

JUDICIAL COUNCIL OF THE EIGHTH CIRCUIT

JCP No. 08-24-90037

In re Complaint of John Doe*

This is a judicial complaint filed by a plaintiff against a district judge who dismissed her *pro se* lawsuit.

In the lawsuit, the complainant and her husband sued officials of the public school district in which their child is enrolled. The plaintiffs alleged that their child was subjected to discrimination on the basis of disability, and that they were subjected to retaliation and harassment due to their advocacy on behalf of their child. They alleged that they reported the retaliation and harassment, and that the defendants did not respond appropriately.

After both plaintiffs were deposed, and the parties filed opposing motions for summary judgment, the plaintiffs filed a notice of voluntary dismissal without prejudice. The notice alleged that defense counsel put the complainant in “fear of harm” for her son when counsel allegedly asked her in a deposition whether the defendants could “shoot Plaintiffs’ disabled child” with a “deadly weapon or dangerous instrument.”

The defendants moved to strike the notice on the ground that voluntary dismissal was inappropriate at that stage of the proceedings. The defendants also

*Under Rule 24(a) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings, the names of the complainant and the subject judge are not disclosed. Citations or references herein to a “Rule” refer to these Rules.

argued that the plaintiffs blatantly misrepresented the deposition questioning. The defendants urged the judge to dismiss the case with prejudice to sanction the plaintiffs for their misrepresentations during the litigation.

The judge granted the defendants' motion and dismissed the lawsuit with prejudice. The judge ruled that voluntary dismissal was inappropriate because the case had been litigated for over a year with extensive discovery and motion practice, and the defendants would be unfairly affected if the plaintiffs were allowed to refile their complaint. The judge stated that the deposition transcript supported the defendants' statement that there were no threats made against the plaintiffs' child. The court found that the "only testimony about shooting involved her testimony that Plaintiff's father had, on occasion, used a Nerf gun to 'test' [the child's] reported symptoms."

The record shows that defense counsel, a female, questioned the child's mother by referring to the previous deposition testimony of the child's father. The father had testified that he had tested the child's reflexes and vision by "using things that were Nerf or using, you know, squirt gun or there was, like, water stimulation, different things that would create some sort of reaction." In questioning the child's mother, defense counsel posited, "Let's say [the child's] own dad questioned whether or not these symptoms were truly being experienced by his son, right, and he did perform these objective tests. I think he mentioned like a Nerf gun or a water gun or something, like super harmless stuff, do you think it would have been appropriate for the school to perform those tests on [the child]?"

In the judicial complaint, the complainant asserts that the judge "confused an attorney's question with [the complainant's] testimony and/or deliberately authorized his staff to fabricate the testimony of an unrepresented Plaintiff." The complaint requests an investigation into the judge's "disabling level of confusion, and/or deliberate misconduct," and notes that the judge is over ninety years old. The

complaint alleges that the plaintiffs made three requests to have the “fabricated” testimony corrected, but that later court orders did not acknowledge the requests.

The complaint focuses on the judge’s use of the pronoun “her” when referring to testimony that the Plaintiff’s father had used a Nerf gun to test the child’s reported symptoms. The complainant points out that the female defense counsel referred in a question to the father’s deposition testimony, but that she (the complainant) did not confirm the father’s testimony in her answer.

The judge may have misspoken about the deposition testimony, but this fact is insufficient to raise an inference that misconduct has occurred. *See* Rule 11(c)(1)(C). Misconduct does not include “an allegation that calls into question the correctness of a judge’s ruling.” Rule 4(b)(1). The material issue for the court was whether there had been threats made against the child. The judge found that the only reference to “shooting” involved something harmless like use of a Nerf gun. Any confusion in the judge’s order regarding precisely who testified or spoke about the Nerf gun was immaterial to the decision. The evidence is insufficient to support an inference that the judge is suffering from an impairment that renders him unable to discharge the duties of judicial office. *See* Rule 4(c), 11(c)(1)(C).

For these reasons, the judicial complaint is dismissed.

/s/ Steven M. Colloton
Chief Judge

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