

Summation - Goodman

1 THE COURT: All right. Are you ready to go?

2 (Jury enters courtroom.)

3 THE COURT: All right. We'll hear now from defense
4 counsel. Go ahead.

5 MR. GOODMAN: May it please the Court, counsel,
6 plaintiffs, ladies and gentlemen of the jury. I want to begin
7 by thanking you for your service. We started with eight
8 jurors a little over a week ago. All eight of you are still
9 here and that's a tribute to your attentiveness and your
10 commitment to this duty and we definitely appreciate it. The
11 system doesn't work without you. That almost sounds like a
12 cliché but it is certainly true and I want to especially note
13 some of you have long commutes in the Eastern District, you
14 come from pretty far away and we definitely appreciate your
15 efforts in doing that. Okay.

16 This is my opportunity to talk about what the
17 evidence showed in this case, to offer you some insight and
18 argument and hopefully help guide you through your
19 deliberations which you're about to undertake. There's been a
20 lot of evidence in this case, there's been a lot of detail
21 about events that happened or allegedly happened or didn't
22 happen. There are a lot of dots and maybe we can try to
23 connect some of those dots now. I thought I might begin
24 though by talking about what this case is not about and what
25 it should not be about.

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1 First of all, this case is not a referendum on civil
2 rights. By that, what do I mean; when you go back to the jury
3 room, you are going to be given what you've already heard
4 referred to as a verdict form, it is a sheet of paper that has
5 questions on it for you to answer. As you've already heard,
6 question number one is in three parts. The first part says,
7 with respect to plaintiff Donna McGrath Venza's claim against
8 the defendant Toys "R" Us for violation of the Administrative
9 Code of the City of New York, how do you find? And there are
10 other questions on the form, we'll go over some of them.

11 There's no question on this form that says are the
12 plaintiffs -- are transsexuals entitled to equal treatment
13 under the law, should they be protected in certain regards,
14 there's no question like that. There's no question on the
15 form that says do plaintiffs deserve to be, in Mr. Shanahan's
16 words, treated like human beings. There's no question is New
17 York City the greatest city on earth. Those questions aren't
18 before you. If they were before you, we wouldn't have a case
19 because everyone would agree. We know and you've seen the
20 evidence, extensive evidence about Toys "R" Us and their
21 harassment policy, their position about these issues. You've
22 seen that it starts at the highest levels in the corporation,
23 this policy, and it filters all the way down to what they call
24 the seasonal associates, the part-time -- or the employees
25 that come before the Christmas season and you've heard what

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1 the company is all about in those terms. They have training
2 that happens at the management level. They have training that
3 happens at the supervisory level. They have the orientation
4 that Ms. Piccolomini talked to you about that is at the entry
5 level for the lowest level employees.

6 And you've heard that this kind of case has never
7 happened before ever to Toys "R" Us, they've never had a
8 lawsuit or any kind of claim for discrimination based on
9 sexual orientation or gender, hasn't happened before.

10 Now, if you want to do what Mr. Shanahan asks you to
11 do and dismiss that and say that all of that policy that you
12 heard about, all the testimony that you heard is just a sham,
13 that it's just put up for your benefit for this trial and the
14 paper is not worth what it's printed on, if that's how you
15 feel, fine. I don't think you can possibly find that way. It
16 is crystal clear on the evidence on this record where the
17 company stands and what their policy is.

18 Okay. I also want to point out that what the policy
19 is and how the company operates itself makes a lot of sense.
20 They, Toys "R" Us, is a retailer, they sell to the public.
21 You have to treat the public with respect. You can't have
22 problems with shopping customers if you're a retailer. And so
23 not only is it the right thing to do, as they understand it,
24 it's also proper for their business to do so. That's their
25 policy and the case is really not about that.

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1 What else is the case not about or what should it not
2 be about? A case in a courtroom is not theater, it's not a
3 place for rhetoric and overblown images. What do I mean by
4 that? Judge Sifton instructed you at the very beginning in
5 his opening instructions that what we are looking for is a
6 cool, dispassionate non-emotional look at the facts and
7 determination of the facts in this case and he's going to give
8 you his charge after I finish -- well, Mr. Shanahan gets a few
9 more remarks, and Judge Sifton will give you the jury charge
10 and he will tell you to exclude sympathy from your
11 deliberations and that, you'll hear his charge and I don't
12 want to usurp his role, but whatever sympathy you might feel
13 for the plaintiffs as individuals, you have to exclude.

14 What else should the case not be about? Again, I'm
15 talking about imagery and overblown statements and rhetoric.
16 Mr. Shanahan told you and he just said in summation that he
17 reiterated the promises that he made in his opening statement
18 and one of those promises was that he would prove to you
19 through the evidence that these plaintiffs and the fourth
20 individual who's not here who you haven't heard from, Andrea
21 Massenberg, that they were chased out of the store.

22 Now, we heard through the evidence, Ms. Lopez in
23 particular and the other plaintiffs being challenged about
24 that, we heard what happened. You know the facts of what
25 happened, what they say happened. There was no chase out of

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1 the store. You heard this inflammatory rhetoric chased out of
2 the store by a bat wielding mob of employees screaming anti-
3 gay epithets. Never happened, never remotely happened and yet
4 now just this morning Mr. Shanahan stands here again and is
5 still insisting on telling you that these plaintiffs were
6 chased out of the store. Well, they weren't.

7 Now, he's trying perhaps to talk about some
8 figurative chase or metaphorical chase. If they're willing to
9 play that fast and loose with the facts and that fast and
10 loose with language, you've got to wonder how far they'll go
11 in other areas.

12 And it's happening again. Lucille Burghardt wrote a
13 letter. Lucille Burghardt is a claims adjuster. She gets
14 incident statements, she's the first line of inquiry at the
15 corporation, not remotely a superior officer of the company.
16 We'll talk about that a little more later. And she makes a
17 determination based on what she sees on these incident
18 statements and facts that she gathers and she decides whether
19 to pay a claim or to deny a claim or to refer a claim to an
20 insurance company. In this case she took what was presented
21 to her and she made a determination that she was not going to
22 pay on this claim and she wrote a letter that said that.

23 Now, in this courtroom Mr. Shanahan would have you
24 interpret those words to mean that Ms. Burghardt said, okay, I
25 looked into this and I found that there was discriminatory,

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1 illegal conduct that happened but that's okay with me and
2 that's okay with the corporation, I'm going to ratify and
3 condone those acts. That's what he would have you believe.
4 That's taking pretty extreme liberties with the language of
5 the letter.

6 You'll have the letter in front of you. Does it
7 possibly support that kind of interpretation. So, this trial
8 should not be and your deliberations should not be about that
9 kind of inflammatory rhetoric and misinterpretation of words
10 and stretches of word about things that never happened.

11 What the case is about are the facts in evidence
12 about what happened on December 13 and December 20th of 2000.
13 To hear Mr. Shanahan's summation just now, 90 percent or
14 more of it was about what happened after that time. He
15 wants to talk about the investigation, he wants to talk about
16 the response of the company and he wants to convince you I
17 suppose that the company didn't take his clients seriously.
18 What does that mean. Well, they didn't settle, Ms. Burghardt
19 didn't adjust the claim and the case is still going on. He
20 actually said in his summation they were forced to litigate
21 for over a year. Who forced them to litigate, who started
22 this case, who brought the case to court and brought it here
23 for resolution.

24 But the case is not about the investigation either,
25 the case is about what happened on the days in question,

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1 December 13 and December 20. So, let's talk about what
2 Mr. Shanahan did not talk about, the facts, the details of
3 what happened and see how that stacks up, okay. Before we go
4 there though, before we get into that nitty-gritty, and that's
5 what jurors should do, that's what your charge is, find the
6 facts and apply the law to the facts, I want to mention
7 something that Judge Sifton mentioned and that is the burden
8 of proof.

9 You will hear the charge from Judge Sifton and he
10 will describe that to you and I will not attempt to describe
11 it to you other than to say the plaintiff has the burden of
12 proof, the plaintiff has to prove -- plaintiffs, I'm sorry,
13 plural, they have to prove their case, they have to move the
14 ball forward, they have to tip the scales. If this thing
15 comes out 50/50, six of one, half a dozen of the other, I
16 can't figure it out, it could be either way, and I don't
17 think you can remotely get to that kind of conclusion on
18 these facts, but if you did, you'd still have to find for
19 the defendant because the plaintiff has the burden to prove
20 their case. Did they do it? They did not do it on these
21 facts.

22 Okay. Let's look at some detail. Evaluating the
23 claim in this case, did the company, Toys "R" Us, deny the
24 privilege to shop in its store to these plaintiffs. That's
25 the Administrative Code question, okay. What happened on

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1 December 13. I honestly, frankly, think based on the evidence
2 here that there's not much to think about in your evaluation
3 of whether some discriminatory act occurred on the 13th. We
4 know that despite anything that may be now being said by their
5 attorney, the plaintiffs left the store completely happy,
6 completely satisfied in terms of shopping. They had shopped
7 and they had purchased goods and they got them at a 50 percent
8 discount.

9 In fact, Ms. Medina testified that when she heard
10 they were going to get a discount, she ran back in the store
11 to get some more items, okay. You also might note in the
12 detail of the testimony that even after Ms. Lopez experienced
13 what she said about seeing employees come into the aisle and
14 appear to be looking at her and laughing at her, she still
15 continued to shop because she ended up at the front of the
16 store with a number of items, a stuffed animal, a remote
17 control car and so forth.

18 In any event, the real issue about the 13th is what
19 Mr. Maloney did and it's quite remarkable to sit here in
20 court today and hear argument that he did nothing, that he
21 didn't act appropriately. Not only that he didn't act
22 appropriately, that he just did nothing at all concerning
23 this situation. Well, maybe, I was in a different courtroom
24 but the evidence that I heard, that I'm sure you heard was
25 that Mr. Maloney talked to these plaintiffs and the fourth

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1 one who isn't here and asked them specifically, among other
2 things, identify, show me the people that did this and even
3 went to the extent of walking up and down the cross-aisles,
4 remember that was his testimony, with Ms. Lopez, up and down
5 the cross-aisles to identify anybody that supposedly committed
6 these acts. And Ms. McGrath participated in the
7 identification process also.

8 Out of all that, one and only one, and that is a key,
9 important crucial point about the 13th and about this whole
10 case, one employee was identified as having been involved; in
11 fact, having been the ringleader or the perpetrator that
12 started all this stuff and that was Antonia Casanova.

13 Now, Mr. Shanahan makes reference to Ms. Medina
14 saying she saw two boys or young men that were involved on the
15 13th also on the 20th. She never pointed that out to
16 Mr. Maloney. They went through the process. There was one
17 young man that he walked down the bike aisle with as
18 Ms. McGrath followed in the aisle next to that aisle and that
19 young man, according to Mr. Maloney, said that he did not know
20 anything about these events, there's one and only one and that
21 was Antonia Casanova.

22 What happened to Antonia Casanova? She gets fired
23 four days later. She's not even around on the 20th. Well,
24 they say, you know, she was fired for something else, she
25 didn't get fired for this. Do you think it would have been

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1 appropriate under those circumstances for Mr. Maloney to have
2 fired her at that point. He goes to talk to her. They say
3 that he didn't follow company procedures but he did follow
4 company procedures, he did exactly what he was supposed to do
5 under the procedures and he did exactly what is reasonable to
6 do under the circumstances and that is to pull her aside and
7 talk to her.

8 Should he have brought the plaintiffs over and tried
9 to force Antonia Casanova to apologize; it doesn't make any
10 sense. Mr. Maloney said it is management 101, you don't bring
11 the two parties that are in conflict together like that. So
12 he goes and talks to her and she admits that she pointed to
13 the plaintiffs and pointed out the plaintiffs to a co-worker.
14 You think it would have been appropriate to fire her for that
15 at that point, to terminate her. He spoke to her, he told her
16 that was inappropriate. She promised never to do it again.
17 Can you possibly sit here and say that he did nothing, that
18 that was inappropriate. Then four days later she's involved
19 in another incident and she's terminated so she's not around
20 on the 20th. There's no overlap on this record between the
21 individuals on the 13th and the individuals on the 20th.

22 Okay. One thing you might want to think about on the
23 13th is the fact that the plaintiffs still to this day are
24 asking you to make findings about discrimination on the 13th
25 based on the facts that you've heard. That should tell you

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1 something about where they're coming from, the overreaching
2 that they're engaging in here. You know, we say in this
3 country that everyone is entitled to his or her day in court
4 and these plaintiffs had their day in court, they've had their
5 week in court and that's good. It is a good system and if you
6 have a claim, you can make it in this country and bring it to
7 court. It doesn't mean that there's anything to it. The fact
8 that we're here sitting in a federal courtroom doesn't mean
9 that there's any substance to it. That's for you guys to
10 determine based on the evidence that you've heard.

11 Okay. Let's move ahead now and talk about again
12 something Mr. Shanahan didn't talk about and that's the
13 factual detail about what happened on December 20th. When you
14 really break it down and pick it apart, which is part of your
15 job, you'll find that these stories don't hold up, they don't
16 hold water. There's so many contradictions, there's so many
17 missing elements, it really makes you wonder.

18 Well, let's start off with Ms. Lopez. Ms. Lopez says
19 that they, four of them, these three and the other, came into
20 the store on the 20th. Ms. Lopez says she and Ms. Medina went
21 to the Barbie aisle and only those two went to the Barbie
22 aisle. There they say that some of the things that they say
23 happened on the 13th started to happen again on the 20th and
24 it even got to the point, according to Ms. Lopez and also
25 Ms. Medina, that Ms. Medina said to a couple of employees if

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1 you're going to whisper, do it softer, that's not nice what
2 you're doing. Remember that that's what they said happened in
3 the Barbie aisle when they first came in the store.

4 Meanwhile, Ms. McGrath says she came in the store and she went
5 in the Barbie aisle also but she went alone to the Barbie
6 aisle. Well, you got a contradiction right of the bat. How
7 important is it, you start to add them up. So it begins with
8 that.

9 Now, Ms. Lopez says after she's in the Barbie aisle
10 she then goes out of the Barbie aisle and goes looking for an
11 electronic section, remember that, and she's looking for a
12 certain electronics area but she ends up at a slightly
13 different area and at that point she testified Ms. McGrath
14 came over to her and said, be careful, there are employees in
15 the store with bats. Okay.

16 Now, problem number one is this is happening at a
17 time before Ms. McGrath, even by her own testimony, said that
18 she ever saw an employee with a bat. But then what was
19 Ms. Lopez' reaction to that warning. The word she used was
20 warning, there are employees in the store with bats, she says
21 okay, thank you, and I proceeded to look through the
22 electronics section. Did she say, well, employees with bats,
23 let's get out of here; employees with bats, let's see the
24 manager; employees with bats, let's stay together or let's
25 figure out what's going on here. No, she says, okay, thanks,

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1 I'll be shopping here in the electronics area. Is that
2 credible, is that reasonable.

3 Let's continue through these events. At that point
4 Ms. Lopez says I -- she remembered this young man, she says a
5 young black man standing in the aisle who stands very still
6 and she walks around him and after she gets around him then
7 realizes that he has a bat next to his leg. No interaction,
8 no discussion, they don't talk to each other, there are no
9 gestures. Well, in her deposition she says there were no
10 gestures. Then here on witness stand, well, he was tapping
11 his leg, okay.

12 At that point Ms. Lopez says, okay, I got scared and
13 I left that area and I went back toward the customer
14 information counter which is only a couple of aisles away, and
15 I'm not going to walk through this thing, you guys know the
16 evidence at this point, but look at the map if you need to
17 look at it, it's all in evidence, and then she says on her way
18 over there she sees this other kind of vaguely described,
19 maybe Hispanic individual with a bat. At the deposition that
20 guy is in the back of the store but now for testimony he's up
21 closer to her as she passes the customer information desk and
22 right after that she bumps into the other individuals in her
23 party.

24 Okay. But think about the timing of what's going
25 on. That's a fast, quick amount of time. She hears

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1 Ms. McGrath say -- warning there are employees in the store,
2 she sees this other individual immediately after that. She
3 leaves the aisle and within a very short amount of time she's
4 back in contact with the rest of her group.

5 In the meantime what else happened, supposedly,
6 according to their stories. Ms. McGrath, by her testimony,
7 who's out of the Barbie aisle, says she went back to the
8 Barbie aisle with Andrea Massenberg, the fourth individual,
9 and she goes back to look at this fur coat for Barbie that she
10 can't decide whether she's going to buy or not, remember that
11 part of the testimony, and she's there with Andrea and that's
12 when she has the incident where she says there were two
13 employees in the Barbie aisle, one of them was the young man
14 Stamati Xenakis who testified here, and another smaller
15 individual, and that's when Mr. Xenakis supposedly said, let
16 one of them brush by me or brush up against me and I'll show
17 then what I can do with a bat.

18 So all of that is supposedly taking place at the same
19 time that Ms. Lopez is going through the events that she says
20 she went through. Then add on top of that Ms. Medina. Now,
21 she's saying that she first sees some employees, one with a
22 bat pointing and she can't hear what they're saying but she
23 can apparently read their minds so she knows that they may be
24 going back to the Barbie aisle to find Ms. Lopez so she goes
25 in a different direction to look for Ms. Lopez and, by the

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1 way, gets to the Barbie aisle and nobody is there, not
2 Ms. Lopez or Ms. McGrath or Ms. Massenberg and, by the way,
3 Ms. Medina says she's with either Donna or Ms. Massenberg but
4 Donna says Ms. Massenberg is with her in the Barbie aisle so I
5 don't know how you're going to figure that out.

6 In any event, what does Ms. Medina say, she hears the
7 same words spoken. She is hiding, as by her testimony, behind
8 some kind of fixture behind the aisle and she sees an employee
9 with a bat and some other employees and there's a group, there
10 are a couple of girls in this group and some other young men
11 and this one man who says the same thing Ms. McGrath reported,
12 let one of them brush by me and I'll show them what I can do
13 with a bat.

14 Well, is she witnessing the same event that Donna
15 McGrath reported? Couldn't be because of the location she
16 says she's in and she says she's been in the Barbie aisle and
17 there's nobody in the Barbie aisle, couldn't be also because
18 she says she's either with Donna or Andrea and Donna says --
19 Ms. McGrath I should say, I don't want to use their first
20 names, is with Andrea Massenberg. How credible is it to you
21 that they both heard the same words spoken, let one of them
22 brush up against me and I'll show them what I can do with this
23 bat. Does that make sense, does it begin to sound contrived
24 and rehearsed.

25 Well, I submit to you when you add it all up, and

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1 there's more and I don't want to pick apart any more detail at
2 this point, it doesn't add up, it doesn't make sense what
3 they're saying happened.

4 Now, what we do have here is a very precise
5 identification of one and only one employee whom supposedly
6 participated in these events and that's Stamati Xenakis.
7 Everything else is vague and uncertain, maybe black, maybe
8 light skinned Hispanic, tall, short, but we got Stamati
9 Xenakis out of this, okay. Well, he came to testify, we
10 brought him in here and put him on the witness stand and he
11 told you his story and he said none of those things that I've
12 been accused of, none of the things that Ms. McGrath says
13 happened did happen, it just didn't happen, okay. But what do
14 you make out of that, the credibility issues are presented to
15 you as a jury.

16 You might want to consider who is interested in the
17 outcome of the case, who is seeking compensatory damages and
18 millions and millions of dollars of punitive damages that
19 you've just heard about and you listen to the judge's charge
20 on parties that are interested in the outcome of the case.
21 You might want to also consider that --

22 THE COURT: The witnesses that are interested.

23 MR. GOODMAN: I'm sorry, yes, witnesses that are
24 interested.

25 Excuse me, Judge.

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1 Consider that Mr. Xenakis, this young man, he worked
2 for Toys "R" Us for a full two and a half months, he was there
3 as a seasonal associate for two and a half months and that was
4 two and a half years ago, okay. Does he have an ax to grind
5 in this case, is he here for anyone or not. Who looked and
6 sounded credible to you, whose demeanor spoke about
7 credibility and whose didn't on the witness stand.

8 Those are issues for you to consider and, yes, you
9 can consider, in the realm of credibility you may consider the
10 criminal conviction of Ms. McGrath, okay, you know, it's four
11 years ago, it's shoplifting, did she just admit to that, she
12 admits that she pleaded guilty but she wants to come in and
13 tell you, well, it wasn't really stealing because I got my
14 friend's employee discount. Wait a minute. \$712 worth of
15 goods for \$27, \$35, whatever she said. Oh, well, that wasn't
16 all my stuff. She doesn't want to come really clean about
17 it. Think about whether they, the plaintiffs, have offered
18 you any corroboration for their stories. All of these things
19 you want to evaluate.

20 Think about the identifications that have happened in
21 this case. They're all vague, they're all inconsistent,
22 they're all over the board. Remember something else,
23 Ms. Piccolomini testified, it's in evidence and you can take a
24 look at them, everyone of these employees wears a name tag and
25 you saw the name tags and you can look at them if you want to

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1 in the jury room. It's required as part of the dress code at
2 Toys "R" Us, you have to have your name on a tag. What's the
3 purpose of that, the purpose of that is so that customers can
4 refer to you by name and identify you but it's also if there's
5 a problem so a customer can identify the name of the associate
6 that's involved and there will be some accountability; if you
7 have to walk around with your name on, you'll be more
8 accountable. Did any of these plaintiffs pick up a name off a
9 name tag, either one of these days?

10 Now, think about another interesting little point in
11 the evidence that happened in this case. Ms. Lopez says I
12 went over to the customer information counter to complain to
13 this individual, Charlie Valva, the young man that testified
14 here, and he was on the phone helping another customer. By
15 the way, that customer was in front of him, the customer went
16 on the phone, he was helping someone in front of him on the
17 phone. And he said, just a minute, I'm helping someone else,
18 you remember that testimony, and while I was waiting, she
19 says, I noticed he had a serious dandruff problem. Remember
20 that, she testified Mr. Valva had dandruff. Dandruff.

21 Wait a minute, you're afraid for your life because
22 you've been threatened with bats and you're noticing that this
23 individual has dandruff and you can't identify anybody, you
24 haven't picked up names off of name tags and you can't get
25 heights and weights and races, skin color correct but you can

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1 notice, you have the presence of mind to pick up a detail like
2 that.

3 Again, it makes you wonder about the credibility of
4 their stories, does it hang together, does it hold water.
5 Ms. McGrath even went to the extent of saying -- I hope you
6 remember in the testimony, I want to remind you of it -- I
7 don't know all of these employees at Toys "R" Us, they all
8 look alike to me. They all look alike to me, that's what she
9 said. She said it in her deposition. So they're here now
10 attempting to prove a case for you and that is the kind of
11 evidence and credibility that they're giving you.

12 Well, I want to talk briefly again about their state
13 of mind at the time of these events on the 20th. You've heard
14 a lot of evidence and discussion here this morning about
15 calling the police. Let's be very clear, Myra Vasquez did say
16 that she heard one of the plaintiffs say call the police but
17 she never testified that she heard the plaintiffs ask
18 Mr. Hofer to call the police.

19 Remember Myra Vasquez's testimony, she was back
20 behind the CIC desk looking out through an opening in the
21 bike aisles where the bikes hang down so it creates an
22 opening, so she's back there at that time and the plaintiffs
23 are up off to the right of the CIC, customer information
24 counter, from her perspective. Don't you think that if these
25 plaintiffs and their fourth friend wanted the police, they

1 would have called the police. One or more of them had cell
2 phones. Mr. Hofer testified that he saw one of this group
3 talking on a cell phone when he came up to the customer
4 information counter. Ms. Lopez -- let's be perfectly clear
5 about what the evidence was. She testified, and Ms. Lopez
6 was the one who led the way to talk to Charlie Valva and then
7 talk to Joe Hofer, and she stated very clearly, I never asked
8 anybody to call the police. So let's get that clarified. And
9 if they wanted the police, is there any reason the police
10 wouldn't have been called. They could have called them
11 themselves or asked somebody to call the police. She says
12 now, Ms. Lopez, remember her testimony, it was my mistake, she
13 said, my mistake not to call the police. Why was it a
14 mistake, by the way, because it would have looked better now
15 at the trial.

16 Charlie Valva's statement, you were read it on
17 Mr. Shanahan's summation. He says he came across a couple of
18 associates staring at some of the plaintiffs and, he said,
19 calling them names. He didn't say calling them names to their
20 faces and he explained to you what he meant, they were making
21 remarks between themselves. Now, does that make it any
22 better. It makes it different. It's not appropriate, it's
23 wrong, and he told them that and they apologized to him, that
24 was his testimony, and said that wouldn't happen again. What
25 else is he supposed to do, fire them on the spot, he has no

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1 power to fire anyway, he's just a world leader; write them
2 up?

3 Let's talk about Mr. Hofer. A lot has been said here
4 about the investigation and what Mr. Hofer did or didn't do
5 and I'll tell you one of the problems in these court cases is
6 you get into a courtroom and we're here with evidence we have
7 and advocates on each side, a judge on the bench and you tend
8 sometimes to forget about the real world. We're talking about
9 real people acting in a real world in a toy store a few days
10 before Christmas and he is dealing with what's in front of him
11 and making decisions and exercising his discretion and trying
12 to evaluate what's he seeing and what's he hearing. And what
13 is he seeing and hearing?

14 Well, the plaintiffs are making complaints but they
15 don't -- no one says call the police and Ms. Lopez' own
16 testimony was that. Then he sees them, their demeanor is
17 laughing and giggling, can't figure out whether to circle
18 M or F or write in transsexual on the incident statement
19 form. Take a look at the forms and you'll see on the forms
20 crossed out, the word transsexual written in, you saw the
21 evidence on that.

22 He hears a comment made, this is how I got my house
23 in Sheepshead Bay. He's evaluating what he's seeing in front
24 of him. He then goes and talks to a couple of these
25 associates. They deny that they've done anything wrong. One

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1 of them says, in fact, it was the plaintiffs themselves that
2 were aggressors in this situation. And what's the evidence on
3 that? Well, Myra Vasquez' incident statement, that's in front
4 of you in evidence, and she says, in part, I saw five guests
5 walk in the building and running around laughing and smiling
6 at the workers and running back to each other and telling each
7 other what just happened when they were laughing and smiling
8 at the workers.

9 Now, Mr. Shanahan says you should just disregard this
10 incident statement all together. Well, I don't think you
11 should. He wants you to consider other parts of Ms. Vasquez'
12 testimony that are good, he thinks good for his case, and
13 you're supposed to disregard the parts that are bad for his
14 case as he sees it but that's not how it works. You have to
15 evaluate all of the testimony.

16 Now, what about all of this business about
17 investigation after the fact, hindsight is 20/20. We can
18 probably sit here and take any event or any set of actions and
19 look back and say, well, it might have been better if we did
20 this or should have done that, that's pretty easy to do, but
21 take yourself back to the real world on the day of the event
22 and the next day. Incident statements are taken from the
23 plaintiffs. The next day they're left for Mr. Maloney, he's
24 the store director. He comes in the next day, he takes some
25 more incident statements. He advises the next person up the

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1 chain of what has happened and later in that day he talks to
2 Ms. McGrath.

3 Do we really sit here now and say that that was some
4 part of a corporate cover-up. If you want to find that these
5 individuals have been engaged in some kind of massive
6 conspiracy and cover up and each one of them has come in and
7 gone up to the witness stand and perjured themselves, if
8 that's what you find, find for the plaintiffs in this case.
9 It wouldn't be supported by a shred of evidence in this case
10 but that's what Mr. Shanahan seems to be suggesting. It
11 didn't happen.

12 And by the way, we talked about what's on the verdict
13 sheet. There's nothing on this verdict sheet that says what
14 kind of investigation was conducted, did the corporation take
15 their claims seriously enough. That's all after the fact.
16 You have to find what happened that night and was there a
17 violation of their civil rights in that they were not given
18 the privileges of shopping for goods in that store.

19 I would submit to you that on all of these facts, as
20 we've gone over them, you cannot find that the plaintiffs have
21 proven their case, that they were subject to discrimination in
22 that the company did not allow them the privilege of
23 shopping. Remember also they're asking for Mr. Maloney and
24 they all admit to that when, the night of the 20th, where is
25 Mr. Maloney, what are you going to do for us, that's what

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1 Mr. Hofer said was said at one point by one of these
2 plaintiffs. When you go back in the jury room and you
3 deliberate, you're going to fill out the verdict form; the
4 answer as to all three plaintiffs as to question number one,
5 the evidence mandates, dictates, compels you to find for the
6 defendant in this case.

7 Now let me talk to you very briefly about some other
8 topics here. In these trials -- in this trial, I should say,
9 you have been thrown what's called a red herring, okay. If
10 you don't know what a red herring is, it's an argument that's
11 meant to distract you and perhaps mislead you and that has to
12 do with video cameras and surveillance. The evidence in this
13 case is absolutely, emphatically crystal clear that there's no
14 camera, there were no cameras in this store on that day that
15 would have captured any of the events that are at issue here.
16 Okay. You have to listen carefully, keep your eyes on the
17 ball and see what we're talking about. There just were not
18 cameras, they weren't there to go shine into the Barbie aisle
19 or the CIC desk or the sporting goods area. You can't create
20 cameras where there weren't any. To say that there were
21 cameras in the store is not to say that there were cameras
22 that would have picked up anything relevant to this case.

23 What does it boil down to, what's Mr. Shanahan really
24 talking about. He's saying there are cameras directly about
25 the registers, okay. Remember what the testimony, the

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1 undisputed testimony was in this case, those cameras shine
2 straight down on a cash register, they are there for the
3 explicit purpose of monitoring the employee handling cash.
4 That's all there is there.

5 Remember the testimony, what could one of those
6 cameras have shown if the plaintiffs came over to one of these
7 registers to fill out these forms which they did. Well, if
8 the plaintiff, if one of them got herself directly under the
9 camera right by the register, as opposed to further out on the
10 counter at the end, maybe that camera might have picked up the
11 top of her head or her handwriting out an incident form and
12 there's no audio on these cameras so we wouldn't have picked
13 up any conversation. That again is completely undisputed.

14 So what is it that should have been done with
15 reference to tapes, there's nothing to look at. Is
16 Mr. Shanahan actually telling you this is part of some
17 cover-up that Toys "R" Us was engaged in, that we should have
18 gone and looked and seen if we could find a few glimpses of a
19 top of a head or a hand writing out an incident form, that
20 that would have somehow been relevant to you for your
21 deliberations. It doesn't make any sense. You have to
22 dismiss that argument completely.

23 Now, another issue, and I would be remiss for not
24 discussing it, is -- let me back up for a second. When you
25 get to the jury room and you fill out the form, you fill out

Summation - Goodman

1 for defendant in question number one. That's the end of the
2 story, end of the case, no liability for the defendant.

3 I need to talk to you about what happens if you don't
4 do that and obviously I want you to do that, I expect you to
5 do that and I think the evidence compels you to do that.

6 But there are other questions that you would not
7 reach if you do that that involve damages. You've heard it
8 discussed here by Mr. Shanahan, you'll hear the judge talk
9 about it in his charge. There are two different aspects of
10 damages, one of them is called compensatory damages and the
11 judge will charge you on what that's supposed to be. The only
12 element in the world of compensatory damages that is
13 suggested, even suggested in this case is mental anguish,
14 okay. There's no lost wages. None of these plaintiffs are
15 employed, they didn't miss time from work, there's no personal
16 injury, there's no counseling, psychiatry, there's nothing
17 like that. It's about their feelings, their hurt feelings on
18 the evening of the events and thereafter as they claim it.
19 Okay.

20 And if you somehow get to the point that you have
21 found liability, which I really can't imagine could happen on
22 these facts, and you do get to this point of compensatory
23 damages, then you have to go into the process of weighing what
24 a dollar amount would be. And there's something about that, I
25 want to be perfectly crystal clear about things that I've said

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1 and Mr. Shanahan quoted me twice in his closing for something
2 I said in my opening, and that has to do with the fact that
3 these plaintiffs, these individuals have before this incident
4 at Toys "R" Us and after experienced other incidents, you
5 heard about one of them, as a matter of fact, at the K-Mart
6 store right next door. I am not at all arguing nor is that my
7 client's position that because other people may have treated
8 them badly, it's okay for everyone to treat them badly.
9 That's not even close to what we're talking about. What we're
10 talking about is in this case where there is a claim for
11 compensatory damages which has to do with mental anguish and
12 suffering and the jury may, you guys may reach the point of
13 trying to put a dollar figure on it, it becomes relevant to
14 consider these other incidents and consider who the plaintiffs
15 are and how much mental anguish they claim to have gone
16 through.

17 You heard Mr. Shanahan, he's saying that they're
18 going to live with the scars of what happened on December 20th
19 for the rest of their lives. You need to evaluate that and
20 it's only in the context of that issue and that evaluation
21 that the other incidents are brought up. And by the way, that
22 K-Mart incident is also really brought to you for the fact
23 that when something similar happened, Ms. McGrath had no
24 problem at all taking out her cell phone and calling the
25 police.

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1 Okay. I submit to you that the only damages that
2 could be awarded in this case if you reach that point and,
3 again, the fact that I'm talking about it doesn't mean that
4 you'll ever reach it, the fact that the judge charges you on
5 it doesn't mean you'll ever reach it, and if you do reach it,
6 nominal damages are the only damages that can be supported in
7 this case and you will be asked the question if you find for
8 any plaintiff in response to question one and find that the
9 plaintiff is entitled to no compensatory damages, state
10 whether the plaintiff is entitled to nominal damages and you
11 just simply have to answer yes or no. If you get to that
12 point, then the answer on damages is nominal damages only.

13 One last point and that, again, is something that I'm
14 compelled to talk about because it's been addressed, you'll
15 hear a charge on it, and that is this issue of punitive
16 damages. And you heard numbers about 100 million or 80
17 million or 20 million dollars. It's absurd. In this case
18 there is no evidence remotely supporting punitive damages.
19 Again, the fact that I'm talking about it, the judge will
20 charge but it does not mean that you have to do it, okay. You
21 need to find for the defendant and let that be the end of
22 this. Punitive damages would require you to find acts that
23 are so wanton and so intentional and evil that the defendant
24 should be punished for those acts. Did you hear any evidence
25 of any act of that kind? Not on this record. More

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1 importantly, you would have to find that the corporation, the
2 company as a whole actually condoned or ratified and said,
3 okay, we know that these things happened in the store and it's
4 okay with us, that's fine, and if you can make that finding,
5 then you should award punitive damages. That never happened,
6 not even close.

7 They're trying to tell you this letter of Lucille
8 Burghardt amounted to her saying well, yeah, okay,
9 discriminatory conduct is okay with the company. She has no
10 place to say that in the first place but she didn't say that.
11 They're trying to say that because certain, in their view,
12 certain parts of the investigation process could have been
13 done a little bit better. You know, Ms. Steinmetz, she's an
14 attorney dealing with a formalized complaint that she gets
15 from these plaintiffs. She wasn't at the store, she doesn't
16 work at the store. She talks to Bob Maloney and she gathers
17 some facts and looks at incident statements and takes a
18 position as an attorney in a case. Did she get some things
19 wrong, yes, she did. You know, a lot of -- just about
20 everybody in this case confuses the 13th and the 20th and
21 misattributes one thing to another. Not surprising. Is that
22 some evidence of a massive corporate cover-up and conspiracy,
23 absolutely not. And does any of this amount to some kind of
24 statement by the company that they accept this kind of
25 behavior. It's hard for me even to argue these points because

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1 it's so far out and it's so unsupported by the evidence that
2 it's even hard to articulate the arguments, it's that far
3 off.

4 Okay. In the end I think you've seen a very
5 compelling case, the plaintiffs had their day in court, they
6 put their evidence on. It's now time for you to deliberate
7 and determine what you're going to do with this thing. If you
8 want to find that Bob Maloney is some kind of evil person who
9 condones this kind of behavior and that's what you saw on the
10 witness stand from him, then you'll find for the plaintiffs.
11 That's not what you saw before you. If you think Joe Hofer is
12 that same kind of individual, Cindy Steinmetz, you'll find for
13 the plaintiffs. That's not what they're about.

14 The plaintiff asked where was Lucille Burghardt.
15 Where was Lucille Burghardt on the plaintiff's case? He could
16 have subpoenaed her the way he subpoenaed Cindy Steinmetz and
17 the other employees of Toys "R" Us. He didn't put her on the
18 stand either. I wonder what the answer to that is.

19 The evidence compels you in this case to find for the
20 defendants. I thank you very, very much for your attention.
21 You've been a wonderful jury and I trust that you will do the
22 right thing by this verdict.

23 Thank you.

24 THE COURT: All right. Is there any statement in
25 rebuttal or not?

Rebuttal - Shanahan

1 MR. SHANAHAN: Yes, Your Honor, very brief.

2 THE COURT: All right, go ahead.

3 MR. SHANAHAN: I'll be very brief. It's been a long
4 week. Again, Mr. Goodman referred to the policy, it's in
5 evidence, you can look at it, you can see if that policy was
6 implemented and procedurally followed by all of the defendants
7 in this case. He brought up the word "chased" and what that
8 means. You saw Tara Lopez, as Mr. Goodman had the opportunity
9 to cross-examine her, explain to him exactly what it meant,
10 exactly what she felt like in the store that day.

11 This is the letter he's asking you to disregard. It
12 is in evidence. I would ask that you look at it, consider it
13 and this is the position of the company. There again there's
14 no dispute that Mr. Maloney did speak to employees that day.
15 We don't dispute that but, again, that did not follow his
16 internal policies.

17 Mr. Goodman makes a lot about contradictions in
18 stories. You have the transcripts from my client's
19 testimony. If, as he said, it's contrived and rehearsed, I
20 would ask you to find for the defendants but you must
21 understand we are talking about three separate human beings
22 each perceiving things from different aspects of the store and
23 each having a different experience. If, in fact, they told
24 you the same exact story, I would submit to you that it would
25 be contrived and rehearsed.