

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

STATE OF WISCONSIN,

and

KITTY RHOADES, in her official
capacity as Secretary of the Wisconsin
Department of Health Services,

Plaintiffs,

v.

Case No.

TOM VILSACK, in his official capacity
as Secretary of Agriculture,

KEVIN CONCANNON, in his official
capacity as Under Secretary for Food,
Nutrition, and Consumer Services,

AUDREY ROWE, in her official capacity
as Administrator of the Food and
Nutrition Service,

JESSICA SHAHIN, in her official
capacity as Associate Administrator of
the Supplemental Nutrition Assistance
Program,

and

SUSAN HOLZER, in her official
capacity as Acting Director of the
Supplemental Nutrition Assistance
Program, Midwest Region,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This case involves a dispute between state and federal officials over whether Wisconsin can require certain welfare recipients to undergo drug testing as a condition of eligibility for an employment training program that satisfies the work requirement for food-stamp welfare benefits.

2. The 2015-2017 Wisconsin Biennial Budget, 2015 Wisconsin Act 55 (“Act 55”),¹ contains several legislative changes aimed at developing Wisconsin’s workforce and increasing workforce readiness. Among other changes, Act 55 creates Wis. Stat. § 49.79(9)(d), which includes drug screening, testing, and treatment requirements for certain individuals receiving unemployment insurance, health services, and public-assistance benefits.

3. One of the public-assistance programs affected by these new provisions is the “FoodShare” program. “FoodShare” is Wisconsin’s name for the federal Supplemental Nutrition Assistance Program (“SNAP”), which provides federally funded benefits to no- and low-income households to purchase food.

4. FoodShare is jointly administered by the federal, state, and local governments.

¹Relevant portions of Act 55 are attached as Attachment 1.

5. Federal law establishes financial and non-financial eligibility requirements for the receipt of FoodShare benefits and provides the State with several options for determining program eligibility.

6. Among the non-financial eligibility requirements, federal law requires certain able-bodied adults without dependents (“ABAWDs”) to meet a work requirement in order to qualify for FoodShare.

7. Wisconsin law likewise contains a work requirement for ABAWDs and provides a means of satisfying that requirement through the FoodShare employment training program (“FSET”). FSET provides education, skills, and work experience to enable FoodShare recipients to obtain competitive employment and enhance earning potential.

8. Wisconsin Stat. § 49.79(9)(d), which went into effect on July 14, 2015, requires the Wisconsin Department of Health Services (“WDHS”) to screen and, if indicated, test and treat FSET participants who are ABAWDs for the use of controlled substances without a valid prescription.

9. Individuals who are subject to the FoodShare work requirement and who are rendered ineligible for FSET under Wisconsin’s new drug screening, testing, and treatment requirements would be rendered ineligible to participate in FoodShare, unless they satisfy the FoodShare work requirement in some other way.

10. Plaintiffs contend that the provisions of Wis. Stat. § 49.79(9)(d) requiring FSET participants to be screened and, if indicated, tested and treated for the use of controlled substances are authorized under 21 U.S.C. § 862b, which provides as follows: “Notwithstanding any other provision of law, States shall not be prohibited by the Federal Government from testing welfare recipients for use of controlled substances nor from sanctioning welfare recipients who test positive for use of controlled substances.”

11. Defendants, to the contrary, have claimed in writing that any drug testing of FoodShare recipients by the State is barred by 7 U.S.C. § 2014(b), which prohibits a state agency from imposing standards of eligibility for participating in a state SNAP program that are not consistent with eligibility standards established by the Secretary of United States Department of Agriculture (“USDA”).

12. To resolve the controversy that now exists between the parties concerning the validity under federal law of Wisconsin’s new drug screening, testing, and treatment requirements for FSET participants, Plaintiffs seek declaratory and injunctive relief: (a) declaring that FoodShare recipients, including those who satisfy FoodShare work requirements through FSET, are “welfare recipients” within the meaning of 21 U.S.C. § 862b; (b) declaring that 21 U.S.C. § 862b allows Plaintiffs, pursuant to Wis. Stat. § 49.79(9)(d), to

screen and, if indicated, test and treat FSET participants for the use of controlled substances; and (c) enjoining each individual defendant from taking any action inconsistent with this Court's declaration of rights, or otherwise prohibited by 21 U.S.C. § 862b. The requested relief would supply a conclusive resolution to the entire controversy between the parties.

PARTIES

13. The State of Wisconsin is a sovereign State in the United States of America.

14. Kitty Rhoades is the Secretary of WDHS and has overall responsibility for the implementation of FoodShare, which provides benefits to Wisconsin residents throughout the State, including in this judicial district.

15. Tom Vilsack is the United States Secretary of Agriculture and is the head of the USDA and its agencies, offices, programs, and services, one of which is the Food and Nutrition Service ("FNS"). He is sued in his official capacity.

16. Kevin Concannon is the Under Secretary for Food, Nutrition, and Consumer Services at USDA. His responsibilities include heading FNS, which administers the USDA's food and nutrition assistance programs, one of which is SNAP. He is sued in his official capacity.

17. Audrey Rowe is the Administrator of FNS. She is responsible for the management of FNS, including SNAP. She is sued in her official capacity.

18. Jessica Shahin is the Associate Administrator of SNAP and is responsible for administering SNAP and its regional offices. She is sued in her official capacity.

19. Susan Holzer is the Acting Director of SNAP for the Midwest Region, which includes Wisconsin. She is sued in her official capacity.

JURISDICTION AND VENUE

20. This Court has jurisdiction over this complaint under 28 U.S.C. §§ 1331 and 2201 because this case presents a substantial question of federal law, specifically whether Wis. Stat. § 49.79(9)(d)'s drug screening, testing, and treatment requirements for certain FoodShare recipients are lawful and valid under 21 U.S.C. § 862b, 7 U.S.C. § 2014(b), and U.S. Const. art. VI, cl. 2 (Supremacy Clause).

21. This Court has authority to issue a declaratory judgment and to order injunctive relief and other relief that is necessary and proper pursuant to 28 U.S.C. §§ 2201 and 2202.

22. Venue is appropriate in this district under 28 U.S.C. § 1391(e)(1). A substantial part of the events giving rise to this claim occurred in this district because a large portion of FoodShare recipients in Wisconsin reside in this judicial district. Additionally, Plaintiffs operate offices in Milwaukee,

Green Bay, and Waukesha, Wisconsin, which are located in this judicial district. Finally, USDA also operates an office in Milwaukee, Wisconsin.

ALLEGATIONS

23. Plaintiffs incorporate by reference all of the preceding allegations in this Complaint.

Federal Food Stamp Program and its Reform

24. SNAP, also known as the “Food Stamp Program,” provides food-purchasing assistance to low- and no-income individuals living in the United States.

25. Since the passage of the Food Stamp Act of 1964, the program has undergone many changes of eligibility, participation, and funding.

26. In 1996, for example, Congress enacted a series of provisions aimed at overall welfare reform entitled the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”).

27. PRWORA changed many welfare programs to add work requirements and time limits for benefits, as well as converting certain welfare programs into block grants to the States.

28. Among other reforms to federal welfare programs, Title VIII of PRWORA made specific and significant reforms to the federal food-stamp program.

29. One section of PRWORA, codified at 21 U.S.C. § 862b, provides as follows: “Notwithstanding any other provision of law, States shall not be prohibited by the Federal Government from testing welfare recipients for use of controlled substances nor from sanctioning welfare recipients who test positive for use of controlled substances.”

30. Currently, SNAP is jointly administered by federal and state officials. At the federal level, FNS in the USDA funds FoodShare benefit payments, monitors state compliance with federal program rules, and oversees participating retailers. In Wisconsin, WDHS administers the FoodShare program by contracting with county consortia and tribes to perform program-enrollment and caseload-management functions, providing electronic-benefit-card services to enrollees, and ensuring compliance with federal requirements.

31. In administering SNAP, States are required to follow a USDA-approved “plan of operation.” Federal law provides as follows: “No plan of operation submitted by a State agency shall be approved unless the standards of eligibility meet those established by the Secretary, and no State agency shall impose any other standards of eligibility as a condition for participating in the program.” 7 U.S.C. § 2014(b).

Wisconsin's Food Stamp Program—FoodShare

32. In Wisconsin, SNAP is called “FoodShare” and administered by WDHS.

33. Wisconsin residents are eligible for FoodShare if they do not exceed income limitations and meet other requirements.

34. For example, certain individuals age 18 to 49 with no minor children living with them (ABAWDs) must meet certain work requirements.

35. One of the ways to meet the FoodShare work requirement is for an applicant to take part in an allowable work program, such as FSET.

FoodShare Reforms—Drug Testing and Treatment

36. On July 14, 2015, Act 55, along with its FoodShare reforms, became effective in Wisconsin.

37. Section 1833 of Act 55 created Wis. Stat. § 49.79(9)(d)1., which provides, in part, as follows:

The department [WDHS] shall promulgate rules to develop and implement a drug screening, testing, and treatment policy to screen and, if indicated, test and treat participants in an employment and training program under this subsection who are able-bodied adults for use of a controlled substance without a valid prescription for the controlled substance.

This provision requires WDHS to develop and implement a drug screening, testing, and treatment program for all FoodShare recipients who satisfy FoodShare work requirements through FSET participation.

38. Wisconsin Stat. § 49.79(9)(d) also requires that WDHS's drug testing, and treatment policy must include at least all of the following elements:

b. If a participant tests negative for use of a controlled substance, or tests positive for the use of a controlled substance but presents evidence satisfactory to the department that the individual possesses a valid prescription for each controlled substance for which the individual tests positive, the individual will have satisfactorily completed the substance abuse testing requirements under this paragraph.

c. If a participant tests positive for use of a controlled substance for which he or she does not have a valid prescription, then the individual must participate in substance abuse treatment to remain eligible for the employment and training program.

d. While participating in treatment, an individual who has tested positive for the use of a controlled substance without a valid prescription for the controlled substance shall submit to random testing for the use of a controlled substance, and the test results must be negative, or positive with evidence of a valid prescription, in order for the individual to remain eligible for the employment and training program under this subsection. If a test result is positive and the individual does not have a valid prescription for the controlled substance for which the individual tests positive, the individual may begin treatment again one time and will remain eligible for the employment and training program. If the individual completes treatment and tests negative for use of a controlled substance, or tests positive for the use of a controlled substance but presents evidence satisfactory to the department that the individual possesses a valid prescription for each controlled substance for which the individual tests positive, the individual will have satisfactorily completed the substance abuse screening and testing requirements under this paragraph.

2. Subject to the promulgation of rules under subd. 1., the department shall screen and, if indicated, test and treat participants in an employment and training program under this subsection who are able-bodied adults for illegal use of a controlled substance without a valid prescription for the controlled substance.

Wis. Stat. § 49.79(9)(d)1. and 2.

39. Section 1832p of Act 55 created Wis. Stat. § 49.79(1m), which provides as follows:

An individual who is a recipient under the food stamp program is considered to be a welfare recipient for purposes of 21 USC 862b.

This provision announces the Wisconsin Legislature's position that FoodShare participants are welfare recipients who may be tested and sanctioned for use of controlled substances without a valid prescription.

Defendants' Objection to the FoodShare Reforms

40. On May 27, 2015, weeks before the enactment of Act 55, Defendant Holzer wrote an email to WDHS indicating that she was aware of the proposal to require drug testing for certain FoodShare recipients. Her email states:

As you are aware, States are prohibited under Federal law from imposing any additional eligibility conditions on individuals for the receipt of SNAP benefits. Therefore, FNS will continue to monitor closely any action the Wisconsin State Legislature takes on this legislation. If the legislation is subsequently enacted into law, FNS will work with its General Counsel to determine how it interacts with Federal law governing the program and advise the State agency appropriately.

(Attachment 2.)

41. This email was consistent with the position taken by USDA in an earlier letter sent to the State of Georgia on June 3, 2014, which read:

FNS policy prohibits States from mandating drug testing of SNAP applicants and recipients. Section 5(b) of the Food and Nutrition Act and 7 C.F.R. § 273.2(a) expressly prohibit States from imposing additional standards of eligibility for SNAP participation. Requiring

SNAP applicants and recipients to pass a drug test in order to receive benefits would constitute an additional condition of eligibility, and therefore, is not allowable under law.

(Attachment 3.)

42. Based on the above communications, it is Defendants' position that federal law precludes Wisconsin from implementing its drug screening, testing, and treatment requirements for any FoodShare recipients.

43. Federal law provides that Defendants must take steps to remedy any state agency's noncompliance with the requirements of the federal SNAP program. Authorized remedial steps include the suspension and/or disallowance of funds for administrative and other costs and actions for injunctive relief against the state agency. *See* 7 U.S.C. § 2020(g); 7 C.F.R. pt. 276.

Plaintiffs' and Defendants' Controversy

44. Given Defendants' position that federal law precludes Wisconsin from implementing its drug screening, testing, and treatment requirements for certain FoodShare recipients, the fact that federal law provides for suspension and/or disallowance of federal funds and other remedial actions in the event of a State's noncompliance with federal requirements, and the fact that Plaintiff Rhoades is under a present and continuing duty to implement Wisconsin's drug screening, testing, and treatment requirements for certain

FoodShare recipients, there exists a real, actual, and continuing controversy between the parties as to the meaning and effect of federal law.

45. Furthermore, Plaintiffs will suffer financial consequences and otherwise be injured by Defendants' threatened and incorrect implementation of SNAP requirements unless this Court declares the relative rights of the parties and enjoins Defendants' actions that are contrary to federal law.

CAUSE OF ACTION

46. Plaintiffs incorporate by reference all the preceding allegations in this complaint.

47. Wisconsin state law provides that FoodShare recipients who satisfy FoodShare work requirements through FSET must undergo drug screening and, if indicated, testing and treatment, as a condition of eligibility to participate in FSET. *See* Wis. Stat. § 49.79(9)(d).

48. Individuals who are subject to the FoodShare work requirement and who are rendered ineligible for FSET under Wisconsin's drug screening, testing, and treatment requirements would be rendered ineligible to participate in FoodShare, unless they satisfy the FoodShare work requirement in some other way.

49. Federal law provides as follows: "Notwithstanding any other provision of law, States shall not be prohibited by the Federal Government

from testing welfare recipients for use of controlled substances nor from sanctioning welfare recipients who test positive for use of controlled substances.” 21 U.S.C. § 862b.

50. FoodShare recipients, including those who satisfy FoodShare work requirements through FSET, are “welfare recipients” within the meaning of 21 U.S.C. § 862b.

51. Under 21 U.S.C. § 862b, the federal government cannot prohibit the State of Wisconsin from testing FoodShare recipients, including those who satisfy FoodShare work requirements through FSET, for the use of controlled substances or from sanctioning recipients who test positive.

52. Defendants have communicated to Plaintiffs their belief that federal law does not permit drug testing of FoodShare recipients as provided in Wis. Stat. § 49.79(9)(d).

53. Plaintiffs, on the other hand, are required by law to implement drug screening, testing, and treatment of certain FoodShare recipients as provided in Wis. Stat. § 49.79(9)(d).

54. There exists an actual and justiciable controversy between Plaintiffs and Defendants concerning the validity under federal law of Wisconsin’s drug screening, testing, and treatment requirements for certain FoodShare recipients.

55. If the controversy between the parties is not resolved by this Court, Plaintiffs will suffer financial and other consequences through the remedial actions of Defendants, as provided in 7 U.S.C. § 2020 and 7 C.F.R. pt. 276.

56. A declaration by this Court clarifying the meaning and effect of the pertinent provisions of federal law, along with appropriate injunctive relief, would provide a conclusive resolution to the entire controversy between the parties.

THEREFORE, Plaintiffs respectfully request that the Court:

A. Declare that FoodShare recipients, including those who satisfy FoodShare work requirements through FSET, are “welfare recipients” within the meaning of 21 U.S.C. § 862b.

B. Declare that 21 U.S.C. § 862b allows Plaintiffs, pursuant to Wis. Stat. § 49.79(9)(d), to screen and, if indicated, test and treat FoodShare recipients, including those who satisfy FoodShare work requirements through FSET, for the use of controlled substances.

C. Enjoin all Defendants from taking any action inconsistent with this Court’s declaration of rights.

D. Enjoin all Defendants from taking any action against Plaintiffs that are prohibited by 21 U.S.C. § 862b.

E. Award Plaintiffs their attorney fees and expenses under 28 U.S.C. § 2412.

F. Award any further necessary or proper relief, including costs.

Dated this 14th day of July, 2015.

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