects for the women's team and, if analyzed under the traditional EPA analysis, it will continue to perpetuate "ancient but outmoded belief[s]"[232] that our country attempted to abandon a century ago when enacting the EPA. In order to properly address pay issues in professional sports when a single employer operates gendered teams, courts must not only adopt the narrow approach to interpreting the EPA's "factor other than sex" articulated by the Tenth Circuit,[233] but must also look to other bodies of law in handling issues within this nontraditional industry. If courts were to approach the EPA with a sports-specific mentality, they could help female athletes climb to a higher rung on the professional ladder. However, without a sports-specific EPA analysis, women might continue to score more goals and win more games, but the playing field will still remain uneven.

Melissa C. Felcher[†]

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[231] *Id.* at 7; *see Women's Rankings*, *supra* note 5 (ranking the USWNT as the top team in the world as of December, 2020).

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

[233] *See* Riser v. QEP Energy, 776 F.3d 1191, 1198 (10th Cir. 2015) (an employer can only assert a factor other than sex that is legitimately based upon business-related factors such as "differences in work responsibilities and qualifications" (quoting Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 525 (2d Cir. 1992))).

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