STATE OF LOUISIANA

COURT OF APPEAL

THIRD CIRCUIT

DOCKET NO. CA-08 00505-CA

COLLETTE JOSEY COVINGTON, ET AL

VERSUS

MCNEESE STATE UNIVERSITY, ET AL

CIVIL APPEAL

Appeal from the Fourteenth Judicial District Court
Parish of Calcasieu, State of Louisiana
Civil Docket Number 2001-2355
Honorable Wilford D. Carter Presiding

REPLY BRIEF

ON BEHALF OF MCNEESE STATE UNIVERSITY AND THE BOARD OF SUPERVISORS FOR THE UNIVERSITY OF LOUISIANA SYSTEM

DEFENDANT/APPELLANT

Respectfully submitted,

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Introduction

The Appellant, referred to herein as McNeese, respectfully submits its Reply Brief in response to the Appellee's brief. The Appellee, Collette Covington, argues that this Honorable Court has an important duty to uphold the Trial Court's ruling that "the disabled" have the fundamental right to access the facilities of Louisiana's public universities free of discrimination. In her conclusion, she again mentions "the disabled." Covington's argument corroborates the contention of McNeese that she has attempted to utilize her single, alleged incident in the restroom of the Old Ranch to manufacture an all out ADA assault on the entire campus of McNeese, shifting the focus from Covington to "the disabled." But this is not a suit by "the disabled" against McNeese. The motion for summary judgment was limited by stipulation to one issue – whether McNeese discriminated against *Covington*. The Trial Court limited his ruling on the motion for summary judgment to the Old Ranch restroom, denying other aspects of Covington's claims, except for the issue of registration. There was no appeal of the Trial Court's denial of those other issues. No matter how hard Covington tries to shift the analysis to "the disabled," the lone complainant is Covington and the sole consideration is whether there exist one or more genuine issues of material fact as to whether she, and she alone, was discriminated against by McNeese.

Covington further alleges that the Trial Court, at the request of McNeese, continued the motion for summary judgment for a full year and twice continued the hearing after the presentation of Covington's arguments to permit McNeese additional time to produce evidence of an issue of material fact. The Record clearly shows, however, that *all* counsel agreed to continue the hearing from March 27, 2006 to May 1, 2006;[1] from May 1, 2006 to June 20, 2006;[2] and that, when the hearing came up again, it was the plaintiff, Covington, who asked for a

[1] Trial Record (TR), Vol. IV, p. 953
[2] TR, Vol. IV, p. 955

continuance, agreed to by defendant, McNeese, from November 20, 2006, to December 4, 2006.[3] Further, the Trial Court recessed the hearing to January 4, 2007 because Covington's argument took up the entire morning and the Trial Court had another unrelated matter, a trial, scheduled for that afternoon.[4]

Covington states in her brief that "it is undisputed" some 13 times. McNeese respectfully disagrees with Covington's characterization of these issues as undisputed.

Standard of Proof – Doubt Resolved in Favor of McNeese

Covington claims that her credibility is not material; on the contrary, her own inconsistent, exaggerated, and contradictory statements make credibility an issue. Covington's statements that are inconsistent with her medical records make credibility an issue. Statements that directly contradict the evidence offered by McNeese, such as the affidavit of Tim Delaney, the Director of Services for Students with Disabilities, also make credibility an issue. Those statements, referred to extensively in the original brief submitted by McNeese and supplemented herein, directly relate to all of the crucial issues of the motion for summary judgment. Their significance is that the Trial Court cannot, at the motion for summary judgment, make credibility evaluations or weigh the testimony. The record shows that is exactly what happened in this case.

The standard of review applicable to summary judgment proceedings is *de novo* review. Appellate courts review the district court's grant of a motion for summary judgment by "viewing the record and all reasonable inferences that may be drawn from it in the light most favorable to the non-movant."[5]

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[3] TR, Vol. IV, p. 1054
[4] TR, Vol. VIII, pp. 1818-1820
[5] ***Hines v. Garrett***, 04-806, pp. 1-2 (La.6/25/04), 876 So.2d 764, 765; ***Vasseur v. Piggly Wiggly Stores, Inc.***, not Reported in So.2d, 2007 WL 4248621, 2007-888 (La.App. 3 Cir. 12/5/07).

Despite the legislative mandate favoring summary judgments found at La. Code Civ. P. art. 966(A)(2), factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and all doubt must be resolved in the opponent's favor.[6] Summary judgment is not a substitute for trial on the merits and it is inappropriate for judicial determination of subjective facts that call for credibility evaluations and the weighing of the testimony.[7] The trial judge cannot make credibility calls on a motion for summary judgment, but must draw those inferences from the undisputed facts which are most favorable to the party opposing the motion for summary judgment.[8] See also Judge Saunders' opinion in ***Peters v. American Alternative Ins. Co.***, 976 So.2d 813, 230 Ed. Law Rep. 987, 2007-972 (La.App. 3 Cir. 2/13/08), where he noted that the Louisiana Supreme Court held in ***Hutchinson v. Knights of Columbus, No. 5747***, 03-1533, p. 8 (La.2/20/04), 866 So.2d 228, 234, that a trial judge cannot make credibility determinations on a motion for summary judgment; and ***Sepulvado v. Toledo Nursing Center, Inc.***, 2007-122 (La.App. 3 Cir. 5/30/07), 958 So.2d 135, where Judge Painter similarly held that when the trial court decides a motion for summary judgment, it cannot make credibility determinations, nor may it inquire into the merits of the issues raised.

Further, unless the motion for summary judgment is supported by affidavits, together with sworn or certified copies of all papers or documents referred to, La. C.C.P. art. 967 does *not* shift the burden to the adverse party to set forth specific

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[6] ***Willis v. Medders***, 00-2507, p. 2 (La.12/8/00), 775 So.2d 1049, 1050; ***Indep. Fire Ins. Co. v. Sunbeam Corp.***, 99-2181, 99-2257 (La.2/29/00), 755 So.2d 226; ***Simon v. Biddle***, 2006-435 (La.App. 3 Cir. 12/29/06), 946 So.2d 733.

[7] ***Chivleatto v. Sportsman's Cove, Inc.***, 05-136, p. 6 (La.App. 5 Cir. 6/28/05), 907 So.2d 815, 819.

[8] See ***Independent Fire Insurance Company v. Sunbeam Corporation***, 99-2257 (La.2/29/00), 755 So.2d 226

facts showing that there is a genuine issue for trial.[9] Covington submitted a voluminous amount of unsworn and unverified documents and such evidence is insufficient in a motion for summary judgment and has little, if any evidentiary value. Covington's evidence is sufficiently countered, either by her own inconsistent or contradictory evidence, or by the evidence submitted by McNeese.

Disability

The Trial Court found that Covington was disabled simply because she was in a wheelchair on the date of her alleged restroom incident in the Old Ranch.[10] Such a ruling is an error of law, as shown below. The Trial Court did not mention epilepsy in his reasons for judgment.[11] Covington argues that she had an impairment that disabled her, had a record of impairment, and was regarded as having an impairment. As used in the Americans with Disabilities Act (ADA) and implementing regulations, the term "disability" means, with respect to an individual: 1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; 2) a record of such an impairment; 3) being regarded as having such an impairment.

Merely having an impairment does not make one disabled for purposes of the ADA. Covington must also show that there is no genuine issue of material fact that the impairment substantially limited a major life activity at the time of her alleged accident.[12]

The ADA addresses impairments that limit an individual, not in a trivial or even moderate manner, but in a major way, to a considerable amount, or to a large

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[9] ***Robertson v. Northshore Regional Medical Center***, 97-2068 (La.App.1 Cir.9/25/98), 723 So.2d 460; See also, ***Sanders v. J. Ray McDermott, Inc.***, 03-64 (La.App.1 Cir.11/7/03), 867 So.2d 771; ***Input/Output, Inc. v. Wilson Greatbatch, Inc.***, 07-570 (La.App. 5 Cir. 1/22/08), 977 So.2d 109; ***Mitchell v. Kenner Regional Medical Center***, 06-620 (La.App.5 Cir. 1/30/07), 951 So.2d at 1193.

[10] TR, Vol. VIII, pp. 1862, 1910

[11] TR, Vol. VIII, pp. 1896-1918

[12] ***Americans with Disabilities: Practice and Compliance Manual***, § 2:10 (Database updated May, 2008); 42 U.S.C.A. §§ 12101 to 12213; ***Toyota Motor Mfg., Kentucky, Inc. v. Williams***, 534 U.S. 184, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002).

degree, and the impairment's impact must be *permanent* or *long-term*. Whether a given impairment substantially limits a major life activity of an individual involves an individualized and case-by-case determination.[13] The question of whether a temporary impairment is a disability under Title II, Part A of the ADA must be resolved on a case-by-case basis, taking into consideration both the duration, or expected duration, of the impairment and the extent to which it actually limits a major life activity of the affected individual. Although temporary impairments are not automatically excluded from the definition of disability, temporary, nonchronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities for purposes of the ADA.[14] While the presumption exists that temporary impairments do ***not*** qualify as disabilities, temporary conditions still require a case-by-case evaluation.[15]

In Appellant's original brief, it was pointed out that Covington herself thought her mobility problem was temporary. In her answers to interrogatories, submitted early in this lawsuit, she stated that "[p]rior to the accident which forms the basis of this suit, Collette was recovering from a surgery which ***temporarily*** impaired her mobility. The ***reason*** for the electric wheelchair was to ***get around campus at a faster pace.***"[16] (emphasis added). Yet Covington argues that McNeese should have known at the time of her alleged incident that she was not only impaired, but so impaired that she qualified as disabled under the ADA.

In its original brief, McNeese gave examples of Covington's medical records which, when viewed in a light most favorable to McNeese, readily support the conclusion that Covington's mobility was only temporarily impaired when her accident occurred and that McNeese could not have known of such impairment.

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[13] ***Americans with Disabilities: Practice and Compliance Manual***, § 2:12; ***Toyota Motor Mfg., Kentucky, Inc.***, supra.

[14] ***Americans with Disabilities: Practice and Compliance Manual***, § 2:15 (citations omitted).

[15] ***Id.; Lester v. Natsios***, 290 F.Supp.2d 11, 2003 WL 22705534 (D.D.C. 10/7/03)

[16] TR, Vol. V, p. 1053 (Covington's answers to interrogatories)

Although Covington criticizes McNeese for arguing that her treating physician, Dr. Lynn Foret, was reluctant to prescribe the wheelchair, the notes of Dr. Foret's nurse specifically state that "[a]lso discussed powered wheelchair. Patient informed that Dr. Foret rathers her ambulate."[17]

Covington would have the Court believe that she was in a wheelchair for the entire eight years that she attended McNeese. This is obviously not the case. If it were, however, it would show that Covington, who was very familiar with the offices and bathrooms in the Old Ranch, had no problem negotiating the campus for the eight previous years. Further, Mr. Delaney testified by affidavit that he was familiar with Covington at the campus, but that he never saw her in a wheelchair and she never complained to him about accommodations at any McNeese buildings.[18]

Clearly, there is a genuine issue of material fact as to whether Covington was impaired to the degree that she qualified as disabled under the ADA at the time of this accident. What happened later is irrelevant for our inquiry as to whether McNeese discriminated against Covington.

Covington also argues that she was disabled because of her epilepsy. The Trial Court gave extensive reasons for his decision, but he did not mention epilepsy. Covington did not present sufficient evidence as to epilepsy and did not give McNeese an opportunity to accommodate her epilepsy.

A careful reading of the record demonstrates that Covington did not exclude all genuine issues of material fact as to whether her impairment of epilepsy qualified her as disabled under the ADA and the circumstances of this case. As noted above, merely having an impairment does not make one disabled for purposes of the ADA. Further, the name or diagnosis of the individual's impairment provides little guidance to the fact finder. Some impairments may be

[17] TR, Vol. V, p. 1040.
[18] TR, Vol. V, pp. 1066-1068.

disabling for particular individuals but not for others.[19] Most significantly, Dr. Fayez Shameih, another treating physician, testified that:

> "At one point she was maintained on one drug and she was ***doing very well.***" (emphasis added)
>
> ". . . as far as I remember ***for many years***, I kept her on medicine which I mentioned Klonopin. Klonopin is a form of Diazepam which is from the family of Valium. But she was taking the Klonopin every day; and as far as I remember, she was ***doing well.*** She was fairly well controlled on this medication." (emphasis added)
>
> "She was fairly well controlled where she would still have occasional seizures but she was doing her daily life, functioning, driving, and we were able to help her."
>
> "Before [the two years preceding September 11, 2003] as I said, she was fairly well controlled. She would have one, two, three or maybe, you know, four [seizures] over the whole year."[20]

Through the medical records of Dr. Shamieh we learn that Covington was actually doing very well with her epilepsy at the time of her alleged incident in the Old Ranch. There is certainly a genuine issue of material fact as to whether her impairment of epilepsy qualifies her as disabled under the ADA

Covington complains in her brief that McNeese attempted to impeach Dr. Shamieh. McNeese merely pointed out that Dr. Shamieh tested Covington to see what injury she may have sustained from the alleged incident and he testified that EMG's of the left leg and left arm of the plaintiff were normal.[21] He further testified that there was no way he could pinpoint Covington's increased seizures to the incident at McNeese.[22] In fact, Dr. Shamieh testified that there were no test results which were an indicator of Covington's epilepsy. He said that he expected Covington to present with an abnormal EEG, but that he, as well as other neurologists, despite numerous tests over many years, could not find anything

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[19] ***Americans with Disabilities: Practice and Compliance Manual***, § 1:42
[20] TR, Vol. VI, pp. 13911392; p. 1401.
[21] TR, Vol. VI, p. 1396
[22] TR, Vol. VI, p. 1403.

wrong with her EMG's.[23] Finally, on January 9, 2003, Dr. Shamieh stated:

> "I discussed the situation with her and that I am lost and do not know what else to do. I would like to send her to a psychiatrist. However, she refused and wanted to think about it."[24]

Even if Covington had convinced the Trial Court that her epilepsy qualified as a disability, she did not give McNeese an opportunity to accommodate her. It has been held that before a governmental entity can be required under ADA Title II to make a reasonable modification to its policies, the party seeking such a modification must specifically request it, presumably on the theory that public entities are not required to guess at what accommodations they should provide. A governmental entity must know what a plaintiff seeks prior to incurring liability for failing to affirmatively grant a reasonable accommodation.[25]

Although a postsecondary educational institution is not required to make fundamental or substantial modifications to accommodate the disabled, it may be required to make reasonable ones. A court must thus evaluate a student's requests for accommodation in light of the totality of circumstances because what is reasonable in a particular situation may not be reasonable in a different situation, even if the situational differences are relatively slight. However, a university is not required to prepare a written plan to accommodate a student's disabilities. A postsecondary academic institution is not required to make reasonable accommodation of a student's disability of which it was ignorant.[26] This is precisely why registration with Tim Delaney would have given the parties an opportunity to avoid any problems. Registration is discussed below.

Covington also argues that she qualified as disabled because she had a record of an impairment and that she was regarded as having an impairment.

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[23] TR, Vol. VI, pp. 1408-1409.
[24] TR, V. II, p. 443
[25] ***Americans with Disabilities: Practice and Compliance Manual,*** § 2:90 (citations omitted)
[26] ***Americans with Disabilities: Practice and Compliance Manual,*** § 1:43

These elements do not apply in this case because even if a plaintiff has a record of impairment, McNeese cannot be held liable for acting with respect to that impairment if it did not have knowledge of the record of impairment and any impairment of Covington was not perceived to be substantially limiting.[27]

Covington failed to establish that her impairment rose to the definition of disability under the ADA and its guidelines. At the very least, she has not excluded all genuine issues of material fact as this issue.

Accessibility

Program accessibility under ADA Title II is different than readily achievable barrier removal under ADA Title III, in that, unlike private entities under ADA Title III, public entities are not required to remove barriers from each facility, even if removal is readily achievable. Physical changes to a building are required only when there is no other feasible way to make the program accessible. In contrast, barriers must be removed from places of public accommodation under ADA Title III where such removal is readily achievable, without regard to whether the public accommodation's services can be made accessible through other methods.[28] A public entity is not necessarily required to make each of its existing facilities accessible to and usable by individuals with disabilities. Existing facilities are those facilities constructed prior to January 26, 1992, the effective date of ADA Title II. The overall policy of ADA Title II is to require relatively few changes to existing buildings, but to impose extensive design requirements when buildings are modified or replaced. Therefore, with limited exceptions, public entities are not required to retrofit existing facilities immediately and completely. Rather, a ***flexible*** concept of accessibility is employed.[29]

When evaluating the changes that McNeese made to the Old Ranch, the

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[27] ***Americans with Disabilities: Practice and Compliance Manual*** §§ 1:43, 2:18, 2:19, and 2:90 (citations omitted).
[28] ***Americans with Disabilities: Practice and Compliance Manual,*** § 2:108 (citations omitted)
[29] ***Id.***

Trial Court necessarily had to weigh the evidence. But the Old Ranch was actually changed very little and replacing yesterday's game room with today's computer room is simply a reflection of societal changes, not a major alteration.

Covington also chastises Dr. Robert Hebert, the President of McNeese, by selecting parts of his testimony out of context. The significant testimony of Dr. Hebert is:

> ". . . very often you can address a complaint without fixing a facility. You can move a classroom to a different floor, you know, to make the class accessible to a student. . . ."[30]

> "So, we always attempted reasonable accommodations."[31]

Although Dr. Hebert stressed the importance of classroom buildings ". . . because we feel that's fundamental for what a student is there at the university to be and to do," he also stressed that if a disabled student needed access to a facility, McNeese provided reasonable accommodations.[32] McNeese could have accommodated Covington in a number of ways and stood ready, willing, and able to do so.[33]

When the programs of McNeese are viewed in their entirety, they are readily accessible. Further, Covington did not go into the Old Ranch to use any of the programs or activities of McNeese. She went into the Old Ranch to use the restroom. Other restrooms were available to her and, in fact, she had just used a restroom in the education building. Whether the restroom in the Old Ranch was sufficient for Covington is a question of fact. She chose to avoid the ADA compliant entrance to the Old Ranch and entered through another non-compliant

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[30] TR, Vol. II, pp. 489, 995.
[31] TR, Vol. II, p. 996
[32] TR, Vol. III, p. 501
[33] Although she argues in brief that she would object to the assignment of an aid to help her, she specifically requested such an aid in her after-the-fact partial registration with Mr. Delaney.

door. She then used the restroom without incident.[34] She claims that she had a problem with the door in leaving the restroom, but there is no competent evidence in the record to support any opinion about the effort required to open that door. As a matter of fact, Covington was not located by campus police in or near the restroom at issue. The only evidence that she was in that restroom is her own self-serving testimony.

Also, the Smith Report, discussed in the original brief of McNeese, raises a genuine issue of material fact; in fact, the report included a recommendation that Mr. Delaney's office be moved to the Old Ranch.[35] If the authors of the Smith Report were of the opinion that the Ranch can properly serve disabled students, does that not raise a genuine issue of material fact as to whether the Old Ranch sufficiently complied with the ADA and regulations? Does that recommendation require a weighing of evidence? As Dr. Hebert testified:

> "As I said, we used the Smith report. . . . [W]e felt it was a strong report in the sense that we had utilized people who were either wheelchair bound or had some other disabilities to help identify for the university the needs on the campus."[36]

It is respectfully submitted that the Smith Report affirmatively answers the above questions and thereby precludes summary judgment.

Registration

Covington claims in her brief that Mr. Delaney browbeat her into registering with him in order to get more funding (Appellees' brief, p. 25) and that McNeese conceded for the first time in its appellate brief that there is no law requiring

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[34] Although Covington claims she urinated on herself, she made no such claims in prior statements (and, in fact, stated she used the stall without incident), her statements to the campus police, the petition and amended petition, or her answers to interrogatories. She first mentioned this at her deposition, over two years after the alleged incident.

[35] TR, Vol. II, p. 351

[36] TR, Vol. IV, p. 998; as noted in the original brief, Richard Rhoden also testified that the university immediately rectifies any problems so that McNeese does not deny the disabled access to the university.

Covington to register her disabilities with McNeese (Appellees' brief, p. 24).[37] But Mr. Delaney testified that he never received a grant[38] and Covington testified in her sworn deposition that she "definitely" registered prior to the incident, more than once, and that she submitted everything that was requested.[39]

As pointed out in the original brief submitted by McNeese, the point of registration is accommodation and verification. The registration process at McNeese is hardly unique. As noted in the January, 2001 issue of the Journal of Law and Education, one of the consequences of the remarkable increase in requests for assistance by disabled students has been the development of disability coordinators and disability offices at colleges, universities and other institutions of higher education throughout the country. Where such programs exist, students are generally required to submit documentation of a disability, with recommended accommodations, to the school's designated coordinator for review; the coordinator is then largely responsible for recommending or authorizing specific types of accommodations.[40] Once a student has provided a college or university with notice of the disability and requested academic adjustments, the student is also required to provide supporting documentation. A university does not discriminate against a student by requesting such documentation.[41]

Obviously, the registration process at McNeese is a necessary and proper tool to help the disabled who attend McNeese and does not in any manner discriminate against them.

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[37] Covington's claims are again contradicted by her own statements. For example, in her deposition, she testified that she "definitely" registered with Mr. Delaney, more than once, and gave his staff "anything they asked for."[37] And McNeese argued at the trial level that there is no law requiring registration, but that common sense requires it.

[38] TR, Vol. VII, p. 1551

[39] TR, Vol. V, p. 1038

[40] Journal of Law and Education, January, 2001, by Tracey I. Levey (citations omitted)

[41] Journal of College and University Law, Spring, 1996, by Adam A. Milani

Conclusion

The record reveals many genuine issues of material fact. Only one is required to reverse the Trial Court's summary judgment. McNeese has been candid in admitting that its campus is not perfect, but McNeese has complied with the ADA to the extent that its service, program, or activity, ***when viewed in its entirety***, is readily accessible to and usable by individuals with disabilities. McNeese has not discriminated against its disabled students and certainly has not discriminated against Collette Covington. Accordingly, McNeese respectfully requests that, after reviewing the record and applicable law *de novo,* this Honorable Court deny the motion for summary judgment.

Respectfully submitted,

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VERIFICATION

BEFORE ME, the undersigned authority, personally appeared ADAM L. ORTEGO, who stated under oath the allegations contained in the foregoing Reply Brief on Behalf of Defendant-Appellant, State of Louisiana, Board of Supervisors for the University of Louisiana System (McNeese State University), are true and correct, and he has served copies of the foregoing Reply Brief on the Honorable Wilford D. Carter and on counsel for the Plaintiffs-Appellees, by U.S. Mail,

properly addressed and with proper postage affixed, to Mr. Seth Hopkins, counsel for the plaintiff.

Lake Charles, Louisiana, this 7th day of July, 2008.

ADAM L. ORTEGO, Affiant

SWORN TO AND SUBSCRIBED BEFORE ME at Lake Charles, Louisiana, on this 7th day of July, 2008.

NOTARY PUBLIC

Noelle Morgan
Notary Public #66627
Calcasieu Parish, LA
Commission Expires at Death