

# EQUAL PAY FOR EQUAL (OR BETTER) PLAY

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## I. INTRODUCTION

The current employment climate is unbalanced, to say the least.<sup>1</sup> For as long as women have been in the workforce, women have earned comparatively less money than their male counterparts.<sup>2</sup> For example, approximately three out of five women are paid less than their male counterparts.<sup>3</sup> The sports arena proves to be no exception to this disparity.<sup>4</sup> The United States Women’s National Soccer Team (“USWNT”) brought significant light to this issue when they filed a lawsuit in March 2016, pursuant to the Equal Pay Act.<sup>5</sup> Around the same time of this lawsuit, the United States Women’s Hockey Team (“USWHT”) went on strike to pursue a better agreement for their league and additionally to receive equitable benefits which equate to that of the Men’s Hockey Team.<sup>6</sup> These two organizations have made a proverbial “splash” in the news, as they have brought attention to this nationwide problem of gender inequality and income.

There are multiple ways to attack the issue of gender inequality, and women in the sports arena should be taking note of such ways.<sup>7</sup> Change cannot be effected without action taking place; thus, the question remains as to which measure is the better path of action to take. The USWNT decided to take the

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<sup>1</sup> Nicole Zerunyan, *Time’s Up: Addressing Gender-Based Wage Discrimination in Professional Sports*, 38 *Loy. L.A. Ent. L. Rev.* 229 (2018).

<sup>2</sup> *Id.* at 1.

<sup>3</sup> *Id.*

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

<sup>5</sup> *Id.* at 7.

<sup>6</sup> *Id.*

<sup>7</sup> Jenna N. Rowan, *Equal Protection for Equal Play: A Constitutional Solution to Gender Discrimination in International Sports*, 20 *Vand. J. Ent. & Tech. L.* 919 (2018).

route of litigation, which, as it turns out, takes years and, of course, money to achieve. A better route than litigation, which would be more effective to leagues not protected by the Equal Pay Act, is to attack the collective bargaining agreement of each league. This would be a better mode of action because, in short, a collective bargaining agreement has more options and is less constrictive than any type of litigation available. Furthermore, this method allows for female athletes to do what they do best – stand up for themselves. Although litigation is a good way to force one’s hand into doing the right (and legal) thing, it would be an even greater success to demonstrate a proactive approach by demanding equal pay and benefits from the beginning.

## II. CURRENT STATE OF PROFESSIONAL FEMALE SPORTS

### *a. Women’s Hockey*

The USWHT, which formed in the 1980s, has been around a relatively short time in comparison to other sports.<sup>8</sup> Since the formation of women’s hockey teams, female hockey teams managed to win multiple championships and gold medals.<sup>9</sup> Despite their multiple successes on the ice, the USWHT realized that their achievements were still being greatly undervalued in comparison to the work of their male counterparts. For example, during travel, male hockey players can bring a guest to championship games, receive free transportation, stay in single rooms, and receive extra game tickets and an apparel package.<sup>10</sup> In contrast, female players were not allowed to bring a guest and instead shared rooms with other teammates.<sup>11</sup> Thus, with this glaring disparity, the USWHT sought to bring their salaries up to a “living wage” with better travel accommodations.<sup>12</sup> Unlike the USWNT, Women’s Hockey pursued a route different from that of

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<sup>8</sup> Patrick C. Coyne, *A Huge Win for Equal Pay: Women’s National Teams Grab Their Biggest Victories Yet in Recent Contract Disputes*, 25 *Jeffrey S. Moorad Sports L.J.* 315 (2018).

<sup>9</sup> *Id.* at 1.

<sup>10</sup> *Id.* at 9.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 6.

litigation. Instead, the USWHT decided to sit down with the league and negotiate for change.<sup>13</sup> Also, unlike the USWNT, Women's Hockey threatened team owners with a strike.<sup>14</sup> Thus, with the potential loss of money weighing over their heads, team owners were more willing to come to the table to work out this dispute. As a result, the USWHT made a deal that provided them "around \$70,000 each per year, although they could make more than \$100,000 in Olympic years if they win gold," as well as improved and equal travel accommodations to the Men's Hockey Team.<sup>15</sup> Further, the parties agreed to implement a "Women's High-Performance Advisory Group," which aimed at increasing visibility and opportunities for Women's Hockey.<sup>16</sup> The teams seem happier with the combination of these new provisions within the USWHT's collective bargaining agreement and, for now, have settled for "equitable pay" rather than equal pay.<sup>17</sup>

*b. Women's Soccer*

On one hand, the USWHT demonstrated success in fighting for equality because they pursued an avenue aside from litigation. On the other hand, USWNT and the U.S. Soccer Federation ("Federation") are still in the midst of ongoing litigation with no end in sight. In March 2016, five of the USWNT's most prominent players filed a wage-discrimination lawsuit under the Equal Pay Act.<sup>18</sup> Regardless of the immense success that the USWNT had on the field in recent years, coupled with the increased viewership, these athletes were paid much less in comparison to Men's Soccer Teams.<sup>19</sup> To break it down, the top tier players of USWNT made \$72,000 per year for twenty Friendly games, with a bonus of \$1,350.00 for each Friendly won – none if they lost.<sup>20</sup> As for the Men's Team, however, players make a range from \$6,250 to \$17,625 for each of the 20 Friendly games played, regardless of

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 9-10.

<sup>16</sup> *Id.* at 12-13.

<sup>17</sup> *Id.* at 2.

<sup>18</sup> Zerunyan, *supra* note 1, at 7.

<sup>19</sup> *Id.* at 7.

<sup>20</sup> Honey Campbell, *Superior Play, Unequal Pay: U.S. Women's Soccer and the Pursuit for Pay Equity*, 51 U.S.F. L. Rev. 545 (2017).

the outcome.<sup>21</sup> Therefore, even if the USWNT won all twenty Friendlies, they would make less than if the Men's Team lost all twenty of their games.<sup>22</sup> Further, the average pay range for the Men's Team is between \$53,000 and \$326,129, while the Women's range is from \$6,842 to 37,800.<sup>23</sup> With this visual disparity, the USWNT filed suit. Not long after the USWHT came to a new deal with their hockey league, the USWNT also made a deal with their employer, although this did not deter their lawsuit.<sup>24</sup> Unlike the USWHT, the USWNT agreed with the Federation upon a Memorandum of Understanding to a "no strike, no lockout" provision.<sup>25</sup> Thus, the USWNT had to negotiate a new collective bargaining agreement without its best bargaining chip.<sup>26</sup> The new terms of the 2017 collective bargaining agreement remain surreptitious but are said to "include significant increases in both direct and bonus compensation for national team players. . . enhanced travel benefits. . . and per diems equal to the men's national team."<sup>27</sup> Nevertheless, the USWNT persisted.

### III. CURRENT LEGAL OPTIONS

To better understand what is actually occurring, it is important to look at the options for the courtroom, as well as what is possible behind the conference room doors at the negotiation table. The options that we have seen thus far include the Equal Pay Act, which is the vehicle for which the USWNT has chosen to voice their cause, as well as the collective bargaining agreement, as seen with the USWHT. However, there are more options on the table that these groups have not considered, such as Title VII of the Civil Rights Act ("Title VII"). Being that the current state of unequal pay is so apparent, it is important to examine these approaches and see how they can fit into the arena of female sports.

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<sup>21</sup> *Id.* at 9.

<sup>22</sup> *Id.*

<sup>23</sup> Zerunyan, *supra* note 1, at 4.

<sup>24</sup> Coyne, *supra* note 8, at 5.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 6.

*a. Equal Pay Act*

The Equal Pay Act delineates:

No employer ... shall discriminate ... between employees on the basis of sex by paying wages to employees in such establishment at a rate less at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. . . .<sup>28</sup>

Under this provision, it is a statutory violation to pay a person less for doing the same work as someone of another sex. In order to prove a case of wage discrimination, a plaintiff must prove (1) the jobs held by male and female employees are substantially similar, and (2) the employer is paying different wages to those engaged in this similar work.<sup>29</sup> Further, courts have delved deeper into the discussion of which cases qualify for a wage discrimination suit, by looking more at the direct language of the statute.<sup>30</sup> Specifically, the word “establishment” has been of some consequence.<sup>31</sup> The Supreme Court has held “establishment” to mean “a distinct physical place of business,” while other courts have held an “establishment” to be “a central administrative unit” that controls hiring, setting wages, and assigning duties.<sup>32</sup>

While looking at the statute and court rulings, it seems that the USWNT has a strong case. The USWNT plays professional soccer – exactly like the Men’s Team - with similar contractual responsibilities.<sup>33</sup> As stated earlier, the USWNT is being paid substantially less than the Men’s Team.<sup>34</sup> Further, the Men’s Team and the USWNT are operating under the umbrella of the Federation.<sup>35</sup> The USWNT and the Men’s Team are both employed by the Federation, which fits the meaning of “establishment”

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<sup>28</sup> Id. at 5.

<sup>29</sup> Id.

<sup>30</sup> Zerunyan, *supra* note 1, at 6.

<sup>31</sup> Id.

<sup>32</sup> Id.

<sup>33</sup> Campbell, *supra* note 20, at 10.

<sup>34</sup> Zerunyan, *supra* note 1, at 6.

<sup>35</sup> Id. at 7.

under the statute.<sup>36</sup> There seems to be no reasonable, legally-viable justification for this pay disparity, and the Federation is currently facing the music for its behavior.

*b. Title VII*

Another venue that has not seen much light in the fight for equal pay in female sports is Title VII of the Civil Rights Act of 1964. Section 703 provides:

It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.<sup>37</sup>

However, this is not the route that the USWHT or USWNT took because of its limitations on filing. It is not as direct as litigation under the Equal Pay Act, which goes straight to the courts.<sup>38</sup> Rather, there are additional hoops to jump through with a Title VII violation filing; the biggest being that one must first file a claim with the Equal Employment Opportunity Commission ("EEOC").<sup>39</sup> Moreover, there are more time limitations regarding the EEOC, being that it must be filed within 180 days of the alleged discrimination.<sup>40</sup> Once the claim is filed, the EEOC performs its own investigation to determine if a violation has

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

<sup>37</sup> Rowan, *supra* note 7, at 5.

<sup>38</sup> *Id.* at 6.

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

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

occurred.<sup>41</sup> If the EEOC determines a violation has occurred, it attempts conciliation between the parties or chooses to file a civil claim against the private employer.<sup>42</sup> On the other hand, if the EEOC finds no violation, it notifies the potential plaintiff, who then has 90 days to file a civil lawsuit.<sup>43</sup>

Another obstacle for a Title VII claim stems from the fact that an employee must prove intent to establish a prima facie case.<sup>44</sup> Under the Equal Pay Act, a plaintiff must demonstrate simply that discrimination occurred.<sup>45</sup> Title VII, of course, goes further by requiring a plaintiff to prove an employer intended to discriminate against an employee based on her gender.<sup>46</sup> Because intent is one of the hardest elements to prove in any case, Title VII presents itself as a less desirable choice for a wage-discrimination lawsuit, particularly for female athletes. On the bright side, Title VII greatly increases the number of damages a plaintiff can receive.<sup>47</sup> Under an Equal Pay Act claim, a plaintiff may recover compensatory damages and possibly punitive damages with limits based on how many people the company employs.<sup>48</sup> As for Title VII, a successful plaintiff may recover back pay, compensatory damages, attorneys' fees, and punitive damages.<sup>49</sup> So, although the rewards might be greater, it seems that the increased number of procedural hoops in comparison to other options available deter female athletes from filing a Title VII claim.

### *c. Collective Bargaining Agreement*

A collective bargaining agreement is like a contract between two parties that many labor unions across the country, and most, if not all, major sports leagues have, although it is usually not as

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<sup>41</sup> Id.

<sup>42</sup> Id.

<sup>43</sup> Id.

<sup>44</sup> Coyne, *supra* note 8, at 3.

<sup>45</sup> Id.

<sup>46</sup> Id.

<sup>47</sup> Id.

<sup>48</sup> Remedies for Employment Discrimination, U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/employers/remedies.cfm>.

<sup>49</sup> Coyne, *supra* note 8, at 3.

collaborative of a process as it sounds.<sup>50</sup> In the sports context, the collective bargaining agreement, which expires every so many years depending on the league, handles the conditions of play, certain league rules, and – most importantly – pay.<sup>51</sup> This negotiation generally takes place between players in the league and team owners; the negotiation is like any other collective bargaining agreement between employer and employees of other industries.<sup>52</sup>

As a collective bargaining agreement is an exclusive privilege offered by the National Labor Relations Act (“NLRA”), it is important for a group to be classified as an employee instead of an independent contractor.<sup>53</sup> Under the NLRA, only employees, as defined under the NLRA, are permitted to collectively bargain.<sup>54</sup> The definition of “employee” caused some grief for the USWHT because their label of either employee or independent contractor was unclear, as both organizations do not operate under the umbrella of the National Hockey League.<sup>55</sup> The USWNT, on the other hand, distinctly fell under the classification of an employee.<sup>56</sup> The USWNT has continued to collectively bargain with the Federation for almost twenty years, beginning first in 2001 and with the most recent agreement established in April 2017.<sup>57</sup>

The purpose of a collective bargaining agreement is to promote labor peace while supporting stable terms of employment.<sup>58</sup> One of the paradoxes that lie within this statement is that striking is one of the most valuable tools given to an employee under labor law, and specifically a collective bargaining agreement. Thanks to online streaming, smartphones, and the ever-expanding ESPN, watching sports has become an event in and of itself. Thus, eyes on screens generate a lot of money for

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<sup>50</sup> Paul C. Weiler et al., *Sports and the Law: Text, Cases, and Problems* (5th ed. 2019).

<sup>51</sup> *Id.* at 85-91.

<sup>52</sup> *Id.*

<sup>53</sup> Coyne, *supra* note 8, at 4.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Weiler, *supra* note 50, at 85-91.

employers, perhaps even more than physical ticket sales. As such, refusal to get into uniform and on the field would cost employers significantly more than an employee-player.

*d. Defenses*

i. Exceptions to the Equal Pay Act and Title VII

Due to the fact that there is no such thing as a perfect statute, the Equal Pay Act has exceptions that an employer can assert as a defense in court. These exceptions include work environments that incorporate systems of (1) seniority, (2) merit, (3) quality or quantity of work, and (4) factors other than gender.<sup>59</sup> To rationalize a wage disparity according to a seniority system, an employer must prove that pay standards are objectively neutral and not based on gender.<sup>60</sup> A merit system must prove to be legitimate and fair-minded with terms and criteria. Additionally, the employer must provide evidence of an organized and structured procedure “whereby employees are evaluated systematically according to predetermined criteria.”<sup>61</sup> Quality, quantity, and factors that are not based on gender are determined to legitimize each case.<sup>62</sup>

Title VII has exceptions that are used as a defense, similar to the Equal Pay Act.<sup>63</sup> Employers are allowed to provide different compensation or terms, conditions, or privileges of employment if it follows a seniority system, merit system, or a system that measures earnings by quantity or quality of production.<sup>64</sup> These systems similarly follow the definitions of acceptable systems described in the Equal Pay Act.<sup>65</sup>

ii. Money

Another defense that employers, like the Federation, utilize in wage discrimination cases is that men’s teams make more

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<sup>59</sup> Zerunyan, *supra* note 1, at 5.

<sup>60</sup> *Id.* at 7.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Rowan, *supra* note 7, at 6.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

money.<sup>66</sup> The money employers vaguely refer to is the money they see from the efforts of the employee.<sup>67</sup> Specifically, in the case of the USWNT, the money mainly comes from profits made off of viewers from watching games.<sup>68</sup> In 2015, the USWNT earned \$6.6 million for the Federation and the men's team earned less than \$2 million.<sup>69</sup> More, in 2016, the USWNT was projected to make more than \$5 million in profit while the men's team was expected to draw a loss of \$1 million.<sup>70</sup> Knowing these statistics, the Federation can no longer use revenue as an argument to pay its female players less money. The fact of the matter is, the USWNT makes more money than men's teams and should be paid accordingly, in a proportional manner; that is—equal to that of their male counterparts.

### iii. Success

Some team owners and organizations argue that women's teams are not as successful as men's teams. Again, this is not always a valid argument, particularly in the case of the USWNT. The USWNT has won several World Cup championships and 4 Olympic championships while the men's team has difficulty just making it to the game.<sup>71</sup> The USWNT plays more games than the men while managing to win far more championships.<sup>72</sup> The term "equal pay for equal play" should run true for female athletes. Yet it seems that even better, more successful, play does not equate to equal pay. In fact, with the most recent World Cup win this year, it appears it is not just the players that understand success on the field should translate to their paychecks.<sup>73</sup> After the USWNT's win at the 2019 World Cup, fans began chanting "equal pay."<sup>74</sup> It is not in the Federation's best interest to use success, either on the

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<sup>66</sup> Campbell, *supra* note 20, at 3.

<sup>67</sup> Rowan, *supra* note 7, at 2.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Zerunyan, *supra* note 1, at 8.

<sup>72</sup> *Id.*

<sup>73</sup> Graham Hays, Chants of 'equal pay' accompany U.S. win, E.S.P.N (Jul. 7, 2019), <https://www.espn.com/soccer/fifa-womens-world-cup/story/3895899/chants-of-equal-pay-accompany-us-win>.

<sup>74</sup> *Id.*

field or with revenue, to justify a blatant wage discrimination violation.

#### iv. Television and Audience

The number of viewers of an event ties directly to a team's revenue. Eyes on a television translate directly into how much a channel, like ESPN, will pay an organization to broadcast the game.<sup>75</sup> During the 2015 World Cup, the USWNT had roughly 25.4 million viewers, making it the most-watched soccer game in American history.<sup>76</sup> To no surprise, after their World Cup win, the USWNT went on a victory tour that attracted tens of thousands of fans to soccer stadiums across the United States and generated tens of millions of dollars.<sup>77</sup> Going beyond television popularity is a social media presence, which can also translate into viewership and popularity.<sup>78</sup> Accordingly, after a third World Cup title, the USWNT's Twitter followers grew immensely from 286,000 to 490,000.<sup>79</sup>

USWNT arguments aside, it is unfair for employers to argue that equal pay is justified for lack of viewership regarding female athletes when these employers actively make deals that reduce female sports' air time.<sup>80</sup> In 2014, female sports made up about 4 percent of the total sports media coverage.<sup>81</sup> Later, a 2015 study found that ESPN's daily sports reporting program, *SportsCenter*, featured 376 stories on men's sports and only 13 on women's sports.<sup>82</sup> It is both a cyclical and nonsensical argument to say that there is a lack of viewership when employers and broadcasting companies curb female sports coverage.<sup>83</sup> Media outlets undeniably deprioritize female sports which enable female sports employers to claim that there is less viewership<sup>84</sup>. Rather, the

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<sup>75</sup> Zerunyan, *supra* note 1, at 3.

<sup>76</sup> Campbell, *supra* note 20, at 4.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Zerunyan, *supra* note 1, at 4.

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

<sup>82</sup> Rowan, *supra* note 7, at 4.

<sup>83</sup> Zerunyan, *supra* note 1, at 4.

<sup>84</sup> *Id.*

limited coverage produces limited viewership.<sup>85</sup> Fewer viewers of female sports in comparison to male sports should not be a valid argument since it is false in cases like the USWNT. Additionally, the argument fails because limited viewership is directly caused by employers and those that control the media coverage.<sup>86</sup>

#### v. Misogyny

The underlying reasons that no one says out loud, which further limits female athletes are misogyny and sexism.<sup>87</sup> One of the most prominent displays of sexism is the way that many female athletes are portrayed by the media.<sup>88</sup> Commentators and the media sexualize female athletes by commenting on their hair, makeup, and body shape.<sup>89</sup> A great example of this was illustrated with Serena Williams who is one of the best tennis players in the world. After her sixth Wimbledon title, the media claimed that her body was not feminine enough.<sup>90</sup> More recently, after Williams argued with a referee during the 2018 U.S. Open, a cartoon appeared in the *Herald Sun*, depicting Williams as an overgrown child throwing a tantrum. The cartoon also overemphasized the shape of her lips.<sup>91</sup> The cartoon instantly drew criticism because of its sexist and racist nature.<sup>92</sup> Other tennis athletes, such as John McEnroe, are notorious and almost glorified for arguing with referees regularly. In contrast, Williams faced criticism for not acting “ladylike” and for being a “sore loser.”<sup>93</sup> If media outlets treated male and female athletes equally in their coverage, there is a good argument that equality may spread to other aspects, such as pay.<sup>94</sup>

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<sup>85</sup> Id.

<sup>86</sup> Id.

<sup>87</sup> Rowan, *supra* note 7, at 4.

<sup>88</sup> Id.

<sup>89</sup> Id.

<sup>90</sup> Id.

<sup>91</sup> Michael Cavanaugh, A racist Serena Williams cartoon went viral. Here's how to caricature her the right way, *Wash. Post* (Sept. 13, 2018), [https://www.washingtonpost.com/news/comic-riffs/wp/2018/09/13/a-racist-serena-williams-cartoon-went-viral-heres-how-to-caricature-her-the-right-way/?utm\\_term=.9ae1a53761df](https://www.washingtonpost.com/news/comic-riffs/wp/2018/09/13/a-racist-serena-williams-cartoon-went-viral-heres-how-to-caricature-her-the-right-way/?utm_term=.9ae1a53761df).

<sup>92</sup> Id.

<sup>93</sup> Id.

<sup>94</sup> Campbell, *supra* note 20, at 3.

Not only is misogyny pervading both the media and sports as a whole, but more importantly, it is making its way down the chain and influencing young women throughout the United States.<sup>95</sup> With all of the current factors the USWNT presented in its claim, the only conclusion that can possibly be drawn is that the Federation values male contributions more than female contributions.<sup>96</sup> This message is becoming more apparent to younger generations, specifically young female soccer players.<sup>97</sup>

Although it may seem minuscule to some, misogyny endures even based on how statutory relief is written. In the Equal Pay Act and Title VII text, it discusses how “he [the employer] pays” and “his employees.”<sup>98</sup> The language of these legal texts indicate that misogyny is not only present in sports, the workforce, and society, but it is also embedded in our laws.<sup>99</sup> In one of the few places that a female athlete can seek recourse for wage discrimination, a misogynistic shadow that cannot be ignored still remains.<sup>100</sup>

#### IV. COLLECTIVE BARGAINING AGREEMENTS AND EFFECTIVENESS

##### *a. Why the Collective Bargaining Agreement?*

A collective bargaining agreement between a team’s employer and the Players’ Association is governed by the NLRA.<sup>101</sup> The NLRA works to maintain relationships between an employer and employee, acting as a set of checks and balances between the parties.<sup>102</sup> Even though the course that the USWNT seems to be working for them and has drawn a great amount of attention to a problem that has only been uttered in hushed tones, the fact is,

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<sup>95</sup> Barry Svrluga, U.S. women’s soccer players deserve equal pay, and it shouldn’t take a lawsuit, Wash. Post (Mar. 8, 2019), [https://www.washingtonpost.com/sports/us-womens-soccer-players-deserve-equal-pay-and-it-shouldnt-take-a-lawsuit/2019/03/08/abe9ad28-41db-11e9-9361-301ffb5bd5e6\\_story.html?noredirect=on&utm\\_term=.1b72fb16bf92](https://www.washingtonpost.com/sports/us-womens-soccer-players-deserve-equal-pay-and-it-shouldnt-take-a-lawsuit/2019/03/08/abe9ad28-41db-11e9-9361-301ffb5bd5e6_story.html?noredirect=on&utm_term=.1b72fb16bf92).

<sup>96</sup> Id.

<sup>97</sup> Id.

<sup>98</sup> Rowan, *supra* note 7, at 5.

<sup>99</sup> Svrluga, *supra* note 95.

<sup>100</sup> Id.

<sup>101</sup> Coyne, *supra* note 8, at 4.

<sup>102</sup> Id.

litigation is expensive for all parties involved and takes too long. The USWNT brought their wage discrimination claim over 3 years ago.<sup>103</sup> Although the team has since negotiated a new collective bargaining agreement, the terms have remained secret.<sup>104</sup> Even with a pending lawsuit, a collective bargaining agreement cannot be avoided as a means of demanding change.<sup>105</sup>

On the whole, the collective bargaining agreement is the best option for female athletes. The work of the USWNT is commendable, but it should not take a lawsuit.<sup>106</sup> The USWNT was lucky enough to fit within the confines of the terms to bring an Equal Pay claim.<sup>107</sup> However, not all female athletes have this option at their disposal because they do not have the same employer as their male counterparts.<sup>108</sup> For example, in 2015 the WNBA's salaries ranged from \$38,000 to \$109,500, while the NBA's of that same year ranged from \$525,093 to \$16.4 million.<sup>109</sup> The salary differences here are comparable to those of the USWNT and the men's team.<sup>110</sup> But, unlike the USWNT's case, the WNBA and the NBA are two entirely different leagues, leaving them without the option for an Equal Pay Act claim.<sup>111</sup> This is why the collective bargaining agreement should be the first place that female athletes look for pay disparities.

*b. Will It Work?*

The problem with the USWNT's lawsuit is that it is reactive instead of proactive. Instead of trying to remedy the problem of wage discrimination after the lawsuit had an impact, female athletes should be working to remove the problem altogether. The work of the USWNT is "a symbol of 'girl power,' achievement, and

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<sup>103</sup> Ali Jessani, *Shooting for Equality: An Analysis of the Market Force Defense as Applied to the U.S. Women's Soccer Team's Equal Pay Claim*, 25 *Duke J. Gender L. & Pol'y* 221 (2018).

<sup>104</sup> *Id.* at 1.

<sup>105</sup> *Id.*

<sup>106</sup> Svrluga, *supra* note 95.

<sup>107</sup> Zerunyan, *supra* note 1, at 7.

<sup>108</sup> *Id.* at 2.

<sup>109</sup> Rowan, *supra* note 7, at 4.

<sup>110</sup> Campbell, *supra* note 20, at 2.

<sup>111</sup> *Id.* at 1.

the synergy of feminism with athleticism.”<sup>112</sup> There is another way – the collective bargaining agreement. All major professional teams have these agreements to regulate working conditions and pay.<sup>113</sup> Female athletes are not a special category of athletes, they leave everything on the field just as their male counterparts do.<sup>114</sup> Being successful on the field leads women of all ages to look up to these athletes and aspire to live a passionate, healthy, and hardworking lifestyle.<sup>115</sup> Men then follow suit and begin to see women as strong, capable, and qualified.<sup>116</sup> This commanding behavior should translate and start long before they even step on the playing field. If women can be competitive, athletic, and strong on the field, there should be no problem in doing so regarding their pay and demanding equality at the negotiation table. There are legal options to seek equal pay, but it should not have to get that far. Female athletes, and women as a whole, should begin thinking proactively by standing up for themselves and for equal pay before the problem progresses to the courtroom.

## V. CONCLUSION

Despite the many justifications that employers use to qualify an obvious pay disparity, they do not hold water regarding the USWNT.<sup>117</sup> The USWNT’s employer, the Federation, have previously argued that they pay differences between the USWNT and men’s teams is fair because men’s teams generate more money, the USWNT negotiate their salaries, and the men’s teams and USWNT negotiate at different times.<sup>118</sup> There is no denying the third prong of the Federation’s argument, but the first 2 are false.<sup>119</sup> Moreover, all of these justifications come from the “basis other than sex” exception found within the Equal Pay Act.<sup>120</sup> We

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<sup>112</sup> Marc Edelman & Elizabeth Masterson, *Could the New Women’s Professional Soccer League Survive in America? How Adopting a Traditional Legal Structure May Save More Than Just a Game*, 19 *Seton Hall J. Sports & Ent. L.* 283 (2009).

<sup>113</sup> Weiler, *supra* note 50, at 85.

<sup>114</sup> Campbell, *supra* note 20, at 10.

<sup>115</sup> Edelman & Masterson, *supra* note 112, at 10.

<sup>116</sup> *Id.*

<sup>117</sup> Campbell, *supra* note 20, at 2.

<sup>118</sup> *Id.*

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

<sup>120</sup> Zerunyan, *supra* note 1, at 7.

are still waiting for an outcome with the USWNT's lawsuit, even after 3 years.<sup>121</sup>

The best way for female athletes to hold their respective employers accountable, especially those whose employers do not qualify as a defendant under the Equal Pay Act, is to come to the negotiation table. The collective bargaining agreement is where the Players' Association and employer come to the table and make a deal. There is no reason that this deal should not be focused around the apparent wage discrepancy between male and female athletes who perform substantially similar duties and play the same game. Rather than fighting the uphill battle once the problem has reared its head, female athletes should be willing to fight on more than the field, ice, or court, but in the negotiation room as well. Equal or better play calls for equal or better pay, and the world is now putting employers on notice - as they did after the 2019 Women's World Cup final.<sup>122</sup> Now, it is time to start demanding equal pay and conditions from the start with collective bargaining agreements and being just as aggressive at the negotiating table as on the field.

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<sup>121</sup> Campbell, *supra* note 20, at 2.

<sup>122</sup> Hays, *supra* note 73.