



DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING
ENFORCEMENT DIVISION
DIRECTIVE

DIRECTIVE
NUMBER
312

DISTRIBUTION
DATE
October 1, 1998

1. **SUBJECT: PROGRESS MEMOS**

2. **PURPOSE:** To set forth the procedures for preparing Progress Memos also known as Progress Reports.

3. **BACKGROUND:** Although Progress Memos generally follow the format utilized for routine investigative reports, they are unique and require special attention. This Directive describes the format to be used when preparing Progress Memos, and the information which must be included in these reports.

4. **PROCEDURES:**

A. **Content of Progress Memos:**

All Progress Memos will contain the following heading and information:

1) Nature of the Complaint:

This section will contain a brief description of the allegations of the complaint.

2) Basis for Recommendation:

This section will identify evidence which connects the protected basis with the act of harm. A separate statement must be made for each separate act of harm and/or basis alleged. All acts and bases alleged must be covered. The narrative portion should be written in the case analysis format using relevant questions with supporting evidence under each relevant question. (Refer to Attachment 1 through 1(F) for sample relevant questions). In addition, all evidence that supports the allegations must be referenced by location in the file (i.e., "Exhibit _"). A separate Exhibit List is not necessary. The

narrative should contain an objective and accurate summary of the relevant facts.

3) Chronology of Events Relevant to Analysis:

This section should describe the significant events relevant to the case, including events *before* and *after* the complaint is filed. Information regarding the date, time, what happened and the parties involved should be included. The location of the information pertaining to the event described should be referenced (i.e., "Exhibit _"). This section is not a chronology of the investigation and is separate and apart from the Case Diary (refer to Attachments 1(G) through 1(I) sample guidelines and chronologies).

4) Witness Statements:

This section is to be divided into two parts. The first part will contain the names of those witnesses who support the complainant. The second part will contain the names of those witnesses who support the respondent. Each entry will include the name of the witness, address, telephone number, what they will testify to, etc. Key testimony must be quoted exactly. This section will also indicate whether supporting declarations and/or statements are attached and their location (i.e., "Exhibit _").

5) Remedy Computation:

This section will contain information relevant to the amount of damages for back pay, loss of commission, health benefits, moving expenses, and other actual out-of-pocket losses suffered by the complainant. The amount of these losses should be calculated and detailed. Evidence concerning mitigation should also be referenced.

The potential for "actual" damages, including damages for emotional distress or mental anguish, exists in most cases. While support for such damages will be developed by Legal staff, Consultants should obtain initial evidence to support such damages.

B. Submission of Progress Memos:

- 1) All Progress Memos will contain a separate memorandum confirming or correcting the address for the respondent and each co-respondent. ***This information is essential.*** It is

particularly important in instances where a co-respondent is no longer in the employ of the respondent that a correct mailing address be identified. If necessary, that person's last known address should be subpoenaed from the respondent.

- 2) All Progress Memos will be prepared using DFEH-400-09 and will be addressed to the Chief Counsel.
- 3) All Progress Memos will be approved by the District Administrator. After approval, the Progress Memo, case file, and a computer-generated transmittal (DFEH-600-26) will be forwarded to the Chief Counsel with a copy to the appropriate Regional Administrator.

C. Confidentiality of Progress Memos:

Progress Memos will not be released without a subpoena unless an accusation has been issued. When an accusation has been issued, Progress Memos are discoverable pursuant to Government Code section 11507.6. Consultants may be deposed or subpoenaed to testify at hearing or trial regarding the Progress Memo.

5. APPROVAL:

Nancy C. Gutierrez, Director

Date

PROGRESS MEMO SAMPLES AND GUIDELINES

SAMPLE RELEVANT QUESTIONS

DISPARATE TREATMENT

In **Disparate Treatment** (termination, denial of selection, etc.) cases, always address the following in the Progress Memo:

- 1) "Is the respondent's reason for complainant's _____ factually accurate?"
 - a) Identify the decision-maker and provide a summary of the decision-maker's assertions regarding the complainant.
 - b) Indicate evidence which refutes the decision-maker's assertions (e.g., interviews, documents, etc.).
 - c) Reference the location of the evidence in the file (i.e., "Exhibits _").
- 2) "Does the respondent's treatment of similarly situated individuals indicate that the complainant's _____ (protected basis) was a factor in the adverse action?"
 - a) Identify who the similarly situated employees are.
 - b) Summarize relevant evidence regarding the respondent's treatment of these individuals.
 - c) Reference the location in the file of the evidence (i.e., "Exhibit _").
- 3) "Does any direct/anecdotal evidence indicate that the complainant's _____ (protected basis) was a factor in the adverse action?"
 - a) Identify direct/anecdotal evidence.
 - b) Reference the location in the file of the evidence (i.e., "Exhibit _").

SAMPLE RELEVANT QUESTIONS

DISABILITY

In **Disability** cases, always address the following in the Progress Memo:

- 1) "Does the complainant's actual or perceived condition qualify as a physical/mental disability under the FEHA?"
 - a) Identify the medical name of the disability.
 - b) Identify the medical evidence that has been gathered to verify the disability (e.g., medical records from the complainant and/or the respondent, interview with the complainant's physician(s), etc.). Always collect medical evidence during the investigation and describe this evidence in the Progress Memo.
 - c) Reference the location of the evidence in the file (i.e., "Exhibit _").
- 2) Was the complainant denied an employment benefit because of the complainant's disability?
 - a) Identify the decision-maker and provide a summary of the decision-maker's assertions regarding the complainant.
 - b) Indicate evidence which refutes the decision-maker's assertions (e.g., interviews, documents, etc.).
 - c) Reference the location of the evidence in the file (i.e., "Exhibit _").
- 3) "Does an affirmative defense exist based on (the complainant's inability to perform; the complainant endangering his/her own health and safety or the health and safety of others, etc.)?"
 - a) Identify the affirmative defense(s) asserted by the respondent.
 - b) Indicate all evidence that supports and/or refutes affirmative defense(s).
 - c) Reference the location of the evidence in the file (i.e., "Exhibit _").

SAMPLE RELEVANT QUESTIONS

DISABILITY

Continued

- 4) "Does a reasonable accommodation exist that would allow the complainant to safely perform the essential job functions"
 - a) Identify the specifics of the accommodation.
 - b) Identify all evidence (medical report(s), job descriptions, etc.) which supports the complainant's and/or the respondent's assertions.
 - c) Reference the location in the file of the evidence (i.e., "Exhibit _").

SAMPLE RELEVANT QUESTIONS

HARASSMENT

In **Harassment** cases, always address the following in the Progress Memo:

- 1) "Did the harassment occur?"
 - a) Identify the conduct alleged by the complainant to be harassment.
 - b) Identify all witness statements and/or testimony which support the complainant's allegations.
 - c) Reference the location in the file of the evidence (i.e., "Exhibit _").
- 2) "Is the alleged harassing conduct severe and/or pervasive so as to create a hostile working environment?"
 - a) Identify the approximate number of times the conduct occurred, the approximate dates of the incident(s) and how the conduct affected the complainant.
 - b) Reference the location in the file of the evidence (i.e., "Exhibit _").
- 3) "Is the alleged harasser a co-worker or supervisor/manager?"
 - a) If the alleged harasser is a co-worker, address whether the respondent had actual or constructive knowledge of the harassment and whether the respondent took immediate and appropriate action.
 - b) If the alleged harasser is a supervisor/managing agent, identify the evidence which supports this characterization (e.g., harasser has the title of manager and has significant authority to affect the complainant's working conditions; the harasser's job description; etc.).
 - c) Reference the location in the file of the evidence (i.e., "Exhibit _").

SAMPLE RELEVANT QUESTIONS

PREGNANCY

In **Pregnancy** cases, always address the following in the Progress Memo:

- 1) Does the complainant's condition qualify as a pregnancy, childbirth, or a related medical condition, OR a perceived pregnancy or related medical opinion?
 - a) Identify the complainant's condition.
 - b) Identify the medical evidence that has been gathered to verify the complainant's condition (e.g., medical records from the complainant and/or respondent, interview with the complainant's physician(s), etc.). Always collect medical evidence during the investigation and describe this evidence in the Progress Memo.
 - c) Reference the location of the evidence in the file (i.e., "Exhibit _").
- 2) "Is the respondent's reason factually accurate?"
 - a) Identify the decision-maker and provide a summary of the decision-maker's assertions regarding the complainant.
 - b) Identify what evidence refutes the decision-maker's assertions.
 - c) Reference the location of the evidence in the file (i.e., "Exhibit _").
- 3) (Differential Treatment Cases) "Does Respondent's treatment of similarly situated (others who have/had temporary disabilities) indicate that Complainant's pregnancy was a factor in the adverse action?"
 - a) Identify the similarly situated employees.
 - b) Summarize relevant evidence regarding the respondent's treatment of these individuals.
 - c) Reference the location of the evidence in the file (i.e., "Exhibit _").
- 4) (Denial of Leave Cases) "Does an affirmative defense exist based on Respondent's inability to return Complainant to her same position, inability to

preserve same position, inability to provide comparable position or providing comparable position would undermine business?"

SAMPLE RELEVANT QUESTIONS

PREGNANCY

CONTINUED

- a) Identify the affirmative defense(s) asserted by the respondent.
- c) Identify all evidence that supports and/or refutes the affirmative defense(s) asserted by the respondent.
- c) Reference the location of the evidence in the file (i.e., "Exhibit _").

SAMPLE RELEVANT QUESTIONS

CALIFORNIA FAMILY RIGHTS ACT (CFRA)

In **CFRA Leave** cases, always address the following in the Progress Memo:

- 1) "Does the complainant qualify for CFRA/FMLA leave?"
 - a) Identify and document that complainant meets CFRA leave requirements.

- 2) "Are the respondent's reasons factually accurate?"
 - a) Identify decision-maker.
 - b) Provide a summary of decision-maker's assertions regarding the complainant.
 - c) Indicate what evidence refutes the decision-maker's assertions.
 - d) Reference the location in the file of the evidence (i.e., "Exhibit _").

- 3) "Does an affirmative defense exist based on the respondent's inability to return to same position due to position having ceased to exist or is the complainant a 'Key Employee'?"
 - a) Identify all evidence that supports and/or refutes the respondent's affirmative defense.
 - b) Reference the location of the evidence in the file (i.e., "Exhibit _").

SAMPLE RELEVANT QUESTIONS

RETALIATION

In **Retaliation** cases, always address the following in Progress Memos:

- 1) "Did the complainant engage in protected activity?"
 - a) Identify and/or summarize protected activity in which the complainant participated.
- 2) "Did the respondent have knowledge of the complainant's participation?"
 - a) Identify the decision-maker and how he/she had knowledge of the complainant's participation.
- 3) "Is the respondent's reason for adverse action factually accurate?"
 - a) Provide a summary of the decision-maker's assertions regarding the complainant.
 - b) Indicate what evidence refutes the decision-maker's assertions.
 - c) Reference the location of the evidence in the file (i.e., "Exhibit _").
- 4) "Does the respondent's timing of the adverse action indicate it was taken due to the complainant's participation?"
 - a) Prepare a chronology of events under Section III of the Progress Memo.
 - b) Reference the location of all evidence in the file (i.e., "Exhibit _").
- 5) "Does the respondent's treatment of similarly situated employees indicate the adverse action was taken due to the complainant's participation?"
 - a) Identify similarly situated employees.
 - b) Summarize the relevant evidence regarding the respondent's treatment of these individuals.
 - c) Reference the location in the file of all evidence (i.e., "Exhibit _").

SAMPLE RELEVANT QUESTIONS

RELIGION

In **Religion** cases, address the following in the Progress Memo:

- 1) "Does the complainant's conduct qualify as a religious observance and/or practice?"
 - a) Identify evidence that supports the complainant's allegations of observance/practice.
 - b) Reference the location of the evidence in the file (i.e., "Exhibit _").
- 2) "Does an affirmative defense exist based on a good faith effort and/or undue hardship?"
 - a) Identify decision-maker(s) and summarize efforts to accommodate the complainant's beliefs.
 - b) Identify all evidence that supports and/or refutes the respondent's assertions.
 - c) Reference the location of the evidence in the file (i.e., "Exhibit _").

CHRONOLOGY OF EVENTS

Guidelines

A chronology of events, detailing relevant/significant events in the order of their occurrence, can be extremely useful when reviewing a case file. A determination of the merits of certain allegations of discrimination often depends on the chain of events surrounding the actions involved. Frequently, a Progress Memo does not provide sufficient information in chronological order. The following are examples of the appropriate use of chronology:

1. Retaliation - What did the complainant do? When? What did the respondent do? When? What occurred as a result of these events? When? What evidence ties the respondent's conduct to the complainant's protected activity?
2. Refusal to Hire - When was the job posted? When did the complainant apply? When was the job filled? When did the successful candidate apply? When was the complainant told he/she was not being hired?
3. Sexual Harassment - When did the harassment begin? In order of occurrence, what happened? When did the complainant complain to management/union/harasser? When did the respondent take action against the harasser? When did the harassment cease? When, if ever, was the complainant terminated/adverse action taken?
4. Constructive Discharge - What occurred, in chronological order, leading the complainant to quit?

SAMPLE CHRONOLOGY

Sexual Harassment

09/10/96 Complainant began work as (job title) (Exhibit _)

11/15/96 Harasser began work (Exhibit _)

11/20/96 Harassment began (Exhibit _)

02/05/97 Complainant quit (Exhibit _)

03/01/97 Harasser no longer at job site (Exhibit _)

05/01/97 Complainant returned to former position (Exhibit _)

07/15/97 Harasser returned to former position (Exhibit _)

07/20/97 Harassment began again (Exhibit _)

08/01/97 Complainant complained to management, no action taken (Exhibit _)

09/10/97 Complainant complained to Union (Exhibit _)

10/01/97 Layoffs occurred (Exhibit(s) _)

11/05/97 Complainant refused to submit to harasser (Exhibit _)

11/10/97 Complainant terminated (Exhibit _)

12/01/97 Complainant filed with DFEH

SAMPLE CHRONOLOGY

Physical Disability

- 1989 - 1996 Complainant employed as wholesale driver for Company X (Exhibit(s) _)
- 09/01/96 Complainant applies for position as truck driver with Respondent Y; Respondent Y advertised ten positions (Exhibit(s) _)
- 09/15/96 Complainant notified by Respondent Y to report to company doctor for pre-employment physical (Exhibit _)
- 09/20/96 Company doctor disqualifies Complainant because of x-rays showing congenital scoliosis (Exhibit _)
- 10/03/96 Complainant's orthopedic specialist provides Respondent with report of physical examination and review of additional x-rays; prognosis is that Complainant is in no greater risk or danger to self than someone without scoliosis (Exhibit(s) _)
- 10/15/96 Respondent refuses to consider specialist's evaluation and upholds disqualification (Exhibit _)
- 11/15/96 Respondent hires ten drivers, including three who apply after 10/15/96; two with less experience than Complainant (Exhibit(s) _)
- 12/01/96 Complainant files complaint with DFEH
- 1996 - 1997 Complainant continues work as wholesale driver for Company X (Exhibit _)
- 11/15/97 All ten drivers hired by Respondent Y in 1996 become permanent employees (Exhibit(s) _)