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Limitations of the Equal Pay Act and its Blocks on the United States Women's National Soccer Team's Pay Discrimination Claim

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I. Introduction

Hard work, dedication, and perseverance won the United States Women's National Soccer Team (USWNT) global recognition for their record breaking wins.[1] The team holds four Fédération Internationale de Football Association (FIFA) World Cup titles, but faces a tougher game against the United States Soccer Federation (USSF) in the United States District Court Central District of California Western Division.[2]

In March 2019, the USWNT filed a sex discrimination suit against the United States Soccer Federation in *Morgan et al. v. United States Soccer Federation*.[3] The women's team alleges that despite its superior performance to the United States Men's National Soccer Team (USMNT), their pay amounts to only half what male players earn.[4] The USWNT has filed a claim under Title VII of the Civil Rights Act of 1964,[5] and the Equal Pay Act (EPA or the Act).[6]

In its class action lawsuit under the EPA, the USWNT asserts differences in playing, training and travel conditions, promotion of their games, and support and development.[7] The EPA requires that men and women doing substantially equal jobs are to be paid at the same rate.[8] The Act offers four affirmative defenses available to defendants.[9] In opposition, the United States Soccer Federation asserts the third defense under the Act, a system which measures earnings by quantity or quality of production, and the fourth defense, a differential based on any

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[1] *See* Andrew Das, *Pay Disparity in U.S. Soccer? It's Complicated*, N.Y. TIMES (April 21, 2016), https://www.nytimes.com/2016/04/22/sports/soccer/usmnt-uswnt-soccer-equal-pay.html.
[2] *See id.*
[3] *See* Compl. at 1:8-9, *Morgan v. United States Soccer Federation Inc.*, No. 2:19-CV-01717 (C.D. Cal. March 8, 2019).
[4] *See id.*
[5] Title VII and the USWNT's claims under the provision will not be addressed in this essay; *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) (1962).
[6] *See* Compl. at 2:5-7; *see also* Equal Pay Act of 1963, 29 U.S.C. §206(d) (1963).
[7] *See id.* at 2:12-13.
[8] *See* Fair Labor Standards Act, 29 U.S.C. §206(d)(1) (1963).
[9] *See id.*

other factor other than sex, in its Answer to the Complaint.[10] The fourth defense, any factor other sex, is overly broad in that it permits the Federation to assert any justification for the disparate pay rate, besides the sex of the players.[11] The wide ranging nature of this defense makes it nearly impossible for the USWNT to bring a claim under the EPA.[12]

The USWNT has been fighting for equal pay since 2005.[13] At that time, the women's team and the Federation were engaged in a collective bargaining agreement (CBA), which outlined the terms of the USWNT's pay rate.[14] Prior to the termination of the 2005 CBA, the USSF and the USWNT agreed to a Memorandum of Understanding (MOU) that included a "no strike, no lockout" provision, which applied during negotiations for the subsequent CBA.[15] This clause restricted the USWNT from refusing to play in any games or appear for any scheduled appearances.[16] Ultimately, in March 2016, three years prior to filing the current suit, the women's team filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging violations for unequal pay as compared to the men's team.[17] The EEOC began an investigation into the USSF.[18] While the investigation was pending, the USWNT was also unable to strike or hold out against the USSF as per the "no strike, no lockout" provision.[19] In order to reach some form of agreement for compensation while the EEOC investigation was pending, the women's team and the Federation struck a collective bargaining agreement in April 2017.[20]

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[10] *See* Answer to Compl. at 17:2-5, *Morgan v. United States Soccer Federation Inc.*, No. 2:19-CV-01717 (C.D.Cal. March 8, 2019).
[11] *See* 29 U.S.C. § 206(d)(1).
[12] *See generally* Sabrina L. Brown, *Negotiating Around the Equal Pay Act: Use of the "Factor Other than Sex" Defense to Escape Liability*, 78 OHIO ST. L. J. 471, 484 (2017).
[13] *See* Patrick C. Coyne, *A Huge Win for Equal Pay: Women's National Teams Grab their Biggest Victories yet in Recent Contract Dispute*, 25 JEFFREY S. MOORAD SPORTS L. J. 315, 236 (2018).
[14] *See id.*
[15] *See id.* at 329.
[16] *See generally id.*
[17] *See id.* at 330.
[18] *See id.*
[19] *See id.*
[20] *See id.* at 331.

As a result of the courts narrow interpretation of the "same establishment" requirement and "factor other than sex" defense included in the EPA, the USWNT was unable to negotiate for equal pay in its collective bargaining agreement.[21] Even though the USWNT filed suit under the Equal Pay Act, it faces two major barriers in bringing suit against the Federation.[22] First, the women's soccer team will need to prove that it is employed by the same establishment as the men's soccer team, which is paid more for substantially equal work.[23] Second, the USWNT will need to argue against the narrow "factor other than sex" defense.[24] At the time of the 2017 CBA, the possibility of facing these challenges in a court case made it nearly impossible for the USWNT to bring an EPA claim, therefore they entered into the 2017 CBA to earn some form of payment.[25] The "same establishment" requirement and "factor other than sex" defense make the EPA too restrictive for plaintiffs to seek protection under the Act.

In 2017, the year the women's team entered into the most recent CBA with the USSF, 201 Equal Employment Opportunity Commission enforcement suits were filed in the federal district courts.[26] Of the 201 suits filed only eleven involved claims under the Equal Pay Act.[27] The limited number of suits filed under the EPA is evidence that the Act is too restrictive to provide protection for plaintiffs.[28] This trend was still true in 2019, when the women's team filed suit against the Federation under the Equal Pay Act.[29] In 2019, 157 EEOC enforcement suits

[21] *See generally id.*; *see also* 29 U.S.C. § 206(d)(1).
[22] *See* Compl. at 1:8-9.
[23] *See* 29 U.S.C. § 206(d)(1).
[24] *See id.*
[25] *See* Coyne, *supra* note 13, at 331.
[26] *See EEOC Litigation Statistics FY 1997 through FY 2019*, U.S. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm#fn1 (last visited Mar. 30, 2020).
[27] *See id.*
[28] *See id.*
[29] *See id.*

were filed in the federal district courts, whereby only seven included EPA claims.[30] The Equal Pay Act is interpreted too narrowly to adequately protect plaintiffs in all industries.

This essay argues that the "same establishment" requirement and "factor other than sex" defense render the Equal Pay Act too restrictive to provide sufficient protection for plaintiffs. This paper uses the litigation filings in *Morgan et al. v. United States Soccer Federation* to illustrate the challenges plaintiffs face when bringing an EPA claim. Due to the private ownership of sports teams, it is most difficult for a plaintiff in the professional sports industry to establish an Equal Pay Act claim.[31] The "same establishment" requirement and the "factor other than sex" defense should be eliminated from the Equal Pay Act, to adequately protect plaintiffs suffering from a disparate pay rate. Since these changes will benefit professional athletes in the industry where it is most difficult to establish an EPA claim, they will also benefit plaintiffs in all industries.

A comprehensive analysis of the limitations of the Equal Pay Act and its effect on the USWNT's suit begins in Part II. That section discusses the enactment and application of the Act. The history of the EPA and its application in federal district courts is necessary to discuss in order to explain how the restrictions in the Act fail to protect all plaintiffs. Part III uses the Complaint and Answer to Complaint from the *Morgan* case to illustrate how the Equal Pay Act is applied by the parties in the case.[32] Analyzing the application of the Act in the *Morgan* case provides a present example of the challenges plaintiffs must overcome due to the limiting requirements in the Equal Pay Act.[33] In Part IV, this essay suggests that eliminating the "same

[30] *See id.*
[31] *See* Nicole Zerunyan, *Time's Up: Addressing Gender-Based Wage Discrimination in Professional Sports*, 38 LOY. L.A. ENT. L. REV. 229, 250 (2018).
[32] *See generally* Compl.; *See also* Answer to Compl.
[33] *See Morgan v. United States Soccer Federation Inc.*, No. 2:19-CV-01717 (C.D.Cal. March 8, 2019).

establishment" requirement and the "factor other than sex" defense will broaden the Equal Pay Act in a manner that will adequately protect all plaintiffs. Part V concludes with a discussion of how these changes will positively impact plaintiffs in all industries and contribute to the scholarly discussion on Equal Pay Act reform.

II. History of the Equal Pay Act and Its Application

In order to understand how the EPA hinders plaintiff's ability to prevail on their claims, it is necessary to briefly discuss the Act's history and the reasons for its enactment. This Part describes the legislative history of the Equal Pay Act and its goals. It then analyzes the elements of an EPA claim. To fully explain the restrictions of the EPA, it is necessary to discuss the federal courts narrow interpretation and application of each element in prior cases. This Part flows chronologically from the enactment of the EPA to its application in federal courts today.

A. Enactment of the Equal Pay

In 1945, the first equal pay bill was introduced in Congress.[34] The bill was based upon the success of the War Labor Board's general order which called for equal pay rates for comparable equality and quantity of work.[35] The proposal made in 1945 did not pass in Congress.[36] No other similar proposal was deemed favorable until 1963.[37]

Preparation for the 1963 Equal Pay Act began two years prior in 1961.[38] President John F. Kennedy established a Presidential Committee to support the idea of equal pay for comparable work.[39] This standard would have allowed equal pay for jobs that had enough like characteristics

[34] *See Equal Pay Act: Hearing on S. 1178 Before the S. Comm. on Educ. and Labor*, 79th Cong. 1 (1945).
[35] *See* Albert H. Ross & Frank V. McDermott Jr, *The Equal Pay Act of 1963: A Decade of Enforcement*, 16 B.C. L. REV. 1, 4 (1974) (discussing the background and legislative history of the EPA).
[36] *See id.*
[37] *See id.*
[38] *See id.*
[39] *See id.*

or qualities that a comparison of the two would have been appropriate.[40] Following hearings conducted by the House Committee on Education and Labor in 1962, an amendment was passed in the House of Representatives that required "equal pay for equal work."[41] The sponsor of this amendment specifically omitted the word "comparable," recognizing the latitude for equal pay that the word would have provided.[42] Nevertheless, lawmakers agreed that "equal pay for equal work" struck a fair compromise between both sides of the equal pay debate.[43] This amendment made equal pay legislation possible.[44]

On June 19, 1963 President Kennedy signed equal pay protection into law through amendment to § 206(d) of the Fair Labor Standard Act.[45] The structure of the Equal Pay Act as an amendment to the existing Fair Labor Standards Act served two purposes.[46] First, the amendment eliminated the need for a new bureaucratic structure.[47] It additionally facilitated compliance with the Act.[48] The purpose of the Act, as articulated by President Kennedy, was to increase the number of women in the work force and address the issue of women being paid wages less than men.[49] Since its enactment, federal courts have been interpreting and applying the elements of the Equal Pay Act more narrowly against plaintiffs.[50]

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[40] *See id.*
[41] *See id.* at 29.
[42] *See id.*
[43] *See id.* at 4.
[44] *See id.*
[45] *See* Donald Elisburg, *Equal Pay in the United States: The Development and Implementation of the Equal Pay Act of 1963*, 29 LAB. L. J. 195, 199 (1978); *See also* Fair Pay Act, 19 U.S.C. § 206(d)(1) (1963).
[46] *See* H.R. REP. NO. 309, 88th Cong., 1st Sess., *reprinted in* [1963] U.S. CODE CONG. & AD. NEWS 687, 688.
[47] *See id.*
[48] *See id.*
[49] *See* Ross, *supra* note 36, at 4.
[50] *See generally* Shultz v. Wheaton Glass Co., 421 F.2d 259 (3rd Cir. 1970).

B. Elements of an Equal Pay Act Claim

(1) Equal Pay: Wages

In 1970, seven years after the enactment of the EPA, the Third Circuit decided one of the earliest Equal Pay Act cases, *Shultz v. Wheaton Glass Co.*[51] In that case, the Secretary of Labor brought an action against Wheaton Glass Co., claiming that it discriminated against its "female selector-packers" by paying them at a rate which was ten percent less than the rate paid to "male selector-packers."[52] In opposition, the company denied that female selector-packers performed equal work as compared to male selector-packers.[53] In the lower court, judgment was entered in favor of the defendant, holding that the Secretary failed to meet the burden of proving that the disparate pay rate was based on sex and that there were no other factors other than sex establishing a reason for the disparate pay rate.[54] The Third Circuit overturned the district court's decision.[55] It held that the Secretary met the burden of proof by demonstrating that male selector-packers received a pay rate ten percent higher than female selector-packers and that both sexes performed equal work.[56]

In rendering its judgment, the Third Circuit noted that Congress did not require that the jobs be identical, but that they be substantially equal.[57] In the courts view, any other interpretation would be contrary to the goals of the Equal Pay Act.[58] The Court explained that the Act sought to overcome the belief that women were inferior to men and to eliminate the negative economic

[51] *See id.* at 261.
[52] *See id.*
[53] *See id.*
[54] *See id.*
[55] *See id.*
[56] *See id.* at 266.
[57] *See id.* at 265.
[58] *See id.*

effects for female workers earning reduced wages.[59] One scholar noted that the Third Circuit was instrumental in furthering the purposes of the Act in *Shultz*.[60]

The United States Supreme Court had an opportunity to apply the Equal Pay Act in 1974.[61] The Court first considered the *prima facie*[62] case under the EPA in *Corning Glass Works v. Brennan*.[63] In that case, the Court consolidated two cases against the same company and resolved conflicting rulings by the Second and Third Circuits.[64] The Secretary of Labor brought an action against Corning Glass Works in both the Second and Third Circuits claiming that the company paid its *night* inspectors, who were all male, a higher wage than its *day* inspectors, who were all female, and performed the same work.[65] The Secretary alleged that the jobs were the same, save for men performing the tasks at night and women performing the tasks during the day.[66]

The Second Circuit found that the company's pay structure was in violation of the Equal Pay Act.[67] It relied on a statement from the House Committee Report which noted that shift differentials would be excluded as a factor other than sex.[68] Since the only difference was thus the employee's sex, the Second Circuit found an equal pay violation.[69]

On the other hand, the Third Circuit found that there was no equal pay violation for compensating *night* shift workers more than *day* shift workers.[70] The Third Circuit relied on a

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[59] *See id.*
[60] *See* Brown, *supra* note 12, at 479-80.
[61] *See generally* Corning Glass Works v. Brennan, 417 U.S. 188 (1974).
[62] "A litigating party is said to have a prima facie case when the evidence in his favor is sufficiently strong for his opponent to be called on to answer it. A prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced on the other side." *See Prima facie*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[63] *See generally Corning Glass Works*, 417 U.S. at 195.
[64] *See id.* at 191.
[65] *See id.* at 192.
[66] *See id.* at 208.
[67] *See id.* at 198.
[68] *See id.*
[69] *See generally id.*
[70] *See id.*

statement from the sponsor of the bill explaining that differences in shift would fall within the difference in working condition factor of the Equal Pay Act.[71] Thus, the Third Circuit found that since men and women worked different shifts, men at *night* and women during the *day*, there was no violation in paying *night* shift workers at a higher rate.[72] The Third Circuit's holding in this case indicates a shift toward a narrower interpretation of the Act, than the court applied in *Shultz*.[73]

Nevertheless, the Supreme Court agreed with the broad interpretation applied by the Second Circuit in finding that since the job of *night* shift workers was substantially equal to that of the *day* shift workers, the *day* shift workers were entitled to the substantially higher rate paid to *night* shift workers.[74] The Supreme Court reiterated that this finding was consistent with the Congressional intent of the EPA and furthered the goals of the Act.[75]

In 1988, the Sixth Circuit shifted from a broad interpretation of the Act, which furthered Congress's goal of paying women at a rate equal to the rate paid to men for equal work, to the narrower interpretation applied by federal courts today.[76] In *EEOC v. J.C. Penney Co.*, the Equal Employment Opportunity Commission challenged J.C. Penney's "head of household" provision for medical and dental insurance plans, which permitted a J.C. Penney employee to elect coverage for his or her spouse only if the spouse earned less than the employee.[77] The EEOC argued that the provision had a disparate impact on female employees.[78] The Court held that

[71] *See id.*
[72] *See id.*
[73] *See id.; Contra Shultz*, 421 F.2d at 266 (finding that male and female selector-packers performed equal work).
[74] *See id.* at 208.
[75] *See id.* at 207.
[76] *See generally* EEOC v. J.C. Penney Co., 843 F.2d 249 (6th Cir. 1988).
[77] *See id.* at 250.
[78] *See id.* at 251.

while the provision did have a disparate impact on women, being the head of the household was a "factor other than sex" sufficient to permit a difference in compensation of benefits.[79]

The *Shultz* and *Corning Glass Works* cases indicate the courts' willingness to interpret the Equal Pay Act in a manner that furthers Congress's goals of making women equivalent to men and eliminating the negative effects of lower wages for women.[80] Conversely, the *J.C. Penney* case is representative of the narrow reading of the Equal Pay Act applied by the federal courts today.[81] This reading is so limited that it is nearly impossible for plaintiffs to satisfy the elements of the Equal Pay Act.[82]

While the courts narrow interpretation of the Equal Pay Act makes it more difficult for plaintiffs to successfully establish a *prima facie* case, plaintiffs must allege facts to satisfy each element of the Act.[83] Plaintiffs must show that an employer pays different wages to employees of opposite sexes for equal work on jobs requiring equal skill, effort, and responsibility, and which are performed under similar working conditions.[84] When evaluating whether two jobs are sufficiently similar to warrant equal pay, the courts employ a substantially equal standard.[85]

(2) Substantially Equal Standard

Courts use the substantially equal standard to determine the degree of job similarity required.[86] Job titles or classifications alone are not sufficient to establish job similarity.[87] Rather,

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[79] *See id.*
[80] *See generally* Brown, *supra* note 12, at 481.
[81] *See id.*
[82] *See id.*
[83] *See id.*
[84] *See* 29 U.S.C. §206(d)(1).
[85] *See* Peter Avery, *The Diluted Equal Pay Act: How Was it Broken? How Can it Be Fixed?*, 56 RUTGERS L. REV. 849, 858 (2004).
[86] *See id.*
[87] *See* EEOC v. Port Auth. of N.Y. & N.J., 768 F.3d 247, 255 (2nd Cir. 2014); *see also* Lavin-McEleney v. Marist Coll., 239 F.3d 476, 480 (2d Cir. 2001) (stating that the standard is not whether the plaintiffs job is identical to a higher-paid position, but that the jobs compared must be substantially equal).

whether two jobs are substantially equal is based on the content of the job and the jobs having the same common tasks.[88]

In *EEOC v. Port Authority of N.Y. & N.J.*, the Court of Appeals for the Second Circuit considered allegations by the Equal Employment Opportunity Commission that the Port Authority had a practice of paying non-supervisory female attorneys at rates lower than the rates paid to male employees for substantially equal work.[89] The EEOC supported its Complaint by claiming that attorneys of both sexes served the same client, had the same job descriptions, and demanded the same degree of professional demeanor.[90] The EEOC's Complaint generally claimed that all of the non-supervisory attorney jobs in the Port Authority's law department are substantially equal.[91] Despite asserting identical evaluative criteria, such as "'project management,' 'communication,' 'flexibility and adaptability,' and 'attendance,'" the Court found that these comparisons failed to address whether the attorneys faced the same level of workplace demands.[92] Without a finding regarding the level of workplace demand, the Court determined that the evidence was insufficient to establish that the jobs were substantially equal.[93] In its holding, the Second Circuit reiterated that job codes are not indicative of the duties performed.[94] The Court held that the EEOC's responses were insufficient to support a finding that the attorneys work was substantially equal.[95]

When the Court considers whether two jobs are substantially equal, a significant differentiating task between the two jobs may negate the equality of the jobs.[96] It is up to the

[88] *See EEOC v. Port Auth. of N.Y. & N.J.*, 768 F.3d at 255.
[89] *See id.* at 250.
[90] *See id.*
[91] *See id.*
[92] *See id.* at 258.
[93] *See id.*
[94] *See id.*
[95] *See id.*
[96] *See* Avery, *supra* note 85, at 858.

lawyers to adequately compare substantially similar jobs and the courts to evaluate the counselor's comparisons and differentiations between the skill, effort, and responsibilities of comparators.[97]

(3) Skill

A plaintiffs job may qualify as substantially equal under the Equal Pay Act if employees have the same skills in order to perform either of the two jobs being compared.[98] In *Ambrose v. Summit Polymers, Inc.*, the Plaintiff designed molded plastic parts for automobiles as part of her job as a "designer."[99] In this role, she was expected to perform both design work and *lower-skilled* detail work.[100] However, she was assigned mostly *lower-skilled* detail work.[101] The Plaintiff brought a claim under the EPA alleging a disparate pay rate as compared to a higher paid, male designer performing substantially equal work.[102] The employer indicated that the Plaintiff performed mostly *lower-skilled* work and was therefore paid less since her work required less skill.[103] The Court considered whether the Plaintiff's performance required equal skill, effort, and responsibility in comparison to the performance of the male designer's job.[104] In finding that the jobs required an equivalent level of skill, the Court disregarded the employer's argument that the Plaintiff performed mostly *lower-skilled* work.[105] The court concluded that the Plaintiff's job required performance of both higher-skilled and lower-skilled tasks.[106] Even

[97] *See* Kimberly J. Houghton, *Equal Pay Act of 1963: Where did we go wrong?*, 15 LAB. L. 155, 173 (1999).
[98] *See* 29 C.F.R. § 1620.15(a)
[99] *See Ambrose v. Summit Polymers, Inc.*, No. 05-1048, 2006 U.S. App. LEXIS 7911, at *2 (6th Cir. Mar. 24, 2006).
[100] *See id.* at *3.
[101] *See id.* at *2.
[102] *See id.* at *4.
[103] *See id.* at *7.
[104] *See id.* at *9.
[105] *See id.* at *1.
[106] *See id.* at *2.

though she was assigned more of the *lower-skilled* work, it did not render her work unequal to the male designers' performance.[107]

(4) Effort

Under the substantially equal standard, the element of effort refers to the level of mental and physical exertion required for the jobs being compared.[108] If there are substantial differences in the degree of effort required to perform the jobs, the equal pay standard cannot apply even if the jobs are equal in all other respects.[109]

The issue of whether two teaching positions required the same level of effort was presented to the Seventh Circuit in *Cullen v. Ind. Univ. Bd. of Trs.*[110] Plaintiff, Director of the Respiratory Therapy Program, alleged a disparate pay rate in violation of the Equal Pay Act as compared to the male Program Director for Physical Therapy.[111] In regards to effort, the Plaintiff alleged that she had to exert more effort to secure outside funding to supplement her department's resources, which was an effort her comparator did not make.[112] The employer countered that the difference in pay was due in part to the fact that the comparator was required to create Master's and Doctoral courses of study for the Physical Therapy program.[113] While the Court admitted that a consideration of the Plaintiff's effort decreased the disparity between the effort required by the two positions, the effort to create Master's and Doctoral courses of study required more effort

[107] *See id.*; Despite successfully demonstrating that the Plaintiff's job required substantially equal skill to the male designers' work, the Court still found that the disparate pay rate was not based on sex and granted the employer's summary judgment motion.
[108] *See* 29 C.F.R. § 1620.16(a).
[109] *See id.*
[110] *See generally* Cullen v. Ind. Bd. of Trs., 338 F.3d 693 (7th Cir. 2003).
[111] *See id.* at 696.
[112] *See id.* at 699.
[113] *See id.*

than the plaintiff exerted in securing outside funding.[114] Even though the plaintiff exerted effort in ways her comparator did not, the Court still found in favor of the employer.[115]

The Court also ignored a study conducted by the University which indicated a significant pay gap between its male and female faculty members.[116] An ad hoc review committee, established to consider the issues raised by the study, strongly recommended that the Plaintiff's pay be increased to rectify the pay disparity between male and female employees.[117] Despite this evidence in support of plaintiffs Equal Pay Act claim, a narrow application of the Equal Pay Act still hindered her ability to prove that her job constituted substantially equal skill, effort, and responsibility.[118] In addition to alleging that a plaintiffs job is substantially equal in effort, the jobs must also be substantially equal in level of responsibility.[119]

(5) Responsibility

The Court's determination as to whether the jobs have substantially equal responsibility turns on the degree of accountability required in the performance of the jobs and the importance of the job obligation.[120] Higher levels of responsibility may be based on supervisory duties or minor authority not entrusted to other employees in the same position.[121]

In *Gunther v. Co. of Washington* the Ninth Circuit found that the jobs of male and female prison guards did not constitute the same level of responsibility.[122] The female Plaintiffs guarded inmates in the female section of the county jail, while males, who were paid at a higher

[114] *See id.*
[115] *See id.*
[116] *See id.* at 697.
[117] *See id.*
[118] *See id.* at 698.
[119] *See* 29 C.F.R. § 1620.17(a).
[120] *See id.*
[121] *See generally* 29 C.F.R. §1620.17(b).
[122] *See* Gunther v. Co. of Washington, 623 F.2d 1303, 1309 (9th Cir. 1979).

rate, guarded inmates in the male section of the county jail.[123] Plaintiffs brought suit alleging that they were denied equal pay for equal work in violation of the Equal Pay Act.[124] The Court considered the fact that male guards were responsible for more inmates than the female guards and the female guards performed more clerical duties.[125] Plaintiffs argued that these differences are insignificant and do not justify the disparate pay rate.[126] The Court disagreed with Plaintiff's argument, finding that the male guards were given significantly greater responsibility because of the higher number of prisoners each guard was responsible for.[127] The Court found that the jobs of the female guards was not substantially equal to that of the male guards, for they did not require the same level of responsibility.[128]

The Plaintiffs in *Gunther* were unsuccessful in demonstrating that their jobs required substantially equal responsibility, just as the Plaintiffs in each of the above mentioned cases struggled to satisfy some element of the *prima facie* case of the restrictive Equal Pay Act.[129] In cases where a plaintiff asserts sufficient evidence to meet the *prima facie* case, they must also prove that the work they perform is for the same establishment as the work performed by the employee whom is paid higher for substantially equal work.[130]

As demonstrated by the case law in this area, it is difficult for a plaintiff to prove that their job requires substantially equal skill, effort, and responsibility to the job of a member of the opposite sex who is paid more.[131] In addition to overcoming the challenge of establishing that a

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[123] *See id.* at 1307.
[124] *See id.*
[125] *See id.* 1310.
[126] *See id.*
[127] *See id.*
[128] *See id.* at 1309.
[129] *See generally id.*
[130] *See* 29 U.S.C. § 206(d)(1).
[131] *See generally Ambrose*, No. 05-1048, 2006 U.S. App. LEXIS 7911, at *2; *Cullen*, 338 F.3d at 699; *Gunther*, 623 F.2d at 1309.

Plaintiff's job is substantially equal, plaintiffs must also prove that they work for the same establishment as a member of the opposite sex who is paid more for substantially equal work.[132]

(6) Same Establishment

For plaintiffs to be successful in claims under the Equal Pay Act they must prove each element of the *prima facie* case discussed in subheadings one through four.[133] To this effect, plaintiffs must prove that the employer pays a member of the opposite sex for a job that is substantially equal in effort, skill, and responsibility to the job performed by the plaintiff.[134] In addition to satisfying all of these elements, a plaintiff must demonstrate that they work for the "same establishment" as the employee being paid more for substantially equal work.[135]

In reference to the Equal Pay Act, same establishment refers to a distinct physical place of business, not the entire business enterprise.[136] The entire organization may operate out of different physical locations.[137] Each separate physical place of business is considered a separate establishment under the EPA.[138] In unusual circumstances two or more business locations may be considered as one entity.[139] Unusual circumstances, such as where there is centralized control over the business, may constitute one establishment.[140] Centralized control includes a common administrative body which conducts hiring, sets wages, and assigns work locations to employees.[141] Centralization may also include employees frequently changing work locations and having daily duties virtually identical to the duties performed by employees at a different

[132] *See* 29 U.S.C. § 206(d)(1).
[133] *See id*.
[134] *See id*.
[135] *See id*.
[136] *See* 29 C.F.R. § 1620.9(a).
[137] *See id*.
[138] *See id*.
[139] *See* 29 C.F.R. § 1620.9(b).
[140] *See id*.
[141] *See id*.

location under similar working conditions.[142] Except for these unusual circumstances, the term "establishment" is used to describe one physical location of the business.[143]

The Supreme Court found one of the unusual circumstances where more than one location of a business constitutes the "same establishment" in *Brennan v. Goose Creek Consol. Independent School Dist.*[144] In that case, the Secretary of Labor filed suit against the Goose Creek Consolidated Independent School District for paying its female janitors less than it paid its male janitors.[145] The school district was comprised of thirteen different schools.[146] Thus, the school district argued, in part, that the Secretary could not properly file an Equal Pay Act claim because the schools should not be treated as the "same establishment."[147] The Court found that "[c]entral control and administration of disparate job sites can support a finding of a single establishment for purposes of the EPA."[148]

While all of the schools in a district constituted the same establishment in *Goose Creek*, this case is an example of one of the few unusual circumstances where multiple physical locations constitute one establishment.[149] This exception is reserved for only a few "unusual circumstances" and is not the usual finding by the Courts.[150]

In fact, in *Renstrom v. Nash Finch Co.*, the United States District Court for the District of Minnesota made a contrary finding.[151] In that case, the Plaintiff alleged that she was paid less than two other head grocery buyers, whom were male, and performed equal work at different

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[142] *See id.*
[143] *See id.*
[144] *See* Brennan v. Goose Creek Consol. Independent School Dist., 519 F.2d 53, 56 (5th Cir. 1975).
[145] *See id.* at 55.
[146] *See id.* at 54.
[147] *See id.* at 56.
[148] *See id.*
[149] *See id.*
[150] *See* Renstrom v. Nash Finch Co., 787 F.Supp. 2d 961, 965 (D. Minn. 2011).
[151] *See id.* at 966.

distribution centers than the one she worked at.[152] The Plaintiff argued that all of the distribution centers constituted the "same establishment" because the Vice President for food distribution for the Midwest region had ultimate authority over all head grocery buyers and other employees at the distribution centers.[153] She claimed his authority overrode the decisions of division managers and that the businesses corporate office created a single job description for all head grocery buyers in the company.[154] The Plaintiff alleged that this type of central control fit into the type of "unusual circumstance" that warrants one enterprise.[155] The Court disagreed and found that the type of central control Plaintiff relied upon was commonplace.[156] The evidence did not demonstrate the same degree of centralized control exercised by the school district in *Goose Creek*.[157] The Court held that the business did not constitute the "same establishment."[158]

Even though there are plaintiffs, such as those in *Goose Creek*, who successfully established that the employer constituted one entity, these circumstances are unusual.[159] A finding that multiple locations are in fact one entity is not typically the finding of the courts when evaluating the "same establishment" requirement.[160] The *Renstrom* case more realistically illustrates the federal courts narrow interpretation of the "same establishment" requirement.[161]

The narrow application of the "same establishment" requirement is representative of the Courts interpretation of the Equal Pay Act today.[162] A reading this limited makes it nearly impossible for an employee working for a large company in any industry that operates out of

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[152] *See id*. at 963.
[153] *See id*. at 965.
[154] *See id*.
[155] *See id*.
[156] *See id*.
[157] *See id*. at 966.
[158] *See id*.
[159] *See generally Goose Creek*, 519 F.2d at 56.
[160] *See generally Renstrom*, 787 F.Supp. at 965.
[161] *See id*. at 965.
[162] *See Renstrom*, 787 F. Supp. at 965.

multiple locations to prove that they are working for the "same establishment" as an employee of the opposite sex who is paid more for substantially equal work at a different location.[163]

Once a plaintiff proves the elements of its *prima facie* case under the Equal Pay Act and satisfies the "same establishment" requirement, they have another barrier under the Act.[164] The EPA provides employers with several different affirmative defenses, which make it more difficult for plaintiffs to prevail.[165] The affirmative defenses available to defendants under the Equal Pay Act can also disadvantage plaintiffs.[166]

C. Defenses Available Under the EPA

If a Plaintiff proves a disparate pay rate by establishing the *prima facie* case and satisfying the "same establishment" requirement, then the burden shifts to the employer to justify the difference in pay based on one of the Act's four defenses.[167] The fourth available defense, a differential based on any other factor other than sex, is a catchall defense, which permits employers to assert any reason other than the employees sex as an explanation for the disparate pay rate.[168] Since any "factor other than sex" is used as an affirmative defense, the employer has the burden of production and persuasion.[169] When asserting the "factor other than sex" defense, the employer must prove that the factor asserted is the reason for the disparate pay rate and that the difference in pay is not due in part to the employees sex.[170]

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[163] *See* Zerunyan, *supra* note 31, at 250.
[164] *See* 29 U.S.C. § 206(d)(1).
[165] *See* Brown, *supra* note 12, at 483.
[166] *See id.*
[167] *See* 29 U.S.C. § 206(d)(1); The Act offers four affirmative defenses for defendants: (1) a seniority system, (2) a merit system, (3) a system which measures earnings by quantity or quality of production, or (4) a differential based on any other factor other than sex. This paper focuses only on the fourth defense, a differential based on any other factor other than sex.
[168] *See id.*
[169] *See id.*
[170] *See id.*

The Seventh Circuit held in *King v. Acosta Sales* that factors such as education and experience can qualify as a factor other than sex.[171] In that case, a former business manager alleged in part that Acosta Sales paid women less than men for substantially equal work.[172] All of the men were paid higher than all of the women in the company, even though men and women performed the same jobs.[173] The company claimed that education and experience account for the disparate pay rate between male and female employees.[174] In the district court, the employer was successful in alleging that the difference in pay was due to higher levels of education and experience in male employees.[175] On appeal, the Seventh Circuit noted that the district court erred in permitting the employer to point out this difference without proving that the difference in education and experience actually accounted for the difference in pay.[176] The Court reversed summary judgment in favor of the employer, for the statute required that the employer prove that the higher levels of education and experience were actually the reasons for the disparate pay rate between men and women.[177]

Differences in experience and education are often considered acceptable factors other than sex.[178] Courts also consider "market forces" as a "factor other than sex."[179] These forces relate to the market rate for an employee of a certain experience or education level.[180] Some circuits also accept prior salary as a justifiable "factor other than sex" for the difference in pay.[181] Use of prior salary may be an acceptable factor even if it is not related to the current job nor business

[171] *See* King v. Acosta Sales & Mktg., 678 F.3d 470, 473 (2012).
[172] *See id.* at 471.
[173] *See id.* at 473.
[174] *See id.*
[175] *See id.*
[176] *See id.*
[177] *See id.*
[178] *See id.*
[179] *See* Brown, *supra* note 12, at 485.
[180] *See id.*
[181] *See id.*

related.[182] Lastly, some, but not all circuits, require the factor other than sex to relate to a legitimate business reason.[183]

One scholar noted that the Equal Pay Act lacks specificity as to what factors qualify as factors other than sex.[184] This scholar claims that due to the lack of detail in the statute, courts have applied the defense inconsistently.[185] This often leads to success for employers and makes it more difficult for employees to successfully seek equal pay protection under the Equal Pay Act.[186] Circuits adopting a broad reading of the Act claim that a broad reading of the "factor other than sex" defense is justified by the word "any" in the statute, but this interpretation permits employers to escape liability under the Equal Pay Act.[187]

The "factor other than sex" defense is interpreted to be so limiting to plaintiffs it renders the Act effectively useless as equal pay protection.[188] Even if a plaintiff is successful in proving a *prima facie* case under the Equal Pay Act, they can still be unsuccessful in their claim if the employer effectively asserts one of the four defenses under the Act.[189] The next section will illustrate how even when a plaintiff has strong evidence to support an Equal Pay Act claim, their success can still be uncertain due to the court's narrow interpretation of the "same establishment" requirement and "factor other than sex" defense.[190]

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[182] *See id.*
[183] *See id.*
[184] *See id.* at 483.
[185] *See id.*
[186] *See generally id.*
[187] *See id.* at 485.
[188] *See generally id.*
[189] *See* 29 U.S.C. § 206(d)(1).
[190] *See generally* Brown, *supra* note 12, at 483.

III. An Illustration of the Effects of the EPA on Morgan et al. v. USSF

The cases discussed in the prior section illustrate how the court's narrow application of the Equal Pay Act can make it nearly impossible for a plaintiff to be successful in a claim under the EPA.[191] This section uses the women's soccer team's case, *Morgan et al. v. USSF*, to demonstrate how even when plaintiffs have favorable facts for its side, that are seemingly more supportive for its claim than facts in prior cases, the restrictions of the Equal Pay Act can still make the outcome uncertain.[192] It discusses each element of the *prima facie* case in reference to the allegations made by the women's team in its Complaint.[193] This section discusses the United States Soccer Federation's Answer to the Complaint to illustrate how the employer can undermine the *prima facie* case and use the affirmative defenses to its advantage.[194] The United States Women's Soccer Team's case is one in which the plaintiffs would have a better chance of success due to the favorable facts for its side, however, it is still limited to the narrow requirements of the Equal Pay Act.[195]

A. Elements of the Equal Pay Act Claim

(1) Equal Pay: Wages

To demonstrate that the women's team is in fact paid less than the men's team for the same work, it needs to prove that its wages are lower.[196] Wages include: "salary, profit sharing, expense account, monthly minimum, bonus, uniform cleaning allowance, hotel accommodations, use of a company car, and gasoline allowance."[197] In its Complaint, the USWNT uses twenty

[191] *See id.*
[192] *See generally Morgan v. United States Soccer Federation Inc.*, No. 2:19-CV-01717.
[193] *See generally* Compl.
[194] *See generally* Answer to Compl. at 17:2-5.
[195] *See generally Morgan v. United States Soccer Federation Inc.*, No. 2:19-CV-01717.
[196] *See* 29 U.S.C. § 206(d)(1).
[197] *See* Zerunyan, *supra* note 31, at 243.

games as a baseline to calculate the difference in wages between its team and the men's team.[198] If each team played twenty games per year, WNT players would earn up to $99,000 or $4,950 per game, as compared to MNT players who would earn up to $263,320 or $13,166 per game.[199] At a rate of twenty games, women's team players would be paid 38% of the compensation of similarly situated men's team players.[200] In further support of its allegation, the USWNT offers two statistics from previous years to establish a difference in pay rate.[201]

From 2013-2016 USWNT players earned only $15,000 for being asked to try out for the World Cup team and making the roster.[202] In comparison, men's team players earned $55,000 in 2014 for trying out and making the World Cup team roster and USMNT players could have earned $68,750 for making the World Cup team roster in 2018.[203]

The USWNT further bolsters its argument in support of this difference by evaluating both team's performance bonuses.[204] In 2014, USMNT players were awarded performance bonuses totaling $5,375,000, even though they lost in the Round of 16.[205] The following year, in 2015, the Federation provided the women's team with only $1,725,000, even though they won the entire tournament.[206] Despite this clear difference in pay for female USWNT soccer players as compared to male USMNT soccer players, the USSF rejected requests made by the women's team in 2017 for compensation equal to that paid to men's team players.[207]

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[198] *See Compl.* at 11:9-13.
[199] *See id.*
[200] *See id.*
[201] *See id.* at 11:16-20.
[202] *See id.*
[203] *See id.*
[204] *See id.* at 11:22-24.
[205] *See id.*
[206] *See id.*
[207] *See id.* at 11:26-27.

If the women's team successfully proves that they are paid less than the men's team, they will also need to demonstrate that their work is substantially equal to that of the men's team.[208]

(2) Substantially Equal

In the women's soccer team's case, substantially equal will turn on whether the WNT and MNT's jobs require substantially equal skill, effort, and responsibility, when focusing on the actual duties performed, rather than the Women's or Men's title.[209] The USSF job requirements outlining the duties of the Plaintiffs and the MNT are:

(1) Be available for training and any games requested by the USSF
(2) Maintain high level of soccer skills and physical condition
(3) Avoid use of illegal or banned drugs and harmful substances
(4) Serve as a soccer spokesperson and promote and develop the sport of soccer in the US
(5) Grant all requests by the USSF to promote games and to participate in media interviews and sessions
(6) Participate in autograph sessions
(7) Devote reasonably necessary time to serve as players and spokesperson
(8) Comport themselves in a manner benefitting their positions as members of the WNT and MNT, spokespersons, representatives of the USSF and the sport of soccer
(9) Comply with the USSF's rules and regulations.[210]

These requirements apply equally to players on the men's and women's teams.[211] The women's team will need to establish that the duties shared by its team and the men's team require the same level of skill, effort, and responsibility.[212]

(3) Skill

Skill is measured by the job's performance requirements, such as education, training, experience, and ability.[213] The USSF requires that Plaintiffs and MNT players maintain soccer skills, physical conditioning and overall health through rigorous training routines, certain

[208] *See generally* 29 U.S.C. § 206(d)(1).
[209] *See* Zerunyan, *supra* note 31, at 244.
[210] *See* Compl. at 8:14-26.
[211] *See id.*
[212] *See* 29 U.S.C. § 206(d)(1).
[213] *See* Zerunyan, *supra* note 31, at 244-45.

nutrition, physical therapy, and other regimes.[214] Players on both teams must attend camps and practices, participate in skill development drills, and play scrimmages and other practice games.[215] In the USSF's March 9, 2020 filing, the Federation alleged that "the job of MNT player[s] requires a higher level of skill based on speed and strength than does the job of WNT player[s]."[216] In opposition, the women's team refutes this claim by arguing that the inquiry under the EPA is limited to the jobs in question and does not account for a comparison of the individuals performing the jobs.[217] Even if the USWNT successfully demonstrates that its job requires an equal level of skill as that of the men's team, it will also need to prove that it exerts the same level of effort for its job.[218]

(4) Effort

Effort refers to the level of mental and physical exertion.[219] Plaintiffs and MNT players are expected to travel nationally and internationally for games, which are the same in length, physical and mental demand, and playing environment and conditions.[220] Members of both teams are required to perform and work in games throughout the United States and globally.[221] The USWNT asserts that it actually exerts more than the men's team, but is continuously paid less.[222] Plaintiffs spend more time practicing for and playing in games, participating in training camps, traveling, and engaging in media sessions, than similarly situated men's team players.[223]

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[214] *See* Compl. at 8:27-28, 9:1-4.
[215] *See id.*
[216] *See* Def.'s Memorandum of Points and Authorities in Opposition to Pl.'s Motion for Partial Summary Judgment at 12:16-19, *Morgan v. United States Soccer Federation Inc.*, No. 2:19-CV-01717 (C.D. Cal. Mar. 8, 2019).
[217] *See* Pl.'s Opposition to Def.'s Motion for Summary Judgment at 11:16-18, *Morgan v. United States Soccer Federation Inc.*, No. 2:19-CV-01717 (C.D. Cal. Mar. 8, 2019).
[218] *See* 29 U.S.C. 206(d)(1).
[219] *See* Zerunyan, *supra* note 31, at 245.
[220] *See* Compl. at 9:6-10.
[221] *See id.*
[222] *See* Compl. at 1:8-9
[223] *See id.* at 9:18-21.

While effort is one of the factors used by the courts to determine whether the jobs are substantially equal, the court will also look at the level of responsibility for each job.[224]

(5) Responsibility

Responsibility refers to the degree of accountability required.[225] All players on the men's team and women's team must adhere to the same set of rules for the game of soccer as established by FIFA.[226] Both teams play on the same size field, with the same size ball, and have the same duration of games.[227] In the March 9, 2020 filing, the Federation alleged that the MNT gets more media attention and therefore has greater responsibility to the USSF.[228] The USWNT opposes this claim by asserting that there is no evidence to support the claim that the women's team and men's team have different responsibilities.[229]

If the women's team successfully proves that there is no merit in the Federation's argument and its jobs are in fact substantially equal, it finally will need to prove that it is employed by the "same establishment" as the men's team.[230]

(6) Same Establishment

In its Complaint, the USWNT addresses each element of the *prima facie* case under the Equal Pay Act and provides examples to support each claim, including that it is employed by the same establishment.[231] The USWNT argues that the women's team and the men's team are

[224] *See generally Gunther*, 623 F.2d at 1309.
[225] *See* 29 C.F.R. § 1620.17(a).
[226] *See* Compl. at 9:12-17.
[227] *See id.*
[228] Def.'s Memorandum of Points and Authorities in Opposition to Pl.'s Motion for Partial Summary Judgment at 13:26-28.
[229] *See* Pl.'s Opposition to Def.'s Motion for Summary Judgment at 13:15-17.
[230] *See* 29 U.S.C. §206(d)(1).
[231] *See generally* Compl. at 2:4-14.

employed by the same employer because the Federation manages and controls every aspect of the men and women's teams.[232]

The Federation challenges the USWNT's *prima facie* case under the EPA.[233] It claims that the women's team and the men's team are separate entities that do not comprise a single enterprise.[234] The USSF does admit that they employ women for the WNT and men for the MNT, but asserts that they are not part of the same establishment, because they are not employed to play for the same team.[235]

In addition to challenging the women's team's *prima facie* case and asserting that the women and men's teams are not the same establishment, the United States Soccer Federation asserts two affirmative defenses under the Equal Pay Act to defend against the USWNT's claims.[236]

B. Defenses Asserted

Even if the USWNT establishes a *prima facie* case under the Equal Pay Act, it's claim may fail if the Federation successfully asserts an affirmative defense.[237] The USSF invokes the third affirmative defense, a system which measures earnings by quantity or quality of production, and the fourth affirmative defense, any factor other than sex, in proving that the difference in pay between the women's and men's team is not a product of sex discrimination.[238]

First, the United States Soccer Federation asserts the third affirmative defense, a system which measures earnings by quantity or quality of production.[239] A difference in quantity or

[232] *See* Compl. at 6:16-18, 7:1-2.
[233] *See* Answer to Compl. at 1:18-19.
[234] *See id.*
[235] *See id.*
[236] *See id.* at 17:2-5.
[237] *See* Brown, *supra* note 12, at 483.
[238] *See* Ans. to Compl. at 17:2-5.
[239] *See id.*

quality of work is determined based on the facts, alleging more work or a higher quality of work, on a case by case basis.[240] The United States Soccer Federation argues that to qualify for the World Cup, MNT players play more games than WNT players.[241] It explains that to qualify for the Women's World Cup, the WNT plays five games in one, two-week tournament.[242] On the other hand, to qualify for the Men's World Cup, the MNT would need to play sixteen games over the course of a two year period.[243] The USSF also asserts that the MNT and WNT face different quantities and qualities of international competition.[244] It claims that since the level of competition faced by each team is different, no comparison can be made between their respective performance and compensation.[245]

Finally, the USSF invokes the Act's fourth defense, any factor other than sex.[246] The Federation further relies on the WNT 2017 CBA as a factor other than sex to explain the disparate pay rate.[247] The USSF argues that the women's team negotiated its salary differently than the men's team through its CBA.[248] Therefore, the Federation claims that as a part of the WNT's agreement it negotiated for a guaranteed salary, rather than a pay-for-play structure that the men's team's pay is based on.[249] It further argues that the MNT and WNT negotiated their CBA's at different times.[250] The USSF relies on the timing of the negotiations of the CBA's as a reason for the lag in the WNT's compensation.[251] It explains that "disparities in ticket revenue

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[240] *See* Zerunyan, *supra* note 31, at 246.
[241] *See* Das, *supra* note 1.
[242] *See id.*
[243] *See id.*
[244] *See* Ans. to Compl. at 11: 24-26.
[245] *See id.*
[246] *See id.* at 17:2-5.
[247] *See id.* at 17:5; *see also id.* at 7:21-22.
[248] *See* Honey Campbell, *Superior Play, Unequal Pay: U.S. Women's Soccer and the Pursuit for Pay Equity*, 51 U.S.F. L. REV. 545, 568 (2017).
[249] *See id.*
[250] *See id.* at 568.
[251] *See id.*

shares and per diem are the result of these different CBA cycles."[252] The USSF asserts that in 2013 when the men's team's agreement went into effect, the women's per diem was equal to the men's.[253] However, the USSF alleges that as per the men's team's agreement, financials increased from the first quad to the second quad causing the discrepancies.[254] The Soccer Federation further argues that compensation for the World Cup differs because FIFA allocates differences in pay for the winners of the women and men's tournaments.[255]

In effect, the Federation counters the women's team's suit in three ways.[256] First, it attacks the USWNT's *prima facie* case on the "same establishment" requirement.[257] Even though the USSF employs members of both teams, it claims that since it is not one establishment, the women's team does not have a basis to demand to be paid equal to the men's team.[258] If the court finds that the USWNT and the USMNT are in fact employed by the same establishment under the Federation, it asserts two defenses to justify the disparate pay rate.[259] Under the third affirmative defense, the USSF claims a difference in the number of games played and differing levels of international competition supports a difference in pay.[260] Under the fourth defense, the USSF relies on the women's team's CBA as a justification for the disparate pay rate.[261]

The *Morgan et al. v. USSF* case demonstrates that even when the facts are in the plaintiff's favor, it is still nearly impossible to succeed in a suit under the Equal Pay Act.[262] The courts narrow interpretation of the Act can still force plaintiffs to enter into unfavorable pay

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[252] *See id.*
[253] *See id.*
[254] *See id.*
[255] *See* Answer to Compl. at 11:19-22.
[256] *See id.* at 17:2-5.
[257] *See id.* at 7-21-22.
[258] *See id.*
[259] *See id.* at 17:2-5.
[260] *See* Das, *supra* note 1.
[261] *See* Campbell, *supra* note 248, at 568.
[262] *See* Brown, *supra* note 12, at 483.

structure agreements with their employers, rather than attempt to overcome the restrictive Equal Pay Act.[263]

IV. Improvements to Broaden the Equal Pay Act

The previous section served as an example of how a narrow interpretation of the elements of the Equal Pay Act can make it nearly impossible for plaintiffs to succeed in their EPA claims, even when the facts are in their favor.[264] In 2019, 157 Equal Employment Opportunity Commission enforcement suits were filed in the federal district courts.[265] Only seven of those 157 claims—4.4 percent—included a claim under the Equal Pay Act.[266] The "same establishment" requirement and the "factor other than sex" defense of the Equal Pay Act are so limiting for plaintiffs that they choose to bring their claims under a different statute.[267] In the same year, 2019, eighty-seven of the 157 EEOC enforcement suits filed involved a Title VII claim.[268] These statistics demonstrate that plaintiffs are less likely to bring claims under the narrow Equal Pay Act.[269] Filing equal pay claims under a statute other than the Equal Pay Act undercuts the goals of the Act to pay women at the same rate as men.[270] Other statutes have also proven inadequate to eliminate the problem of a disparate pay rate, since plaintiffs are still suffering from a disparate pay rate today.[271] The Equal Pay Act should be rewritten, so that courts may interpret the Act in a manner which adequately protects plaintiffs suffering from a disparate pay rate and achieves equal pay between both sexes.

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[263] *See* Das, *supra* note 1.
[264] *See generally* Compl.
[265] *See EEOC Litigation Statistics FY 1997 through FY 2019*.
[266] *See id.*
[267] *See generally id.*
[268] *See id.*
[269] *See generally id.*
[270] *See* Ross & McDermott, *supra* note 36, at 4.
[271] *See* Avery, *supra* note 87, at 849.

Reforms to the Equal Pay Act are necessary to broaden the federal courts interpretation of the Act, so that plaintiffs suffering from a disparate pay rate may successfully seek protection under the EPA. This section proposes that Congress eliminate the "same establishment" requirement under the Equal Pay Act by rewriting the statute in a way that mirrors the language in the California Fair Pay Act (CFPA).[272] Additionally, Congress should enact the federal Fair Pay Act of 1999 (FPA) which has been introduced twenty times to eliminate the broad "factor other than sex" defense.[273] Arguably scholars will challenge that these changes are unnecessary.[274] This section concludes by discussing why these counterarguments are insufficient to rebut the proposed changes.

A. California Fair Pay Act

While the federal Equal Pay Act applies in all states, some states, including California, have enacted their own equal pay laws.[275] The California Fair Pay Act of 1949 was similar to the federal Equal Pay Act and purported that

> [n]o employer shall pay any individual in the employer's employ at wage rates less than the rates paid to employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.[276]

[272] *See generally* California Fair Pay Act, Cal. S.B. 358 (2016).
[273] *See generally* Fair Pay Act of 1999, S. 702, 106th Cong. (1999); Fair Pay Act of 1999, H.R. 1271, 106th Cong. (1999).
[274] *See generally* Zerunyan, *supra* note 31 at 250; *see also* Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581, 645 (2018).
[275] *See generally* Cal. S.B. 358.
[276] *See* California Fair Pay Act, Cal. Labor Code §1197.5 (LEXIS 1949).

In 2016, California amended the California Fair Pay Act of 1949 to eliminate the "same establishment" requirement.[277] California's new statute provides, "an employer shall not pay any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions."[278] Under the CFPA employees must be paid equally for doing substantially similar work, even if they work in different establishments.[279] By eliminating the geographical factor from the court's interpretation of the "same establishment" requirement, the California Fair Pay Act makes it easier for plaintiffs to assert equal pay claims.[280] Eliminating the "same establishment" requirement broadened the California Fair Pay Act by permitting plaintiffs to sue their employers for equal pay for substantially equal work, even if they do not work at the same location as their opposite sex counterpart.[281]

Congress can include California Fair Pay Act's elimination of the "same establishment" requirement in its federal Equal Pay Act legislation.[282] Plaintiffs can enjoy similar success under the federal Equal Pay Act if Congress eliminates the "same establishment" requirement.[283]

B. Fair Pay Act 1999

The Fair Pay Act would similarly serve plaintiffs suffering from a disparate pay rate by broadening the federal courts interpretation of the Equal Pay Act. The FPA was introduced in both the House and the Senate in March 1999 in an effort to amend the Equal Pay Act to prohibit wage discrimination on the basis of sex, race, national origin, and other purposes.[284] The Fair

[277] *See id.* Cal. S.B. 358.
[278] *See id.*
[279] *See id.*
[280] *See* Zerunyan, *supra* note 31, at 254.
[281] *See id.*
[282] *See generally* Cal. S.B. 358 (2016).
[283] *See id.*
[284] *See* Houghton, *supra* note 97, at 173.

Pay Act would expand protection against wage discrimination for work on *equivalent* jobs.[285] *Equivalent* jobs are those whose duties require skill, effort, responsibility, and working conditions that are equivalent in value, even if the jobs are dissimilar.[286] The Fair Pay Act would also eliminate the fourth and broadest defense under the EPA which permits wage differentiation based on any "factor other than sex."[287]

Since the bill was introduced, no action has been taken to pass the measure.[288] It was introduced in the House on March 24, 1999 and referred to the House Committee on Education.[289] While no action has been taken to move the bill beyond the introductory stage, it has been introduced every subsequent year, most recently on April 2, 2019.[290] Presentation of the bill for the past twenty years demonstrates Congress's persistent recognition of the problems with the EPA and the need for revisions to adequately protect plaintiffs suffering from disparate pay rates.[291] Consistent conversation about the failures of the Equal Pay Act will encourage Congress to address the problem by enacting new legislation.[292] The National Committee on Pay equity instituted Equal Pay Day annually on April 12 to encourage discussions about possible solutions to rectifying the failures of the Equal Pay Act.[293] Supporters are hopeful that a national day for Equal Pay will lead to the enactment of the Fair Pay Act.[294]

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[285] *See id.*
[286] *See* S. 702, 106th Cong. (1999); H.R. 1271, 106th Cong. (1999).
[287] *See id.*
[288] *See* Houghton, *supra* note 97, at 173.
[289] *See* S. 702, 106th Cong. (1999); H.R. 1271, 106th Cong. (1999).
[290] *See* Fair Pay Act of 2019, H.R. 2039, 116th Cong. (2019).
[291] *See generally id.*
[292] *See* Mallorie McCue, *One Topic, Two Audiences: Equal Pay Day Events to Engage Leaders*, 18 LAWYERS J. 8 (2016).
[293] *See id.*
[294] *See* National Committee on Pay Equity, *Questions and Answers on the Fair Pay Act*, PAY-EQUITY.org, *https://www.pay-equity.org/info-Q&A-Act.html* (last visited April 19, 2020).

Enacting the Fair Pay Act would permit individuals to file a claim for disparate pay rates if they are performing equivalent jobs for separate entities and it would eliminate the "factor other than sex" defense under the Equal Pay Act.[295] The equivalent job factor present in the FPA would alleviate the burden on plaintiffs of opposite sexes who perform equivalent work for different entities.[296]

Furthermore, eliminating the "factor other than sex" defense would take away the catchall justification that permits employers to assert any reason for the difference in pay rate between male and female employees.[297] Eliminating this defense would take away the large loophole it creates for employers to escape liability.[298]

C. Separate Provision for Athletes

While this paper proposes reforms that will benefit plaintiffs in all industries, one scholar argues for a sports-specific provision of the EPA.[299] She purports that the "same establishment" requirement makes it nearly impossible for professional athletes to prove they work for the same establishment as their opposite sex counterparts, due to individual ownership of sports teams.[300] This scholar claims that merely eliminating the "same establishment" requirement would still permit employers of professional athletes to escape equal pay liability by registering as a separate employer and not a separate establishment.[301] Therefore, this scholar supports that a sports-specific provision would treat all pay differences in professional sports as per se discrimination.[302] She alleges that under a sports-specific provision it would be illegal for

[295] *See* S. 702, 106th Cong. (1999); H.R. 1271, 106th Cong. (1999).
[296] *See generally id.*
[297] *See* Brown, *supra* note 12, at 483.
[298] *See id.*
[299] *See* Zerunyan, *supra* note 31, at 250.
[300] *See id.*
[301] *See id.* at 254.
[302] *See id.* at 256.

separate entities that are so similar they could be one establishment, save for their separate ownership, to pay athletes different wages based on gender, when performing similar work based on skill, effort, and responsibility.[303]

Enacting a separate provision for professional athletes is not necessary if the other recommendations in this essay are enforced. Eliminating the "same establishment" requirement, similar to the language of the California Fair Pay Act, would enable athletes of the opposite sex to bring a claim under the Equal Pay Act even if they play for separate entities.[304] Scholars advocating for the separate provision for athletes misconstrue the language of the California Fair Pay Act by claiming that registering as a separate employer would allow them to escape liability.[305] The purpose of the California Fair Pay Act is to protect employees suffering from a disparate pay rate as compared to employees performing substantially similar work for a different entity.[306] Even if professional sports teams registered as separate employers, employees performing substantially similar work would be able to file a claim under the language of the CFPA.[307] If the federal legislature similarly eliminates the "same establishment" requirement from the Equal Pay Act, the statute will also protect professional athletes, even if their employers are registered as separate employers from their opposite sex counterparts.[308]

Similarly, permitting claims to be filed based on equivalent jobs under the federal Fair Pay Act would also permit plaintiffs to file equal pay claims, even if they are employed by a separate establishment as their opposite sex counterparts.[309] Eliminating the "same establishment" requirement would benefit all plaintiffs by necessitating separate establishments paying opposite

[303] *See id.*
[304] *See generally* Cal. S.B. 358 (2016).
[305] *See generally* Zerunyan, *supra* note 31, at 254.
[306] *See generally* Cal. S.B. 358 (2016).
[307] *See generally id.*
[308] *See generally id.*
[309] *See generally* S. 702, 106th Cong. (1999); H.R. 1271, 106th Cong. (1999).

sexes to do substantially equal work to pay each sex the same, regardless of the conjuncture or separation of the entities.[310] This reform would benefit professional athletes, as well as employees in the retail, education, and legal fields who do the same work for different establishments.[311] A separate provision would not be necessary, for professional athletes would be protected if the "same establishment" requirement under the Equal Pay Act is eliminated.[312]

Eliminating the "factor other than sex" defense would also help to alleviate the burden on all employees asserting a claim under the EPA, including professional athletes.[313] Without this defense, employers would not have the advantage of a catchall defense and would need to assert a specific justification under one of the other three defenses available under the EPA.[314]

D. Counterarguments

This paper's proposed reforms will enable federal courts to interpret the Equal Pay Act more broadly, in turn benefitting plaintiffs seeking equal pay protection under the Act. Despite the advantages these proposed reforms will have for plaintiffs, some scholars will undoubtly counter that they are inadequate or unnecessary.[315]

For example, the California Fair Pay Act helps plaintiffs in their equal pay claims by eliminating the "same establishment" requirement, however, employers can escape liability under the CFPA by registering as separate employers.[316] Arguably scholars will assert that the California Fair Pay Act does not adequately protect plaintiffs.[317] Nevertheless, employees

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[310] *See generally id.*
[311] *See generally* Zerunyan, *supra* note 31, at 250; *see also Renstrom*, 787 F.Supp. 2d at 965; *Cullen*, 338 F.3d at 693; *EEOC v. Port Auth. of N.Y. & N.J.*, 768 F.3d at 255.
[312] *See generally* Cal. S.B. 358 (2016).
[313] *See* Brown, *supra* note 12, at 483.
[314] *See id.*
[315] *See generally* Zerunyan, *supra* note 31, at 254; Bornstein, *supra* note 274, at 645.
[316] *See generally* Zerunyan, *supra* note 31, at 254.
[317] *See id.*

working for separate employers would still be protected under the reforms to the Equal Pay Act, because they will be able to file claims even if they are not employed by the same entity.[318]

Scholars may also counter that the Equal Pay Act should not be reformed to make it easier for plaintiffs to assert equal pay claims because a difference in pay is representative of women's "choices."[319] They assert that women may choose to prioritize shorter work days to allow flexibility for family caregiving.[320] Some scholars further allege that employers should not bear the financial burden of paying for women's choices.[321] As scholars have argued, regardless of how women choose to prioritize work and their familial responsibilities, women do not "choose" economic disadvantage.[322] This paper's proposed reforms to the Equal Pay Act do not advocate for higher pay for unequal work. Rather, this paper's proposed reforms seek to equate the pay rate of all sexes for work on substantially equal jobs.

Even though there will be opposition to the proposed reforms, eliminating the "same establishment" requirement and the "factor other than sex" defense will broaden the Equal Pay Act in a manner that courts can interpret to bring it closer to achieving its goal of requiring employers to pay women performing equivalent work at the same rate as their male counterparts.[323]

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[318] *See id.*
[319] *See* Bornstein, *supra* note 274, at 645.
[320] *See id.*
[321] *See id.*
[322] *See id.*
[323] *See* Ross & McDermott, *supra* note 36, at 4.

V. Conclusion

This paper has argued that Congress should incorporate the language of the California Fair Pay Act into the Equal Pay Act to eliminate the "same establishment" requirement under the EPA. Furthermore, it proposed that Congress should enact the federal Fair Pay Act first introduced more than twenty years ago to eliminate the "factor other than sex" defense, which will eliminate a catchall defense under the Equal Pay Act. These proposals would help the United States National Women's Soccer team, as well as plaintiffs in the education, retail, and public service industries and any other industry where an individual is suffering from a disparate pay rate as compared to a person of the opposite sex.[324] This paper seeks to start a conversation among scholars about ways to broaden the Equal Pay Act to adequately serve plaintiffs seeking equal pay protection.

[324] *See* Zerunyan, *supra* note 31, at 231.