

Dr. Clark

Please introduce yourself to the jury.

Where do you live?

How long have you lived here?

How old a gentleman are you, sir?

What is your occupation?

How long have you been on the faculty of IU?

Have you been a teacher?

A researcher?

A scientist?

And a doctor who treats patients who have diabetes/

How long have you been treating people with diabetes

How long have you been researching diabetes?

Share with the jury your leadership role in the world's diabetes community. [For the past 25 years he has directed the Diabetes Research and Training Center at Indiana University School of Medicine. This Center, funded by the National Institutes of Health, is a leader in basic, clinical and health services research in the world. Explain role with ADA, DCCT trials, editor of Diabetes Care etc]

What was the DCCT?

Did it involve only Type 1 people with diabetes like Gary Branham?

What was your role in that important project?

When you say Data Safety Quality Committee what does this mean?

What did we learn from that project?

Now let's talk about your role with the ADA. What it mean to be president of the ADA?

Is the ADA the world's top organization in terms of diabetes?

Tell the jury what the ADA does in terms of publishing the medical standards of care for doctors who treat patients with diabetes. [Clinical practice guidelines published in Diabetes Care etc]

FAA Pilots license issues. His role. PX 24

Now, was the FAA a federal agency?

And did the Agency actually involve the leadership in the diabetes community in publishing standards for that agency to issue private pilots licenses. *PX 24 page four distinguished endocrinologists*

What is that speciality called [endocrinology—just in case the jury is unfamiliar with this term they will now know Dr. Ski is qualified]. To become endocrinologist what training do you have to have.

Now, in contrast to the FAA, from reviewing the records in this case, could you find any evidence at all that the IRS involved any diabetes specialists at any stage of Gary's review?

Does that make any sense, medically, to exclude specialists of a field involving the applicant?

What happens when non specialists try to assess the future situation of people who have diabetes?

Now, for the benefit of the jury, what is diabetes?

What is the difference between Type 1 and Type 2 diabetes?

Now until the 1920s what happened to every person who was unlucky enough to have type 1 diabetes?

What type of diabetes does Gary have?

How did Gary treat that diabetes [4 shots per day]

Was multiple shots a day the preferred and best treatment for Gary in 1999-2000?

Why?

Was he on two different types of insulin?

Why?

What is an AIC test? What does it tell us. Did you have a chance to review Gary's AICs submitted to the IRS? What did they show?

How important is it for doctors to stay current with diabetes care?

Why?

In the years between 1990 and 2000, would you say the landscape of diabetes care changed rapidly?

How so?

What happens when doctors trying to judge applicants with diabetes don't have current up to date skills in treating people with diabetes?

Let me just ask you this at this point. How did you come to be involved in this case?

Have you reviewed Gary's medical records, the depositions of Gary, Drs. Miller and Butler and Dr. Cohen, and Mr. Gay in the case, and the evidence?

Based on what you reviewed did the IRS involve a single person with expertise in endocrinology or diabetes care when it withdrew the promotion for Gary?

Can you tell the jury whether the IRS had information that proved that Gary was qualified and not a direct threat? [sure, from Dr. Ski, the eye specialists et al]

Now, Dr. Ski is what kind of doctor?

He was Gary's treating diabetes doctor?

Where does he work?

Does he also teach at IU medical school?

Do you know him?

Because Dr. Ski practices at IU do you give his opinion more weight than you would an endocrinologist practicing elsewhere

Did the IRS completely disregard his recommendations?

Did Dr. Ski clear Gary for duty? PX 13 pg 41

When Dr. Ski says he had no medical contraindications for doing the job, what does that mean?

Have you looked at Dr. Ski's records and his support for Gary's promotion?

From what you have reviewed Was Dr. Ski correct, that Gary was physically fit to perform the job?

Was there anything at all in those records that would cause **Gary** to be disqualified or a direct threat to anyone at all? [absolutely not]

Let's talk about some of the things the IRS did or did not do in connection with its direct threat defense. First, did they give Gary a true individualized assessment of his present ability to do that job? [No, they did not have him examined by an expert, and they ignored or misunderstood everything Dr. Ski submitted to them. Not being experts, they misunderstood the lab values **[make sure he goes into this in detail to make them look really dumb. Also point out that Dr. Ski explained this to them in his 7/99 Declaration on reconsideration and they just ignored it]**. They had no understanding of glucose brain impairment, so they completely misunderstood the fact that GB had a broken meter for a few days. They misinterpreted a few days of values in the 200 and 300 range, which meant nothing. And either they ignored or refused to gather Gary's up to date a1c readings.

Would a true individualized assessment require the IRS to gather the most current data, and have the most current medical knowledge and expertise to understand it?

And did the IRS do any of that with Gary?

Was the IRS's taking away Gary's promotion based on reasonable medical judgment? [Absolutely not, because no diabetes specialist was involved at all]

Besides an endocrinologist, what kind of doctor has the expertise to offer reasonable medical judgment about predicting dangerous hypoglycemia or hyperglycemia? [A doctor with regular and ongoing experience in treating patients, and the experience has to be current, because diabetes care changes year to year, and sometimes, month to month.]

Should any physician judging the diabetes future symptomology of a patient attend annual continuing medical education on endocrinology and/or diabetes care taught by the ADA or other clinical groups? [Absolutely]

Would an occupational medicine doctor, without further education and training, necessarily have a thorough knowledge of diabetes and diabetes care.

Just because an occupational medicine doctor has type 2 diabetes, does that make that person qualified to offer predictions about type 1 patients? [No, of course not]

Why couldn't Dr. Butler offer a reasonable medical judgment? [Because he hasn't treated patients in 15 years, because he admits he is not an expert in this field, and because his testimony proves that he simply has no expertise in this area.]

Does he ever even tell the IRS that he is an expert in diabetes? No.

And **in** his report to the IRS, tell the jury what Dr. Butler did with Gary's test results. [He misinterpreted them, making it look like Gary was having higher blood sugars than he was]

And his opinion, accusing Gary of having unstable diabetes, what about that? [Well first off, he is simply wrong. GB has never had unstable diabetes. He has never had a bad low, or a bad high blood sugar. And even if we pretended that Gary's values were erratic and all over the map, it would not matter unless he was having dangerous highs or dangerous lows, and obviously, he wasn't.]

The IRS says Gary had high blood sugars for a few days, and crazy readings that were in the 20s and 30s for a few days and that voila, he is disqualified: what is your response to this? [These values mean nothing. All patients have some ups and downs. We look at the effect on the person, and the high values had no effect on anything whatsoever. He has never spilled a ketone, which would be the warning sign for danger. As for the low readings, those were the product of a broken electronic blood glucose meter.]

Now any doctor with any experience with diabetes, had they gotten the records that Dr. Miller got, that showed a few days of extremely out of kilter low blood sugars, and a another few days of higher than normal sugars, what would any doctor with any expertise at all in diabetes do?

Was that ever done by the IRS or any of its doctors?

Had the IRS simply done that, what would they have found out?

Over the long term, has Gary had a very stable history with his diabetes?

So what about the 27 that Dr. Miller was so concerned with?

How do you know this? [We know it first, because he had no symptoms of a 27. A person like Gary, who had a 27, would have near coma like symptoms such that it would be unlikely that he could have performed all of the steps to check with his meter, and he did that. He felt fine. So he did what any patient who gets a crazy reading should. He repeated it. And then he did what any patient should do. He bought a new meter and tested it against the old one and proved that the old meter was broken.]

Go into whether unusual for meters to record inaccuracies.

In fact, Dr. Clark, do you consult with meter manufacturers to help them be accurate?

And how many calls a year does one of the leaders receive?

And how many just from faulty readings?

And if they are not calibrate with the right code, then what?

Did the IRS simply disregard the facts about that meter that spat out a 27 BG?

So, not only did it not figure out the facts, it ignored the facts when Dr. Ski and Gary shred them with Dr. Miller?

Well the IRS says he has a1c values from 7 to 9: Does this have anything to do with Gary's ability to do the job? [absolutely not]

Have him explain what would expect AIC to be

Dr. Clark, take a look at Dr. Miller's justification for disqualifying Gary, PX 13 PG 63

Go over each pillar and refute them.

And his attachment that he used to justify his rejection of Gary, what is that?

Have you ever seen it before this case?

Where did Dr. Miller get it?

To you knowledge has this document ever been subjected to review by anyone with expertise in diabetes?

Is it full of inaccuracies?

For example the statement is made that diabetes progresses to a multitude of bad complications? Is this true? **PG 64 3rd Paragraph**

What did you learn about complications in the DCCT trials?

Dr. Miller also says you need time for frequent monitoring? **PG 65 1st full graph**

True?

Or that people like Gary have to have preplanned meals? PG 65 same place

Why not?

And where he says people with diabetes have to take insulin at preplanned times, eat at preplanned times, is this true? PG 65 3rd full graph

In the next paragraph Dr. Miller says that the testing for blood sugar and injecting insulin is a difficult process? Is that true? PG 65 4th graph

When Dr. Miller says that a person with diabetes has to go to secluded area and remove their clothes to give insulin, what does that say about his knowledge of diabetes? PG 65 65 4th full graph

The last page, Dr. Miller talks about hypoglycemia unawareness. What is that?

Does Gary have this?

Has he ever had?

What is the single best predictor of direct threat of hypoglycemia that Dr. Miller was afraid of?

And has Gary, ever in his life, had such an episode?

The issue is whether the diabetic can properly manage his blood glucose level so as to avoid any debilitating symptoms.]

Can non-diabetics have low blood sugar readings

Make him a significant or substantial risk of harm to himself or others? [absolutely not]

Why not? [Because these numbers don't relate in any way to his ability to work. They just say that his diabetes, like most other people who have it, has numbers that ebb and flow. What we are interested in, is, no more and no less than this: whether the disease will impact his ability to perform the job?

From your review of all the records and your visit with Gary, has he ever, in his entire life had a dangerous low blood sugar? [No, none]

Has he ever, in his entire life, had a dangerously high blood sugar? [No. None]

What does the fact that he has had diabetes that long and never had such an issue say about his future? [shows that his future is good and that he is not likely to have any of the IRS's fears come true]

Can you to put a mathematical number, from your experience with the DCCT trials, of Gary's risk of any kind of incapacitating hypoglycemic episode? [Sure, although Gary's is probably lower since his diabetes discipline is higher than the average subject in the DCCT trials]

Is his risk significant? No its miniscule?

Miniscule risk, it that the opposite of significant risk?

How infinitesimally small is that number? [Gary's chances of suffering from a severe hypoglycemic reaction, especially on the job, one in which he would suffer from impaired judgment up to and including loss of consciousness, is no greater than 0.2% per year. To put this figure in perspective, it is the same relative risk of an American over 64 with no history of heart disease to die from a heart attack (<http://www.hcra.harvard.edu/pdf/October1999.pdf>). Dr. Clark looked this up on Harvard website about risks of certain medical conditions of general population and came up with figures for this that he testified to in affidavit. Have him go into what he did to assess this. If he just says no greater risk without anything to back it up, not very effective. Do you think Gary's so called risk is any greater than an IRS special agent having a heart attack or stroke? [No, since I don't believe Mr. Branham would ever have any dangerous on the job diabetes issues, because of his discipline and his track record. Period]

How much risk of hypoglycemia is there where blood glucose values are monitored and regulated? I changed this so not leading [Yes they can only happen where monitoring was not done or the readings are ignored]

And Gary, tell the jury about Gary's track record with taking care of his blood sugars? [He has been so disciplined that he has never in his entire life had any dangerous high or low values, and never once in his career has diabetes impacted his abilities.]

Well the IRS says wait a minute, the special agent's job is arduous, hard, long hours, skipped meals, working in the cold, etc, so that's different. What is your response to that? [He has demonstrated that his diabetes is no barrier to any job that his experience and skills qualify him for.]

So even if he was out running in the cold, or working an 18 hour shift, or doing surveillance for hours without a meal, his diabetes is not a barrier? [Not at all because he was on two types of insulin, one that mimics the pancreas, and the other that he took only when he ate, so if he doesn't eat, he doesn't take a shot—it's a simple as that.]

And as an insurance policy, what does Gary carry with him at all times? [Glucotabs, lifesavers or packs of sugar.]

Why? [In the event he gets warning signs of having low blood sugar, a sugar packet or glucotabs prevent him from having hypoglycemia]

So he has control over this?

And the power to prevent all the things the IRS was afraid of?

From your review of the evidence, is there any reason at all to justify the IRS's taking this promotion away from GB?

Was he able to perform any job that his education and experience would allow him to do?

And this job in particular, no matter how arduous the IRS says it is?

And have you seen one shred of evidence that the IRS ever made any analysis at all of whether Gary's diabetes made him a direct threat of serious harm to himself or anybody else? [None]

Or that the IRS tried to figure the likelihood that Gary would have a dangerous high or dangerous low blood sugar? [No all the IRS doctors said they never even looked at that]

Or that the risk of Gary having one of these issue is imminent or way down the road? [No, the IRS says they can't predict the future]

Did you find one shred of evidence tha the IRS investigated any accommodations that would have lessened the IRS' fears about Gary's diabetes? [None]

Now even if the IRS's negative view of Gary's diabetes was true, were there steps the IRS could have taken to alleviate or mitigate their fears? [Sure, they could allowed him one minute per two hours of work to check his blood sugar so as to make sure he is not having any issues with his blood sugars]

You mean an accommodation that would take less time during the workshift than going to the bathroom? [Right }

And that would have lessened or completely made moot their fear of risk? [That is right]

So finishing up, what is your opinion of Garys's physcial ability to do the job? Absolutely any job his education allowed him to do.

And was he direct threat? Absolutely not.

Dr. Clark, Gary has told the jury of the limitations that diabetes has imposed in the manner in which he cares for himself and eats, given the four to five shots a day, the four to six finger stick blood sugar checks, and the limitation of having to have insulin and supplies 24/7.

Are the limitations he endures what allow him manage his type 1 diabetes?

He has told the jury that enduring these limitations on eating and caring for himself has made him a better worker.

Are there studies that address how people with type 1 diabetes do in the workplace?

Pass the witness.