

# The Legal Illusion Of A Doctor's Note: Why Employers Should Use Discharge Letters



What will arrive first: the employee with their doctor's note or the employer with the discharge letter?

Most employers have come to view sick leave notes as a farce. Yet, when I suggest an employer client provide an employee with a warning letter, I am increasingly met with reluctance. Clients express concern the employee will rush to the nearest clinic in an attempt to save their job. Even union representatives seldom treat doctors' notes seriously.

I sometimes joke, but only slightly, that, if given a few hours, I could find a doctor to certify I am pregnant. There are enough doctors sufficiently patient-friendly that they certify illness with little examination or question. In the case of clinic doctors, it may be the first time they have attended to the patient.

It is not that these doctors are necessarily lazy or dishonest; most lack sufficient expertise to diagnose, a psychiatric disability for example, and with a quick Internet search, employees can easily ascertain what symptoms to lay claim to.

But is this all a legal illusion? Will a medical note salvage an employee's position?

Crystal Parent was a good employee until she had a very ill son; he was so ill that he had to be taken to hospital as often as five times a week. Spielo Manufacturing accommodated her, providing more flexibility than any other employee received, while making it clear she would still have to meet its performance standards.

Within a few months, Parent's performance was slipping and she was placed on a performance improvement plan. When her performance did not improve, she was warned in two successive evaluations that she was at risk of dismissal. Before receiving her last evaluation, she handed in a doctor's note, stating she had to take six weeks off for surgery.

When Parent returned to work, she was handed her evaluation and fired for poor performance and her inability to improve.

In court, she argued that her performance was not the real reason for her discharge, but that Spielo wished to avoid the burden of her and her son's health issues.

Justice Jean-Paul Ouellette of the New Brunswick Queens Bench disagreed. "It was put in writing what was expected of her, what [Spielo] required and the instructions to enable her to meet the standards," he said, in finding that she was fired for cause.

It was irrelevant that she was fired on her return from sick leave. In fact, the court found she had deliberately delayed receiving her performance evaluation before going on sick leave.

Firing an employee either when they announce they are ill or pregnant or when they return from leave can be a legal quagmire. However, if the evidence is clear that the decision to dismiss preceded the employee's announcement, employers will succeed. Although the practical (and, before a human rights commission, legal) onus is much higher, employers with good cause cases should not be too apprehensive of a sick leave claim, particularly one that appears opportunistic.

At the end of the day, judges are people too, and they can see through false claims of victimization.

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