

ON YOUR MARK, GET SET, SUITE!

The race to ensure equality for women athletes at the Olympic Games has been, like a marathon, long and arduous. Last year, on the road to the Games in Los Angeles, some female distance runners took a new turn—to the courthouse—to press their claims.

By Sherrill Kushner

Did the refusal to schedule a 5,000-meter and a 10,000-meter race for women at the upcoming 23rd Olympiad constitute unlawful sex discrimination? Yes, asserts the American Civil Liberties Union (ACLU) which represents, *inter alios*, more than 58 female distance runners from around the world in a lawsuit seeking injunctive and declaratory relief and a writ of mandate ordering the inclusion of these two races in time for the summer Olympic Games.¹

On August 10, 1983, the ACLU filed a complaint in Los Angeles Superior Court which, as now amended, names as defendants the International Olympic Committee (IOC), the United States Olympic Committee (USOC), the Los Angeles Olympic Organizing Committee (LAOOC), the International Amateur Athletics Federation (IAAF), The Athletic Congress of the United

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States (TAC), and the Los Angeles Coliseum Commission.

The plaintiffs allege that although these two races meet IOC requirements, they were excluded because of sex discrimination which is prohibited by international, U.S., state and local laws. Claiming that they have exhausted all available administrative remedies, these women, with the International Runners Committee (IRC) and the Road Runners Clubs of America, are seeking redress by legal means.

The 5,000 meters and the 10,000 meters for women runners were excluded from the Olympics because of sex discrimination, a lawsuit alleges.

The amended complaint has four causes of action: the runners allege that 1) the defendants violated the Unruh Civil Rights Act² and the federal Public Accommodation Act,³ both of which prohibit discrimination or segregation in places of public accommodation; 2) they violated equal protection clauses under the U.S. Constitution⁴ and the California Constitution,⁵ which grant protection from arbitrary and discriminatory actions based upon sex; 3) they violated the Amateur Sports Act of 1978,⁶ which mandates as one of the USOC's objectives the encouragement and provision of assistance

to amateur athletic activities for women; and 4) they violated international law prohibiting sex discrimination (embodied in such documents as the United Nations Charter and various other covenants and declarations).

THE FIGHT TO PARTICIPATE

While the lawsuit is unprecedented (and as yet unresolved as we go to press), women have been struggling for a long time merely to participate at all in the Games. Women were forbidden to be participants or spectators at the ancient Olympic Games in Greece. A tale is recounted about a woman who tried to circumvent these restrictions:

In 404 B.C., a widow, who came from a great sporting family of wealthy Rhodian exiles, wished to watch her son box in the boys' event at the Olympic Games. She went disguised as a trainer, but, in her excitement when the boy won, she leaped over the barrier behind which the trainers were stationed and exposed herself. The judges let her off without penalty "out of respect for her father and her brothers and her son, all of whom were Olympic winners," but a rule was immediately introduced requiring trainers henceforth to attend the contests as naked as the participants.⁷

This woman was lucky. Usually women risked death for defying the strict rules.

From the time of these ancient Games until the nineteenth century, women hardly participated in sports. However, soon after the modern Olympic Games were established in 1896, women competed for the first time. Their initial appearance in the 2nd Olympiad in Paris in 1900 was limited to lawn tennis contests only. In 1904 women were allowed to compete in archery and in 1908 women were permitted to compete in skating as well. The slow expansion of women's participation was not surprising, given the philosophy of the Games as expressed by their founder, Baron Pierre de Coubertin, who

stated in 1912:

We feel that the Olympic games must be reserved for men. . . . We feel that we have tried and that we must continue to try to achieve the following definition—the solemn and periodic exaltation of male athleticism with internationalism as a base, loyalty as a means, art for its setting and female applause as reward.⁸

Women were forbidden to be participants or spectators at the ancient Olympic Games in Greece.

That same year the IAAF was founded and recognized as the governing body for track and field. It formulated uniform rules and ratified world records.

As early as 1917, national women's governing bodies for track and field began to form in Europe and America. In 1921, an international body, the Federation Sportive Feminine Internationale (FSFI) was created, acting as a catalyst for many of the early women's international competitions held in the 1920s and 1930s. It performed functions for women's athletics parallel to those that the IAAF did for men's.

Under the auspices of the FSFI, Olympic Games for women were held. The first was in Monte Carlo in 1922 with seven countries represented by 300 competitors, followed by the second in 1926 with 10 countries participating in Sweden. Succumbing to pressure by the men of the IOC and the IAAF, the women changed the name of the Women's Olympic Games to the Women's World Games.

A representative of the women went before the IOC in 1919 to ask that women's track and field events be included in the 1920 Olympic Games. By that time women had been competing in swimming, skating, tennis, golf and archery. Baron de Coubertin responded by suggesting that all women's events be removed from the Games.

The women tried again in 1924, but to no avail. Finally, in 1928, a women's track and field program was introduced. Although women in several countries were competing in 15 athletic events, the IAAF recommended only five, including 100- and 800-meter races. Many of the female runners in the 800 meters collapsed in exhaustion at the finish line, as male runners often do. Avery Brundage, the president of the IOC, described it as a horrible sight to see ladies in such a state of disarray. Consequently, an Olympic Committee decree was passed, barring women from running any race longer than 200 meters. For 32 years that decision stood.

As a result of the fierce opposition accompanying the expansion of women's athletics and because the IOC can revoke an event at any time, the women continued their own world games until 1934. Also by sponsoring their own games, the women were able to take part in more events than were permitted them in the Olympics. The third Women's World Games were held in Prague in 1930, with competitors from 17 nations; and the fourth (and last) Women's Games were held in London in 1934, with 19 of the 26 FSFI member countries represented.

Plans by the FSFI for the fifth World Games were halted when the IAAF agreed to accept the women's world records and to include an extended women's program in the Olympics. Relying on those promises, the FSFI disbanded in 1938. The IAAF did extend the women's program to include three additional events in 1936, but did not accept all the FSFI world records, causing long delays in recognition for some women, and to this day, no recognition at all for others.

In 1960 women were allowed to compete again in the 800-meter race and, in 1972, the 1,500 meters was added to the women's program. More lobbying efforts resulted in the addition of the 3,000 meters, a decision made in 1980 for inclusion in the 1984 Olympics. Thus, the women's running events up through the 1980 Olympics consisted of the 100-, 200-, 400-, 800- and 1,500-meter races plus 100-meter hurdles and two relay events.

Still, the middle-distance races, *i.e.*, the 5,000 and 10,000 meters for women, were lacking. "Between the 3,000 meter and the marathon yawns a gap in which languish several of the world's most brilliant women distance runners," reported the International Runners Committee (IRC), a nonprofit corporation representing long-distance runners dedicated to ending discrimination against women runners.

BACKGROUND TO THE LAWSUIT

During a 1980 radio interview, ACLU Director Ramona Ripston stated that the ACLU was threatening to take legal action against the International Olympic Committee for its discrimination against women. Hearing the broadcast, Jacqueline Hansen, former world record holder in the marathon and then co-president of the IRC, contacted the ACLU to offer her support. When inroads were being made toward the inclusion of more women's sporting events, such as the addition of the women's marathon in 1981, the ACLU withdrew its threat, feeling that women were finally getting a fair shake.

Nobody noticed the thousands of middle-distance female runners until finally one generation of women said, "Enough!"

Hansen thought differently. In 1982 she informed the ACLU staff

¹After the action was filed, nearly 30 more female runners approached the ACLU seeking to enter the suit.

²Civ. CODE § 51.

³42 U.S.C.A. § 2000(a) *et seq.* Even though sex is not expressly covered by this law the plaintiffs are arguing that the itemized categories are meant to be descriptive, not definitive.

⁴U.S. CONST. amends. V, XIV.

⁵CAL. CONST. art. I, § 7.

⁶36 U.S.C.A. § 374 *et seq.*

⁷M.I. FINLEY AND H.W. PLEKET, *THE OLYMPIC GAMES—THE FIRST THOUSAND YEARS*, at 45-6 (1976).

⁸WOMEN'S SPORTS, July 1983.

that despite constant lobbying efforts, which had begun in 1979, the middle-distance running events still were not being scheduled. While the inclusion of the marathon for women was considered a great advance, there were many runners who could not run the marathon but could excel in the 5,000- and 10,000-meter runs. ACLU staff attorney Susan McGreivy offered to work with the IRC if it first exhausted the proper channels and met the IOC requirements for inclusion, *i.e.*, evidence of interest and participation, demonstrated by "being widely practiced in 25 countries and 2 continents."

Hansen went to work. In the summer of 1983, she gathered the names and addresses of hundreds of women who were legitimate 5K and 10K runners from more than 30 different countries by soliciting IRC members, contract athletes with Nike Sportshoe Company (an IRC sponsor), statisticians, track and field publications, and by using her own contacts made from personally competing in past international running championships. With these names, the IRC conducted a mailing campaign that eventually yielded the responses of 80 women in 27 countries who sent signed right-to-sue letters in 10 different languages.

Hansen also demonstrated that "the proper channels" had been tried repeatedly without success, as she related the history of the attempts made to include these races. In order for an athletic event to be added to the Games, a proposal for the event is usually offered by a national athletics governing body for approval by the IAAF. If the IAAF approves the proposal, it is brought before the IOC which turns it over to a program commission. The commission, composed of specially hired, independent consultants, studies the feasibility of adding the event. Taking into consideration the commission's findings, the IOC approves or disapproves.

"That is how an event is supposed to become part of the Olympic program; however that's not what always happens," notes Susan McGreivy. "Lip service is paid to this process and often the events don't go through any of these procedures," she continues.

In late 1977, the U.S. Amateur Athletic Union (since superseded by

TAC) sponsored a proposal to have the women's marathon, 5,000-meter and 10,000-meter races included in the Olympic Games. Pat Rico, representing the AAU's Women's Long Distance Running Committee, carried the proposal to the IAAF in 1978, but it was not taken seriously. The IAAF sent out three questionnaires concerning the proposal, but it was only after the third time that it got any feedback from its members, and then the only interest shown was in the women's marathon, which was eventually approved in 1981.

Middle-distance races don't require sophisticated training, they can be run barefoot, and the runners can be trained in any part of the world.

Still, the absence of the middle-distance races caused great disappointment for many of the female runners. If the races were not going to be included in the 1984 Games, then many runners would be precluded from ever competing, having reached the peak of their short running careers. Most world-class athletes, reports McGreivy, are able to compete through one Olympiad.

Undaunted, Hansen then approached IAAF President Primo Nebiolo, who advised her that the only way to get these races in the Olympic agenda was to take the proper steps—the first being to get them recognized as world-record events.

"I was astonished!" remarks Hansen. "I was holding in my hand the *Track and Field News* issue with the rankings of these races around the world. The 5,000 meters and the 10,000 meters were established as world-record events the year before." Although Hansen courteously pointed out this fact, Nebiolo continued to insist that the races had to be established as world-record events.

"Here was a man in the highest echelon of the government of our

sport and he didn't even know this had already happened," exclaims Hansen. Increasing her frustration, Nebiolo revealed that the program commission would give greatest consideration to events giving the greatest yield and then proceeded to characterize the two races as "boring." Not long thereafter, Hansen went to the ACLU, laden with ammunition for the lawsuit.

"When Jacqueline Hansen was able to collect the signatures of the many women runners who were being discriminated against to the extent that they were willing to go to court to seek some relief, I was impressed," recalls McGreivy. McGreivy herself had been an Olympic swimmer in 1956 in the 400-meter freestyle, but her best event—the 1,500 meters—was not then, nor is it now, open to women. Identifying with the plight of the runners, she took on the task of representing them with the aid of co-counsel Daniella Sapriel, a local civil trial lawyer.

"Up until 1983, Jacqueline Hansen and the IRC kept pushing within the system to get the middle-distance races, but no one within the system would take responsibility for what was requested," comments Sapriel. "The bringing of the lawsuit was not done as a political statement, but was brought as a last resort because the plaintiffs felt there was no other solution for them."

It was not until well into discovery when plaintiffs' counsel learned to what extent women runners were participating in these two races worldwide. In a recent deposition, Katherine Switzer, director of the Avon International Running Circuit, revealed that 6,000 women ran in last year's 10,000-meter race in Sao Paulo, Brazil, and thousands ran in Hong Kong, Thailand, the Philippines, and Japan.

"It's looking like these races may be the singularly most popular women's events in the Olympic competition in terms of numbers of competitors, probably because they are 'poor people's races'—they don't require great amounts of sophisticated training, they can be run barefoot, and the runners can be trained in any part of the world. The great tragedy is that thousands are there and nobody noticed until finally one generation of women said, 'Enough, we deserve

to be in the Olympics," says McGreivy with great conviction.

PRETRIAL ACTIONS

After the complaint was filed, the Coliseum Commission had the case removed to federal court. It was assigned to U.S. District Court Judge David Kenyon of the Central District.

In October 1983, the American-based defendants (the LAOC, the USOC, TAC, and the Coliseum Commission) answered, denying the charges of sex discrimination. Both the IAAF and the IOC (in London, England, and Lausanne, Switzerland, respectively) have to date failed to respond. They claim that service has been invalid. Envelopes containing the pleadings sent to both organizations have been returned to the ACLU; some opened, some unopened. The ACLU contends that service has been proper pursuant to the Federal Rules of Civil Procedure, by service on the LAOC as managing or general agent of the IAAF and the IOC.

How does the international athlete get due process against a remote corporation in the Swiss Alps?

Despite the plaintiffs' claim of having properly served the European defendants, they have continued with service procedures consistent with Swiss and British law as a safeguard. According to Sapriel, the service abroad requires letters rogatory. For the Swiss, this involves translating into French the entire complaint as well as portions of the applicable statutes at issue. After the ACLU had completed the translations, the documents were then forwarded to Judge Kenyon, whose court translator reviewed them before he signed them.

"Widely practiced" means having national championships or cups permanently organized by the respective national sports federations, international participation and the holding of regional and/or world championships in the respective sports (IOC Rule 32).

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They were then sent to the U.S. State Department, which has transmitted them to the appropriate Swiss officials. The officials are supposed to determine if there is such a cause of action for sex discrimination under Swiss law. If not, the IOC cannot be served, since they have not broken any Swiss law. In accordance with British law, the letters rogatory were sent directly to the British officials without the intermediate step to the State Department.

In the meantime, the ACLU attorneys are preparing to go forward on an entry of default against the IAAF and the IOC, while the remaining defendants are moving ahead on discovery. After the entry of default, the ACLU will appear at a hearing and prove its case as if it were in trial.

The geographic complexities, such as service abroad and conducting discovery on parties located worldwide, coupled with the time constraints imposed by the impending Games, have combined to make litigating this lawsuit an attorney's nightmare.

THE DEFENSE ARGUMENTS

So why has there been opposition to including the 5,000- and 10,000-meter races? It is difficult to answer because the LAOOC has refused to comment and the foreign defendants have not yet answered the complaint. However, based on the answers that have been filed and the parties who have been interviewed, an answer may be pieced together.

First, to understand the issues involved, it is important to understand who the defendants are and how they relate to one another. At the local level, the Coliseum Commission is responsible for the L.A. Memorial Coliseum, site of the opening and closing ceremonies of the 1984 Games as well as the site of the track and field competitions. The Los Angeles Olympic Organizing Committee is a nonprofit, California corporation organized for the purpose of staging the 1984 Olympic Games.

At the national level, The Athletic Congress of the United States is the national governing body for track and field, governing pursuant to a congressional grant of power. It is charged with the duty of promoting and organizing track and field both on national and international levels.

The U.S. Olympic Committee has exclusive jurisdiction, also pursuant to a congressional grant of power over all matters relating to the participation of the U.S. in the Games. Among its duties, the USOC appoints the organizing committee of the American host city in conjunction with the authorities of the host city. James Colbert, representing the USOC, emphasizes that it is a private body and not an instrumentality of the U.S. government.

At the international level, the International Amateur Athletic Federation establishes the rules and regulations of the various athletic events and makes recommendations to the IOC for acceptance of athletic events in the future Olympic Games. The International Olympic Committee is the policy-making and governing body for the Olympic Games. It coordinates selection of the Olympic program with the host city's organizing committee and the international sports federations. It also selects the city to host the Games.

There are four key allegations common to these defendants' answers: 1) that none of them is empowered to authorize the inclusion of athletics events in the Games without the approval of the IOC and thus none of them is the real party in interest; 2) that none of them is "the agent, servant and employee of the other and that each has not been acting under color of city, county, state, U.S. and international law; 3) that none of them has unlawfully discriminated against women on the basis of sex in denying the inclusion of these races; and 4) that because the plaintiffs waited too long to file suit, the claim should be barred by laches.

"The weakness of the case against all of the defendants except the IOC," comments Lionel Sobel, a Loyola Law School professor specializing in entertainment and sports law, "is that none has power to add these races to the Olympics. As against those parties, the case is analogous to a lawsuit by women against a movie theater owner alleging that a movie being shown by the theater was made by a production company that discriminated against women in its hiring for that movie."

Jacqueline Hansen admits it was
(Continued on page 44)

difficult for the plaintiffs to name the USOC, the LAOOC and TAC in light of their support for women's athletics. TAC took the women's suggestions, included the 5,000-meter and 10,000-meter races in their national competitions, and led the way for the women runners to proceed in getting them through on the international level by TAC's example.

Susan McGreivy explains why the three were named. The USOC and TAC, by an act of Congress, were given plenary powers over the Olympic Games. "If we didn't name them," notes McGreivy, "we were afraid they could make some esoteric argument that the IOC did not have real control of the Games at the end and we'd be in the classic situation which the runners already faced, getting the run-around while trying to seek administrative remedies. The LAOOC was named since any injunctive relief had to include them as agent of the IOC."

But these legal arguments do not explain the real reasons for the opposition. The crux of the opposition from the IOC's point of view, alleges McGreivy, is its need to protect "the integrity of the process," i.e., to prevent being forced by an outside entity to add an event. She feels that the IOC believes it would be bad precedent to give into any outside pressure, especially since there are national organizing committees within the Olympic structure which are charged with the task of introducing events. Further, since the Games are hosted around the world, the IOC needs to move around the world freely, without having to respond to individual court systems. "But the question then arises," says McGreivy, "how does the international athlete get due process against a remote corporation in the Swiss Alps?"

THE PLAINTIFFS RESPOND

The plaintiffs feel strongly that the "integrity of the process" argument is spurious because the process is whatever the IOC wants it to be. In support of that, the plaintiffs argue that Rule 32 and Rule 33 of the IOC Charter have continually been bent at the IOC's whim. Rule 32 requires that for an event to be added there

must be evidence of interest and participation. The IRC claims:

Cursor research reveals that such requirements have never applied across the board. . . . As recently as 1972, several sports had fewer than ten nations represented. . . . Moreover, women distance runners are not asking for the addition of a new sport, but rather for the addition of two events within an existing program.¹⁰

As for Rule 33, requiring that all events be named four years prior to the Games, the plaintiffs contend that since 1982 alone, board sailing, women's kayak racing, super heavyweight boxing, super heavyweight judo and two wheelchair races for handicapped athletes have been added.

Another reason for the opposition, according to the International Runners Committee, has been focused on whether the women can physiologically withstand the rigors of racing these endurance events. The plaintiffs contend the concern is groundless since in the last decade, tens of thousands of women have successfully performed worldwide in running competitions, including the 26-mile marathon, a distance far exceeding either the 5,000 meters or the 10,000 meters which are approximately three and six miles, respectively.

Another reason for the failure to schedule these races is that they have not been deemed to be cost-effective, since they have been attacked as lacking spectator and television viewer interest. The plaintiffs are outraged at having to meet what they consider to be a "standard of profitability," which, they contend, the men have not had to meet. They also dispute the "boring" label, pointing out that the women's finish times are only a few minutes more than the men's and no one complains that the men's races are boring. Further, a recent women's 10K road race world championship held in San Diego, by all accounts, was an exciting race, ending in a photo finish between two competitors.

A third reason given for the opposition has been the inability to

accommodate these events at this late date. The LAOOC claims that it has planned accommodations, transportation, training, and tickets based on the established program. To schedule the additional events now, states the answer, "would place an intolerable burden on the LAOOC and would disrupt the planning for and the conduct of the Games."

Contrary to this allegation, LAOOC President Peter Ueberroth, in a deposition taken in late January 1984, stated that it was not too late to accommodate the races, according to McGreivy. The plaintiffs contend, as well, that the races could be run on one of the newly refurbished alternative tracks in Los Angeles, particularly one near the Coliseum at the University of Southern California.

"Thousands of events are not found in the Olympic Games," points out USOC attorney James Colbert. "If every event were included, the Games would last for months and months. There will always be competitors unhappy about this, but it is necessary to be selective based on reasonable criteria. Here the motivation was not sexual."

CONCLUSION

Whatever the outcome of the suit, it is incontestable that women lack equality in Olympic competition and have since the Games began. While 17 events have been added to the 1984 Olympic program since its establishment four years ago (10 for women exclusively) and three have been returned to the program after having been discontinued from earlier Games, women still have about one-third the opportunities to win medals as men.

The process of gaining recognition through the scheduling of more women's events has been arduous. In the ancient Games, women were not allowed to watch or participate. In the very beginning of the modern Games, women could only watch. Eventually, women were able to participate in selected events. Perhaps there will come a time when women will fully participate. However, whether or not this lawsuit will be significant in reaching that goal remains to be seen. JL

¹⁰International Runners Committee press release.