

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

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ALINA BOYDEN and  
SHANNON ANDREWS,

Plaintiffs,

v.

Case No. 17-CV-0264

STATE OF WISCONSIN DEPARTMENT  
OF EMPLOYEE TRUST FUNDS, et al.,

Defendants.

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**DEFENDANTS' RESPONSE TO PLAINTIFFS' PROPOSED  
VOIR DIRE AND OBJECTION TO PLAINTIFF'S REQUEST FOR  
ATTORNEY-CONDUCTED VOIR DIRE**

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**OBJECTIONS TO PLAINTIFFS' PROPOSED VOIR DIRE**

One purpose of voir dire is to expose potential juror bias and impanel an impartial jury. *Mu'Min v. Virginia*, 500 U.S. 415, 427, 431 (1991); *Aldridge v. U.S.*, 283 U.S. 308, 311 (1931); *United States v. Hasting*, 739 F.2d 1269, 1272 (7th Cir. 1984). “[It] is not conducted to allow the parties to obtain jurors predisposed to agree with their litigation positions or place certain ideas into the heads of the jurors before the presentation of the evidence.” *Marsh Supermarkets, Inc. v. Marsh*, No. 1:09-CV-458-SEB-TAB, 2013 WL 53788, at \*2 (S.D. Ind. 2013). “[T]he trial court retains great latitude in deciding what questions should be asked on *voir dire*.” *Mu'Min v. Virginia*, 500 U.S. 415, 424

(1991). But essential to the parties' attorneys' questions is that they be "subject to the essential demands of fairness." *Aldridge*, 283 U.S. at 310. Applying these standards, Defendants submit that Plaintiffs' proposed question nos. 3, 8, 9, 10, 11, 13, 14, and 18 are improper and should not be adopted by the Court when conducting voir dire.

Plaintiffs' proposed question no. 3 states: "Could you return a verdict against the State of Wisconsin and in favor of Plaintiffs, Alina Boyden and Shannon Andrews, if the evidence and the applicable law supported a verdict in favor of Plaintiffs?" This question seeks a pledge from the prospective juror before hearing the relevant facts and being instructed on the law. It is a juror's duty to hear the evidence with an open mind and to refrain from forming or expressing an opinion until the case is submitted for a verdict. It is improper to ask questions during voir dire to elicit a pledge from jurors about how they would decide under a given state of facts or which party they would favor assuming a certain set of evidence. *Pike v. Premier Transp. & Warehousing, Inc.*, No. 13-CV-8835, 2016 WL 6395466, \*2 (N.D. Ill. 2016). This questions fall under that category of impermissible voir dire.

Plaintiffs' proposed question no. 8 states: "Will you be able to follow the instructions I give you about what sex discrimination is, even if what I tell you is different from what you previously thought or is something you personally disagree with?" This question is vague, ambiguous, and confusing to a

prospective juror. They have not been instructed on the law of sex discrimination, so it leaves the prospective juror having to guess at what sex discrimination means in order to adequately answer the questions. However, Defendants do not object to the first part of this voir dire question: “Will you be able to follow the instructions the court gives you in this case?”

Plaintiff’s proposed question no. 9 states: “Do you agree that people with the same qualifications, who do the same job, and work the same hours should be paid the same amount of money?” Proposed question no. 10 states: “Do you agree that it would still be wrong for any employer to only give a valuable benefit, such as an end-of-year bonus, to women?” And proposed question no. 11 states: “What if your employer told you and your co-workers it couldn’t afford to give the bonus to everyone, so it had to make a choice and decided to give the bonus only to women?” All three of these questions go to the heart of the issues involved in the case. Substitute “sex reassignment surgery insurance coverage” for the “bonus” and “cisgender persons” for “women,” and the questions are the issues in the case. And proposed question no. 13 tackles the issue head-on: “Do you agree that is an insurance plan covers a particular treatment, that everyone who needs that treatment should be covered equally?” As does proposed question no. 18: “Do you believe that everyone should be treated fairly when trying to obtain health insurance coverage for their medical problems?”

Unlike proper voir dire questions that attempt to expose juror bias and impartiality, Plaintiffs' proposed question nos. 9, 10, 11, 13, and 18 essentially seek to know whether or not the juror would return a verdict in Plaintiffs' favor. This is an improper attempt to indoctrinate prospective jurors on an application of the law that is uncertain given the factual ambiguities. This type of voir dire is improper because it seeks to precondition prospective jurors to a particular result, which denies the Defendants their right to an impartial jury. Court should not allow voir dire that opens a wide range of possibilities for indoctrination or pre-education of jurors. *Pike*, 2016 WL 6395466 at \*2. Plaintiffs' proposed questions have crossed the line of voir dire fairness.

Plaintiff's proposed question no. 14 states: "Do you agree that modern medicine allows us to treat many medical conditions today that were not treatable in the past?" This question is too vague and ambiguous to elicit juror bias concerning any issues in the case. The Court has discretion to restrict voir dire questions that are misleading, vague, and broad. *See Hernandez v. Davis*, No. EP-15-CV-51-PRM, 2017 WL 2271495, \*17 (W.D. Tex. 2017). This question is too vague to be of any value in this case, and it will only mislead the jury as to the actual issues in the case.

Defendants urge this Court not to adopt the following proposed voir dire questions: 3, 9, 10, 11, 13, 14, and 18.

**OBJECTION TO PLAINTIFFS' REQUEST FOR ATTORNEY-  
CONDUCTED VOIR DIRE**

Defendants object to Plaintiffs' motion for attorney-conducted voir dire. (Dkt. 167.) As demonstrated in the Court pretrial conference orders (Dkt. 37; 45), it is this Court's practice to examine prospective jurors itself. In their motion, the Plaintiffs ask for "no more than fifteen (15) minutes of non-repetitive examination of prospective jurors." (Dkt. 167:1-2.) They give no basis for justification for this request, and they fail to articulate or circulate what the requested examination will entail. Certainly, Plaintiffs may request such additional questions as they may deem necessary in light of prospective jurors' response to the Court's examination. But they have not stated a sufficient basis to depart from the well-established practice of the Court conducting the voir dire examination of prospective jurors. Plaintiffs' motion for attorney-conducted voir dire should be denied.

Dated this 14th day of September, 2018.

Respectfully submitted,

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