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# SEX DISCRIMINATION: ANOTHER HURDLE ON THE ROAD TO EQUALITY

In the area of athletic competition, women runners have made great strides, but there are still many hurdles to overcome before full equality will be reached. In *Martin v. International Olympic Committee*,[1] the Ninth Circuit Court of Appeals held that California's Unruh Civil Rights Act[2] did not compel the International Olympic Committee ("IOC") to add separate women's middle distance running events in the 1984 Los Angeles Summer Olympic Games. While this case follows a long line of cases interpreting the Unruh Civil Rights Act, the court declined to extend it into the sui generis area of international women's amateur athletic event. Even though discrimination is more tolerated in the area of athletics than in the areas of housing and employment, this case raises some unique questions in the area of international amateur athletic events.

In 1983, a group of women runners and runners' organizations brought suit in a California state court against the IOC[3] asking for a mandatory preliminary injunction which would require the Olympic organizers of the 1984 Summer Games to include both 5,000 meter and 10,000 meter running events for women.[4] The women runners claimed that exclusion of these track and field events violated their constitutional rights under the fifth and fourteenth amendments, and under those rights established by the Unruh Civil Rights Act. The action was subsequently removed by the Olympic organizations to the United States District Court for the Central District of California.[5] In March 1984, the district court denied the women runners' request for injunctive relief,[6] and they

1. Martin v. Int'l Olympic Comm., 740 F.2d 670 (9th Cir. 1984).

2. The Unruh Civil Rights Act, CAL. CIV. CODE § 51 (Deering 1985), reads in full: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

3. The suit also named the International Amateur Athletic Foundation, the United States Olympic Committee, the Athletic Congress of the United States, the Los Angeles Olympic Organizing Committee, and various directors and officials of these groups. *Martin*, 740 F.2d at 673.

4. *Id.*

5. *Id.* 28 U.S.C. § 1441 (1982).

6. *Martin*, 740 F.2d at 673.

appealed.[7]

The district court found that women traditionally have been discriminated against by the Olympics. This was evidenced by the inequality in the number of events that women could compete in, as compared to the number of events open to men.[8] The IOC adds new Olympic events as it sees fit. In 1949, when the IOC adopted rules by which new events were to be added, more women's events began to be included. The rules adopted by the IOC limited new events to those recognized internationally through national championships and international competition.[9] Moreover, the decision to add new events is made four years before the event is to be included.[10] Thus, the critical period of time in which the 5,000 meter and 10,000 meter events for women were to be considered was between 1976 and 1980.[11] While both the 5,000 meter and the 10,000 meter events for women gained world record status in 1980, they remained non-sanctioned for international competition.[12] Thus, neither event qualified for inclusion in the 1984 Summer Olympics.

The 1984 Summer Olympics was a once-in-a-lifetime event for many women runners.[13] It was the first time that there were sufficient numbers of 5,000 meter and 10,000 meter women runners. For many of these women, the 1984 Summer Olympics offered the only hope of ever running in an IOC-sanctioned 5,000 meter and/or 10,000 meter event.[14]

The Ninth Circuit, in reaching its decision in *Martin*, held for the IOC on two grounds.[15] First, the court found that the IOC's rules for adding new events do not arbitrarily discriminate against any protected class. Second, the court held that the Unruh Civil Rights Act does not compel the creation of "separate but equal" events for women. In addition to these reasons, the court expressed its reluctance to apply a state statute to an event organized and conducted pursuant to the terms of an

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7. This is an unreported decision. Martin v. Int'l Olympic Comm., No. 83-5847 (C.D. Cal. Apr. 16, 1984).

8. *Martin*, 740 F.2d at 673.

9. *Id.* at 673-74. In order for a new event to be included it "must be recognized internationally through national championships and international competition during the four years before the time it is first considered for inclusion." Rule 32 of the 1970 Olympic Charter (IOC).

10. *Martin*, 740 F.2d at 674.

11. *Id.*

12. *Id.* Today, the 5,000 and 10,000 meter running events are the most popular among amateur athletes.

13. This is especially true for those women whose countries boycotted the 1980 Moscow Summer Olympics.

14. 6 L.A. Daily J., Aug. 25, 1983, at 4, col. 3.

15. There is no clear majority opinion in the reasoning of the court for there are two separate opinions finding for the IOC, with one judge dissenting.

international agreement. In reaching its decision regarding the women's equal protection arguments under both the fifth and fourteenth amendments, the Ninth Circuit found that the alleged disproportionate impact on women resulting from the IOC's application of its rules did not reflect a discriminatory intent.[16]

The Unruh Civil Rights Act prohibits any form of arbitrary discrimination by a business establishment.[17] While it is an open question whether the Unruh Civil Rights Act applies to participation in the Olympics, the Ninth Circuit neither reached nor decided this issue[18] but instead chose merely to assume that it did apply for the sake of argument.[19]

The Unruh Civil Rights Act is derived from the common law right of equal access to inns, common carriers and those enterprises "affected with a public interest."[20] "The California Legislature, in 1897, enacted those common law doctrines into the predecessor of the present Unruh Civil Rights Act."[21] In doing so, the Legislature determined that it is the public policy of the State of California that "business establishments of every kind whatsoever" shall be open to all on an equal basis.[22] The California courts have interpreted the phrase "business establishment" very broadly,[23] to include "all commercial and noncommercial entities open to and serving the general public."[24]

The women runners argued that the Olympics is a business establishment subject to the Unruh Civil Rights Act, because it is a business entity serving the general public. As such, the Olympics would be re-

16. *Martin*, 740 F.2d at 678-79.

17. CAL. CIV. CODE § 51 (Deering 1985). *See supra* note 2.

18. *See infra* text accompanying note 43.

19. *Martin*, 740 F.2d at 676.

20. *In re* Cox, 3 Cal. 3d 205, 212, 474 P.2d 992, 996, 90 Cal. Rptr. 24, 28 (1970) (persons with long hair excluded from shopping center).

21. *Id.* The original 1897 act provided:

> That all citizens within the jurisdiction of this State shall be entitled to the full and equal accommodations, advantages, facilities, privileges of inns, restaurants, hotels, eating-houses, barber-shops, bath-houses, theatres, skating-rinks, and all other places of public accommodations or amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens.

(Stats. 1897, ch. 108, p. 137 § 1).

22. *Cox*, 3 Cal. 3d at 212, 474 P.2d at 996, 90 Cal. Rptr. at 28.

23. Curran v. Mount Diablo Council of the Boy Scouts of America, 147 Cal. App. 3d 712, 729, 732, 195 Cal. Rptr. 325, 335, 337 (1983), *appeal dismissed*, 468 U.S. 1205 (1984). In this case the California Court of Appeal held that the Boy Scouts are a business establishment within the meaning of the Unruh Civil Rights Act.

24. *Id.* at 733, 195 Cal. Rptr. at 338. While the majority in *Martin* never reached the issue of whether the Unruh Civil Rights Act applies in this case, it is hard to characterize the Olympics, in which an event is open only to the top amateur athletes in the world, as being open to the general public.

quired to offer the same types of events to both men and women. Further, the women runners, while conceding that the Unruh Civil Rights Act is not absolute, argued that the only way for the IOC to avoid violating the Act was to show that the exclusionary policy contained in the rules served some "compelling societal interest."[25] In this regard, the IOC argued that a business establishment need only establish reasonable "regulations that are rationally related to the services provided."[26] In addressing this argument, the Ninth Circuit identified an ambiguity created by the California Supreme Court.[27] The Ninth Circuit indicated that the California Supreme Court established the proposition that "when a statute or rule arbitrarily discriminates against any class of persons, it may be justified only if there is a compelling societal interest."[28] The court further indicated that the California Supreme Court has established the proposition that "a business establishment may exclude individuals, however, if they violate a reasonable deportment rule which is rationally related to the services performed."[29] Resolving the apparent ambiguity created by these two decisions, the Ninth Circuit held that Rule 32 did not exclude any class of persons, since it applied equally to all proposed new Olympic events and therefore did not arbitrarily discriminate.[30]

Upon finding that Rule 32 did not arbitrarily discriminate against women, the Ninth Circuit next turned to the issue of whether Rule 32 had a disproportionate impact upon women that violated their equal protection rights guaranteed by the fifth and fourteenth amendments. The Ninth Circuit held that it did not appear from its review of the record on appeal as if the "district court erroneously found state action."[31] The

25. Marina Point, Ltd. v. Wolfson, 30 Cal. 3d 721, 743, 640 P.2d 115, 128, 180 Cal. Rptr. 496, 510, *cert. denied*, 459 U.S. 858 (1982).

26. *Martin*, 740 F.2d at 676. *See also Cox*, 3 Cal. 3d at 217, 474 P.2d at 999, 90 Cal. Rptr. at 31.

27. This apparent ambiguity in California is created by the different issues addressed in *Marina Point* and in *Cox*. *Marina Point* dealt with the issue of discrimination based on an arbitrary classification, age, whereas *Cox* dealt with the issue of an individual excluded from a public shopping mall on account of long hair.

28. *Martin*, 740 F.2d at 677 (citing *Marina Point*, 30 Cal. 3d at 743, 640 P.2d at 128, 180 Cal. Rptr. at 510).

29. *Martin*, 740 F.2d at 677 (citing *Cox*, 3 Cal. 3d at 217, 474 P.2d at 999, 90 Cal. Rptr. at 31). *E.g.*, Ross v. Forest Lawn Memorial Park, 153 Cal. App. 3d 933, 203 Cal. Rptr. 468 (1984), where the Second District Court of Appeal held here that the Unruh Civil Rights Act would not have been violated had a cemetery excluded punk rockers from a funeral. *See also* 59 Ops. Cal. Att'y Gen. 70 (1976).

30. *Martin*, 740 F.2d at 677.

31. *Id.* The fourteenth amendment states that "No state shall . . . deny to any person within its jurisdiction the equal protection of its laws." U.S. CONST. amend. XIV, § 1. A

court then went on to state that proving disporportionate impact alone does not establish a violation of the Equal Protection Clause and that it was necessary for the women runners to show discriminatory intent in order to succeed on their equal protection claims.[32] The court held that since Rule 32 is facially neutral, and applies equally to new events for either men's or women's events, that the women runners' equal protection rights had not been violated.[33] The court noted that even the women runners conceded that forty-eight new women's events had been added since 1949, when Rule 32 was adopted, as compared to forty-three new events for the men.[34]

The majority also had difficulty in accepting the propriety of the type of relief requested by the women runners. The court stated that imposing a "separate but equal" 5,000 meter and 10,000 meter event is not allowed under the Unruh Civil Rights Act. The court stated "[w]e simply do not read the Act to compel the creation of separate but equal events for women. The decisional law interpreting the Act provides no support for the remedy the runners seek."[35]

In addition to being reluctant to grant the relief asked for, the court was also reluctant to apply a state statute to an international event, organized pursuant to an international compact.[36] The Ninth Circuit did not believe that it was appropriate to supercede an international agreement with a state statute.

The decision in *Martin* leaves a lot to be desired. This case is of limited precedential value.[37] It also will have relatively little impact upon future Unruh Civil Rights Act violations.[38] Most categories of Un-

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finding of state action is required before the protection of the Fourteenth Amendment can be invoked. The Civil Rights Cases, 109 U.S. 3 (1883).

32. *Martin*, 740 F.2d at 678 (citing Washington v. Davis, 426 U.S. 229, 239-42 (1976)).

33. *Martin*, 740 F.2d at 678-79. The court here relied primarily upon Personnel Adm. of Mass. v. Feeney, 442 U.S. 256 (1979). In that case a veterans' preference statute that excluded both men and women did not violate the Equal Protection Clause, even though over 98% of the veterans in that state were male.

34. *Martin*, 740 F.2d at 678-79.

35. *Id.* at 676. Indeed, Judge Alarcon was moved enough to concur in a separate opinion just on this issue.

36. *Id.* at 677.

37. This is because it is a federal court interpreting a state statute. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

38. In Isbister v. Boy's Club of Santa Cruz, 40 Cal. 3d 72, 88 n.16, 707 P.2d 212, 222 n.16, 219 Cal. Rptr. 150, 159 n.16 (1985), the California Supreme Court held that it was a violation of the Unruh Civil Rights Act to exclude girls from joining the Boy's Club, that court declined to determine if "the precise semantic definition of the *Marina Point* test" had been applied in *Martin*.

ruh Act violations have already been decided in prior case law.[39] In addition, the law is already well settled in the area of amateur athletic competition where an event is open to all individuals.[40] Also, sex discrimination in athletic events sponsored by an educational institution is prohibited by both state and federal laws.[41] Nor will this decision have

39. *E.g.*, O'Connor v. Village Green Owners Ass'n, 33 Cal. 3d 790, 662 P.2d 427, 191 Cal. Rptr. 320 (1983) (children excluded by covenant from condominium complex); *Marina Point*, 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496, *cert. denied*, 459 U.S. 858 (1982) (children excluded from apartment complex); *Cox*, 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970) (persons with long hair excluded from shopping center); Stoumen v. Reilly, 37 Cal. 2d 713, 234 P.2d 969 (1951) (homosexuals excluded from public restaurants and bars); Orloff v. Los Angeles Turf Club, 36 Cal. 2d 734, 227 P.2d 449 (1951) (persons with immoral reputations excluded from public race track); Rolon v. Kulwitzky, 153 Cal. App. 3d 289, 200 Cal. Rptr. 217 (1984) (homosexuals excluded from private dining facilities); *Curran*, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983), *appeal dismissed*, 468 U.S. 1205 (1984) (homosexuals excluded from Boy Scouts); Easebe Enters. v. Rice, 141 Cal. App. 3d 981, 190 Cal. Rptr. 678 (1983) (exclusion of males from bars); Winchell v. English, 62 Cal. App. 3d 125, 133 Cal. Rptr. 20 (1976) (protection provided for those who associate with members of a protected class). These are only a few of the cases that interpret the Unruh Civil Rights Act.

40. The issue of athletic competition has been interpreted by other states to meet their public accommodations statutes, which is the equivalent of the Unruh Civil Rights Act. *See* New York Roadrunners Club v. State Div. of Human Rights, 81 A.D.2d 519, 437 N.Y.S.2d 681 (1981), *aff'd on other grounds*, 55 N.Y.2d 122, 432 N.E.2d 780, 447 N.Y.S.2d 908 (1982) (participation in the New York City Marathon is covered by the New York state public accommodations statute); National Organization of Women, Essex Chapter v. Little League Baseball, Inc., 127 N.J. Super. 522, 318 A.2d 33 (1974) (private, non-profit baseball organization is a public accommodation under New Jersey law).

41. CAL. EDUC. CODE § 41 (Deering 1985) (allows for the creation of separate athletic events for men and women by a school district or community college); CAL. EDUC. CODE § 230(c) (Deering 1985) (defines sex discrimination to be the denial of participation in, or denial of equivalent opportunity in, athletic programs); CAL. EDUC. CODE § 231 (Deering 1985) (provides for the maintaining of separate toilet facilities, locker rooms, or living facilities for the different sexes, so long as comparable facilities are provided); CAL. EDUC. CODE § 66016 (Deering 1985) (requires that opportunities for participation in intercollegiate athletic programs in the community colleges, the campuses of the California State University and the campuses of the University of California, be provided on as equal a basis as is practicable in the respective men's and women's athletic programs); CAL. EDUC. CODE § 72012 (Deering 1985) (mandates that every community college district comply with CAL. EDUC. CODE §§ 41 and 66016); CAL. EDUC. CODE § 89240 (Deering 1985) (declares that within the California State University and Colleges that females be given the same opportunity to participate in athletics and compete with other females in individual and team athletics as is available to males who participate with other males in individual and team athletics); CAL. GOV'T CODE § 11135 (Deering 1985) (prohibits discrimination on the basis of sex in any program or activity that is funded directly by the state or receives any financial assistance from the state; this section could be used to prevent sex discrimination in private educational institutions); Title IX of the Education Amendments of 1972, 10 U.S.C. § 1681 (1985) (prohibits sex discrimination in any educational institution which receives federal financial assistance, with a few exceptions being religious educational organizations, educational institutions whose primary purpose is the training of individuals for military service, and those public institutions of undergraduate education which traditionally and continually from their establishment have had a policy of admitting students of only one sex); 45 C.F.R. § 86.41 (allows for the creation of separate teams

an effect in the area of professional sports, for the Unruh Civil Rights Act does not apply in the area of employment.[42] Thus, this case is conceivably one whose impact is confined to its own facts.

Even though this decision is of limited precedential value, it does serve as a useful model for analyzing Unruh Act violations because the court raised the correct questions. The first major question raised was whether the Unruh Civil Rights Act even applies. The majority opinion sidestepped answering this question by assuming that the Act applies, thereby declining to decide if in fact the Unruh Civil Rights Act does apply. The dissenting opinion stated that the Unruh Act does apply, but offered only a cursory analysis of why.[43] Thus, the question of whether the Unruh Act applies appears to remain an open one. While the Olympics itself is a business establishment, it is unclear if it is of a type subject to the Unruh Act. While athletic participation in the Olympics may not be akin to activities of a truly private club, athletic participation is also not open to the general public.[44] The dissent relies heavily upon an opinion which found the Boy Scouts of America to be a business establishment subject to the Unruh Act.[45] What the dissenting opinion fails to take into account is that membership in the Boy Scouts is open to the general public.[46] As the dissent itself correctly notes, athletes' participation in the Olympics is "subject only to their athletic qualifications."[47] While this statement may be true, it is misleading, for only a few of the many athletes who desire to participate in the Olympics ever do. In addition, the circumstances presented in *Martin*, which concern the rights of women athletes to participate equally in the Olympics, appears to fall more easily into the category of an employment type relationship, which

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for members of each sex; where selection is based upon competitive skills but team membership has only been offered for members of one sex and where opportunities for members of the excluded sex have been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport).

42. Alcorn v. Anbro Eng'g, 2 Cal. 3d 493, 498 P.2d 216, 219-20, 86 Cal. Rptr. 88, 90 (1970). This case involved a truck driver who sued his former employer for employment discrimination under the Unruh Civil Rights Act. The court held that employment is not an "advantage" or "privilege" protected by the Unruh Act. Professional sports falls into the category of employment, and therefore is not covered by the Unruh Civil Rights Act.

43. *Martin*, 740 F.2d at 681-82.

44. The issue of whether the Unruh Civil Rights Act applies to a private club is currently being litigated. Rotary Club of Duarte v. Bd. of Directors of Rotary Int'l, 178 Cal. App. 3d 1035, 224 Cal. Rptr. 213 (2d Dist. 1986), *juris. postponed*, 55 U.S.L.W. 3315 (U.S. Nov. 3, 1986) (No. 86-421).

45. Curran v. Mount Diablo Council of the Boy Scouts of America, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983), *appeal dismissed*, 468 U.S. 1205 (1984).

46. *Martin*, 740 F.2d at 681-82 (Pregerson, J., dissenting). The dissent correctly notes this statement, but fails to apply it.

47. *Id.*

is not covered by the Unruh Act.[48]

If the Unruh Civil Rights Act does apply in *Martin*,[49] the remedy of "separate but equal" events may be constitutionally permissible. Both state and federal law allow for the creation of "separate but equal" sports teams in school programs.[50] The majority vehemently argued that the creation of "separate but equal" middle distance running events is impermissible under the Unruh Civil Rights Act, absent a compelling societal interest. But, this contradicts current state and federal law. While this remedy, in their view, may not be compatible with the Unruh Act, allowing the women runners to compete together with the men should be allowable. But, it is the IOC which has set up separate events based upon gender. Because the United States Constitution allows "separate but equal" events in some areas, and since the IOC already requires the segregation of men's and women's events, denying the women the relief that they asked for appears to be incorrect.

Finally, even if Rule 32 is facially neutral, its intent was clearly discriminatory.[51] The Olympics has a long and sordid history of denying women equal participation in track and field events. While the Supreme Court found a veterans' preference statute to serve a legitimate state interest, there is no legitimate interest being served here by denying women runners the equal opportunity to compete in Olympic sanctioned track and field events. Against this background of discrimination, Rule 32 does not appear to be neutral in its application, because the men's track

48. Because of the rigorous selection process involved, only the most qualified athletes are given the opportunity to compete on an Olympic team. The position of an athlete on an Olympic team is akin to employment. "[T]he term [employment] is equivalent to hiring, which implies a request and a contract for compensation." BLACK'S LAW DICTIONARY 471 (5th ed. 1979). The compensation involved does not have to be money, it can be any type of consideration, which can be almost anything of value. It would even be sufficient if the Olympic team agreed not to allow someone else to compete in that event, giving up the right to have someone else compete in that event. Thus, this situation could arguably fall into the category of employment.

49. Until a California court decides this issue, it will remain an open question.

50. CAL. EDUC. CODE § 89240 (Deering 1985) states: "It is the further intent of the Legislature that females be given the same opportunity to participate in athletics and compete with other females in individual and team athletics as is available to males who participate with other males in individual and team athletics." 45 C.F.R. § 86.41 specifically creates an exception for separate teams "where selection for such teams is based upon competitive skill or the activity involved is a contact sport." The California Supreme Court in *Isbister*, 40 Cal. 3d at 77, 707 P.2d at 214, 219 Cal. Rptr. at 152, states, "we do not preclude the Legislature from amending the Act to allow the Boys' Club to maintain its male-only policy. The validity of any such future legislation is not before us." Thus, in the area of gender discrimination the court kept open the possibility of single-sex facilities and programs.

51. *Martin*, 740 F.2d at 683 (Pregerson, J., dissenting). The dissent argues that intent is irrelevant, provided that the women are actually excluded from an event.

and field events were completely established by 1912.[52] While Rule 32 may apply to all new events, it also applies to those old events in which the women runners had not been allowed to participate. Therefore, to categorize Rule 32 as neutral in its application is incorrect, when it is actually just one more barrier to establishing equal men's and women's track and field events.

Thus, after *Martin* it is still unclear how far the California Unruh Civil Rights Act goes in protecting a class from the ills of arbitrary discrimination.[53] In addition, it is also unclear what type of relief the Unruh Act affords an injured party. While these questions remain unanswered, the fact remains that for this group of women athletes approaching the end of their competitive prime, the chance to compete in an IOC-sanctioned middle distance running event may have come and gone.[54]

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52. *Id.* at 681.

53. In light of two subsequent California Supreme Court cases where gender based discrimination was held to violate the Unruh Civil Rights Act, *Isbister* (girls excluded from joining the Boys' Club) and Koire v. Metro Car Wash, 40 Cal. 3d 24, 707 P.2d 195, 219 Cal. Rptr. 133 (1985) (gender-based price discounts), the holding in *Martin* may be untenable.

54. A 10,000 meter middle distance running event, but not a 5,000 meter event, has been added for the 1988 Seoul Summer Olympic Games. Telephone interview with United States Olympic Committee (Nov. 13, 1986).