

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Jeffrey Kapche,  
Plaintiff,

vs.

Eric Holder, Attorney General of the  
United States,  
Defendant

§ CIVIL ACTION NO. 07-2093 (JR)  
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§ A JURY IS DEMANDED

Plaintiff's Pretrial Statement

Plaintiff Jeffrey Kapche, by and through undersigned counsel, hereby files his Pretrial Statement pursuant to Local Rule 16.5.

**I. STATEMENT OF THE CASE**

**A. Nature of the Case**

Jeff Kapche brought this lawsuit to challenge the revocation of his offer of employment as a special agent for the FBI. The government told Kapche that he could not have the job of a special agent because he has diabetes. The FBI claimed – without any medical evidence – that his diabetes was “not sufficiently controlled to meet the requirements of the Special Agent position.” Kapche contends that Eric Holder, Attorney General of the United States, violated the Rehabilitation Act of 1973, 29 U.S.C. § 791 et seq. by revoking a job offer based on his disability when he is a qualified person with disability.

**B. Identity of the Parties**

Plaintiff is Jeff Kapche, who applied for a position as Special Agent with the FBI, which is an agency of the federal government under Defendant Eric Holder, Attorney General of the United States.

### **C. Jurisdiction**

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 791. Mr. Kapche properly exhausted his administrative remedies, as the government admits. (Doc. 4-2 at 3).

## **II. PLAINTIFF'S STATEMENT OF CLAIMS**

Mr. Kapche challenges the government's violation of the Rehabilitation Act by withdrawing his job offer for the position of Special Agent with the FBI simply because he has a disability. He is (1) a qualified individual with a disability and (2) was denied a job because of his disability.

### **A. Denial of Job Offer - Kapche is a Qualified Individual**

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, has the requisite skills and experience for the job, and can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C. § 12111.

Kapche had the requisite education and experience for the special agent job as shown by the fact that the FBI offered it to him in November 2004. Second, Kapche was able to perform the essential functions of the job. John Burpeau, the government physician who examined him and knew the essential functions of the special agent job, cleared him for "worldwide duty." Further, Kapche has been a sheriff's deputy for 15 years and his disability has never interfered with his job performance. No defense witness questions his abilities.

### **B. Kapche Has a Disability.**

Kapche's Type 1 diabetes is a disability. The term "disability" means, with respect to an individual – (A) a physical or mental impairment that substantially limits one or more of the

major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.

### **1. Kapche's Actual Disability**

For an impairment to substantially limit a major life activity, the impairment must make the individual either unable to perform a major life activity that the average person in the general population can perform or significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the average person. 29 C.F.R. § 1630.2(j).

While Kapche is not “unable” to perform major life activities, he is clearly substantially limited in the manner in which he eats, cares for himself and metabolizes food. Each of these has been recognized as a major life activity.

There are a host of ways in which Kapche's diabetes creates limitations for him that he has worked hard to overcome. Kapche has to buy blood glucose meters, vials of test strips, then code the meter each time a new vial of strips is used, and then use a lancet device to prick his finger each time he tests his blood sugar. The meter then displays the blood glucose value, which then determines what he must do next. If the value is below a certain mark, he must consume a carbohydrate such as juice or sugar. If the value is higher than a certain mark, he must administer insulin. Because his pancreas produces no insulin, he must inject insulin into his body to live. He does that numerous times a day. Because of diabetes, he is limited in the manner in which engages in exercise, travel and eating when compared with a member of the general population who does not have diabetes. He is limited in those areas in order to carefully balance the levels of insulin and glucose in his bloodstream. That does not mean he cannot do those things at all. It just means he must ensure that his blood glucose level is appropriate, that

he has insulin on board, and that he has a source of carbohydrates. In caring for himself, he must always have insulin, as well as fast absorbing carbohydrates. These limitations are 24 hours a day, seven days a week. When he is sick, the limitations are even more severe, because blood glucose is much more difficult to manage during illness. A person who does not have diabetes is not limited in the manner in which they eat or care for themselves, because they have a functioning pancreas, which allows them to automatically balance glucose with insulin.

Because his pancreas produces no insulin at all, Kapche's body cannot metabolize carbohydrates and convert them to energy. That is what insulin does in a person who does not have diabetes. And it occurs automatically 24 hours a day. Kapche must manually attempt to mimic the normally function pancreas and liver, by injecting insulin, obtaining blood glucose readings and making manual adjustments. And because diabetes treatment is not a substitute for a normally functioning pancreas, he simply cannot metabolize food the way others do. When his blood sugar is higher than normal, which is of course an ongoing situation with Type 1 diabetes, his ability to metabolize food like people who don't have diabetes is substantially limited. When there is insufficient insulin, carbohydrates simply are not metabolized: they stay in the bloodstream, causing blood sugar values to rise.

He is also significantly restricted as to eating. He cannot eat when his blood glucose is too high, or when he does not have insulin to cover for the carbohydrates. Before he eats, he must determine his blood glucose level, and be prepared with insulin to inject. He must also take into account whether he is ill or is insulin resistant in some other way, which will cause him to use different calculations of the amount of insulin necessary to cover food. If Kapche were to eat like average members of the population, without regard to blood glucose, he would die within days due to toxically high blood glucose levels. Before insulin was invented, all people

with diabetes just died. Now, with the substantial limitations diabetes and its treatment brings, he can work effectively by making the sacrifice of being so limited in the way he eats, cares for himself, and metabolizes food.

Kapche's treating physician, Dr. Brian Tulloch, agrees. He states that Kapche, as a Type 1 diabetes patient, must be eternally vigilant in maintaining blood sugar levels. Type 1 diabetics must calculate food quantity and quality, test their blood multiple times per day, inject insulin on multiple occasions, and adjust insulin for exercise and stress. And, they must do these things each and every day of their lives. These are all things that the normal person in the population need not do. Dr. DeFronzo agrees that Kapche faces substantial limitations in caring for himself.

## **2. The FBI Regarded Kapche as Disabled in the Major Life Activity of Working.**

For this claim, the focus is on the government's perception of Kapche's abilities -- whether he was considered substantially limited in his ability to work in a class of jobs or a broad range of jobs. Law enforcement is considered a class of jobs.

Yoder, who made the decision to disqualify Kapche, testified that he did so "by reason of IDDM, which is incompatible with safe and efficient job performance." When questioned about what job function he thought Kapche was limited in doing because of diabetes, he blurted out the most common law enforcement function of them all -- using a weapon.

Using a weapon is a fundamental duty of law enforcement work.<sup>1</sup> And Yoder viewed Kapche as substantially limited in his ability to do that -- and this is the core of law enforcement duties..

And, the government's misperception was not limited to just this one task. Yoder specifically expressed concern about Kapche's "level of control for the critical duties" of the

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<sup>1</sup> The Occupational Information Network (<http://online.onetcenter.org>), which was developed for the Department of Labor, lists special agents, police officers, criminal investigators, deputy sheriffs and supervisors of police and detectives as jobs that require weapons.

position. Again, the very nature of law enforcement is to require just such quick decisions and the government's belief that Kapche could not do those is a belief that he was incapable of law enforcement work generally.

### **3. The government acted on Kapche's record of a disability.**

A "record of disability" includes not only an *accurate* record of a person's substantially limiting impairment, but a *misguided* one as well. Recognizing that it is cold comfort to the person who loses their job because of an error about their medical condition to say later that they were not actually as limited as claimed, the ADA enforcement regulations state that

Has a record of such impairment means has a history of, or has been *misclassified* as having, a mental or physical impairment that substantially limits one or more major life activities.

29 C.F.R. §1630.2(k). This is a classic misclassification case.

Yoder determined that diabetes was "incompatible with safe and efficient job performance" due to his belief, from records, that Kapche was limited in his ability to handle weapons, among other duties. Yoder admitted that a "record" of a disability prompted his decision to declare Kapche unfit for duty:

The medical information you submitted however shows that your Insulin Dependent Diabetes Mellitus (IDDM) is not sufficiently controlled to meet the requirements of the Special Agent Position.

Yoder's statement is, of course, untrue, but it was this record that caused the FBI not to allow him into the January 2005 FBI training at Quantico, Virginia. Yoder's record "misclassified" him. The government now admits that Kapche's diabetes was always well controlled. The only information in Yoder's possession showed that Kapche's diabetes was very well controlled, but that did not stop him from making a record of his contrary findings and denying Kapche a job.

## **III. PLAINTIFF'S STATEMENT OF DEFENSES**

### **A. Kapche Is Qualified.**

The FBI argues that it was concerned that Kapche, due to his diabetes, might, *at some future time*, have difficulty serving in what the FBI calls “austere medical support environments,” which, the FBI argues is an essential function of the job. Yet the element of being qualified has nothing to do with fears about what might happen in the future. This implicates the “direct threat” defense discussed below.

In any event, there is no support for the assertion that service in “austere medical support environments” is an essential function, because serving in “austere medical support environments” is voluntary, not an essential function as defined by the regulations. The FBI Deputy Director confirms that Special Agents must volunteer for special assignments to dangerous countries. He knows of no agent who has been forced to go to such a location and he admits there have always been adequate volunteers. In fact, one agent with diabetes has repeatedly volunteered to serve in such locations, but has not been able to go because there are too many volunteers.

And, even if it were an essential function, the undisputed evidence is that Kapche was able to perform in any location, austere or not. He was cleared for worldwide duty by the FBI’s own retained physician.

### **B. Kapche Has a Disability**

The government’s claims that when “the claimant takes corrective measures that either eliminate *or reduce* the alleged impairment, he is not disabled within the meaning of the Rehabilitation Act.” This is a fundamentally erroneous view of what makes a disability. The government posits that Kapche’s excellent control of his diabetes means *ipso facto* that he has no claim. Ironically, the government also argues at length about all the complications that can arise from even a momentary lapse of glycemic control and claims that diabetes is such a serious condition that only one particular type of treatment is appropriate for an FBI agent. The

government also concedes that it is extremely “difficult” to manage diabetes the way that Kapche has.

The truth is that the law recognizes that people are to be *commended*, not punished, for working hard to overcome the challenges a chronic disease has dealt them. The Rehabilitation Act, like the ADA, addresses substantial limitations on major life activities, not utter inabilities. Finally, this Court has determined that this issue is one of fact.

With regard to whether Kapche was regarded as having an impairment, the government says it only considered him limited in performing one job – not a class of jobs. But, as stated above, the government’s view was that Kapche was limited in his ability to use a firearm, which is a fundamental duty of law enforcement jobs. So the fact that only one job was involved is of no moment. The government’s view is that he could not do any law enforcement job.

### **C. Direct Threat**

Direct threat is an affirmative defense to a claim of disability discrimination, but it cannot be utilized here because of its elements. The governing regulations provide:

This assessment shall be based on a reasonable medical judgment that relies on the *most current medical knowledge and/or on the best available objective evidence*. In determining whether an individual would pose a direct threat, the factors to be considered include:

- (1) The duration of the risk;
- (2) The nature and severity of the potential harm;
- (3) The likelihood that the potential harm will occur; and
- (4) The imminence of the potential harm.

29 C.F.R. § 1630.2(r). Even the government acknowledges that the first element of proof is an individualized assessment based on the best available objective evidence. That was not done. The government did not ask for specific information about Kapche’s diabetes until after it rejected him. It admits this.

The direct threat defense also requires that the employer have considered, among other things, the imminence of the risks and the severity of the harm. Yoder has admitted that no such

risk assessment ever took place regarding Kapche. He also admits he did not seek out anyone who was such an expert before determining to reject Kapche. Instead, Yoder declared Kapche's diabetes "uncontrolled" even though he now admits that all the evidence in his possession was to the contrary. He said nothing to Kapche about needing to use a pump to treat his diabetes. But the FBI cannot deem Kapche a direct threat when no one had examined his ability to do the job, as the law requires.

Inexplicably, the FBI's highly paid retained expert was not even asked to address the FBI's direct threat affirmative defense.

#### **D. Business Necessity**

Under the business necessity affirmative defense, the standard screening out those with disabilities must be:

- 1) Uniformly applied;
- 2) Job-related for the position in question;
- 3) Consistent with business necessity; and
- 4) Cannot be met by a person with plaintiff's disability even with a reasonable accommodation.

Fifth Circuit Pattern Jury Instructions, 11.7.4 (2006) (Ex. 29 at 43). Just as the FBI did not ask its expert to weigh in on the direct threat defense, it did not ask Dr. Crantz to defend the ban under the business necessity affirmative defense.

##### **1. The hidden standard is not uniformly applied.**

The government employs agents with diabetes who use multiple injection therapy. And it sends those same special agents around the globe – to places like Jordan, Colombia, and Panama. Secondly, the standard is applied differently to those who have been offered special agent jobs and those agents who are diagnosed the day they show up to work. In other words, the FBI will not accept an offeree who employs injection therapy, but does accept incumbent special agents who use the same therapy Kapche does. The rule is obviously not uniformly applied, as the FBI admits.

## **2. The hidden standard is not job-related.**

The government says that the use of a pump is so critical because of diabetes complications – hypoglycemia and hyperglycemia. But the government allows special agents who use multiple injection therapy to travel around the world and they do so without any problems. Thus, the government own experience shows that this so-called standard does not measure the individual's ability to do the job.

Further, no matter what the insulin delivery vehicle, insulin may need more than an hour to take effect, so the fast way to treat low blood sugar caused by exercise is to carry glucose in the form of Lifesavers, sugar packets or glucotabs. Dangerously high blood sugar is much more likely to happen with a pump patient whose infusion set becomes dislodged or its adhesion lost due to sweat. Injection therapy actually provides the best protection against such adverse events. The ban is clearly *not related* to better performance. To be sure, the FBI's own policy that requires case by case assessment is job related, not the ban.

## **3. A hidden criteria is not a business necessity.**

While the government says that an unwritten standard can be a business necessity in this case, the very same government is on record as recognizing that such bans are only justified in very limited situations – where in *all* cases the medical condition would prevent the person from performing the essential functions of the job. And the government's recognized standard can hardly be met here – where the government employs others with diabetes as special agents and they have not had any problems on the job.

The government's own medical expert is studiously silent as to whether its ban is a business necessity. He has not been asked to address the issue and the government thus improperly asks this Court to excuse its discrimination even though it has no medical evidence suggesting that the ban on insulin injection therapy is a business necessity. Rather than supporting the government's position on business necessity, the government's expert was even

unwilling to take a position on whether it would be reasonable to require individual assessment for those who use multiple injection therapy, as Kapche does. However, before being retained as an expert witness, Crantz stated quite clearly that every individual with diabetes “needs to be evaluated on an individual basis.”

Evidence that the use of a pump is not a business necessity is also shown by Yoder’s admission that agents who travel to austere medical locations should have injectable insulin as a “backup” to supplement their pump therapy. He recommends the therapy Kapche uses on a daily basis. Crantz also recognizes what he calls the “challenge” of using pump therapy in hot, traumatic environments, challenges which Kapche, who uses an insulin pen to inject his insulin, would not suffer.

**4. The government does not prove the absence of a reasonable accommodation.**

The government blithely says that there is no reasonable accommodation that would have allowed safe performance. It thus admits that it has no evidence on this element. It claims an excuse for its lack of evidence. It claims that Kapche’s insulin regimen was untried at the time – in other words, that there were not enough studies yet. Not only is this untrue and ironic since Yoder paid no attention to such studies, but the issue vis-a-vis reasonable accommodation is accommodating Kapche as an individual, not verifying whether a particular therapy worked for everyone. Moreover, even if the FBI’s fears were more than hypothetical ones born of stereotype, it has created the accommodation that it claims works: let these agents work in the United States. That is how the FBI says it deals with special agents on injection therapy now.

**E. FBI’s unpled after acquired evidence argument.**

The government contends that Kapche’s damages are limited because it claims that Kapche did not tell them in an unrecorded oral interview in late 2006 that he had been disciplined by his current employer.

This argument is simply not preserved. It is not pled. This omission was noted by Kapche during summary judgment and the Court denied the FBI's request to limit damages. Second, since economic damages are for the Court, this issue has no place before a jury as noted in the plaintiff's motion in limine. Third, this argument about the oral interview is nothing but an attempt to use settlement discussions in contravention of FRE 408. The only reason for the disputed oral interview was a mediated settlement agreement. Fourth, the after-acquired evidence deals with alleged misconduct that had occurred or not before the date of a job action, but which the employer did not know about. That is not what we have here. This disputed oral interview occurred after the FBI revoked its offer because of diabetes. Kapche would never have been at the Fort Bend County Sheriff's Department if the government had not discriminated against him in the first place. Fifth is that introduction of this issue in the case would create a trial within a trial that would waste large amounts of time. Government employee Lucretia Robinson never *asked* him if he had been disciplined at work. If she had – and he *had* lied, the objective evidence would *not* show, as it does, that (1) he shared the discipline contemporaneously with the Houston Police Department, and (2) he passed the government's polygraph examination *after* his discussion with Robinson. And the polygraph examination was specifically designed to test whether Kapche had been deceptive in any of his answers to the FBI.

Instead of carefully asking the questions that she was required to ask, and carefully recording the answers, Robinson sped through the form. And she made errors that the FBI concedes. When Robinson turned it in, it had a blank on it. Second, the FBI knew then and there that one of her recorded "No" answers was wrong, because Kapche had already fully disclosed previous litigation on the application itself. The government, which had objective evidence from its polygraph examination that Kapche was honest and forthright, chose to ignore that, even though it admits that this objective polygraph examination is used to determine whether the

individual has “lied” or “misrepresented” facts to the FBI. In fact, Robinson herself can’t testify that she remembers asking him the question about prior discipline. All that she remembers is that he complimented her on her attire. Kapche has been very clear that if Robinson had asked him about the discipline, he would have told her, just as he told HPD.

#### **F. Kapche’s Age**

Rather than addressing its own obligation to provide an individualized assessment of Kapche’s diabetes, the government blames Kapche’s age. The FBI, under established law, was obligated to conduct an individualized assessment before rejecting him because of diabetes. It failed to do this. Dr. Yoder has already admitted that *he could have assessed* Kapche properly before he revoked the offer, but that is not how the FBI does it. They wait until after a decision is made. He could have asked for additional information from Kapche, Burbeau or Tulloch. He refused to do so. And the record shows that the government *concealed* its ban on those employing Kapche’s therapy until litigation commenced. Also, since the government later extended Kapche an age waiver, it certainly cannot show that this was not a reasonable accommodation under the circumstances.

#### **IV. SCHEDULE OF WITNESSES TO BE CALLED BY PLAINTIFF**

See Appendix A.

#### **V. LIST OF EXHIBITS TO BE OFFERED IN EVIDENCE BY PLAINTIFF**

See Appendix B.

#### **VI. PLAINTIFF’S DESIGNATION OF DEPOSITION EXCERPTS**

Plaintiff intends to introduce the deposition of Ralph DeFronzo because we believe that he is unavailable for trial. Plaintiff may call Brian Tulloch, Desmond Schatz or James Gavin by deposition if they are unavailable for trial. The pages and lines of testimony of each witness are attached as Appendix C.

#### **VII. PLAINTIFF’S ITEMIZATION OF DAMAGES**

In addition to attorney fees and costs, and compensatory damages in an amount to be determined by the jury, Plaintiff claims the pecuniary damages itemized in the following table:

<b>Mitigated Back Pay<sup>2</sup></b>	<b>\$80,972.84<sup>3</sup></b>
<b>TOTAL</b>	<b>\$80, 972.84</b>
<b>Nonpecuniary Compensatory Damages</b>	<b>To be determined at trial</b>

Plaintiff will also ask this Court to instate him as an FBI special agent as of January 2005 should the jury find in his favor. He has a strong desire to serve his country. Accordingly, he does not, at this time, present any request for future monetary relief. Should the Court decline to instate him, he will present a request for alternative front pay and retirement losses post-trial.

### **VIII. PLAINTIFF'S REQUEST FOR RELIEF**

The Plaintiff hereby requests the following relief:

- a. Back pay until the date of trial, inclusive of pre-judgment interest;
- b. Instatement to the special agent position or front pay, equivalent to the difference between what Plaintiff would have earned had he been hired as a Special Agent by the FBI until mandatory retirement and what he could earn in his current employment;
- c. If plaintiff is not instated, the difference in the retirement benefits between what Plaintiff would have received had he been hired as a Special Agent by the FBI and what he accrues in retirement benefits at his current employment;
- d. Payment for physical and emotional pain and suffering cause by the Defendant's discriminatory actions; and
- e. Reimbursement of reasonable attorney fees and costs.

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<sup>2</sup> Kapche will update this figure closer to trial

<sup>3</sup> This is the back pay amount were Kapche to be assigned to the Houston area. If he were assigned to the Washington, D.C. area, backpay would be \$64,027.32, and were he assigned to a location in the U.S. outside of a specifically designated area for locality pay, backpay would be \$47,711.40.

**IX. PLAINTIFF'S PROPOSED VOIR DIRE QUESTIONS**

See Appendix D.

April 8, 2009

Respectfully submitted,

/s/ JOHN W. GRIFFIN

John W. Griffin, Jr.  
State Bar No. 08460300  
Marek, Griffin & Knaupp  
203 N. Liberty Street  
Victoria, Texas 77901  
(361) 573-5500 [telephone]  
(361) 573-5040 [telecopier]

Katherine L. Butler  
State Bar No. 03526300  
1007 Heights Boulevard  
Houston, Texas 77008  
(713) 526-5677  
Fax (713) 526-5691

David R. Cashdan  
D.C. Bar No. 051342  
Cashdan & Kane, PLLC  
1150 Connecticut Avenue N.W.  
Washington, D.C. 20036-4129  
(202) 862-4353 (telephone)  
(202) 862-4331 (fax)

**Certificate of Service**

I certify that a true and correct copy of this document has been served upon the defendant via electronic filing on April 9, 2009.

/s/Katherine L. Butler