

1 **** E-filed September 30, 2010 ****

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7 NOT FOR CITATION
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION

11 MARY C. YARUM,

No. C09-05615 JW (HRL)

12 Plaintiff,

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION TO COMPEL AND
DENYING PLAINTIFF'S MOTION
FOR SANCTIONS**

13 v.

14 ALLIEDBARTON SECURITY SERVICES,
LP; and DOES 1-100,

[Re: Docket Nos. 22, 25 & 45]

15 Defendant.
16 _____/

17 **BACKGROUND**

18 Plaintiff Mary Yarum ("Yarum") is a former employee of defendant AlliedBarton Security
19 Services, LP ("AlliedBarton"). Yarum worked as a security guard and suffered an on-the-job injury
20 in December 2007, so she was put on medical leave. According to Yarum, her physician released
21 her to return to work in March 2008 under certain medical restrictions. She contends that even
22 though (according to her) she was able to perform her duties despite these restrictions, AlliedBarton
23 did not permit her to return to work and eventually terminated her in June 2008.

24 Yarum thereafter filed suit in California state court alleging wrongful termination and
25 violations of California's Fair Employment and Housing Act, Cal. Gov. Code § 12940 *et seq.*
26 ("FEHA"). AlliedBarton removed the action to federal court in November 2009 on the basis of
27 diversity.
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1 On May 3, 2010 Yarum propounded 14 interrogatories and 9 requests for the production of
2 documents to which AlliedBarton responded.¹ Yarum did not believe that AlliedBarton’s responses
3 were sufficient, though, and after a particularly unproductive meet and confer, filed a motion to
4 compel further responses (Docket No. 22 (“MTC”) and a motion for sanctions (Docket No. 25
5 (“MFS”).

6 Upon reviewing the papers, it was clear that the parties did not confer in good faith before
7 Yarum filed her motion to compel, so the Court continued the original hearing date and required
8 them to meet and confer again and to submit a joint statement updating the Court as to any
9 remaining disputes issues. (Docket No. 40.) The parties did so and filed their joint statement on
10 September 28, and, now, only two issues remain. (*See* Docket No. 45 (“Joint Statement”).)

11 Pursuant to Civil Local Rule 7-1(b), the Court finds the matter suitable for determination
12 without oral argument, and the October 5, 2010 hearing is vacated.

13 DISCUSSION

14 A. The Remaining Disputes on Yarum’s Motion to Compel

15 1. Yarum’s Request for Production No. 5

16 Yarum’s Request for Production No. 5 asks for “[a]ny and all DOCUMENTS in plaintiff’s
17 personnel file.” (*Id.* at 2.)

18 Yarum argues that even though AlliedBarton produced Yarum’s “purported” original
19 personnel file, it did not contain “all documents defendant and its counsel represented were part of
20 [it],” namely a letter from Eri Shu, an AlliedBarton human resources specialist, to Yarum dated
21 December 20, 2007. (*Id.*) Yarum contends that “[s]uch an important letter would have been a part
22 of plaintiff’s personnel file had it been drafted and sent to plaintiff as defendant contends.” (*Id.*) As
23 such, Yarum has requested that AlliedBarton either admit the letter was not part of Yarum’s
24 personnel file or produce its original copy of it. (*Id.*)

25 AlliedBarton responds that it told Yarum’s counsel that it believes that the “file copy” of the
26 letter had been in Yarum’s personnel file but was pulled from the file for use in responding to
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¹ On April 1, 2010, Judge Ware set a discovery deadline of February 28, 2011 for this case. This action was subsequently reassigned to Judge Koh.

1 Yarum’s discrimination complaint filed with the California Department of Fair Employment and
2 Housing. (*Id.*) It also notes that it already produced a copy of this letter to Yarum anyway. (*Id.*)

3 Yarum’s request seeks all documents in Yarum’s personnel file, and AlliedBarton produced
4 them. This fulfilled the request. The parties’ argument over whether the letter was originally in
5 there but now is not is irrelevant in this regard. As such, Yarum’s motion is denied as to Request
6 for Production No. 5.

7 2. Yarum’s Interrogatory No. 9

8 Yarum also takes issue with AlliedBarton’s responses to Interrogatory No. 9, which asks
9 AlliedBarton to, among other things, describe the “essential function(s)” of Yarum’s job (subpart
10 (a)), explain why they are essential (subpart (b)), and state “all reasons why plaintiff was unable to
11 perform such function(s)” (subpart (d)).² (*Id.* at 3.)

12 i. Subpart (a): The Essential Functions of Yarum’s Job

13 With respect to the description of the essential functions of Yarum’s job, AlliedBarton
14 responded that the “[e]ssential functions of Plaintiff[’]s Security Officer position include:
15 responding to emergencies, such as medical emergencies, bomb threats, fire alarms, and intrusions,
16 including the ability to perform CPR and AED and carry emergency equipment; assisting with
17 evacuations during emergencies; monitoring/controlling access to the facility; and receiving and
18 lifting packages.” (*Id.*)

19 Yarum argues that AlliedBarton’s use of the term “such as” shows that it only provided
20 examples of the essential functions of Yarum’s job and did not provide a complete response to the
21 interrogatory. (*Id.* at 4.) Yarum misreads AlliedBarton’s response. AlliedBarton’s response lists
22 “responding to emergencies” as the essential function, and then uses “such as” to provide examples

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24 ² Interrogatory No. 9 provides in full: “Describe what essential function or functions of the job that
25 plaintiff was unable to perform between March 3, 2008 through June 25, 2008 because of medical
26 restrictions contained in ‘Primary Treating Physicians Progress Report (PR-2)’ issued by Christian
27 Foglar, MD between 2/27/08 and 5/7/08 (copies of which are attached hereto as Attachment ‘1’) by
28 (a) describing the essential function(s); (b) stating why such function(s) was or were essential; (c)
stating the dates when plaintiff was unable to perform such function(s); (d) stating all reasons why
plaintiff was unable to perform such function(s); (e) stating the name, ADDRESS, and telephone
number of each PERSON who have knowledge of any of the information given in response to any
of the preceding subsections in this interrogatory; (f) identifying any DOCUMENT that refers to
any of the information given in response to any of the preceding subsections in this interrogatory.”
(Joint Statement at 3.)

1 of emergencies. In other words, the examples fall under the more specific essential function of
2 “responding to emergencies.” In any case, to ask AlliedBarton to list every conceivable example of
3 an emergency would be absurd. Yarum’s motion therefore is denied as to this subpart of
4 Interrogatory No. 9.

5 ii. Subpart (b): Why the Essential Functions Are Essential

6 With respect to why these listed essential functions are indeed essential, AlliedBarton
7 responded that it “considers such functions to be ‘essential’ due to the importance of such functions
8 for the position and [its] contractual obligations to its client.” (*Id.* at 3)

9 Yarum argues that AlliedBarton’s references to the “importance” of these job functions and
10 the “contractual obligations” to its client are conclusory, evasive, and/or vague. (*Id.* at 4.) Instead,
11 Yarum insists that AlliedBarton must state “*why* such functions are essential” and “*what specific*
12 *contractual obligations* made [such] functions important or essential.” (*Id.* (emphasis in original).)
13 AlliedBarton believes that its response is sufficient, as it has produced to Yarum a copy of her job
14 description and will produce (upon entry of a stipulated protective order) a copy of the relevant
15 contract, and so Yarum can review these documents to identify the bases upon which AlliedBarton
16 has made its determination of the essential functions of the job. (*Id.* at 5.)

17 Although Yarum’s argument strikes the Court as overly fussy, AlliedBarton’s response, as
18 written, does not quite answer Yarum’s question, and so Yarum is entitled to a further supplemental
19 response to this subpart. That said, AlliedBarton can likely do this using information it provided in
20 response to Yarum’s argument in the parties’ Joint Statement. In doing so, AlliedBarton need not,
21 however, point out each and every specific contractual provision as Yarum requests. Accordingly,
22 Yarum’s motion is granted as to this subpart of Interrogatory No. 9.

23 iii. Subpart (d): Why Yarum Was Unable to Perform the Essential Functions of Her
24 Job

25 As for the “reasons why plaintiff was unable to perform such function(s),” AlliedBarton
26 responded that Yarum was unable to perform those functions “because of the work restrictions
27 imposed by her physicians(s).” (*Id.* at 3.)
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1 Yarum says that AlliedBarton’s response is “silly” and not made in good faith. (*Id.* at 4.)
2 She states that this subpart of the interrogatory asks “why defendant contends plaintiff could not
3 perform each function *with her medical restrictions*, not whether defendant contends plaintiff could
4 not perform the function *because* of medical restriction.” (*Id.* (emphasis in original).) Yarum’s
5 intended question is a fair one, but it is not necessarily the question asked in the interrogatory. The
6 language in the interrogatory is ambiguous and could fairly be read to ask either question that
7 Yarum identified above. AlliedBarton’s response, then, is not “silly” as Yarum rather
8 inappropriately contends. If Yarum wants to ask the question she now says she meant, she can do
9 so, but it is not specifically the question she asked here, so her motion as to this subpart of
10 Interrogatory No. 9 is denied.

11 **B. Yarum’s Motion for Sanctions**

12 Yarum also filed a motion for sanctions in the outlandish amount of \$16,720 (for Yarum’s
13 counsel’s fees in preparing her motion to compel) under Rule 37(a)(5), which provides that an
14 award of sanctions is appropriate in the event that a court grants a motion to compel. (MFS at 8.)
15 However, Rule 37(a)(5) also instructs that a court should not order such an award if the movant filed
16 the motion before attempting in good faith to obtain the discovery without court action. FED. R.
17 CIV. P. 37(a)(5)(A)(i). As noted above, this Court initially continued the hearing on Yarum’s 100-
18 page motion to compel because it believed that Yarum failed to meet and confer in good faith with
19 AlliedBarton before filing it. (Docket No. 40.) Indeed, after the parties were instructed by the
20 Court to try again, Yarum’s motion to compel was subsequently whittled down to the four minor
21 disputed issues addressed in this order. Such a drastic reduction in the number of disputed issues
22 suggests that this Court was correct. And even if it was not, the Court is not convinced that
23 AlliedBarton’s conduct was sanctionable. Yarum’s motion for sanctions is denied.

24 **CONCLUSION**

25 Based on the foregoing, Yarum’s motion to compel is GRANTED IN PART and DENIED
26 IN PART. Specifically, Yarum’s motion to compel is DENIED as to Request for Production No. 5
27 and subparts (a) and (d) of Interrogatory No. 9 and GRANTED as to subpart (b) of Interrogatory
28 No. 9. In addition, Yarum’s motion for sanctions is DENIED.

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IT IS SO ORDERED.

Dated: September 30, 2010



HOWARD R. LLOYD
UNITED STATES MAGISTRATE JUDGE

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