

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JARI MCPHERSON, JERALD SAMS, and	§	
DANIEL MARTINEZ,	§	
<i>Plaintiffs,</i>	§	
	§	
v.	§	Civil Action No. 1:20-CV-01223-DAE
	§	
TEXAS DEPARTMENT OF PUBLIC	§	
SAFETY,	§	
<i>Defendant.</i>	§	

DEFENDANT’S MEMORANDUM IN SUPPORT OF MOTION FOR MISTRIAL

TO THE HONORABLE DAVID EZRA:

Defendant Texas Department of Public Safety (“DPS”) files this Memorandum in Support of its Motion for Mistrial made orally at trial.

This trial improperly morphed from an employment dispute involving two specific employees into closing arguments that addressed general “systemic racism” and sending a message “across the entire country.”¹ After the improper closing arguments irreparably prejudiced the jury, a further taint was added when the jury was allowed to change their verdict after improper objections and commentary from plaintiff’s counsel. Moreover, the Court and plaintiffs’ counsel engaged the Jury Foreperson in a dialogue concerning the jury’s deliberations

¹ Counsel’s statements to the press after the verdict confirm that this case was meant to improperly send a political message. Plaintiffs’ counsel: “This should be a clarion call for the state legislators and the governor to gut out the poison of institutional racism that is flourishing in that agency.” Taylor Goldenstein, “[Jury finds Texas Department of Public Safety liable for racial discrimination against two troopers](#),” *Houston Chronicle*, February 5, 2026. Plaintiff also stated “outcome should prompt state leaders to examine what he characterized as institutional racism within the department.” Dalton Huey, “[Texas DPS hit with \\$1.6M jury verdict in race discrimination, retaliation lawsuit, KXAN Austin](#),” February 4, 2026.

and the jury's understanding of a jury note and the written response from the Court. Accordingly, a mistrial is warranted.

A. The Legal Standard

“A new trial is warranted when improper closing argument irreparably prejudices a jury verdict.” *Clapper v. Am. Realty Invs., Inc.*, 95 F.4th 309, 313 (5th Cir. 2024); *see also Baisden v. I'm Ready Prods., Inc.*, 693 F.3d 491, 509 (5th Cir. 2012); *Nissho-Iwai Co., Ltd. v. Occidental Crude Sales, Inc.*, 848 F.2d 613, 619 (5th Cir. 1988)).

To determine if a new trial is warranted, the statements at the closing arguments must be examined collectively and in the specific context of the trial at issue. *Clapper*, 95 F.4th at 314. Courts should “examine the propriety of closing argument by reviewing the entire argument ‘within the context of the court’s rulings on objections, the jury charge, and any corrective measures applied by the trial court.’” *Id.* (quoting *Nissho-Iwai Co., Ltd.*, 848 F.2d at 619). As the Court explained:

If the tactics used during trial, taken together, tarnish the badge of evenhandedness and fairness that normally marks our system of justice, then a new trial is warranted. This is especially the case when, as here, those tactics are used during closing argument, which often leaves an especially powerful impression on the jury. We do not wish to underestimate the value of closing argument, as it is the last impression a defendant makes upon the jury.

Clapper, 95 F.4th at 314 (internal quotes and citations omitted). In *Clapper*, the Fifth Circuit reversed the denial of a motion for mistrial, where counsel made “numerous improper and highly prejudicial statements in closing argument.” *Id.* at 312.

Similarly, in *O'Rear v. Fruehauf Corp.*, the Fifth Circuit held that the trial judge had erred in not declaring a mistrial after counsel's improper comments about another lawsuit during closing arguments. *O'Rear v. Fruehauf Corp.*, 554 F.2d 1304, 1309 (5th Cir. 1977). Despite the

district judge giving instructions to the jury such as “Statements and arguments of counsel are not evidence and must not be considered by you as such,” the appellate court found that “it is impossible to conclude that substantial rights were not affected.” Parallels between *O’Rear* and the instant DPS case here can be drawn:

[Counsel’s] prejudicial remarks without more might have been harmless error, for the judge gave cautionary instructions to the jury[;] ... however, there is more. [Counsel’s] final argument, contrary to specific court orders and his own assurances, deliberately reemphasized the impression he had been fomenting throughout the trial, that is, [DPS is a systemically racist organization].

O’Rear, 554 F.2d at 1308 (modified to address the instant DPS case).

The error from the closing argument was compounded when the jury was permitted to modify their verdict after commentary from Plaintiffs’ counsel. While most published cases dealing with juries leaving or changing blank answers involved criminal matters such as double-jeopardy for retrying counts where the jury left blanks on verdict forms, one instructive employment case on this matter is *Weichert v. E-Fin. Call Ctr. Support*, No. CV 13-2493-KHV, 2016 WL 1261035 (D. Kan. Mar. 30, 2016). In *Weichert*, which concerned a pay discrimination claim, the jury appeared to be confused on the jury instruction regarding damages, and over the defendant’s objections that the intervening comments “had tainted the process,” the judge gave the jury a clean verdict form. *Id.* at *4.

Notably, neither *Weichert* nor this case is a simple matter of the court directing “the jury to further consider its answers and verdict” in response to “answers inconsistent with the verdict,” which is generally permitted in FED. R. CIV. P. 49(a)(3). There was no inconsistent answer provided by the jury here.

Importantly for the holding, the *Weichert* plaintiff stipulated she would accept the initial jury verdict—which the court relied upon in deciding that a mistrial was not warranted. *Id.* at *8 (“Because the Court enforces plaintiff’s agreement to accept unitary damages under the initial verdict, it need not decide whether proceedings in the courtroom tainted the special verdict.”). The court found that “as a result of its decision to enforce the stipulations, defendants have suffered no demonstrable prejudice,” so “[a]ccordingly, the Court overrules the defendants’ motion for mistrial.” *Id.* In plain contrast to *Weichert*, here Plaintiffs McPherson and Sams refused to stipulate and accept the initial verdict.

B. Argument

This approximately three-week trial played out against the backdrop on the protests in Minneapolis. At the final pretrial conference, this Court noted that if plaintiffs’ “case rests on some guy making an ill-advised post about a Hitler message that he’d like to send or making a joke about, you know, Hitler, you’re in big trouble in this trial.” Exhibit 1 (pretrial conference transcript), at 24:6-9. The Court also directly admonished Plaintiffs not to “sink your own ship”:

Now, I think Counsel needs to be careful both in opening statement -- from opening statement, you shouldn't be doing this anyway, but *in closing argument, we don't want any argument to the jury that, you know, I want you to send a message, you know, that kind of stuff*; we won't stand for this kind of thing in Austin and, you know, that kind of argument. That's -- *you're asking for a reversal on appeal.*

Even if I granted, immediately stopped, instructed the jury to disregard -- you know, I've seen cases go down the tubes where -- It was just recently, I think it was a Fifth Circuit case or I don't know -- it was either a Supreme Court or Fifth Circuit case. Anyway, some lawyer got up and made those -- I think it was a Fifth Circuit case -- made these kinds of bombastic statements. And even though the judge, you know, excoriated the jury not to take those into consideration, his appeal, no. Sorry. So you don't want to sink your own ship.

Exhibit 1, at 28:5-24 (emphasis added). The Court then proceeded to rule on related motions in limine that were subsequently violated during the closing argument. *See id* at 29:10-30:25 (no “custom or practice of racial discrimination”); *id.* at 32:2-9 (no “systemic racism” arguments); *id.* at 32:20-22 (no comment on availability of witnesses to testify).

At closing, Sams’ counsel started by referencing Sams’ dismissed retaliation claim that was not before the jury, and also referenced “institutional racism.” Exhibit 2 (closing argument transcript) at 30:4; 34:22. McPherson’s counsel almost entirely focused on “systemic racism” within DPS, supporting his improper arguments with “pattern-or-practice” examples:

- Counsel argued that McPherson’s time in Temple established a pattern and practice of racism, concluding that “you are able to extract from that that there is systemic racism within the Department of Public Service (sic).” *Id.* at 41:25-42:13.
- “[T]his background evidence shows a pattern and practice within the DPS where race is indeed a factor.” *Id.* at 44:14-18.
- “So we’ve established background evidence showing a pattern and practice of racism ... indicating that there is systemic racism at the DPS.” *Id.* at 48:15-19.

At the pretrial conference, the Court prohibited such arguments verbatim. *See* Exhibit 1 at 27:17-28:25; 29:10-30:25; 32:2-9. The “pattern-or-practice method of proof is not available in private, non-class action lawsuits” brought under Title VII, such as this suit. *Frank v. Xerox Corp.*, 347 F.3d 130, 137 (5th Cir. 2003).

Counsel for McPherson then violated another motion in limine, arguing that the defense failed to put Captain Koenig as a witness:

And that brings me to another important point. Captain Koenig was available to testify. Did the Defense put him on in order to defend his decisions? I mean, wouldn’t he be the logical witness to tell you, this is why I did it, and these are the reasons and race wasn’t part of that? Where is he? He is not here. Their defense is not supported by a witness.

Exhibit 2, at 47:1-8.

McPherson's counsel then later concluded with the type of exact type of emotional argument about "sending a message" that this Court warned would "sink your own ship":

A very famous American, Martin Luther King, once said: If injustice is tolerated anywhere, justice is threatened everywhere. And what he meant was, even though this involves just two people in Austin involving employment within a Department, your decision is going to resonate across the entire country. I said earlier today you were the law, and you are. And your decision will have impact on other cases throughout the country.

Exhibit 2, at 72:2-11. This kind of argument warrants a mistrial. *See e.g., Clapper*, 95 F.4th at 314.

These mistrial concerns are further exacerbated by Plaintiffs' counsel's interjection and attempted argument after the jury had initially rendered a verdict. *See* Exhibit 3 (jury verdict transcript), at 7:17-9:12. The jury returned a consistent verdict that was published by the Court Deputy. *Id.* at 4:1-7:16. "When the general verdict and the answers are consistent, the court must approve, for entry under Rule 58, an appropriate judgment on the verdict and answers." FED. R. CIV. P. 49(b)(2).

Plaintiffs' counsel then improperly objected to the verdict before the jury (not outside the presence or at sidebar). The taint began at this point, and the improper dialogue continued until the Court admonished, "No, don't say anything more." *Id.* at 8:16. At this point, the Court could have polled the jury with the simple question ("Is this your true and correct verdict?"), which may have prevented tainted further jury deliberation.

Instead, the Court and plaintiffs' counsel engaged the Jury Foreperson in a dialogue concerning the jury's deliberations in open court in the presence of the jury—specifically, the jury's understanding of a jury note and its understanding of the written response from the Court. *Id.* at 8:18-9:11. After excusing the jury to the jury room, argument on the issue finally occurred

outside of the presence of the jury. *Id.* at 9:14-14:14. At this point, any second deliberation was irreparably tainted.

To prevent a mistrial caused by the tainted second deliberation, Plaintiffs could have stipulated an acceptance of the initial verdict, which they nearly did. *Id.* at 16:21-17:14. This would have made this case more akin to *Weichert*. See *Weichert*, 2016 WL 1261035, at *8. But Plaintiffs declined. Instead, the jury rendered its second verdict, nearly tripling the amount of damages awarded. Exhibit 3, at 21:10-25:11. At the time, the Court noted, “I’m very seriously considering a mistrial and starting all over again.” *Id.*, at 12:17-18. A mistrial is warranted here.

C. Conclusion

For these reasons, Defendant DPS respectfully requests that the Court declare a mistrial.

Dated: February 9, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via ECF filing on February 9, 2026 to all counsel of record.

/s/ Drew L. Harris

DREW L. HARRIS

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**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

JARI MCPHERSON and) Case 1:20-cv-1223-DAE
JERALD SAMS,)
)
Plaintiffs,)
)
vs.) Austin, Texas
)
TEXAS DEPARTMENT OF)
PUBLIC SAFETY) January 6, 2026

FINAL PRETRIAL CONFERENCE

BEFORE THE HONORABLE JUDGE DAVID ALAN EZRA

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02:12 1 buy that.

02:12 2 MR. MUNGO: Yeah.

02:12 3 MR. NOTZON: I think that's a jury question.

02:12 4 That's not a question of law.

02:12 5 MR. MUNGO: Yeah, it's about color.

02:12 6 THE COURT: Listen, if your case rests on some

02:12 7 guy making an ill-advised post about a Hitler message

02:12 8 that he'd like to send or making a joke about, you know,

02:12 9 Hitler, you're in big trouble in this trial.

02:12 10 MR. NOTZON: I'm not saying it is only, Your

02:12 11 Honor. But I think it is one in a package of actions

02:13 12 that are there that our clients experienced that I think

02:13 13 the jury has a right to hear that's going on and is not

02:13 14 restricted by the supervisors in charge of DPS.

02:13 15 THE COURT: I don't know what -- what is

02:13 16 this -- what about -- with Trump -- the thing with Trump

02:13 17 and a beer bottle? I mean, what --

02:13 18 MR. MUNGO: Your Honor --

02:13 19 THE COURT: That doesn't have anything to do

02:13 20 with that case.

02:13 21 MR. MUNGO: -- we don't want that. We don't

02:13 22 want that. You can exclude that. That's obviously

02:13 23 outside of the realm.

02:13 24 THE COURT: Thank you.

02:13 25 MR. MUNGO: And I don't know how that got in

02:13 1 there. And our final exhibit list did not include those
02:13 2 others.

02:13 3 The only ones we're concerned with is the
02:13 4 Hitler mustache and the "Black Socks Matters." We
02:13 5 believe that those hit right square in the middle of the
02:13 6 kind of case that --

02:13 7 THE COURT: Well, I would agree with "Black
02:13 8 Socks Matters," but I'm going not -- I'm going to
02:13 9 reserve judgment on the Hitler mustache.

02:14 10 MR. MUNGO: Okay.

02:14 11 THE COURT: That's a little close. The rest
02:14 12 of them, this one with the guy diving with the dog and
02:14 13 all that type of --

02:14 14 MR. MUNGO: No, no, no, the rest of them --

02:14 15 THE COURT: And sweating, I don't know what
02:14 16 this has to do with anything.

02:14 17 MR. MUNGO: Nothing, nothing -- we used that
02:14 18 during the deposition, Your Honor.

02:14 19 THE COURT: And COVID-19.

02:14 20 MR. MUNGO: Those were not supposed to be in
02:14 21 there, in our final.

02:14 22 MR. HARRIS: This is -- we took this from the
02:14 23 Bates Numbers for Plaintiffs' Exhibit Number 80.

02:14 24 THE COURT: Yes, well, sometimes people put
02:14 25 stuff in that they don't intend to use.

02:14 1 MR. MUNGO: Clearly, those are not --

02:14 2 THE COURT: Those are not --

02:14 3 MR. MUNGO: -- Mr. Harris --

02:14 4 THE COURT: You can give this back

02:14 5 (indicating.)

02:14 6 MR. MUNGO: The only things we want are the

02:14 7 Hitler mustache and the "Black Socks Matters."

02:14 8 THE COURT: All right. Let's move on to the

02:14 9 next one.

02:14 10 MR. HARRIS: And just for clarity, Your

02:14 11 Honor --

02:14 12 MR. MUNGO: Your Honor -- I'm so sorry -- just

02:14 13 to be clear, you have granted with regard to the

02:14 14 "Black Socks Matters" --

02:14 15 THE COURT: Yes.

02:14 16 MR. HARRIS: He denied it.

02:14 17 THE COURT: I denied it.

02:14 18 MR. MUNGO: Denied, yes, I'm sorry. Denied,

02:14 19 and you're holding in abeyance your ruling on the --

02:15 20 THE COURT: We'll see how the case develops on

02:15 21 the Hitler thing.

02:15 22 MR. HARRIS: Thank you.

02:15 23 And just for clarity because I think --

02:15 24 THE COURT: The rest of them it's granted as

02:15 25 to -- because they're not germane. I mean, we're not

02:15 1 going to inject Donald Trump and a beer bottle here.

02:15 2 That's ridiculous.

02:15 3 MR. HARRIS: And just for clarity, I believe

02:15 4 Number 3 -- Motion in Limine Number 3 regarding

02:15 5 time-barred claims, that was granted?

02:15 6 THE COURT: Yes, that's right.

02:15 7 MR. HARRIS: All right.

02:15 8 THE COURT: Because they're not claims in this

02:15 9 case.

02:15 10 Listen, we've got enough that's in this case

02:15 11 to talk about. We don't need to talk about things that

02:15 12 aren't in the case.

02:15 13 MR. HARRIS: That's true.

02:15 14 THE COURT: But as I said, there may be

02:15 15 evidence that --

02:15 16 MR. NOTZON: There you go.

02:15 17 THE COURT: -- would prove a time-barred

02:15 18 claim, but also prove a claim that is currently alive so

02:15 19 that -- if you have an objection, you just need to raise

02:15 20 the objection.

02:16 21 All right. Where are we now?

02:16 22 DPS conduct at the George Floyd protest.

02:16 23 That's granted. We're not going to get into the George

02:16 24 Floyd or Antifa or BLM or any of that stuff. They don't

02:16 25 have any objection to that. They're not trying to prove

02:16 1 their case with that.

02:16 2 And the next one is the same. That's
02:16 3 references to emotional social justice issues. That's
02:16 4 granted.

02:16 5 Now, I think Counsel needs to be careful both
02:16 6 in opening statement -- from opening statement, you
02:16 7 shouldn't be doing this anyway, but in closing argument,
02:16 8 we don't want any argument to the jury that, you know, I
02:16 9 want you to send a message, you know, that kind of
02:16 10 stuff; we won't stand for this kind of thing in Austin
02:16 11 and, you know, that kind of argument.

02:16 12 That's -- you're asking for a reversal on
02:16 13 appeal. Even if I granted, immediately stopped,
02:17 14 instructed the jury to disregard -- you know, I've seen
02:17 15 cases go down the tubes where --

02:17 16 It was just recently, I think it was a
02:17 17 Fifth Circuit case or I don't know -- it was either a
02:17 18 Supreme Court or Fifth Circuit case.

02:17 19 Anyway, some lawyer got up and made those -- I
02:17 20 think it was a Fifth Circuit case -- made these kinds of
02:17 21 bombastic statements. And even though the judge, you
02:17 22 know, excoriated the jury not to take those into
02:17 23 consideration, his appeal, no. Sorry. So you don't
02:17 24 want to sink your own ship.

02:17 25 MR. MUNGO: No.

02:17 1 THE COURT: The next one is references to
02:17 2 cases all involving allegations of race-based police
02:17 3 conduct against private citizens. This is the same
02:17 4 thing. You know, trying to paint somebody -- you know,
02:17 5 you're sending a message; we don't allow this kind of...
02:18 6 So I'm going to grant that motion.

02:18 7 And the final one is motion to exclude
02:18 8 evidence, statement, or argument regarding George Floyd.
02:18 9 That's already granted.

02:18 10 Other employees' racism claims, well, we are
02:18 11 going to have other employees testify and they probably
02:18 12 have the right to testify about what happened to them.

02:18 13 MR. HARRIS: I believe that would actually be
02:18 14 error because, again, this is a case involving the
02:18 15 two Plaintiffs --

02:18 16 THE COURT: Right.

02:18 17 MR. HARRIS: -- and their claims and the Fifth
02:18 18 Circuit's held that you can't just have a bunch of
02:18 19 people come and say, oh, yeah, that happened to me; that
02:18 20 happened to me. We would then need to have witnesses to
02:18 21 rebut all of those other satellite claims.

02:18 22 THE COURT: No, no, I'm not talking -- no, I
02:18 23 think you misunderstand what I -- maybe I misspoke or
02:18 24 maybe I'm not as clear as I should be.

02:18 25 I'm not talking about what we would refer to

02:19 1 as custom and practice evidence -- you know, they had a
02:19 2 custom and practice of racial discrimination; look at
02:19 3 all of these people that got racially discriminated
02:19 4 against; they have no right to testify.

02:19 5 They have the right to come in and testify
02:19 6 if they were part of a situation that occurred that
02:19 7 involved the Plaintiffs.

02:19 8 MR. HARRIS: Yes, but the concern that I have,
02:19 9 is that even in responding to our Motion in Limine
02:19 10 Number 8, they specifically flagged Plaintiff Martinez
02:19 11 is going to come and testify about his experiences with
02:19 12 racism.

02:19 13 THE COURT: No, he can't do that.

02:19 14 MR. MUNGO: We weren't going to do that.

02:19 15 MR. NOTZON: Your Honor, I think that's a
02:19 16 little bit misstated. Martinez was a lieutenant over
02:19 17 McPherson and others in his group.

02:19 18 THE COURT: Well, he has the right --
02:19 19 remember, I said he can testify -- people can testify
02:19 20 about things that occurred of which they were a part.

02:20 21 MR. NOTZON: Right.

02:20 22 THE COURT: They can't testify about their own
02:20 23 individual, separate, distinct racial discrimination
02:20 24 claim, got it?

02:20 25 MR. NOTZON: That's exactly right.

02:20 1 THE COURT: So if he has substantive,
02:20 2 probative evidence that has to do with the claims of the
02:20 3 others and he was a witness and he knows what went on,
02:20 4 he can testify about that. He is -- what do you call
02:20 5 it -- a percipient witness.

02:20 6 But that's different from him testifying up
02:20 7 there about his own individual claim of which they
02:20 8 weren't directly a part of. He can't do that.

02:20 9 MR. MUNGO: Wait a minute. Restate that,
02:20 10 Judge, to make sure I got that.

02:20 11 I apologize. I apologize.

02:20 12 THE COURT: You know what you should do?
02:20 13 Order a transcript.

02:20 14 MR. NOTZON: I got it. I can -- I think I can
02:20 15 convey it, Your Honor.

02:20 16 THE COURT: Well, you can order it. You
02:20 17 should order a transcript. You guys should get dailies
02:21 18 in this case.

02:21 19 That's my suggestion. It's up to you, but,
02:21 20 it's up to you. You can -- you know, you don't have to
02:21 21 order every day, but I would get dailies of the
02:21 22 important testimony so you can cross-examine them.

02:21 23 MR. MUNGO: Yes, sir, thank you.

02:21 24 THE COURT: I mean, I'm not telling you to do
02:21 25 it. I mean, it's up to you. I was a trial lawyer too.

02:21 1 I used to order dailies.

02:21 2 All right. References to police reform,
02:21 3 systemic racism, police racism, no. We're not -- this
02:21 4 is not an Attorney General case against, you know, the
02:21 5 Los Angeles Police Department, you know, that kind of
02:21 6 thing.

02:21 7 MR. NOTZON: Not objected to, Your Honor.

02:22 8 THE COURT: That's not objected to, so that's
02:22 9 granted.

02:22 10 References to police codes, that's granted,
02:22 11 "code of silence," "blue wall," that kind of stuff.

02:22 12 References to any settlement discussions, of
02:22 13 course, that's granted. I don't know if there were --
02:22 14 were there settlement -- did anybody ever try to settle
02:22 15 this case?

02:22 16 MR. HARRIS: There was some settlement
02:22 17 discussion back and forth, but we didn't end up --

02:22 18 THE COURT: Obviously not or we wouldn't be
02:22 19 sitting here.

02:22 20 Availability of witnesses to testify. Yes,
02:22 21 there should not be any reference to that. That's
02:22 22 granted.

02:22 23 All right. Okay. That's all the motions in
02:22 24 limine.

02:22 25 Let me tell you about, if you try to -- did

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

1		
2		
3	JARI McPHERSON and JERALD)	Case No. 1:20-cv-01223-DAE
4	SAMS,)	
5	Plaintiffs,)	
6	vs.)	Austin, Texas
7	TEXAS DEPARTMENT OF)	
8	PUBLIC SAFETY, and)	
9	Director Steven C. McGraw)	
10	in his official capacity,)	
11	Defendant.)	January 28, 2026

TRIAL ON MERITS

BEFORE THE HONORABLE JUDGE DAVID ALAN EZRA

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10:19 1 Now, ladies and gentlemen, before we begin,
10:19 2 there -- you've heard some testimony about money and
10:19 3 claims they may have earned in the future and had they
10:19 4 not been terminated, right?

10:19 5 That is typically called front pay. That is
10:19 6 not an issue for you as a jury. Okay? That is an issue
10:19 7 for the Court, for me, and would only become an issue if
10:19 8 you, in fact, find for the Plaintiffs on certain claims.

10:19 9 Now, by telling you this, I'm not suggesting
10:19 10 you should or shouldn't find for the Plaintiffs.
10:19 11 All right? I'm just explaining to you why that's not
10:20 12 going to be discussed by Plaintiffs' counsel or why
10:20 13 that's not an issue for you. All right?

10:20 14 Go ahead.

10:20 15 **CLOSING ARGUMENT FOR PLAINTIFF JERALD SAMS**

10:20 16 MR. MUNGO: May it please the Court. Good
10:20 17 morning, ladies and gentlemen. First of all, I want to
10:20 18 thank you, heartfelt, for your endurance.

10:20 19 DEPUTY CLERK: Into the microphone, please,
10:20 20 Mr. Mungo.

10:20 21 MR. MUNGO: I want to thank you for your
10:20 22 endurance and your patience. This has been a long
10:20 23 trial. And you -- some of you have driven quite a
10:20 24 distance every day for it, and for that reason, I'm
10:20 25 going to be very brief.

10:20 1 I'm going to skim through what we believe to
10:20 2 be gun-smoking evidence that was submitted to you to
10:21 3 prove our case that Mr. Sams was denied a promotion
10:21 4 because of his race and he was retaliated against and he
10:21 5 was exposed to a racially hostile environment.

10:21 6 Now, I want to -- and you have to pardon me.
10:21 7 It's kind of awkward. I have got to get there to flip
10:21 8 to the next slide, but I want to show you the policy
10:21 9 that the Defendants have in place, a no tolerance --
10:21 10 they will -- intimidating, hostile, and offensive
10:21 11 environments will not be tolerated or condoned by the
10:21 12 Department.

10:21 13 Ladies and gentlemen, in this case, that
10:21 14 promise by the Department has not been kept. And we
10:21 15 believe that we have presented sufficient evidence to
10:22 16 prove -- by a preponderance of the evidence to prove
10:22 17 that that is the case. And I promised you I was going
10:22 18 to be brief, so I'm going to skim through this
10:22 19 testimony. I know you guys got it.

10:22 20 You took copious notes. I saw you. So it's
10:22 21 going to be quick. Okay? And I'm going to rely on
10:22 22 you -- which I know I can trust you to follow the
10:22 23 evidence that you have even made notes of.

10:22 24 The first person I want to cover is Katie
10:22 25 Conley. You recall she took the stand, Major Katie

10:22 1 Conley. She oversaw the promotional process for the
10:22 2 entire Texas Department of Public Safety. She didn't
10:22 3 just run one division or one department or one station.
10:22 4 She oversaw the entire Department's promotional process.

10:22 5 And this is what she had to say, if you
10:23 6 recall. She said that: Captain Richards' method of
10:23 7 rating Sams had no place in law enforcement.

10:23 8 That's pretty strong. And she said:
10:23 9 Captain Richards' actions leading to the denial of
10:23 10 Jerald Sams' promotion to a Sergeant over the Mounted
10:23 11 Unit was wrong.

10:23 12 That's powerful. That's strong. Coming
10:23 13 from the person that governs, the person that monitors,
10:23 14 the person that sets the policies and determines whether
10:23 15 or not those policies are met, that's Katie Conley. She
10:23 16 said this about Richards, who denied Mr. Sams'
10:23 17 promotion.

10:23 18 She also said that: The competency ratings
10:23 19 that the Department uses to determine whether or not a
10:23 20 candidate would be promoted after they apply for that
10:23 21 particular promotion is 100 percent subjective.

10:23 22 That means that a person could vote -- if
10:24 23 they just didn't like you, they would vote you down and
10:24 24 if they had the influence over the others who were
10:24 25 participating in the rating system, to influence them to

10:24 1 vote you down, it's about feelings.

10:24 2 It's about -- it's just subjective, as we
10:24 3 know subjectivity to be. Now, just taking those two
10:24 4 points alone, I can see why Captain Schwartz, in his
10:24 5 testimony, said the Texas Department of Public Safety is
10:24 6 a dysfunctional family.

10:24 7 Why would you have a system to determine
10:24 8 whether or not someone is qualified for a promotion that
10:24 9 they've worked hard for, that they spent their entire
10:24 10 life in that career to be left up to subjective notions?
10:24 11 There has got to be objective ways of determining
10:24 12 whether or not someone is qualified for a position.

10:24 13 She also stated that: Other board members
10:24 14 lowered their competency ratings due to Captain
10:24 15 Richards' inappropriate behavior.

10:25 16 Now, that's an exhibit that's going to be
10:25 17 submitted to you.

10:25 18 And that's a promotional document where it
10:25 19 shows where McKinney actually lowered his ratings
10:25 20 three times. Three times he lowered his ratings. He
10:25 21 went from exceptional to marginal, and you'll see that.
10:25 22 And that all happened after Captain Richards'
10:25 23 comments -- inappropriate comments.

10:25 24 The Promotion Board, she says, can be easily
10:25 25 manipulated, as it was in this case, and acknowledged

10:25 1 that Sams was treated differently from other candidates.

10:25 2 Now, again --

10:25 3 *(Mr. Welch publishes document.)*

10:25 4 MR. MUNGO: There you go. Thank you. You're
10:25 5 going to help me out.

10:25 6 *(Mr. Welch publishes document.)*

10:25 7 MR. MUNGO: Okay. Good.

10:25 8 And then we go to the testimony of

10:25 9 Christopher Jones. Now, Christopher Jones,

10:26 10 Major Christopher Jones, with all due respect, who has

10:26 11 been with us the entire trial was the Major over -- in

10:26 12 the chain of command that oversaw the Mounted Unit that

10:26 13 Sams was part of.

10:26 14 What did he say in his testimony? He said:

10:26 15 Sams should have received the Sergeant's promotion over
10:26 16 the Mounted Unit.

10:26 17 He said that.

10:26 18 Now, he wouldn't have -- he wouldn't have

10:26 19 said that unless he believed that, I believe. He

10:26 20 wouldn't have said that unless he believed it. And it

10:26 21 was only one position. So if he believes Sams should

10:26 22 have gotten it, then he had to believe that Devenport

10:26 23 should not have.

10:26 24 He also stated: It was likely that Sams was
10:26 25 not promoted due to his race.

10:26 1 Now, this is a race case, yes, and we are
10:26 2 looking for and we have established that there has been
10:26 3 enough race injected into the promotional process
10:26 4 that -- wherein Sams was denied that promotion that he
10:27 5 was entitled to and injected into what we call the
10:27 6 racially hostile environment. We've presented evidence
10:27 7 that race is there.

10:27 8 Even if we start from Captain Richards
10:27 9 taking the picture of Sams while he is tending to the
10:27 10 horse's hooves, you see, Captain Richards thought that
10:27 11 was funny that a Black man -- in his profession, he
10:27 12 spent all his life preparing for this profession, and
10:27 13 part of it was the Mounted Unit, which serves a great
10:27 14 and important purpose for the Texas Department of Public
10:27 15 Safety for our safety, for our protection.

10:27 16 He thought it was funny that a Black man
10:27 17 would be given that kind of responsibility in this job
10:27 18 that he's trained for all of his life. He came up
10:27 19 loving horses and training horses and that's race.

10:27 20 He said, it's a Black man, it's funny,
10:28 21 ha-ha-ha. And also Major Jones stated that he believes
10:28 22 that institutional racism was present in the Department
10:28 23 of Public Safety.

10:28 24 Again, going back to Captain Schwartz
10:28 25 comment: The Texas Department of Public Safety is a

10:28 1 dysfunctional family.

10:28 2 You heard it from their witness, their
10:28 3 employee who was retired at the time he testified, but
10:28 4 nonetheless, was a Captain that, in the Agency, he would
10:28 5 know.

10:28 6 He also testified that: No White trooper
10:28 7 under investigation was treated like Sams was treated.

10:28 8 Being escorted to do his work, he said no
10:28 9 White trooper was ever escorted when they were under
10:28 10 investigation to do their work on a daily basis.

10:28 11 And he also testified -- he admitted that
10:28 12 the Department of Public Safety takes two to three years
10:28 13 to address complaints of discrimination, ladies and
10:29 14 gentlemen. Two year -- that's his testimony, the Major,
10:29 15 in the Texas Department of Public Safety.

10:29 16 That doesn't sound to me like they have met
10:29 17 their obligations, their responsibility, their being
10:29 18 held accountable for their duties to their employees,
10:29 19 not to tolerate -- zero tolerance of any conduct that
10:29 20 creates a racially hostile environment.

10:29 21 Well, if it takes two or three years, ladies
10:29 22 and gentlemen, the persons who's complaining about the
10:29 23 treatment that diminishes their humanity and dignity and
10:29 24 self-respect has to languish in that condition every day
10:29 25 they walk into work. Two to three years. Unheard of.

10:29 1 Unheard of.

10:30 2 Now, we go to the deposition -- or the
10:30 3 testimony of David Devenport. Now, he admitted there
10:30 4 was other candidates more qualified than him when he
10:30 5 interviewed with the board. He admitted that. And the
10:30 6 other two candidates was Sams and another person.

10:30 7 And in my thinking, Sams had to be the
10:30 8 person that he felt he was less qualified than. He
10:30 9 tried to avoid the recertification process that he
10:30 10 ultimately failed. He never led the Mounted Unit on one
10:30 11 deployment. More importantly, we have a requirement --
10:30 12 we have a requirement in the Mounted Unit.

10:30 13 So we have a requirement in the Mounted Unit
10:30 14 that every employee that mounts a horse must pass that
10:31 15 recertification because a horse can be a dangerous
10:31 16 animal, not only to the person riding it, but also to
10:31 17 the public. Okay? All right.

10:31 18 So the retaliation, we talked about the
10:31 19 racially hostile environment. We saw the picture with
10:31 20 the gorilla. And I didn't put all the language up
10:31 21 there -- it is just horrible -- stop showing the video
10:31 22 of him dragging that F-ing out of -- out of that little
10:31 23 hood baby.

10:31 24 And then we have the instance in which Sams
10:31 25 filed the complaint of racial discrimination because he

10:31 1 was denied Sergeant. In 2019, Sams was subjected to the
10:31 2 Department of Public Safety's employee renditions of
10:31 3 Hitler and "Black Socks" mocking Black Lives Matter.
10:31 4 And Sergeant Jessica Springer overtly lying about
10:31 5 Mr. Sams abusing horses.

10:32 6 He loves horses. He loves horses.

10:32 7 Now, what I'd like to do, ladies and
10:32 8 gentlemen, for the remaining time that I have is talk to
10:32 9 you about your decision in favor of Sams, that he has
10:32 10 indeed proved by a preponderance of evidence that he was
10:32 11 denied the promotion because of his race, that he was
10:32 12 subject to a racially hostile environment, and that he
10:32 13 was retaliated against for complaining about this
10:32 14 treatment.

10:32 15 So when you go back to the jury room, you
10:32 16 will have a Jury Verdict Form, and the Jury Verdict
10:32 17 Form, Number 1, the first question is -- the question
10:32 18 that you'll see and that you'll have to answer: Do you
10:33 19 find that Plaintiff Sams would not have been denied a
10:33 20 promotion to the Sergeant position that he applied for
10:33 21 in 2018 in the absence of or in other words but for his
10:33 22 race?

10:33 23 Now, his race doesn't have to be the sole
10:33 24 reason as read to you by the Judge in the instructions.
10:33 25 It doesn't have to be the only, sole reason. It only

10:33 1 has to be one of the reasons.

10:33 2 And we believe that your answer there should
10:33 3 be "yes."

10:33 4 Okay. And then this Question Number 3: Has
10:33 5 Plaintiff Sams proved that he was harassed because of
10:33 6 his race by Defendant?

10:33 7 We just presented a plethora of evidence
10:33 8 that he was subjected to harassment because of his race,
10:33 9 and we believe that you should answer "yes" to Number 3
10:33 10 as well for Sams.

10:33 11 And then Number 4: Did Defendant DPS know,
10:33 12 or in the exercise of reasonable care, should have
10:33 13 known, that Plaintiff Sams was being harassed based on
10:34 14 race?

10:34 15 The answer we believe you should give to
10:34 16 that is "yes."

10:34 17 He continued to be harassed from 2016 all
10:34 18 the way up to 2020 -- 2024 when he, ultimately, decided
10:34 19 to leave because he couldn't stand it any longer.

10:34 20 And also the Jury Verdict Form you're going
10:34 21 to come to a portion where we're going to ask for
10:34 22 damages. Okay?

10:34 23 Did Defendant DPS fail to take prompt
10:34 24 remedial action with regards to Plaintiff Sams?

10:34 25 We believe your answer should be "yes."

10:34 1 With those "yes" answers, we believe damages
10:34 2 are appropriate. And Question Number 9, very, very
10:34 3 important:

10:34 4 What sum of money, if paid now --

10:34 5 DEPUTY CLERK: Three minutes.

10:34 6 MR. MUNGO: Okay. Number 5 should be "no."

10:35 7 Did Defendant DPS fail to take prompt
10:35 8 remedial action with regards to Plaintiff Sams?

10:35 9 The answer should be "no." They did not.
10:35 10 These complaints languished in their departments, in
10:35 11 their files for two to three years.

10:35 12 And this is why he was continuously,
10:35 13 continuously harassed in the same manner -- and I
10:35 14 apologize for that error.

10:35 15 And then Question Number 9: What sum of
10:35 16 money, if you're paid now in cash, would fairly and
10:35 17 reasonably compensate Plaintiff Sams for his damages, if
10:35 18 any, caused by the Defendant DPS?

10:35 19 The answer in dollars and cents for the
10:35 20 following items and none other -- the economic losses
10:35 21 due to the reduction in backpay and benefits from
10:35 22 October 1st, 2018 through Sam's retirement of
10:35 23 February 29th, 2024, we believe -- and we've calculated
10:36 24 this -- that it should be \$150,000.

10:36 25 And for emotional distress, Defendants --

10:36 1 this is not about a person being upset. This is about
10:36 2 what discrimination does to a person's life. And so we
10:36 3 believe that he should be awarded a maximum of 300,000
10:36 4 for past and 600,000 for future.

10:36 5 Ladies and gentlemen, that is my
10:36 6 presentation and I want to thank you again for your
10:36 7 patience.

10:36 8 Thank you.

10:36 9 MR. LUCAS: May I proceed, Judge?

10:36 10 THE COURT: You may.

10:36 11 **CLOSING ARGUMENT FOR PLAINTIFF JARI McPHERSON**

10:36 12 MR. LUCAS: May it please the Court?

10:36 13 Joseph Lucas appearing on behalf of Jari
10:36 14 McPherson. I'm going to echo some of what you heard
10:36 15 Mr. Mungo say. To begin with, I want to thank you, I
10:36 16 want to thank each and every one of you because I know
10:37 17 this has been a tremendous imposition on your life. We
10:37 18 have taken a long, long time to do that -- do this
10:37 19 trial.

10:37 20 But I want you to remember, this is an
10:37 21 important case. You are the law. You will resolve the
10:37 22 issues in this case, and, therefore, we wanted to put on
10:37 23 the best case we could with all the evidence that we
10:37 24 could muster to support our request for an award from
10:37 25 you.

10:37 1 I also want to thank Judge Ezra. I think I
10:37 2 have been in front of many judges over my career. He's
10:37 3 a very hardworking and fair-minded judge and I'm proud
10:37 4 to have been in his Court.

10:37 5 I'm also proud to represent these men. Jari
10:37 6 McPherson and Jerald Sams have devoted a substantial
10:37 7 part of their life to defending their country when they
10:37 8 were in the United States Army and to serving the people
10:37 9 of Texas in their careers as law enforcement officers
10:37 10 with the Department of Public Service [sic]. I'm proud
10:37 11 to be here as their attorney.

10:37 12 I want to remind you of one thing before we
10:38 13 move on to the substance of the case, which is, this is
10:38 14 the only chance for justice. They can never come back
10:38 15 to Court again to litigate these claims. You are their
10:38 16 only decider, and we were asked that after you hear --
10:38 17 consider all of the evidence, you return a verdict which
10:38 18 is consistent with truth and justice.

10:38 19 Now, let's talk a little bit about -- I'm
10:38 20 going to have to do the same thing and slide over here
10:38 21 and go through this.

10:38 22 We put together a PowerPoint (indicating).
10:38 23 I'm going to skip through some of it because Mr. Mungo
10:38 24 covered it already.

10:38 25 But what -- you've heard a term called

10:38 1 "background evidence" and that refers to evidence that
10:38 2 took place before Mr. McPherson went to Austin, and the
10:38 3 reason you were able to hear that and the reason we
10:38 4 presented it was because that is our proof of motivation
10:38 5 and pattern.

10:39 6 And when you go through what happened in
10:39 7 Temple, you are able to extract from that that there is
10:39 8 systemic racism within the Department of Public Service.

10:39 9 And if I go through the events that you see
10:39 10 there, you can see that while he was in Temple -- we've
10:39 11 heard testimony from Lieutenant Holguin and he indicated
10:39 12 that: They did not want us here because of our skin
10:39 13 color.

10:39 14 Do you remember he had that heart-to-heart
10:39 15 with Mr. McPherson, that he testified that the treatment
10:39 16 he and Mr. McPherson received was because they were
10:39 17 minorities. He also -- I am going to turn this around.
10:39 18 It is a little bit easier to look at the screen here
10:39 19 (indicating).

10:39 20 He also testified that: Mr. McPherson, in
10:39 21 his experience, had been up front and honest. That was
10:39 22 Lieutenant Holguin, the smoking-gun witness. He is
10:39 23 employed by the State. He was their employee and these
10:40 24 are his admissions from their witness.

10:40 25 He also indicated that: Jari's use of the

10:40 1 State vehicle was consistent with the instructions to
10:40 2 use their vehicles in the case of family medical
10:40 3 emergencies and Jari told him he had used the vehicle
10:40 4 when he came back.

10:40 5 The C-1 complaint that was later filed by
10:40 6 Captain Schwartz is untruthful. Jari did not lie to
10:40 7 him. And this brings me really to an important point in
10:40 8 the case. If Jari did say something that was untruthful
10:40 9 to Captain Schwartz and that meeting was recorded, like
10:40 10 Captain Schwartz said, and the tape was given to the
10:40 11 Defense, why did they not produce it in support of their
10:40 12 claim? They had the tape. They could have proven the
10:40 13 lie and they didn't.

10:40 14 When we look at Captain Schwartz himself, he
10:41 15 is retired now. But he retired under circumstances to
10:41 16 avoid a demotion. He indicated that the use of the
10:41 17 State vehicle was no big deal, if you remember that
10:41 18 testimony, and Jari did not lie to him and he admitted
10:41 19 that the vehicle -- his vehicle use to Lieutenant
10:41 20 Holguin.

10:41 21 Once again, Captain Schwartz testified that
10:41 22 that meeting was recorded, but you've never been given
10:41 23 the audiotape of that meeting to confirm whether a lie
10:41 24 took place or not.

10:41 25 And Jari has testified he did not lie. So

10:41 1 the only evidence that we have with regard to that C-1
10:41 2 complaint is Jari's. And Jari said there was no lie and
10:41 3 that C-1 finding, which you have seen so much, was,
10:41 4 basically, unfounded.

10:41 5 Also Captain Schwartz indicated he's an
10:41 6 equal opportunity person. The only people he filed C-1
10:41 7 complaints against were an African-American agent and a
10:42 8 Hispanic lieutenant and he did nothing involving any of
10:42 9 the White agents in terms of investigations.

10:42 10 And, ultimately, that's the question that
10:42 11 you saw when we discussed the verdict form, that's the
10:42 12 question that really permeates it: Was race a factor in
10:42 13 the decisions that were made?

10:42 14 And as Mr. Mungo said, it doesn't have to be
10:42 15 the main factor. It doesn't have to be primary. It
10:42 16 just has to be a factor. And this background evidence
10:42 17 coming out of Temple develops and shows a pattern and a
10:42 18 practice within the DPS where race is indeed a factor.

10:42 19 Jari thought he was going to have a clean
10:42 20 start when he got to Austin. He left Temple. He was in
10:42 21 a new division right here in Austin and he thought,
10:43 22 okay, that's behind me. And once he was outside of
10:43 23 Captain Schwartz's jurisdiction, he exercised a
10:43 24 protective right.

10:43 25 He filed an EEOC complaint against

10:43 1 Captain Schwartz. That's what we lawyers call a
10:43 2 "protected activity." The law allows you to do that and
10:43 3 the law further says: An employer cannot retaliate
10:43 4 against you for doing it.

10:43 5 In this case, he filed his EEO complaint and
10:43 6 it was a protected activity. What is the first thing
10:43 7 that happened to him when he got to Austin? He asked
10:43 8 for assignment to Squad 7C2, specifically an undercover
10:43 9 squad, his area of expertise, and, in fact, he has had
10:43 10 four years of doing investigations.

10:43 11 But he was told, no, over here, you have got
10:43 12 to go to Squad 7C1 in order to learn investigations here
10:43 13 in Austin and he accepted that. That's what
10:43 14 Captain Koenig told him and he accepted that reason. He
10:44 15 didn't complain. So when the Defense says to you, These
10:44 16 guys are just a bunch of complainers, they want it and
10:44 17 they want it now, that's not true.

10:44 18 When Jari was moved to 7C1, he accepted it.
10:44 19 The reason offered was allowed and legitimate and, in
10:44 20 fact, he didn't complain at all. It was only later that
10:44 21 a slot opened up on 7C1 [sic] and he asked to be
10:44 22 transferred, and that was denied, and that slot was
10:44 23 filled by a lesser qualified White trooper, who came
10:44 24 from the bicycle police.

10:44 25 Jari complained about that. Once again,

10:44 1 that's his right, and the law allows him to do that.

10:44 2 What happened after he complained? Let's
10:44 3 have a discussion about the use of the service vehicle.
10:44 4 You remember the testimony was, he had used the service
10:44 5 vehicle to drive to and from work for three months from
10:44 6 his arrival in Austin for about three months, until
10:44 7 about January of 2020, no problem.

10:44 8 Once he makes the complaint about his
10:44 9 reassignment to 7C2, Lieutenant Martinez testified:
10:45 10 Captain Koenig came to me and told me, we have to take
10:45 11 care of this car issue, and Lieutenant Martinez made a
10:45 12 heck of an effort. He put together a PowerPoint, laying
10:45 13 out different options, accommodations, ways to handle
10:45 14 it. None of it was accepted.

10:45 15 He was told Jari doesn't get to use his
10:45 16 service vehicle. He doesn't even get to drive it
10:45 17 partway home and park it somewhere. He doesn't get to
10:45 18 use his service vehicle. And ladies and gentlemen,
10:45 19 that's what we submit is retaliation. That is the
10:45 20 textbook case of retaliation.

10:45 21 Now, that is -- that is our background
10:45 22 evidence. That is our current evidence. Lieutenant
10:45 23 Martinez, Danny's [sic] supervisor while he was at 7C1
10:45 24 confirmed it was Captain Koenig who told him to take
10:45 25 away Jari's vehicle.

10:46 1 And that brings me to another important
10:46 2 point. Captain Koenig was available to testify. Did
10:46 3 the Defense put him on in order to defend his decisions?
10:46 4 I mean, wouldn't he be the logical witness to tell you,
10:46 5 this is why I did it, and these are the reasons and race
10:46 6 wasn't part of that?

10:46 7 Where is he? He is not here.

10:46 8 Their defense is not supported by a witness.

10:46 9 And not to put too fine a point on it, Jari
10:46 10 did eventually get moved to 7C2. But if you look at the
10:46 11 timeline, that only happened after Lieutenant Martinez
10:46 12 filed his own EEO complaint alleging discrimination in
10:46 13 7C1. That was what caused the move to 7C2 for Jari, not
10:46 14 some remedial action they were taking.

10:46 15 They did it because they had yet another
10:47 16 complaint about 7C1 being a segregated unit and they
10:47 17 thought they could correct the optics, make it look
10:47 18 better, but it wasn't a remedial action. They took no
10:47 19 effort to resolve any of these problems.

10:47 20 You've heard a lot of discussion about
10:47 21 but-for causation. I apologize for this PowerPoint
10:47 22 being so wordy. There is a lot to put into it.

10:47 23 But, in essence, if you look at the
10:47 24 timeline -- and that's an easy form of reference -- if
10:47 25 you look at the timeline, back at RDS -- or RSD, his

10:47 1 career was on the uprise. He was going to the FBI
10:47 2 leadership training. Everything looked good.

10:47 3 When he got moved to Temple, things did a
10:47 4 180. He was not wanted because of skin color per
10:47 5 Lieutenant Holguin. He was under intense scrutiny with
10:47 6 regard to his timesheets and his weekly reports and we
10:47 7 had that whole circus involving the C-1 complaint over
10:48 8 an alleged lie which they've never proven.

10:48 9 He then gets to Austin. What happened
10:48 10 there? The same thing. He makes an EEO complaint and
10:48 11 he loses the use of his vehicle. He asks to be in 7C2.
10:48 12 They put him in the segregated 7C1 unit. When he
10:48 13 complains about being passed over by a White employee,
10:48 14 another protected activity, he loses a vehicle.

10:48 15 So we've established background evidence
10:48 16 showing a pattern and practice of racism. You heard
10:48 17 testimony from Major Jones indicating that there is
10:48 18 systemic racism at the DPS and indicating it takes years
10:48 19 to resolve complaints of discrimination.

10:48 20 And so that really brings us to the verdict
10:48 21 form and the damages available.

10:48 22 Mr. Mungo did a very good job of taking you
10:49 23 through the verdict form. It's a long questionnaire.
10:49 24 We worked hard putting it together. The Judge has tried
10:49 25 to distill it -- distill the case into, I think, it's

10:49 1 ten questions you have to answer.

10:49 2 But some of those questions are going to
10:49 3 ask, was Mr. McPherson subject to racial -- not racial
10:49 4 discrimination, but was his -- he subjected to adverse
10:49 5 employment actions while at Austin?

10:49 6 And the answer there should be "yes."

10:49 7 We asked specifically the: Was he denied
10:49 8 assignment to 7C2?

10:49 9 The answer should be "yes."

10:49 10 Was he denied the use of a State-issued
10:49 11 vehicle?

10:49 12 The answer should be "yes."

10:49 13 When you move through the form a little bit
10:49 14 further, you'll have an additional set of questions
10:49 15 regarding Mr. McPherson.

10:49 16 Was he harassed in Austin based on his race?

10:49 17 Your answer should be "yes."

10:49 18 Did the DPS know about the harassment?

10:50 19 Know about it? They were doing it.

10:50 20 Captain Koenig, his supervisor, was the individual who
10:50 21 was actually ordering that the State vehicle be taken
10:50 22 away and who was actually placing the lesser-qualified
10:50 23 White trooper in 7C2. So, yes, they knew about it.

10:50 24 And then Number 3, that they failed to take
10:50 25 prompt remedial action.

10:50 1 They took no action. They didn't move Jari
10:50 2 to 7C2 until another EEO complaint was filed. He never
10:50 3 got his vehicle back until he was in 7C2, and then,
10:50 4 finally, they did an accommodation which allowed him to
10:50 5 drive partway home using his service vehicle.

10:50 6 And as he outlined for you, that service
10:50 7 vehicle is very important. It's not just a car. It has
10:50 8 weapons in it. It has his vest in it. It has traffic
10:50 9 control devices, like, flares, and first aid kits.

10:50 10 It is not just you're taking away his right
10:50 11 to wear a particular coat. You're taking away his
10:51 12 ability to be a functioning, useful member of the DPS in
10:51 13 dealing with traffic emergencies he would encounter as
10:51 14 he drove around Austin.

10:51 15 So it's a significant change in the terms
10:51 16 and conditions of his employment and we submit it
10:51 17 amounts to harassment and there was no remedial action,
10:51 18 none, taken by the Department to fix that.

10:51 19 So that really takes us to the bottom line
10:51 20 question.

10:51 21 DEPUTY CLERK: Three minutes. Three minutes.

10:51 22 THE COURT: I don't know whether he heard you.
10:51 23 Three minutes, Counsel.

10:51 24 MR. LUCAS: Three minutes? Oh, well, that's
10:51 25 plenty of time.

10:51 1 Thank you. I'll keep it short. I won't use
10:51 2 three minutes. I've got on the screen the verdict form.
10:51 3 You've had testimony from Jari what it cost him to use
10:51 4 his personal vehicle during those four years from
10:51 5 January '20 to January '24.

10:51 6 His assessment included wear and tear on the
10:51 7 vehicle, and included the lost time he had because he
10:51 8 couldn't bill driving his own vehicle. It can't be --
10:51 9 he can't be paid for that, whereas agents with the
10:52 10 service vehicles could be.

10:52 11 So there was financial loss to him, there
10:52 12 was wear and tear on the vehicle, and he had to use his
10:52 13 personal vehicle, really, for four years when he only
10:52 14 lived 2 miles outside of the 50-mile radius.

10:52 15 I have spent more time driving around Austin
10:52 16 in the last couple of weeks than I ever have in my life.
10:52 17 Out here, 2 miles is nothing. It is a short distance.
10:52 18 Things are really spread out. Suburbs go on and on and
10:52 19 on, so being outside the 50-mile radius by 2 miles is
10:52 20 easily accommodated. As the testimony showed, it was
10:52 21 accommodated for White agents, but not for him.

10:52 22 Also we talked about noneconomic damages.
10:52 23 That's pain, suffering -- lawyers refer to it. Look
10:52 24 what Jari went through. He was in fear of losing his
10:52 25 job during the C-1 investigation. Even now, since

10:52 1 he's -- after he got to 7C2, we have the two pictures
10:53 2 that we showed you, the Hitler picture and the "Black
10:53 3 Socks Matter" picture.

10:53 4 That's reminding him of what he's dealing
10:53 5 with. He gone up for promotion four times in the last
10:53 6 two years. He never even made the eligibility list. I
10:53 7 mean, his career -- his career at the DPS was over. But
10:53 8 he's not retired. He has got four or five more years of
10:53 9 employment.

10:53 10 And we would submit to you that an award of
10:53 11 \$300,000 would be fair compensation for that -- for what
10:53 12 he had to undergo.

10:53 13 And then there is another component to this
10:53 14 I haven't mentioned. The collateral damage to his
10:53 15 family. He's a married man. He's got children. He and
10:53 16 his wife used to have a date night every month, just to
10:53 17 be able to have some personal time with his wife.

10:53 18 They stopped doing that because he was
10:53 19 depressed. He's a diligent father. He goes to all of
10:53 20 his children's sporting activities and dance activities.

10:53 21 And he stopped going because he was
10:53 22 depressed. He mentioned that his daughter won a major
10:54 23 award, and he wasn't there to see her get it. And every
10:54 24 time he looks at that picture of his daughter with his
10:54 25 wife, he just -- what he sees is, where is Dad? Why am

10:54 1 I absent? This is the proof that I'm -- I am detached
10:54 2 from my family.

10:54 3 So, ladies and gentlemen, I would submit
10:54 4 that that damage, that injury that he had to his family
10:54 5 and that he will continue to have is worth -- should be
10:54 6 awarded \$600,000.

10:54 7 One last point, the Defense has never
10:54 8 challenged his depression diagnosis by Dr. Shiener.
10:54 9 They have the right to put on their own psychiatrist.
10:54 10 They didn't do it. They have the right to put on their
10:54 11 own economist. They didn't do it.

10:54 12 So our medical testimony is unrebutted. Our
10:54 13 economic testimony is unrebutted.

10:54 14 And I submit that when you arrive at a
10:54 15 decision -- and I know you will -- you will make sure to
10:54 16 make an award to Jari in the amounts that I've outlined
10:54 17 here.

10:54 18 Again, thank you. Thank you very much.

10:54 19 THE COURT: Okay. How much time did they
10:54 20 reserve?

10:55 21 DEPUTY CLERK: Five minutes each.

10:55 22 THE COURT: Five minutes each. Okay. All
10:55 23 right.

10:55 24 So we will take a short recess now. Ladies
10:55 25 and gentlemen, use the restroom, we will come back and

11:32 1 That's what you really need to look at.

11:32 2 Circumstantial evidence builds the case and
11:32 3 when you look at the timeline, you'll see the actions
11:32 4 that were taken, and they speak louder than any words.
11:32 5 People can say -- from the stand, say, no, no, that was
11:32 6 never a factor in the decision.

11:32 7 Second, I didn't mention in my original
11:32 8 statement -- well, let me phrase it this way. There
11:32 9 really hasn't been a defense in this case. What has it
11:33 10 been? They attack Jari's character. They go back
11:33 11 20 years to find corrective actions where he got
11:33 12 counseled back in 2004 to suggest that he is untruthful
11:33 13 today.

11:33 14 Just remember, this is a man who spent
11:33 15 24 years working for the Department. He's still
11:33 16 employed today. In 2024, he won the Regional Director's
11:33 17 Award. They don't just give that to some marginal
11:33 18 performer. They give it to the best of the best. And
11:33 19 to now come in here and attack their own agent as being
11:33 20 untruthful or unreliable, that's offensive. That's not
11:33 21 how you're supposed to address an employment issue.

11:33 22 And so, ladies and gentlemen, I would
11:33 23 suggest you not follow that narrative because it's a
11:33 24 false one. He's a good officer, a good husband, and a
11:33 25 good employee for the Department, and he has received

11:33 1 accolades and promotions through his entire career.

11:34 2 A very famous American, Martin Luther King,
11:34 3 once said: If injustice is tolerated anywhere, justice
11:34 4 is threatened everywhere.

11:34 5 And what he meant by that was, even though
11:34 6 this involves just two people in Austin involving
11:34 7 employment within a Department, your decision is going
11:34 8 to resonate across the entire country.

11:34 9 I said earlier today you were the law, and
11:34 10 you are. And your decision will have impact on other
11:34 11 cases throughout the country.

11:34 12 So I want you -- I note that you've kept
11:34 13 your oath. I know the Judge told you not to discuss the
11:34 14 case with your family or your friends while you were
11:34 15 sitting, but once you leave here and make your -- give
11:34 16 your verdict, you're free to talk about the case. And I
11:35 17 know you will talk about it with your family and your
11:35 18 loved ones and you'll tell them what you did.

11:35 19 And I want you to be proud of what you did
11:35 20 here today. I want you to be able to look your husband
11:35 21 or your wife or your children in the eye and say: Look,
11:35 22 when the time came for a test, when I was tested, I
11:35 23 stood with justice. I stood with truth. I rendered a
11:35 24 verdict in favor of Jerald Sams and Jari McPherson.

11:35 25 That's the decision you should make and if

11:35 1 you do make it, I think you'll be proud of what you
11:35 2 accomplished here today.

11:35 3 Thank you.

11:35 4 THE COURT: All right. Ladies and gentlemen,
11:35 5 you've now heard the -- you have my instructions on the
11:35 6 law. You've heard the closing arguments of counsel, and
11:35 7 it's now your opportunity and your responsibility to
11:35 8 sift through the evidence.

11:35 9 You are the finders of fact. No one else.
11:35 10 Determine what the facts are and apply the law as I've
11:36 11 instructed to you to reach a unanimous verdict. Your
11:36 12 verdict must be unanimous. Okay?

11:36 13 This isn't like TV. So that's important.
11:36 14 It's also important for you to remember that you are not
11:36 15 here to send a message. You are here to decide this
11:36 16 case on its facts and the law. You're not here sending
11:36 17 messages. That's not what you're here for. You are
11:36 18 here to decide this case.

11:36 19 Also, you must remember that, as
11:36 20 Abraham Lincoln said -- and I told you at the beginning:
11:36 21 A Federal courtroom is the Temple of Justice.

11:36 22 What does this mean? You've seen pictures
11:36 23 of Lady Justice, a woman holding a scale, balancing the
11:36 24 scale with a blindfold over her eyes.

11:37 25 Does this mean she is blind to the evidence? No.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

1		
2		
3	JARI McPHERSON and JERALD)	Case No. 1:20-cv-01223-DAE
4	SAMS,)	
5	Plaintiffs,)	
6	vs.)	Austin, Texas
7	TEXAS DEPARTMENT OF)	
8	PUBLIC SAFETY, and)	
9	Director Steven C. McGraw)	
10	in his official capacity,)	
11	Defendant.)	January 29, 2026

TRIAL ON MERITS

BEFORE THE HONORABLE JUDGE DAVID ALAN EZRA

APPEARANCES

16	For Plaintiffs:	Mr. Robert Stephen Notzon
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1 P-R-O-C-E-E-D-I-N-G-S

2 *(Jury deliberating since 9:00 a.m.)*

12:36 3 *(Open court, commencing at 12:37 p.m.)*

12:36 4 *(Jury not present.)*

12:37 5 DEPUTY CLERK: Austin:20-CV-1223, McPherson,
12:37 6 et al. versus Texas Department of Public Safety.

12:37 7 THE COURT: The Court has received a message
12:37 8 from the jury. I have the Counsel present, but no -- no
12:37 9 jurors, of course.

12:37 10 If we -- the question reads: If we award
12:37 11 damages, please confirm what we have to determine. Then
12:37 12 there is past pay, future pay, interest.

12:37 13 And my response would be: In response to
12:37 14 your question, if you award damages, you may award back
12:37 15 pay. No front pay or interest.

12:37 16 MR. HARRIS: Yes.

12:37 17 THE COURT: Is that okay?

12:38 18 MR. HARRIS: That seems correct.

12:38 19 MR. MUNGO: Yes, Your Honor.

12:38 20 THE COURT: Okay. I will have that typed out,
12:38 21 I'll put it in a note and send it to them right away.

12:38 22 Thank you very much. Don't run away.

23 *(Recess taken at 12:38 p.m.)*

24 *(Open court, commencing at 2:45 p.m.)*

02:37 25 *(Jury not present.)*

02:45 1 THE COURT: All right. You can be seated.

02:45 2 The Court will note presence of Counsel and the absence
02:46 3 of the ladies and gentlemen of the jury. I was told we
02:46 4 have a unanimous verdict. Of course, I have no idea
02:46 5 what it is, so we will call back the ladies and
02:46 6 gentlemen of the jury, please.

02:46 7 Before they come in, I do again --

02:46 8 THE BAILIFF: All rise for the jury.

02:46 9 THE COURT: -- want to thank Counsel for your
02:46 10 many courtesies during this trial. You both fought very
02:46 11 hard. Regardless of what the verdict may be, you both
02:46 12 have the right to be very proud of your performance
02:46 13 here. That includes Mr. Mungo.

02:46 14 MR. NOTZON: Yes, Your Honor, I will convey
02:46 15 your message.

02:46 16 *(Jury enters courtroom.)*

02:46 17 THE COURT: All right. The Court will note
02:46 18 the presence of the ladies and gentlemen of the jury. I
02:46 19 have been advised that you've reached a unanimous
02:46 20 verdict; is that correct?

02:46 21 JURY FOREPERSON: Correct.

02:46 22 THE COURT: All right. Would the Foreperson
02:47 23 hand the verdict to the Court Security Officer, please?

02:47 24 *(Foreperson hands Jury Verdict Form to Court*
02:47 25 *Security Officer.)*

02:47 1 THE COURT: Thank you.

02:47 2 *(Judge reviews the verdict form.)*

02:49 3 THE COURT: Okay. You can read the verdict.

02:49 4 DEPUTY CLERK: Austin:20-CV-1223, McPherson,
02:49 5 et al. v. Texas Department of Public Safety. Question
02:49 6 1: Do you find that Plaintiff Sams would not have been
02:49 7 denied promotion to the Sergeant position that he
02:49 8 applied for in 2018 in the absence of -- in other words,
02:49 9 but for -- his race?

02:49 10 Answer: No.

02:49 11 Question 2: Do you find that Plaintiff
02:49 12 McPherson would have not been subject to the following
02:49 13 adverse employment actions but for his complaint
02:49 14 complaining of race discrimination?

02:49 15 2(a): Denied assignment to Unit 7C2:

02:49 16 Yes.

02:49 17 2(b): Was denied the use of his
02:49 18 State-issued vehicle:

02:49 19 Yes.

02:49 20 Question Number 3: Has Plaintiff Sams
02:50 21 proved that he was harassed because of his race by
02:50 22 Defendant DPS?

02:50 23 Answer: Yes.

02:50 24 Question 4: Did Defendant DPS know or in
02:50 25 the exercise of reasonable care should have known that

02:50 1 Plaintiff Sams was being harassed based on race?

02:50 2 Answer: Yes.

02:50 3 Question 5: Did Defendant DPS fail to take
02:50 4 prompt remedial action with regards to Plaintiff Sams?

02:50 5 Answer: Yes.

02:50 6 Question 6: Has Plaintiff McPherson proven
02:50 7 that he was harassed because of his race by Defendant
02:50 8 DPS?

02:50 9 Answer: Yes.

02:50 10 Question 7: Did Defendant DPS know or in
02:50 11 the exercise of reasonable care should have known that
02:50 12 Plaintiff McPherson was being harassed based on his
02:50 13 race?

02:50 14 Answer: Yes.

02:50 15 Question Number 8: Did Plaintiff DPS fail
02:51 16 to take prompt remedial action with regards to Plaintiff
02:51 17 McPherson?

02:51 18 Answer: Yes.

02:51 19 Damages: Question 9: What sum of money, if
02:51 20 paid now in cash, would fairly and reasonably compensate
02:51 21 Plaintiff Sams for his damages, if any, caused by
02:51 22 Defendant DPS?

02:51 23 A: Economic loss due to reduction in
02:51 24 backpay and benefits from October 1st, 2018 through
02:51 25 Sams' retirement on February 29th, 2024: Zero dollars.

02:51 1 B: Emotional pain and suffering,
02:51 2 inconvenience, mental anguish, and loss of enjoyment of
02:51 3 life:

02:51 4 Past, \$300,000.

02:51 5 Yes.

02:51 6 Question Number 10: What sum of money, if
02:51 7 paid now in cash, would fairly and reasonably compensate
02:51 8 Plaintiff McPherson for his damages, if any, caused by
02:51 9 Defendant DPS?

02:51 10 A: Economic loss due to denial of his
02:52 11 service vehicle from May 2020 through January 2024:
02:52 12 \$62,600.

02:52 13 B: Emotional pain and suffering,
02:52 14 inconvenience, mental anguish, and loss of enjoyment of
02:52 15 life: \$200,000.

02:52 16 Signed Foreperson dated January 29th, 2026.

02:52 17 MR. NOTZON: Your Honor, I guess I question --
02:52 18 there was no reading of a front emotional damage.
02:52 19 Theirs -- theirs was blank for that. And front
02:52 20 emotional damage is different than front pay.

02:52 21 THE COURT: Question 9: What sum of money, if
02:53 22 paid now, would fairly and reasonably compensate
02:53 23 Plaintiff Sams for his damages, if any, caused by
02:53 24 Defendant DPS? Answer in dollars and cents.

02:53 25 A: Economic loss due to reduction in back

02:53 1 pay and benefits from October 1st, 2018 through Sams'
02:53 2 retirement in February 29th, 2024: Zero.

02:53 3 Emotional pain and suffering, inconvenience,
02:53 4 mental anguish, and loss of enjoyment of life:

02:53 5 Past, \$300,000.

02:53 6 MR. NOTZON: That was read. Nothing was read
02:53 7 for the future emotional damage.

02:53 8 THE COURT: Then it wasn't in the thing here,
02:53 9 because Number 10: What sum of money paid in cash would
02:53 10 fairly and reasonably compensate Plaintiff McPherson --

02:53 11 MR. NOTZON: There was a past and future
02:53 12 emotional damage on the jury charge.

02:53 13 THE COURT: It's blank. They didn't -- the
02:53 14 answer is "zero" because it's blank.

02:53 15 MR. NOTZON: I'm concerned that there was --

02:53 16 THE COURT: No, don't say anything more.

02:53 17 MR. NOTZON: Yes, Your Honor.

02:54 18 THE COURT: Ladies and gentlemen of the jury,
02:54 19 did you intentionally leave this blank?

02:54 20 JURY FOREPERSON: Did we intentionally leave
02:54 21 this blank? Yes, but we were -- that was our question.
02:54 22 We asked a question specifically on that.

02:54 23 THE COURT: This is emotional pain and
02:54 24 suffering, mental anguish, and loss. This isn't pay.

02:54 25 JURY FOREPERSON: So our question was specific

02:54 1 to that, and we got a response, saying that --

02:54 2 THE COURT: Okay. They asked a question
02:54 3 apparently about future --

02:54 4 MR. NOTZON: We understood it to be --

02:54 5 THE COURT: We understood that to be --

02:54 6 MR. NOTZON: -- economic.

02:54 7 THE COURT: -- economic, not pain and
02:54 8 suffering that you were asking about. Were you asking
02:54 9 about pain and suffering?

02:54 10 THE JURY: (Nodding head.)

02:54 11 THE COURT: Okay. Let's send the jury back.

02:54 12 MR. NOTZON: Thank you, Your Honor.

02:55 13 *(Jury exits courtroom.)*

02:55 14 THE COURT: Read that question again. Do we
02:55 15 have the question here? The question is pretty clear.

02:55 16 DEPUTY CLERK: Let me go get it.

02:55 17 MR. NOTZON: Let's wait until they leave,
02:55 18 guys.

02:55 19 THE COURT: They are gone.

02:55 20 DEPUTY CLERK: I have to go get it.

02:55 21 MR. NOTZON: Okay. When I was conveying it to
02:55 22 my clients, I couldn't remember -- I think it just said
02:55 23 "damages," and not "economic damages."

02:55 24 But they used the word "front pay."

02:55 25 THE COURT: They used "front pay," "backpay."

02:55 1 MR. NOTZON: Yeah, but we understand that as
02:55 2 related to economic damages.

02:55 3 THE COURT: Well, that's not -- this just says
02:55 4 here -- the question is pretty clear: Emotional pain
02:55 5 and suffering, inconvenience, mental anguish, and loss
02:55 6 of enjoyment of life. It doesn't say anything about
02:55 7 pay.

02:55 8 MR. NOTZON: I know, but, Your Honor, they're
02:55 9 not attorneys.

02:55 10 THE COURT: Well, they may not be attorneys,
02:55 11 but they didn't answer -- it says: "If we award
02:55 12 damages, please confirm what we have to deliberate,
02:56 13 past pay, future pay, interest."

02:56 14 MR. NOTZON: Clearly, they've mistaken it,
02:56 15 Your Honor, because it just says "damages." It doesn't
02:56 16 say "economic." So it doesn't limit it. It's --

02:56 17 They're referring to all damages, and
02:56 18 apparently by their comments from the box, they clearly
02:56 19 were reacting to the instruction "no front pay" as
02:56 20 nothing for front, because they don't understand --

02:56 21 THE COURT: I don't know how this could have
02:56 22 been any clearer, this question. It says: Backpay,
02:56 23 future pay. It doesn't say anything about emotional
02:56 24 damages. It says "pay." Pay means money you earn.

02:56 25 MR. NOTZON: I think it is ambiguous,

02:56 1 Your Honor, because --

02:56 2 THE COURT: It is not ambiguous.

02:56 3 MR. NOTZON: -- the question does not specify
02:56 4 what kind of damages they were asking about.

02:56 5 THE COURT: Yes, it does. It says: Past pay,
02:56 6 future pay, interest -- past pay, future pay, interest.

02:57 7 MR. NOTZON: The question just said "damages."

02:57 8 THE COURT: Counsel, it isn't -- as much as
02:57 9 you would love it to be ambiguous, it isn't ambiguous.
02:57 10 It is pretty clear that what they asked -- now, I don't
02:57 11 know what they intended to ask. Okay? But what they
02:57 12 asked had to do with past pay, future pay, interest.

02:57 13 There is a big difference between past pay,
02:57 14 future pay, and interest. And Mr. Mungo, when he was
02:57 15 arguing, even made that distinction in his argument. He
02:57 16 talked about pay and then he talked about the emotional
02:57 17 damage to his family. There's -- there is a difference,
02:57 18 and so did Defense Counsel.

02:57 19 MR. NOTZON: I --

02:57 20 THE COURT: Counsel --

02:57 21 MR. NOTZON: I agree with Your Honor.

02:57 22 THE COURT: We can argue all day long. The
02:57 23 fact of the matter, here we are. So what do we do now?

02:58 24 MR. NOTZON: I agree with Your Honor that --

02:58 25 THE COURT: Let's talk about what we do now.

02:58 1 All right? I don't want to argue about what this says.

02:58 2 MR. NOTZON: I believe we send the Verdict
02:58 3 Form back to the jury and have them either -- with a
02:58 4 note that had future pay and future emotional damages
02:58 5 are not the same thing, and that you are allowed to
02:58 6 award for future emotional damages. You are not allowed
02:58 7 to award on future -- on front pay, and --

02:58 8 THE COURT: You've just -- you just validated
02:58 9 exactly what I told you, pay.

02:58 10 MR. NOTZON: Oh, I said that. I started with
02:58 11 I agree, Your Honor. I agree that, to me, pay -- front
02:58 12 pay is different than future emotional damage.

02:58 13 THE COURT: I don't think that this could have
02:58 14 been more clear.

02:58 15 MR. NOTZON: Obviously, they do, though,
02:58 16 Your Honor.

02:58 17 THE COURT: I don't know. I'm very seriously
02:59 18 considering a mistrial and starting all over again.

02:59 19 MR. NOTZON: I don't think the jury's been
02:59 20 unduly --

02:59 21 THE COURT: Well, they have come back in.
02:59 22 They have told us what part of their verdict is, and --

02:59 23 MR. NOTZON: And they haven't been released.
02:59 24 They haven't violated any jury rules.

02:59 25 THE COURT: No, they haven't violated any jury

02:59 1 rules.

02:59 2 MR. NOTZON: We haven't violated --

02:59 3 THE COURT: Yes, we do have a violation.

02:59 4 Normally, the jury is never to tell the Court or the
02:59 5 parties what their verdict is before it's received.

02:59 6 That is a cardinal rule in State and Federal Court. And
02:59 7 we have their verdict, unfortunately, sitting here in
02:59 8 front of me.

02:59 9 I've never had this situation happen in
02:59 10 38 years on the bench, so I don't know what to do here,
02:59 11 quite frankly, because I've never had this situation
03:00 12 before. I want to think about it for a few minutes.

03:00 13 All right?

03:00 14 MR. NOTZON: Yes, Your Honor.

03:00 15 My request --

03:00 16 THE COURT: I know what your request is. You
03:00 17 want me to send it back in here with some kind of a
03:00 18 note.

03:00 19 MR. NOTZON: Yes, Your Honor.

03:00 20 THE COURT: I don't know whether -- what is
03:00 21 your thoughts?

03:00 22 MR. HARRIS: I don't think that would be
03:00 23 proper. I do think that, again, hearing from the jury
03:00 24 about opining upon what they might be thinking as
03:00 25 opposed to the actual verdict, that's -- I've never

03:00 1 heard of that happening before.

03:00 2 THE COURT: Well, it happened here. Not -- I
03:00 3 don't think it was my fault.

03:00 4 MR. HARRIS: Right.

03:00 5 THE COURT: Here we are, because -- you know,
03:00 6 I looked at the -- you might have seen my face when I
03:00 7 looked at the Verdict Form because it seemed a little
03:00 8 inconsistent. I have had inconsistent Verdict Forms.
03:00 9 And that is a whole other story, but this is truly an
03:00 10 inconsistent Verdict Form. It is an incomplete Verdict
03:01 11 Form.

03:01 12 All right. I'm going to think about this.
03:01 13 All right?

03:01 14 MR. NOTZON: Yes, Your Honor. Thank you.

03:01 15 COURT SECURITY OFFICER: All rise.

03:01 16 *(Recess at 3:01 p.m.)*

03:01 17 *(Open court, commencing at 3:22 p.m.)*

03:22 18 *(Jury enters courtroom.)*

03:22 19 THE COURT: Obviously, there was -- I don't
03:22 20 want to say a misunderstanding -- but I guess
03:22 21 "misunderstanding" might be the wrong word. Although we
03:22 22 thought we were pretty clear on the instruction,
03:22 23 obviously, you didn't know what we were instructing you
03:22 24 on and you thought it was going to be different.

03:23 25 So what we are going to do is send you back,

03:23 1 and you can deliberate on the issue of -- or issues that
03:23 2 you wish to deliberate on, now that you truly understand
03:23 3 what we're talking about.

03:23 4 The future means -- I don't have the Verdict
03:23 5 Form here, but...

03:23 6 *(Ms. Springs hands Verdict Form to the Judge).*

03:23 7 THE COURT: It means: What sum of money, if
03:23 8 paid now in cash, would fairly and reasonably compensate
03:23 9 Mister -- Plaintiff McPherson for the damages, if any,
03:23 10 caused by DPS? Answer in dollars and cents.

03:23 11 And (a): Economic damages, loss -- you
03:23 12 already mentioned that.

03:23 13 (b) is: Mental pain, suffering, and loss of
03:23 14 enjoyment.

03:23 15 "Past" has 200,000. "Future" is blank.
03:23 16 Okay?

03:23 17 You could answer any figure, zero to
03:24 18 whatever the figure is that you feel is appropriate or
03:24 19 any other figure or number in this Verdict Form. Okay?

03:24 20 MR. NOTZON: And, Your Honor, for both
03:24 21 Plaintiffs, right?

03:24 22 THE COURT: Yes, for both Plaintiffs, so
03:24 23 you're going to continue your deliberations. All right?
03:24 24 We will hand back the Verdict Form.

03:24 25 Maybe we will give you a clean Verdict Form.

03:24 1 We will give you a clean Verdict Form. All right?

03:24 2 MR. NOTZON: Should they have both?

03:24 3 THE COURT: No.

03:24 4 These are very bright people. They know
03:24 5 what they did.

03:25 6 Go back and restart your deliberations and
03:25 7 we will get you the form in two minutes. All right?

03:25 8 Thank you.

03:25 9 *(Jury exits courtroom at 3:25 a.m. to continue*
03:25 10 *deliberations.)*

03:25 11 THE COURT: We will keep this form and make it
03:25 12 part of the record here.

03:53 13 *(Recess taken.)*

03:53 14 *(Open court, commencing at 3:53 a.m.)*

03:53 15 *(No jury present.)*

03:53 16 THE COURT: All right. So the Court has --
03:54 17 the Court would note the presence of counsel, the
03:54 18 parties, and the absence of the jury.

03:54 19 Now, Mr. Notzon, you wanted to say
03:54 20 something?

03:54 21 MR. NOTZON: Yes, Your Honor. In consulting
03:54 22 with my co-counsel and with the Plaintiffs, we're
03:54 23 concerned about the potential for a mistrial and having
03:54 24 to redo all of this all over again, and we would like to
03:54 25 avoid that. I know there is multiple steps from here to

03:54 1 getting a mistrial and to move for it. We get to
03:54 2 respond.

03:54 3 THE COURT: Well, they are going to move for a
03:54 4 mistrial, anyway, right?

03:54 5 So that's okay. You want to accept -- that
03:54 6 doesn't mean I'm going to grant it.

03:54 7 MR. NOTZON: Correct. Yes, Your Honor.

03:54 8 THE COURT: I would be unlikely to grant a
03:54 9 mistrial on this basis if you accept the verdict, but
03:54 10 I'm not telling you to accept the verdict.

03:55 11 MR. NOTZON: That was my proposal, is my
03:55 12 clients would -- in the interest of not redoing a trial,
03:55 13 would be interested in accepting the verdict as it
03:55 14 previously existed --

03:55 15 THE COURT: Okay.

03:55 16 MR. NOTZON: -- before they redid -- reworked
03:55 17 it.

03:55 18 THE COURT: All right. And that would affect,
03:55 19 basically, Mr. McPherson?

03:55 20 MR. NOTZON: He would be possibly walking away
03:55 21 from 100,000, yeah.

03:55 22 THE COURT: Mr. McPherson, I would like you to
03:55 23 stand up, please.

03:55 24 I should say "Officer McPherson." Because
03:55 25 you're still a DPS officer?

03:55 1 MR. McPHERSON: Yes, sir.

03:55 2 THE COURT: All right. You've heard what
03:55 3 Counsel has said. Has anybody coerced you or
03:55 4 intimidated you in any way into making this decision?

03:55 5 MR. McPHERSON: No, sir, not at all.

03:55 6 But I personally feel like -- you know, I
03:55 7 don't understand, like, all of the rules here and how
03:55 8 you guys do things and what happened with the jury, but
03:55 9 I don't want to do this all over again.

03:56 10 THE COURT: Well, you wouldn't necessarily
03:56 11 have to do it all over again, but we don't know that.

03:56 12 So, I mean, you consulted with your lawyers
03:56 13 and you do want me to just accept the verdict and not
03:56 14 send it back to the jury?

03:56 15 I have to have an answer.

03:56 16 MR. NOTZON: Can I ask a question, Your Honor?

03:56 17 THE COURT: Yes.

03:56 18 MR. NOTZON: Can he hear the new verdict?

03:57 19 THE COURT: Absolutely not.

03:57 20 MR. NOTZON: It was a good question.

03:57 21 THE COURT: No, then we would for sure have a
03:57 22 mistrial.

03:57 23 MR. NOTZON: Okay.

03:57 24 MR. McPHERSON: So if I do that, Your Honor,
03:57 25 does that -- so we don't know if there is going to

03:57 1 actually be a mistrial, is what you're saying?

03:57 2 THE COURT: They are going to -- they are
03:57 3 going to move for a mistrial, okay, on the basis of
03:57 4 what's happened. But if -- I'll be honest with both
03:57 5 counsel. I mean, if you just accept the verdict as it
03:57 6 is, it's as if they provided zero damages for that
03:57 7 one -- the future emotional distress.

03:57 8 MR. McPHERSON: Correct.

03:57 9 THE COURT: So -- because it was left blank.
03:57 10 And you accept that verdict, then they don't have a
03:57 11 basis for a mistrial on the grounds that somehow we
03:58 12 heard a verdict and we shouldn't be sending them back to
03:58 13 reconsider things.

03:58 14 So it's unlikely that I would grant a
03:58 15 mistrial on that basis. Now, they may move for a
03:58 16 mistrial on something else that's not connected with
03:58 17 this.

03:58 18 MR. McPHERSON: Right.

03:58 19 THE COURT: And that would happen anyway.

03:58 20 MR. McPHERSON: Right. But on the other end
03:58 21 of it -- I'm trying to understand before I make my
03:58 22 decision -- on the other end of it, if I do and the
03:58 23 number has changed --

03:58 24 THE COURT: You do what?

03:58 25 MR. McPHERSON: What am I trying to say here?

03:58 1 If you walk away from the new verdict or if
03:58 2 I hear the new verdict --

03:58 3 MR. NOTZON: Then they will move for a
03:58 4 mistrial.

03:58 5 THE COURT: Then the new verdict will be
03:58 6 there. They will move for a mistrial. I will have to
03:58 7 decide whether there is a mistrial, and I don't know
03:58 8 what my decision will be.

03:58 9 I'd have to hear both sides. I'd have to
03:58 10 hear the argument. I'd have to do legal research. And
03:59 11 even if I decide there is no mistrial, they can still
03:59 12 appeal and the Appellate Court could say, Ezra should
03:59 13 have granted the mistrial, or they might say, Ezra
03:59 14 couldn't have granted a mistrial.

03:59 15 MR. NOTZON: And they could appeal anyway. We
03:59 16 don't know.

03:59 17 THE COURT: They could appeal anyway.

03:59 18 MR. NOTZON: On something else.

03:59 19 THE COURT: They're likely to appeal anyway on
03:59 20 other basis because, you know, I have had to make a lot
03:59 21 of rulings in this case. I'm pretty confident in my
03:59 22 rulings. I think I've conducted a fair trial. I don't
03:59 23 think either lawyer is going to suggest that I wasn't
03:59 24 fair to them. Nobody is 100 percent happy with every
03:59 25 ruling a judge makes.

03:59 1 MR. NOTZON: Then they can file an un -- an
03:59 2 ill-advised appeal. It doesn't have to be valid for
03:59 3 them to file an appeal.

03:59 4 THE COURT: Yeah. And that can happen
03:59 5 anyway -- I mean, that was going to happen anyway. That
03:59 6 doesn't make any difference, one way or the other.

03:59 7 Even if you say -- if you say I want to hear
04:00 8 a new verdict from them, and they give you a
04:00 9 new verdict, they're still going to appeal.

04:00 10 MR. McPHERSON: Okay. We'll just get a
04:00 11 new verdict.

04:00 12 THE COURT: You want a new verdict?

04:00 13 MR. McPHERSON: Yes, sir.

04:00 14 MR. NOTZON: We'll roll the dice.

04:00 15 THE COURT: All right. Okay.

04:00 16 Bring them in.

04:00 17 COURT SECURITY OFFICER: All rise for the
04:00 18 jury.

04:01 19 *(Jury enters courtroom at 4:01 p.m.)*

04:01 20 THE COURT: All right. Having considered,
04:01 21 have you reached a unanimous verdict?

04:01 22 JURY FOREPERSON: Yes.

04:01 23 THE COURT: All right. Can you hand the
04:02 24 Verdict Form to the Marshal?

04:02 25 *(Foreperson hands Verdict Form to the Marshal.)*

04:02 1 THE COURT: Thank you.

04:02 2 *(The Court reviews the Verdict Form.)*

04:02 3 THE COURT: Okay. You can read the verdict.

04:03 4 DEPUTY CLERK: Austin:20-CV-1223, McPherson,
04:03 5 et al. versus Texas Department of Public Safety.

04:03 6 I'm reading the whole thing again, right?

04:03 7 THE COURT: Yes.

04:03 8 DEPUTY CLERK: Okay. Question Number 1: Do
04:03 9 you find that Plaintiff Sams would not have been denied
04:03 10 promotion to the Sergeant position that he applied for
04:03 11 in 2018 in the absence of -- in other words, but for --
04:03 12 his race?

04:03 13 Answer: No.

04:03 14 Question 2: Do you find that Plaintiff
04:03 15 McPherson would not have been subject to the following
04:03 16 adverse employment actions but for his complaining of
04:03 17 race discrimination:

04:03 18 2(a): Denied assignment to Unit 7C2: Yes.

04:03 19 2(b): Was denied the use of his

04:03 20 State-issued vehicle: Yes.

04:03 21 Question Number 3: Has Plaintiff Sams

04:03 22 proved that he was harassed because of his race by

04:03 23 Defendant DPS?

04:03 24 Answer: Yes.

04:03 25 Question Number 4: Did Defendant DPS know

04:04 1 or in the exercise of reasonable care should have known
04:04 2 that Plaintiff Sams was being harassed based on race?

04:04 3 Answer: Yes.

04:04 4 Question Number 5: Did Plaintiff [sic] DPS
04:04 5 fail to take prompt remedial action with regards to
04:04 6 Plaintiff Sams?

04:04 7 Answer: Yes.

04:04 8 Question Number 6: Has Plaintiff McPherson
04:04 9 proved that he was harassed because of his race by
04:04 10 Defendant DPS?

04:04 11 Answer: Yes.

04:04 12 Question 7: Did Defendant DPS know, or in
04:04 13 the exercise of reasonable care should have known, that
04:04 14 Plaintiff McPherson was being harassed based on race?

04:04 15 Answer: Yes.

04:04 16 Question Number 8: Did Defendant DPS fail
04:04 17 to take prompt remedial action with regards to Plaintiff
04:04 18 McPherson?

04:04 19 Answer: Yes.

04:04 20 Question Number 9: What sum of money, if
04:04 21 paid now in cash, would fairly and reasonably compensate
04:05 22 Plaintiff Sams for his damages, if any, caused by
04:05 23 Defendant DPS? Economic loss due to reduction in pay
04:05 24 and benefits from October 1st, 2018 through Sams'
04:05 25 retirement on February 29th, 2024: Zero dollars.

04:05 1 Emotional pain and suffering, inconvenience,
04:05 2 mental anguish, and loss of enjoyment of life:

04:05 3 Past, 300,000. Future, 575,000.

04:05 4 Question Number 10: Was the sum of money --
04:05 5 what sum of money, if paid now in cash, would fairly and
04:05 6 reasonably compensate Plaintiff McPherson for his
04:05 7 damages, if any, caused by Defendant DPS?

04:05 8 Economic loss due to denial of use of his
04:05 9 service vehicle from May 2020 through January 2024:
04:05 10 \$62,600.

04:05 11 Emotional pain and suffering, inconvenience,
04:05 12 mental anguish, and loss of enjoyment of life:

04:05 13 Past, 200,000. Future, 525,000.

04:06 14 Verdict of the Jury, signed Foreperson,
04:06 15 dated January 29th, 2026.

04:06 16 THE COURT: All right. Ladies and gentlemen,
04:06 17 you've heard the verdict read. Is that your unanimous
04:06 18 verdict? If it is not your individual verdict, please
04:06 19 raise your hand.

04:06 20 No hands having been raised, the Court will
04:06 21 note the unanimity of the verdict.

04:06 22 And with that, ladies and gentlemen, I want
04:06 23 to thank you. You have concluded your service to this
04:06 24 United States District Court and the people of this
04:06 25 community and the people of the United States of

04:06 1 America.

04:06 2 I want to sincerely thank you for your
04:06 3 service.

04:06 4 You are going to go back to the jury room
04:06 5 for just a moment. I'm going to come back to chat with
04:06 6 you for just a second and then we're going to let you
04:06 7 go.

04:06 8 Okay?

04:06 9 Thank you.

04:06 10 THE BAILIFF: All rise for the jury.

04:07 11 *(Jury exits courtroom.)*

04:07 12 THE COURT: Please be seated.

04:07 13 Counsel, you wanted to file a motion?

04:07 14 MR. HARRIS: Yes, Your Honor. At this time, I
04:07 15 will move for a mistrial.

04:07 16 THE COURT: All right. The Court is going to
04:07 17 take the motion for a mistrial under advisement.

04:07 18 I'm going to give Counsel ten days within
04:07 19 which to file a -- each side simultaneously file a brief
04:07 20 as to why I should or should not grant a mistrial in
04:07 21 this case, and I will take that under advisement and
04:07 22 rule.

04:07 23 Any motion that you wish to make regarding
04:08 24 front pay and so forth should be made at the conclusion
04:08 25 of my having ruled on a mistrial. Because if I grant a

04:08 1 mistrial, obviously, there is no front pay. Right?

04:08 2 MR. HARRIS: Well, there is also a question
04:08 3 that involves from A, which would have been the
04:08 4 promotion denial, the jury answered "no" on that one.
04:08 5 So there is not actually a claim for front pay.

04:08 6 THE COURT: Oh, that's right. There is no
04:08 7 claim for front pay.

04:08 8 They said "zero." Okay. There is no
04:08 9 front pay, you're right. Thank you very much, Counsel,
04:08 10 for bringing that to my attention. You're exactly
04:08 11 right.

04:08 12 MR. NOTZON: And I assume, Your Honor, that
04:08 13 the attorneys' fees and costs would also be held back?

04:08 14 THE COURT: Yes, that's always held back.

04:08 15 All right. Again, I want to thank Counsel.
04:08 16 It's been a long trial, much longer than I think we
04:08 17 thought initially and, of course, I think Counsel and
04:08 18 the parties understand that, even though they came back
04:08 19 with this 500-something-thousand number, the law limits
04:09 20 it to \$300,000, so that's under the law.

04:09 21 MR. NOTZON: Yes, Your Honor.

04:09 22 THE COURT: And the Court will adjust the
04:09 23 verdict accordingly, assuming if I deny the mistrial
04:09 24 motion.

04:09 25 So, please, in your Motion for Mistrial, in

04:09 1 your brief in support of your Motion for Mistrial, in
04:09 2 your brief in opposition, please address the issues that
04:09 3 occurred here today. That's the key.

04:09 4 MR. NOTZON: Yes, Your Honor.

04:09 5 THE COURT: And I can't think of anything
04:09 6 else.

04:09 7 Can you, Counsel?

04:09 8 MR. HARRIS: No, Your Honor.

04:09 9 MR. NOTZON: If we could get a copy of the
04:09 10 question because I think that's pertinent to the motion.

04:09 11 THE COURT: Oh, yes. Of course you can.
04:09 12 We'll get you a copy of the question and you, of course,
04:09 13 can get a copy of the Final Verdict Form.

04:09 14 DEPUTY CLERK: Once they're docketed.

04:10 15 THE COURT: Once they're docketed, it's public
04:10 16 record.

04:10 17 MR. NOTZON: Ten days is probably on the
04:10 18 weekend, so just the next Monday?

04:10 19 THE COURT: What's ten days from now?

04:10 20 You're probably right. I don't know where
04:10 21 I am tomorrow, let alone ten days from now.

04:10 22 DEPUTY CLERK: Seven, eight, nine -- ten is
04:10 23 February 8th. So let's do February 9th.

04:10 24 THE COURT: February 9th. We can go off the
04:10 25 record.