No. 11-5017

Oral Argument Scheduled January 20, 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

_____

JEFFREY KAPCHE,

Plaintiff-Appellant/Cross-Appellee

v.

ERIC HOLDER,

Defendant-Appellee/Cross-Appellant

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____

RESPONSE AND REPLY BRIEF FOR THE APPELLANT/CROSS-APPELLEE

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Table of Contents

Table of Authorities

CASES

*Authorities upon which we chiefly rely are marked with asterisks.

STATUTES

RULES

OTHER AUTHORITY

Certificate as to Parties, Rulings, and Related Cases:

(A) **Parties**

The appellant/cross-appellee is Jeffrey Kapche, who was the plaintiff in the District Court. The appellee/cross-appellant is Eric Holder, who was the defendant in the District Court.

(B) **Rulings Under Review**

At issue in Kapche's appeal are the District Court's June 1, 2010, judgment denying appellant equitable relief (Dkt. 135, for reasons in Dkt. 133), and the District Court's November 30, 2010, order denying appellant's Rule 59 motion to alter or amend judgment. (Dkt. 141.) The Honorable James Robertson entered the first judgment and order. The Honorable Reginald Walton entered the second order.

In the FBI's cross-appeal, the FBI appeals the district court's decision of September 11, 2009, denying defendant's motion for judgment as a matter of law on the question of whether plaintiff had a disability within the meaning of the Rehabilitation Act. (Dkt. 113.)

(C) **Related Cases**

This case has not previously been before this Court and counsel are aware of no currently pending related cases.

Glossary of Abbreviations

EEOC	-	Equal Employment Opportunity Commission
FAA	-	Federal Aviation Administration
FBI	-	Federal Bureau of Investigation
Fed. R. App. Pro.	-	Federal Rules of Appellate Procedure
Fed. R. Civ. Pro.	-	Federal Rules of Civil Procedure
FRE	-	Federal Rules of Evidence

Citations to the Record

"Dkt. __" refers to items on the district court docket sheet.

"Transcript ___" refers to the trial transcript.

"Pre-Trial Transcript ___" refers to the transcript of the district court hearing on May 11, 2009.

"Hearing Transcript" refers to the transcript of the district court hearing on equitable relief held on October 21, 2009.

"Plaintiff's Ex.__" or "Defendant's Ex. __" refer to trial exhibits.

"Hearing, Plaintiff's Ex. __" or "Hearing Defendant's Ex. __" refer to exhibits at the October 21, 2009 hearing on equitable relief.

Statement of the Issues in the Cross-Appeal

After the jury found that Kapche's diabetes constituted a disability, whether the district court erred in denying the FBI's motion for judgment as a matter of law on that issue.

Statutes or Regulations

All applicable statutes—in this case, only selected portions of the Rehabilitation Act of 1973, 29 U.S.C. §§ 791 *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. §§ 12001 *et seq.* —are contained in the Brief for Cross-Appellant/Appellee. (FBI Br. at 61-65.)

Statement of the Case Relevant to the Cross-Appeal: Kapche's Disability

Kapche, an applicant for federal employment as a special agent, brought a disability discrimination action on the ground that he was a qualified person with a disability. More specifically, he alleged that his "diabetes is a disability under the Rehabilitation Act because it is a physical impairment of the digestive and endocrine systems that substantially limits several major life activities." [1] Kapche identified these activities as "eating, caring for himself, and metabolizing food."

[1] S.D. Texas Dkt. 3 at ¶ 13. Kapche filed his lawsuit in the Southern District of Texas. When the case was transferred to the District of Columbia, it was given a new case number, and the docketing of documents started anew with number one, rather than picking up with the last number on the S.D. Texas docket. Hence, documents filed in S.D. Texas are cited with the court's name to avoid confusion with documents docketed with the same number in the court below.

(S.D. Texas Dkt. 3 at ¶ 17.) He alleged that diabetes substantially limited him in these activities because, in order to live with diabetes, he had to follow "a highly restrictive regimen of diet, exercise, insulin and by caring for himself with extreme diligence. He eats in a way that is substantially limiting when compared to persons without diabetes." (*Id.* at ¶ 14.) Kapche also alleged that the FBI discriminated against him because it regarded him as a person with a disability. (*Id.* at ¶¶ 20-23.)

On cross-motions, both parties sought summary judgment on, among other things, the issue of whether Kapche was a person with a disability.[2] (Dkt. 36 (Plaintiff's Motion) at 15-18; Dkt. 43-2 (Defendant's Motion) at 19-37.) The district court denied both motions (Dkt. 67), and so the issue of Kapche's actual or regarded-as disability was tried to the jury (May 12-20, 2009).

Before the case was submitted to the jury, the FBI moved under FED. R. CIV. PRO. 50(a) for judgment as a matter of law on both disability theories (actual and regarded-as). (Transcript 817-29.) The district court denied the motion with respect to actual disability. (*Id.* at 831.)

At trial, the district court instructed the jury to consider the efforts that Kapche expended to control his diabetes as an element of the substantial limitations

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[2] The FBI's brief uses "disabled," but the statutory language, which Kapche follows, protects qualified individuals with a disability. 42 U.S.C. § 12112(a). The latter language emphasizes that the Rehabilitation Act requires only *a* disability, not that a person be disabled in the more complete sense of that word's normal usage.

that it imposed on him.[3] This feature of the instruction addressed Kapche's allegation, in his complaint, that living with diabetes required "a highly restrictive regimen of diet, exercise, insulin and by caring for himself with extreme diligence." (S.D. Texas Dkt. 3 at ¶ 14; *see also* p.2, *supra*.)

The district court submitted to the jury a form for a general verdict ("[o]n his claim of discrimination in violation of the Rehabilitation Act, we find in favor of

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[3] The complete instruction on the issue of disability was as follows:

> In the phrase "individual with a disability," the term "disability" means a physical or mental impairment that substantially limits one or more major life activities. Type 1 diabetes is not a disability unless in the individual case it substantially limits one or more of a person's major life activities.
>
> Mr. Kapche contends that, in his individual case, his Type I insulin dependent diabetes substantially limits the manner in which he performs the major life activities of eating and caring for himself when compared to an average person in the general population.
>
> In determining whether a limitation is substantial, *you must take into account any mitigating or corrective measures.* You should consider the effects of those measures, both positive *and negative*, on Mr. Kapche's performance of the major life activities of eating and caring for himself. You may also consider these factors: The nature and severity of the restriction; the duration or expected duration of the restriction; and the permanent or long-term impact, or expected permanent or long-term impact of or resulting from the restriction.

(Transcript 943-44; italics added.) Whether Kapche had a disability with respect to metabolizing food (*see* S.D. Texas Dkt. 3 at ¶ 17 & pp.1-2, *supra*) was not presented to the jury.

[plaintiff or defendant]"), with one question regarding damages. (Dkt. 101; *see* FED. R. CIV. PRO. 49(b)(1).) The jury's general verdict in favor of Kapche, along with its award of $100,000 in damages (Dkt. 101), constituted its finding that Kapche was indeed a qualified person with a disability.

After the district court entered judgment on the verdict (Dkt. 102), the FBI moved under FED. R. CIV. PRO. 50(b) for judgment as a matter of law. (Dkt. 104.) Insofar as the FBI's cross-appeal relates to the motion, the motion argued that the evidence was legally insufficient to support the jury's implicit fact-finding that Kapche had a disability with respect to eating or caring for himself because of substantial limitations imposed by diabetes or by the effort of controlling it. (Dkt. 104-2 at 7-23.)

The district court denied the motion:

> In this individual case, there was enough evidence in the record to support the jury's finding that Kapche's "Type 1 insulin-dependent diabetes substantially limit[ed] the manner in which he perform[ed] the major life activities of eating and caring for himself when compared to an average person in the general population." Kapche described his regimen as "a constant battle every day," one where "the minute you don't do [it] is when you can have problems or complications." Tr. 540:7-9. In part, his regimen consisted of: testing his blood sugar several times a day, Tr. 538: 18-19; closely monitoring the quality and quantity of food he ate, Tr. 539:8-17; adjusting his food intake and insulin levels before exercising or long days of work, Tr. 539:14-25; and recalculating his target insulin levels and food intake when ill, Tr. 542: 23-543:7. One of Kapche's expert witnesses, Dr. James Gavin, stated that Kapche was "subject to a number of severe limitations in terms of his eating and the way he care[d] for himself," and highlighted

> the severe consequences Kapche would face if he did not maintain constant vigilance. Tr. 465:15-467:4.
>
> At trial, through cross-examination and the presentation of his own witnesses, the defendant made the same argument that he makes now: that Kapche's diabetes management regimen is simply a hassle, and involves the same kinds of monitoring and planning that one would do when on a diet. But the jury determined that Kapche's limitations were more substantial—a reasonable conclusion given the evidence before them.

(Dkt. 113 at 4-5.)

This denial is the subject of the FBI's cross-appeal.[4]

Statement of the Facts Relevant to Kapche's Disability[5]

After Kapche received (in 2005) the FBI's conditional offer to employ him as a special agent (Transcript 80 & Pl. Ex. 2), he underwent a pre-employment medical examination by a physician (Dr. Burpeau) under contract with the FBI. Dr. Burpeau reported to the FBI that Kapche "has diabetes but is healthy." (Transcript 83.) Using a list of job tasks that the FBI provided to him (*id.* at 67), Dr. Burpeau certified that Kapche was "'medically clear, fit for duty.'" (*Id.* at 83).

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[4] The FBI poses this specific appellate issue: "Whether the district court erred in concluding that plaintiff was disabled ...." (FBI Br. at 2.) Whether Kapche was a person with a disability was a fact question on which the district court instructed the jury (Transcript 942-44 & 1021-23), and it was the jury, not the district court, that found him to be a person with a disability (Dkt. 101).

[5] The facts are based on the evidence construed in the light most favorable to the jury verdict. *Muldrow ex rel. Estate of Muldrow v. Re-Direct, Inc.*, 493 F.3d 160, 163 (D.C. Cir. 2007).

In addition to receiving Dr. Burpeau's certification of Kapche's fitness for duty, the FBI—specifically, one of its medical officers, Dr. James Yoder (Transcript 48)—also received a letter from Kapche's treating endocrinologist (Dr. Brian R. Tulloch). (*Id.* at 74). Dr. Tulloch's letter stated that Kapche had maintained an "outstanding" A1C level[6] (*id.* at 378[7]), and Dr. Yoder agreed that Kapche's A1C level put him "at the top of the list of people in terms of their control [of diabetes] as evidenced by their lab values." (*Id.* at 84-85.[8]) One of Kapche's experts, Dr. Desmond Schatz, testified that Kapche's A1C values demonstrated "outstanding control" (*id.* at 229); the other, Dr. James Gavin, testified that he was "under extraordinarily good control" (*id.* at 464).

Though Kapche's diabetes was well-controlled, the FBI rejected him because of the way he controlled it: through insulin injections, rather than an insulin pump.[9]

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[6] The A1C test provides a long-term measure of how well blood sugar has been controlled over time. *Dyrek v. Garvey*, 2001 WL 1002471, at *1 (N.D. Ill. Aug. 31, 2001), *aff'd*, 334 F.3d 590 (7th Cir. 2003). As Dr. Yoder explained, "the red cells in the blood actually carry a memory, if you will, for their life span, which is several months, of what the highs of glucose have been, and you can measure that." (Transcript 198.) Dr. Yoder testified that A1C values were one of "four main areas of concern" when he evaluated applicants with diabetes. (*Id.* at 191; *see also id.* at 197 & 201.)

[7] *See also* Transcript 384 ("excellent control").

[8] *See also* Transcript 97 ("[h]e appeared to be well-controlled" over a 15-year period); *id.* at 113 (agreeing that Kapche was "extremely well-managed").

[9] An insulin infusion pump is a battery-powered device that supplies insulin through tubing connected to the body of the patient.

The FBI tells this Court that when it rejected Kapche, it advised him "that he could qualify for reconsideration by demonstrating control of his diabetes over at least thirty days by using an insulin-infusion pump, rather than the injection therapy he was using." (FBI Br. 2-3.) The assertion lacks a record citation, and necessarily so: the record contains no evidence that the FBI's rejection was accompanied by any such advice.[10] To the contrary, the FBI did not inform Kapche of this rationale until after he filed a lawsuit. (Transcript 71-72.)

Maintaining control through injections imposed upon Kapche the substantial limitations that were the source of the jury's finding that he was a person with a disability.[11] Kapche's treating endocrinologist (Dr. Brian Tulloch) and, more extensively, another expert (Dr. James Gavin) testified about what Kapche does differently from an average member of the population who does not have diabetes

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[10] Dr. Yoder testified for the FBI that he would not approve hiring Kapche or anyone else as a special agent, even "a Superman type," who was "using insulin injections" (Transcript 93; *see also id.* at 70-71 & 111).

[11] Kapche did not contend that diabetes in and of itself imposed substantial limitations on any major life activity. In fact, Dr. Schatz testified that Kapche's A1C values were controlled at a level of those who do not even have diabetes. (Transcript 312.) Dr. Tulloch testified that Kapche "has no problems secondary to the nature of his diabetics [sic]." (*Id.* at 384.) Rather, Kapche contends that the effort of controlling his diabetes imposed those limitations. The legal authority for that contention is discussed in the argument portion of this brief; here, Kapche simply identifies the record evidence that described his effort.

to avoid the risk of dangerously high levels of blood sugar (hyperglycemia), and dangerously low levels (hypoglycemia):

- Exercises constant vigilance over current sugar levels. (Transcript 390 (Schatz).) "You know, people without diabetes don't have to worry about their blood sugar at all because they have a functioning pancreas .... People with Type 1 diabetes, like Mr. Kapche, have to monitor that themselves because they don't have that internal possibility." (*Id.* at 474 (Gavin).)
- Checks blood sugar (finger stick blood sample) multiple times daily. (Transcript 391-92 (Schatz).)
- Understands that "he doesn't have the prerogative to simply eat what he wants when he wants. Everything has to be calculated and planned because everything has consequence." (Transcript 465 (Gavin).)
- "For example, if you want to [eat] and it turns out that your blood sugar is already very high, you have to wait....You can't simply decide to do it ...." (Transcript 470 (Gavin).)
- Understands that exercise can strongly affect sugar levels. (Transcript 392 (Schatz).) "He doesn't have the luxury of simply engaging in physical activity, doing exercise, or participating in what might be

strenuous leisure time activity without considering what the consequences could be." (*Id.* at 465 (Gavin).)

- "[H]e has to know what his starting blood sugar is .... [T]hen he has to assess, how much activity is he going to engage in?" (Transcript 466 (Gavin).) Based on that information, "he has to decide, how much is he going to preload in terms of taking enough additional carbohydrates if that's necessary in order to keep him from going low as a result of that exercise." (*Id.* (Gavin).)
- Even for hours after the exercise is over, he monitors blood sugar because "the risk of going low ...is not just immediate or during the exercise, but ... can exist for several hours afterwards." (Transcript 466 (Gavin).)

- Understands that illness can also strongly affect sugar levels. (Transcript 392 (Schatz).) "He can't just be sick, get the flu or get a cold. There are specific rules that now have to be applied in order to keep him from progressing into a more severe stage of physical illness." (*Id.* at 466 (Gavin).)
- Injects insulin (if not on a pump) at least twice daily. (Transcript 391 (Schatz).)

Dr. Gavin testified that Kapche's record of control showed that he was extremely attentive to details.

> He's had to be constantly vigilant, he's had to be fastidious and very conscientious in the way he has made decisions and applied the things that he has been taught. Because you just don't get these kinds of outcomes casually.

(Transcript 467.) "[P]eople who achieve the kinds of results that I've seen with Mr. Kapche, are people who are going to be checking themselves very frequently. They're going to be checking themselves anywhere from five to sometimes 10 times a day." (*Id.* at 475.)

Hence, Dr. Gavin described Kapche as severely limited: "When compared to a person who does not have diabetes, Mr. Kapche is subject to a number of severe limitations in terms of his eating and the way he cares for himself." (Transcript 465.)

Consistently with the testimony from Drs. Tulloch and Gavin, Kapche testified extensively about how the effort of controlling his diabetes "restricted ... how I eat, how I conduct myself physically, and how I care for myself; you know, physical health issues" (Transcript 538[12]):

[12] "Q. ... [a]re you [Kapche] in your life doing the things that Dr. Gavin testified today a diabetic must do to maintain excellent control? A. Yes." (Transcript 571.)

- "[W]hen I get up, the first thing is you need to check to see where your blood is. So you do a blood finger stick check." (Transcript 538.) Based on that, he "decide[s] if I'm going to make an adjustment or not, if I need to eat a snack[13] or I need to take insulin." (*Id.*)
- "[D]uring the course of the day, I'll check myself anywhere from three to five times, most likely." (Transcript 538.) He checked on the lower side on days when "I'm doing the same routine where I may be in the office most of the day and I'm eating the same type of food that I usually eat," and on the higher side "if I"m being active or running around in the field as a detective doing investigations." (*Id.*) He also checked on the higher side when he was sick ("where I need to have more vigilant control and make sure everything is in line") or when "something doesn't feel right." (*Id.* at 538-39.)
- He checks his blood sugar "before and after exercising," and usually eats a snack before exercising. (Transcript 539.)
- Illness "causes issues with a diabetic in that it raises your blood sugar level and you have to check yourself more often." Transcript 542.) "I may check myself eight or more times in a day when I'm sick because

[13] In Kapche's parlance, a snack is a remedy for a dip in blood sugar, not a response to hunger. (Transcript 582.)

of the illness, and make sure that it doesn't spike or my blood sugar raises too high." (*Id.* at 543.)

- Meals demand special attention.
  - "[E]very time I eat [a meal], I have to do an injection." (Transcript 539.) Without insulin, he cannot eat.
  - The injection is based on a careful awareness of the food's carbohydrate load. "[Y]ou have to tally up the number of grams of carbohydrates[14] ..., and you've got to adjust your insulin-to-carb ratio ...." (Transcript 540-41.) This is easier "if you eat the same kind of meals over and over again, [because] then you know how much you're going to need." (*Id.* at 541.)
  - Though "there's probably not any limits" on what Kapche theoretically can eat (as long as he can perform the carbohydrate calculations and has insulin), "since I became a diabetic, there's certain foods that I just refuse to eat. I don't eat sweets, I don't drink colas, I don't eat candy bars." (Transcript 543.) This limitation, while self imposed, is real for Kapche in his life.

[14] Naturally, this means having the knowledge, or ready access to it. For example, Kapche compared the carbohydrate counts of a bagel and a donut. (Transcript 541-42.) (Footnote not in original.)

- In addition to taking insulin along with every meal, Kapche injects a dose of long-acting insulin every evening. (Transcript 572.[15])

Kapche summarized:

> It's a constant battle every day. The minute that you don't do that is when you can have problems or complications. So I've decided that I want to walk my daughters down the aisle for their weddings and I want to be able to be there when they graduate, so I want to take care of myself so I'm there for them. And that won't happen if you don't take care of yourself. You have complications, you have issues.
>
> So very early on, even before I had a family, there's things I wanted to do and be able to accomplish. I think I'm a better police officer because I check myself so much.

(Transcript 540.)

Summary of the Argument

A. The Response to the FBI's Cross-Appeal

The cross-appeal raises two issues concerning evidence: (1) that the district court improperly allowed Dr. Gavin to give a legal conclusion that Kapche was substantially limited in certain major life activities, and (2) that the denial of its Rule 50(b) motion relied on evidence that improperly invited speculation about Kapche's substantial limitations if he had not made efforts to control his diabetes.

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[15] The FBI's expert, Dr. Frank Crantz, also explained that a person with Type 1 diabetes "has a certain underlying insulin requirement. We call that the basal insulin ...." (Transcript 615.) This type of diabetic also "needs insulin with each meal," calibrated to the meal's carbohydrate load. (*Id.*)

Both issues lack merit. Dr. Gavin testified with copious facts about the restrictions that a person with Kapche's record of diabetes control would have to endure in order to achieve that record. Dr. Gavin did not supply the jury with a mere legal conclusion. Second, both Dr. Gavin and Kapche briefly remarked on the obvious fact that if Kapche failed to control his diabetes, he would face medical consequences. This testimony, to which the FBI never objected, was offered merely to explain why Kapche undertook such burdens to control his diabetes.

Based on the complete record, without the FBI's attempted excisions, the evidence was legally sufficient for the jury to find that Kapche's efforts to control his diabetes substantially limited him vis-à-vis eating and caring for himself. His "constant battle every day" (Transcript 540) entailed multiple finger-stick blood tests, multiple injections of insulin, and a pervasive awareness of what his body was telling him at any moment of the day about whether his blood sugar was properly balanced on the fulcrum of food and insulin. These limitations exist for him, but not for average members of the general population.

B. The Reply in Support of Kapche's Appeal

The district court's denial of equitable relief to the prevailing plaintiff was reversible error. The court inverted the burden of proof on the after-acquired evidence defense. Instead of requiring the FBI to prove its defense, it required Kapche to prove that the FBI's decision was not in "good faith." And it required

Kapche to do so without any access to the only person with personal knowledge of the defense – Tracy Johnson.

The court's misallocation of the burden of proof led it to excuse the FBI's failure to prove its case. Authority from this Circuit requires the FBI to prove that its disqualification of Kapche was consistent with its actual practices. It did not do so. The FBI presented no witness with personal knowledge about why Kapche was disqualified or whether the FBI's own policies were followed in that process, much less whether that disqualification was in line with its past practices.

Argument and Authorities

A. Response to the FBI's Cross-Appeal: The Evidence was Legally Sufficient for the Jury to Find that Kapche was an Individual with a Disability

1. How Kapche Controlled His Diabetes, and the FBI's Challenges to that Evidence

The FBI does not dispute Kapche's testimony about how he controlled his diabetes. For example, the FBI does not cite any evidence that Kapche did not perform multiple finger sticks each day to test his blood sugar, that he did not inject himself with insulin at each meal and again in the evenings, that he did not have to consider his blood sugar and the carbohydrate load of food before he consumed it, that he did not have to take special care to monitor his blood sugar before and after exercise, and when he was sick, or that he had to refrain from eating when his blood

sugar was high. The only evidentiary disputes in the cross-appeal relate to (1) some testimony offered by Dr. Gavin about Kapche's limitations, and (2) some offered by Dr. Gavin and Kapche about what would happen if Kapche stopped trying to control his diabetes. (FBI Br. 20-21.)

a. Dr. Gavin's Testimony about "Severe Limitations"

To put the first dispute in context, we must go back to the FBI's original objection, which was to *any* testimony from Dr. Gavin, on the ground that it would be *cumulative* of testimony already heard from Dr. Schatz (Kapche's other expert witness). (Pretrial Transcript 79-80; Transcript 420: "We don't think it's necessary for Dr. Gavin to testify. We just heard quite a bit of testimony from Dr. Schatz.")

Kapche's counsel responded:

> Your Honor, [Dr. Gavin is] testifying as to the elements upon which we have the burden of proof, that [Kapche is] qualified with the disability.... Dr. Schatz spent his time talking about the direct threat analysis defense and the business necessity defense. [Dr. Gavin is] my only expert to talk about diabetes as a disability and those elements upon which we have the burden of proof.

(Transcript 420-21.) The FBI then changed tactics, emphasizing to Judge Robertson that Dr. Gavin's testimony would be unnecessary in light of Kapche's: "Your Honor, to show that Mr. Kapche is disabled, they need look no further than Mr. Kapche. He's in the best position, frankly, to explain to the jury what his potential burdens are and what the potential significant restrictions are in his daily life

activities." (*Id.* at 421.) According to the FBI, "Dr. Gavin has no opinions specific to Jeff Kapche with respect to burdens. His opinion is simply that Type 1 diabetics generally have certain burdens, but understand, Your Honor, it's an individualized assessment." (*Id.*) The district court overruled the objection. (*Id.*)

The next day, after Dr. Gavin's testimony about his qualifications, the district court qualified him, over the FBI's objection, as "an expert in the field of diabetes." (Transcript 457.) Dr. Gavin then explained to the jury that he had been retained to give an opinion on two issues, one of which was "did [Kapche] have a disability under the terms that had been set forth defining disability." (*Id.* at 461.) His testimony on that subject was introduced by this question: "Can you tell the jury whether ... [Kapche] does have substantial limitations in the way he eats and cares for himself when compared to an average member of the population who doesn't have diabetes?" (*Id.* at 465.)

The FBI objected on the ground that the question called for a legal conclusion (Transcript at 465), but the district court overruled the objection (*id.*), and Dr. Gavin proceeded to answer in words that the district court quoted when it denied the FBI's Rule 50(b) motion: "When compared to a person who does not have diabetes, Mr. Kapche is subject to a number of severe limitations in terms of his eating and the way he cares for himself." (*Id.*, *quoted in part by* Dkt. 113 at 5.) Dr. Gavin then identified the specific ways in which Kapche was severely or substantially limited

with respect to eating and caring for himself. His testimony is quoted at length at pp. 8-11, *supra*.

The FBI now renews its objection to the introductory question and the responsive testimony about "severe limitations" on which the district court partially relied when it denied the FBI's Rule 50(b) motion. Each point that the FBI now argues – that the opinion amounted to a legal conclusion, and that it lacked a foundation – is addressed separately below.

i. The Question and Testimony about Kapche's Limitations were Permissible

The district court did not abuse its discretion when it overruled the FBI's objection to the question on the ground that it asked for a legal conclusion.[16] In overruling the objection, it stated the following:

> Well, it remains to be seen whether that's the right law, but he's entitled to ask the question in that form, and the answer will be captured in that little legal capsule. We'll see how it works out.

(Transcript 465.)

The ruling reflects the reality that "substantial limitations," a phrase that appears in the statutory definition of a person with a disability,[17] has a legal

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[16] Evidentiary rulings are reviewed for abuse of discretion. *Ford v. Mabus*, 629 F.3d 198, 203 (D.C. Cir. 2010).

[17] 42 U.S.C. § 12102(1)(a), incorporated into the Rehabilitation Act at 29 U.S.C. § 705(20)(B). Under these provisions, a person demonstrates an actual disability with evidence of a physical or mental impairment that substantially limits

meaning congruent with its common, ordinary meaning. In *Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1212 (D.C. Cir. 1997), the court held that "[e]xpert testimony ... consist[ing] of legal conclusions cannot properly assist the trier of fact ... and thus it is not 'otherwise admissible.'" But testimony consists of legal conclusions only if "'the terms used by the witness have a separate, distinct and specialized meaning in the law different from that present in the vernacular. If they do, then exclusion is appropriate.'" *Id.* (quoting *Torres v. County of Oakland*, 758 F.2d 147, 150 (6th Cir. 1985)).

The FBI's objection to the district court, and its brief in this Court, make no effort to satisfy this standard. The FBI nowhere proposes to the Court that "substantial limitations" has a legal meaning different from what the jury would have understood it to mean in light of Dr. Gavin's subsequent testimony about all of the specific, fact-bound ways that controlling diabetes affected Kapche's eating and caring for himself.

Stripped of its factual underpinnings, the question and answer might have been objectionable, but the district court left that possibility open: "We'll see how it works out." (Transcript 465.) "[H]ow it work[ed] out" was that Dr. Gavin did not

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a major life activity. An individual may be substantially limited by being "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j).

leave the jury with a bald legal conclusion couched in specialized legal language; he provided facts that were consistent with the ordinary meaning of "substantial limitations." Thus, even if the FBI had renewed its objection after having an opportunity to "see how it works out"—and it did not—there would have been no abuse of discretion.

ii. The FBI did not Preserve its Foundation Objection or, if it did, the Objection has no Merit

The FBI's second complaint in the cross-appeal about Dr. Gavin's testimony is that he provided it without "hav[ing] any knowledge of plaintiff." (FBI Br. 20.) According to the FBI's jury argument style attack, Dr. Gavin "never met or examined plaintiff ... and he did not know even the most basic information about plaintiff's management regimen, including how often plaintiff tests his blood sugar levels or how many injections he takes in a given day." (*Id.*)

The FBI again distorts the actual trial record. It is true that on cross-examination, the FBI attempted to attack the records that Dr. Gavin had relied on in forming his opinion that Kapche was a qualified person with a disability. On cross examination, Dr. Gavin testified that he had formed his opinions about Kapche's efforts to control his diabetes from multiple sources. First, Dr. Gavin reviewed the "fairly extensive physical examination and historical record that had been obtained by the examining physician on behalf of the FBI." (Transcript 462.) In other

words, Dr. Gavin reviewed the same records that the FBI's own physician reviewed in branding Kapche unfit, and the FBI then attacked him for relying on the exact same data.

Dr. Gavin also reviewed three months of blood glucose logs, his A1C levels, and "the absence of recorded events [*i.e.*, hypo- or hyperglycemic episodes] that would reflect the absence of that kind of discipline." (Transcript 488.) Further, Dr. Gavin testified that Kapche could not have achieved such control over his blood chemistry without having taken great care. Kapche had to be extremely attentive to details.

> He's had to be constantly vigilant, he's had to be fastidious and very conscientious in the way he has made decisions and applied the things that he has been taught. Because you just don't get these kinds of outcomes casually.

(*Id.* at 467.) "[P]eople who achieve the kinds of results that I've seen with Mr. Kapche, are people who are going to be checking themselves very frequently. They're going to be checking themselves anywhere from five to sometimes 10 times a day." (*Id.* at 475.) Clearly, Dr. Gavin had a foundation, rooted in his medical understanding of the cause-and-effect relationship between the control measures he did not observe and controlled outcomes he did observe, for his opinions about how Kapche lived day-to-day with diabetes.

The argument is also inaccurate on a more specific level. The FBI's claim that Dr. Gavin did not know how often Kapche checked his blood sugar abuses the trial record. Dr. Gavin testified that based on Kapche's glucose logs, he was checking "at least four," and "[s]ometimes three" times per day. (Transcript 490.) And while Dr. Gavin could not recite the precise number of insulin injections Kapche took each day, he did testify that he knew Kapche took at least one injection daily of basal insulin and up to one injection with each meal. (*Id.* at 499.)

Not only has the FBI failed to explain how these records were not a medical basis for Dr. Gavin's testimony, but his testimony was fully consistent with Kapche's. (*Id.* at 538: "[D]uring the course of the day, I'll check myself anywhere from three to five times, most likely." *Id.* at 572: In addition to taking insulin along with every meal, Kapche injects a dose of long-acting insulin every evening.)

The final problem is that the FBI failed to preserve its foundation objection. When Dr. Gavin was actually on the witness stand, the FBI objected when Kapche's counsel asked about substantial limitations, but did so only on the ground that the question called for a legal conclusion. (*Id.* at 465.) The FBI did not restate its foundation objection, either then or anytime else during Dr. Gavin's testimony. Instead, the FBI chose to cross-examine Dr. Gavin on the fact that had never examined or met Kapche, in order to suggest to the jury that his opinions were not credible.

Now, however, the FBI wants to revive the foundation objection that it failed to make during Dr. Gavin's testimony. Of course, it may do so, but only by establishing plain error,[18] and admitting the evidence was not an abuse of discretion for the reasons provided above.

b. The Evidence of "Significant Adverse Consequences"

The FBI's second evidentiary point is that the district court erred in reasoning toward denial of the Rule 50(b) motion when it cited testimony from both Dr. Gavin and Kapche that Kapche "would suffer significant adverse consequences if he failed to maintain his regime for controlling his diabetes." (FBI Br. 21.) The FBI claims that "all this evidence shows" is what his health would be if his diabetes were uncontrolled, which *Sutton* prohibits. (*Id.*)

Specifically, the district court's denial quoted Kapche's testimony that "'the minute you don't do [it] is when you can have problems or complications.'" (Dkt. 113 at 5, quoting Transcript 540 (brackets in Dkt. 113, "it" referring to the "constant battle every day" of diabetes control).) Notably, the FBI did not object to the question that introduced this bit of Kapche's testimony, nor did it move to strike it, nor did it ask the district court to instruct the jury not to consider this testimony

[18] "Absent plain error, however, a failure to object to the admission of evidence normally amounts to a waiver of the right to challenge its admission on appeal." *Anderson v. Group Hospitalization, Inc.*, 820 F.2d 465, 469-70 (D.C. Cir. 1987).

for the purpose that it now fears the testimony served, nor did its Rule 50(b) motion alert the district court to a problem with the testimony. Hence, the FBI should have to show that the admission of the testimony constituted plain error (*see* n. 18, *supra*), but it does not make even the shadow of that argument.

Instead, without making any objection to the evidence itself, the FBI argues that the district court's Rule 50(b) decision should have ignored it. Even if the FBI can properly complain about evidence against which it does not raise a plain error objection, the FBI is wrong in asserting that Kapche, in that brief snippet of testimony, invited the jury (or the district court) to judge his limitations based on speculation of how his health would deteriorate if he stopped his control regimen. These few words appear in a two-pages-long answer to this question: "share with the jury the treatment regimen that you have." (Transcript 538.) They are simply Kapche's explanation to the jury of why he makes the effort to comply with his burdensome regimen. The words do not bear the FBI's construction of them.

The FBI also complains about the district court's statement that Dr. Gavin "highlighted the severe consequences Kapche would face if he did not maintain constant vigilance." (Dkt. 113 at 5, citing Transcript 465:15-467:4.) In this stretch of his testimony, Dr. Gavin touched on "consequences" three times, but each time noted the restrictions that Kapche endures to avoid those consequences:

> [H]e doesn't have the prerogative to simply eat what he wants when he wants. Everything has to be calculated and planned because everything has *consequences*. He doesn't have the luxury of simply engaging in physical activity, doing exercise, or participating in what might be strenuous leisure time activity without considering what the *consequences* could be.

(Transcript 465; italics added.)

> So a person like Mr. Kapche has to be aware and vigilant about the effects of strenuous physical exercise before the event, during the event, and hours after the event. And he really has to be taught how to monitor himself to prevent adverse *consequences*.

(Transcript 466-67; italics added.)

Again, the FBI made no objections below to any of this testimony on the ground that it invited improper speculation of how Kapche's health would deteriorate if he stopped his control regimen, nor does the FBI complain now that admission of the testimony constituted plain error. Further, the testimony did not invite improper speculation about Kapche in a state of uncontrolled diabetes, but simply acknowledged that he would suffer adverse consequences if he neglected control. The district court cited the evidence for its ability to explain Kapche's dedication to his control regimen, not as a way to amplify its estimation of Kapche's then-present limitations. With all respect, the FBI's complaint amounts to no more than nit picking.

In summary, the FBI does not dispute the facts relevant to whether Kapche was a person with a disability, and its objections and other complaints about

testimony from Dr. Gavin and Kapche have no merit. The FBI's Statement of Facts (FBI Br. 4-9) contains a mere one sentence describing Kapche's disability, and it is more argumentative than record-based (indeed, it is not even supported by a citation to the record): "Plaintiff's evidence at trial showed only that, in order to control his blood sugar levels, plaintiff must take routine measures that are not meaningfully different from the mitigating measures recommended for any other individual with well controlled, insulin dependent diabetes." (FBI Br. 8.[19]) That argumentative sentence captures the disagreement to which we now turn: whether the undisputed measures that Kapche used to control his diabetes imposed substantial limitations on his ability to eat and/or care for himself. As the district court recognized, the jury had the right to draw inferences from the facts and to conclude that Kapche was an individual with a disability.

2. Controlling Diabetes Substantially Limited Kapche's Eating and Caring for Himself

a. *Branham*, and the FBI's Other Cases

This Court "do[es] not ... lightly disturb a jury verdict. Judgment as a matter of law is appropriate only if [on the Court's de novo review] the evidence and all reasonable inferences that can be drawn therefrom are so one-sided that reasonable

[19] Hence, the FBI's brief does not actually contain a "statement of facts relevant to the issues submitted for review with appropriate references to the record." FED. R. APP. P. 28(a)(7), incorporated in FED. R. APP. P. 28.1(c)(2).

men and women could not have reached a verdict in plaintiff's favor." *Novak v. Capital Mgmt. & Dev. Corp.*, 570 F.3d 305, 311 (D.C. Cir. 2009) (internal quotations omitted; *quoting Muldrow ex rel. Estate of Muldrow v. Re-Direct, Inc.*, 493 F.3d 160, 165 (D.C. Cir. 2007)). The FBI cannot achieve that standard.

Under the Rehabilitation Act, a person demonstrates an actual disability with evidence of a physical or mental impairment that substantially limits a major life activity. 29 U.S.C. § 705(20)(B); *Taylor v. Rice*, 451 F.3d 898, 905 (D.C. Cir. 2006). An individual may be substantially limited by being "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j). The FBI ignores this test, even though its own principal authorities require it.[20]

Kapche's evidence addressed eating and caring for onself, and the FBI does not dispute that diabetes is a physical impairment, or that eating and caring for oneself are major life activities. The only issue is whether the undisputed measures that Kapche used to control his diabetes imposed substantial limitations on his ability to eat and/or care for himself.

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[20] *See, e.g.*, *Fraser v. Goodale*, 342 F.3d 1032, 1040 (9th Cir. 2003), *Nawrot v. CPC Int'l*, 277 F.3d 896, 902 (7th Cir. 2002), and *Lawson v. CSX Transportation, Inc.*, 245 F.3d 916, 924 (7th Cir. 2001).

The leading case on this question is *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999),[21] where the Supreme Court held that

> if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is "substantially limited" in a major life activity

527 U.S. at 482.[22] The Court observed that a disability assessment based on how the plaintiff would present in the absence of corrective or mitigating measures "could ... lead to the anomalous result that ... courts and employers could not consider any negative side effects suffered by an individual resulting from the use of mitigating measures, even when those side effects are very severe." *Id.* at 484.[23]

Following *Sutton*, a handful of opinions from the federal circuits have addressed diabetes management regimens as a source of substantial limitations. The

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[21] Kapche agrees with the FBI that *Sutton* and other case law decided before the ADA Amendments Act of 2008, which was not retroactive, are controlling. (*See* FBI Br. 13.)

[22] The FBI cites *Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 184, 198 (2002), for the position that "[a] substantial limitation will be found only if the impairment 'prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives [*i.e.*, major life activities]." Corrective or mitigating measures were not at issue in *Toyota*, and the case certainly did not overrule *Sutton*'s inclusion in the limitation analysis of restrictions that arise from such measures. Failure to control an impairment is not necessary for having a disability.

[23] This was the source of the district court's jury instruction on disability, and in particular the italicized portion in n.3, *supra*.

most apposite is *Branham v. Snow*, 392 F.3d 896 (7th Cir. 2005), where the facts were very similar to those here:

> In order to keep his blood sugar at an appropriate level, Mr. Branham [who like Kapche, has Type 1 diabetes] follows a treatment regimen formulated by his physician .... Mr. Branham must check his blood sugar level four to five times a day. He controls his blood sugar through the use of insulin [footnote omitted] and through diet and exercise. The readings produced by Mr. Branham's blood sugar tests dictate the amount of insulin that he must administer, as well as when and what type and amount of food he can eat. It is possible for Mr. Branham to skip or delay meals on occasion.

392 F.3d at 899. Also as in this case, the major life activities at issue were eating and caring for oneself. *Id.* at 902. In reversing summary judgment for the defendant, the Seventh Circuit held that a jury could find that Branham's treatment regimen amounted to substantial limitations on eating and caring for himself:[24]

> For Mr. Branham, these negative side effects are many. He is significantly restricted as to the manner in which he can eat as compared to the average person in the general population. His dietary intake is dictated by his diabetes, and must respond, with significant precision, to the blood sugar readings he takes four times a day. Depending upon the level of his blood sugar, Mr. Branham may have to eat immediately, may have to wait to eat, or may have to eat certain types of food. Even after the mitigating measures of his treatment regimen, he is never free to eat whatever he pleases because he risks both mild and severe bodily reactions if he disregards his blood sugar readings. He must adjust his diet to compensate for any greater exertion, stress, or illness that he experiences.

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[24] The difference in procedural postures is irrelevant because "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000).

> We must conclude that, on the record before us, a trier of fact rationally could determine that Mr. Branham's diabetes and the treatment regimen that he must follow substantially limit him in the major life activity of eating. Accordingly, we cannot accept the district court's determination that summary judgment was appropriate on the question of whether Mr. Branham is substantially limited in a major life activity.

392 F.3d at 903-04.

To distinguish *Branham* from this case, the best the FBI can do is assert that "the evidence suggested that [Branham] had to manage his diet with substantially more precision than does Mr. Kapche." (FBI Br. 16.) But the FBI provides no basis for this assertion, nor a citation to any record evidence that might support it. *Branham* is precisely on point, factually and legally. Had the FBI been able to somehow distinguish it, it clearly would have done so with at least some citation to that case, or to the record here. It failed to do so in its opening brief.

For its argument that there is "a triable issue on the issue of disability only when the claimant's diabetes [is] substantially more severe than Mr. Kapche's and necessitated a strict dietary regimen and constant monitoring" (FBI Br. 18), the FBI cites three cases: *Fraser v. Goodale*, 342 F.3d 1032 (9th Cir. 2003), *Nawrot v. CPC Int'l*, 277 F.3d 896 (7th Cir. 2002), and *Lawson v. CSX Transportation, Inc.*, 245 F.3d 916 (7th Cir. 2001). In all three, the appellate courts found triable issues of fact about disabilities in major life activities arising from treatment of diabetes.

First, regarding *Lawson*, the FBI cites no evidence that Lawson, with Type 1 diabetes, was on a "strict[er] dietary regimen" than Kapche's. *Lawson* mentions no categorical food restrictions but only, like Kapche must deal with, moment-to-moment restrictions related to blood sugar and the availability of insulin. 245 F.3d at 924. With respect to monitoring, Lawson tested his blood four to six times daily, *(id.* at 918), whereas Kapche tested three to five times. (Transcript 538.) Like Kapche, Lawson "'must always concern himself with the availability of food, the timing of when he eats, and the type and quantity of food he eats.'" 245 F.3d at 924. Also like Kapche, he "must endure the discomfort of multiple blood tests to monitor his blood glucose levels." *Id.* For Lawson and Kapche, there was no significant difference between how they controlled their diabetes.

Since there was no meaningful difference between Lawson and Kapche with respect to "strict dietary regimen and constant monitoring" (FBI Br. 18), the FBI is left to find refuge in its proposed distinction that Lawson's diabetes was "substantially more severe than Mr. Kapche's." (*Id.*) It is true that Kapche was broadly successful at regulating his blood sugar (*see* pp. 8-14, *supra*), while Lawson "[t]hroughout his life ... has had great difficulty regulating his blood sugar level," 245 F.3d at 918, which "has precipitated a number of other serious ailments that limit him physically and complicate his treatment and prognosis regarding his diabetic condition." *Id.* at 919 (footnote omitted).

But the FBI does not explain how these facts made any difference in the Seventh Circuit's analysis. The issue was whether Lawson was limited in the way he ate. And in finding a genuine issue the Seventh Circuit focused on precisely the same the same thing that Kapche's evidence emphasized: his control regimen.

> Mr. Lawson's physician characterized the measures he must take to manage his disease as "as perpetual, multi-faceted and demanding treatment regime" requiring "constant vigilance." If Mr. Lawson fails to adhere strictly to this demanding regimen, the consequence could be dire: he could experience debilitating, and potentially life threatening, symptoms. *This evidence* is sufficient for a jury to find that Mr. Lawson is substantially limited with respect to the major life activity of eating.

245 F.3d at 924 (emphasis supplied). *Lawson* provides no authority for the position that a control regimen is less burdensome simply because it is more successful. Secondary ailments and difficulty in controlling blood sugar were features of Lawson's diabetes, but they were incidental to the Seventh Circuit's analysis of how the regimen itself affected his life. Hence, *Lawson* is not meaningfully different from this case.

With respect to *Fraser*, again the FBI stumbles. There is no evidence that Fraser was on a stricter diet than Kapche,[25] or checked her blood sugar more

[25] For example, *Fraser* nowhere mentions that any foods were off-limits, just that the plaintiff, like Kapche, "cannot put a morsel of food in her mouth without carefully assessing whether it will tip her blood sugars out of balance." 342 F.3d at 1041.

frequently.[26] She was, like the plaintiff in *Lawson*, generally less able than Kapche to control her blood sugar ("her blood sugar levels are very difficult to control," 342 F.3d at 1035), and generally sicker than Kapche (she had "adult respiratory distress syndrome, ulcers, chronic nausea, and diabetic gastroparesis," *id.* at 1043). But as in *Lawson*, the other ailments were irrelevant to the Ninth Circuit *(id.* at 1043), and the burden of Fraser's regimen, not its uneven success, was its key feature as a substantial limitation on eating.[27]

The facts in *Nawrot*, another Seventh Circuit case, come nearer to the rule that the FBI would like to prove, but still fall short. Nawrot followed a rigorous control regimen, in some respects more rigorous than Kapche's: he "test[ed] his blood sugar level at least ten times a day," 277 F.3d at 904, and he was "on a restrictive diet." (*Id.* at 905.) He was, nonetheless, far less successful than Kapche, and even less successful than Lawson and Fraser: he suffered both "unpredictable hypoglycemic episodes," (*id.* at 905), and the onset of long-term complications

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[26] Like Kapche, "[s]he must constantly, faithfully, and precisely monitor her eating, exercise, blood sugar, and other health factors." 342 F.3d at 1041.

[27] "[T]he major life activity of eating is substantially limited because of her demanding and highly difficult treatment regimen." 342 F.3d at 1042. Fraser failed in arguing that she was substantially limited in caring for herself. She contended that she was limited only "when she [was] unsuccessful in attaining a proper blood sugar level,"*(id.* at 1043), not that she was limited because of her treatment regimen, as Kapche has contended. This aspect of *Fraser* is distinguishable for that reason and may be ignored.

from hyperglycemic episodes (in particular, "kidney damage and nerve damage in his feet," *id.*) "His difficulties became so overwhelming that ... he took medical leave to care for his physical health and to attend to his diabetes management." *Id.*

Thus, the analysis of Nawrot's substantial limitations (on the major life activities of caring for himself and thinking) included not only the negative aspects of his control regimen but also, as an important factor, the symptoms that his regimen failed to control. *Id.* While that is certainly a feature that distinguishes *Nawrot* from this case, nothing in the Seventh Circuit's opinion can be read to mean that a successful plaintiff must prove not only a control regimen, but also some symptoms that the regimen failed to control. Indeed, *Branham* and *Lawson* hold otherwise.

Other cases that the FBI cites are too factually different to provide useful guidance. They are cases in which the plaintiffs' control regimens entailed significantly fewer burdens than Kapche contended with. In *Collado v. United Parcel Service, Co.*, 419 F.3d 1143, 1155-56 (11th Cir. 2005) (*cited in* FBI Br. 16 & 18), the plaintiff provided very little evidence of how he controlled his diabetes, and no evidence about how the control effort entailed constant monitoring. Perhaps *Collado* was poorly lawyered, or perhaps there was no such evidence;[28] for either

[28] This possibility in *Collado* illustrates why the Court should not accept the FBI's invitation to misconstrue Kapche's disability argument. The truth is that not all persons with Type 1 diabetes will have disabilities, since their treatment

reason, the type and quality of evidence present in this case was absent in *Collado*. As the FBI has observed, diabetes did not, under the previous version of the ADA, constitute a *per se* disability. Collado simply failed to prove what Kapche did.

Similarly, in *Scheerer v. Potter*, 443 F.3d 916 (7th Cir. 2006) (*cited in* FBI Br. 16 & 18), Scheerer's evidence showed that "the predominant purpose of his dietary restrictions was to lose weight—as millions of other non-disabled individuals seek to do— rather than to control rapid fluctuations of his blood sugar levels that could lead to immediate and dire consequences." *Id.* at 920. As with *Collado*, we cannot know whether Scheerer's evidence could have been argued differently or whether it was simply absent, but we do know that Kapche's dietary restrictions *did* serve the purpose of controlling his blood sugar.

Orr v. Wal-Mart Stores, Inc., 297 F.3d 720 (8th Cir. 2002) (*cited in* FBI Br. 14 & 18) and *Cash v. Smith*, 231 F.3d 1301 (11th Cir. 2000) (cited in FBI Br. 18) are even further off the mark: the opinions mention no evidence of how either plaintiff controlled diabetes or of how the control efforts entailed constant monitoring. Further, the major life activities that Orr put at issue — seeing, speaking, typing, reading and walking, (*id.* at 724) — were not the same as those at issue here, and were not the type of major life activities that one might reasonably

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regimens are all different, and some people may choose not to undertake the more intrusive and burdensome control regimens that Kapche, Branham, and Lawson did.

expect to be limited at all by a control regimen that focused on the relationship between food intake and blood sugar. *Cash* does not even mention the major life activities that were at issue.[29]

Of all cases that the FBI cites, *Branham* is the most similar to this one, and illustrates why the district court's denial of the Rule 50(b) motion should be affirmed. Courts in this Circuit have recognized that *Branham* stands for the proposition that when an individual undertakes the dietary restrictions necessary to balance insulin and glucose levels, it creates an issue of fact on the major life activity of eating. *See Duberry v. District of Columbia,* 582 F.Supp.2d 27,36 (D.D.C. 2008) (citing *Branham*'s discussion of the life activity of eating). Branham's restrictions in caring for himself and eating were the fact issues, not complications (of which Branham had none). This is precisely what we have here. Kapche had no obligation to prove he was unsuccessful in managing diabetes in order to prevail.

b. <u>The FBI's Approach at Trial to Kapche's Limitations</u>

The FBI today contends that "spend[ing] only a few minutes each day administering insulin and checking his blood sugar" does not amount to a substantial limitation for Kapche (FBI Br. at 17), but the Court must understand

[29] According to the Eleventh Circuit, Cash "failed to specify a major life activity in which she is substantially limited." 231 F.3d at 1305.

how differently the FBI argued this case at trial. Then, the FBI urged the jury to find that it had a business necessity defense to Kapche's claim because it was simply impossible for a new special agent to manage diabetes with injections as well as with an insulin pump. (Transcript 985-97.) To make that case, it elicited such testimony as the following from Dr. Gavin about the constant vigilance required to manage diabetes:

> Q. Now, you agree, Dr. Gavin, it's more challenging for a Type I diabetic to manage his or her diabetes when that individual has demanding and unpredictable job responsibilities?
>
> A. It is more demanding for a person with Type I diabetes when there is unpredictability with respect to eating and physical activity, which is why they really have to understand the principles of diabetes management, the balance between insulin intake, food intake, and physical activity.
>
> Q. And because of that, it may in fact require changing the amount of foods that an individual eats. Correct?
>
> A. People with Type I diabetes are in fact instructed concerning those kinds of adjustments.
>
> Q. Or changing the amount of insulin that individual takes?
>
> A. Same principle.
>
> Q. Or even changing the frequency or the timing of the monitoring that a diabetic does. Correct?
>
> A. That's exactly the kind of thing that they are taught to do, and that, if they're vigilant, they will follow.

(Transcript 498-99.)

Even without large changes in day-to-day activities, the jury could easily understand from their own experience that every day is different, and could therefore also understand that diabetes management required Kapche's constant awareness and responsiveness to what his body was telling him at any moment of the day about whether his blood sugar was properly balanced on the fulcrum of food and insulin. Kapche's testimony on this point ("It's a constant battle every day. The minute that you don't do that is when you can have problems or complications. (Transcript 540,)) was consistent with Dr. Gavin's (Transcript 467: "He's had to be constantly vigilant, he's had to be fastidious and very conscientious ....), and with Dr. Tulloch's (Transcript 391: Agreeing that because "no two days are alike," a person with Type 1 diabetes has "to make insulin judgments on a daily basis.") . Even Dr. Yoder, the FBI's witness, agreed that "people with diabetes who manage it well have to very carefully limit the manner in which they care for themselves on a daily basis." (Transcript 126.)

The record contains substantial evidence – from both parties – about the difficulty of managing diabetes with insulin injections. The jury heard this from both sides and had the right to make inferences from the FBI's contention that Kapche's diabetes was so limiting that it constituted a direct threat.

c. The FBI's Mistaken Comparison

After giving *Branham* short shrift, the FBI's argument closes with the assertion that there was no "evidence suggesting that plaintiff's burden of managing his diabetes is more substantial than that of any other insulin-dependent diabetic." (FBI Br. 22.) This argument significantly confuses the major life activities at issue, and the proper comparison of burdens. The Rehabilitation Act calls for an assessment of the limitations on a plaintiff's major life activities and then a comparison of the plaintiff's limitations with those faced by average members of the general population. 29 C.F.R. § 1630.2(j) (*see also* p. 28, *supra*). The major life activities that the jury considered were eating and caring for oneself (*see* n. 4, *supra*), and so the jury had to compare Kapche's abilities to eat and care for himself with the same abilities of average members of the general population.

He did not have to show that his control regimen was more burdensome than that of other insulin-dependent diabetics. All the jury had to do, and all it was instructed to do, was to compare the manner in which Kapche eats and cares for himself with the manner in which average members of the general population eat and care for themselves. The FBI's ill-conceived comparison would have the practical effect of eliminating all persons with Type 1 diabetes from becoming special agents. If a diabetes-based disability requires substantial limitations as compared with other persons having diabetes, rather than as compared with average

members of the general population, then an applicant with diabetes will probably be considered disabled only if the applicant's health is so poor that it precludes that kind of employment. The correct comparison is not whether "plaintiff's burden of managing his diabetes is more substantial than that of any other insulin-dependent diabetic," but whether Kapche's burdens with respect to eating and self-care are more substantial than those of the average member of the general population. For the reasons explained in Sections A(2)(a) & (b), *supra*, the evidence was sufficient for the jury to conclude, from that comparison, that he was substantially limited.

B. Reply in Support of Kapche's Appeal:

After a jury found that the FBI denied Kapche employment as a special agent in 2005 because of his disability, the agency claimed, in a post-trial proceeding, that another reason justified its denial – his supposed actions almost two years later. The FBI had the burden of proof for that argument and it failed to adduce sufficient evidence to support its position. The district court erred in finding otherwise.

1. The FBI Ignores Its Burden of Proof, As Well as the Operative Cases

The district court misapprehended the proof necessary to establish the FBI's defense of after-acquired evidence. Instead of requiring that the FBI prove that Kapche was properly disqualified under its actual practices, the district court required that Kapche prove that the FBI's decision was not in good faith. (Dkt. 133,

Order p. 6, n.4 (concluding that the FBI made "a sufficient demonstration of good faith.")).

The district court's ruling directly contradicts Supreme Court precedent, case law of this Circuit, and the common sense approach applied by a variety of courts. An employer's good faith – its subjective intent – is not relevant to the inquiry of whether it is entitled to the relief afforded by the after-acquired evidence defense. To prevail on this defense, an employer must offer more than testimony of what it *could have* done under its policies. There must be evidence of what it *would have* done, and that burden of proof requires, not conclusory testimony, but evidence of what it has done in the past. *McKennon v. Nashville Banner Publishing Company,* 513 U.S. 352 (1995);[30] *see also Frazier v. Industrial Co. v. National Labor Relations Board*, 213 F.3d 750, 760 (D.C. Cir. 2000) (requiring actual evidence that the employer "has routinely dismissed employees for similar omissions" and rejecting the sufficiency of "bare assertions").

The FBI said nothing about *Frazier* in its response brief. Nor did it address the other cases that presented similar facts that Kapche designated as his principal

[30] *Cf. Price Waterhouse v. Hopkins,* 490 U.S. 228, 252 (1989) ("proving that the same decision would have been justified ... is not the same as proving that the same decision would have been made.").

authorities.[31] Rather than responding to Kapche's arguments, the government chose to rely on a Ninth Circuit decision, *O'Day v. McDonnell Douglass Helicopter Co.*, 79 F.3d 756 (9th Cir. 1996). *O'Day*, however, is not on point because Mr. O'Day did not contest either that he engaged in misconduct or that he would have been terminated.

2. The FBI Provided No Evidence Of Its Actual Practices

One might conclude from the FBI's brief that it has a rigid, absolute, black-and-white practice of denying employment to each and every applicant whose candor is questioned. The brief touts that the FBI "routinely denies" employment when applicants show a lack of candor. (FBI Br. 35.) And it insists that these decisions are made pursuant to an "established practice." *Id.*

But the FBI does not, and cannot, point to any evidence that supports what it tells this Court. To the contrary, Bonnie Adams testified that, when lack of candor is at issue, an applicant is denied a job *only* when there is a pattern of such behavior. (Hearing Transcript 122.) Nor is there a single document in the record that such a stringent standard even exists, much less that it is an established practice on the ground. To the contrary, the FBI's Suitability Guidelines state that an alleged lack

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[31] *See* Appellant's Opening Brief at v-vi, 14-19; *see, e.g.*, *Sellers v. Peters*, 2007 WL 390771 at * 7 (E.D. Mo. 2007) (rejecting the defense because the government's "actual employment practices shows plaintiff's post-termination misconduct not to bar her reinstatement").

of candor is not an automatic disqualifier. (Dkt. 127, Ex. B.) While Kapche noted this evidence in his Opening Brief, (*see* p. 22) the FBI neglected to address it.

a. The FBI's Witnesses Lacked Personal Knowledge

The FBI, in its effort to prove that it met its burden of proof, cites testimony from three FBI employees. Not one of these individuals, however, had any personal knowledge of why Kapche was disqualified, much less what was considered (or not considered) in making that determination. (Hearing Transcript 152, 166, 214-15, 257.) Nor did any of these witnesses testify about other, real applicants whose candor had been questioned. Not a single one of these officials offered the "evidence" the FBI represents as being in the record. They only made self-serving, conclusory assertions.

Here is what the witnesses really said.

Bonnie Adams. At the hearing on equitable relief, the FBI represented that Adams was the "ultimate decision-maker" with regard to Kapche. (Hearing Transcript 120). But, Adams conceded at the hearing she had no such role – she, in fact, had no role at all. (Appellant's Opening Brief 35-36). And she conceded that she had no idea about proper procedure in Kapche's specific situation: when an applicant passes a polygraph about his candor. (Hearing Transcript 152, 162, 166.) The FBI neglected to mention these facts, much less address them, when extensively quoting Adams in support of what it represents as its "evidence." It

simply repeats her conclusory assertions that Kapche's disqualification was "clear cut" and "definitively proved."

Sharon Magargle. Magargle's only role was to review a report written by the only person with personal knowledge – Tracy Johnson. Magargle did not have even second-hand knowledge of what led to Kapche's disqualification. She did not know what was in Kapche's file; she had not reviewed it. Nor did she recall even discussing Kapche with Johnson. (Hearing Transcript pp. 212-16.) Because Magargle did not know how or why Johnson concluded that Kapche was disqualified, she was in no position to testify that Johnson's decision was a "straightforward application" of the agency's actual practices. (FBI Br. 31.) The only "evidence" Margargle had to offer was that she accepted Johnson's recommendation.

Bryan Chehock. Chehock had never worked with applicant qualification issues for the FBI and had no personal knowledge of how or why Kapche was disqualified. (Hearing Transcript 257.) He also admitted that he had no familiarity with the suitability guidelines for applicant qualification issues. *Id*.

And Then There Was Tracy Johnson. Johnson, the only person with personal knowledge, did not testify. Nor was she identified in discovery. Nor was she presented for deposition. (*See* Appellant's Opening Brief at 32-37.) She, at least, would know what she did and did not do, and what she did and did not consider,

when deciding that Kapche was disqualified. The record is silent as to whether she could have provided evidence required for the next step: whether her assessment was in accordance with the FBI's actual practices. But the FBI's suitability guidelines require this to be considered. (Dkt. 127, Ex. B. at 5).

b. Kapche's Evidence: The FBI's Real Practices

The only evidence about the FBI's actual practice in candor issues came, not from the party with the burden of proof, but instead from Kapche. That evidence refutes what the FBI represents as fact to this Court. Kapche proved that the FBI did not "routinely" deny employment to applicants whose candor was questioned. This evidence pertains to two applicants whose candor was strongly in question but whom the FBI nonetheless hired.

Applicant No. 1. As noted in Kapche's Opening Brief, the FBI hired one applicant who had tried and failed numerous times to get hired by other law enforcement agencies.[32] The Secret Service refused to hire him because he was less than forthcoming about his history of drug abuse and failed its polygraph exam. (Dkt. 127, Ex. D at 5.) Records from another agency showed the applicant was

[32] The applicant applied to work with one department four times and was rejected each time due to allegations of theft and illegal drug activity. (Dkt. 127, Ex. D at 6-7.) That is not what he told the FBI though. The story he told the FBI was that he was "not selected due to the large number of applicants." (Dkt. 127, Ex. D at 18.)

involved in a drug deal and had purchased fake identification. (Dkt. 127, Ex. D at 13.) While, the FBI's investigation confirmed that he acted as a middle man for a drug buy, his vacillation between admitting and denying this crime was not enough to stop the FBI from hiring and promoting him. *Compare* Dkt. 127, Ex. D at 7, 16 (he facilitated the drug deal) *with* Dkt. 127, Ex. D at 11 (he was not the middle man) *and* Dkt. 127, Ex. D at 13 (he was not involved in drug dealing). While the FBI now represents to this Court that the allegations were found to be "unfounded" (FBI Br. 33 (citing Dkt. 127, Ex. D at 7)), that is not what the record reveals.

Applicant No. 2. The FBI hired another applicant who hid significant information during the application process. The FBI investigator concluded that he failed to disclose "serious" citizen complaints that had been lodged against him, including a complaint of excessive force. (Dkt. 127, Ex. E at 5.) While now excusing this omission because he was not disciplined, the FBI ignores that its own adjudicator wrote that the applicant was specifically asked about complaints made against him and failed to reveal them. *(Id*.) He also tried to conceal that, instead of enforcing the law, he gave "a break" to an intoxicated fellow law enforcement officer. (Dkt. 127, Ex. E at 4, 8, 10.) In addition, the applicant deliberately concealed that he had been in counseling because of his desire for an extramarital affair. (Dkt. 127, Ex. E at 5.)

The agency's position that any proven lack of candor is cause for disqualification cannot be squared with accepting these applicants.[33]

c. The Red Herring: Kapche's Alleged Lack of Candor

Instead of addressing the pivotal question – the question of its actual practices – the FBI tries to shift the focus to whether there was proof that Kapche had "deliberately" been less than candid about the gallon of gas during his interview. There are two problems with the FBI's position on this point.

First, the evidence does not support its assertion. The only evidence it offers is a form that Kapche did not prepare and was not even allowed to review before it was finalized, ignoring that he thereafter passed a polygraph specifically designed to test his candor. (Hearing Transcript 91-93; 45; 182-83).

More importantly, however, the evidence shows that not even an admitted lack of candor is an automatic bar to employment. After all, the FBI hired one man who vacillated between admitting and denying his participation in dealing drugs, and another man who failed to disclose an excessive force complaint and deliberately concealed the reason he went to psychological counseling. In those two situations, the record shows that the FBI engaged in a thorough investigation,

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[33] The government also claims that it could not accept Kapche because he would have been "*Giglio* impaired," but this was no barrier for the two applicants described above. Unsurprisingly, the FBI neglects to share with this Court how these individuals would not be *Giglio* impaired.

and based its final decision on the context of the omission, its weight, and mitigating factors. [34]

No such evidence exists in Kapche's case. Johnson's memorandum does not reveal what she considered, whether she followed the suitability guidelines, or whether she considered any mitigating factors. (Hearing, D.Ex. 35). Nor is there any assessment of Kapche's situation vis-à-vis those of other applicants. From the document alone, it appears she gave no consideration to evidence that was favorable to Kapche. The document reveals no reference to evidence that: (1) he passed a polygraph examination specifically directed to whether he had been candid, (2) he acknowledged and provided full details about being disciplined over the gas can incident when, contemporaneously, he interviewed for a position with another law enforcement agency; and (3) his supervisor fully supported his application to the FBI. (Hearing Transcript 42-43, 45, 182-183, Plaintiff's Ex. 2.)

Of all organizations, the FBI knows how to prove the elements of an affirmative defense. And its own suitability guidelines require the adjudicator to consider the very evidence it says here need not be considered. The guidelines

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[34] It is also probative that the investigation done in Kapche's case is ignored by the FBI. Its own representative went to Ft. Bend and learned from Kapche's supervisor that Kapche had admitted taking a gallon of gas. Yet the FBI continues to ignore that finding and claim that Kapche refused to admit the violation until threatened with a polygraph. (FBI Br. 7).

require that, in reaching a decision, the adjudicator must take into consideration "*prior experience in similar cases*". (Dkt. 127, Ex. B at 5.) (emphasis supplied).

3. The FBI's Failure to Plead the Affirmative Defense

When challenged because it failed to plead after-acquired evidence as an affirmative defense,[35] the government insisted that it had indeed pled that defense. It referred to its defense that Kapche was not hired "for legitimate non-discriminatory reasons." (FBI Br. 24). Since Kapche's suit was over his rejection in 2005, the applicability of the defense asserted in the answer does not logically reveal any intent that it apply to what happened in 2007. Fed R. Civ. Pro. Rule 8(c) requires clarity, not clairvoyance.

As this Court has noted, Rule 8(c) is designed to frame the issues so that the opposition will know what discovery to conduct. *Harris v. Secretary, U.S. Dept. Of Veteran's Affairs*, 126 F3d 339, 343 (D.C. Cir. 1997). But the district court did not hold the FBI to that standard. It ruled that a non-specified "legitimate, non-discriminatory reason" as a defense to a 2005 decision revealed that the FBI had a theory that deprived Kapche of equitable relief based on its actions in 2007.

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[35] Kapche recognizes that this Court has not yet decided the question of whether after-acquired evidence" is an affirmative defense. This Court's opinion in *Harris v. Secretary, U.S. Dep't of Veterans Affairs,* 126 F.3d 339, 343 (D.C. Cir. 1997), however, is instructive. *Harris* demonstrates why such a defense must be pled. *See also*, *Red Deer v. Cherokee County, Iowa*, 183 F.R.D. 642, 649-53 (N.D. Iowa 1999).

4. The District Court Denied Kapche's Critical Discovery

The district court's denial of equitable relief resulted, at least in part, from discovery rulings it made before, during, and after the hearing.

The FBI's brief ignores the critical issue: that, when directly asked in an interrogatory, it failed to identify either Johnson or Magargle as persons with knowledge of relevant facts – even though they were the only people who could know anything about the after-acquired evidence defense. (Dkt. 121, Plaintiff's Reply to Defendant's Opposition to His Motion to Exclude An Unpled Affirmative Defense, Ex. A at Interrogatory 13; Dkt. 117, Plaintiff's Motion to Exclude An Unpled Affirmative Defense, Ex. A and Dkt. 129 Response to Plaintiff's Motion for Discovery, Ex. E.) The FBI focuses instead on when Kapche filed suit, as if the timing of a lawsuit excuses a violation of the FBI's obligation to comply with Fed. R. Civ. Pro. Rule 26.

The FBI also claims that this defense was the subject of active pre-trial discovery. But it does not explain how any "active" discovery could have been done when the only people who were involved in the disqualification were never deposed. In its order, the court acknowledged Kapche's repeated complaints that "he had never had access" to Johnson. (Dkt. 133 at 6, n.4). But still the FBI claims that his decision not to depose Johnson was a strategic one. That claim is at odds with the record. Kapche moved for this discovery before the hearing on equitable

relief and the FBI fought his discovery efforts. (Dkt. 117 at 16). The district court's decision to deny that discovery was an abuse of discretion.

Despite the broad discretion afforded the district court to permit belatedly-raised claims or defenses, that discretion is not unlimited. This Court thoughtfully addressed the competing equities in *Harris*, *supra,* as Kapche noted in his Opening Brief. While the overarching desire is to present all claims and defenses for a decision on the merits, fair warning is required. The opposing party must have time to discover the evidence needed to counter the new argument. Discretion, therefore, requires consideration of whether the opposing party will be able to mount a proper defense through further discovery or whether that right will be jeopardized by time constraints. 126 F.3d at 345.

Only by misrepresenting Kapche's counsel's remarks at the hearing can the FBI claim that Kapche did not want to depose Johnson. Read in context, however, the exchange between Kapche's counsel and the district court arose from the FBI's failure to prove its own case. (Transcript 294-96). Even after the spirited colloquy the FBI seizes upon, the district court invited Kapche to detail the discovery sought, and, for the second time, he sought this discovery.[36] (Tr. at 296).

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[36] And though the government contends that Kapche did not meaningfully raise the issue of the government's database in the court below, this too is incorrect. The record shows that, in its post-hearing brief, Kapche specifically requested information about applicants who were rejected and accepted based on

The court's disallowance of discovery led to a truly inappropriate result. In most cases, the parties have a chance to question the person who knows the facts behind the decision. But, in this case, that person never appeared and her deposition was never permitted. Kapche was thus denied what is considered the "ultimate safeguard" against conclusory assertions made by his opponent – he was denied the opportunity to "present evidence tending to contradict or diminish the weight of those conclusions." *Beech Aircraft Corp. v. Rainey,* 488 U.S. 153, 168 (1988).[37]

5. The Hidden Polygraph

The district court also denied Kapche access to significant mitigating evidence: the results of his polygraph examination. While the FBI contends the decision was appropriate under the law enforcement privilege, it failed to present any evidence to support that position.

Its own authority, *Piper v. Dep't. of State,* 294 F.Supp.2d 16 (D.D.C. 2003), sets forth the means by which this information may be withheld. And a significant requirement is that the party claiming the privilege must show that the release of the

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candor issues in 2006 and 2007. (Dkt. 128 at 13-15)

[37] The case offered by the FBI in support of its "lack of prejudice" argument is not on point. In *English v. District of Columbia*, 651 F.3d 1 (D.C. Cir. 2011), there was no evidence that the trial proceedings would have been different had a timely supplemental disclosure been made. *Id*. at 11. Here, of course, the record is replete with examples of how the hearing would have been different if he had been allowed the evidence he so strenuously sought.

information "could reasonably be expected to risk circumvention of the law." 294 F.Supp.2d at 30. No such evidence is in this record and that is not surprising, since Kapche continues to work with FBI agents on a regular basis. Without that evidence the district court's ruling cannot be upheld.

6. Failure to Allow Rebuttal of Untimely Evidence.

The FBI accuses Kapche of making a "tactical error" when he followed the district court's explicit instructions by requesting permission before supplementing the record. (FBI Br. 46). It does not, however, provide any support for the concept that a party should be punished for honoring a court's orders.

If Kapche had been allowed to present his evidence, the district court would have learned that the FBI's damage model is not properly utilized when the decades left in his career make it so clearly speculative. Ironically, the speculative nature of the FBI's model is vividly shown by political events of the past year.

With state and local government employee benefits being cut, the speculative nature of any model that predicts what they will receive several decades in the future is clear. By improperly crediting those benefits as a certainty, the court erred in its ruling that Kapche would have received no benefit from two years at a higher paying job with the FBI. If the court had allowed and considered Kapche's evidence, it would have learned that the FBI's position is in opposition to standard economic damages methodology.

C. The FBI Asserts Immunity from Civil Rights Laws

Ultimately, the FBI is reduced to arguing that this Court cannot question its "business decisions." (FBI Br. 36). Obviously, this is hyperbole. The jury properly determined that the FBI violated the country's civil rights laws by denying Kapche a job because of a disability.

The FBI presents no authority for the proposition that it has immunity from proving its affirmative defenses just like any other employer. That is certainly not what the *Sellers* court found. And that argument would render a host of cases, such as *McKennon* and *Frazier,* meaningless.

Conclusion

For all the reasons stated here and in his opening brief, Jeffrey Kapche respectfully asks this Court to affirm the district court's denial of the FBI's Rule 50 motion and reverse its ruling on equitable relief and remand the case for a determination of equitable relief.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that this response/reply brief complies with the type-volume limitation set out in Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 13.0, and contains 13,523 words.

/s/ Katherine L. Butler

Certificate of Service

I certify that a true and correct copy of this document has been served upon counsel for the appellee via the court's electronic filing system and by email (at her request) on October 12th, 2011.

/s/ Katherine L. Butler