

By

Jonathan Fraser Light



**A** frustrated department supervisor comes to you, the Human Resources manager, and says, "I have had it with Lori. Today she screwed up again and she's been making mistakes for months. She needs to go."

More often than not, you reply, "It may be difficult to terminate Lori now, because..." Any one of a number of reasons may follow: "Didn't she just come off a worker's comp or pregnancy disability leave?" or "Isn't she the only one in your group who is [a person of color] [disabled] [over 40/50/60]?" or "Didn't you give her a satisfactory review nine months ago?"

Unless Lori is a relatively new employee, and does not fit into one of the above categories, it is going to be difficult to terminate her immediately in accordance with the supervisor's wishes. [Remember also that "at-will" is not a defense to claims of harassment, discrimination or retaliation.]

Your next question is usually, "Have you documented any of the mistakes?" The response often is, "No, I didn't have enough time," or "No single problem I had with her over the last several months warranted its own memo," or "I knew she would go ballistic if I confronted her with these problems, so I let it go."

Most every HR manager has been frustrated with these scenarios. You now need to implement what I refer to as a "catch-up" memo that incorporates all of the past undocumented problems. The memo reads something like this:

"Today you [describe bad behavior]. ***This behavior is consistent with a pattern of conduct over the last several months, consisting of the following: [list the incidents complained of by the supervisor].***"

The memo will then acknowledge that the employee received one or more verbal warnings about these issues (if true). The memo continues:


"Based on this pattern of behavior, you have forced us to put you on probation [or issue this formal warning]. We will expect to see immediate and sustained positive performance, or we will be forced to take further disciplinary action [or you will be terminated]."

Please remember that you are an at-will employee, meaning that you or the company may terminate our employment relationship at any time, with or without cause. Nevertheless,

we wanted you to have the benefit of our thinking on the subject and provide you with an opportunity to improve your performance before taking such action. Allowing you this opportunity to improve, however, does not change our at-will employment relationship."

I always like to give the employee the opportunity for the last word:

"If you have any questions about this process, or any of the issues referenced in this memo, please do not hesitate to discuss them with me."

Whenever I evaluate employment situations at this stage, I am looking ahead a year or two as if the HR manager, owner, or supervisor was sitting in court justifying the termination decision to a judge or jury. Those people like paper, and often find paper the most credible source of information. The "catch-up" memo will effectively help justify why you were forced to terminate the employee, cataloging the laundry list of infractions committed by the departed employee. Even though a warning memo was not created when each problem occurred, the catch-up memo will likely be viewed as a credible component of your paper trail. 

*Jonathan Fraser Light is the Chair of the Employment Law Group at Nordman Cormany Hair & Compton LLP, Ventura County's largest law firm.*