

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 5, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-2889

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CHRIS SPANGBERG,

PLAINTIFF-APPELLANT,

v.

**JOHN C. TALIS, LAWTON & CATES, S.C.,
AND XYZ INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Marathon County:
PATRICK BRADY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Chris Spangberg appeals a summary judgment dismissing his legal malpractice action against attorney John Talis, his insurer and his law firm. Spangberg's complaint alleged that Talis negligently allowed the statute of limitations to expire on two claims Spangberg wanted to commence

against his employer, Community Health Care, Inc. The trial court correctly concluded that Spangberg suffered no damage as a result of the alleged malpractice because he would not have prevailed in the underlying actions. Therefore, we affirm the summary judgment dismissing the malpractice action.

¶2 Spangberg worked for Community Health Care, Inc., as executive director of the Visiting Nurse Association. Several of his subordinates complained to management about Spangberg's volatile outbursts, loud screaming, lack of respect and attempts to humiliate employees. Spangberg did not deny any of the accusations and admitted to behavior that he was "not proud of." Spangberg apparently associates his behavioral problems with his medical condition, renal failure.

¶3 On March 10, 1997, Spangberg was placed on a sixty-day paid administrative leave because of his abusive and disruptive behavior. His employer asked that he use that time to develop a plan to improve his performance and address his behavior problems. He was also asked to obtain a statement from his physician detailing any work limitations or job accommodations that would be necessary upon his return from leave. During this administrative leave, Spangberg's doctor indicated that Spangberg would commence dialysis treatments as of April 29, 1997, and this constituted a full medical disability. In May 1997, Spangberg requested sick/disability leave and his employer granted that request for a one year leave commencing April 29.

¶4 On July 23, 1997, his employer informed Spangberg that his position as executive director would be filled by another person. Spangberg remained on total disability until May 1998 when he was released by his doctor to work on a parttime basis. On June 29, 1998, when Spangberg was allowed to resume

fulltime work, he was given another position at 67% of his previous salary. Spangberg contends that Talis negligently failed to file employment discrimination complaints within 300 days of the March 10 administrative leave and the July 23 notification that Spangberg's position would be filled.

¶5 Summary judgment is appropriate when there is no issue of material fact and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08(2).¹ Summary judgment should be granted when it is “perfectly plain that there is no substantial issue to be tried.” *See Kafka v. Polk*, 194 Wis. 2d 234, 240, 533 N.W.2d 491 (1995). When expert testimony is required to prove a claim, the trial court should grant summary judgment if the plaintiff presents no expert testimony to support the claim. *See Kinnick v. Schierl*, 197 Wis. 2d 855, 862, 541 N.W.2d 803 (Ct. App. 1995).

¶6 The measure of damages in a legal malpractice action is the monetary loss caused by the attorney's negligence. *See Lewandowski v. Continental Cas. Co.*, 88 Wis. 2d 271, 277-78, 276 N.W.2d 284 (1979). Spangberg's claim against Talis for failing to timely challenge the March 10, 1997, administrative leave fails because Spangberg could not have recovered any damages from his employer. The sixty-day administrative leave undisputedly resulted from Spangberg's inappropriate behavior. The fact that Spangberg's behavior problems may have been precipitated by a disability does not constitute discrimination. *See Palmer v. Circuit Court, Cook County, Ill.*, 117 F.3d 351, 352 (7th Cir. 1997). An employer is not required to tolerate unacceptable behavior

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

merely because it was precipitated by a medical condition. Placement on sixty days fully paid leave was not an adverse discriminatory employment action as a matter of law. *See Stipetich v. Grosshans*, 2001 WI App 100 at ¶17, 235 Wis. 2d 69, 84, 612 N.W.2d 346 (Ct. App. 2000). In addition, fully paid administrative leave is not an adverse employment action. Spangberg suffered no monetary loss from the administrative leave and therefore the measure of his damages for legal malpractice is zero.

¶7 Spangberg argues that he could recover damages from Talis notwithstanding the lack of monetary loss due to the sixty-day administrative leave. First, he attempts to associate his return to work at 67% of his former salary with the administrative leave. They are not causally related. He was returned to work at lower pay because his position was filled while he was on medical leave. The administrative suspension did not cause the vacancy in his position, the decision to fill his position in his absence or the reduction in his pay when he returned to work.

¶8 Spangberg also argues that he could have collected attorney fees in an action against his employer even if he was entitled to no other monetary damages. That argument incorrectly assumes that he had a valid discrimination claim. It also faults Talis for negligently failing to commence an action that would have resulted only in collection of Talis's legal fees. Spangberg would not have benefited from that litigation.

¶9 Spangberg argues that the law does not require that he suffer an economic loss before he can pursue a discrimination claim because the law favors giving publicity to discrimination where it is found. The policies behind justifying a discrimination claim without monetary loss do not apply to a legal malpractice

action. The law does not favor bringing a legal malpractice action solely for the purpose of publicizing an alleged employment discrimination claim.

¶10 Spangberg's claim that Talis failed to timely file a discrimination claim from the July 23 decision to fill his position also fails for two reasons: (1) It was not supported by Spangberg's only expert witness; and (2) Talis reasonably concluded that Spangberg did not have a viable claim based on the decision to hire a replacement executive director. Spangberg's expert witness, Harry Hertel, did not aver that Talis deviated from the standard of care expected from an attorney with regard to the July 23 claim. Expert testimony is required to support the claim because the degree of care, skill and judgment a reasonably prudent lawyer would exercise in these circumstances is not a matter within the common knowledge of lay persons. *See Olfe v. Gordon*, 93 Wis. 2d 173, 181, 286 N.W.2d 573 (1980). Spangberg attempts to take advantage of an exception that occurs when a lawyer fails to follow his client's explicit instructions. *See id.* at 183 n.1. However, he does not identify any explicit instruction to commence a discrimination claim based on the July 23 decision to fill his position.

¶11 In addition, Talis reasonably concluded that a discrimination claim would not succeed if it had been timely filed. At the time his position was filled, Spangberg was on medical leave based on complete disability to perform his job, with or without accommodations. He acknowledged that he did not know when he would be able to return to any form of work. Under these circumstances, he could not meet his burden of proving that he was a "qualified individual" to perform the job he vacated. *See* 42 U.S.C. § 12111(8). His employer was not required to hold open his position for an indeterminate time while he was on complete disability leave. Because Spangberg's claims would have failed as a matter of law had they

been timely filed, he can establish no damage resulting from Talis's failure to timely file the claims.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

