

**Detective Jeff Kapche (right) and his lawyer, John Griffin. Kapche has had diabetes for 19 years. Griffin developed diabetes in 1998, while he was handling Kapche's lawsuit against the city of San Antonio, Tex.**

# One Star



San Antonio told **Jeff Kapche** that he couldn't be a cop because he used insulin. Jeff and his lawyer, John Griffin, teamed up to fight the decision.



"What do you want to be a police officer for anyway?" Jeff Kapche recalls the doctor asking him. "The pay is low and the work is dangerous."

Those words inspired Kapche—inspired him to get a lawyer and fight for his dream. And his rights.



## "Like A Concert"

Back in 1994, San Antonio sounded like a good place to be a cop. The pay was higher and the benefits better than at other police departments in Texas. Because so many people wanted to apply, the department planned on handing out only

200 applications on a certain Monday.

Kapche, fresh out of three months at the police academy and with a bachelor's degree in hand, drove with a buddy from Houston to San Antonio. They got there Sunday night; some people had been there since Friday. "It was like waiting for concert tickets," says Kapche.

On Monday morning, Kapche got one of the applications.

He took a written test that reminded him of the SATs. "It was the hardest law enforcement test I've ever taken," he says. Kapche was one of 60 applicants to pass. He also passed the background check, the polygraph, and the physical agility and psychological tests.

But the physical was a different story. The doctor found Kapche to be healthy—and disqualified him because he uses insulin. Driving is an "essential function of the job," and drivers who use insulin were considered to be a safety risk to themselves

and others. (Studies show that as a whole, people using insulin do not have a higher rate of car accidents than the general population.)

Kapche appealed the decision to the City of San Antonio Police Officer's and Firefighter's Commission. He went to two more doctors of the Commission's choosing, at his expense. Neither was a diabetes specialist. Neither assessed Kapche's ability to do the job. They simply stated that Kapche used insulin—and disqualified him. One tried to convince him he didn't really want to be a cop.

Kapche tried every other internal and external appeal process he could find. After more than a year, he had run out of appeals. He thought back to those very uninspiring words from the one doctor.

"What if someone had told him not to be a doctor because medical school is expensive?" Kapche says. "I'd spent a year jumping through their hoops. I'd had someone try to convince me not to do something I felt had been chosen for me. I wanted to make sure that no one else would have to go through the process I went through and still have the door slammed in their face."

Kapche called his father, Ron, and told him, "I'm going to fight this. But I need help."

His father knew where to go. He called the American Diabetes Association.

## A Win For One, But Not All

The Association had been keeping track of developments in Texas for some time. In a 1993 case, *Chandler*

*v. City of Dallas*, the federal Fifth Circuit Court of Appeals, which covers Texas, Mississippi, and Louisiana, decided that the rights of a plaintiff, Lyle Chandler, had not been violated when he was demoted from a position that required driving because he used insulin.

So *Chandler* was case law. Case law works like judicial peer pressure, as in "Your Honor, *Chandler* said such-and-such, so you should do the same thing in this new case."

A year later, another man with diabetes, another demotion. Jeff Jacob had worked for several years as a package car driver for United Parcel Service when he developed type 1 diabetes. He drove for UPS for another two years. Then he was busted down to a part-time desk job at less than half the pay. UPS said he could no longer drive for the company because he used insulin.

Jacob went to John Griffin, a lawyer in Victoria, Tex. Griffin took the case. He knew it would be an uphill climb because of the *Chandler* ruling. But the judge who had written the *Chandler* opinion, Jacques Weiner, included these words in his ruling: "We nonetheless share the hope...that medical science will soon progress to the point that exclusions on a case-by-case basis will be the only permissible procedure..." That is,

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that blanket bans would someday be unlawful.

Griffin saw his opening, but he needed medical experts to bolster his case. The American Diabetes Association put him in touch with Ralph DeFronzo, MD, an endocrinologist in San Antonio who was serving on the Association's national board of directors. DeFronzo examined Jacob and pronounced him able to do the job. He also testified that blanket bans were unwarranted medically and that each person ought to be evaluated individually.

The lawyers for UPS asked the judge to throw the case out on what is called "summary judgment," arguing that its blanket ban was supported by *Chandler* so the judge should simply dismiss the case. The judge, however, relied on DeFronzo's testimony and ruled that the



case could continue. UPS settled before the case went to a jury. The company promoted Jacob to a higher-paying, non-driving position.

It was a win for Jacob, but not a win for others with diabetes. Because UPS didn't have its blanket ban challenged in court, *Chandler* was still the last word.

### "Not As Easy"

When Ron Kapche called the Association about his son's case, he was referred to Michael Greene, former ADA Chair of the Board and the person who founded the Association's efforts to fight discrimination. He had fol-

lowed the Jacob case and suggested that Ron Kapche call Griffin.

Griffin took Kapche's case enthusiastically. "Maybe naively, maybe optimistically, we thought we'd have the same result in San Antonio as we did in the Southern District" [with the *Jacob* case], Griffin says.

"It hasn't been as prompt. It hasn't been as easy."

No kidding.

*Jacob* took a year and less than 250 lawyer-hours start to finish.

*Kapche*? A bit more.

In 1995, Griffin filed suit on Kapche's behalf with the United States District Court for the Western District of Texas. The American Diabetes Association was involved from the beginning. Medical expertise was provided by both DeFronzo and Edward Horton, MD, a former president of the Association.

In 1997, the city requested summary judgment. Judge Edward Prado granted the request and dismissed the lawsuit based on the

*Chandler* decision. Kapche appealed. Michael Greene submitted a friend of the court (*amicus curiae*) brief on behalf of the Association. The brief supported Kapche's position that blanket bans that disqualify all people with diabetes from given positions are both unlawful and medically unnecessary.

When a case reaches the federal

court of appeals, it's heard by three judges. One of them is assigned to write the opinion. As luck would have it, that assignment went to Weiner, the same judge who had left that opening in the *Chandler* decision. In 1999, the appellate court found in Kapche's favor. "In light of this evidence [presented by the American Diabetes Association], we find there to be a genuine dispute of material fact regarding the safety risk posed by insulin-dependent drivers... We conclude the time has come for a re-evaluation." That is, the appellate court said that the court below should not have dismissed the lawsuit out of hand, and sent the case back to the district court.

Our guys started to uncrate the champagne. "We knew that the medical evidence was on our side," says Griffin. "We knew we would win."

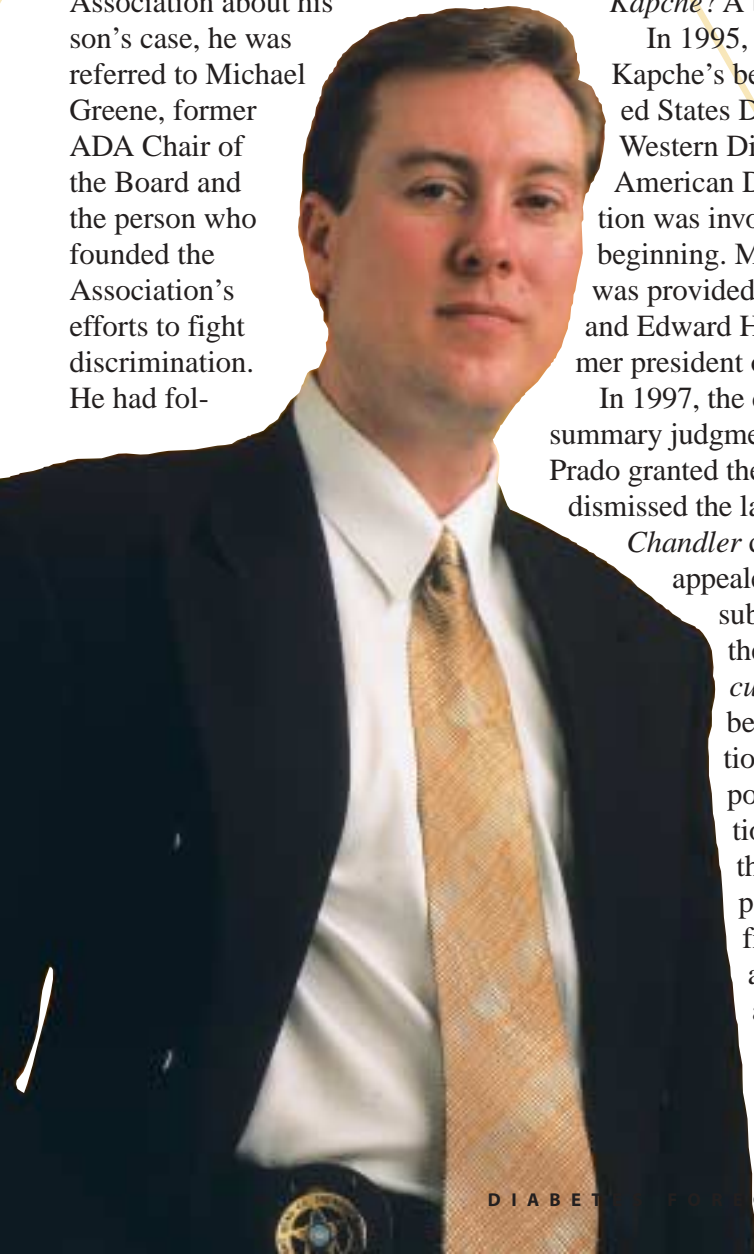
But they didn't get their day in court. In July 2000, Judge Prado found that the city was entitled to reject Kapche in 1994 because the law at that time tolerated employment restrictions for people with diabetes. He once again dismissed Kapche's complaint and tossed out his lawsuit against San Antonio.

Perhaps the other side thought that would be the end of it. It wasn't.

"I was committed," Kapche says. "Then it was just jumping hurdles."

Kapche appealed the decision for a second time. This time, he asked the appellate court to do what it had instructed the district court to do: Consider recent medical evidence and advances to determine whether blanket bans are justified. Once

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## does Jeff Kapche have a disability—and why does it matter?

San Antonio, Tex., rejected Jeff Kapche for a law enforcement position for one and only one reason—because he has diabetes. Kapche sued under the Americans with Disabilities Act (Act) claiming he was perfectly capable of performing the job of police officer. San Antonio's response was twofold. First, it claimed no one with insulin-treated diabetes was capable of being a police officer. Second, it argued that Kapche couldn't sue the city because his diabetes doesn't constitute a disability under the Act. So far, Kapche has proved San Antonio wrong on both accounts, but it hasn't been easy.

The Americans with Disabilities Act was passed in 1990. The legislative history includes many references to people with diabetes. It seemed clear that people with diabetes were among those whom the Act sought to protect. However, beginning in 1999, the Supreme Court has issued a series of decisions that make it harder for people with diabetes—as well as people with many other chronic diseases—to prove they are protected by the Act.

To be protected by the law,

someone like Kapche must show that he either has a disability, the employer regards him as having a disability, or he has a record of a disability. That's hard to swallow for people like Kapche who have a "can do" attitude and aren't interested in labels like "disability." But it's important to be protected by the Act. Otherwise it is perfectly legal for an employer to refuse to hire a person with diabetes simply because the employer doesn't like needles, or is afraid of high health care costs, or any other reason related to diabetes.

The problem is the Supreme Court has limited the definition of disability so that it sometimes seems that a person has to prove he or she is too ill to work before the person comes inside the law's protections.

That isn't right, and it isn't what Congress had in mind.

The Association has worked hard to educate courts about diabetes and the complex balancing act that constitutes good diabetes management today. Once courts understand the disease, they are much more likely to understand that

people like Jeff Kapche deserve to be protected by the law—they deserve a chance just like everyone else.

### If You Face Discrimination...

Discrimination based on diabetes is often the result of ignorance. Decision-makers simply don't understand diabetes and diabetes management today. The American Diabetes Association urges people with diabetes to try to *educate* those who are discriminating. Next, try to *negotiate* a mutually agreeable resolution. If that doesn't work, you may need to *litigate*—involve the legal system to achieve fairness. In some cases, the laws themselves may not provide needed protection. In that case, the answer is to *legislate*.

If you face discrimination at work, at school, or elsewhere in your life, the American Diabetes Association can help. Contact ADA at 1-800-DIABETES. The Association provides comprehensive materials about discrimination. You can also talk directly with the ADA's Legal Advocate. Materials about discrimination are also available online at [diabetes.org/main/community/advocacy/discrim.jsp](http://diabetes.org/main/community/advocacy/discrim.jsp).

Don't delay. Timelines for asserting your rights can be very short. In some situations you may have only 45 days after the discrimination takes place to file an administrative charge.

And keep in mind that when you fight discrimination based on diabetes you don't just help yourself—you are also fighting for the rights of all of the 17 million Americans with diabetes.

—Shereen Arent, JD



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again, ADA was right there, both writing a brief and presenting oral arguments to the court. And this time the federal government weighed in on Kapche's side; the Department of Justice submitted its own friend of the court brief.

## **A Victory For All People With Diabetes**

By the summer of 2002, the tally on *Kapche v. City of San Antonio* was seven years, more than 2,000 lawyer-hours, and not one red cent to show for it. Were Griffin's law partners lifting a questioning eyebrow in his direction? "Oh, sure!" admits Griffin.

That changed in August 2002. The appeals court, citing four recent decisions from the United States Supreme Court, held that "an individualized assessment of Kapche's present ability to safely perform the essential functions of an SAPD police officer is required." They kicked the case back down to the district court yet again, which means the lawsuit can go forward.

This decision was a big, big deal, not only for Jeff Kapche but also for all working people with diabetes. Why? *Chandler* was the last court-sanctioned blanket ban on employment of people with diabetes in the country. That doesn't mean there are no blanket bans left. Many companies still disqualify people from certain jobs simply because they use insulin without individualized assessments of their abilities to do the jobs. But now there is no case

law to support this position, should someone sue. Instead of employers' lawyers citing *Chandler*, plaintiffs' lawyers will be citing *Kapche*.

"It was a major accomplishment," says Griffin.

So even though the lawsuit has not yet been won, and no money has yet been awarded, things are looking up. "My partners are quite pleased now," says Griffin. "There's been a lot of good press, and we're on the right side of the issue." Griffin is now a member of the ADA Advocacy Committee and Vice Chair of its Legal Advocacy Subcommittee.

## **Model Officer**

Will Kapche win his lawsuit? Is he, indeed, qualified to be a cop? Well, you could ask Texas' Fort Bend County Sheriff's Office. They hired him in 1994. Kapche's diabetes wasn't an issue; Fort Bend already had a jail deputy with diabetes.

After the obligatory nine-month stint as a jailor, Kapche was promoted to patrol deputy. He liked having a beat, being connected to the community.

"You take a runaway home," he says. "You talk to the runaway, you talk to the mother, and you see what the problem is. It's always easier for a third person, who's not emotionally involved, to see what's going on. And at the end of the call, they're both crying and hugging each other. You've solved that problem. It gives you a good feeling.

"As a police officer, you have to be a medic, a social worker, a family lawyer. You're a problem solver,

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and you can remedy a lot of things, help people with advice.

"And if people don't want to listen to you," he adds dryly, "you have a place for them to stay."

In 1999, Kapche was promoted to detective. He's assigned to the Family Violence Unit, which deals with domestic violence, sexual assaults, child molestations, and runaways. He has passed the test for the next level up, detective sergeant, and is waiting for an opening. He also teaches courses at a police academy.

All this strengthens his case against the city of San Antonio. "Jeff Kapche is a model person to represent," says Griffin. "He's in great physical shape, and he's a model law enforcement officer."

Sounds like it may be time to chill the champagne. ▲

*Marie McCarren is the author of Carb Counting Made Easy and Heart Healthy Despite Diabetes, and editor of A Field Guide To Type 1 Diabetes, all published by the ADA. She lives in Arnold, Md.*