

April 24, 2003

COURT UPHOLDS BAN ON DRUG TESTING FOR WELFARE RECIPIENTS

(Marchwinski v. Howard)

By an equally divided vote of 6-6, the U.S. Court of Appeals for the Sixth Circuit upheld a district court ruling that struck down a Michigan law that provided for drug testing of certain welfare recipients. Last year, in a victory for the Washington Legal Foundation (WLF), a three-judge panel of the court of appeals overturned the lower court decision that ruled that Michigan's drug testing program was unconstitutional. However, the entire Sixth Circuit vacated that decision and reheard the case last month. Because the recent vote of all the 12 judges on the Sixth Circuit was evenly split, no opinion was issued. Under these rare circumstances, a tie vote by the appellate court means that the district court opinion stands, unless the U.S. Supreme Court were to hear the case. The decision could affect current or proposed drug testing programs not only in the Sixth Circuit, but also across the country.

In 1996, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act. This landmark welfare reform legislation abolished the Aid to Families with Dependent Children program and replaced it with the Temporary Aid to Needy Families (TANF) program. Under TANF, the States are expressly authorized to design their own public assistance programs, including testing welfare beneficiaries for illegal drugs and imposing consequences for failing such tests.

In *Marchwinski v. Howard*, the ACLU challenged Michigan's drug testing program, claiming that the tests constitute unreasonable searches and seizures in violation of the Fourth Amendment. The purpose of Michigan's program is to identify those recipients who need treatment in order to put them back in the workforce and to prevent child abuse and neglect. Positive test results are *not* used for the purpose of reducing welfare benefits, removing children from the home, or for criminal prosecution.

In its brief, WLF argued that because welfare is not an entitlement, Michigan has a right to place reasonable restrictions or conditions on the receipt of discretionary government benefits, including the waiver of any Fourth Amendment rights that may be implicated by this minimally intrusive program. WLF cited Supreme Court cases where the Court has upheld drug testing for those participating in other voluntary programs, such as students who participate in interscholastic athletics, or those who choose to apply for government jobs that require drug testing.

The district court ruled in September 2000, that the testing program violated the recipients' Fourth Amendment rights to be free of unreasonable searches and seizures. While the court conceded that testing welfare recipients for drugs is a "laudable and understandable" means to address substance abuse as a barrier to employment, that goal is not a sufficient "special need" to warrant drug testing. The court interpreted prior case law as authorizing drug testing only if public safety is at stake. For example, the Supreme Court has upheld drug testing of U.S. Customs Agents who are involved in drug interdiction efforts, and high school students who are engaged in school-sponsored sports where the student athlete may injure himself or other students if drug-impaired. On the other hand, the Supreme Court ruled in another case, *Chandler v. Miller*, that the State of Georgia could not require candidates for State office to pass a drug test because public safety was not in jeopardy.

WLF argued that the drug testing program did raise safety concerns, inasmuch as drug testing can help prevent child abuse by welfare recipients. The district court, however, ruled that such concerns were insufficient; otherwise, said the court, the state could test other recipients of public funds or benefits for this reason. The court also indicated that Michigan had alternative means of identifying and screening drug users, such as the use of questionnaires that request welfare applicants to divulge their drug use history.

Last fall, a three-judge panel of the Sixth Circuit agreed with WLF that the drug testing program did not violate the Fourth Amendment. Because no one is constitutionally entitled to welfare benefits, the condition imposed on receiving those benefits, namely drug testing, is voluntarily accepted by the recipient, and hence, a valid condition. However, that favorable decision was vacated by the full court, and the case was reheard last month. The recent tie vote resulted in the lower court decision being reinstated.

WLF's brief was filed with the *pro bono* assistance of David G. Leitch and Christopher Bartolomucci who at the time of the filing were attorneys with the Washington, D.C. law firm of Hogan & Hartson, LLP. Currently, both lawyers are respectively the Deputy and Associate White House Counsel to the President. WLF's clients in the case included the Allied Educational Foundation and the Colorado Department of Human Services.

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