

COLLETTE JOSEY COVINGTON : 14<sup>TH</sup> JUDICIAL DISTRICT COURT  
AND JADE COVINGTON

VS. NO. 2001-2355 : PARISH OF CALCASIEU

MCNEESE STATE UNIVERSITY, : STATE OF LOUISIANA

ET AL

FILED 1-3-11 : DIVISION "G" JUDGE CANADY

*Carol Speer, Deputy Clerk*

**MEMORANDUM ON THE ADMISSIBILITY OF THE OFFICIAL  
WEBSITE OF THE U. S. DEPARTMENT OF JUSTICE AS SELF  
PROVING AND AS AN EXCEPTION TO THE HEARSAY RULE UNDER  
THE PROVISIONS OF U.S. FEDERAL RULES OF EVIDENCE, FED. R.  
902(5) AND FED. R. 803 (8), AND CORRESPONDING LOUISIANA CODE  
OF EVIDENCE ARTICLES, LA. C. E. ART. 902 (5) AND  
LA. C.E. ART. 802 (8)**

**ISSUE**

Petitioners, Collette and Jade Covington, seek to introduce two documents discovered by plaintiffs on December 31, 2010 and obtained from the official US Department of Justice website, <http://www.Justice.gov>. The first item of evidence sought to be introduced is an official U.S. Department of Justice communication to the public dated September 9, 2010 entitled "Justice Department and McNeese State University Reach Settlement to Insure Compliance with the Americans With Disabilities Act." The official release is accessed from the general justice department website clicking on "Briefing Room, then "Justice News," then "September, 2010," and, finally, "January 9, 2010." The second item is likewise from the Department of Justice website and is entitled "McNeese State University Agrees to Improve Campus Accessibility" taken from the "Disability Rights online News," November 2010, Issue Thirty-Nine and is accessed by clicking on ADA Publications, then "Disability Rights online News," and finally, November, 2010- Issue Thirty-Nine. The articles which are proffered into evidence are attached as Exhibit A in globo and show the government website information at the bottom of the page.



## RELEVANCE TO THE INSTANT HEARING

On cross examination, defense counsel chose to introduce three separate lines of questions to plaintiffs' counsel which can only be effectively rebutted with this evidence. First, defense counsel asked plaintiffs' counsel directly what credit should be given to the U.S. Department of Justice for the results in the *Covington* case. This U.S. DOJ official communication indicates that the *Covington* case was the basis for its decision to initiate the investigation.

Second, defense counsel asked plaintiffs' counsel a number of questions about the reasonableness of the defendants' legal position in this case and challenged plaintiffs' counsel to relate its legal defense of the case with the U.S. Department of Justice investigation. This U.S. DOJ official communication clearly answers that question by stating:

*The United States initiated an investigation of the university after the state attorney general's office took the position—in private ADA litigation against the campus—that it was not required to have an accessible toilet room in the primary student union building.*

Third, defense counsel alleged in cross examination that plaintiffs' counsel's website was the basis for adverse publicity that McNeese has suffered as a result of this case. The court allowed the defendants to introduce, without limitation, evidence of the plaintiffs' website. Clearly, the Plaintiffs should be allowed to introduce evidence showing that the U.S. Department of Justice website's official online announcement had a far more wide-ranging effect on any publicity in this case than anything plaintiffs prepared.

**APPLICABLE LAW PERTAININ TO ADMISSIBILTY OF THE  
DOCUMENT AS SUBSTANTIVE EVIDENCE:**

**Authentication:**

Under the provisions of both the Federal Rules of Evidence and the Louisiana Code of Evidence relating to the authentication of documents for purposes of laying a proper foundation for admissibility of government documents which are published over the Internet such as this document, such documents such as the document here from official government websites are considered to be self authenticating and there is no need to offer extrinsic evidence of its authenticity in order to introduce it into evidence.

Federal Rule of Evidence 902 (5) provides:

**Rule 902. Self-authentication**

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(5) Official Publications. Books, pamphlets, or other publications purporting to be issued by public authority.

There is long precedent in federal law allowing the introduction of such evidence as self authenticating. *Kitty Hawk Air Cargo, Inc. v. Elaine Chao, etc.*, 418 F. 3d 453 (5<sup>th</sup> Cir. July 20, 2005) and *In Re Katrina Canal Breaches*, 2008 US. Dist. LEXIS 86538 (E.D. La. September, 2008).

The language of La. Code of Evidence, Rule 902 (5) is identical and it has been interpreted the same by Louisiana courts as it has in federal courts.<sup>1</sup>

**Hearsay:**

In addition to being self authenticating, Fed. R. Evid., Rule 803(8), provides that such government documents published over the Internet on its official

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<sup>1</sup> La. Art. 902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

websites are admissible as an exception to the hearsay rule for the truth of the information contained within the document.

Federal Rule of Evidence 803 (8) provides:

**803 (8) Public Records and Reports.**

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

As stated in *Williams v. Long*, 585 F. Supp. 2d 679 (D. Mary., November, 2008) in a case where printed copies of documents obtained from government websites were offered and accepted into evidence as self authenticating and over the objection of the documents being hearsay, at p. 686:

Fed. R. Evid. 803 (8). Justification for this exception derives from the trustworthiness of the documents themselves, having been made by a public office or agency, as well as the inherent necessity to avoid requiring public officials to needlessly testify as witnesses about reports, data compilations, records or statements made in their official capacities. 4 Mueller & Kirkpatrick, *supra*, Section 8:86, at 770-772. The documents are considered trustworthy due to the “duty that that comes with public service,” and it is presumed that public officials execute their tasks “carefully and fairly, without bias or corruption, and this notion finds support in the scrutiny and risk of exposure that surround most government functions.” *Id.* at 770-771.

Louisiana’s rule, La. C.E. Art. 803 (8)(iii) is similar to the federal statute but differs in one respect. La. C. E. Art. 803 (8) provides:

**(8) Public records and reports.**

(a) Records, reports, statements, or data compilations, in any form, of a public office or agency setting forth:

- (i) Its regularly conducted and regularly recorded activities;
- (ii) Matters observed pursuant to duty imposed by law and as to which there was a duty to report; or

(iii) Factual findings resulting from an investigation made pursuant to authority granted by law. Factual findings are conclusions of fact reached by a governmental agency and may be based upon information furnished to it by persons other than agents and employees of that agency.

(b) Except as specifically provided otherwise by legislation, the following are excluded from this exception to the hearsay rule:

(i) Investigative reports by police and other law enforcement personnel.

(ii) Investigative reports prepared by or for any government, public office, or public agency when offered by that or any other government, public office, or public agency in a case in which it is a party.

(iii) Factual findings offered by the prosecution in a criminal case.

(iv) Factual findings resulting from investigation of a particular complaint, case, or incident, including an investigation into the facts and circumstances on which the present proceeding is based or an investigation into a similar occurrence or occurrences.

Thus, "factual findings resulting from investigation of a particular complaint, case, or incident, including an investigation into the facts and circumstances on which the present proceeding is based or an investigation into a similar occurrence or occurrences" are not allowed as an exception to the hearsay rule under Louisiana evidence law unlike federal law." In all other respects the law is the same. As a consequence, police reports and other investigative reports prepared as a result of investigating the particular matter are not admitted into evidence.

But here no attempt is made to introduce the "*factual findings*" of the investigation of McNeese by the US DOJ for ADA violations. Those factual findings have already been introduced through the U.S. DOJ settlement agreement with McNeese, which was made part of the April 23, 2010 stipulated injunction. This is simply an official statement by a government agency in the normal course of business that McNeese and the US DOJ reached a settlement agreement and stating the reason that the investigation was initiated.

Clearly, the decision to investigate McNeese for ADA violations would be separate and apart from and would be the conclusions of the investigation itself and would not be a “factual finding” of the investigation. This statement published by the US DOJ on its official website as part of its ongoing regular reporting its activities to the public according to its normal routine is an exception to the hearsay rule under both federal and Louisiana law. The comments to the federal rules make it clear that the purpose of this hearsay exception is to prevent litigants from burdening federal employees from having to endlessly travel across the country to testify as to routine communications provided to the public.

An analogy can be drawn of the court publishing its docket on the Internet for the public and noting the names of the cases set for trial and referencing the reason why the case was brought against the individual, i.e., the district attorney has accused a defendant of burglary and his trial is set for a certain day at a certain time. Or, that there is a civil docket with a trial scheduled for a certain date and time where the plaintiff has filed a petition against a doctor because he claims that doctor committed malpractice, i.e., the reason the plaintiff brought the claim against him. Such routine facts and communications to the public are exempt from the hearsay rule.

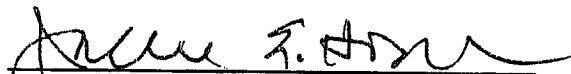
Consequently, the statement of the US DOJ in reporting that it had reached a settlement agreement with McNeese to resolve a compliance review initiated in 2008 “after the state attorney general’s office took the position—in private ADA litigation against the campus—that it was not required to have an accessible toilet room in its primary student union building” simply explains why it initiated the investigation of McNeese and makes no attempt to give any of the “factual findings” of what the US Department of Justice found after it initiated that investigation. Thus, the document is not a “factual finding” resulting from investigation of a particular complaint, case, or incident” and, therefore the

document which is attached that is being offered into evidence is admissible under La. C. E., Art. 803(8).

**CONCLUSION**

The document downloaded from the Internet from the official website of the U.S. Department of Justice is self authenticating and the content of that document is admissible as an exception to the Hearsay rule under both federal and state law.

Respectfully submitted:



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JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE

Thursday, September 9, 2010

Justice Department and McNeese State University Reach Settlement to Ensure Compliance with the Americans with Disabilities Act

WASHINGTON - The Justice Department today announced a comprehensive settlement agreement with McNeese State University and the Board of Supervisors of the University of Louisiana System under the Americans with Disabilities Act (ADA).

The settlement agreement resolves a compliance review initiated by the United States in 2008. The United States initiated an investigation of the university after the state attorney general's office took the position - in private ADA litigation against the campus - that it was not required to have an accessible toilet room in its primary student union building. Under the agreement, McNeese, a public university located in Lake Charles, La., will continue its efforts to come into compliance with the access provisions of Title II of the ADA. The university will take a number of steps to improve access for students, visitors and employees with disabilities including:

- Bring all newly constructed facilities into compliance with the ADA Standards for Accessible Design;
Develop and implement a campus wide Physical Access Plan to bring all covered facilities into compliance with the terms of this agreement and Title II of the ADA. The Physical Access Plan will include specific remedial actions and time tables to ensure that the university's programs, services and activities afford program access by no later than Sept. 1, 2016;
Display information on its website about disability access and create and/or update its campus-wide emergency evacuation, sheltering, and shelter-in-place plans for individuals with disabilities; and
Designate an ADA coordinator, to ensure that the university meets the terms of this Agreement and the requirements of the ADA.

In addition to the specific remedial work required by this agreement, the board of supervisors (in conjunction with the Louisiana Division of Administration/Office of Facility Planning) has commenced procedural changes to emphasize ADA accessibility rules and regulations for capital outlay projects for the University of Louisiana System.

"Full access to all programs and services is a civil right enjoyed by all, including individuals with disabilities. We are pleased that McNeese is taking steps to ensure that individuals with disabilities are guaranteed full access to its programs, services and activities, and we applaud the board of supervisors for taking steps to ensure access at all of the University of Louisiana campuses," said Thomas Perez, Assistant Attorney General for the Civil Rights Division.

"This a positive move by McNeese and the board of supervisors. Their efforts reflect a commitment to ensuring that all individuals with disabilities have full access to the university," said Stephanie A. Finley, U.S. Attorney for the Western District of Louisiana.

It is a top priority of the U.S. Attorney's Office to enforce the laws that guarantee that persons with disabilities have equal opportunity to pursue their education."

The ADA protects individuals with disabilities from discrimination in all activities of state and local government entities, including those activities housed in public schools and universities. For more information about the ADA call the department's toll-free ADA Information Line at (800) 514-0301 or (800) 514-0383 (TDD), or access the ADA website at www.ada.gov

10-1014

Civil Rights Division

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# Disability Rights online **News**

U.S. Department of Justice  
Civil Rights Division

**November 2010  
Issue Thirty Nine**

### **Disability Rights Online News**

is a bi-monthly update about the Civil Rights Division's activities in the area of disability rights. The Division enforces laws prohibiting discrimination based on disability in employment, housing, access to businesses serving the public, access to government programs and services, including voting and public transportation, and unconstitutional conditions in institutions of confinement.

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### **MCNEESE STATE UNIVERSITY AGREES TO IMPROVE CAMPUS ACCESSIBILITY**

On September 9, 2010, McNeese State University, a public university located in Lake Charles, Louisiana, entered into a settlement agreement with the Department resolving access issues identified in a compliance review of the university's services, programs, and activities. McNeese has approximately 8,900 students and 68 buildings.

Under the agreement, McNeese will take a number of steps to improve access for students, visitors, and employees with disabilities, including bringing newly constructed facilities into compliance with Americans with Disabilities Act (ADA) Standards for Accessible Design (Standards); developing and

(Continued on page 2)

### **STATE OF GEORGIA AGREES TO OVERHAUL ITS MENTAL HEALTH AND DEVELOPMENTAL DISABILITY SYSTEM TO COMPLY WITH ADA**

On October 19, 2010, the State of Georgia entered into a comprehensive settlement agreement with the Department that will transform the state's mental health and developmental disability system. The agreement requires the state to vastly expand its community-based services so that Georgia can serve individuals with mental illnesses and developmental disabilities in the most integrated setting appropriate to their needs, as required by the ADA and the Supreme Court's landmark decision in Olmstead v. L.C., an earlier case challenging segregation in a Georgia state hospital.

Under the agreement, over the next five years the state will create at least 1,000 Medicaid waivers to transition all individuals with developmental disabilities from state hospitals to community settings. The state will also create or greatly expand crisis, respite, family support, and housing

(Continued on page 2)

(McNeese University, continued)

implementing a campus-wide physical access plan with specific remedial actions and timelines for making other facilities accessible by September 1, 2016; displaying information on its website about campus accessibility; updating its campus-wide emergency evacuation, sheltering, and shelter-in-place plans that address the needs of individuals with disabilities; and designating an ADA coordinator to oversee these compliance efforts.

The State of Louisiana's Division of Administration/Office of Facility Planning has control over the budget, design, and construction of all significant architectural projects at state owned buildings. Since the Department began its investigation, the University's Board of Supervisors has been discussing with the state agency how to incorporate ADA requirements into its rules and regulations for capital outlay projects for the University of Louisiana system.

"Full access to all programs and services is a civil right enjoyed by all, including individuals with disabilities. We are pleased that McNeese is taking steps to ensure that individuals with disabilities are guaranteed full access to its programs, services and activities, and we applaud the

board of supervisors for taking steps to ensure access at all of the University of Louisiana campuses," said Thomas E. Perez, Assistant Attorney General for the Civil Rights Division.

"This a positive move by McNeese and the board of supervisors. Their efforts reflect a commitment to

ensuring that all individuals with disabilities have full access to the university," said Stephanie A. Finley, U.S. Attorney for the Western District of Louisiana. It is a top priority of the U.S. Attorney's Office to enforce the laws that guarantee that persons with disabilities have equal opportunity to pursue their education."

(State of Georgia, continued)

support services to better serve these individuals in the community. In addition, the state will increase its assertive community treatment, intensive case management, case management, supported housing, and supported employment programs to serve 9,000 individuals with mental illnesses in community settings. The state will create crisis services centers, crisis stabilization programs, mobile crisis units, and crisis apartments to respond to and serve individuals in a mental health crisis without the need for admission to a state hospital.

The Department began its investigation of Georgia's seven state hospitals in 2007, and found that preventable deaths, suicides, and assaults occurred with alarming frequency in the hospitals, in violation of the constitutional and legal rights of the hospital residents. In January 2009, the Department filed a lawsuit against the state under the Civil Rights of Institutionalized Persons Act (CRIPA) and entered into a settlement agreement with the state regarding conditions in the hospitals. In January 2010, the Department filed a separate ADA lawsuit against the state to protect individuals confined in state hospitals from continued unlawful segregation in restrictive institutional settings. At that time, the Department also filed an amended complaint and a motion for immediate relief in its CRIPA lawsuit, and requested that the two cases be joined. (See previous article in issue # 36.)

The settlement agreement on the ADA issues is the result of extensive negotiations between the State of Georgia, the Justice Department, the Office for Civil Rights at the U.S. Department of Health and Human Services, and a number of advocacy groups, including Georgia's protection and advocacy agency.