

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

GARY L. BRANHAM,	)	
	)	
Plaintiff,	)	<b>1:01-CV-152-JDT-WTL</b>
	)	Indianapolis, Indiana
-v-	)	December 12, 2005
	)	10:00 a.m.
PAUL HENRY O'NEILL, Secretary,	)	
United States Department of	)	
Treasury/Internal Revenue Service,	)	
	)	
Defendant.	)	

Before the Honorable  
JOHN DANIEL TINDER, JUDGE

OFFICIAL REPORTER'S TRANSCRIPT OF  
**CLOSING ARGUMENTS**

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PROCEEDINGS TAKEN BY MACHINE SHORTHAND  
TRANSCRIPT PRODUCED BY ECLIPSE NT COMPUTER-AIDED  
TRANSCRIPTION

**CLOSING ARGUMENTS**

**MR. GRIFFIN:** Your Honor, may it please the court if I may move the easel closer to me?

**THE COURT:** Sure, go ahead.

**MR. GRIFFIN:** You all know the saying you can't have it both ways. In this trial, the IRS has established for the past week that it is trying have it both ways, claiming that Gary Branham is so disabled that he can't work as a special agent, and then claiming to y'all that he doesn't have a disability at all. But you just heard from Judge Tinder that your decision in this case has to be based on the facts in evidence, based upon the sworn testimony from the witnesses --

(Brief interruption.)

**MR. GRIFFIN:** -- that the evidence is what controls what you do. And as Judge Tinder's read to you, when you go into the jury room, you will consider what was said under oath from the witness stand and from the exhibits that had been introduced into evidence in this case, not fears, not stereotype, and not speculation. That's what the instructions say.

Proof from the facts in evidence, and what did the IRS tell you they would prove in this case? They said they would prove, number one, that Gary's diabetes was so dangerous that he could not work and carry a gun as a special agent with the Internal Revenue Service. And then they turned right around and told

you they would provide that his diabetes was so bad and uncontrolled that he was a direct threat because of his diabetes. Too sick to work, but doesn't have a disability at all.

Now, some of you folks might have thought that's going to be hard to prove that he's so dangerous he can't work, but he doesn't even have a disability. I mean, just the argument, too sick to work but too healthy to be even covered, the effect of that argument is if he don't have a disability, they can discriminate against him on account of diabetes all day long, and that's where they're trying to have it both ways.

Consider this, though: You have to make your decisions based upon what is in the evidence from the sworn testimony. And the question you might be asking now is who said Gary Branham doesn't have a disability. Nobody from the other side said that.

Now, trials, everybody has the right to put on witnesses. You heard Dr. Clark and Gary testify that Gary Branham has a disability. But consider this: When the IRS put their witnesses on the witness stand, did a single one of those witnesses take an oath and look you in the eye and say that Gary Branham does not have a disability? None. Not one. And you might be wondering why would they try to come in and try to prove two opposite points, that he's so sick and dangerous on the one hand, but he doesn't have a disability on the other.

Maybe because they think they're above the law, but they're not because you're here. And I, from the bottom of my heart, and Betsy and Gary and Karen thank you for serving as jurors in this case. We had a snowstorm. You've had to come from your homes. You had to be away from your place of business, but you've done something important here and we thank you for that.

It's taken us six years to get to this point. So we're grateful you're here. Now y'all might be wondering why is this going on. Why is it that they would be trying to prove things that are self-contradictory and why would they be refusing to consider a decision that was made without any expertise based upon bias and fears instead of merit.

I'll tell you what it is. I think it's habit. The habit that the IRS has of getting its way and not having to explain or justify what they've done. When they are allowed by the nature of the system that they have built and nurtured to get their own way with nobody asking them any questions, they get used to that and don't want to answer questions. So when somebody like Gary stands up and says why, what is your rule that applied here, why did you do this, the IRS gathers up its forces, insulates itself, and then they get stubborn by habit.

How dare Gary ask about the justification of this. I mean, the two doctors we now know were not experts in diabetes. We now know they made mistakes. The government knows they made mistakes. The government knows in 18 months they never

consulted with one single person who was an expert in diabetes. We know that. But yet they still come into this court asking to have it both ways. And it makes some sense, doesn't it? It's kind of like somebody's got a quarter with heads on both sides, who then flips it and calls heads. You know, the coin flipper who has a two-headed coin and calls heads, yeah, he wins a lot of money and gets a habit of winning, but does that make it right? Does that make it honest? No.

But let's talk about the real world. We all lose if people are not judged on their merit and are judged instead based on fears and speculation. Yes, there's a huge loss in this case, and it goes beyond what Gary and his family have lost in this case, because if you let the system like this remain in place without any experts, with people who don't have ideas about diabetes, who won't answer any questions, who won't participate in a dialogue with Gary or his doctor, who ignores all of the relevant objective evidence that is given by Dr. Skierczynski, the treating endocrinologist, we'll all be worse off.

And it will be far worse than just for this family, because it will be condoning decisions being made on fears as opposed to merit. You'll see from Plaintiff's Exhibit 16 where even the IRS's investigator asked the decision-makers why did you disregard these, the opinion of Dr. Skierczynski? What effort was made to make this right? He refused to answer. He refused to answer from the witness stand, and we still don't have

answers even today.

But make no mistake, if the IRS wins here, we all lose because people like Gary Branham will not be serving us. People who, as Dr. Charles Clark explained, are focused, disciplined, and prepared for any contingency, that's the way people when they're limited in the way they care for themselves and the way they eat when compared to average members of the population are better than the average agent.

We all lose when our confidence that the government will follow the same rules that they expect us to follow, that that doesn't happen. We have to have confidence that the government is the gold standard, that if anyone will follow their own rules, it will be our own government.

Yet, the rules, we've seen it during the trial. You guys have been patient to listen to the evidence on the rules. We all know that the IRS had a rule for people like Gary who wanted to be a special agent. It's set up in advance. He knows what he's got to do. He can't have any complications such as vision or complications that would interfere with him doing the job; and second, he can't have any history in the past year of any severe hypoglycemic insulin reaction. That was their rule.

All three of these people claim not to know anything about it. They made it up as they went, about A1Cs and other criteria that are not written down anywhere. Mr. Gay didn't

think about it. Dr. Butler incredibly, Defendant's Exhibit 21 was written before this gentleman, Dr. Butler, had even looked at the rule that applied to Gary Branham, and Mr. O'Connor, the chair of the committee, he told us right from the stand "We didn't have the rule in front of us when we considered Gary's case."

You see, if they win, we all lose in this courtroom because make no mistake about it, if they can talk you into answering Question No. 1 "No" in this blank, you see right at the bottom, the IRS wins, and the discrimination in this case will be condoned. It says right there, but I don't think you're going to do that, because I think you know from the evidence what kind of person Gary Branham is, what his background was, what his qualifications were.

And you heard from Dr. Charles Clark who testified on this issue. And I think because you have to base your decision on what you heard from the witness stand and the exhibits and not on fears and speculation, I think the answer to Question No. 1 is "Yes," and I will tell you why. Y'all might have been wondering why did I ask Gary, "Are you substantially limited in the manner in which you care for yourself when compared with a an average member of the population?" Seems like a pretty long question. You probably all wondered, "Why is he asking that?" I asked that because that's the judge's instruction. That's how you have to base your decision. And when I ask Gary

Branham about caring for himself and eating, he said, "Yes, of course I have a disability. I can't eat like everybody else, I can't care for myself like everybody else. The manner in which I do that is much, much more limiting and severe." And we've got a chart that you can kind of go through all of the things that Dr. Clark and Gary testified about, the constant blood sugar vigilance, quarterly lab visits, multiple shots with the syringes, insulin changes, side effects from insulin, multiple blood tests, food calculations, carb counting, all of those things; adjusting food for insulin, adjusting for exercise. This is the manner in which he cares for himself that's limiting when compared to the rest of us who don't have to do any of those things.

Who else said Gary Branham has a disability? Charles Clark, that's who. They could have put somebody on the witness stand to contradict Dr. Clark, but they didn't. Every -- any city in the world would be proud to have such a doctor in their midst, and certainly we in -- those folks in Indianapolis have a right to. But according to Dr. Clark, and according to Gary Branham, the answer to Question No. 1 has to be "Yes."

Now, what did the IRS say? I asked Mr. Gay, "Do you think Gary Branham has a disability?"

He doesn't know. He didn't know. "I don't know."

Dr. Clark knew. But I challenge them to tell you one witness, one document that supports a "No" answer to



Question 1. There aren't any.

Now, why -- another question I have for them, "Why, if he doesn't have a disability at all, are they even talking about accommodations?" We got that handwritten note you'll see where they actually talked about making him monitor his blood sugar more frequently in case they're worried that he would have bad blood sugar. I mean, you saw the document. Can we mandate that he check his blood sugar more regularly? Oh, yes, sure, as a reasonable accommodation. Their witness, Mr. Spottswood, said oh, yeah, that's a good idea. That's who the Phil is there. But the question is why are they discussing an accommodation if the answer to Question No. 1 is no, that he doesn't have a disability?

So based upon the evidence, which you must according to Judge Tinder, the only evidence on Question No. 1 is "Yes" because the IRS put not one witness on that witness stand to support a "No" answer, and that's what you've got to go on, the evidence.

Question 2 asks was Gary qualified. And there's definitions in there. But that's a pretty easy answer, too. Of course Gary was qualified. They offered him the job. They selected him at the front of the line of hundreds of people who wanted the job, only because he passed the test, proved he could do the job. Yes, he was qualified. They wouldn't have offered him the job unless he was qualified.

And lest we forget, Gary Branham had worked side by side with special agents. You can see that even when he's writing Dr. Miller, he's telling Dr. Miller, "I have worked closely with special agents and am extremely familiar with the duties of the special agent position."

And Mr. Gay, I asked him, "You wouldn't have offered him the job unless he was qualified?"

"Oh, no, yeah, that's right."

Leisa Smith, an employee of the IRS, the first witness took the stand, looked you in the eye and said, "I supported Gary Branham a hundred percent to be a special agent because I knew he could do the job." She works around special agents every day, too. That's what she said.

So the facts in evidence: Mr. Gay and Mr. Elder, the IRS's witnesses they put on the stand said Gary would actually have an advantage over other special agents because of his accounting background and ability to interview people. And let's not forget that both Gary and Dr. Clark testified under oath in front of you that Gary was qualified to do that job.

So they want to have it both ways because that's what they are in the habit of doing. They acted in front of you like the job was some sort of a Bruce Willis movie, or a mock CSI: Miami-type shoot 'em up show with ice picks, guns and explosives. From the one guy in Utah they brought here, you would have thought it was some sort of a SWAT team job. Ask

yourselves, though, from the facts in evidence, were these claims of drama backed up or were they not?

Plaintiff's Exhibit 30, it's a thick document written by -- written for the IRS by Judge Webster. That document detailed that these special agents are supposed to be collecting tax, not being drug enforcement agents. So what did the investigation reveal? Over five years, one gun report reported in the incident, and in that instance, the only casualty was a pitbull dog. And you should know, we have it on pretty good authority, that neither the agent who fired the gun, nor the dog had diabetes.

But let's get serious here just for a minute. Even if this job was a cops and robbers shoot 'em up type of job, who would be the best person to be making those decisions than a person like Gary Branham, who has, because of his lifestyle of limitations, is focused, disciplined and prepared for any contingency?

And you heard the evidence that Gary Branham had more than that. He is trained as a person, who's an expert in conflict resolution. In Exhibit 30, the IRS's own report says that conflict resolution is important to avoid violence. He's a trained certified mediator to resolve conflicts. Don't we want someone who would be proactive to avoid violence instead of engaging in macho-type brandishing weapons and shoot 'em ups? Of course that's right.

So even if this job was a dangerous one, as the IRS portrays, there's nobody better that I would want guarding me than somebody with the discipline, focus and preparedness of Gary Branham.

Yes, according to the evidence, the facts in evidence, the testimony and the exhibits, the answer to Question No. 2 is a clear "Yes."

Now, I want to spend a few minutes talking with you about something that I think the IRS is cleverly trying do, and that's what we call shift the burden of proof. The judge has given you the burden of proof in this case, and you've got it both in your instructions and we talked about it early on in the burden of proof. This is our burden. We have to show that Gary was qualified and that he had a disability. We sustained that burden and we think the answers to those questions are yes. But this is the IRS's burden, to talk about risk, safety, direct threat and harm.

So when you hear the IRS telling you to answer Question No. 2 on the basis of those things, just remember, they're cleverly trying to get you to divert your attention from what Judge Tinder tells you from Question 3 that they have the burden of proof on, and shift it onto us on Question No. 2, and I don't think you're going to do that.

But turning then to Question 3, that's where they have the burden of proof, and we think they have not satisfied that

burden. They haven't even come close. The only thing they've really proven is that they have fear, that the only thing that they really have proved is the fear itself. Unreasoned fear, unjustified fear, irrational fear of having Gary Branham perform in a job they selected him to do.

Why would they do that? Well, in law school, they tell us if you have the facts on your side, pound on the facts. If you have the law on your side, pound on the law. And if you don't have the facts or the law on your side, you pound on the table real loud and hope you'll scare the jury as the last resort. And the emotion they are pushing you -- on you in this trial is the emotion of fear: Fear of the unknown, fear of anything different, fear of the unpredictable future. That's what they're doing.

The problem that they've got with Question No. 3, it doesn't allow you to answer that question on the basis of fear. It asks you to assess his risk. And who was the only witness in this trial to assess whether the risk was serious or substantial or whether it was miniscule? That was Charles Clark. Dr. Clark, a world leader in diabetes, analyzed Gary Branham and said he's a miniscule risk. And miniscule is the opposite of substantial or significant.

The judge tells you in final instruction No. 15, a mere increase in risk isn't enough. The increased risk must be substantial, must be significant or substantial. That's in the

instructions. They didn't come close to proving that.

So why would the IRS be exaggerating with its fear tactics? If they didn't have the evidence on their side. But did you hear Dr. Cohen the other day? Yes, he was a little bit evasive, but he admitted that he had diabetes patients who were FBI agents. Nobody testified that the IRS job is more stressful than the FBI, did they? And I want to talk to you about the witness's bearing on the witness stand. The judge tells you you're supposed to look at how the witness did on there when they were up there.

A parade of IRS witnesses seemed offended to try to answer a straight question. They were evasive, they bobbed, they weaved. Sometimes even the judge had to say, "You really need to answer the question." And what were those questions? Why, when they're in the habit of not having to answer to anybody, they were offended even in front of you to try to answer a question, "Why did you disregard the information?" "Why didn't you consider the A1C?" "Why didn't you consider the most recent A1C?"

You may hear an argument, "Well, we didn't even see his latest A1C of 6.7. The EEO got it, we didn't." Well, that may be a good excuse for that one, but what's their excuse for not looking at the 6.8 in the month before they disqualified him? They had that good A1C and disregarded it.

Now, fear tactics don't work. Dr. Butler was asked -- maybe

by one of y'all, I can't remember -- "In the history of people losing their weapons and getting it taken away from them, did any of these involve somebody with diabetes?" No.

Diabetes may be a disability as we've proved in this case, but diabetes has nothing to do with national security when it's diabetes of a person like Gary Branham. Yes, Dr. Butler could not cite a single example in the history of our country where a person with diabetes like Gary Branham had ever fallen down on a law enforcement job. Never in the history of our country. That's the difference between unreasoned fear and basing decisions on objective medical and other evidence.

Now I want to talk to you about something that's important: the rules. Now, we talked to you a moment ago about them ignoring the applicable rule that should have governed Gary Branham. None of the IRS witnesses even argued to you or told you under oath that they went over that rule when they rejected his promotion. Dr. Butler said he didn't have it, but I tell you what, I don't think the IRS would let us ignore their rule when we don't like them.

All Dr. Cohen -- I asked him about the official criteria. Dr. Cohen says, "Oops, you're right, he doesn't have complications," and "Oops, he doesn't have any evidence of severe hypoglycemic insulin reactions." Under their own rule, Gary should never have been disqualified.

You see, if we were to accept the fear angle here in this

courtroom, then every competent person would be excluded from the government job because we all have some sort of increased risk for something, sometime, somewhere, somehow. You heard Dr. Charles Clark tell what would happen if we were going to be denying people just on the potential increased risk. Women couldn't work because they're predisposed to breast cancer, men because they're more predisposed to heart attacks, African-Americans because they're more predisposed to sickle cell anemia.

The charge requires them to prove to you that this risk was likely. You look at the government's own definition in their own manual about direct threat. Significant means highly probable. Nobody who knew anything about diabetes in this case ever even suggested that had Gary Branham been promoted as they selected him, that injury was highly probable. In fact, Dr. Clark told you the opposite. Dr. Clark told you that it was an insignificant risk, it was miniscule, and that they had not proved this in any way, shape, form or fashion.

The judge tells you not to speculate or do guesswork. It says right here, "I don't mean to suggest your decision be based on speculation. It cannot. It must be based on the evidence." So the answer to Question No. 3 really is "No." And make no mistake, they're asking you did they prove it was highly likely that he was going to be dangerous.

See, when we base our decisions on the facts in evidence, we



can ask why didn't a single witness with any knowledge about diabetes testify that he was a direct threat. They didn't. We have to go on the evidence. So the question in No. 3 is no.

Y'all asked, or I think one of the jurors asked one of the witnesses, "Did y'all have anybody with endocrinology helping you at any time during this entire process of a year and three months?"

"No."

Somebody asked, "Well, if you take out those screwy low blood levels and you only had the normal, would y'all have taken him then?"

He said, "Sure, why not." That's what the fellow from Utah said.

So that's what I mean about making up the rules as they go. They all said they're not supposed to do that. You'll notice I asked the witnesses: "Y'all are not supposed to be making these rules up as you go, are you?" They said "No," but look what happened. They had a shifting of the rule. They talk about an A1C. And as we know from the chart they brought up, Gary had one A1C value in his entire life above the eight number. One. Okay? By where does the criteria say that a nine disqualifies him or makes him unsafe?

I asked Dr. Clark: "Did that nine have anything to do whatsoever with this man's ability to work?"

"Absolutely not."

That's to avoid long-term complications down the road, not having any effect whatsoever on his ability to be a special agent.

Now, I go to the doctor. Y'all probably do, too. I go to the doctor and they've got the chart up on the wall of what your weight's supposed to be. It's got this green area and the Heart Association says if you want to avoid long-term complications for heart attack, you need to be in this green area. And every time I look at that thing, it says I need to lose 20 pounds.

I don't like that chart, but what it's saying if I lose 20 pounds, I might not have a heart attack when I get older. Okay, I can accept that, but does that have anything to do with the person's ability to do the job today? No. That's what the judge instructs you to make your decision on, whether he can do the job, not whether he might have complications when he's 60 or 70 years old.

Dr. Clark said he probably wouldn't because he's in such good control of his diabetes. No, he doesn't want to be a nine all the time because if he's a nine for 20 or 30 years, he might get some small vessel disease or some complications, but that's like the smokers. People have a right to smoke. Even if they smoke doesn't mean they can't work, doesn't mean they can't put in a good day's time. If they smoke for 20 years, would they get some complications? Probably, but that doesn't

exclude them from doing work today. And Dr. Clark alone took a full look at this whole record with his expertise and 25, 30 years in medicine, and said Gary Branham was not a direct threat to anyone under the judge's instructions that say a mere increase in risk is not enough.

Now, the IRS had a chance to talk to you. They brought their witnesses. And Dr. Cohen was on the witness stand. Their guy, after the fact guy they hired, I asked him: "Dr. Clark told the jury that he's not a direct threat at all. Can you disagree with Dr. Clark?" No, wouldn't disagree with him. He's competent to testify about that.

Dr. Butler testified. Dr. Butler says, "I went out and did all the obstacle courses." He bragged about how he went fighting and doing the guns and wrestling people and all the things that he says Gary can't do, but then he had to admit he had blood sugars in his history of 500s and 40s, dangerously low 40s values with a meter that wasn't broken and he still did the job. Under these facts in evidence that you've heard, the answer to Question No. 3 is "No."

Finally, you heard in terms of the IRS evidence, I mean, one of their witnesses, Mr. -- what was his name, the special agent guy from Utah, excuse me for not remembering his name, pardon me for that. The guy from Utah, I asked him, "What does 'garbage in/garbage' out mean?"

He says, "When you add bad input to the process, you're

going to have bad, wrong decisions."

That's precisely what happened here. No, the IRS never proved the direct threat defense in this case. They didn't even come close.

We know there's a right way of doing things and a wrong way of doing things. You heard Dr. Clark explain how the FAA when qualifying people to be private pilots, they got distinguished endocrinologists involved, and yet when they get qualified, they have to have experts in diabetes to determine whether a given person ought to be qualified to operate a private aircraft.

But the IRS just bullies Gary, won't let him attend the committee meeting, disregards everything he sends to them because they are in the habit of getting their own way. The IRS says, "You can't question us, you can't challenge us." Mr. Gay didn't answer the questions they gave him or answer the questions in front of you.

They have no minutes of their committee meetings. They didn't consider their own rules. They said they wanted to leave no stone unturned to help this man. I'd like to see in the evidence where any stones were unturned.

An agency that won't keep minutes of their official meetings, ironic that an agency expects taxpayers to keep records of every little thing, they don't even have verification of what happens even during the meeting where this

gentleman's future was discussed. They couldn't keep their stories straight. That's credibility the judge talked about.

Mr. Gay said, "We wouldn't let him in the committee meeting because all we wanted to look at was paperwork." Other witnesses, "Oh, no, he should have been able to attend that meeting." They don't even keep their stories straight in that way either.

But, in any event, the answer to Question No. 3 is no, according to Dr. Clark, the only witness who actually followed the judge's instructions and applied all of those factors that was required to be filed.

I want to talk to you briefly about damages. Question No. 4 asks whether the IRS taking this promotion away from Gary Branham caused him mental pain and physical pain and anguish. Well, again, we have to make this decision on the basis of the evidence.

Now, Gary said he suffered those damages. His wife said he suffered those damages. We even have some evidence to those damages from the government's e-mail where they say he was shocked and devastated with being disqualified, and that he's a polite and pleasant man, unlike some of those other folks that they deal with over there.

Leisa Smith, his own boss, got up on the stand and said he was depressed at work, he didn't let it interfere with his job, but she could tell he was hurt deep down to his core that the

agency where he had given 12 years of his life had done this to him in this manner of keeping him at -- in limbo for all this time. From June '99 when he asked reconsideration, they wait a whole other year before, in June 2000, they give him the final pink slip that says he is rejected, a few months before he turns 37, and age will prevent him from ever having that job.

**THE COURT:** That's 30.

**MR. GRIFFIN:** Thank you. 30, Your Honor? Thank you. His Honor's been kind enough to let the lawyers know where we are.

So what is the answer to Question No. 4? It's yes. And the reason I say that is because the IRS, they had umpteen witnesses up there, did a single IRS witness tell you that Gary Branham did not suffer mental anguish and mental pain as a result of having this rug pulled out from under him? No. Based upon the evidence that was sworn from this witness stand, the answer to Question No. 4 is "Yes."

Now, Question 5 asked you to value the loss, and the judge tells you in the instruction you have to do that even if it's difficult. It's in your hands, but I can suggest to you that this was a deep harm to the core of somebody who had given almost since they graduated from IU their loyalty and fidelity to the IRS.

To put him through the application process, to prove he could do the job, to show his qualifications, to pass the

exercises with people where they have to solve problems and do interviews, he did all that only to have the rug pulled out from under him, and to be told "You can't attend the meeting, we will pay no attention to the medical documentation that we give you, we'll not tell you anything for a year, and then right before you turn 37, we'll tell you you have the pink slip for good."

But I can say this, suggest this to you. In our own lives, paychecks are important. They really are. But what's more important is our family, our peace of mind and our right to have life's ups and downs that occur naturally. And Gary has had ups and downs like we all have, but he's been brought to his knees in a blow to his heart for what his employer did in this case.

So I suggest to you this harm, this loss, has to be far greater than just the lost paychecks that we're going to talk about in just a few moments. This has gone on for five and half years since the final rejection, and more than six and a half years since he first applied.

So what is the -- what is the final decision? You just saw it there. It was on June 6th, a pink slip. So the next question is an even easier question: Did he suffer back pay? And I'm just guessing here, I think that the IRS will admit that when they took the promotion away from him, he got lost wages. If he'd have gotten the job, he would have made \$78,000

more than what he's made.

Now y'all may wonder how did the 78,000 come out instead of 72- he talked about. Well, it's in Defendant's Exhibit No. 35. It's some training pay that we neglected to talk about. It's supported. So the government, though, says, "We think it should be 77,000 because of the pay differential." Remember, between Nashville and Indianapolis, there's still that argument. But I think even the government will tell you his back pay is 78- or \$77,000.

And that's what the evidence is. And they put on no evidence to contest his back pay figure. It stands. If we base our opinion on the evidence we heard, the answer to that question should be 78,000 or 77- if you adopt the government's number.

Now I'm going to sit down, and the IRS's counsel representing them will have a chance to talk to you as well. And I know you'll want to pay the same courteous attention to them as you have for me, but there's some questions that are really bothering me that have not been answered in six years, and maybe they'll answer them now in their final opportunity to talk to you. Why was Dr. Skierczynski's documentation and judgment repeatedly ignored? He sent them a letter in April '99. He sent them a sworn affidavit under oath, and then he filled out their own official form that says, "No limiting condition, and that the applicant is certified to be physically



capable of performing the arduous and hazardous tasks without hazard to himself with no limiting condition, and he can do any emergency or crisis."

I think they need to tell you why that was disregarded, why all three of those were disregarded. Why didn't they have any specialists involved in this process at all when they were reviewing people with the disease as complex as insulin-treated diabetes? They didn't. I hope they'll answer that as well.

And how an IRS, as an official agency, can have committee meetings with no minutes or records. They wouldn't put up with that for us. Remember, Gary, he asked what were the rules. He asked them politely, "I request any standards specific to diabetes that you use." So the question that begs to be answered is why did they ignore their own standard in Exhibit 2B, the one about complications and low blood sugars in the past year. Maybe they'll answer it.

I hope the IRS will answer those questions, and I know you do, too, and I'll be listening for their answers as I know you will, too, and I will look very much forward to summing up for about eight or ten minutes at the conclusion of our case, and thank you so very much.

**THE COURT:** All right. We're going to take a five-minute recess now, and we're going to move that TV out of your way, hopefully. Be careful coming in and out around it.

(Jury excused.)

**THE COURT:** You may be seated.

(Recess taken from 10:30 a.m. to 10:45 a.m.)

**THE COURT:** All right. Please be seated. We will resume with the defense.

**MR. HUNTER:** May it please the court, members of the jury, I want to thank you for your attention over the last week. I know it's been a long week for us all, and some bad weather in the middle. But we're reaching the end of the process now.

Ms. Richards told you at the beginning of the case that you would learn a lot of things during the course of the trial, including the requirements of the special agent job, information about the IRS, and information about diabetes. I think it's fair to say you've learned a lot about all those areas, and today you've learned a lot about the law in the area based upon the court's instructions.

As you know, there are three issues that you have to discuss and consider among yourselves: One, has Mr. Branham proven that he was a person with a disability; two, has Mr. Branham proven that he was qualified for the position; and three, whether the defendant has proven that Mr. Branham was a direct threat to himself or others.

We submit that the evidence is that Mr. Branham has not shown that he was a person with a disability as defined in the law contained in the instructions read to you, and that he

cannot show that he was qualified as he was unable to perform the essential functions of the job due to the lack of control with his diabetes. He had a condition that would hinder full, efficient performance of the duties of the position, or that would cause him to be a hazard to himself and others. And that is a requirement for the special agent position.

In addition, we believe that the evidence before you is that Mr. Branham was a direct threat to himself or others. You've heard that based upon the testimony of all the people that you have heard. You've heard Dr. Butler testify. You've heard Mr. Gay, Mr. O'Connor and Mr. Elder. You've heard their testimony, and you heard the testimony of Dr. Cohen, an endocrinologist who reviewed the medical determinations of Dr. Miller, and determined that Dr. Cohen, the endocrinologist, was an essential -- he agreed with the essential conclusions of Dr. Miller, and determined his opinion was that Dr. Miller's judgment was a reasonable medical judgment that relied upon the most current medical knowledge and the best available objective evidence about whether plaintiff could safely perform the essential functions of the job.

Now, the very first matter that you must consider is whether plaintiff was a person with a disability, and in that issue, the burden is upon the plaintiff to show that he is a person with a disability. The defendant here has no burden of proof, does not have to prove anything in connection with this matter,

and that is the issue before you.

The court has instructed you regarding what a person -- what you have to find to see -- to find that a person is a person with a disability, and that's in jury instruction 11. And I think we've called that up on the screen. Can we make that bigger? Excuse me for a minute here. I have the wrong set of instructions.

**THE COURT:** Would you like to take a minute?

**MR. HUNTER:** Yes, if I might, Your Honor. I apologize.

**THE COURT:** If you want to stand and stretch for a minute.

**MR. GRIFFIN:** We have an extra set.

**MR. HUNTER:** If you have an extra set, thank you.

**MR. GRIFFIN:** No problem.

**MR. HUNTER:** Okay.

**THE COURT:** Did you want to go to the document camera or back?

**MR. HUNTER:** I think if we can follow up with 11 again. That instruction says that at the time of the application for the position, the person has to show that he has a disability. First, the person has to have an impairment, and in connection with this Mr. Branham, the defendant has not disputed that Mr. Branham has an impairment, and that impairment is, of course, the diabetes.