

and commenced the present action on September 22, 2000, pursuant to the Americans with Disabilities Act (“ADA”), 42 U.S.C.A. §§ 12101-12213 (West 1995 & Supp. 2000). The defendant has now moved for summary judgment. The motion has been argued and is ripe for decision.

II

The essential facts of the case, either undisputed or, where disputed, recited in the light most favorable to the nonmovant on the summary judgment record, are as follows.

Statzer suffers from a developmental speech disorder that impedes his ability to communicate effectively. Dr. Jana Losey, a speech-language pathologist who examined Statzer, opined that Statzer’s speech was only approximately fifty percent intelligible. (Losey Aff. Ex. A.) The condition is developmental in nature, and not a result of problems with his oral anatomy or physiology. (Losey Aff. Ex. B.)

Statzer has been employed by the Town as a utility carpenter since September 1986. While he initially did only carpentry work, Statzer was transferred to the maintenance department in 1992 and performed general maintenance in addition to carpentry. Approximately two years later, Statzer was transferred back to carpentry, but was still asked to do non-carpentry maintenance tasks. (Statzer Dep. at 38-40.)

When Statzer inquired about getting a raise for the additional job responsibilities, Michael L. Duty, the town manager, told him that he had “a damn good job, and if [he] didn’t like the job, [he] could quit.” (*Id.* at 71.)

In February 1996, Benny Robinson was promoted to maintenance superintendent/assistant public works director. Approximately seven months later, Robert Lasley, the public works director, told Statzer that he did not get the promotion because of his “mouth.” (Statzer Dep. at 67, 120.)

In October 1998, Statzer was sent home early for being fifteen minutes late for work and for cursing his supervisor. Statzer filed a grievance with the Town, and his pay for that day was reinstated.

Over the course of his employment, Statzer has been asked to do jobs by himself that he believes should take “two or three men” to do. (*Id.* at 84.) He also states that he is subjected to disparate treatment at work. For example, once, on a date uncertain, Statzer was asked to take compensatory time for overtime worked instead of getting paid for the hours. (*Id.* at 58.) He has also been asked to wear a hard hat when other employees were not. (*Id.* at 87-88.) Statzer states that while other employees go unpunished for not wearing their uniforms, he always wears his uniform for fear that he would be sent home without pay. (*Id.* at 86.)

Statzer also complains of his treatment by co-workers. He says that co-workers assign him job tasks. (*Id.* at 104.) They have made fun of his speech (*id.* at 102) and have used the carpentry tools assigned to Statzer and failed to return them. (*Id.* at 64.)

Statzer has received pay raises annually in the course of his employment, but claims that he has only gotten the minimum increase required while others have gotten higher increases. (*Id.* at 50.) The basis for his belief about his co-worker's pay increases is "talk" that he has heard. (*Id.* at 51.) When Statzer asked why he did not receive a bigger raise, he was told it was "because of [his] mouth and [his] attitude." (*Id.* at 107.) Statzer admits that he did have a "bad attitude" at the time. (*Id.* at 108.)

Statzer's pay has never been decreased, but he claims he was "demoted" when the organizational structure was revised. (*Id.* at 111.) An organizational chart generated in March 1995 shows the position of utility carpenter reporting directly to the director of public works, but an organizational chart generated in July 1999 shows two supervisory positions between the utility carpenter and the director of public works. (Statzer Aff. ¶ 2, 3.) Statzer was assigned to a different supervisor more than twenty times between January 4, 1999, and September 10, 1999 (Statzer Aff. ¶ 4), which caused him "a whole lot of stress." (Statzer Dep. at 100.)

Summary judgment is appropriate when there is “no genuine issue of material fact,” given the parties’ burdens of proof at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see* Fed. R. Civ. P. 56(c). In determining whether the moving party has shown that there is no genuine issue of material fact, a court must assess the factual evidence and all inferences to be drawn therefrom in the light most favorable to the non-moving party. *See Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985).

Rule 56 “mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is not “a disfavored procedural shortcut,” but an important mechanism for weeding out “claims and defenses [that] have no factual basis.” *Id.* at 327.

In opposing summary judgment, the nonmoving party must “set forth such facts as would be admissible in evidence.” Fed. R. Civ. P. 56(e). Inadmissible hearsay cannot be used to oppose summary judgment. *See Greensboro Prof. Fire Fighters Ass’n v. City of Greensboro*, 64 F.3d 962, 967 (4th Cir. 1995).

III

A

As to any acts of discrimination that occurred prior to April 11, 1999, I hold that Statzer's claim is time-barred.

The ADA expressly adopts and incorporates the “powers, remedies, and procedures” set forth in Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e-4, 2000e-5, 2000e-6, 2000e-8, & 2000e-9 (West 1995 & Supp. 2000). 42 U.S.C.A. § 12117(a) (West 1995 & Supp. 2000). Because Virginia is a “deferral” state, the period of limitations to file a charge of discrimination with the EEOC is 300 days. *See* 42 U.S.C.A. § 2000e-5(e)(1) (West 1994 & Supp. 2000); *see also Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 440 (4th Cir. 1998) (holding that Virginia is a deferral state with 300-day limitations period under Title VII).

This administrative deadline operates like a statute of limitations as to any later judicial proceeding. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). Therefore, because Statzer filed his charge of discrimination on February 5, 2000, any claims of unlawful employment discrimination arising from events occurring prior to April 11, 1999, are barred.

Statzer claims that the Town should be liable for its actions prior to April 11, 1999, under the “continuing violation” doctrine.

The continuing violation doctrine is an equitable exception that allows an employee to seek damages for otherwise time-barred allegations if they are deemed part of an ongoing series of discriminatory acts and there is some violation within the statute of limitations period that anchors the earlier claims. This ensures that these plaintiffs' claims are not foreclosed merely because the plaintiffs needed to see a pattern of repeated acts before they realized that the individual acts were discriminatory.

O'Rourke v. City of Providence, 235 F.3d 713, 730 (1st Cir. 2001) (internal quotations and citations omitted).

The plaintiff's claim of a continuing violation fails for two reasons. First, in order to establish a continuing violation, a plaintiff must demonstrate that despite the existence of a pattern or practice of discrimination, the plaintiff lacked notice of a discriminatory animus. *See Washington v. George G. Sharp, Inc.*, 124 F. Supp.2d 948, 957 (E.D. Va. 2000). Once an event has occurred to put the employee on notice of discrimination, he is expected to bring a claim within the time limitation. *See id.* The theory of a continuing violation is that in some cases, "'discriminatory animus' is hidden and the plaintiff must figure out its existence based on a series of adverse employment actions." *Id.* (quoting *Bolt v. Norfolk S. Corp.*, 22 F. Supp.2d 512, 518 (E.D. Va. 1997)).

The plaintiff does not allege that he was unaware that he was being discriminated against until 1999, nearly thirteen years after he began his employment with the

defendant. In fact, the plaintiff states that he complained to several people of discriminatory treatment as early as 1996, when he was passed over for a promotion. Further, in his charge of discrimination to the EEOC, the plaintiff asserted that he had filed a grievance regarding harassment in October 1998. (Compl. Ex. B.) Thus, the plaintiff was on notice of discriminatory treatment prior to April 11, 1999, and the defendant's actions prior to that date do not constitute a continuing violation.

Even if the defendant had not been on notice, however, the continuing violation doctrine does not apply because, as discussed below, the plaintiff has not established that there was a violation within the statutory time period to “anchor” the continuing violation pattern. *See O'Rourke*, 235 F.3d at 730. As the Fourth Circuit has stated, “It is *only* where an actual violation has occurred within that requisite time period that under any possible circumstances the theory of continuing violation is sustainable.” *Woodard v. Lehman*, 717 F.2d 909, 915 (4th Cir. 1983) (emphasis in original).

B

As to the time period between April 11, 1999, until the date of the filing of this action on September 22, 2000, the plaintiff alleges several working conditions that he claims violated the ADA. While the plaintiff has provided no dates for most of these occurrences, I will give the plaintiff the benefit of the doubt that these were ongoing conditions that extended into the relevant time period. These complaints are (1) that

Statzer was assigned to do jobs alone without assistance; (2) that Statzer was frequently shifted between different supervisors; (3) that Statzer was “demoted” on the organizational chart; (4) that Statzer was given only the minimum annual pay raise; (5) that Statzer feared enforcement of work rules against him while violations by others were tolerated; and (6) that his co-workers created a hostile work environment.

In order to make out a prima facie case under the ADA, the plaintiff must establish (1) that he was disabled within the meaning of the ADA; (2) that he is otherwise qualified for the employment or benefit in question; and (3) that he suffered an adverse employment action due to discrimination on the basis of his disability. *See Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1264-65 (4th Cir. 1995). Assuming the plaintiff is disabled¹ and otherwise qualified in his job, Statzer has failed to prove that he suffered an adverse employment action as recognized by law.

Statzer alleges that he has been given job responsibilities that should be shared by others, has been shifted among several supervisors, and was “demoted” on the organizational chart. Assuming these allegations are true, they do not rise to the level of unlawful discrimination. It has been held that

not everything that makes an employee unhappy can form the basis of a federal discrimination suit. . . . Rather, the

¹ The defendant argues that Statzer’s speech impediment does not constitute a protected disability, but it is not necessary for me to determine that issue.

action must cause an adverse change in the terms and conditions of employment that is more disruptive than a mere inconvenience or alteration of job responsibilities.

Tyler v. Ispat Inland Inc., 245 F.3d 969, 972 (7th Cir. 2001). As such, “reassignments without salary or work hour changes do not ordinarily constitute adverse employment decisions in employment discrimination claims.” *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 885 (6th Cir. 1996). Statzer’s pay has never been reduced; in fact, he has received a raise every year since he has been employed by the defendant.

That the plaintiff has experienced changes in job responsibilities, supervisors, and job departments is not atypical in the workplace. Furthermore, the plaintiff has not established that he was singled out in this regard. When asked at his deposition whether other employees have had to endure changes in job responsibilities and supervisors, the plaintiff answered, “Well, I [] can’t answer that. I don’t know about that.” (Statzer Dep. at 100-101.) Also, the organizational charts proffered by the plaintiff reflect that, in addition to the plaintiff’s job, several positions were shifted, resulting in a new supervisory structure. (Statzer Aff. Ex. A, B.) The plaintiff has failed to meet his burden to establish a discriminatory adverse employment action.

Statzer also states that while he has received an annual raise, other employees receive greater increases. (Statzer Dep. at 50-51.) The defendant maintains that the annual raises are not merit-based, and that all employees get the same cost of living

increase. (Duty Aff. ¶ 3.) Statzer bases his allegation on “talk” that he has heard among employees. (Statzer Dep. at 51.) Inadmissible hearsay cannot be used to oppose summary judgment. *See Greensboro Prof. Fire Fighters Ass’n*, 64 F.3d at 967. Therefore, Statzer’s allegations regarding pay raises are not actionable.

In support of his claim, the plaintiff also states that he was subjected to disparate treatment in the enforcement of certain work rules, namely the requirement that employees wear a uniform and hard hat. This contention is not persuasive. Statzer testified that employees received a memorandum that employees not wearing their uniforms would be sent home without pay. (Statzer Dep. at 86.) The plaintiff states that “[a] whole lot of people never wore them and weren’t sent home, but I never did try that because I feel they’d be waiting on me.” (*Id.*) The plaintiff cannot prove disparate treatment based on assumptions. There is no indication that had Statzer also refused to wear a uniform, he would have been treated differently from the other employees. Accordingly, this allegation fails to support Statzer’s claim.

Finally, Statzer argues that his co-workers created a hostile work environment. The Fourth Circuit has recently recognized a cause of action under the ADA for hostile work environment harassment. *See Fox v. Gen. Motors Corp.*, 247 F.3d 169, 176 (4th Cir. 2001). The court held that in order to prove such a claim, a plaintiff must establish the following elements:

(1) he is a qualified individual with a disability; (2) he was subjected to unwelcome harassment; (3) the harassment was based on his disability; (4) the harassment was sufficiently severe or pervasive to alter a term, condition, or privilege of employment; and (5) some factual basis exists to impute liability for the harassment to the employer.

Id. at 176-77.

Statzer testified at his deposition that none of his supervisors have ever made offensive comments about his disability. (Statzer Dep. at 101.) He also mentioned, without providing any detail or description, that his co-workers did make fun of his speech. (*Id.* at 102.) Benny Robinson, a co-worker in a supervisory role, testified that some employees have made fun of Statzer, but not in a mean-spirited way. (Robinson Dep. at 39.) Robert Lasley, director of public works, reported that co-workers did ridicule Statzer, but that “[e]verybody carries on.” (Lasley Dep. at 10.) Finally, John Gibson, the water plant supervisor, testified that the co-workers talked about Statzer’s speech, but that “everybody rides everybody.” (Gibson Dep. at 17.)

Taken in the light most favorable to the plaintiff, these facts do not demonstrate harassment “sufficiently severe or pervasive to alter a term, condition, or privilege of employment” as required by law. *Fox*, 247 F.3d at 177. Furthermore, there is no factual basis to impute liability for the harassment to the employer. *Id.* Statzer admitted that no supervisors ever harassed him, and has provided nothing to indicate

that the Town should be liable for his co-worker's actions. As such, the plaintiff has failed to show sufficient facts to establish a hostile environment claim.

IV

The plaintiff has moved pursuant to Federal Rule of Civil Procedure 56(f) for additional discovery in order to respond to the defendant's motion for summary judgment. However, that motion will be denied.

A scheduling order was entered in the case on November 20, 2000, requiring, among other things, that all discovery be completed at least forty-five days prior to trial. (Scheduling Order ¶ 9.) The order specifically provided that "[t]his schedule requires that written discovery be served in sufficient time to allow the responding party time to respond before the cutoff date for discovery." (*Id.*)

Plaintiff's counsel took the discovery deposition of the town manager, Michael L. Duty, on March 2, 2001. During that deposition, Duty was asked if the Town kept a record of the date and percentage increase of each pay increase for each employee of the Town. He replied that such records were in the form of time cards for each employee. (Duty Dep. at 34.) Counsel then had the following colloquy:

Q At a convenient time, Mr. Duty, to be arranged, a convenient time for you and the town to be arranged between counsel for the town and counsel for Mr. Statzer, would you produce those time cards in a

convenient place in city hall so that counsel can come down and examine those records?

A Well, certainly.

Q Okay. And would you make that -- I don't guess we can make that a late-filed exhibit, but just produce that? And we'll talk with counsel so we can get a convenient time and come down and take a look at it.

A Uh-huh.

Mr. Murthy [counsel for Town]: Certainly within the discovery rules it's fine.

Mr. Bailey [plaintiff's counsel]: All right.

Mr. Murthy: Just for clarification.

Mr. Bailey: Sure.

Mr. Murthy: What time cards do you want? All time cards?

Mr. Bailey: Okay. That was something you mentioned to me. Do you want to explain that, Larry?

Mr. Crain [plaintiff's counsel]: Let's put this on the record. Why don't we do a letter to you detailing what records we're interesting in?

Mr. Murthy: Okay.

Mr. Bailey: Okay, we'll do that. Thank you, sir.

(Duty Dep. at 34-35.) Later in the deposition, counsel for the plaintiff similarly represented that he would write a letter requesting production of the plaintiff's personnel file. (Duty Dep. at 40.)

Counsel for the plaintiff never did write a letter concerning production of any discoverable items. Instead, on March 14, 2001, they served a formal request for production pursuant to Federal Rule of Civil Procedure 34, asking that certain specified documents be produced at the office of plaintiff's counsel within thirty days of the date of service. The request sought production of the plaintiff's personnel file, but not the time cards of all employees. The defendant declined to produce the documents requested on the ground that production would be required after the discovery deadline in the case.²

On April 11, 2001, the defendant filed its motion for summary judgment, which was set for hearing for April 30. On April 25, five days before the hearing, the plaintiff filed a "Motion to Amend Scheduling Order," requesting that the deadline for response to written discovery be extended and the trial date continued. The basis for the motion was that "without defendant's responses to plaintiff's outstanding written discovery requests, plaintiff will not be able to respond to certain factual allegations and arguments presented in defendant's Motion for Summary Judgment" (Mot. to Amend Scheduling Order ¶ IV.)³

² The trial was scheduled for May 11, 2001, and thus the discovery deadline in the case was March 27, 2001, forty-five days prior to trial.

³ The plaintiff also based his motion on the fact that he had not yet completed his corrections to his discovery deposition taken on March 2, 2001. However, I did allow an extension of time to file any statement of changes to the deposition pursuant to Federal Rule of Civil Procedure 30(e), and

Rule 56(f) provides that when it appears that the nonmovant cannot “for reasons stated present by affidavit facts essential to justify the [nonmovant’s] opposition [to the motion for summary judgment],” the court may allow further discovery. Fed. R. Civ. P. 56(f). However, the nonmovant’s obligation under the rule is to “particularly specif[y] legitimate needs for further discovery.” *Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir. 1995). Here the plaintiff has not specified how the unanswered written discovery might allow him to counter the defendant’s assertions. Accordingly, the motion under rule 56(f) will be denied.

V

For the foregoing reasons, summary judgment will be granted in favor of the defendant.

DATED: June 4, 2001

United States District Judge

such statement was thereafter timely filed.