

19 OPENING STATEMENT ON BEHALF OF THE PLAINTIFF

20 MR. GRIFFIN: Good afternoon, ladies and gentlemen.

21 Have you ever heard it said you can't have it both ways,
22 or heads I win, tails you lose? Well, let me share with you a
23 little bit about this case and you may then know why I'm asking
24 that question.

25 After 9-11, the FBI needed qualified special agents to

 Scott L. Wallace, RDR, CRR, Official Court Reporter

 (202)354-3196 * scottlyn01@aol.com

1 serve this country. At that point in time, Jeff Kapche was a law
2 enforcement officer near Houston, Texas. He worked with FBI
3 special agents as part of his job. One day the FBI was
4 conducting an investigation out of his office and one of those
5 special agents said to Jeff, why don't you become a special
6 agent?

7 Jeff knew it would be more prestige, a better job
8 environment and more pay for his wife and family. The one thing
9 he wanted to know from the FBI before he started that process is:
10 Is there any FBI policy that's going to get in my way to getting
11 into the FBI?

12 So he asked Lucretia Robinson, who's here in the
13 courtroom: Is this going to get in my way? He found out later
14 from the FBI, no; as long as you qualify and as long as you can
15 do the job, diabetes won't get in your way. Jeff wanted to know
16 that because he had a barrier before with the city of San Antonio
17 and even a legal proceeding over the city of San Antonio not
18 allowing people to work who have diabetes as police officers.

19 So, he started that process in the fall of 2002 -- excuse
20 me -- in February 2002. Now, the FBI only wants the most
21 competitive people who can pass their written test, pass oral
22 tests, pass interviews. They have to be able to be highly
23 skilled. And in Jeff's case, they said our need right now -- we
24 need IT people; we need people who know how to work computers.

25 So they asked Jeff -- even though he was already working a

Scott L. Wallace, RDR, CRR, Official Court Reporter

(202)354-3196 * scottlyn01@aol.com

1 full-time job, they said if you really want to be competitive for
2 this, go back to school. So he took the sacrifice to go back to
3 school, learn computer skills and IT skills, all while his
4 application for FBI agent was pending.

5 Now, it's not like going to work for a grocery store,
6 where you might know pretty quick whether you're going to get a
7 job. Here he applied in February 2002 and it took them until
8 November 2004 to act on his application. But at the end of that
9 period, in November 2004, Jeff got a letter from the FBI. It was
10 a letter that he and his wife Nora were waiting for. It says:
11 "Congratulations. We're pleased to offer you a conditional offer
12 of employment as a special agent in the FBI." It was subject to
13 his passing his background investigation and his physical.

14 The background investigation was no problem. He received
15 his top security clearance. Then came the physical. You'll find
16 that the FBI has a very comprehensive way of making sure that
17 people -- or supposed to be making sure that people who are
18 actually given offers to the job of special agent, that they can
19 actually do them. And they have a very sophisticated program in
20 place. They hire expert physicians around the United States to
21 examine people who the FBI has chosen to be special agents.

22 There's one in Houston. His name is Dr. Burpeau. He's
23 paid by the federal government, by the FBI, \$257,000 a year to
24 assess and certify that a person the FBI has offered a job as
25 special agent is capable and certified as being able to perform

Scott L. Wallace, RDR, CRR, Official Court Reporter

(202)354-3196 * scottlyn01@aol.com

1 all of the essential functions of the job.

2 Now, Jeff went through this process and it was arduous.
3 It took more than a few days to get it all completed.
4 Dr. Burpeau -- that's the name of the doctor in Houston -- he ran
5 Jeff through a bunch of lab tests, interviews, and at the end of
6 that process -- it took him more than a week, Dr. Burpeau -- at
7 the end of that process, he has to fill out an exhausting record
8 and send it to the FBI and he has to determine whether or not
9 that person selected to be an agent is qualified to perform the
10 essential functions of the job or not qualified.

11 And if they're not qualified, he's directed by the FBI to
12 say what defects, if any, could play a role in interfering in the
13 person's ability to perform the essential functions of the job.

14 At the end of that process, Dr. Burpeau, who is highly
15 paid because he's a board certified internal medicine doctor, who
16 has been given information about the job by the FBI so that he
17 can make a certification whether a person is qualified to perform
18 the job -- at the end of that process, he tells Jeff Kapche
19 congratulations, you have passed your physical.

20 Now, Jeff knows he's got one more step. He's got to go do
21 an actual -- some sort of physical endurance test. He's got to
22 go run a certain amount of distance and a certain amount of speed
23 under a certain amount of time. But he knew he was going to pass
24 that and he did. And he even tells his boss where he works at
25 the sheriff's department in suburban Houston, I have gotten my

Scott L. Wallace, RDR, CRR, Official Court Reporter

(202)354-3196 * scottlyn01@aol.com

1 job at the FBI and I'll be going to Quantico.

2 The next call that he got was from Lucretia Robinson, who
3 you'll hear was not happy. She was disappointed, but she called
4 him and said, Jeff, I'm sorry to tell you that they've rejected
5 you from headquarters because you have diabetes. They're afraid
6 you'll go to a dangerous country and not be able to have your
7 insulin.

8 That's what they said even though he passed the tests,
9 he'd been given an offer, he'd been certified clear for duty by
10 someone who knows what they're doing.

11 What had happened, unbeknownst to Jeff and unbeknownst to
12 the public, a person in Washington, D.C., an FBI employee, a
13 doctor at HQ, had overruled the FBI's own examining physician in
14 deeming him unfit for duty on January 11th, 2005. That man does
15 not have expertise in diabetes. That man has no understanding of
16 the advanced insulin that Jeff uses, how he's protected 24 hours
17 a day from calamity on his treatment. He didn't have any
18 expertise, how it works with law enforcement and insulin -- the
19 same thing Jeff Kapche has been doing for more than ten years as
20 a law enforcement officer in the Houston area.

21 But when Jeff said, "This cannot be right. I passed all
22 the tests. I did everything they asked me. My background, my
23 physical -- I passed," that's where the Catch-22 comes in.

24 As soon as he did that, they claimed diabetes is no
25 disability whatsoever. You're doing so great with your diabetes

Scott L. Wallace, RDR, CRR, Official Court Reporter

(202)354-3196 * scottlyn01@aol.com

1 that it's trivial. It's just a nonissue. We can discriminate
2 against you, they say, and reject you because you have diabetes
3 even though your diabetes, we say, is so trivial you don't have a
4 disability at all.

5 So the same condition that disabled him from the job is no
6 disability at all. That is -- that is the Catch-22 that you will
7 see in this case.

8 Who was the man who had the bias in this case? His name
9 is James Yoder and you're going to see him testify later this
10 afternoon. He came up with it. It's not written down anywhere.
11 He's going to admit to you that official policy at the FBI is --
12 and you'll see it as soon as I'm allowed to show it to you -- the
13 FBI policy that says all individuals will be reviewed on a
14 case-by-case basis on their own merit, not lumped in with
15 everybody else.

16 Now, we all here know, and you'll hear it in this trial,
17 people with diabetes -- we have a whole range of how we deal with
18 it. It's a hard disease. Some people don't do as well as others
19 with it, sometimes not even their fault. But you're going to
20 hear throughout this trial that this man has been the one in a
21 million. He manages it. He manages it every day. He manages it
22 while becoming one of the best law enforcement officers around.
23 He's managed it by having promotions, even while he has diabetes,
24 chasing criminals, working at night, doing the things that law
25 enforcement people do. He's done all that.

1 But you will find that FBI policy on paper says every
2 person will be given a case-by-case assessment and since we need
3 good officers, we will not discriminate against any of them on
4 account of disability. So the policy on paper, their official
5 policy looks like, A, they're going to judge everybody
6 case-by-case by people who know what they're doing; and B,
7 they're not going to discriminate against people who have a
8 disability unless it actually interferes with their ability to
9 perform the job.

10 But you're going to hear Dr. Yoder. He didn't do that.
11 He had an unwritten rule. You'll hear me ask him: Is this
12 written down or published anywhere? No. I asked him, how would
13 somebody like Jeff or any of the other millions of people with
14 diabetes on insulin treatment -- how would they know of your
15 hidden rule?

16 He answered bluntly, he won't know.

17 Okay. Well, then, I asked him -- and you know what this
18 is about? This doctor in Washington who is at the FBI, the HQ
19 guy, he has a fascination for a device that we call an insulin
20 infusion pump. It's be in evidence. Both sides are offering it.
21 It's a battery powered device. It's got many parts. You've got
22 insulin cartridges, batteries, you've got all these buttons. And
23 what happens is you stick a needle in your stomach like this and
24 then you remove the needle and then there's a catheter that stays
25 in there for a few days and it delivers insulin to you.

Scott L. Wallace, RDR, CRR, Official Court Reporter

1 That's what an insulin pump is. They cost about 7,000
2 bucks and you'll hear in this case that 15-20 percent of people
3 with insulin treated diabetes use this battery powered device.
4 Now, the other 85 percent of the people in this country, you're
5 going to hear, use a didn't kind of device. Some people call it
6 a pen, some people call it a syringe, but it's a device that you
7 twist and shoot.

8 Insulin now lasts 24 hours. People take one shot before
9 they go to bed, they're covered to imitate the normal pancreas of
10 those of us who don't have diabetes.

11 So there are different kinds of insulins, stuff you take
12 after a meal; sometimes you have different kinds of insulin. But
13 the reason why I'm telling you this is Dr. Yoder didn't know any
14 of this. He was fascinated with this device (indicating). So he
15 had an unwritten rule that nobody would know, that not even the
16 public would know, not even the FBI's \$257,000 expert examining
17 doctor would know about this ban.

18 You'll also hear that he kept it secret for a reason,
19 because he had this deal. He rejected everybody on Jeff's
20 therapy no matter how well they did, even if they're the best law
21 enforcement officer, even if they have the best insulin
22 treatment, even if that's the person who might be the person who
23 would catch the most wanted criminal in this country, they would
24 not get in even though they passed their physical because of
25 Dr. Yoder's fascination with this device.

1 But I asked him, Dr. Yoder, do you think there's some
2 ethical implication in you, a nonexpert in diabetes, telling
3 somebody doing as great as this guy on his therapy to change his
4 treatment even though you're not his doctor?

5 Do you know what his answer was? "Well, that's part of
6 the reason why we don't write it down."

7 Can you imagine that? Is there an ethical implication?
8 That's part of the reason why I don't write it down.

9 But later on -- and you're going to hear it -- I ask
10 Dr. Yoder: So somebody's choice is, if somehow they find out
11 about your rule that's not written down anywhere, even if they
12 knew it, you wouldn't take them if they wouldn't go to your
13 chosen method of treatment. In other words, the FBI wanted to
14 play doctor. We'll prove that to you. They say to everyone,
15 whether they're 36 years old, 26 years old or 25 years old, no
16 matter how well you're doing with your diabetes, you've got to
17 change to Yoder's treatment or you cannot get into the FBI.

18 And I asked him that question: So that's their choice?
19 Let you play doctor or they don't get in?

20 He said, "You do have it right. That is correct."

21 Well, why, I asked. Well, they first do the Catch-22, the
22 Catch-22 being you don't even have -- just because you have
23 insulin treated diabetes and just because you have to take shots,
24 just because you have to do finger sticks, just because you have
25 to carb count, just because you have to use conversion factors of

Scott L. Wallace, RDR, CRR, Official Court Reporter

1 how much insulin it takes to compensate and bring you back to a
2 level, a flat level -- he does that 24/7. He's disciplined, the
3 way he eats. Unlike anybody else, he knows how to count carbs;
4 he knows how to count carbs when he's exercising; he knows how to
5 count carbs when he's sitting in a courtroom and he knows how to
6 count carbs when he's sick, because the way the human body is, we
7 use insulin differently when we're sick, we use insulin
8 differently when we're physically active, we use -- sometimes
9 people even use insulin differently when they're under stress.

10 But Jeff has managed through all of that to keep his blood
11 sugar levels to a very, very tightly controlled state. You will
12 hear Dr. Yoder admit -- and this is -- we'll prove this to you,
13 that his A1c value -- that's a test that people do to see how
14 well their blood sugar's controlled -- on the test, you'll see
15 four and a half to six is what normal people have who don't even
16 have diabetes.

17 When Dr. Yoder rejected Jeff Kapche, his was a six.
18 You'll hear doctors say it's a rare day when a person with
19 diabetes can get a blood sugar level over 90 days that's like a
20 person that doesn't even have diabetes. That's how controlled he
21 was.

22 But with Dr. Yoder, that was not enough. It was not
23 enough. We asked Dr. Yoder -- now, you pay this doctor \$257,000
24 to make a judgment on whether Jeff is determined to be fit for
25 duty or medically unfit for duty. Did you pick up the phone or

1 do anything to talk to him? You're not an expert. He is. He
2 knows about diabetes. He's hired and paid \$257,000 to make these
3 determinations.

4 He said no.

5 Why not?

6 "Because we don't do it that way."

7 I'm going to ask him, and you'll hear his answer: "Why
8 don't you do it that way?"

9 You're going to get some answer like, it wouldn't change
10 our minds. Or maybe I didn't want to hear what he had to say,
11 because what an expert would have to say is that rule makes no
12 sense, that you would accept people using this sort of thing
13 (indicating) and not people who are protected 24 hours a day
14 (indicating). But that is what you're going to hear Dr. Yoder
15 say during his testimony.

16 Now, after they get with the Catch-22, what happens then
17 is they have to come up -- they have to come up with some
18 explanations for this. Now remember, until we got into court or
19 into legal proceedings, we didn't get all these secret memos
20 you're going to see what the FBI is writing down. But we're
21 going to prove to you, and you're going to see it in the
22 evidence -- it's going to be black and white -- they told Jeff
23 his diabetes was not sufficiently controlled and, therefore, he
24 had to be rejected.

25 But their memo that was private says the pump was more

1 dependable than the pen. That's the words they use. This,
2 that's got all these parts, batteries, things that fail, recall
3 notices, all of that -- that's more dependable than this. That's
4 what they wrote.

5 When we got into court, they had to come up with some
6 ideas of how are we going to get out of this. What are we going
7 to say about why we did what we did? Because Dr. Yoder had
8 turned a blind eye.

9 So, Yoder -- when we got him into court, we asked him, did
10 the FBI ever conduct any analysis whatsoever of these two devices
11 as to risk of having one as a special -- no, didn't do that.

12 Asked him this: Have you ever heard of anybody who's done
13 a study on the relative risk and reliability of this device, the
14 \$7,000 pump, or this pen? No, hadn't done that.

15 Then I asked him this: What other employer in the world
16 has a rule like Dr. Yoder's where you get a case-by-case with
17 this (indicating), case-by-case assessment and be judged on your
18 merit with this, but not with this (indicating)?

19 None. He couldn't think of one.

20 We asked their expert that, too. He said, I haven't even
21 looked into that. I have no clue.

22 Well, I want to talk to you a little bit about the
23 different reasons that you're going to see in this case, and
24 you'll hear them all laid out. Excuse number one was diabetes is
25 disqualifying because it's incompatible with safe performance.

1 That's what they said in their memo.

2 They had to withdraw that one because they had a small --
3 or rather a large problem. They found out that they let people
4 work special agents every day with the same treatment Jeff Kapche
5 has, insulin injections on Lantus insulin just like Jeff has.
6 They let them work. They let them work in the United States.
7 They let one of them even go to Jordan in the Mideast on some
8 counter-terrorism mission. They let them work with the very same
9 treatment that Dr. Yoder banned him.

10 Dr. Yoder doesn't reject them. He doesn't get them fired.
11 He doesn't medically disqualify them. He only disqualifies those
12 who seek to come in. He will tell you they let people who get
13 diagnosed with insulin treated diabetes while they work for the
14 FBI -- they get to stay even though they are taking on the ordeal
15 of learning how to deal with insulin treated diabetes. And it is
16 learning. And some people don't -- can't do it as well as he
17 can. Some people, it takes weeks or months to deal with learning
18 how to work with diabetes and insulin.

19 So what you will hear in this case is that Dr. Yoder
20 accepts people who are less certain to deal with diabetes than
21 Jeff Kapche, who has proven. We will show you it's more likely
22 than not they keep the unproven with diabetes when they're
23 diagnosed and reject those who have already proven for 15 years
24 they can be successful law enforcement officers.

25 So they got rid of that excuse.

1 The next excuse they said was: Your diabetes is not
2 sufficiently controlled. That's what they wrote him in the
3 letter. They said, "Your diabetes is not sufficiently
4 controlled."

5 And then they went and looked at his file from
6 Dr. Burpeau, and it will be in evidence, the whole thing.
7 Dr. Burpeau says the opposite. Dr. Burpeau says, "well
8 controlled, "doing well."

9 And then he gets asked this box -- is the box: Is there
10 any defect, any at all that might interfere with his ability to
11 perform the essential functions?

12 None.

13 So, excuse number one, gone: "Incompatible with safe
14 performance," because they have to admit they let other people
15 with his therapy work.

16 Not sufficiently controlled? They'll admit that's not
17 true either. Dr. Yoder will tell you he's a role model for
18 people with diabetes. Dr. Yoder will tell you, of all the charts
19 he's every seen at the FBI, no one stands out with any better
20 control over diabetes than Jeff Kapche. So that excuse had to go
21 by the boards.

22 And then they had the excuse that you'll see in the memo,
23 that this (indicating) is more dependable than this (indicating).
24 Well, the problem with that is that not even their own expert
25 could agree with that, and so they've kind of dropped that. Not

1 more dependable. They have other words to describe it.

2 And then they came up with age. You'll hear them all in
3 this case. They've got all kinds of explanations, but the age is
4 the most interesting one. They rejected him when he was 36.
5 They tell you that if he was 25, 35, or 30, it didn't make any
6 difference; they weren't going to let him in as long as he
7 wouldn't go to Dr. Yoder's preferred therapy. He had to let them
8 play diabetes doctor for him. Let the FBI play doctor for him or
9 he couldn't get in.

10 So what they say is, well, you were almost 37 when we
11 rejected you, so it's really your age, you know. But what
12 about -- you'll hear them say this -- what about the young man
13 who's got the kind of numbers and proof of 15 years of law
14 enforcement -- what about the person who says, "I'm not going to
15 change my therapy? I'm doing great. My doctor told me not to."

16 And you will hear his doctor's testimony: "I told him not
17 to change therapy and go on a pump because pumps are for people
18 not well controlled in diabetes."

19 So, the dependable went down the tubes; they went with the
20 age. But the age goes down the tubes and it kind of drifts in
21 and drifts out, but I think in this trial, they're going to talk
22 about age. "Well, he was almost 37, you know. Maybe we would
23 have -- maybe he might have changed. If he would change, we'd
24 let him in."

25 But the undisputed testimony from Dr. Yoder was not going

1 to let him in no matter what his age was as long as he was on the
2 therapy that was doing so well for him in his law enforcement
3 career and in his life.

4 And then they have one -- I think it's the most recent
5 one, but they can tell you about it. They've got one that they
6 say that pump therapy is more flexible. Well, the tubing is
7 flexible. But the problem with the tubing, as you'll hear in
8 this case, is a little tug on a door nail or anything else and
9 it's busted. It's broken. These things go into your gut with an
10 adhesive. Get sweaty, they come off. Now, you can put gook and
11 tape and stuff and you can try to do that, but these people are
12 maybe out sweating.

13 But you're going to hear them try to prop up the idea that
14 a pump is more flexible than injections. That's what they're
15 going to say.

16 But here's the problem they're going to have. At the end
17 of the case, you're going to get questions. And I'm glad Judge
18 Robertson shared with you this morning that we have the burden of
19 proof on a couple of questions and the FBI has the burden of
20 proof on some questions. Our burden is to show it's more likely
21 than not that Jeff was a qualified person with a disability. And
22 Judge Robertson will define those terms for you.

23 But what it really means -- and the judge will tell you
24 what it means, but to be qualified means to have the education,
25 experience and prerequisites to do the job. The FBI admits he

1 has those. That's why they offered him the job.

2 The other part of the definition is he's able to perform
3 the essential functions of the job. They're not going to have
4 anybody take that stand who will say this man couldn't do every
5 one of those functions that they have. They're going to tell you
6 they offered him that job because they thought he could.

7 You're going to hear evidence that in 15 years of law
8 enforcement, diabetes has never interfered with a single function
9 of his job as a law enforcement officer and he's been doing
10 juvenile crime, white collar crime; you name it, he's been doing
11 it because he's been working at the sheriff's office. That's
12 what you're going to hear.

13 The definition of disability is people who have a
14 substantial limitation in the manner in which they eat, compared
15 to average people in the population who don't have diabetes. So
16 you're going to hear the burden's on him, what he's got to do
17 when he eats. He's got to check his blood sugar. He's got to be
18 able to have enough insulin ready to go to cover his meal. He's
19 got to do finger sticks with monitors that look like this
20 (indicating) and draw it up with a little needle and put a drop
21 of blood on the end and figure out what it is. And then he's got
22 to do all the mental calculations to do that every single time he
23 eats. If he wants to exercise, if he wants to travel, he's got
24 to undergo those burdens to keep diabetes under control the way
25 he has.

1 So he cares for himself in a much more limited way than
2 most of us. We can eat when we want, we can have an extra piece
3 of pie when people want to, that sort of thing. But people who
4 have diabetes -- we can't do that. We've got to be able to do
5 all those things.

6 So the bottom line is what we have to show you is it's
7 more likely than not that Jeff Kapche was a qualified person with
8 a disability and that his disability was the cause of the FBI
9 rejecting him. And you'll see their letter. Their letter says
10 you're rejected because you have diabetes and you're on the wrong
11 therapy and we don't like -- we're not taking anybody on your
12 therapy. You've got to go to Dr. Yoder's therapy, even though
13 he's not an expert. That's what they say.

14 Now, the FBI has the burden of proof on two questions.
15 Because our country makes it unlawful for people to have rules --
16 bans like this; in other words, standards that screen out people
17 with diabetes Congress has said is unlawful.

18 So they can have an affirmative defense. They can excuse
19 it and get away with it if they can prove that, A, that Jeff
20 Kapche was going to be a direct threat to injure someone had he
21 been hired as a special agent, and we don't think they'll have
22 any evidence of that.

23 You'll also hear that they are going to ask you to answer
24 a question about whether it was necessary; whether this ban was a
25 necessity, not an option, not a preference, not Dr. Yoder's rule,

1 but a necessity. You'll get to decide at the end of the case
2 whether flexible -- even if they can make an argument this is
3 flexible; I don't think it is, but if they make this argument
4 it's flexible, you're going to hear evidence of whether necessity
5 means reliability or does necessity -- or is flexibility more of
6 an option when you're undergoing guns and when you're in an
7 environment where there's violence going on.

8 And the FBI will tell you that some of their agents go to
9 Afghanistan, Iraq, foreign countries. They go all over the
10 place. And Dr. Yoder is going to tell you his only concern with
11 Jeff Kapche -- he says he likes Jeff Kapche -- his only concern
12 is he might have to go to a place like that, and if you're going
13 to what he calls "an international austere medical location," he
14 needs to have this (indicating).

15 I asked him, where are they going to get supplies if
16 something goes wrong?

17 Well, they mail order it.

18 What's going to be mail ordered in Iraq? He doesn't have
19 that problem with this.

20 No, you're right.

21 Well, then, why are you going to have something like this
22 that can come off when you're in battle, come out of your
23 stomach, the tubing break, the electricity goes off at the wrong
24 time, it's too cold, it's too hot, the battery's not working
25 right?

1 He says, well, I just still think it's more dependable.

2 That's what he said. I think it's more flexible.

3 That's what you'll have to decide in this case, whether
4 they have proven this ban is a necessity or have they proven this
5 ban was come up with by a man in Washington who will admit to you
6 this afternoon that he has no expertise whatsoever in diabetes.

7 So, who are you going to hear in this case as witnesses?

8 Well, you're first going to hear Dr. Yoder. He's going to
9 explain that ban to you. He's going to have to explain why he
10 says -- let me make sure I've got my notes right -- "that people
11 must switch therapy or not be hired."

12 He will tell you why he answered that they don't write it
13 down, because it might be an ethical -- breach of ethics to tell
14 someone to change their therapy when it's working so well. He
15 might tell you why the FBI doesn't have anybody with expertise
16 looking at these cases. He might tell you why the FBI alone
17 among all the companies and organizations in the whole world ban
18 people on injection while giving a case-by-case assessment of
19 people with the pump.

20 You will hear him say it didn't matter how good Jeff was
21 or how -- what his insulin was like, no matter how well managed
22 or how long, it didn't matter to Dr. Yoder because a hundred
23 percent of them are rejected. FBI policy says everybody gets a
24 case-by-case assessment. Dr. Yoder says only those willing to
25 switch to his therapy.

1 Next, depending on scheduling, you'll either hear
2 Mr. Raucci, who -- I didn't give him this name; he did. He says,
3 "I am God for HR at the FBI."

4 He's going to say we're supposed to give a case-by-case
5 assessment. He's going to say, "I don't know where this rule
6 came up with where people with pumps get a case-by-case
7 assessment, but people on a pen do not. I had nothing to do with
8 it," he said. "I know nothing about Mr. Kapche."

9 But what he will tell us is when agents go to Iraq and
10 Afghanistan, it's optional. It's voluntary. They've never in
11 their history made somebody go to one of those countries who
12 don't want to go. They have enough of them volunteering for it.

13 And I can tell you the evidence would be Jeff Kapche could
14 go to any of those countries. There's going to be evidence that
15 you might believe he could do better than some of the folks they
16 have over there, because Dr. Yoder is going to admit to you they
17 let people work who have heart disease, hypertension, high blood
18 pressure, extreme obesity. They let them work. They can stay
19 and guard the public.

20 This man is hard as a rock and fit as a fiddle -- he
21 can't, even though he passed all the tests. That's not -- we
22 will prove to you that's not a business necessity. We will prove
23 to you that that's a business absurdity, where you keep people
24 who are less qualified than those they reject.

25

Next you will hear Dr. Desmond Schatz. He's a well known
Scott L. Wallace, RDR, CRR, Official Court Reporter
(202)354-3196 * scottlyn01@aol.com

26

1 diabetes expert. He's a physician, a teacher. He teaches young
2 people at the University of Florida Medical School. He teaches
3 patients and families in Gainesville and he does research in the
4 hope of a cure for diabetes some time in our lifetime.

5 He will tell you in no uncertain terms that Jeff Kapche is
6 not a direct threat to anyone and that the FBI cannot prove that.
7 He will also show that it is not a business necessity to ban
8 everybody on this therapy (indicating) that 80 percent of us use
9 and let only the 20 percent of us on the \$7,000 pump get a
10 case-by-case assessment.

11 You then will hear from Dr. Brian Tulloch. That will be a
12 little different. The judge will explain it to you. But
13 Dr. Tulloch will testify -- because he's in Houston treating
14 patients, we're going to read his testimony to you, but he will
15 tell you, "I told Jeff Kapche, you shouldn't go on the pump
16 because pumps are for people not in good control of their
17 diabetes and you are," he said, "the best ever." That's what he
18 wrote on his charts about Jeff Kapche. He said Jeff Kapche is
19 the kind of patient any doctor would like.

20 He's got a great law enforcement career, albeit not doing
21 as well as he would do with the FBI, but he's a great law
22 enforcement officer with good labs, with good numbers. He's
23 played by the rules, played it by the book. And his doctor will
24 say that there was no need for him to go on the pump.

25

And I think every doctor that's asked a question in this

Scott L. Wallace, RDR, CRR, Official Court Reporter

(202)354-3196 * scottlyn01@aol.com

27

1 trial will probably answer it the same way: Is there any
2 employer anywhere in the world who needs a rule that bans
3 everybody who is on injection therapy and gives a case-by-case to
4 people on the pump?

5 Now, you won't hear any doctors criticize either of these
6 therapies. Everybody's different. The FBI may even bring one of
7 their agents in who actually uses a pump. I don't know.
8 Somebody who actually likes the pump and you'll get to hear. But
9 everybody's different and that's what every doctor will say.

10 So after Dr. Schatz, who will you hear? Well -- excuse
11 me -- Dr. Tulloch, who will you hear?

12 You will hear from Dr. Crantz. Now, I know this is a very
13 lot for you to absorb, things that we've been living now for the
14 last two or three years that this has been going on. But I asked
15 Dr. Yoder one time, I said, "Dr. Yoder, who came up with this
16 rule? Who came up with this ban of letting people have a
17 case-by-case only if they're willing to go on the FBI doctor's
18 preferred therapy?"

19 He said, "I ran into a guy name Crantz one time. He's an
20 endocrinologist in suburban Virginia over there. And I ran into
21 him at a reception someplace he's the one that came up with it.
22 I had a conversation and he came up with this ban, I thought."

23 Well, I'm going to go talk to him. He's supposed to be an
24 endocrinologist. No endocrinologist would say that. So we

25 subpoenaed him. We asked him the question: "Did you come up
Scott L. Wallace, RDR, CRR, Official Court Reporter
(202)354-3196 * scottlyn01@aol.com

28

1 with this ban that Yoder has got over there at the FBI?"

2 "No," he said, "absolutely not." I quote: "Bans scrape a
3 nerve with me, Mr. Griffin. Why do you keep asking me about
4 banning? I would never ban anybody, any people. I believe in
5 opening doors of people with diabetes, not close them. I would
6 have never have told Dr. Yoder to ban all people on injections
7 just because I thought somebody with a pump might make it."

8 That's what he told me. That's what he told me before the
9 FBI went and hired him, okay? He gives this testimony under
10 oath. He denies telling Yoder he came up with this ban. He says
11 he doesn't believe in bans. He says everybody -- and I'm trying
12 to remember. I believe this is almost verbatim: "I believe
13 every person for this position of special agent should be judged
14 on a case-by-case basis."

15 Wow. Surprisingly, after he said that, the FBI went and
16 hired him and he sort of changed his tune a little bit. We'll
17 find out tomorrow and the next day how much they paid him, but
18 10, 20, 25,000 bucks. But whatever they paid him, he now wants
19 to say the ban can be defended, although he won't say it's
20 necessary. I asked him that: "Do you think it's a necessity?"

21 "Well, I'm not taking any position on that."

22 I said, "Do you claim that Jeff Kapche is a direct threat
23 to" --

24 "Oh, no, I don't take any position on that."

25 I said, "Well, do you think a pump is more dependable than
Scott L. Wallace, RDR, CRR, Official Court Reporter
(202)354-3196 * scottlyn01@aol.com

29

1 a pen?"

2 No, I don't think it's more dependable, but it might be
3 more flexible unless, of course, it breaks."

4 And then you'll hear in this case a fact of life: When a
5 pump goes bad and people don't have insulin in three to four,
6 five hours, they could be dead, because that's what diabetes is.
7 People don't have enough insulin coming out of their pancreas to
8 cover the glucose and the sugar in their blood and their blood
9 gets toxically full of sugar.

10 Well, on Jeff's 24 hour insulin, he's covered 24 hours a
11 day. He can't get that because he's covered. Now, he's very
12 tightly controlled so he carries a pen with him when he goes to
13 eat. He covers a little more just to cover the carbs when he
14 eats.

15 But you'll hear Crantz say when it's sweaty, that's the
16 enemy of the pump. They can't go underwater. This same FBI who
17 tells you they like pumps -- they've got jobs that require people
18 to go scuba diving. You can't use a pump scuba diving. Only
19 people on injections can scuba dive. Only people on injections
20 can climb to high altitudes. Only people with injections can
21 work in the cold. These pumps have limitations. They might be
22 fun. And they might be fun for Yoder and maybe he owns stock in
23 a pump company. I don't know.

24 THE COURT: Mr. Griffin, this is getting into argument,

25 really,

Scott L. Wallace, RDR, CRR, Official Court Reporter
(202)354-3196 * scottlyn01@aol.com

30

1 MR. GRIFFIN: Thank you, Your Honor. I'll move to the end
2 of the witnesses.

3 THE COURT: Thank you.

4 MR. GRIFFIN: Thank you for that, Your Honor.

5 In any event, you'll hear what Dr. Crantz has to say. And
6 I'm looking forward to presenting him to you.

7 You'll also hear from Jeff and Nora Kapche. He will tell
8 you what it was like to go two years and eight months to wait for
9 a yes or no. He will tell you what it was like going back to
10 school with a young family, even though he has a full-time job,
11 to go get IT computer skills that they said they needed. He'll
12 tell you what it was like to feel like that two and a half years
13 is worth the wait in November.

14 But he's also going to tell you about the professional
15 humiliation of telling your boss you're going into the FBI
16 Academy at Quantico and then have to tell your boss that you're
17 not, that you were rejected from our country's premier law
18 enforcement organization in this country.

19 Now, he's not one to talk a lot. He's a stoic kind of
20 person. He doesn't go around talking and complaining. But I'm
21 going to tell you, and you're going to hear the evidence from him
22 and his wife, that it affected him deeply.

23 Now, has he gone into the mental hospital or anything like
24 that? Of course not. He still works. He gets up and works

25 every day. His wife will tell you he's had lots of trouble

Scott L. Wallace, RDR, CRR, Official Court Reporter

(202)354-3196 * scottlyn01@aol.com

31

1 sleeping when that happened, after it happened. His stomach was
2 all messed up. He had nausea. He had headaches. He was not the
3 same person. That's what this kind of decision happened [sic]. P

4 And at the end of the case, there will be, as the judge
5 shared with you this morning, Judge Robertson, should you find
6 that he was an individual, a qualified individual with a
7 disability, and should you not -- should the FBI not prove to you
8 that this ban was a necessity, and not prove that Jeff Kapche was
9 a direct threat, that you will place a value in one blank in the
10 jury form of what was taken away from this man and caused to this
11 man because of what the FBI did in this case.

12 We're going to finish, because of scheduling, again --
13 Dr. James Gavin used to live in Washington. He was the president
14 of the American Diabetes Association when he was here. He also
15 was the first person of color to be elected as president of the
16 ADA. He is the leader in our world, all over the world in
17 studying how diabetes affects people of color, African-Americans,
18 Native Americans and Hispanics, because it does.

19 But he knows about Type I, Type II diabetes. He's taught.
20 He was the dean of the medical school at Morehouse in Atlanta.
21 And he's going to tell you one simple thing. If there ever was a
22 qualified person with a disability in this country, this man is a
23 qualified person with a disability.

24 That will be our last witness on Thursday morning.
25 Because of scheduling -- and the judge will be always the boss of
 Scott L. Wallace, RDR, CRR, Official Court Reporter
 (202)354-3196 * scottlyn01@aol.com

32

1 all of our scheduling, but we may have to put some witnesses out
2 of order. We have Dr. Schatz coming in from Gainesville. He'll
3 be here between 9 and noon tomorrow. Dr. Gavin is flying in here
4 on late Wednesday night and is going to be here from 9 to noon on
5 Thursday. So we're all going to work around together to make
6 sure you get to hear what you need to hear about answering those
7 five questions.

8 Now, all of this you will hear over the next several days
9 will help you decide whether it's more likely than not that Jeff
10 Kapche is a qualified person with a disability. And you will
11 decide whether the FBI has proven that this ban is necessary and
12 not just optional, convenient or preferred. You will also see if
13 they can prove their accusation, because those who do the
14 pointing got to do the proving, that this man was going to be a
15 direct threat to anyone.

16 Yes, we're at the end of this opening statement and I
17 appreciate very much the opportunity of telling you what we are
18 going to present to you to enable you to decide this case.

19 I think you can -- I can say this very sincerely. We
20 expect the FBI to obey the law as it enforces it. I expect Judge
21 Robertson will instruct you the government has the same rights
22 and obligations to follow the law as you and I and the public. I
23 very much look forward to presenting the evidence to you to help

24 you make the best decision in this very important civil rights
25 case.

Scott L. Wallace, RDR, CRR, Official Court Reporter
(202)354-3196 * scottlyn01@aol.com

33

1 Thank you, Your Honor.