IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

John R. Curtis, Plaintiff, vs. Century Surety Company, Defendant.	No. CV 05-1538-PHX-ROS **ORDER**

Plaintiff filed this action alleging constructive discharge in violation of Arizona law and retaliation in violation of the Sarbanes-Oxley Act of 2002. Pending is Defendant's Motion For Summary Judgment (Doc. #36). For the reasons set forth below, the Motion will be granted.[1]

I. BACKGROUND

Prior to becoming an attorney, Plaintiff John R. Curtis worked for 17 years as an insurance professional. (PSOF ¶ 1). Plaintiff graduated from law school in 1999 and passed the Arizona bar exam in 2001. (PSOF ¶ 3). In 2003, Defendant Century Surety Company

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[1] The Court did not set a hearing on the Motion for Summary Judgment because the parties submitted memoranda thoroughly discussing the law and evidence in support of their positions, and oral argument would not have aided the Court's decision. See Mahon v. Credit Bur. of Placer County, Inc., 171 F.3d 1197, 1200 (9th Cir. 1999), modified, No. 97-17298, 1999 U.S. App. LEXIS 8016; Partridge v. Reich, 141 F.3d 920, 926 (9th Cir. 1998).

("Century") hired Plaintiff to work as a Litigation Adjuster until his admission to the State Bar of Arizona, after which time Defendant agreed to promote Plaintiff to the position of Claims Attorney. (PSOF ¶ 6). Plaintiff was admitted to the State Bar of Arizona in 2003, and Defendant moved Plaintiff to the position of Claims Attorney, where he worked on construction defect cases from July 2003 until December 2004. (PSOF ¶ 7; DSOF ¶ 2). Plaintiff contends that between the fall of 2003 and fall of 2004, he expressed concern to several supervisors about Defendant's understated exposure on construction defect claims and inadequate loss reserves regarding the litigation on which he worked. (PSOF ¶ 8). In the spring of 2004 Defendant went public with an Initial Public Offering. (PSOF ¶ 9). In late 2004/early 2005 Defendant demoted Plaintiff to a Claims Representative III, a non-lawyer position, at a reduction in pay of $12,000 per year. (PSOF ¶ 10; DSOF ¶ 3). Plaintiff contends that after receiving notice of the demotion, he gave notice of his resignation on January 17, 2005, effective two weeks later. (PSOF ¶ 14).

During Plaintiff's tenure with Defendant, Century had posted a notice concerning constructive discharge claims under Arizona law directed to employees who believe that working conditions "may become intolerable, causing [the employee] to resign." (DSOF ¶ 5). Such notice provides that in order to preserve the right to bring a legal claim for constructive discharge, the employee must notify Century management in writing of the alleged intolerable working conditions in accordance with A.R.S. § 23-1502 and provide Century fifteen calendar days to respond in writing to the employee's concerns before resigning. (DSOF ¶ 5). Defendant never received a notice required by A.R.S. § 23-1502, or any notice from the United States Department of Labor that Plaintiff had filed an administrative complaint under the Sarbanes-Oxley Act of 2002. (DSOF ¶¶ 6, 7).

Plaintiff filed suit on May 24, 2005 (Doc. #1), and amended his complaint on March 6, 2006 (Doc. #19). Plaintiff alleges constructive discharge in violation of A.R.S. § 23-1502 and retaliation in violation of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A(b)(2)(D); 29 C.F.R. § 1980.103(d). (Doc. #19). On March 28, 2006 Defendant filed a Motion For

Summary Judgment on both claims (Doc. #36). Plaintiff responded on May 22, 2006, although the response was not filed until August 8, 2006 (Doc. #35).[2] Defendant replied on June 20, 2006 (Doc. #31).

II. JURISDICTION

The Court has federal question jurisdiction under 44 U.S.C. § 1331 over the Sarbanes-Oxley claim and supplemental jurisdiction under 44 U.S.C. § 1367 over the state law claim.

III. LEGAL STANDARD

A court must grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the non-moving party "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 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Substantive law determines which facts are material, and "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Also, the dispute must be genuine, that is, "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248.

A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." Celotex, 477 U.S. at 323-24. Summary judgment is appropriate 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." Id. at 322; see also Citadel Holding Corp. v. Roven, 26 F.3d 960, 964 (9th Cir. 1994). The moving party need not disprove matters on which the opponent has the burden of proof at trial. See Celotex, 477 U.S. at 323.

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[2] On August 8, 2006 Plaintiff filed a notice indicating that he submitted his Response to the Court on May 22, 2006, *in camera*, via process server. On August 7, 2006 Chambers' staff contacted Defense counsel indicating that although Defendant's Reply referenced Plaintiff's Response, no Response had been filed or received. It is unclear why Plaintiff sought to file the Response *in camera*, particularly where it was served on opposing counsel.

The party opposing summary judgment "may not rest upon the mere allegations or denials of [the party's] pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Brinson v. Linda Rose Joint Venture, 53 F.3d 1044, 1049 (9th Cir. 1995). There is no issue for trial unless there is sufficient evidence favoring the non-moving party; if the evidence is merely colorable or is not significantly probative, summary judgment may be granted. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986). However, because "credibility determinations, the weighing of evidence, and the drawing of inferences from the facts are jury functions, not those of a judge, . . . the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor" at the summary judgment stage. Id. at 255 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970)); see Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995).

IV. DISCUSSION

A. Sarbanes-Oxley Claim

Before an employee can assert a cause of action in federal court under the Sarbanes-Oxley Act, the employee must file a complaint with the Occupational Safety and Health Administration ("OSHA") to afford him or her an opportunity to resolve the allegations administratively. 18 U.S.C. § 1514A(b)(1)(A). The administrative action must be commenced within 90 days of the alleged adverse employment action. 18 U.S.C. § 1514A(b)(2)(D). The complaint must include "a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations." Id. If the administrative filing requirements are met, and OSHA does not issue a final decision within 180 days of the filing of the administrative claim, the employee may proceed by filing an action in federal court. 18 U.S.C. § 1514A(b)(1)(B); McClendon v. Hewlett-Packard Co., 2005 WL 2847224, *2-3 (D. Idaho Oct. 27, 2005).

Defendant contends that summary judgment should be granted, because the claim is barred for failure to exhaust administrative remedies under the Act and by the statute of limitations. Plaintiff does not dispute that he did not file an administrative claim; rather, he contends that the statutory requirements do not apply because compliance would require him to breach his fiduciary duty to Defendant and require him to divulge information subject to the attorney-client privilege in violation of the Ethics Rules of the State Bar of Arizona. Plaintiff cites no authority to support his argument that the Court should create such an exception.

The only authority cited by Plaintiff includes a California State Bar Ethics Alert and Washington State Bar Opinion reminding lawyers that they remain bound by the ethical rules of conduct surrounding breach of attorney-client confidences despite the passage of disclosure requirements under Sarbanes-Oxley. (Doc. #34, Exh. A & B). However, the Ethics Alert and Opinion relate to individuals divulging privileged information, not merely information deemed confidential by an employer. The State Bars are concerned about the rare occurrence that compliance with Sarbanes-Oxley would conflict with an attorney's ethical duty to protect privileged information, not the general instance where an attorney divulges information about his employer. Further, it is unclear how the Ethics Alert and Opinion support Plaintiff's argument, as he has not established how the information upon which he would have relied would have been privileged, or that the purported privileged information would have been necessary to the administrative complaint. Indeed, Plaintiff filed this complaint apparently without violating his ethical obligations as an attorney. Merely because he is an attorney employee does not mean the subject of his disclosure is privileged.

To the contrary, it is clear from the existence of Section 307 of Sarbanes-Oxley, 15 U.S.C. § 7245, that Congress recognized circumstances in which attorney employees would

be whistleblowers regarding violations of securities laws.[3] Despite this acknowledgment, no exceptions were created. The fact that Congress included a provision addressing attorneys as claimants and did not create an exemption for them indicates an intention not to create such an exception. See United States v. Northrop Corp., 59 F.3d 953, 959 (9th Cir. 1995) (recognizing that courts are compelled to conclude that, in the absence of contrary congressional intent, Congress provided precisely the remedies it considered appropriate and that Congress stated in the statute). Neither the plain language nor the legislative history of the Act or any judicial interpretation supports creating such an exception.

The Motion will be granted on this claim.

B. Constructive Discharge[4]

Plaintiff's claim for constructive discharge is brought under A.R.S. § 23-1502. Defendant argues that the claim is procedurally barred, because Plaintiff did not provide notice to Defendant under the statute of the objectively difficult working conditions and notice of an intent to resign within fifteen days. Plaintiff does not dispute that he did not provide notice, but contends that under the circumstances, any reasonable attorney would have resigned and that he was exempt from having to provide notice under the statute. However, an employee is only exempt from providing notice "in the event of outrageous conduct by the employer or by a managing agent of the employer including sexual assault,

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[3] Section 7245 mandates that the "Commission shall issue rules . . . . setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers . . . ."

[4] It is unclear in the Amended Complaint whether Plaintiff's constructive discharge claim is brought pursuant to Arizona law or federal statute. The Amended Complaint provides that the Court has both diversity jurisdiction, which supports the conclusion that it involves a state law claim, and federal question jurisdiction over the Sarbanes-Oxley claim. Plaintiff's Response, however, relies upon cases involving retaliatory discharge under the Age Discrimination in Employment Act ("ADEA"), which supports the conclusion that Plaintiff is proceeding under a federal statute. Nonetheless, the Court finds that Plaintiff's claim involves one of state law, because Plaintiff does not dispute Defendant's characterization of it as such in the Motion For Summary Judgment.

threats of violence direct at the employee, a continuous pattern of discriminatory harassment by the employer or by a managing agent of the employer . . . ." A.R.S. § 23-1502(F). As a matter of law, the conduct alleged does not rise to the level contemplated by the statute. All authority cited by Plaintiff involves retaliatory discharge claims brought under the ADEA, and does not support his argument why the statutory notice requirement does not apply. As a result, no material issue of fact remains. Summary judgment will be granted.

Accordingly,

IT IS ORDERED that Defendant's Motion For Summary Judgment is GRANTED.

DATED this 22 day of August, 2006.

Roslyn O. Silver
United States District Judge