IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DARRELL J. ANDREWS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 00-901 GMS
	)	
ABBOTT LABORATORIES,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

I. INTRODUCTION

On October 17, 2000, the plaintiff, Darrell J. Andrews ("Andrews"), filed the above-captioned action against his former employer, Abbott Laboratories ("Abbott"), alleging race discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. and 42 U.S.C. § 1981. Specifically, Andrews alleges discrimination with regard to Abbott's promotion policies.

Presently before the court is Abbott's motion for summary judgment. For the following reasons, the court will grant this motion.

II. STANDARD OF REVIEW

The court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Boyle v. County of Allegheny, Pennsylvania*, 139 F.3d 386, 392 (3d Cir. 1998). Thus, the court may grant summary judgment only if the moving party shows that there are no genuine issues of material fact that would permit a reasonable jury to find for the non-moving party. *See Boyle*, 139 F.3d at 392. A fact is material if it might affect the outcome of

the suit. *Id*. (citing *Anderson v. Liberty Lobby*, *Inc.,* 477 U.S. 242, 247-248 (1986)). An issue is genuine if a reasonable jury could possibly find in favor of the non-moving party with regard to that issue. *Id*. In deciding the motion, the court must construe all facts and inferences in the light most favorable to the non-moving party. *Id*.; *see also Assaf v. Fields*, 178 F.3d 170, 173-174 (3d Cir. 1999).

With these standards in mind, the court will describe the facts that led to the motions presently before the court.

III. BACKGROUND

Andrews began his employment with Abbott on or about March 29, 1993 as a sales trainee in Abbott's Diagnostics Division ("ADD"). On October 11, 1993, he was promoted to the position of Area Account Manager II.[1]

A. The Transfer to PPD

In October 1995, Andrews sought a transfer from ADD to a sales representative position in Abbott's Pharmaceutical Products Division ("PPD"). At his deposition, Andrews acknowledged that transferring to a sales representative position in PPD would not have constituted a promotion or a salary increase.

When Andrews requested a transfer to PPD, Dave Kruger, his regional manager, told him that he could not transfer out of ADD. Sometime thereafter, Andrews contacted Abbott's human resources department to complain about not being permitted to transfer. Specifically, he complained that four of his Caucasian counterparts were allowed to transfer out of ADD and into PPD, while

[1]On or about November 6, 1995, he was further promoted to the position of Area Account Manager I.

he was denied an opportunity to do the same. At that time, he believed that he was being discriminated against based upon his race, and he communicated that belief to Abbott's human resources department. Andrews admits to having been aware at that time that it was unlawful for an employer to discriminate against an employee based on his race.

In December 1995, Abbott's human resources department informed Andrews that he could transfer to PPD. His transfer became effective on January 15, 1996.

B. The "Air Force" Position

In September 1996, Andrews learned about an open position in a division within PPD known as the "Air Force." Soon thereafter, he discussed the Air Force position with his district manager, John Villeneau ("Villeneau"). Andrews alleges that Villeneau informed him that he was not eligible for the Air Force position because he did not have enough time in his current position. Abbott subsequently hired an African American female to fill the Air Force position in question.

Abbott maintains that regional managers had various philosophies on how long a subordinate should remain in a position before seeking a promotion. Generally, Abbott expected employees to stay in a position for two years before moving to another sales position or being considered for a promotion. However, Abbott admits that there was no written policy governing how long a person had to remain in a position before seeking a promotion.

Andrews believes that he suffered discrimination with regard to the Air Force position because two Caucasian employees who had begun working for PPD at the same time as he had were allegedly promoted in 1996 to specialty positions. Abbott maintains that, in fact, one of the employees in question was promoted to a specialty sales position in a different sales region from Andrews. Abbott further maintains that the other employee in question did not work in Andrews'

sale region, nor did she report to his regional manager. Further, both individuals were not promoted to specialty positions until May and June 1997, respectively.

Although Andrews testified that he believes the denial of an opportunity to interview for the Air Force position was an act of discrimination, he did not complain to Abbott's human resources department about this. Moreover, he testified that there was "no reason in particular" that he did not complain to human resources.

C. The SR Position

In March 1997, Andrews approached Villeneau about interviewing for a specialty sales position known as the "SR position." Villeneau informed Andrews that he would relay that request to Park Lamberton ("Lamberton"), Andrews' regional manager and Villeneau's boss. Villeneau later informed Andrews that Lamberton would not allow him to interview for that position because he needed to have served at least two years in his current position to be eligible for an interview.

With regard to this position, Andrews argues that he suffered discrimination because a Caucasian employee was granted an interview for a specialty sales position, while he was not. He further alleges that this individual also had less than two years in his current position. Abbott contends that, in fact, that employee had been at his current position from October 15, 1995 to December 15, 1997 - two years and two months - at the time of his promotion.

Although Andrews believes that the denial of an opportunity to interview for the SR position in March 1997 was an act of discrimination, he once again failed to report this concern to Abbott's human resources department.

D. The HIV Institutional Representative Position

In August 1997, Andrews interviewed for an HIV institutional representative position. The representative's job duties included acting as a liaison between Abbott and various hospitals and medical schools and marketing the drug Norvir to those institutions. Both the original HIV institutional position and the HIV specialist position were considered promotions from a primary care sales representative position. Furthermore, both positions were at the same grade level and had equal opportunities for bonuses and increased base salaries. The HIV institutional position reported to Joseph Mosso ("Mosso"), the HIV district sales manager.

Mosso interviewed two candidates for the HIV institutional position, Andrews and Marc Marrone ("Marrone"), a Caucasian. Both Andrews and Marrone were primary care sales representatives, although they were in different districts, had slightly different titles, and reported to different district managers. Specifically, Andrews was a Professional Products Representative ("PPR") and reported to Villeneau. Marrone was a Professional Marketing Representative ("PMR") and reported to Bill Craney.

Mosso ultimately selected Marrone for the position. At his deposition, Mosso gave two reasons for his decision. First, Marrone displayed an enthusiasm and passion for the HIV institutional position that was lacking in Andrews. Second, Marrone resided in Philadelphia, Pennsylvania, whereas Andrews lived in Bear, Delaware. Mosso further testified that, if possible, Abbott tries to locate qualified people who live in the territory in which they will work.

Andrews again believed that his rejection was discriminatory. However, he failed to report this complaint to Abbott's human resources department.

In November 1997, an HIV specialist position became available in Mosso's district. The position was located in Delaware, where Andrews still lived. Mosso called Andrews and offered

him the position, without considering anyone else and without requiring that Andrews appear for a second interview. Andrews admits that he accepted this promotion without interviewing for the position.

E. The District Manager Position in the Long Term Care Division

In June 1998, Andrews sought to be promoted to a district manager position in a new division known as the Long Term Care Division. Andrews feels that Abbott discriminated against him because he was not allowed to interview for the district manager position. However, Andrews is not aware of any HIV specialist who was allowed to interview for the position. In fact, Abbott maintains that it created this division to market a new product. Accordingly, it intended to fill the Long Term Care district manager positions with employees who had previous experience as district managers. The four individuals who ultimately filled the available positions were experienced district managers.

Andrews again felt that Abbott was discriminating against him. However, he failed to file a complaint with Abbott's human resources department, and he did not include this allegation in his letter of resignation. He further failed to include this allegation in his charge of discrimination.

F. The Regional Training Specialist Position

Andrews alleges that, on or about September 1998, he sought a regional training specialist position, but was denied an opportunity to interview for the position. Douglas Woolley ("Woolley"), the regional sales manager, made the hiring decision for the regional training specialist position at issue. He testified that he does not recall Andrews contacting him or leaving any messages about his interest in the regional training specialist position. In fact, Woolley testified that the position was not available in 1998. From June 16, 1997 to approximately February or March

1999, Ben Naparstek ("Naparstek") held that position.

In the summer or fall of 1998, Naparstek was scheduled to be promoted to a district manager position. Around that time, Abbott made the decision to eliminate one of its sales divisions, known as the Air Force. Abbott then gave the district manager position that Naparstek was scheduled to receive to one of the Air Force district managers. Naparstek returned to his regional training specialist position within a day or two of leaving that position. During the brief period of time that Naparstek was a district manager, Woolley testified that he did not solicit any candidates for the regional training specialist position, nor did he consider any candidates for that position.

Andrews believes that he was discriminated against because when he called Woolley to inquire about the regional training specialist position, Woolley did not return his telephone call. Andrews further maintains that Woolley did not contact him when the position finally became available in 1999. Andrews never reported this allegedly discriminatory incident to Abbott's human resources department, nor did he include this allegation in his letter of resignation. Finally, Andrews failed to include the regional training specialist position in his EEOC complaint.

G. The Clinical Liaison Position

In February 1999, Abbott converted the HIV institutional representative position into a newly created position known as a clinical liaison. The two HIV institutional representatives in Andrews' district were Marrone and Se Se Yennes ("Yennes"). Accordingly, when the HIV institutional representative position was converted into the clinical liaison position, Marrone and Yennes accepted the clinic liaison positions.

Andrews was an HIV specialist, but not an HIV institutional representative at the time that the clinical liaison position was created. He admits that he knows of no person who became a

clinical liaison who did not hold the position of HIV institutional representative at the time the clinical liaison position was created.

Andrews did not file a complaint about this allegedly discriminatory act with Abbott's human resources department.

H. Andrews' Resignation and Initiation of Suit

On March 22, 1999, Andrews forwarded his letter of resignation to Mosso. In that letter, Andrews alleged that he had suffered discrimination with regard to promotional opportunities at Abbott. Mosso testified that the letter of resignation was the first time that Andrews had expressed this view to him.

On May 27, 1999, Andrews filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). The charge lists the following allegations: (1) Andrews was initially not allowed to transfer from ADD to PPD; (2) he was not allowed to interview for a specialty sale position in September 1996; (3) he was not allowed to interview for a specialty sales position in March 1997; (4) he was denied the promotion to HIV institutional representative in July 1997; and (5) he was not informed about or considered for the clinical liaison position in February 1999.

On July 21, 2000, the EEOC issued a Notice of Right to Sue Letter to Andrews. On October 17, 2000, he filed a complaint against Abbott, which was subsequently amended in February 2001.

IV. DISCUSSION[2]

A. Exhaustion of Administrative Remedies

In addition to the five claims Andrews brought before the EEOC, Andrews has also alleged two additional claims in his complaint: (1) in June 1998, Abbott denied him the opportunity to interview for the position of district manager in the Long Term Care division and (2) in September 1998, Abbott refused to consider him for the position of Regional Training Specialist. Because these two additional claims were not raised with the EEOC, Abbott maintains that Andrews did not exhaust his administrative remedies with regard to them.

The Third Circuit has recognized that there are limitations on the presentation of new claims in the trial court that were not included in the EEOC charge. *See Howze v. Jones & Laughlin Steel, Corp.*, 750 F.2d 1208, 1212 (3d Cir. 1984). Specifically, a trial court may assume jurisdiction over claims not included in the EEOC charge only if the acts alleged in the subsequent Title VII suit are fairly within the scope of the prior EEOC charge or the investigation arising therefrom. *See Antol v. Perry*, 82 F.3d 1291, 1295 (3d Cir. 1996).

On the present facts, the court recognizes that Andrews' EEOC complaint listed certain specific allegedly discriminatory acts. However, in the "additional text" pages attached to the Charge of Discrimination, Andrews ends by stating "I believe Respondent systematically discriminates against blacks in that they are kept in non-mangement [sic] positions and denied

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[2]Andrews alleges a disparate impact claim for the first time in his Answer Brief. However, having pursued this case solely on a disparate treatment theory, he cannot now change theories after a motion for summary judgment has been filed. *See Bulkoski v. Bacharach, Inc.,* 1 F. Supp. 2d 484, 487 (W.D. Pa 1997) (denying a change in legal theory after a motion for summary judgment had been filed). Accordingly, the court will disregard Andrews' disparate impact argument.

promotional opportunities to higher ranking field and internal positions." Further, in his opposition brief to the present motion, Andrews states that he is claiming racial discrimination arising out of "the repeated failures of Abbott to inform or allow him, as a minority, of promotional opportunities within the organization. [sic]" The court therefore concludes that the two additional instances of alleged promotion discrimination, falling within the same time period as the specifically alleged acts, are fairly within the scope of the prior EEOC charge.

B. Statute of Limitations

Abbott next argues that the majority of Andrews' claims are barred by the statutes of limitations applicable to Title VII claims and Section 1981 claims. The court will address each type of claim in turn.

1. Title VII Statute of Limitations

In this jurisdiction, a claim of employment discrimination under Title VII must be filed with the EEOC within 300 days of the last alleged discriminatory act.[3] *See* 42 U.S.C. § 2000e-5(e); *see also Arasteh v. MBNA America Bank, N.A.*, 146 F. Supp. 2d 476 (D. Del. 2001). Failure to file a charge of discrimination within the applicable period constitutes a ground for dismissal of the claim. *See Parker v. State of Delaware Department of Public Safety*, 11 F. Supp. 2d 467, 472 (D. Del. 1998).

In the present case, Andrews filed a charge of discrimination with the EEOC on May 27, 1999. Thus, for an alleged unlawful employment practice to have been within 300 days of the

[3]Typically, a claim of employment discrimination under Title VII must be filed with the EEOC within 180 days of the last alleged discriminatory act. *See* 42 U.S.C. § 2000e-5(e). However, Delaware allows claimants who file either with the EEOC or the Delaware Department of Labor to rely on the 300 day statute of limitations. *See Arasteh v. MBNA America Bank, N.A.*, 146 F. Supp. 2d 476, 490 (D. Del. 2001).

EEOC charge filing date, it would have had to occur on or after July 31, 1998. Andrews, however, alleges discrimination in October 1995, September 1996, March 1997, August 1997, June 1998, September 1998 and February 1999. Accordingly, absent the application of the continuing violation doctrine, the only claims that Andrews is not barred from pursuing are the September 1998 claim concerning the regional training specialist position and the February 1999 claim concerning the clinical liaison position.

2. Section 1981 Statute of Limitations

The statute of limitations applicable to Section 1981 claims is the Delaware two-year personal injury statute of limitations. *See Cuffy v. Getty Refining & Marketing Co.*, 648 F. Supp. 802, 807 (D. Del. 1986). Accordingly, Andrews' Section 1981 claims will be barred unless they were filed within two years of his sustaining injury due to Abbott's alleged discrimination. *See id*. Andrews filed suit on October 17, 2000. Thus, any claim that occurred before October 17, 1998 is time barred. Applying the law to the present facts, all of Andrews' Section 1981 claims, except the February 1999 claim, are barred absent the application of the continuing violation doctrine.

C. Continuing Violation Doctrine

As alluded to above, the Third Circuit recognizes an exception to the strict application of the limitations periods under Title VII and 42 U.S.C. § 1981. This exception is known as the "continuing violation doctrine." *See West v. Philadelphia Elec. Co.*, 45 F.3d 744, 756 (3d Cir. 1995). Under this exception, a plaintiff may pursue a claim for discriminatory conduct that began prior to the filing period if he or she can demonstrate that the act is part of an ongoing pattern or practice of discrimination. *See Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476, 481 (3d Cir. 1997) (following the Fifth Circuit's leading approach in *Berry v. Board of Supervisors Louisiana State*

Univ., 715 F.2d 971 (5th Cir. 1983)). However, before this doctrine applies, the plaintiff must show that at least one discriminatory act occurred within the limitations period. *See id*.

Although recognizing the vitality of this doctrine, the Third Circuit cautions against allowing stale claims to proceed under the rubric of a continuing violation. *See id*. Specifically, the *Rush* court noted that to allow stale claims to proceed would be inconsistent with the administrative procedure established by Title VII which contemplates the prompt filing of charges. *See id*.

Furthermore, the Fifth Circuit has held that a one-time employment event such as a failure to promote is the sort of "discrete and salient even that should put the employee on notice that a cause of action has accrued." *See Huckabay v. Moore*, 142 F.3d 233, 240 (5th Cir. 1998). Similarly, in a more recent Fifth Circuit opinion, the court stated that an employee who claims to be the victim of a racially motivated failure to promote is put on notice that his rights have been violated at the time the adverse employment decision occurs. That employee must therefore bring the claim within 180 days of the adverse decision. *See Celestine v. Petroleos De Venezuella SA*, 266 F.3d 243, 354 (5th Cir. 2001); *see also West*, 45 F.3d at 756 (noting in dicta that there is no continuing violation for discrete events, such as a denial of a promotion, because such events trigger the duty to assert the lost right caused by the deprivation.). The Seventh Circuit takes a similar approach. *See Jones v. Merchants Nat. Bank & Trust Co. of Indianapolis*, 42 F.3d 1054, 1058 (7th Cir. 1994) (holding that "[i]f the plaintiff knew or with the exercise of reasonable diligence would have known after each act that it was discriminatory and had harmed her, she must sue over that act within the relevant statue of limitations.").

However, the court recognizes that there is case law from courts within this circuit, and other circuits, which concludes otherwise. Specifically, in *Wright v. ICI Americas, Inc.*, the Delaware

District Court held, on similar facts, that allegations of numerous failures to promote were allegations of a "broad policy of discrimination and for purposes of a summary judgment motion should not be broken down into discrete acts of discrimination." 813 F. Supp. 1083, 1088 (D. Del. 1993); *see also*, *Tyson v. Sun Refining and Marketing Co.*, 599 F. Supp. 136, 139 (E.D. Pa. 1984) (denying summary judgment as to alleged discrimination which had occurred twelve years earlier because the plaintiff alleged a broad policy of discrimination); *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 760 (9th Cir. 1980).

Andrews began his employment at Abbott in 1993 as a sales trainee in Abbott's Diagnostics Division ("ADD"). In 1995, he sought a transfer to a sales representative position in Abbott's Pharmaceutical Products Division ("PPD"). He alleges, however, that his regional manager would not allow him to transfer to PPD. Because Andrews was aware that several of his white colleagues had been allowed to transfer to PPD, he filed a discrimination complaint with Abbott's human resources department. He further testified at his deposition that he understood it was against the law for an employer to discrimination against an employee based on that employee's race. As a result of this complaint, Andrews received his transfer.

On these facts, it is clear that, as early as 1995, Andrews was fully aware that race discrimination in employment is illegal, he was convinced that he was the victim of such illegal discrimination, and he made an internal complaint. However, he chose not to pursue his rights through the EEOC's enforcement process - presumably because he achieved his desired result through Abbott's human resources department. His remaining failure to promote claims follow the same pattern, although he curiously never again sought the assistance of Abbott's human resources department.

Specifically, in September 1996, he learned of an open position in a division known as the Air Force. His manager told him he was not eligible for that position because he did not have enough time in his current position. As with his failure to be transferred to PPD when he first requested it, he believed that the denial of an opportunity to interview for this position was an act of illegal discrimination. However, "for no reason in particular," he chose not to file a complaint with Abbott's human resources department.

Likewise, Andrews testified that at the time of the March 1997, August 1997 and June 1998 incidents, he felt that he had suffered discrimination, but that he nonetheless failed to file a complaint with Abbott's human resources department, the EEOC, or the court. Thus, in each of the above instances of alleged discrimination, he knew of the alleged violation at the time it occurred, he believed that he was the victim of the discrimination, and he knew that race discrimination was illegal. Based on these facts, the court has doubts as to whether the continuing violation doctrine should operate to save these claims. However, out of an abundance of caution in light of the important issue at stake, the court concludes that Andrews' allegations are eligible for continuing violation status because it is feasible to read them as alleging an on-going, broad policy of discrimination.

D. The September 1998 and February 1999 Claims

Assuming, as the court will, that the October 1995, September 1996, March 1997, August 1997, and June 1998 incidents can be included as continuing violations, at least one act of discrimination must nevertheless have occurred during the limitations period. *See Rush*, 113 F.3d at 481. As the court stated above, the September 1998 and February 1999 incidents fall within the 300 day statute of limitations for Title VII claims, and the February 1999 incident falls within

Section 1981's two-year statute of limitations. However, the court concludes that Andrews has failed to meet his evidentiary burden with respect to both of us these incidents.

There is no direct evidence of racial discrimination in the record. Therefore, the court will utilize the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*. 411 U.S. 792 (1973). In order to establish a *prima facie* case under the *McDonnell Douglas* test, Andrews must prove the following elements: (1) he belongs to a racial minority; (2) he applied, and was qualified, for a job for which the employer was seeking applicants; (3) despite his qualifications, he was rejected; and (4) after his rejection, the position remained open and the employer continued to seek applicants from persons of his qualifications. *See Equal Employment Opportunity Commission v. Metal Service Co.*, 892 F.2d 341, 347, n.7 (3d Cir. 1990).

1. The September 1998 Incident

Based on his complaint, Andrews' claim of discrimination as to the September 1998 incident appears to rest on his belief that the position became open at that time.[4] Andrews then abandons the allegations in his complaint, and instead argues that when the position did become open in March 1999, Abbott should have sought him out for the position. As Andrews no longer disputes that the position was never open in September 1998, the court will address only his later allegation.

Andrews maintains that he had heard that the Regional Training Specialist position would be opening in September 1998 due to Naperstec's anticipated promotion. As he was interested in pursuing this job opportunity, he testified to having left several telephone messages with the Regional Manager Doug Woolley ("Woolley"). Andrews alleges that Woolley had previously met with Andrews and was aware of his interest in moving forward in the company. Andrews further

[4]Abbott maintains that the position was never open.

alleges that Woolley knew that he worked as a Regional Field Trainer, a voluntary position similar to the position of Regional Training Specialist.

Although Abbott strongly contests that Woolley was "well aware" of Andrews' career aspirations, the court must assume that he was aware of these aspirations for purposes of deciding this motion. However, even making that assumption, the court concludes that Andrews has failed to carry his *prima facie* burden with regard to this incident.

Andrews has supplied sufficient evidence to meet the first three prongs of his *prima facie* test. First, there is no dispute that he is a member of a racial minority. Second, it is well-settled that an employee need not actually apply for the position so long as he or she reasonably informed management of an interest in the open position. *See EEOC*, 892 F.2d at 348. Andrews further alleges that his work experience was comparable to that required for the new position. These allegations are sufficient to create a genuine issue of material fact with regard to the second prong. Third, he clearly did not receive the job. However, with regard to the fourth prong, he provides no evidence as to who was invited to interview for the position, what those individual's credentials were, or whether the position was ever filled, and if so, by whom.

Moreover, Andrews' argument that Abbott should have actively sought him out to offer him a chance at this job opportunity is insufficient to establish his *prima facie* case. Aside from this conclusory allegation, he has offered no supporting evidence on this point.[5] Absent such evidence, it would be unreasonable to infer that, without an explanation, the employer's actions were more

[5]Instead, Andrews engages in a lengthy discussion of the lack of procedure governing internal transfers. While the court recognizes that a lack of procedure may indeed be relevant in the context of alleged discrimination, such allegations alone cannot establish Andrews' *prima facie* case.

likely than not based on discrimination. *See EEOC*, 892 F.2d at 348 (noting that, although the *McDonnell Douglas prima facie* test is not inflexible, the plaintiff must nonetheless produce evidence sufficient to create an inference that the employment decision was based on impermissible criteria.) On this record, no reasonable factfinder could conclude that Abbott's management was discriminating against Andrews solely because Abbott failed to actively seek him out for a position that he had expressed an interest in six months earlier, before the position had even became available.

2. The February 1999 Incident

Andrews next alleges that, in February 1999, Abbott failed to promote him to a newly-created position known as a clinical liaison. The court concludes, however, that Andrews has failed to meet his *McDonnell Douglas* burden on two counts.[6]

First, Andrews has not provided any evidence demonstrating that he was qualified for the clinical liaison position. Abbott maintains that the relevant qualification for becoming a clinical liaison was that the applicant must, at that time, have held the position of HIV institutional representative. Andrews has offered no contrary evidence. Moreover, Andrews acknowledges that he was not an HIV institutional representative, nor is he aware of any person who became a clinical

[6]In defense of this claim, Andrews attempts to rely on evidence produced in an unrelated lawsuit against Abbott. *See* Plaintiff's Appendix Exhibits 6, 7, and 8. Abbott has moved to strike these exhibits because they fail to comply with Federal Rule of Civil Procedure 56(e). The court agrees. The exhibits in question have not been identified by a sworn affidavit, nor have they otherwise been made admissible into evidence. Instead, Andrews' counsel has submitted a signed, but unsworn, statement in which he purports to certify the authenticity of the exhibits. This clearly runs afoul of the Rule 56(e) requirements. Additionally troubling is the fact that Andrews candidly admits that these exhibits were not produced during discovery in the present case. For these reasons, the court will disregard this evidence for purposes of deciding the present motion.

liaison who was not previously an HIV institutional representative. Finally, there is no dispute that the two individuals in Andrews' district who became clinical liaisons were, in fact, HIV institutional representatives. Accordingly, Andrews has brought forth no evidence that he was qualified for this position.

Additionally, Andrews has failed to establish that another similarly situated employee (i.e., a non-HIV institutional representative) had an opportunity to interview for the position of clinical liaison. Thus, he cannot meet the fourth element of his *prima facie* case, namely, that, after his rejection, Abbott continued to seek applications from individuals of his qualification.

Because Andrews has failed to meet his evidentiary burden with respect to the only incidents to have allegedly occurred within either the Title VII or Section 1981 statute of limitations, the court will grant summary judgment on these claims. As there remain no incidents which occurred within the statute of limitations period for either Title VII or Section 1981, a "continuing violation" theory cannot save Andrews' remaining time-barred claims. *See Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476, 481 (3d Cir. 1997).

V. CONCLUSION

The court concludes that each of Andrews' claims must fail as being untimely or for lack of any supporting evidence of discrimination.

For these reasons, IT IS HEREBY ORDERED that:

1. Abbott's motion for summary judgment (D.I. 25) is GRANTED.

2. Judgment BE AND IS HEREBY ENTERED in favor of Abbott.

3. Abbott's motion to strike (D.I. 34) is GRANTED.

Date: April 18, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE