

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JERRY L. ELLIS,
Plaintiff,

v.

MOHENIS SERVICES INC. and
LAUREL LINEN SERVICES INC.,
Defendant.

Civil Action
No.96-6307

Gawthrop, J.

August 21, 1998

M E M O R A N D U M

Plaintiff Jerry L. Ellis seeks reconsideration of an order for summary judgment entered on the ADA claims, Counts I and II of his complaint, in favor of the defendants, Mohenis Services, Inc. ("Mohenis") and Laurel Linen Services, Inc. ("Laurel Linen"). Upon the following reasoning, I shall deny plaintiff's motion.

I. Background

Mohenis is a Virginia corporation in the commercial linen laundry business. Ellis claims that Mohenis hired him as a Sales Manager for its Maryland plant in 1989. In 1995, Ellis transferred to Laurel Linen in Philadelphia, Pennsylvania, and began working as a Manager for Customer Owned Goods ("COG"). Ellis describes Laurel Linen as a plant which is a branch, and a

wholly owned subsidiary, of Mohenis.

In January, 1996, Ellis was diagnosed with viral Hepatitis C. On March 11, 1996, he began receiving medication, Interferon, which caused flu-like symptoms. Ellis continued to work during this period and to experience symptoms including excessive fatigue, fever, chills, and body ache. (Pl.'s Resp. Defs.' Mot. S.J. at 4.) Ellis requested a reduction in his hours, from 60 to 40 hours per week. At this time, the general manager, Bob Carroll, allegedly began to act in "a harsh and deliberate manner in an effort to demean, humiliate, inconvenience and embarrass Ellis." (Pl.'s First Am. Compl. at 6-7.) On March 13, 1996, Carroll directed Ellis to fill in for a driver of a large truck. Ellis suggested in a note to his manager that it would be risky to have him drive the large truck. He also provided a pharmaceutical warning, which stated that persons on Interferon should not drive until their reaction to the Interferon injection was known. The defendants then removed the company car Ellis used for commuting to and from the plant and for servicing his major customer, the Ritz Carlton Hotel in Philadelphia. Ellis then filed his first charge of disability discrimination with the United States Equal Employment Opportunity Commission ("EEOC"), and, on March 14, 1996, went on leave under the Family and Medical Leave Act ("FMLA"). At the end of the twelve weeks permitted under the FMLA, Ellis did not return to work and was

terminated from his employment by letter dated June 14, 1996. In the beginning of June, he moved to Pittsburgh to live with his sister and began working as a car salesman, a job he maintains, although with a different dealership.

Ellis filed an amended charge with the EEOC on September 6, 1996. The EEOC issued a second right-to-sue letter on September 11, 1996, and Ellis timely filed this suit on September 17, 1996. The suit alleged, inter alia, that the defendants discriminated against him in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-13. On March 3, 1998, this court entered an order denying defendants' summary judgment motion, because, as to the ADA claims, it appeared that at the very least there remained a viable cause of action under the theory of the employer's having regarded the plaintiff as being disabled. However, the next day, at the start of trial, upon additional argument from the parties, this court granted summary judgment on the ADA claims in favor of the defendants. Ellis now seeks reconsideration of that order.

II. Standard of Review

A federal district court will grant a motion for reconsideration based upon one of three reasons: "(1) an intervening change in controlling law, (2) the emergence of new evidence not previously available, or (3) the need to correct a

clear error of law or to prevent a manifest injustice." Environ Products, Inc. v. Total Containment, Inc., 951 F. Supp. 57, 62 n.1 (E.D. Pa. 1997); see also, Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985) ("The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence."). Ellis bases his motion on the third reason stated, a clear error of law, claiming that this court erroneously ignored genuine issues of material fact.

III. Discussion

To establish a prima facie case of discrimination under the ADA, Ellis must demonstrate that he "(1) has a 'disability' (2) is a 'qualified individual' and (3) has suffered an otherwise adverse employment decision because of that disability." Deane v. Pocono Med. Ctr., 142 F.3d 138, 142 (3d Cir. 1998). It was Ellis's inability to satisfy the first prong of the prima facie case - that he is disabled within the meaning of the ADA - upon which summary judgment was granted.

The ADA defines disability as "(a) a physical or mental impairment that substantially limits one of more of the major life activities of [an] individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

In his motion for reconsideration, Ellis relies on the first

and third prongs of that definition. Defendants argue that the issue of whether they perceived Ellis as disabled was never properly before the court in summary judgment because it was not raised by Ellis in either his complaint or his first response to the motion for summary judgment. The defendants argue that Ellis is barred from changing his theory of the case now, after the close of discovery and after defendants filed a dispositive motion, because he did not "plead, allege, or disclose" a "regarded as" claim until his sur-reply to the summary judgment motion, and then only after the defendants had pointed out in their motion that the plaintiff did not allege such a claim. (See Defs.' Resp. Mot. Recons. at 2.) The defendants say that the plaintiff's complaint did not provide them with sufficient notice that his theory of the case involved a claim that the defendants regarded him as disabled within the meaning of the ADA. I agree with the defendants that the plaintiff's complaint does not expressly state a claim under the "regarded as" theory. However, in light of the liberal pleading standards, and recognizing that the court orders here at issue addressed both the first and third prongs of the disability definition, I shall address both. Contrary to their assertions, I do not find that the defendants will be prejudiced by allowing this theory at this late date, because I find that the plaintiff is unable to establish a disability under either of the theories.

A. Substantial Limitation of Major Life Activity

During the relevant time frame, Ellis had been recently diagnosed with Hepatitis C, was undergoing Interferon therapy,¹ and suffered from excessive fatigue, "body ache, mild fever, and chills." (Pl.'s Resp. Defs.' Mot. S.J. at 4.) Ellis appears to argue that Hepatitis C is a disability per se because it is a chronic illness that affects a major organ.² However, under the

¹Both parties argue whether the effects of the plaintiff's Interferon treatments should be considered in determining whether he is disabled under the ADA. The Third Circuit recently held that disabled individuals who control their disability with medication may invoke protections of ADA. Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933, 935 (3d Cir. 1997); see also 29 C.F.R. pt. 1630 app. § 1630.2(j) ("The determination of whether an individual is substantially limited in a major life activity must be made . . . without regard to mitigating measures such as medicines, or assistive or prosthetic devices."). Here, however, unlike in Matczak, the medication aggravated, not ameliorated, the plaintiff's symptoms and physical state. Nevertheless, the parties' arguments on this point are immaterial, since Ellis has not demonstrated that his physical impairment substantially limited his ability to work either with or without the medication. See, e.g., Gordon v. E.L. Hamm & Assoc., 110 F.3d 907, 912 (11th Cir. 1996) (finding that while side effects from chemotherapy may qualify as physical impairments under ADA, such impairment did not substantially limit plaintiff's ability to care for himself or to work).

²"The Hepatitis C virus . . . 'remains in the blood for years and accounts for a large percentage of cirrhosis, liver failure, and liver cancer cases.'" Downs v. Hawkeye Health Services, Inc., -- F.3d --, No. 97-3851, 1998 WL 348201, at *3 (8th Cir. July 1, 1998) (quoting Stedman's Medical Dictionary 784 (26th ed. 1995)); see also Sharp v. McDermott Inc., No. Civ. A. 95-4037, 1997 WL 538002, at *3 (E.D. La. Aug. 25, 1997) (noting Hepatitis C "can cause varying degrees of debilitating and often permanent damage to the liver and/or result in a person being a

ADA, not every illness is considered a disability, even if the disease is life-threatening or ultimately terminal. See, e.g., Sharp v. McDermott Inc., No. Civ. A. 95-4037, 1997 WL 538002, at *3 (E.D. La. Aug. 25, 1997) (holding plaintiff diagnosed with Hepatitis C did not establish prima facie case of discrimination under ADA); Ellison v. Software Spectrum, Inc., 85 F.3d 187, 190 (5th Cir. 1996) (holding that, on the facts presented, breast cancer which required chemotherapy and treatment involving significant side effects did not qualify as a disability); Ennis v. National Ass'n of Bus. and Educ. Radio, Inc., 53 F.3d 55, 60 (4th Cir. 1995) (holding that court could not find HIV or any other sickness was per se disability and instead must rely on specific evidence of how disease affected one's daily activities). Instead, plaintiff bears the burden of establishing on the facts of the particular case that the ailment at issue constitutes a disability for purposes of the ADA. See, e.g., Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 164 (5th Cir. 1996) (quoting 29 C.F.R. pt. 1630 app. § 1630.2(j)) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has but rather on the effect of that impairment on the life of the individual").

Here, the defendants claim that Ellis has not shown that his

permanent chronic carrier").

physical impairment limited one or more of his major life activities. Ellis claims that his physical impairment substantially limited him in the major life activity of working. See 29 C.F.R. § 1630.2(i) (defining "Major Life Activities" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working").

To be substantially limited in the major life activity of working, a plaintiff must be "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i); see also Olson v. General Elec. Astropace, 101 F.3d 947, 952 (3d Cir. 1996)(applying same regulations). Thus, it is not enough for Ellis to show that his physical limitations prevented him from continuing in his position as COG manager; instead, he must show that these limitations precluded him from performing a broader class of potential jobs for a person with his vocational skills and training. Ellis has failed, however, to bring forth evidence in

this regard.³

Ellis claims that as a result of his impairment he could only work forty hours per week. He defines the class of jobs from which he was foreclosed by this limitation as "management positions in general and in the various Mohenis Commercial Laundry subsidiaries in particular." (Pl.'s Mot. Recons.) However, other courts have found that "[t]he inability to work more than forty-hours per week by itself does not constitute a substantial limitation on the major life activity of working." Kolpas v. G.D. Searle & Co., 959 F. Supp. 525, 529 (N.D. Ill. 1997); see also Duff v. Lobdell-Emery Mfg. Co., 926 F. Supp. 799, 808 (N.D. Ind. 1996) (finding that impairment that renders person incapable of working more than forty hours per week is not disability under the ADA); Roth v. Lutheran General Hosp., 57 F.3d 1446, 1454-55 (7th Cir. 1995) (ruling where plaintiff had visual condition which prevented working for more than eight to ten hours straight, his inability to fulfill long shifts or 36-hour call duties required of desired employment position was not a disability under ADA).

Nor has Ellis offered evidence to support his assertions that his physical impairment restricts his ability to perform a

³Indeed, although not conclusive of the issue before the court, the evidence does show that Ellis continued working while on leave, although earning minimum wage at a "menial job." (Pl.'s Dep. at 548-551.)

class of jobs.⁴ Where a plaintiff asserts that he has an impairment substantially limiting his ability to work, he "must present demographic evidence to show what jobs in [his] geographic area [he] has been excluded from due to [his] disability." Taylor v. Phoenixville Sch. Dist., 998 F. Supp. 561, 568 (E.D. Pa. 1998) (citation omitted) (addressing plaintiff's burden under the ADA). Failure to do so is fatal to plaintiff at the summary judgment stage. Id. (citations omitted). Ellis has not offered any evidence as to his vocational training, the accessible geographic area, or the number and type of jobs demanding similar training from which he was also disqualified. Thus, Ellis did not and has not met his burden, and the record cannot support a finding that he was precluded from employment in an entire class or a broad range of jobs. See Horth v. General Dynamics Land Sys., Inc., 960 F.

⁴The plaintiff should present evidence of:

- (1) the geographical area to which the individual has reasonable access; (2) the job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
- (3) the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of an impairment.

29 C.F.R. § 1630.2(j)(3)(ii)(A)-(C).

Supp. 873, 880 (M.D. Pa. 1997) (finding plaintiff's evidence "failed to address the significant factors of vocational history, educational background, the labor market for which [plaintiff] is suited and the number and types of jobs from which [plaintiff] may be disqualified" given his impairment and management training); Bolton v. Scrivener, Inc., 36 F.3d 939 (10th Cir. 1994). Accordingly, summary judgment was appropriate under the first prong of the ADA definition of disability.⁵

B. Regarded As Disabled

In the alternative, Ellis argues that he is properly classified as disabled under the third prong of the "disability" definition - that the defendants regarded him as disabled. Under that definition a court must decide not whether Ellis was impaired, but simply whether the defendants regarded him as

⁵Ellis also points to a recent Supreme Court case, Bragdon v. Abbott, as supporting his claim that he is disabled under the first prong. 118 S. Ct. 2196 (1998). He appears to assert that this case supports the proposition that anyone with a contagious, infectious disease, such as hepatitis, is per se disabled under the ADA. The Supreme Court's holding in Bragdon, however, does not change the analysis of this case under the ADA. There the Supreme Court held that the respondent's HIV infection was a physical impairment, that reproduction is a major life activity, and that the plaintiff's HIV virus substantially limited her ability to reproduce. Id. at 2207. Ellis has a different physical impairment, hepatitis, and relies upon a different major life activity, working. The Supreme Court never actually reached the question whether HIV infection is a per se disability under the ADA. Id.

having an impairment, and whether the impairment, as perceived by the defendants, would have substantially limited one or more of his life activities. Deane, 142 F.3d at 143. Under this prong, then, the actual impairment, is of no consequence to the analysis. Id.

Ellis argues that the defendants erroneously perceived that the nature and extent of his physical impairment substantially limited his ability to work. In support of this assertion, Ellis points to the defendants' removal of his company car and to their forcing him to take leave under the FMLA.

The defendants dispute that they forced plaintiff to take a medical leave, stating instead that they encouraged him to file for a leave of absence when he failed to appear for work. Even viewing the leave in the light most favorable to the plaintiff, however, his argument must fail. Whether the defendants believed the plaintiff was eligible for FMLA leave, or believed the taking of such leave was proper under the circumstances, does not demonstrate that they regarded him as disabled. See, e.g., Johnson v. Boardman Petroleum, 923 F. Supp. 1563, 1568 (S.D. Ga. 1996) (offer of leave of absence showed concern for employee's well being, not treatment of employee as disabled).

"'[D]isability' under the ADA and 'serious health condition' under the FMLA are different concepts which must be analyzed separately." Vincent v. Wells Fargo Guard Servs., Inc. of Fla.,

3 F. Supp. 2d 1405, 1420 (S.D. Fla. 1998) (citing 29 C.F.R. § 825.702(b)). Further, "the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA]." 29 C.F.R. § 825.702(a). Thus, from an employer's perspective, an employee who has a "serious health condition" for purposes of the FMLA is not necessarily "disabled" under the ADA.

Ellis also points to the removal of his company car from his use as evidence that the defendants regarded him as disabled and terminated him because of it. The defendants argue that they were merely acting in response to the plaintiff's claim that he could not safely drive, coupled with the absence of any evidence that he could. The defendants allegedly asked Ellis to drive a large truck shortly after his first Interferon treatment. Ellis then gave his general manager a note saying that he did not think that he should drive the truck. (Defs.' Ex. 9.) The defendants admit that they took the company car away from the plaintiff in response to this note, but claim that they did so for safety reasons and point to an information sheet given to Ellis by a pharmacy regarding his Interferon prescription. The pharmacy description warns that persons on this medication should "not drive, . . . until [they] know how [they] react to this medication." (Defs.' Ex. 10.) Donald Struminger, the President of both Mohenis and Laurel Linen, testified that "[o]ur concern

was that now we were put on notice that the medication he was taking could have adverse effects while driving." (Defs.' Ex. 17.) Ellis argues that the defendants were incorrect in their belief that he was not able to drive and, thus, cannot justify their removal of the company car.

That the defendant prevented the plaintiff from driving a company car while receiving Interferon therapy, particularly after plaintiff told them that for him then to drive the truck might be dangerous, does not, in and of itself, establish that they regarded him as disabled. See, e.g., Gordon 100 F.3d at 914 (rejecting plaintiff's argument that because he no longer had access to company vehicle after returning from medical leave, employer regarded him as disabled). "An employer's belief that an employee is unable to perform one task with an adequate safety margin does not establish per se that the employer regards the employee as having a substantial limitation on his ability to work in general." Chandler v. City of Dallas, 2 F.3d 1385, 1393 (5th Cir. 1993) (holding that an employer's belief that employees were unable to perform driving tasks with an adequate safety margin did not establish per se that employer regarded those employees as disabled); see also Feldman v. American Mem'l Life Ins. Co., No. 96-3371, 1998 WL 102663, at *5 (N.D. Ill. Mar. 3, 1998) (finding that even if facts supported inference that employer regarded employee as unable to perform as traveling

salesperson because of her inability to drive, this did not support that employer regarded her as being unable to perform broad range of positions within company).

At most, then, the record before the court supports the inference that the defendants regarded Ellis as unable to drive and unable to perform his specific job in his assigned geographic area while undergoing Interferon therapy.⁶ The plaintiff's own evidence, including letters sent to him requesting him to file for leave or to report to work, supports that the defendants did not regard Ellis as substantially limited in his ability to work. (Pl.'s Ex. E.) Had the defendants regarded Ellis as being unable to perform a broad range of positions with the company, they would not have sought his return to work.

In addition, the defendants offered to pay for a transit pass for his use on public transportation since the company car seemed out of the question at least for a while. (Pl.'s Dep. at 487.) The defendants also offered him a sales position covering Center City Philadelphia, an area which Ellis could have used public transportation to service, but he declined, calling it "discriminatory in itself" because he "was not to drive a car like all the other salesmen." (Pl.'s Dep. at 488.) Putting aside the reasonableness of the sales position, which the

⁶According to the FMLA form completed by the plaintiff's physician, Ellis was scheduled to receive "therapy with Interferon for anywhere from 3-12 months." (Defs.' Ex. 1.)

plaintiff viewed as a demotion, it is clear that defendants did not perceive plaintiff as precluded from a broad range of jobs. It is also clear from the plaintiff's comments that he would accept nothing less than the return of the company vehicle. Plaintiff did not, however, present the defendants with any evidence, medical or otherwise, to show that he could safely drive. See Downs, 1998 WL 348201, at *1 (holding employee with Hepatitis C receiving Interferon therapy could not bring ADA claim where he had previously attested that his flu-like symptoms - extreme fatigue and nausea - made him unable to safely perform his duties).

As evidence of his ability to drive while getting the Interferon treatments, Ellis offers a doctor's note he gave to defendants in June 1996 which states, in part, that "there is no specific recommendation regarding the use of an automobile however all of my patients on Interferon have continued to drive without difficulty." (Pl.'s Ex. T.) The note goes on to state, however, that "[t]he ultimate decision is between the patient and the employer." Thus, it says nothing, specifically, regarding the plaintiff's reaction to the medication.

Nor is this a case where the defendants merely took plaintiff's note and the pharmaceutical warning at face value. Cf. Deane, 142 F.3d at 145 (finding plaintiff may have ADA claim where defendant employer did not contact her physicians, or

independently review her medical records, but rather relied solely on one phone conversation with plaintiff to determine extent of her limitations). Instead, defendants repeatedly asked the plaintiff to provide medical confirmation that his reaction to the Interferon therapy would not impair his driving ability. They also took plaintiff to the company doctor, who could not clear him to drive. Plaintiff also refused to authorize release of his medical records for defendants to review. Defendants did not act on unsubstantiated fears of safety risks. See 29 C.F.R. pt. 1630 app. § 1630.2(1) (giving as example of "regarded as" claim an employer who reassigns employee to less strenuous work because of unsubstantiated fear that employee will suffer a heart attack). Rather, they prevented Ellis from driving a company car until they could ascertain whether he could safely drive upon notification that plaintiff was taking medication that might impair his ability to do so. Daugherty v. City of El Paso, 56 F.3d 695, 698 (5th Cir. July 3, 1995) (citations omitted) ("Woe unto the employer who put such an employee behind the wheel of a vehicle owned by the employer which was involved in a vehicular accident.").

Plaintiff seems to claim that defendants discriminated against him by forcing him to take an unwanted and unrequested ADA accommodation, the removal of his company car, because they misperceived his ability to drive safely. Cf. Alba v. Upjohn

Co., Inc., No. 95-12788-JLT, 1997 WL 136334, at *5 n.3 (D. Mass. Feb. 21, 1997) (finding confiscation of plaintiff's company computer and company car were not unreasonable and did not rise to level of adverse employment action under ADA). At the end of his leave, Ellis received a letter from the defendants, stating: "Twelve weeks have elapsed and since you still cannot drive a vehicle because of your medication, your employment and health insurance have been terminated, effective June 7, 1996." (Defs.' Ex. 19.) Ellis relies on this statement as evidence that the defendants regarded him as disabled and terminated him because of it. Given the record before the court, I do not find the defendants' actions discriminatory, but rather, prudent. Defendants argue, and the record supports, that the plaintiff could have regained use of the company car by presenting medical clearance that he could drive without impairment. Ellis offers no evidence that he contacted defendants during his twelve-week leave to discuss his returning to work or to show his ability to drive. Indeed, the facts show that the defendants had great difficulty contacting Ellis about his status. In a letter dated April 26, 1996,⁷ the defendants called Ellis a "valued employee,"

⁷In the April 26, 1996, letter sent to Ellis and to a lawyer he had sought for legal aid, the defendants also detailed their difficulty in obtaining information from the plaintiff:

Understand that Mr. Ellis was very secretive about his latest difficulty, and has been very uncooperative with our local manager. He evidently does not have a

but opined that they had "no idea whether or not he has decided to come back to work, and if so, when." (Pl.'s Ex. P.) Further, at the time Ellis received his termination letter, he had taken the maximum leave allowed. Following this leave, he had not returned to work, but, rather, had moved over 250 miles away. The Third Circuit has stated that "both parties have a duty to assist in the search for appropriate reasonable accommodation and to act in good faith." Deane, 142 F.3d at 149 (quoting Mengine v. Runyon, 114 F.3d 415, 420 (3d Cir. 1997)). Ellis cannot now be heard to complain that defendants forced him out of a position for which he was qualified, when he failed to make the effort at the time to establish his ability to safely perform the duties of that job. See, e.g., Beck v. University of Wisconsin Bd. of Regents, 75 F.3d 1130, 1137 (7th Cir. 1996) ("[W]here, as here, the employer does not obstruct the process, but instead makes reasonable efforts both to communicate with the employee and provide accommodations based on the information it possessed, ADA liability simply does not follow.").

telephone, and we have no way of communicating with him other than by mail or by physically driving to his residence hoping to find him at home. Our general manager, Mr. Carroll, has personally driven him to our company doctor for evaluation. Mr. Ellis has not communicated with us on a regular basis, which has made it even more difficult to determine what is going on.

(Pl.'s Ex. P.)

IV. Conclusion

I am not insensitive to the plaintiff's medical misfortune. I am, of course, required to decide this case not out of empathy, but under the law. And the governing statutory definition leads to the conclusion that the plaintiff is not disabled within the meaning of the ADA. I thus must deny plaintiff's motion for reconsideration, leaving intact the previous order granting summary judgment to the defendants on the ADA claims.

An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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MOHENIS SERVICES INC. and
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Civil Action
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O R D E R

AND NOW, this day of August, 1998, Plaintiff's Motion
for Reconsideration is DENIED.

BY THE COURT:

Robert S. Gawthrop, III J.