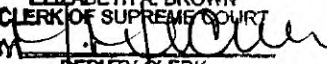


IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM KIMBROUGH, AN
INDIVIDUAL,
Appellant,
vs.
ROUND MOUNTAIN GOLD
CORPORATION, A FOREIGN
CORPORATION; AND KINROSS GOLD
U.S.A., INC., A DOMESTIC
CORPORATION,
Respondents.

No. 86252

FILED
AUG 21 2024
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting a motion to dismiss in an employment action. Eighth Judicial District Court, Clark County; Nadia Krall, Judge.

Appellant William Kimbrough was terminated from his employment following a presumptively positive drug test for cannabis. The sequence of events that preceded the drug test included a serious medical episode followed by medical accommodation and leave, and an attempt to return to work. Kimbrough filed suit alleging the following 8 causes of action: (1) Unlawful employment discrimination for the lawful use of a product; (2) Disability discrimination; (3) Retaliation; (4) Tortious discharge in violation of public policy; (5) Negligent hiring training and supervision; (6) Deceptive trade practices; (7) Defamation; and (8) Age discrimination. We review the grant of a motion to dismiss de novo. *Ceballos v. NP Palace, LLC*, 138 Nev., Adv. Op. 58, 514 P.3d 1074, 1076 (2022). A claim should be dismissed “only if it appears beyond a doubt that [the nonmoving party] could prove no set of facts, which, if true, would entitle it to relief,” treating the nonmoving party’s factual allegations as true and drawing all inferences

in its favor. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

Regarding the first cause of action for unlawful employment discrimination for the lawful use of a product, Kimbrough contends that he properly stated a claim of discrimination pursuant to NRS 613.333(1) based on a *perceived* use of a lawful substance. We disagree. When construing all facts and inferences in Kimbrough's favor, he fails to state a claim upon which relief can be granted. Either he used an unlawful substance and tested positive, or he did not use any substance, and his termination was based on a false positive. If he used an unlawful substance, then he cannot maintain a claim under NRS 613.333. *Freeman Expositions, LLC v. Eighth Jud. Dist. Ct.*, 138 Nev. Adv. Op. 77, 520 P.3d 803, 811 (2022). On the other hand, if he did not use any substance, then he did not "engage[] in the lawful use" of a product and cannot state a claim under NRS 613.333. We affirm the dismissal of this claim because NRS 613.333 does not support claims based on the non-use or "false perceived" use of a lawful substance. *Cf. Freeman Expositions, LLC*, 138 Nev. Adv. Op. 77, 520 P.3d at 811 ("NRS 613.333 provides employment protections for the lawful *use* of products outside of the workplace." (emphasis added)).

As to Kimbrough's retaliation claim under NRS 613.340, he disputes whether his termination was finally effective when he filed a claim with the Nevada Equal Rights Commission (NERC), argues that he was unlawfully terminated for the perceived use of cannabis, and on reply, asserts that his granted medical accommodation was a protected activity such that his termination constituted retaliation. However, only his termination, and not his perceived use of cannabis or his granted medical accommodation, could provide a basis for an unlawful employment practice

under these circumstances. Nothing in the complaint suggests that Kimbrough disputed the timing of when his termination was finally effective, and he filed the Charge of Discrimination with NERC after his termination date. Thus, the adverse action, his termination, is not causally related to the protected activity, his NERC complaint, because the protected activity took place after the adverse action and therefore cannot be retaliatory.


Kimbrough's citation on reply to *Pardi v. Kaiser Found. Hospitals*, 389 F.3d 840, 850 (9th Cir. 2004), does not support the assertion that granted medical leave may form the basis of a retaliation claim for a later termination. Rather, the *Pardi* court stated that "[w]hen adverse employment decisions closely follow complaints of discrimination, retaliatory intent may be inferred." *Id.* (emphasis added). We affirm, as Kimbrough has not otherwise cogently argued and presented relevant authority in support of his argument that his approved medical leave supports a claim for retaliation. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).


Turning to Kimbrough's tortious discharge claim, he asserts that respondents' testing, administration, and use of the drug test constituted an invasion of privacy sufficient to breach public policy. In Nevada, "tortious discharge actions are severely limited to those rare and exceptional cases where the employer's conduct violates strong and compelling public policy." *Ceballos*, 138 Nev., Adv. Op. 58, 514 P.3d at 1078. "Where the Legislature has provided an employee with a statutory remedy, that remedy will be instructive as to whether the public policy at issue rises to the level of supporting a claim for tortious discharge." *Freeman Expositions, LLC*, 138 Nev., Adv. Op. 77, 520 P.3d at 810.

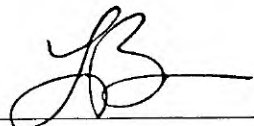
NRS Chapter 678D, decriminalizing adult recreational marijuana use, does not prohibit employers from restricting actions otherwise permitted under this chapter. *Ceballos*, 138 Nev., Adv. Op. 58, 514 P.3d at 1078. Because “the Legislature . . . enacted statutes addressing the same subject matter” we declined to allow a claim for tortious discharge based on a positive marijuana test. 138 Nev., Adv. Op. 58, 514 P.3d at 1079. Here, public policy does not support Kimbrough’s argument. *See id.* We therefore affirm.

Finally, we affirm the dismissal of the remaining claims because Kimbrough has not cogently argued nor presented relevant authority in support of those claims. *Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. We therefore

ORDER the judgment of the district court AFFIRMED.


_____, J.
Herndon


_____, J.
Lee


_____, J.
Bell

cc: Hon. Nadia Krall, District Judge
Kristine M. Kuzemka, Settlement Judge
Gabroy | Messer
Michael Best & Friedrich, LLP
W&D Law, LLP
Eighth District Court Clerk