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November 19, 2008

Honorable Charles K. McNeely
Clerk of Court
Third Circuit Court of Appeal
P.O. Box 16577
Lake Charles, LA 70616

Re: *Collette Josey Covington, et al versus McNeese State University, et al*
Docket No.: 08 00505-CA on appeal from
14th JDC, Calcasieu Parish, Docket Number 2001-2355

Dear Mr. McNeely:

Enclosed on behalf of Defendant-Appellant, McNeese State University (i.e., the Board of Supervisors for the University of Louisiana System), please find the original and four (4) copies of our "Application for Rehearing".

Thank you for your assistance in this matter. If you have any questions, or require any additional information, please do not hesitate to contact me.

Yours very truly,

JAMES D. "BUDDY" CALDWELL
ATTORNEY GENERAL

By: 
ADAM L. ORTEGO
Assistant Attorney General

ALO/nm

Enclosures

cc: Judge Wilford D. Carter
 ↳ Seth Hopkins

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 2008, a copy of the foregoing pleading was served upon each other party to this action by mailing same to all known counsel of record herein, by U.S. Mail and with proper postage affixed

Adam L. Ortego
ADAM L. ORTEGO

STATE OF LOUISIANA

COURT OF APPEAL

THIRD CIRCUIT

DOCKET NO. 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

APPLICATION FOR REHEARING
AND SUPPORT BRIEF

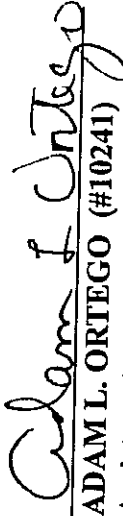
ON BEHALF OF MCNEESE STATE UNIVERSITY AND THE BOARD OF
SUPERVISORS FOR THE UNIVERSITY OF LOUISIANA SYSTEM

DEFENDANT/APPELLANT

Respectfully submitted,

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MAY IT PLEASE THE COURT:

McNeese respectfully submits this application for rehearing for the purpose of seeking to persuade the Court that one genuine issue of material fact remains in the case. Further, it is hoped that the Court will allow McNeese to address some of the language of the opinion rendered herein.

Assignment of Error No. 1

In its first assignment of error, McNeese argued that the Trial Court applied an incorrect standard in concluding that McNeese discriminated against Covington. McNeese agrees that this Assignment of Error is moot and will not take up any more of the Court's time on this Assignment, except to thank the Court for its clarification of the standard of review in this case.

Assignment of Error No. 2
(addressed by the Court as Assignment of Error No. 3)

McNeese argued in this Assignment of Error that there was a genuine issue of material fact as to whether Covington qualified under the ADA as disabled. The Court deemed the proof of disability as so cemented that the Court suggested that it may have granted a motion for frivolous appeal on this issue.

As we know, the term “disability” means, with respect to an individual:

- a physical or mental impairment that substantially limits one or more of the major life activities of the individual.
- a record of such an impairment.
- being regarded as having such an impairment.

McNeese argued that, as to a physical or mental impairment, there was an issue of fact because, *inter alia*, the impairments of Covington may have been temporary, citing medical records and statements of Covington.

The Supreme Court has noted that Congress intended the existence of a disability under the ADA to be determined in a case-by-case manner and that no agency has been given authority to issue regulations interpreting the term

"disability" in the ADA.¹

To establish a disability under the ADA, there must be some proof of permanency. It is the limitation on the claimed major life activity that must be permanent or have a long term impact. The permanency of the mental or physical condition leading to the impairment is not necessarily sufficient.² Moreover, in determining how a particular impairment affects a particular plaintiff, the Court must consider any corrective or mitigating measures taken by that individual.³ While the presumption exists that temporary impairments do not qualify as disabilities, temporary conditions still require a case-by-case evaluation.⁴

This Honorable Court looked to Equal Employment Opportunity Commission guidelines for a definition of disability, citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65, 106 S.Ct. 2399, 2404 (1986) and mentioning that the *Vinson* case cited *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164 (1944). It is respectfully submitted that the *Meritor* case, a sexual harassment claim, and *Skidmore*, a case involving the Fair Labor Standards Act, are not applicable to the case *sub judice*.

McNeese acknowledges, however, that some courts hold that Congress intended the term "disability" and the phrase "substantially limits" to have uniform meaning throughout the ADA. Nonetheless, as noted above, the United States Supreme Court decisions in this area emphasize that these regulations yield to the

¹ *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002).

² See, e.g., *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 646 (2d Cir.1998), where the Court held that a temporary impairment of seven months was not substantially limiting. In appellee's brief, at page 13, she argued that she used crutches and a walker since May 16, 2000, or for some eight months prior to the incident at issue.

³ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482-84, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999) (the *Sutton* case is a prime example of how the Supreme Court views the regulations because it is in direct contravention of the regulation providing that in making the assessment whether an individual has a physical or mental impairment, an employer or other covered entity *cannot* consider mitigating measures, such as medicines, or assistive or prosthetic devices).
⁴ *Lester v. Natsios*, 2003 WL 22705534 (D.D.C. 2003).

pronouncements of the Supreme Court.

McNeese is aware of Covington's impairments; however, it is respectfully submitted that there is a genuine issue of fact as to whether those impairments qualified as disabilities under the ADA on January 31, 2001, the date of the alleged incident in this case. The Court considered post accident symptoms in assessing this issue, but McNeese respectfully submits that since Covington claimed that the accident greatly exacerbated her impairments, we must look to the status of her impairments at or before the accident, particularly since she had attended McNeese for eight years with no known complaints and no known incidents related to the ADA.

This Honorable Court found that evidence in the record relevant to whether Covington was qualified as disabled under the ADA includes the medical records of Dr. Lynn E. Foret, the medical records and deposition of Dr. Fayez Shamieh, and the medical record from Christus St. Patrick Hospital labeled Functional Assessment Too. As pointed out in previous briefs, those medical records and deposition also contain evidence which could be construed in McNeese's favor, particularly if Covington's own statements are considered relevant to the issue of disability.

The record reflects that, pursuant to an office visit on January 16, 2001, Dr. Lynn Foret, Covington's treating orthopedic surgeon, wanted Covington to "[w]alk and exercise as much as possible."⁵ It is well settled that a treating physician's testimony is generally given more weight than a non-treating physician, such as someone who examines a party solely for litigation purposes. This is because the

⁵ TR, Vol. V, p. 1039.

treating physician is more likely to know the patient's symptoms and complaints due to repeated examinations and observations of the injured person.⁶

As noted in this Court's opinion at page 3, the Court is required to construe factual inferences that are reasonable drawn from the evidence presented in favor of the party opposing the motion; all doubt is to be resolved in the non-moving party's favor. Similarly, the United States Fifth Circuit has held that when the parties have submitted evidence of conflicting facts, "the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."⁷ Accordingly, it is reasonably to infer that on January 16, 2001, two weeks prior to the incident at issue, Dr. Foret reviewed Covington's symptoms and complaints; that Dr. Foret knew that Covington could walk on that date; and that his opinion was that walking as much as possible would be beneficial to her recovery. Further, Dr. Foret's opinion contradicted the opinion of Dr. Shamieh. Dr. Foret was of the opinion that Covington's falling was attributable to "not seizure as much as just weakness."⁸

Covington also thought that her impairment as to the activity of walking was temporary, as indicated by her answers to interrogatories.⁹

As to the January 3, 2001 Functional Assessment Tool from Christus St. Patrick Hospital, it should be pointed out that this assessment occurred just sixteen days after Covington's knee surgery and it is reasonable to infer that Covington's assessment reflected that she was in the very early stages of recovering from knee surgery.

The Court also noted that under the second test for disability as defined in the

⁶ *Johnson v. Rogers & Phillips, Inc.*, 753 So.2d 286, 1999-0116 (La.App. 4 Cir. 7/21/99).

⁷ *Willis v. Roche Biomedical Labs, Inc.*, 61 F.3d 313, 315 (5th Cir. 1995).

⁸ TR, Vol. II, p. 391.

⁹ TR, Vol. V, p. 1053.

ADA, an individual must have a record of a physical or mental impairment that substantially limits one or more of the major life activities of such individual. Implementing regulations explain that having a record of a disability means having a history of, or having been misclassified as having, such an impairment. Individuals who once had a qualifying impairment but have since recovered would be protected by the ADA against discrimination based on their record of impairment. For example, a person who had cancer that was in complete remission would be covered by the statute if an employer turned him down for work because his medical records indicated his treatment for cancer.

Given the purpose of this provision, it appears that even if Covington has such a record, she still must prove that her impairments qualified as disabilities on the date of the incident.

As to the third test for disability as defined in the ADA, an individual must be regarded as having a physical or mental impairment that substantially limits one or more major life activities of such individual. Under the regulations implementing the ADA, the phrase "is regarded as having an impairment" as used in the definition of disability means—

- has a physical or mental impairment that does not substantially limit major life activities but that is treated by a private entity as constituting such a limitation. This provision is not applicable because Covington maintains that she does have such a physical or mental impairment and, in fact, alleges that McNeese failed to treat her as qualified under the ADA.
- has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment. Again, this provision is not applicable in that there has

been so such argument advanced.

- has none of the impairments listed in the regulations, but is treated by public or a private entity as having such an impairment. Once again, this provision is not applicable; Covington maintains that she does have such impairments.¹⁰

The Court made reference to Tim Delaney's testimony in concluding that Delaney regarded Covington as disabled; however, Delaney's testimony does not fit any of the categories above. Further, although Delaney used the word "disability," it is more reasonable to infer that he meant "impairment" because at the time of his deposition he recalled that Covington had some type of surgery about a problem with her foot. His testimony does not infer permanence, but instead, by discussing surgery, infers some type of temporary disability addressed by surgery. Further, in his affidavit of December 6, 2006, Delaney stated that he never saw Covington in a wheelchair prior to the January 31, 2001 incident, and he did not know of her disabilities, lending further credence to the reasonable conclusion that Delaney meant "impairment" rather than a legal conclusion of "disability." Covington has the burden of proof on this issue and McNeese has the advantage of having all doubt resolved in its favor.

Assignment of Error No. 3
(addressed by the Court as Assignment of Error No. 4)

McNeese argued in its third Assignment of Error that there was a genuine issue of material fact as to whether McNeese discriminated against Covington.

This Court noted that Title II prohibits discrimination in the provision of public services, citing 42 U.S.C.A. 12132, which provides that "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation

¹⁰**American Jurisprudence, Second Edition** (Database updated September 2008), Americans with Disabilities Act Analysis and Implications, § 19.

in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” McNeese maintains that Covington was not excluded from its services, programs, or activities “by reason of such disability.”

On January 31, 2001, Covington participated in a program at the education building and used an ADA compliant restroom in that building. She did not thereafter attempt to participate in any service, program or activity offered by McNeese. It is respectfully submitted that, when construing the applicability of the ADA on a case by case individualized basis, McNeese did not discriminate against Covington on January 31, 2001.

As to the alteration of the Old Ranch, McNeese respectfully submits that making a determination as to whether alterations are sufficient to trigger the heightened requirements of new construction is a fact specific inquiry which necessitates the weighing of evidence. Some cases, such as the *Orlando* case, refuse to apply the heightened requirements of new construction when the alterations tend to make a facility more accessible.¹¹ Other cases point out that the ADA does not necessarily require a public entity to make its existing physical facilities accessible, finding that the ADA only requires that the public entities ensure that each service, program, or activity, *when viewed in its entirety*, is readily accessible to and usable by individuals with disabilities. Only if the building has undergone *extensive* renovation after the ADA's effective date must the upgrades provide accessibility.¹² It is clear that the results reached in these cases are fact dependent and are not arrived at as a matter of law. Further, as noted above, all of the regulations are subject to the narrow interpretations of the United States

¹¹ *Ass'n for Disabled Americans v. City of Orlando*, 153 F.Supp.2d 1310 (M.D., Fla.2001)

¹² *Haus v. Quest Recovery Services, Inc.*, 247 Fed.Appx. 670 (C.A.6 Ohio 2007), 247 Fed.Appx. 670, 2007 WL 2386464

Supreme Court.

Assignment of Error No. 4
(addressed by the Court as Assignment of Error No. 2)

McNeese argued in its final Assignment of Error that McNeese is immune from this ADA claim under the 11th Amendment to the United States Constitution. This Honorable Court noted that McNeese’s “sole argument” against waiver is that “McNeese does not waive its right to immunity under the Eleventh Amendment” and that, other than that partial sentence in brief, McNeese did not discuss the waiver issue elsewhere in brief or in oral argument. McNeese was aware of the jurisprudence relied upon by Covington and cited by this Honorable Court and, particularly, the cases equating the ADA’s rights and remedies with the Rehabilitation Act; accordingly, McNeese did not feel it an appropriate use of this Court’s time to advance arguments on the issue. On the other hand, McNeese felt compelled to make reference to the issue as an attempt at avoiding an allegation that the argument was abandoned should the United States Supreme Court render a decision overruling such jurisprudence.¹³ It was hoped that the Court would understand why McNeese placed so little emphasis on this assignment, while vigorously arguing the existence of a genuine issue of material fact in the other assignments of error.

Conclusion

The matters before the Court are significant for Covington and McNeese. McNeese has admitted in these proceedings and in its prior briefs that its campus is not perfect and it is readily apparent that this Honorable Court shares that opinion.

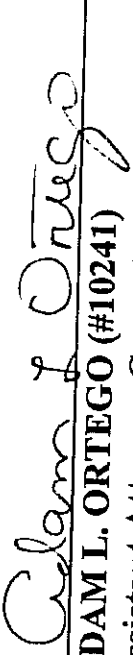
Nonetheless, McNeese respectfully urges the Court to reconsider the rulings and

¹³ As noted in McNeese’s original brief, the Supreme Court, the final arbiter of this federal law, has generally viewed the ADA narrowly; see, as examples, *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 119 S. Ct. 2162, 144 L. Ed. 2d 518 (1999); *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002); *Sutton v. United Airlines, Inc.*, 119 S. Ct. 2139 (U.S. 1999).

dicta of its opinion herein. McNeese respectfully requests that, rather than transforming a statute that calls for individualized inquiries into one that operates on *per se* rules, this Honorable Court finds one genuine issue of material fact herein. Ultimately, the issue is not what would be reasonable in a general sense, but what would be reasonable given the individualized facts before the court.¹⁴

Respectfully submitted,

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¹⁴ *Zukle v. Regents of the Univ. of California*, 166 F.3d 1041, 1048 (9th Cir.1999).

VERIFICATION

BEFORE ME, the undersigned authority, personally appeared ADAM L. ORTEGO, who stated under oath the allegations contained in the foregoing 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 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.

Lake Charles, Louisiana, this 19th day of November, 2008.


ADAM L. ORTEGO, Affiant

SWORN TO AND SUBSCRIBED BEFORE ME at Lake Charles,
Louisiana, on this 19th day of November, 2008.


NOTARY PUBLIC
MIKE LANDRY