857 F.2d 1478
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA9 Rule 36-3 for rules regarding the citation of unpublished opinions.)
United States Court of Appeals, Ninth Circuit.

Heidi Sargent JELDNESS, Plaintiff-Appellant,
v.
Robert J. WATSON, individually and in his official capacity as Administrator of the Corrections Division of the State of Oregon; Pat Tuthill, individually and in her official capacity as Superintendent of Oregon Women's Correction Center, Defendants-Appellees.

No. 87-4009. | Argued and Submitted May 4, 1988. | Decided Sept. 8, 1988.

D.Or.

REVERSED AND REMANDED.

Appeal from the United States District Court for the District of Oregon; Michael R. Hogan, Magistrate, Presiding.

Before WALLACE and REINHARDT, Circuit Judges, and EDWARD DEAN PRICE,* District Judge.

Opinion

MEMORANDUM

***1** Jeldness represents a class of present and future female inmates in the Oregon Women's Correctional Center (women's prison). She appeals a judgment following a trial conducted by a magistrate absolving the Oregon prison system administration (prison administration) of sex discrimination in all but one of the programs challenged as violative of Title IX of the 1972 Education Act, 20 U.S.C. § 1681, *et seq.* and the equal protection clause of the fourteenth amendment. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we reverse and remand.

Jeldness contends that the magistrate abused his discretion both by granting the prison administration's motion for modification of the pretrial order and by departing from the modified order at trial. We review the magistrate's decision to modify a pretrial order for abuse of discretion. *See United States v. First National Bank of Circle,* 652 F.2d 882, 887 (9th Cir.1981) (*First National*); *Globe Indemnity Co. v. Capital Insurance & Surety Co.,* 352 F.2d 236, 239 (9th Cir.1965).

The trial court may modify the pretrial order "to prevent manifest injustice." Fed.R.Civ.P. 16(e). When considering a motion to modify the order, the trial court must consider the following factors: (1) the extent to which the moving party would be prejudiced by a failure to modify; (2) the degree of prejudice the nonmoving party would suffer from a modification; (3) whether a modification made at that stage of the litigation would have a negative impact on the orderly and efficient conduct of the case; and (4) whether the moving party has been guilty of willfulness, bad faith or inexcusable neglect. *First National,* 652 F.2d at 887. If refusal to allow a modification might result in injustice while allowance would cause no substantial injury to the nonmoving party and no more than slight inconvenience to the court, a modification should ordinarily be allowed. *Id.* To prevent harm to the nonmoving party or parties, the court may attach appropriate protective terms and conditions to its order granting the modification. *Id.*

In the present case, the magistrate granted the prison administration's motion to modify the order on the day of trial. The modifications placed at issue several facts that had been stipulated to earlier in the litigation. Ordinarily, "a party need offer no proof at trial as to matters agreed to in the order, nor may a party offer evidence or advance theories at the trial which are not included in the order or which contradict its terms." *Id.* at 886. Consequently, the last minute modification of the pretrial order had a great potential to prejudice Jeldness; she was placed in the difficult position of having to introduce evidence

pertinent to the modified facts on very short notice.

However, the magistrate took care to mitigate any prejudice to Jeldness by stating that he would place the burden on the prison administration to prove its new contentions. This response to the potential for prejudice was clearly appropriate. *See id.* at 887 (to prevent harm to the opponent, appropriate protective terms and conditions may be attached to the order granting the modification). Moreover, Jeldness did not request a continuance in order to prepare to rebut the evidence to be offered by the prison administration at trial. Under these circumstances, the magistrate did not abuse his discretion by conditionally modifying the pretrial order.

***2** Jeldness also argues that the magistrate departed substantially from the modified pretrial order by ignoring his decision to place the burden of proving the modified facts on the prison administration. She argues that this departure prejudiced her by misleading her regarding the nature of her burden of proof regarding crucial factual issues at trial, including the question whether female inmates have equal or roughly equal access to apprenticeship and vocational programs.

We agree with Jeldness that the magistrate's opinion indicates that he failed to shift to the prison administration the burden of proving the facts implicated by the modifications. For example, when ruling that male prisoners do not have greater opportunity to participate in apprenticeship programs than their female counterparts do, the magistrate stated that "*plaintiffs* did not submit credible evidence to carry *their burden* of proving that the listed programs are not available to [the female] inmates." (Emphasis added.) This language clearly demonstrates that the magistrate improperly placed the burden of persuasion regarding this issue on Jeldness in contravention of the modified pretrial order.

Similarly, when describing his findings regarding the availability of vocational programs to inmates incarcerated at the women's prison, the magistrate stated that "the evidence does not support *plaintiffs' contentions* " that male inmates have more vocational training programs available than female inmates. Although it is not completely clear from this statement that the magistrate required Jeldness to carry the burden regarding this issue, by identifying the issue as "plaintiffs' contention," it appears likely that the magistrate failed to shift the burden to the prison administration with regard to this issue, as well as the apprenticeship issue. *See* E. Clearly, *McCormick on Evidence,* § 337 at 948 (3d ed.1984) (generally, a party who pleads an issue carries the burden to prove it).

We also agree with Jeldness that the magistrate's apparent failure to shift the burden of proof to the prison administration, combined with the grant of the modification of the pretrial order on the morning of trial, had a great potential to prejudice Jeldness. The issues on which the state bore the burden of proof under the protective terms of the modified order were inseparable from the ultimate issues before the court: whether the allocation of educational and vocational programs in the Oregon state prison system violated the women inmates' civil rights. We cannot say that the magistrate would have reached the same factual conclusions if he had required the prison administration to bear the burden of proving the equal availability of the various programs.

Absent a timely modification, a party is entitled to expect that pretrial orders will be honored and enforced. *First National,* 652 F.2d at 886-87. Where, as here, the magistrate modifies a pretrial order and then unexpectedly departs from the modified order to the prejudice of a party, the judgment must be reversed. *Id.* at 887.

***3** Jeldness also argues that the magistrate's factual findings were further tainted by his consideration of improperly admitted evidence. Jeldness contends that Boyd, who coordinates educational and vocational programs at the women's prison, should not have been allowed to testify to the ability of the inmates incarcerated at the women's prison to participate in apprenticeship programs at one of the men's prisons because Boyd lacked personal knowledge of the programs at the men's prison. Boyd's testimony regarding the availability of apprenticeship programs conducted at the men's prison to female inmates incarcerated at the women's prison was based on a list he received from the men's prison vocational supervisor.

Under Fed.R.Evid. 602, a witness may not testify to a matter "unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." Here, Boyd admitted having no personal knowledge of the men's prison programs, yet the magistrate relied on Boyd's testimony in deciding that the apprenticeship programs at the men's prison were available to female inmates incarcerated at the women's prison. Under these circumstances, the magistrate abused his discretion in admitting Boyd's testimony over Jeldness's objection.

Because the magistrate's failure to shift the burden of proof as to issues raised by the modifications and his reliance on inadmissible testimony appear to have tainted the court's factual conclusions in this case, we reverse the judgment in favor of the defendants and remand this case to the district court for further proceedings. On remand, the district court should also consider what effect, if any, the enactment of the Civil Rights Restoration Act of 1987, P.L. 100-259 (amending Title IX of

the 1972 Education Act, 20 U.S.C. § 1681, *et seq.*) and the Supreme Court's decisions in *Turner v. Safley,* 107 S.Ct. 2254 (1987), and *O'Lone v. Estate of Shabazz,* 107 S.Ct. 2400 (1987), have on the issues presented in this case.

REVERSED AND REMANDED.

Parallel Citations

1988 WL 96600 (C.A.9 (Or.))

Footnotes

[*] Honorable Edward Dean Price, United States District Judge, Eastern District of California, sitting by designation.