

1 know, for your own reference if you want to turn it  
2 over --

3 MS. IRWIN: I'll just --

4 THE COURT: Oh, you've got them. But, again,  
5 you're not going to quote from a deposition --  
6 deposition testimony.

7 MS. IRWIN: I'm going to do it the way  
8 Mr. Kaczmarek did; he said this in his deposition, as  
9 you heard in the court --

10 THE COURT: Okay.

11 (IN OPEN COURT - JURY PRESENT)

12 THE COURT: Attorney Irwin, whenever you're  
13 ready.

14 MS. IRWIN: Thank you, your Honor.

15 CLOSING ARGUMENT BY ATTORNEY IRWIN

16 MS. IRWIN: Ladies and gentlemen of the jury,  
17 Maureen McPadden, Attorney Fradette, and I thank you for  
18 your attention to this case. I want to warn you I may  
19 take an hour and possibly a little bit more, but Maureen  
20 McPadden has waited several years to have her case heard  
21 and I want to make sure I do her case justice.

22 So I want to start out with why does the law  
23 protect the activities of raising safety and other legal  
24 concerns? And the reason is that reporting these issues  
25 is good for the public. We want someone to stop Walmart

1 when its practices are unsafe, someone like a pharmacist  
2 who can tell that the practices are unsafe. We want  
3 someone to raise an issue when patients' privacy is  
4 being violated. We also think it's good for the public  
5 to take limited leaves of absence to address medical  
6 reasons. In Maureen's case, she took a leave of absence  
7 to make sure that she could be safe to fill  
8 prescriptions.

9           But if we all agree that this is important  
10 activity, why would employees need legal protection when  
11 they do it? Well, the truth is that hearing someone  
12 blow a whistle about your failures is unpleasant and  
13 frustrating. Imagine someone standing near you and  
14 blowing a whistle to tell you that you're doing  
15 something wrong, repeatedly, again and again. That's  
16 unpleasant. And that would naturally lead someone to  
17 want the person blowing the whistle to go away. This is  
18 especially true for a new manager who would feel more  
19 threatened by criticism.

20           Mr. Certo was a brand-new market manager and  
21 he had just hired a brand-new pharmacy manager, Josh  
22 Varieur. That was Mr. Certo's hire who clearly was not  
23 up to the job. Maureen's concerns and her raising those  
24 concerns very likely made Mr. Certo feel defensive since  
25 it was -- he was new, it was his decision to put Josh

1 Varieur in the position, and the pharmacy was clearly  
2 operating under unsafe conditions. Now add on that Mr.  
3 Certo was covering two markets as a brand-new market  
4 manager in the fall of 2012. He's busy. And as  
5 Attorney Kaczmarek said, he's stretched thin. He  
6 doesn't want to hear someone raising safety and legal  
7 concerns.

8           The same is true with the FMLA leave. A leave  
9 of absence, particularly unplanned, is, in fact,  
10 inconvenient, especially for a new market manager like  
11 Joe Certo who was facing staffing issues already. Even  
12 Mr. Certo had to agree that an unplanned leave of  
13 absence creates a challenge for management.

14           So the law protects employees like Maureen  
15 from being fired for doing the right thing. The law  
16 doesn't stop a manager from feeling the frustration; the  
17 law stops the employer from acting on it by taking  
18 adverse action against the employee.

19           Now, Walmart has stipulated, which means that  
20 Walmart agrees, that Maureen had a reasonable and good  
21 faith basis to raise safety concerns, to raise her HIPAA  
22 concern, and also that she engaged in protected activity  
23 under the FMLA. So you do not need to decide those  
24 issues because there's no dispute on those issues.

25           The evidence in this case demonstrates that

1 when Maureen raised those reasonable and good  
2 faith beliefs about the unsafe conditions, including  
3 Josh Varieur's synthroid error and the other conditions  
4 at the pharmacy, the HIPAA violation, and when she took  
5 and discussed her need for FMLA leave, Joe Certo  
6 eventually got frustrated and he used that frustration  
7 to seize on the loss of the key as an excuse to fire  
8 Maureen. And he influenced the decision so that he  
9 could get her fired. That was the real reason.

10 Now, I am not the first person to come up with  
11 an idea of what type of evidence can be used in an  
12 employment discrimination case. There's a body of law  
13 that has been developed on this and Judge McAuliffe is  
14 going to tell you what that law is. And so one of the  
15 ways that you can prove discrimination or retaliation is  
16 through circumstantial evidence. And the shifting or  
17 consistent reasons and the timing, those are all ways  
18 that the law has found legitimate, perfectly good ways  
19 to prove these cases. That's not my idea. That's what  
20 the law says. And so I would just ask you to please  
21 pay -- listen to the judge on those instructions and I  
22 will try to summarize the evidence in a way that's  
23 consistent with that law.

24 The evidence in this case demonstrates that  
25 when Maureen raised her good faith beliefs, he got

1 frustrated and he seized on the key as an excuse. And  
2 Walmart is defending the case by essentially saying Joe  
3 Certo and Walmart may have not been the best, but they  
4 did the best they could, they don't have really good  
5 memories, and they didn't discriminate or retaliate.  
6 But, ladies and gentlemen of the jury, Mr. Certo is not  
7 stupid. He went from being a pharmacist to a pharmacy  
8 manager to a market manager to now a regional manager in  
9 less than five years. He knows what to do and he knows  
10 what he wants.

11 Judge McAuliffe will instruct you that Maureen  
12 McPadden does not need direct evidence of Walmart's  
13 unlawful motive. A company and a person like Mr. Certo  
14 or Ms. McCaffrey or Ms. Kulwicki, for that matter, will  
15 never -- in my experience, will never admit that they  
16 violated the law. That's why you are allowed to look at  
17 circumstantial evidence and you can rely exclusively on  
18 circumstantial evidence. There are several types that  
19 you may consider in the case.

20 The first type is called temporal proximity,  
21 which is the timing. And the reason for that is when  
22 you see a lot of protected activity happening close in  
23 time to when the termination happens, that's evidence  
24 that the decision was motivated by the unlawful reasons.  
25 So let's look at the timing.

1           Maureen reported the dispensing error, which  
2 was a patient safety issue, on August 13th, 2012.  
3 Maureen then e-mailed Mr. Certo about safety concerns on  
4 August 29th, 2012. And let's imagine each one of these  
5 things is a blowing of a whistle.

6           Maureen took FMLA leave from November 19th  
7 (sic) through October 3rd and when she returned, she  
8 alerted Mr. Certo that she wanted a meeting to discuss  
9 the HIPAA violation. That one-hour meeting took place  
10 in mid to late October. During that meeting, she  
11 reported the HIPAA violation, the FMLA leave that she'd  
12 taken and she'd likely need more, and she reiterated her  
13 safety concerns. Maureen e-mailed Mr. Certo with her  
14 serious safety concerns again on November 16th, 2012.

15           By November 26th, 2012, Maureen had -- was  
16 again raising concerns that the technicians were not  
17 being given bathroom breaks. And you'll be looking at  
18 Exhibit 47. It is very clear that Mr. Varieur is saying  
19 that Maureen is resisting him. And when Mr. Certo says  
20 he understands the frustration, the e-mail is about  
21 Maureen not stopping the technicians from taking breaks  
22 when it was outside of their scheduled 15-minute break.

23           So, again, Maureen is standing up for the --  
24 for someone, raising a concern, and by this point -- and  
25 obviously these things can build -- by this point,

1 Mr. Varieur is describing Maureen's reporting as  
2 resistance and Mr. Certo, most importantly, is saying, I  
3 understand your frustration.

4 That very same day, Mr. Certo is involved in  
5 the decision to issue the second-level coaching to  
6 terminate Maureen. Well, the defense questioned why not  
7 earlier. First of all, these issues do build. There's  
8 a new manager, she's repeatedly raising concerns and  
9 raising concerns from the very end of August until  
10 November. It's not a very long time period and there  
11 are quite a few concerns raised. So certainly it would  
12 be -- his frustration would naturally be building.

13 Secondly, as I discussed earlier, Mr. Certo is  
14 not stupid. Ms. McPadden had raised her concerns in  
15 writing, said that she was documenting. He would know  
16 that human resources had a record of her FMLA leave. If  
17 he's going to do something to her, he's going to do it  
18 carefully. He's risen amazingly fast at Walmart. He  
19 knows what he's doing. He was going to do it carefully  
20 and he was going to do it with cover from his peers and  
21 from his manager. So there's compelling evidence based  
22 on the timing alone.

23 The second type of circumstantial evidence  
24 you may consider is called pretext. Pretext means false  
25 or -- or although true, not the real reason for the

1 action taken. A pretext is an excuse to hide the  
2 unlawful reason. One way to show pretext, which the  
3 judge will tell you is the law, is to show that  
4 Walmart's explanation for issuing the second-level  
5 coaching to Maureen is weak, inconsistent, and/or has  
6 contradictions in it. That's not a theory that I'm  
7 raising for the first time in history. That's what the  
8 law says about this and so you are allowed to consider  
9 that evidence.

10           There's no dispute that Maureen lost her key  
11 and immediately and properly reported the loss. There's  
12 no dispute on that. And we agree that Walmart does not  
13 need a policy to terminate an at-will employee. We  
14 agree with that. But there is compelling evidence of  
15 Walmart's shifting, weak, and contradictory  
16 explanations.

17           Now, Mr. Certo, being a witness at the Human  
18 Rights Commission, didn't say, hey, you know, she lost  
19 the key, we consider that important, that's why she got  
20 a second level. He actually -- he could have said, we  
21 don't have a policy that covers this, but we wanted to  
22 do this. But that's not what he did. He -- he said it  
23 was the AP-05 policy. And he actually said, I believe  
24 in court and also at his deposition, that it was that  
25 AP-05 policy that was discussed with Ms. McCaffrey and

1 Ms. Kulwicki. Well, Walmart didn't like that policy  
2 because it's not a policy -- when you look at it, it  
3 doesn't justify any discipline for losing a key and  
4 properly reporting it.

5           So Walmart changed it to POM 902, which, by  
6 the way, POM stands for Pharmacy Operation Manual. So  
7 that's what a POM is. So they changed to 902 and then  
8 eventually up pops this idea of a matrix, which does not  
9 have a POM at the top of it. It's a matrix. And  
10 Ms. Kulwicki loved to talk about the matrix because she  
11 believed that allowed her to say she didn't have to  
12 consider any other comparators, whether anyone had ever  
13 lost a key in the history of Walmart before, because the  
14 matrix made it a whole new world, so she didn't have to  
15 do her job of assuring that there was consistency to  
16 avoid violations of the law.

17           Now, you can see that when you look at the  
18 interrogatory answers and the other exhibits that you  
19 have, the matrix was never mentioned in written  
20 statements under oath at all. So they tried to use a  
21 policy to justify a termination. When it didn't work,  
22 they testified under oath that they were really using a  
23 different policy.

24           Now, I'll just respond to one issue Attorney  
25 Kaczmarek raised. If they wanted to say that different

1 people had different memories, they certainly could have  
2 done that. You'll see in some of the sworn testimony  
3 they actually say, Mr. Certo recalls. They could have  
4 said Mr. Certo recalls this, Ms. Kulwicki recalls that,  
5 Ms. McCaffrey recalls the other thing. That's not what  
6 they said. They gave an official answer of what was  
7 Walmart's answer and they had their people sign it under  
8 oath.

9           And so they switch around which policy, none  
10 of the policies actually tell you that anybody would be  
11 disciplined or how much the discipline would be for  
12 losing a key. And, of course, the problem with being  
13 dishonest is that it's hard to keep your story straight.  
14 And in the end, Mr. Certo and Ms. McCaffrey and  
15 Ms. Kulwicki, among themselves, could not decide which  
16 policy they were using to justify the discipline, which  
17 policy they had discussed when they were deciding on the  
18 discipline. And remember Ms. Kulwicki finally had to  
19 admit that no policy actually justified the discipline,  
20 so she went back to saying, we don't need a policy.

21           Now, Walmart doesn't need a policy, but they  
22 spent a lot of time being dishonest about it to try to  
23 cover themselves. And shifting around and being  
24 inconsistent is evidence that they were trying to cover  
25 up the discriminatory and retaliatory reasons for the

1 termination.

2           And, finally, I would remind you that Andy  
3 Tau, in his short video deposition, testified that he  
4 was told that he was disciplined for losing his key  
5 because it cost Walmart money to change the locks.

6           Now, on the issue -- another inconsistency is  
7 on the issue of who decided to issue the second-level  
8 coaching. Again, shifting inconsistent reasons. First,  
9 Mr. Certo clearly stated at the Human Rights Commission  
10 that he was one of the three who conferred and  
11 determined and that he was one of the three who was  
12 ultimately responsible for the decision to terminate.  
13 And that's in Exhibit 10, number 18. So it wasn't a  
14 tricky question. It was who was responsible for making  
15 that termination decision, and he listed that he was one  
16 of the three.

17           Then Walmart decided since Mr. Certo knew all  
18 about Maureen's protected activity and Ms. McCaffrey and  
19 Kulwicki maybe did not, it would be bad for Walmart if  
20 Mr. Certo was a decision-maker. So what did they do?  
21 They rewrote history and said only McCaffrey and  
22 Kulwicki decided. That's Exhibit 11. It really  
23 couldn't be stated more clearly. It's not a tricky  
24 question. They said they decided it and then they said  
25 Mr. Certo only executed the decision. Big change. Not

1 by accident.

2           And as I said before, the problem with being  
3 dishonest is it is hard to keep the story straight. And  
4 when he's on the stand, Mr. Certo eventually went back  
5 to saying he was a decision-maker and then he wasn't  
6 sure if he was a decision-maker and then he was a  
7 decision-maker and then Ms. Kulwicki really couldn't  
8 decide if she was a decision-maker or not, even though  
9 she had done a sworn statement under oath in written  
10 documents that Walmart submitted.

11           And, eventually, Ms. McCaffrey testified  
12 that -- finally testified -- that Mr. Certo had clearly  
13 influenced her decision. And one of the things that I  
14 find striking about the differences in the way we  
15 describe the case in closing, which obviously is not  
16 evidence, but there's one key conversation that  
17 Attorney Kaczmarek did not discuss. And that was the  
18 conversation after Mr. Certo sent his nice, innocent  
19 e-mail, is there accountability for a lost key, question  
20 mark, there was a call. Ms. McCaffrey said, I didn't  
21 e-mail him back, I called him. And this was before the  
22 conference call. She's got to get the scoop for what  
23 are we going to be talking about, what are we going to  
24 be doing here. That wasn't mentioned at all.

25           Well, that was a pretty big part of

1 Ms. McCaffrey's testimony and, by the way, she was the  
2 most adamant and unshakeable witness, in my opinion,  
3 that Walmart had. So there's the call.

4           And during that call, Ms. McCaffrey says  
5 Mr. Certo influenced her decision because he told her  
6 that Ms. McPadden did not take it seriously. And that's  
7 why she went into the conference call with the idea that  
8 she thought second level was -- was a good idea. And,  
9 remember, she said there are only two reasons that she  
10 thought second level was appropriate, not that she  
11 thought termination was okay to go ahead the next day.  
12 She said there were two reasons for second level. One,  
13 losing a key is bad; and, number two, Mr. Certo told her  
14 Maureen did not take it seriously. And that was before  
15 the conference call.

16           And, by the way, one could certainly -- if we  
17 want to try to synthesize information, one could  
18 certainly imagine when Mr. Certo called Ms. McCaffrey  
19 back the next day to finally tell her that it actually  
20 was going to be a termination, he very likely would have  
21 reiterated again that he didn't think that Maureen took  
22 it seriously. So is it possible he said it twice?  
23 Absolutely. But we know he said it on that -- on  
24 November 26th to Ms. McCaffrey. She's not -- got no  
25 reason to make that up.

1           Judge McAuliffe will instruct you that Walmart  
2 can be liable for discrimination and retaliation if  
3 Mr. Certo had a discriminatory or retaliatory motive and  
4 influenced a neutral decision-maker like Ms. McCaffrey  
5 or Ms. Kulwicki. So even if they didn't know about the  
6 protected activity, if Mr. Certo did his work to  
7 influence the decision -- which clearly he did,  
8 Ms. McCaffrey said his input was one of the two reasons  
9 that she gave a second level -- then Walmart is  
10 responsible.

11           And I would -- finally, on the  
12 inconsistencies, a final issue is even what reason they  
13 state for the second-level coaching. They actually  
14 don't list in any of their sworn answers that one of the  
15 reasons was that Mr. Certo told Ms. McPadden that  
16 Maureen didn't take it seriously. They just say it's  
17 the loss of the key is the loss of the key is the loss  
18 of the key. It's only when Ms. McCaffrey slips up or  
19 discloses that information we see that in deposition  
20 testimony. It's not in their sworn answers.

21           Now, remember Mr. Certo clearly testified he  
22 had absolutely no basis to suggest that Maureen didn't  
23 take the loss seriously and, in particular, when he  
24 first spoke to Ms. McCaffrey, all he had were e-mails  
25 from Maureen where she said, I've lost my key, I've

1 notified the store manager, a locksmith's on the way.

2           And certainly, perhaps, Mr. Certo knew that he  
3 had no basis for that. He had told Ms. McCaffrey this.  
4 And when he went to seal the deal on November 27th, he  
5 wanted to have it -- in case she asked, what's your  
6 basis for seriousness. He had called Maureen, he had  
7 told her to look for a key that didn't work anymore. We  
8 all know she looked very hard for the key. But he says,  
9 somehow, that she didn't -- indicated in some way that  
10 she didn't take it seriously. Perhaps she may have said  
11 to him that we all understand I've gotten the pharmacy  
12 rekeyed, just to make sure -- you know, which was a  
13 fact. But

14 every -- there is no dispute that she took it very  
15 seriously and she turned her house upside down.

16           So why was Mr. Certo dishonest about Maureen  
17 when he spoke to Ms. McCaffrey? Mr. Certo was tired of  
18 Maureen's complaints, he was tired of the time it was  
19 costing him to deal with her concerns and her FMLA  
20 leave, and he jumps on this issue like nothing we have  
21 seen in this case. He's involved in a flurry of  
22 e-mails. So how is he going to -- how is he going to  
23 get this done?

24           Well, we know through e-mails that he  
25 originally thought she was already on a third level. So

1 he just needs a first level. But he knows she's put  
2 some concerns in writing recently. He knows her FMLA  
3 leave is up with HR. So he's going to get some cover.  
4 He thinks he only needs first level. He goes to his  
5 peers. He -- he gets a first level.

6           And we know, and I believe Attorney Kaczmarek  
7 admitted very likely, and certainly according to  
8 Mr. Kelly, absolutely company practice. He actually  
9 looks it up. He's into this issue. There were tons of  
10 e-mails on this issue. During that time, he looked up  
11 what her status was. He said to Mr. Wallis, I'll -- I  
12 think she's on third level. I'll get back to you. He  
13 looked up her status and he saw he needed second level.  
14 But now he's agreed to first level. He's got to do  
15 something to get up to second level. And that's why  
16 he's dishonest about Maureen not taking the issue  
17 seriously.

18           Now, Mr. Certo told a rather tortured story  
19 about asking Maureen to look for the key that no longer  
20 worked because he was feeling badly for Maureen and  
21 thinking that the second level was too harsh. Well,  
22 this story doesn't work for two reasons. One,  
23 Mr. Certo's e-mail, which is Exhibit 57, shows that he  
24 thought Maureen was on a third level at 11:53 in the  
25 morning. Okay? If he thought -- and he testified he

1 thought she was on a third level all day long. It  
2 wasn't till the next day that he realized that she was  
3 only on second. So, you know, he had nothing to do with  
4 this problem.

5 But he -- his e-mail shows he thought she was  
6 on third level on the 26th. So if he thought she was on  
7 third level, he wouldn't care whether she got one more  
8 level or two more levels because even one more level  
9 would have gotten her fired. If she's already on third,  
10 which is what he says he thought, all he needs is a one  
11 level. So why is he feeling badly that the coaching is  
12 too harsh? It doesn't make any sense at all based on  
13 his own e-mails that he thought she was already on a  
14 third level.

15 Second, if Mr. Certo was actually sympathetic  
16 to Maureen and trying to save her job, as he wants you  
17 to believe, why would he fail to advocate for her for a  
18 lesser discipline and why instead would he tell his  
19 manager something negative about her, that -- give an  
20 opinion, an unsupported opinion, that she didn't take it  
21 seriously. His story makes no sense because it's a  
22 cover-up for what he really did, which was he got  
23 Maureen fired. He got the job done.

24 Walmart was also inconsistent with its  
25 standard practice -- deviated or was inconsistent from

1 its standard practice when it came to Maureen. That's  
2 additional evidence of pretext. You heard Mr. Kelly  
3 testify this morning that the custom and practice was  
4 for a market manager to accurately lay all the facts on  
5 the table and advocate for the discipline that he  
6 wanted.

7 And, actually, Rick, if you could just pull up  
8 82, I'm going to go low-tech and just show you one of  
9 the exhibits on a blowup.

10 So you heard Mr. Kelly testify this morning  
11 that it would be standard practice for the market  
12 manager to advocate for what he or she wanted as a  
13 discipline. And that's exactly what we see here. This  
14 is a different market manager, not Mr. Certo, and what  
15 does this market manager do? First of all, she puts  
16 right on the table that she checked with the peers and  
17 that they thought it should be first level and that she  
18 agreed, I would totally agree this would be next level  
19 of coaching. Right? She -- she says that this  
20 pharmacist informed them as soon as possible and that  
21 she really thought that first level was appropriate.  
22 That's the custom and practice of Walmart, to advocate  
23 for what you want. But what do we see here? We have  
24 evidence that Mr. Certo advocated for a second level by  
25 saying Maureen didn't take it seriously, but Mr. Certo

1 tries to say, I didn't do anything; I -- I didn't  
2 advocate one way or the other; I thought this was too  
3 harsh, but I didn't say anything because, you know, that  
4 was my boss. That's just not credible.

5           And this is extremely strong evidence that  
6 Mr. Certo wanted Maureen fired. He did not give  
7 Ms. McCaffrey the full facts. He didn't talk about what  
8 the peers had recommended, that he had agreed, he claims  
9 he didn't talk about the protected activity, and he  
10 didn't advocate in her favor. Instead, he falsely  
11 suggested that she didn't take it seriously. This is  
12 just the type of circumstantial evidence that allows you  
13 to conclude that Maureen was fired for unlawful reasons  
14 even though Walmart won't admit it.

15           In addition to that pretext evidence that I've  
16 just spoken about, we also have some key additional  
17 pieces of evidence. You heard Mr. Certo admit in court  
18 that he viewed Maureen's raising of complaints as  
19 aggressive. Remember when they were trying to have him  
20 agree that Mr. Varieur had raised a concern before, too,  
21 and Mr. Certo said, well, that was different, and  
22 Maureen's was aggressive? Maureen testified -- so we  
23 know that Mr. Certo saw Maureen as different and he saw  
24 her concerns as aggressive, which obviously is a  
25 negative word which would be -- which would lead someone

1 to view her negatively.

2 We also had Maureen testify very credibly that  
3 by the time of her termination, Mr. Certo was indicating  
4 in his way of speaking to her, his lack of interest in  
5 issues, and his body language that he was all done with  
6 her.

7 We also know that Mr. Certo was trained on  
8 HIPAA. He'd been a pharmacy manager for two years  
9 before he was a market manager. He knew all about HIPAA  
10 issues. And yet he did nothing to investigate Maureen's  
11 serious HIPAA violation. And then he was dishonest  
12 about it in court, trying to claim that he had done some  
13 sort of informal investigation that involved asking the  
14 store manager how things were going at the pharmacy.  
15 Does that make sense?

16 Not to mention that even if we were to somehow  
17 think that made sense, that he didn't know what he was  
18 doing because he was brand-new, he'd -- he escalated --  
19 he testified that he went to regional because he was new  
20 and he had questions. He didn't go to regional and ask  
21 questions about this. He just didn't investigate it.  
22 He decided to wing it on his own. The truth is he did  
23 nothing on that. Both Deb Genna and even Josh Varieur  
24 testified that he absolutely never spoke to them about  
25 this serious HIPAA issue.

1           Finally, as we've talked about the  
2 November 26th e-mail, about Maureen raising concerns,  
3 demonstrates that Mr. Certo was frustrated. And I'm not  
4 sure if you caught it, but Mr. Certo tried to say that  
5 he was being supportive of Maureen in that e-mail. If  
6 you read that e-mail, Mr. Certo was clearly not being  
7 supportive of Maureen. He was saying she needs to be  
8 retrained so that she can stop technicians from taking  
9 breaks when they want to. That's what the e-mail said.  
10 And that's what he meant. And for him to try to say  
11 that that meant he was supportive calls his credibility  
12 into question yet again.

13           Now, the gender discrimination claim is a bit  
14 separate because Maureen was not complaining about  
15 gender discrimination while she worked for Walmart. She  
16 didn't know that it had happened and she had been  
17 treated differently until she was fired, but the  
18 evidence on that remains clear as well. And I would  
19 also say to you the reason that Mr. Certo is the  
20 important actor for the retaliation claims is because  
21 he's the one who knew of the protected activity, but for  
22 gender, Walmart is not allowed to discipline women more  
23 harshly than men for the same conduct. That's Walmart.  
24 It doesn't have to be just Certo. It's Walmart as a  
25 whole.

1           But first we see Mr. Certo's preferential  
2 treatment of Mr. Varieur demonstrates gender  
3 discrimination. Mr. Certo didn't bother to discipline  
4 Mr. Varieur for log copies or even when Mr. Varieur  
5 failed to submit a report for a serious dispensing error  
6 and even when Mr. Certo saw on an e-mail from  
7 Mr. Varieur that it had involved an intentional  
8 switching of generic -- brand-name to generic because of  
9 insurance, which is absolutely not allowed.

10           But Mr. Certo didn't discipline Mr. Varieur at  
11 all. When Maureen raised concerns, Mr. Certo saw it as  
12 aggressive and when Mr. Varieur talked about errors,  
13 Mr. Certo complimented Mr. Varieur on his great detail  
14 into his business. That's classic gender  
15 discrimination.

16           And, finally, we have Andy Tau, which we have  
17 this exhibit up here. Now, Mr. Certo wasn't involved in  
18 disciplining Mr. Tau more leniently. He was involved in  
19 getting Maureen disciplined more harshly. But everyone  
20 knew of Maureen's gender, including Barbara Kulwicki.  
21 The evidence could not be clearer. Maureen, who is  
22 female, got a harsher discipline than Andy, who is male,  
23 about a year apart.

24           Ms. Kulwicki tried to avoid responsibility for  
25 her role in approving that lesser discipline for the

1 very same conduct. She first tried to say that she was  
2 only asked about it after the fact and if she'd been  
3 asked about it before, she would have said second level.  
4 But then Walmart turned over this e-mail just a couple  
5 weeks before trial and we can tell that that was not  
6 true. Ms. Kulwicki was notified before the discipline  
7 was imposed, before the decision was made. So then  
8 she's consulted about it, so then what does she do? She  
9 says, well, after this there was there was a phone call,  
10 because I hadn't remembered Maureen -- this is the  
11 person who said she never remembered a pharmacist ever  
12 losing her pharmacy key before and Maureen was the first  
13 one. But even a year later, less than a year later,  
14 she'd completely forgotten about Maureen losing her key.  
15 That's what she said.

16 So when she's reminded about Maureen in the  
17 phone call, she says, oh, well, I think it had already  
18 been done, so I really didn't want to go back and change  
19 that.

20 And then I had to show her exhibit -- I  
21 believe it's Exhibit 3, which showed that actually  
22 Mr. Tau was not disciplined for several more days, not  
23 till December 19th. So even though she got this e-mail  
24 on a Sunday and she was, you know, all confused because  
25 it was a Sunday and she couldn't be at work and figure

1 it out, by the time he was disciplined, she'd had  
2 several days and she'd been reminded, because she needed  
3 reminding about Maureen's second-level discipline.

4 So she had all the information in front of  
5 her. She didn't look -- she says she didn't look at her  
6 matrix where she'd written second level right on it  
7 after she had agreed to the discipline for Maureen and  
8 she allowed a male pharmacist to get a lesser discipline  
9 for the same conduct.

10 And then, finally, she tried to distinguish  
11 Mr. Tau by talking something about a crazy snowstorm  
12 excuse. Certainly this e-mail tells her the store had  
13 not been rekeyed yet for Mr. Tau. If he lost his key in  
14 the Walmart parking lot in the snow and the key still  
15 worked, how does that justify a lesser discipline? It  
16 makes absolutely no sense and there is no snowstorm  
17 defense to gender discrimination.

18 Ms. Kulwicki tried to suggest that she doesn't  
19 have to abide by the law because she's responsible for a  
20 thousand stores. Well, it's Walmart's choice to not put  
21 enough people in the human resources department and they  
22 need enough people to make sure that they abide by the  
23 law. Ms. Kulwicki did not do her job to ensure that  
24 Walmart followed the law.

25 Mr. Certo was Walmart's 30(b)(6) company

1 representative on this issue and he also agreed that  
2 while second-level discipline was appropriate for  
3 Maureen, first level was appropriate for Andy Tau. And  
4 Mr. Certo told you the reason was that Mr. Tau's key was  
5 in the possession of the parking lot. It makes no sense  
6 and is evidence of gender discrimination.

7 I would submit to you that it all comes down  
8 to who's credible and who has demonstrated integrity in  
9 the case. Maureen has integrity and credibility. She's  
10 worked as a capable pharmacist for Walmart for 13 years.  
11 Maureen had previously reported concerns to different  
12 supervisors and those supervisors had worked to fix  
13 things. They did not retaliate. But then Joe Certo and  
14 Josh Varieur came on board and conditions got worse.  
15 Maureen had called the central office in Arkansas before  
16 when she had concerns and she'd been directed back to  
17 work with her market manager. She viewed that as using  
18 the open door policy and she followed directions on that  
19 issue.

20 Finally, there's no dispute Maureen properly  
21 reported the key loss and she spent a lot of the night  
22 trying to find that key. Maureen has integrity and she  
23 did the right thing and her testimony was credible.

24 Maureen even spoke to you about performance  
25 evaluations, even though performance evaluations are not

1 a reason for termination in this case. She wanted you  
2 to have the full story. And she has to rely on the  
3 documents that Walmart produced in the case. And she  
4 talked about the fact that she had very good, she had  
5 some medium, she had some issues that she could work on.  
6 She wanted you to have the full story. And obviously  
7 that's not the reason for her termination, but she  
8 wanted to be complete.

9 Now, on the issue of the coaching, the first  
10 time -- you heard Maureen tell you the first time that  
11 she saw what Walmart has submitted as the coaching  
12 documents in this case, the previous coachings, was at  
13 her deposition. She thought she had had a verbal  
14 coaching with no document from her manager in 2011. So  
15 she would understandably be surprised to see something  
16 called a First Written Coaching. It doesn't have her  
17 signature on it, had never seen it before, and the date  
18 tells you that it was changed after the coaching -- the  
19 verbal was given to her. It makes sense that she would  
20 have been surprised and not understand why -- what that  
21 coaching was called. She did not dispute that  
22 Ms. Urbanski had spoken to her verbally about getting  
23 caught up on log copies. That was never disputed  
24 anywhere.

25 And then the second-level coaching, same

1 thing. She had thought it was a first level, because  
2 that's what she was told at the time. They changed it  
3 after the fact. As soon as everybody got clear that  
4 Walmart had changed their documentation, she readily  
5 admitted to you she was on a second level in November of  
6 2012. There's no dispute about that and Maureen didn't  
7 try to dispute it. There's no loss of memory. It was a  
8 change in the documents.

9           And Maureen didn't exaggerate. She didn't say  
10 that Mr. Certo said, I'm going to get you. She told you  
11 the truth. She told you how his lack of response and  
12 his demeanor, especially at the one-hour meeting and  
13 after, demonstrated that, to her, she felt that he was  
14 all done with her. She told you how his having her look  
15 for a key that no longer worked demonstrated to her that  
16 he was going to use this key issue as an excuse to get  
17 her fired. She told you the truth.

18           Walmart does not have credibility. Joe Certo  
19 is handling so many pharmacies that he just couldn't be  
20 bothered to get to the bottom of really much of anything  
21 during that fall. Not serious safety concerns, not  
22 dispensing errors, nothing. He never escalates anything  
23 of these concerns or these errors up to his regional  
24 until he's got an issue with Maureen's key that he wants  
25 to use and he knows that she's been recently raising

1 concerns.

2           After months of inaction, he is a tornado of  
3 activity as soon as he finds an excuse to get rid of  
4 Maureen. Look at how quickly that happened. It was  
5 within a matter of hours. Multiple e-mails, he's  
6 e-mailing, he's meeting, he's talking on the phone with  
7 Ms. McCaffery, he's joining on the conference call.  
8 He's got her fired within three hours of her reporting  
9 that the key is lost.

10           As to the timing of those e-mails, we know  
11 that some of Mr. Certo's e-mails were one hour off.  
12 They may have been central time instead of eastern  
13 standard. I would represent to you that when you look  
14 at Exhibit 57, it appears that when the e-mails say "On  
15 behalf of Joe Certo," they're eastern standard time and  
16 when they just say "Joe Certo," they're central time,  
17 which is one hour earlier.

18           And Joe Certo actually admitted in court that  
19 he may have contacted Ms. McCaffrey after he had agreed  
20 to a first -- that a first level was appropriate and  
21 Mr. Kaczmarek just pointed out a few minutes ago a point  
22 that I was going to make, which is the title of the  
23 e-mails changes from Lost Key to Key Control after  
24 Mr. Wallis brings up the key control policy. So it  
25 makes sense that Mr. Certo is talking about key control

1 after the two-minute exchange he has with Mr. Wallis  
2 where he agrees that first level is appropriate.

3 The reason that that's important is that it  
4 shows that after Joe agrees that first level's  
5 appropriate, which at the time he thinks will get  
6 Maureen fired, he looks up her discipline and he knows  
7 he needs second level and that's when he speaks with  
8 Ms. McCaffrey and says that Maureen did not take it  
9 seriously.

10 He also in the conference call didn't tell  
11 them that he discussed it with his peers and he'd agreed  
12 that first level was appropriate. He doesn't say a word  
13 about that like the other market managers do.

14 He also doesn't tell them about the example  
15 that he was given of someone being disciplined for  
16 failing to report the loss of a key. And, of course, he  
17 most likely doesn't tell them that he's frustrated about  
18 Maureen's reports of concerns and her need for medical  
19 leave when they're short-staffed. He does more than not  
20 provide full information. He provides false information  
21 about Maureen's lack of seriousness.

22 Now, we believe the evidence will show that  
23 Mr. Certo knew that Maureen was going to be fired by  
24 November 26th, by the afternoon, when he tells his  
25 peers, it's going to be second level, and he's going to

1 partner with Mr. Hamilton. In fact, again, it was  
2 Ms. McCaffrey who was extremely solid on that point.  
3 She said, you partner with Hamilton or you would partner  
4 with Hamilton for a termination meeting. She couldn't  
5 have been clearer on that issue.

6 And, again, Ms. Kulwicki, her job is to be the  
7 last protection for employees to make sure that Walmart  
8 follows the law before an employee is fired to make sure  
9 that it was a lawful termination. What does she do to  
10 fulfill that duty? Absolutely nothing. She actually  
11 testifies that it's just a goal; she really can't do it;  
12 it's not just an unattainable goal. That's the law.

13 I'm trying to skip through a little bit.

14 And, finally, Walmart fired a 13-year employee  
15 for unlawful reasons. They took away her livelihood,  
16 they caused her to suffer emotional distress, and then  
17 they tried to say that she was eligible for rehire so it  
18 would look better somehow. Well, we know that Maureen  
19 reapplied for a perfect position with Walmart and didn't  
20 even get called for an interview. Walmart has no  
21 integrity or credibility. Walmart violated the law.

22 Now, I just want to talk briefly about the  
23 specific legal claims. There are several separate legal  
24 claims and that's because different laws protect  
25 different types of activities and status.

1           There is a gender claim under both state and  
2 federal law. It's the same evidence for gender  
3 discrimination. They're just different types of  
4 damages. You will see that on a verdict form that the  
5 judge is going to give you.

6           Also Maureen was engaging in protected  
7 activity that was covered both by New Hampshire's common  
8 law wrongful termination and New Hampshire's  
9 whistleblower protection law. Essentially, the same  
10 thing because Walmart has agreed that Maureen had good  
11 faith and reasonable beliefs to raise these safety --  
12 which were legal -- concerns, but they're different  
13 damages. So you'll see them separately on the verdict  
14 form.

15           And the FMLA is separate because it's a  
16 separate law.

17           Now, you may recall that we originally spoke  
18 to you about a disability claim. Although Dr. Howe's  
19 testimony, we believe, established that Maureen has  
20 disabilities, as the evidence unfolded at trial, we did  
21 not feel that we could prove by a preponderance of the  
22 evidence that Mr. Certo was motivated to fire Maureen  
23 because of the disabilities, so we voluntarily withdrew  
24 that claim because we want you to consider the claims  
25 that have the strong evidence. I just wanted to explain

1 that to you.

2 Now, you must decide what motivated Walmart to  
3 fire Maureen. You may find that it was her  
4 whistleblowing, also wrongful termination law, her FMLA  
5 leave, and/or her gender. You can find in Maureen's  
6 favor on some of her claims but not others or all of her  
7 claims or none of her claims. Each unlawful reason does  
8 not have to be the only or sole reason for the  
9 termination. You do not have to pick one reason as the  
10 reason.

11 We believe the evidence demonstrates that all  
12 of Maureen's protected activity was happening at the  
13 same time and it frustrated Mr. Certo and it motivated  
14 him to get her fired and also that Walmart clearly  
15 treats men more favorably than women. But it's up to  
16 you to decide.

17 And as Attorney Fradette mentioned in the  
18 opening argument, this is not a criminal case. This is  
19 not a beyond a reasonable doubt standard. It is a  
20 preponderance of the evidence standard. And that means  
21 that you find that the issues are proven more probable  
22 than not, more probably than not, that the elements of  
23 the claims occurred. A good way to think of this is to  
24 imagine the scales of justice. Place all of the  
25 evidence in Maureen's favor on one side, all of the

1 evidence in Walmart's favor on the other. If the tip --  
2 scales tip ever so slightly in Maureen McPadden's favor,  
3 then she has met her burden of proof.

4 And, finally, I want to talk very briefly  
5 about damages. I know this has been a long morning for  
6 you and I want you to be able to get to lunch.

7 But the easy part is the economic damages. We  
8 had an undisputed expert, Dr. Moore, here to testify.  
9 He told you how he calculated the damages. He reduced  
10 them to present value, which is what's required by the  
11 law, and he told you that despite Maureen's efforts to  
12 find -- diligent efforts to find comparable work, even  
13 reapplying to Walmart, the best job that Maureen has  
14 been able to find is the floating pharmacist position  
15 with CVS which pays her significantly less.

16 Dr. Moore calculated the economic damages from  
17 the date of termination to the date of trial, the wages  
18 to be to be about \$164,000, and \$19,670 of lost benefits  
19 for a total of back pay of \$183,700 -- sorry --  
20 \$183,763.

21 You are going to have those exhibits in there  
22 in the jury room. They're Exhibits 69 to 73.

23 Dr. Moore calculated that the economic losses  
24 from the date of trial until retirement age are about  
25 \$558,392. This is what's called front pay. So the

1 total economic losses that we are claiming are \$742,155.  
2 And you will have that information with you.

3 And, by the way, since Mr. Varieur and  
4 Mr. Certo are both gone -- no longer connected with the  
5 Seabrook pharmacy store by early 2013, if Maureen had  
6 not been fired, she would have -- we would all have  
7 every reason to believe that Maureen could continue  
8 working at Seabrook until her retirement.

9 The harder part for you to determine is  
10 noneconomic losses. The first category is called  
11 compensatory damages, to compensate Maureen for  
12 emotional upset, loss of enjoyment of life, what did she  
13 feel and experience because of the termination.

14 You heard that Maureen has never been  
15 terminated from any job before in her life and she  
16 was terminated for unlawful reasons.

17 You heard Maureen -- and I would say  
18 particularly Ken McDevitt tried to describe how  
19 devastating this was for Maureen. I'm not going to go  
20 over that again, but I would ask you to please fully and  
21 fairly compensate Maureen for that emotional distress.

22 And you heard Maureen describe that she's  
23 grateful to have the job at CVS, but it is really  
24 different from the job she had at Walmart. She's a  
25 floater. She never has a schedule, she's not guaranteed

1 full-time hours, she often has a very long commute, and  
2 she never gets to know the people that she works with or  
3 the patients who come into the pharmacy, which was one  
4 of the things she really enjoined when she worked for  
5 Walmart. You are also allowed to consider that when you  
6 consider compensatory damages.

7 I would submit to you that Maureen's  
8 noneconomic damages are at least as significant as her  
9 economic damages and would ask that you award an amount  
10 that fully compensates her for emotional distress that  
11 she continues to experience to this day.

12 The judge will instruct you that you are also  
13 allowed to award enhanced compensatory damages on the  
14 State gender discrimination claim if you find that  
15 Walmart recklessly disregarded Maureen's rights under  
16 that law. I would submit to you that both Mr. Certo's  
17 unlawful disparate treatment of men versus women and  
18 Ms. Kulwicki's failure to even try to ensure that the  
19 laws were abided by or to know that there is an  
20 antidiscrimination law in New Hampshire would support an  
21 award of enhanced compensatory damages in this case.

22 Finally, the federal discrimination claim.  
23 The gender discrimination claim allows you to award  
24 punitive damages. That is the only claim where you are  
25 allowed to award punitive damages. Those are awarded if

1 you find that Walmart recklessly disregarded the law as  
2 well and those damages allow you to consider what will  
3 stop a huge company like Walmart from doing this again  
4 and to punish Walmart for its unlawful behavior. The  
5 evidence in this case justifies an award of punitive  
6 damages.

7           You will be receiving, as I've talked about,  
8 something called a special verdict form from the judge  
9 that helps you walk through each claim separately and to  
10 determine liability and damages.

11           We truly appreciate the attention you've paid  
12 to this case. We know that it's not easy to take time  
13 out of your schedules to sit on a jury and I want you to  
14 know that this case is very important to Maureen  
15 McPadden and we hope that you will use this opportunity  
16 to correct this injustice.

17           Thank you.

18           THE COURT: All right. Thank you  
19 Attorney Irwin.

20           Would you mind taking that -- ladies and  
21 gentlemen, that concludes the closing arguments in the  
22 case. So let me again just remind you that closing  
23 arguments, like opening statements, are not evidence.  
24 To the extent the lawyers have made reference to  
25 evidence or facts in the case that differ from what you