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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 112522/2003

MCCARTHY, EDWARD J.

VS

PHILIPS ELECTRONICS NORTH

Sequence Number : 011

SUMMARY JUDGMENT

EX NO. 112522/03

TION DATE 6/11/07

TION SEQ. NO. 011

TION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Motion sequences 011 and 012 are decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that, in motion sequence no. 011, the motion for summary judgment is granted and the complaint is hereby severed and dismissed as against said defendants Thomas Lloyd and Ron Sabatini, and the Clerk is directed to enter judgment in favor of such defendants with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that, in motion sequence no. 012, the motion is granted only to the extent that the third, the sixth, and the eighth causes of action, and those branches of the first and second causes of action that allege discrimination on the basis of age, are dismissed, and the motion is otherwise denied; and it is further

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: _____ _____

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

ORDERED that the remainder of this action shall continue; and it is further

ORDERED that counsel for defendants Lloyd and Sabatini shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel.

Dated 7/19/07 ENTER: _____, J.S.C.

HON. CAROL EDMEAD

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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EDWARD J. McCARTHY,

Plaintiff,

-against-

PHILIPS ELECTRONICS NORTH AMERICA CORP., KONINKLIJKE PHILIPS ELECTRONICS B.V., JAN CHRISTIAEN, in his individual capacity and as aider and abettor, FRANK KLAASSEN, in his individual capacity and as aider and abettor, JANNY KOSTENSE, in her individual capacity and as aider and abettor, THOMAS LLOYD, in his individual capacity and as aider and abettor, and RON SABATINI, in his individual capacity and as aider and abettor,

Defendants.

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Index No. 112522/03

DECISION/ORDER

EDMEAD, J.S.C.

MEMORANDUM DECISION

Motion sequence nos. 011 and 012 are consolidated for disposition. In motion sequence no. 011, defendants Thomas Lloyd and Ron Sabatini jointly move, pursuant to CPLR 3212 (a), for summary judgment dismissing the complaint. In motion sequence no. 012, defendant Philips Electronics North America Corp. (Philips) similarly moves for summary judgment.

The complaint alleges that defendants discriminated against plaintiff Edward J. McCarthy (plaintiff) on the basis of his age and his disability, in violation of both the New York State Human Rights Law (NYSHRL), Executive Law § 290, et seq., and the New York City Human Rights Law (NYCHRL), Administrative Code of the City of New York (Administrative Code) § 8-101, et seq. In addition, the

complaint alleges that Philips failed to pay plaintiff certain accrued employment benefits and failed timely to pay his bonus for 2002.

The following is undisputed. Philips is the wholly owned subsidiary of defendant Koninklijke Philips Electronics N.V. (Royal Philips), headquartered in Eindhoven, the Netherlands. Plaintiff commenced work at Philips on March 28, 1999, and was soon promoted to the position of Cluster Manager. He was assigned to the North American Division of the Non Product Related (NPR) Global Services Unit of Royal Philips, with an office in New York City. Plaintiff's major responsibilities in that position were to locate and purchase goods and services for Philips's operational needs, such as temporary employment, food services, leasing of real estate and automobiles, and such personnel matters as the time and attendance system. Plaintiff's duties included managing the contracts that he had negotiated. In March 2001, plaintiff suffered serious non-work-related injuries, when an automobile that he had been fixing fell on him. As a result of the accident, plaintiff suffered a crushed left wrist, a broken left knee, a punctured lung, and an anoxic brain injury that permanently diminished his fine motor skills and significantly impaired his ability to speak. Plaintiff was in a coma for 36 hours, hospitalized for two and a half months, and unable to return to work for approximately six months.

Within days of learning about plaintiff's accident, defendant Frank Klaasen, who was, at all relevant times, the International

Human Resources Manager, NPR Purchasing Services, for Royal Philips, dispatched a Royal Philips employee from Eindhoven to pick up on the work that plaintiff had been doing. Shortly thereafter, non-party Rebecca Steffen was hired, at first temporarily, to continue that work. After plaintiff returned to work in September 2001, defendant Janny Kostense, who was Global Product Line Manager, Personnel and Professional Services, and who was plaintiff's direct supervisor from the time that he returned until he accepted the position of Senior Business Analyst in September 2002, divided his former areas of responsibility between him and Ms. Steffen. Some time in May 2003, Lloyd informed plaintiff that his position as Senior Business Analyst would be terminated on May 28, 2003.

Discussion

Timeliness

As an initial matter, the court rejects plaintiff's argument that the motions are untimely. While a scheduling order, dated June 22, 2004, required plaintiff to file his note of issue before November 25, 2004, and required any dispositive motions to be made no later than 60 days after the filing of the note of issue, a subsequent scheduling order, dated May 16, 2006, required the note of issue to be filed by November 30, 2006, and did not contain a deadline for the making of dispositive motions. Plaintiff filed his note of issue on November 29, 2006. Accordingly, defendants' dispositive motions had to be made within 120 days thereafter, that is, no later than March 29, 2007. See CPLR 3212 (a); Landau v

Oceanside Cove Homeowners, Inc., 265 AD2d 381 (2d Dept 1999). Lloyd and Sabatini filed their joint motion on March 5, 2007. Phillips also filed its motion on March 5, 2007. Consequently, both motions are timely.

Motion Sequence No. 012

Discrimination

Executive Law § 296 (1) provides that:

> It shall be an unlawful discriminatory practice: (a) For an employer ... because of the age ... [or] disability ... of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

Executive Law § 292 (21) defines "disability" as:

> (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function ... provided, however, that ... the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.

Administrative Code § 8-107 (1) provides that:

> It shall be an unlawful discriminatory practice: (a) For an employer ..., because of the actual or perceived age [or] ... disability ... of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against any such person in compensation or in terms, conditions or privileges of employment.

In order to make a *prima facie* case of unlawful discrimination, under either statute, a plaintiff must show that he or she: (a) is a member of a statutorily protected group; (b) was qualified for the position held or sought; and © suffered an adverse employment

action in circumstances from which a discriminatory intent on the part of the employer can be inferred. See Mittl v New York State Div. of Human Rights, 100 NY2d 326 (2003) (NYSHRL); Ferrante v American Lung Assn., 90 NY2d 623 (1997) (same); Messinger v Girl Scouts of U.S.A., 16 AD3d 314 (1st Dept 2005) (NYCHRL). Where a plaintiff has made a *prima facie* case, the burden shifts to the employer to show a legitimate business reason for the adverse action, whereupon, the burden shifts back to the employee to show that the reason put forward by the employer is merely pretextual. Ferrante v American Lung Assn., 90 NY2d 623, supra; Brennan v Metropolitan Opera Assn., 284 AD2d 66 (1st Dept 2001).

Philips, which does not dispute that plaintiff was disabled, for purposes of both the NYSHRL and the NYCHRL, contends that plaintiff has acknowledged that effective verbal communication was a necessary function of his position as cluster manager, and that he also acknowledged that, after his accident, he was unable to speak effectively. Accordingly, Philips argues that, by plaintiff's own admissions, plaintiff was unable to perform the duties of his position, and that, therefore, there can be no inference that plaintiff's transfer to the position of business analyst was the result of discrimination on the basis of disability. With regard to plaintiff's termination, Philips contends that it had determined to reduce by 25% the expense of its general purchasing activities, and that, as part of that reduction in costs, it eliminated plaintiff's position, as well as the positions of three cluster managers, none of whom suffered from a

known disability. Accordingly, Philips argues that plaintiff's termination does not raise an inference of unlawful discrimination. In addition, Philips argues that, because plaintiff did not request an accommodation, Philips was not required to provide one, and that, in any event, it did provide an accommodation by creating the business analyst position specifically for him.

While plaintiff acknowledged that his speaking ability had been significantly impaired as a result of his accident, he also testified at his deposition that, despite that impairment, he did not need anyone's help in communicating with customers and vendors, and that, although he would have done a more effective job had he been able to speak as he had before the accident, he was able to perform his duties by increasing his use of e-mail. To be sure, a plaintiff's self-assessment of his or her abilities is not normally conclusive evidence. Here, however, Philips relies mostly on plaintiff's own assessment of his verbal abilities as evidence that he was unable to perform the duties of a cluster manager. For the rest, Philips relies on the deposition testimony of Kostense, Ms. Steffen, Sabatini, Karen Jones, and Dr. Derek Aita, a clinical psychologist who evaluated plaintiff, after plaintiff was terminated, with a view of assisting him in vocational planning. Dr. Aita concluded, and testified at his deposition, that plaintiff's speech was severely compromised. Kostense testified that, at a July 2001 meeting with plaintiff, in Boston, she could understand what he was saying, albeit only with difficulty. Kostense also testified that there had been one complaint about

plaintiff's speech from a person at a catering company with which Phillips did business, and complaints from Ms. Steffen, who, according to Kostense, had her own difficulties with verbal communication, and who, moreover, was competing with plaintiff for areas of responsibility. Ms. Steffen testified at her deposition that Kostense and other, unidentified, persons had "concerns" about plaintiff's speaking ability. Sabatini, who was Business Control Officer of the New York office, and who described his function as that of an overseer, testified at his deposition that, except for complaints from Kostense and Klaasen, he was not aware of any complaints about plaintiff's speech from anyone in the Philips companies or the companies with which plaintiff conducted business, and that, while Klaasen and Kostense were concerned that plaintiff's speech impediment could be a detriment to Philips, he had no knowledge that the impediment had affected plaintiff's work, although he had a sense that it had played a role in the termination of plaintiff's employment. Ms. Jones, who was in charge of human resources for the NPR purchasing organization at Philips, testified at her deposition that Sabatini, Klaasen, and Kostense were concerned about plaintiff's speech problem. In sum, what all this testimony amounts to is that Klaasen, Kostense, and some other employees of Royal Philips, or of Philips, had concerns centered on plaintiff's speech difficulties, but that, as Kostense confirmed, throughout the year following his return to work, plaintiff did his job as cluster manager. There is no evidence in the record that the results of plaintiff's work, throughout the

year following his return in September 2001, differed significantly in quality or quantity from the results of the work that he performed prior to his accident. Accordingly, Dr. Aita's evaluation of plaintiff is largely immaterial in that, while it suggests that plaintiff would have had difficulty in performing a job that required verbal conversation, it is not evidence that, contrary to the testimony of Kostense, plaintiff did not, in fact, do his job.

The New York Court of Appeals has repeatedly explained that, under the NYSHRL,

> it is not enough for the employer to show that the employee's physical impairment is somehow related to the duties he must perform ... . Nor is it sufficient to show that the impairment precludes the employee from performing the duties in a perfect manner. The statute bars discrimination against an impaired individual who is reasonably able to do what the position requires. Unless it is shown that the employee's physical condition precludes him from performing to that extent, the disability is irrelevant to the job and can form no basis for denying him the position.

Matter of Miller v Ravitch, 60 NY2d 527, 532 (1983); see also Matter of McEniry v Landi, 84 NY2d 554 (1994); Matter of Antonsen v Ward, 77 NY2d 506 (1991). Similarly, 9 NYCRR § 466.11 (d) (1) (ii) provides in relevant part, that:

> Reasonable performance is not perfect performance or performance unaffected by the disability, but reasonable job performance, reasonably meeting the employer's needs to achieve its business goals.

Philips has failed to show that there is not an issue of fact as to whether plaintiff was reasonably capable of performing the duties of his position as cluster manager.

Nor has Philips shown that the transfer of plaintiff to the

position of business analyst had a legitimate business reason. Klaasen knew that that position would end in a matter of months. Plaintiff testified at his deposition that, in a November 15, 2001 meeting in New York City, Klaasen told him that his impaired speech was a problem with regard to his performing the duties of a cluster manager, and that, at a subsequent time, he had seen in the printer of a computer an e-mail, dated sometime in January 2002, from Klaasen to Sabatini, asking whether plaintiff could be fired. Similarly, Jones testified at her deposition that, at some time after plaintiff's accident, Klaasen told her that he wanted to fire plaintiff, and that she was so alarmed at Klaasen's intention that she spoke to an attorney at Phillips who knew Klaasen and "would be able to provide language to get his attention." She found it necessary to specifically advise Klaasen that Philips would not discriminate against any qualified employee because of a known or perceived disability, or age, and she later advised him that plaintiff's title should not be changed unless he requested an accommodation. Defendant Jan Christiaens s/h/a Christiaen, who was the Chief Financial Officer of NPR Purchases for Royal Philips, testified at his deposition that, in the summer of 2003, he drew up the specifications of a project that he thought needed to be done, and that would take between six and nine months. He presented it to Klaasen, asking whether someone from Eindhoven should be assigned to do it. Klaasen told Christiaens that plaintiff was available to fill that position. When plaintiff went to Eindhoven to meet Christiaens (who, incidentally, testified that he had an

hour-long conversation with plaintiff and understood what he was saying), he also met with Klaasen. Plaintiff testified at his deposition that, at that meeting, Klaasen told him that he was being removed from his position as cluster manager because of his speech. In these circumstances, Philips has not shown that there is no question of fact as to whether Klaasen placed plaintiff in the position of business analyst, against Jones's advice not to change plaintiff's job title solely because of his speech impairment, simply as a way to terminate his employment within several months. The court notes that Philips has not presented an affidavit from Klaasen, and that defendants have failed to produce him for a deposition in the United States, although they were required to do so by the terms of a stipulation that they entered into with plaintiff.

Even had Philips shown that plaintiff's speech impediment prevented him from reasonably performing the duties of a cluster manager, there would still remain a material question as to whether Philips had provided plaintiff with a reasonable accommodation. To be sure, plaintiff did not request an accommodation, and the Appellate Division, First Department, has held, following a decision of the United States Court of Appeals for the Eighth Circuit in a case brought under the Americans With Disabilities Act, 42 USC § 12101, et seq., that, under the NYSHRL, an employer's duty to provide an accommodation does not arise absent the employee's request for one. Pembroke v New York State Office of Court Admin., 306 AD2d 185 (1st Dept 2003); see also Pimentel v

Citibank, N.A., 29 AD3d 141 (1st Dept 2006). However, the NYCHRL differs from the NYSHRL with regard to the issue of accommodation. Whereas the NYSHRL provides that it is unlawful for an employer "to refuse to provide reasonable accommodation to the known disabilities of an employee ... in connection with a job or occupation sought or held," (Executive Law § 296 [3] [a] [emphasis added]), the NYCHRL affirmatively requires that "any person prohibited by the provisions of this section from discriminating on the basis of disability shall make reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job." Administrative Code § 8-107 (15) (a) (emphasis added).[1] Philips has not shown that there is not a question of fact as to whether Philips sought to accommodate plaintiff's speech impediment. Philips's argument that it created the business analyst position as an accommodation for plaintiff is directly contradicted by Christiaens's deposition testimony that he described the function that he needed filled, without a thought of who would fill it. Inasmuch as it is undisputed that Klaasen knew that the position was a short-term one, there is an issue of fact as to whether Klaasen, in effect, forced plaintiff to accept that position, not as an accommodation, but as a way of terminating his

[1] The court notes that, in Pembroke v New York State Office of Court Admin. (306 AD2d 185, supra) and Pimentel v Citibank, N.A. (29 AD3d 141, supra), the Appellate Division sub silentio nullified 9 NYCRR §§ 466.11 (e) and 466.11 (j) (3) and (4), all of which provide that an employer must consider reasonable accommodation, not only when an employee requests accommodation (9 NYCRR § 466.11 [e] [2] and [3]), but also where, absent a request, the disability and the need for accommodation are known to the employer.

employment when the position ended. For the same reason, Philips has not shown that there is not an issue of fact as to whether the termination of Philips's employment was based on his disability, even though it is undisputed that Philips was reducing staff in New York, at that time, and transferring certain functions to Eindhoven.

Philips relies on Graves v Finch Pruyn & Co. (457 F3d 181 [2d Cir 2006]) for the proposition that, because the ADA does not require an employer to create a new position as an accommodation for a disabled employee, an employee assigned to a new position cannot complain when that position is eliminated. In that case, however, it was undisputed that the position in question had been created in order to provide the plaintiff with an income stream for several weeks, following his election to take disability retirement. Here, by contrast, it is undisputed that plaintiff did not intend to retire.

Plaintiff's claim of discrimination on the basis of age rests entirely on the fact that, in 2003, non-party Inigo Franco, who is much younger than plaintiff, was assigned some of plaintiff's functions. Plaintiff has not alleged any facts, other than Franco's relative youth, to raise an inference that plaintiff was discriminated against on the basis of his age. Accordingly, those branches of the first and second causes of action that allege such discrimination will be dismissed.

The Bonus and the Other Remaining Issues

The third through eighth causes of action in the complaint

allege that Philips failed, or failed timely, to pay plaintiff certain accrued employee benefits, to wit, his annual bonus for 2002, his accrued vacation time, and his severance payment. The third cause of action alleges that the alleged failure to pay benefits was based on considerations of plaintiff's disability and age. The eighth cause of action alleges that said failure to pay was in retaliation for a letter that plaintiff wrote, stating his belief that he had been terminated because of his disability. These causes of action will be dismissed because there is nothing in the record to support them. While there is significant evidence that plaintiff was moved from his position as cluster manager because of his difficulties with speech, there is no evidence that Klaasen, or anyone else at Philips, wanted to harm plaintiff, beyond terminating his employment. Nor has plaintiff alleged any fact to support his conclusory eighth cause of action.

With regard to the severance payment, Philips points out that its written Severance Pay Policy (Policy) is to pay severance "no sooner than seven (7) days after the eligible employee signs a release" (Jones Aff., Exh. A, at 2), and it asserts that, while it informed plaintiff of the amount of severance to which he was entitled, plaintiff refused to sign and return the release that had been sent to him. The Policy does not specify the contents of the release that an employee must sign to obtain severance payment. It provides that, for each year of service, eligible employees will be entitled to one week of severance pay, in the amount of a week of base pay at the time of termination, excluding bonuses and other

payments, and subject to both a minimum and a maximum. The release that Jones sent to plaintiff would have required him not only to release Philips from any claims of discrimination, as well as other matters typically included in releases, but also provided that the severance payment would "be considered payment for any and all vacation, bonuses, entitlements and other benefits due to you now or at any time in the future." Jones Aff., Exh. B, at 1. Inasmuch as severance pay, bonuses, and vacation pay appear to be independent entitlements of Philips employees, plaintiff's refusal to sign the proffered release, and thereby to forego his earned bonus in order to receive his severance pay, does not vitiate his current claim for severance pay. Accordingly, the seventh cause of action will not be dismissed.

It is undisputed that plaintiff was entitled to a bonus for 2002, and the amount of that bonus is, likewise, not in dispute. A non-discretionary bonus constitutes wages, within the meaning of Article 6 of the Labor Law. Labor Law § 191 (1) (d) provides that a worker other than a manual worker, a railroad worker, or a commission salesman, "shall be paid ... not less frequently than semi-monthly ... ." Labor Law § 191 (3) provides that "[i]f employment is terminated, the employer shall pay the wages not later than the regular pay day for the pay period during which the termination occurred ... ." The pay period during which plaintiff was terminated ended on June 1, 2003. Accordingly, Philips properly issued plaintiff's final paycheck, which included payment for five unused vacation days in 2003, as well as his final salary

payment, on May 30, 2003. Plaintiff's bonus payment for 2002 was due at that same time. It is undisputed, however, that Philips did not tender plaintiff's earned bonus until July 1, 2003, together with payment for unused vacation days from 2002. Plaintiff's counsel returned the check, stating that, inasmuch as the payment of the bonus was untimely, plaintiff was entitled, in addition, to interest, attorney's fees, and liquidated damages of 25% of the bonus due. See Labor Law § 198. Accordingly, plaintiff's fourth cause of action, alleging breach of implied contract, and his fifth cause of action, alleging violation of Labor Law § 191 (3), will not be dismissed.

Plaintiff's sixth cause of action alleges that "[a]s of May 28, 2002, when Philips terminated [p]laintiff's employment, [p]laintiff was entitled to receive payment for accrued and unused vacation for the year 2003." It is evident that the years "2002" and "2003" have been transposed. It is undisputed that Philips paid plaintiff for his unused 2003 vacation time in the check that contained his final salary payment. With regard to unused vacation in 2002, plaintiff argues that Sabatini approved plaintiff's carryover to such earned vacation days to 2003, and the sixth cause of action seeks the payment for the unused vacation days in 2002 that were included with plaintiff's bonus in the check tendered on July 1, 2003. Philips's Time Off policy states, however, that any vacation time carried over into a year subsequent to the year in which it was earned must be used by March 31st of that next year. See Jones. Aff., Exh. C, at 3. Philips had no obligation to pay

plaintiff for vacation days carried over from 2002 and not used within the prescribed time. Accordingly, the sixth cause of action will be dismissed.

Motion Sequence No. 011

Lloyd's motion to dismiss will be granted, because, whether Lloyd was plaintiff's supervisor after plaintiff took the position of business analyst, as plaintiff contends, or not, Lloyd testified at his deposition that he informed plaintiff that his position was being terminated, at the express direction of Christiaens, who testified at his deposition that, plaintiff's project having been completed, he, Christiaens, was unwilling to extend funding for the position. Lloyd also testified that he confirmed with Klaasen that he should follow Christiaens's direction. Moreover, Christiaens testified at his deposition that he had extended the funding for plaintiff's position once, at Lloyd's request, and that Lloyd had asked him to extend it again. There is no evidence that, with regard to plaintiff's termination, Lloyd was more than the bearer of ill tidings, who had attempted to avert, or at least to postpone, the termination.

Sabatini's motion will also be granted. It is undisputed that Sabatini knew that Klaasen wanted to fire plaintiff; that Christiaens sent the business analyst job description to Sabatini with a request for his opinion as to whether plaintiff was a suitable person for that job; and that Sabatini both had some input into the parameters of the project and recommended plaintiff for the position. However, there is no evidence that Sabatini forced

plaintiff out of his position as cluster manager, or even that he urged plaintiff to take the position of business analyst. Nor is there any evidence that Sabatini played any part in plaintiff's termination. Accordingly, Sabatini cannot be held to have aided and abetted either of those allegedly discriminatory acts.

Accordingly, it is hereby

ORDERED that, in motion sequence no. 011, the motion for summary judgment is granted and the complaint is hereby severed and dismissed as against said defendants Thomas Lloyd and Ron Sabatini, and the Clerk is directed to enter judgment in favor of such defendants with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that, in motion sequence no. 012, the motion is granted only to the extent that the third, the sixth, and the eighth causes of action, and those branches of the first and second causes of action that allege discrimination on the basis of age, are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the remainder of this action shall continue.

Dated:July 19, 2007

ENTER:

Carol Robinson Edmead, J.S.C.