

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

ALINA BOYDEN and
SHANNON ANDREWS,

Plaintiffs,

v.

Case No. 17-CV-0264

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

Defendants.

**DEFENDANTS' ARGUMENT IN SUPPORT OF
VOIR DIRE QUESTION NO. 8(e),
AND AN ALTERNATIVE TO QUESTION NO. 8(a)**

At the September 25, 2018 pretrial conference, the Court requested further input regarding voir dire Question Nos. 8(a)¹ and 8(e).² (Dkt. 215:1.) Defendants' continued position is that Questions No. 8(e) should be included in the Court's voir dire of potential jurors. Defendants also request that Question No. 8(a) be replaced with one or more of the following alternatives:

¹ Question No. 8(a) states in full: "Are you or someone close to you transgender? If so, what is your relationship? Any concern that this would impact your ability to decide this case solely on the evidence admitted at trial, whether because of sympathy or lack of sympathy?"

² Question No. 8(e) states in full: "Have you or someone close to you ever been employed by, been a member of or volunteered for any organization whose mission includes the protection of constitutional or civil rights? Similarly, have you or someone close to you ever been employed by, been a member of or volunteered for any organization whose mission includes the strict or narrow construction of constitutional or civil rights?"

- Have you or someone close to you ever been discriminated against for being transgender? If so, could you describe the incident? [Allow a sidebar, if necessary, to respond] Any concern that this experience would impact your ability to be fair and impartial to both sides in this case?
- Have you or someone close to you ever submitted a claim for discrimination based on being transgender? If so, could you describe the circumstances of the claim? [Allow a sidebar, if necessary, to respond] Any concern that this experience would impact your ability to be fair and impartial to both sides in this case?
- Have you or someone close to you ever sought treatment for gender identity disorder or gender dysphoria? If so, were [you/someone close to you] denied insurance coverage for these services? Any concern that this experience would impact your ability to be fair and impartial to both sides in this case? [Allow a sidebar, if necessary, to respond to any portion of this question]

Voir dire provides the court with an opportunity to select impartial jurors and counsel with assistance in exercising peremptory challenges. *See Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991). The right to challenge has little meaning if it is unaccompanied by the right to ask relevant questions on voir dire. *Ham v. South Carolina*, 409 U.S. 524, 532–33 (1973) (Marshall, J., concurring). Voir dire must be conducted to provide “a reasonable assurance that prejudice would be discovered if present.” *United States v. Dellinger*, 472 F.2d 340, 367 (7th Cir. 1972). That standard will often require “go[ing] beyond asking the venirepersons only a few . . . ‘stock questions.’” *Art Press, Ltd. v. Western Printing Mach. Co.*, 791 F.2d 616, 619 (7th Cir. 1986) (quoting *Fietzer v. Ford Motor Co.*, 622 F.2d 281, 285 (7th Cir. 1980)). That is

because “there is . . . need for a searching voir dire examination [on] matters concerning which either the local community or the population at large is commonly known to harbor. *United States v. Robinson*, 475 F.2d 376, 381 (D.C. Cir. 1973).

In this case, an alternative to voir dire Question No. 8(a) is necessary to provide a reasonable opportunity to discover potential bias that is directly relevant to the issues in this case. As this Court has acknowledged, “transgender individuals have been subject to harassment and discrimination in virtually every aspect of their lives, including in housing, employment, education, and health care.” *Flack v. Wis. Dept. of Health Servs.*, No. 18-CV-309-wmc, 2018 WL 3574875, *1 (W.D. Wis. July 25, 2018). So it is important to provide the parties in this case a fair opportunity to explore potential biases or preconceptions a juror may have related to their experience being transgender—or because of the experiences of someone close to them.

Defendants’ alternatives to Question No. 8(a) elicit substantive information to assist counsel in exercising a preemptory strike, which may be based on “intuitive assumptions that are not fairly quantifiable.” *United States v. Williams*, 934 F.2d 847, 850 (7th Cir. 1991) (citation omitted). This includes information that a potential juror, or a close friend or family member, has experienced situations closely analogous to the issue in the case.

See United States ex rel. Roosevelthouse v. Welborn, No. 93-C-2165, 1993 WL 321741, at *4–6 (N.D. Ill. 1993) (upholding prosecution’s preemptory challenges to jurors who had a friend or family member who had been criminally prosecuted because of potential bias for the defense in a criminal case). Question No. 8(e) elicits similar information concerning civil rights advocacy groups. Each question provides the parties with some relevant and useful information to support any “intuitive assumptions” which may serve as a proper basis for a preemptory challenge.

Defendants do not suggest that transgender status, alone, should be a basis for exercising a preemptory strike, which is why they do not oppose removing the current Question No. 8(a). However, Defendants’ alternatives are more narrowly tailored to the issues in this case. They elicit specific information about a juror’s transgender experience that is directly relevant to the issues of discrimination and the denial of insurance coverage, and allow the parties to explore potential biases related to these specific types of transgender experiences.

At the pretrial conference, Plaintiffs proposed relying *solely* on Question No. 8(b) to uncover juror prejudice and bias related to their transgender status. While Defendants do not object to Question No. 8(b), it is a conclusory question meant to elicit a dismissal for cause. Standing alone, Question No. 8(b) provides no substantive information from which Defendants can

reasonably assess the credibility, bias, or potential prejudices of jurors. One or more of Defendants' alternatives to Question No. 8(a) must accompany it.

Further, refusal to ask questions may be an error of the court if they concern "matters where the likelihood of prejudice is so great that not to inquire would risk failure in assembling an impartial jury." *Dellinger*, 472 F.2d at 368–69 (reversing convictions of the Chicago Seven where the district court refused to question about attitudes toward Vietnam War and anti-war protest movement, toward "the so-called youth culture—hippies, yippies, and freaks," and toward law enforcement).

Finally, the fact that Defendants' alternatives to Question No. 8(a) seek information that is private or sensitive in nature is not a basis to exclude the questions from voir dire. As one court observed, "[t]he subjects discussed on this voir dire were not more 'sensitive' than the subjects that would be discussed in many other cases of rape, incest, indecent liberties, prostitution and other sexual crimes." *United States ex rel. Gacy v. Welborn*, No. 89-C-6392, 1992 WL 211018, at *17 (N.D. Ill. 1992). The same could be said for other types of civil rights discrimination cases. Here, Defendants' alternatives to Question No. 8(a) do not elicit information as sensitive as the voir dire topics referenced in *Welborn*. Nor does Question No. 8(e). Moreover, because the alternatives to Question No. 8(a) include the phrase "or someone close to you," an affirmative answer does not mean that the potential juror

must self-identify as transgender if he or she does not want to do so. As the Court explained at the pre-trial conference, the option of a side bar is always available to address any particular juror's sensitivities.

In summary, Defendants do not oppose removing the current Question No. 8(a) from the Court's voir dire in this case, but request that it be replaced with one or more of the above proposed alternatives. Defendants also request that Question No. 8(e) remain in the Court's voir dire.

Dated this 28th day of September, 2018.

Respectfully submitted,

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