

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

NATIONAL DANCE INSTITUTE - NEW MEXICO, INC

and

Case No. 28-CA-157050

DIANA OROZCO-GARRETT

Charging Party's Exceptions to the
Decision of the Administrative Law Judge

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The Charging Party Diana Orozco-Garrett presents to the NLRB her Exceptions to the Decision of the Administrative Law Judge.

Introduction. These exceptions are a recitation of the vindictive actions of her employer National Dance Institute New Mexico (hereinafter NDI) against Orozco-Garrett, triggered by her filing of her original NLRB case in reaction to the “kangaroo court” imposition of the September 2014 probation, are sufficient proof that adverse actions taken against her by NDI were in direct retaliation for asserting her rights to the NLRB, EEOC and internally. The falsity of the allegations against her, the grossly unfair method of NDI’s “change the facts and hide the facts” investigation, and the conspiracy of management and their attorney in July and August 2015 to come up with an actionable excuse for termination constitute the requisite proof of a retaliatory termination. The overly broad standards, improperly adopted and applied retroactively, cited in her termination are a clear violation of the Act.

Although the ALJ outlined proper areas of inquiry, she failed to analyze the facts presented within the relevant context of Orozco-Garrett’s outspoken advocacy of her and her fellow employees’ rights. She often failed to even discuss, much less consider and analyze (contrary to assertion on p. 14, ll. 29-31 ALJ Decision), Orozco-Garrett’s evidence that NDI engaged in a protracted campaign to discredit, undermine and falsely document her performance both before and after the settlement in Case No 28-CA-136974 in March of 2015. NDI management offered a pretextual basis their decision to terminate Orozco-Garrett, based upon the items listed in the paragraph below designated as numbers 1 – 8.

In regards to the General Counsel’s charge that the actions of NDI management violated Section 8(a)(4) and (1), the ALJ made a surface inquiry into the offered proof of the elements which by circumstantial evidence may establish unlawful employer motivation. ALJ Decision p. 18, ll. 1-40.

As set forth in the cases cited by the ALJ, ALJ Decision, p. 18, ll. 15-40, inquiry into the following should be made:

1. The timing of employer’s adverse action in relationship to the employee’s protected activity,
2. The presence of unfair labor practices,
3. Statements and actions show the employer’s general and specific animus
4. The disparate treatment of the discriminees
5. The departure from past practice
6. Evidence that an employer’s proffered explanation for the adverse action is a pretext
7. The lack of a meaningful investigation into the incident may be further evidence of unlawful motivation.
8. Shifting explanation for personnel actions.

Timing. Although the ALJ noted that Orozco-Garrett had filed charges in Case 28-CA-136974, settled in March 2015, she failed to discuss the numerous other charges Orozco-Garrett filed against NDI with government agencies and filed internally:

1. Internal Complaint, filed September 12, 2014, Exh. GC 28, p 3, 1st full paragraph
2. EEOC case, filed September 17, 2014, referenced in CG Exh. 24
3. Internal Complaint, filed October 13, 2014, referenced in GC Exh. 24
4. EEOC case, filed July 29, 2015, EEOC Case No. 39-B-2015-02235, HRB Case No. 15-08-28-0325
5. NLRB case No. 28-CA-157050 (the present case), filed July 30, 2015
6. Internal Complaint, filed August 31, 2015, CG Exh. 24,
7. Appeal of termination to NDI Board, filed September 8, 2015. CG Exh. 30.

All of these cases are not only in reasonable proximity to her ultimate termination on September 4, 2015, but are also evidence of her strenuous efforts to assert and to protect her and co-worker rights in the face of the consistent and persistent harassment of Orozco-Garrett by NDI management.

Without a full discussion of the timing and impact of these cases, NDI's whitewash of the allegations in the internal complaint filed on September 12th, the absolute failure of NDI management to respond to the internal complaint filed on October 13th, the failure of the NDI management and its Board of Directors to respond to the internal complaint filed on August 31st, the ALJ glosses over the background of the Orozco-Garrett's employment situation at NDI and the strong evidence of the existence of a pattern of harassment and retaliation, and her efforts at employee protection.

Never in her over 14 years of employment by NDI had the pattern of harassment and retaliation been so concerted and intentional until the aftermath of Orozco-Garrett's legal complaint to the NLRB after the September 2014 probation railroading episode.

Presence of Unfair Labor Practices. Although the ALJ noted the basics of Orozco-Garrett being placed on probation in September of 2014, ALJ Decision, p. 3, ll. 31-38, she utterly failed to analyze the circumstances of that event in order to place it into the context of Orozco-Garrett's employment at NDI, and, more importantly, set the background for the pattern of harassment by NDI that followed, and the efforts by Orozco-Garrett to protect herself from future retaliatory discipline (characterized by NDI management as "defiant ... insubordinate").

The September 2014 Probation:

In order to understand Orozco-Garrett's actions in response to NDI charges against her, it is necessary to fully explicate the circumstances that put her on notice that she was subject to unbridled disciplinary and retaliatory action, and ultimately termination, at the hands of NDI management. As a result, she was determined that she would no longer be blindsided by undocumented allegations by NDI, and that she would do whatever was necessary to protect herself. The ALJ Decision fails in this regard, and therefore unfairly colors her description of events, findings and conclusions.

As she testified, she had been employed with National Dance Institute New Mexico since 2001, first as an apprentice, then as an instructor in the in-school program, the after school program (Dance Barns) and the residency program (outside of the Santa Fe area). Tr. p 442, l. 7; p 443, ll. 10-11; p 444 ll. 12-22. ALJ Decision, p. 3, ll. 31-32.

During all of this time, she was the only bi-lingual, bi-cultural instructor employed by NDI. As such, she was called upon to conduct classes with mono-lingual students (Spanish only) and to communicate with mono-lingual parents. Tr. p 538, ll. 12-16.

In September 2014, she was placed on probation by NDI management for the 2014-15 school year as a result of alleged complaints by the Sweeney Elementary School principal. ALJ Decision, p. 3, l. 31 through p. 4, l. 2. None of these complaints were ever substantiated.

The ALJ utterly fails to consider the grossly unfair and hostile conduct of NDI in placing her on probation.

On September 10, 2014, she summoned to a meeting by Liz Salganek, the Artistic Director of NDI. Her oral inquiry to her as to the subject matter of the meeting was met by Salganek's refusal to disclose. Upon arrival, Salganek and Emily Lowman, her immediate supervisor, advised her that the principal of Sweeney Elementary had lodged a complaint against her. Both refused to provide her with any specifics of the complaint so that she could respond knowledgeably. Unbelievably, Salganek told her that "this is not an investigable matter." (To date she has no idea what it is she was alleged to have said or done despite oral and written requests to Salganek and Russell Baker, Executive Director of NDI, and the decision maker). At the end of meeting, she was handed a probation letter which had been prepared prior to the meeting by Baker, Salganek and Lowman, all prior to the time they ever heard a word out of her mouth. Exh. R-H (Exhibit R-H is the revised version issued after the Settlement Agreement in March 2015).

It should be noted that there was never a request by Sweeney's Principal for a different instructor or a suggestion that she be replaced. In fact the principal asked NDI supervisor Emily Lowman to keep this information from her because it was "last year" (Exh. R-EEE).

NDI did not provide any direct evidence of "verbal abuse" No explanation was provided by NDI to address the fact the given the severity of Lowman's assertion "verbal abuse" that the Principal never made a complaint to NDI at the time of occurrence and did not submit this information in the end of year evaluation she filled out. The Sweeney incident was instead fueled by Lowman's exaggeration and misrepresentation of the Principal's comments. As Orozco-Garrett testified, the Assistant Principal Georgia Baca stated to the HRB and to her in writing that the Principal does not stand by Lowman's assertions. Exh. GC-28, p. 3, 6th full paragraph.

Orozco-Garrett refused to sign the original letter of reprimand and probation, since it contained the following provision, which she considered to be in violation of Section 7 of the NLRA:

You are expected not to discuss this matter with any NDI New Mexico or Santa Fe Public School Staff.

As a consequence of this summary proceeding, Orozco-Garrett filed a complaint with the NLRB, Case No. 28-CA-136974. A Settlement Agreement was entered on the hearing date March 2015. R-Exh. G.

The ALJ decision does not even mention Orozco-Garrett's attempts to resolve this disciplinary action internally. She lodged an internal complaint with Maria Wolfe, Business Manager and de facto HR manager, in accord with the harassment prohibition portion of the employee handbook. Exh. GC 28, p 3, 1st full paragraph. It was a sham. Wolfe failed to interview all of the witnesses provided to her. Despite the fact that the summary proceeding should have shocked the conscience of any reasonable person, Wolfe rubber stamped the actions of Baker, Salganek and Lowman. Exh. GC-28, p 3, first full paragraph.

Wolfe utterly failed to respond to Orozco-Garrett's second internal complaint.

Prior to September 2014, Orozco-Garrett had never been found insubordinate or disciplined by NDI. Testimony of her immediate supervisor, Emily Lowman, Tr. p. 416, ll. 5-11.

The ALJ falsely stated that Orozco-Garrett has been "previously been counseled about behavior similar to what is at issue..." on July 23, 2010. R Exh UU. ALJ Decision, p. 3, fn. 3. The statement, taken from the September 2014 probation letter that she had been subject to prior discipline, is not true. Russell Baker, the executive director of NDI, in his testimony referred to Exhibit UU, a memo dated July 3, 2010, over four (4) years ago, as the example of prior discipline. *Not one disciplinary word appears in that exhibit.* Baker's testimony at trial reveals his assertion that this exhibit serves as the basis for progressive discipline. It does not because it is not disciplinary in nature. As Orozco-Garrett testified to, without any rebuttal by Baker, no specific allegation of misbehavior was made and no reprimand nor any discipline resulted from this meeting. As she explained at trial, this memo was issued as a result of a meeting with Baker that she requested to expand her teaching assignments. The next week her assignments were substantially increased. Tr. p 616, l. 9.

Between July of 2010 and September of 2014, over four years, no negative accusations of work performance or attitude were made against Orozco-Garrett by NDI. It was only after the filing of the NLRB case in the fall of 2014 did the harassment and retaliation scenario commence.

Although NDI posted the documents required by the settlement Agreement of March, 2015, they followed up by a pattern of harassment and retaliation.

Employer Animus.

The most blatant proof of employer animus is detailed in the probation letter issued to Orozco-Garrett in September 2014, in which she was ordered "not to discuss this matter with any NDI New Mexico or Santa Fe Public School Staff. " NDI was ordered to remove this provision in the settlement of March 2015. R-Exh. G.

Second is the Salganek July 31 email to Orozco-Garrett, R-Exh. U, which castigated her for challenging a management accusation, and threatened her with referral to the NDI director for further discipline, all based upon a section of the employee handbook that had been removed in response to the March 2015 settlement agreement. R-Exh. G.

Third is the failure of NDI management to remove from Orozco-Garrett personnel file the so-called "prior counseling," Exhibit UU, which contains language regarding being a "good ambassador," language was prohibited by the March 2015 Settlement Agreement.

In the spring of 2015, Orozco-Garrett was accused, in public in front of other NDI staff, by Maria Wolfe, Business Manager, and Liz Salganek, Artistic Director, of misusing petty cash while on teaching assignment in Artesia, NM. However, upon confrontation by Orozco-Garrett and her immediate supervisor Ms d'Oliviera, they backed down from this assertion. Referenced in CG Exh. 28, p. 15, item 9.

Disparate Treatment.

Although the ALJ found that NDI treated another employee more favorably regarding similar infractions (injury to school personnel), ALJ Decision, p. 19, ll. 1-6; p. 20, ll. 6-8, she failed to do sufficient analysis to justify her conclusion that Orozco-Garrett would have been discharged anyway.

The ALJ relied upon but did not sufficiently analyze Baker's credibility and the evidence of retaliation in the disparate treatment afforded to Orozco-Garrett and to the white employee Gemtria St. Clair, who was accused by a Gonzales School teacher of roughly handling her during the same year end event at which Orozco-Garrett was accused of bruising a school employee, Maria Robledo. St. Clair apologized to the teacher, and in a meeting with Baker, took responsibility for her actions. Tr., p 195 - 196.

Orozco-Garrett also apologized to Robledo, not for bruising her or grabbing a child as stated by the ALJ, ALJ Decision, p. 6, l. 32, but for yelling at her to get out of the way of an onrush of children. Exh. R-XX. What she did not do was acknowledge the truth of the allegation against her.

The ALJ credited Baker's testimony that "...Orozco-Garrett had apologized to her [Robledo], and he found it impossible to reconcile with Orozco-Garrett's denial that anything had occurred." ALJ Decision, p. 8, ll. 34-36. Further, the ALJ credited Baker's testimony that "... the nature of Orozco-Garrett's written responses to him that she was avoiding discussing the incident by attempting to cloud and confuse the issues." ALJ Decision, p. 8, ll. 36-38. This is a complete mischaracterization of Orozco-Garrett's testimony.

Baker's testimony is not creditable.

As part of Orozco-Garrett's efforts at self-protection, when she was accused of injuring a school employee, she requested that Baker provide her with the facts. On June 23rd, he replied that "this is all the information that I have." ALJ Decision, p. 8, ll. 5-6. GC Exh. 13a.

This June 23rd statement by Baker was not true. At that time he had in his possession:

- a. the minutes of the wrap-up meeting at the Gonzales school, dated 5-19-15, Exh. R-M (note that Robledo was not at this meeting, therefore all information contained in the minutes is hearsay);
- b. the incident report, dated 5-20-15, Exh. R-N;
- c. the memo of the meeting of Salganek and Wolfe with the Robledo, dated 5-16-15, Exh. R-K;
- d. email from Pamela Ladas, who took the initial report from Robledo, dated 5-22-15, Exh. R-O;
- e. notes of a telephone conversation with Robledo, Exh. R A, p 4; and
- f. multiple emails from Salganek and his replies, Exhs. R-I (5-15-15), R-J (5-16-15), R-L (5-17-15).

The ALJ failed to note Baker's lie about available information in his June 23rd email to Orozco-Garrett in response to her request for information. He not only did not provide to her the requested information, he lied about having it.

The ALJ failed to acknowledge that since Orozco-Garrett was under threat of further discipline and termination, she was entitled to fully protect herself by demanding full disclosure of the facts, if any, as a basis for the allegation of injury to school personnel.

What Orozco-Garrett did not do was acknowledge the truth of the allegation against her. She testified that the only interaction with Robledo was on the previous Tuesday at a rehearsal, and Robledo confirmed to her that her complaint to Ladas was about the yelling at rehearsal. Tr. p. 487-489. She disputed to management the allegations against her. Had she lied and said she did it, then perhaps she would have had the same treatment as St. Clair, but probably not, given the level of hostility towards her by NDI management. Exh. R-Y.

Furthermore, had NDI management actually believed, rather than utilized them as a pretext for discipline, the charges that Orozco-Garrett had bruised Ms Robledo and grabbed a child hard enough to make her say "Ow," then it is very unlikely that she would have been assigned, subsequent to that alleged incident in May, to regular summer classes teaching children as young as age 3 and to the Summer Institute for four hours per day every day for three weeks. During the entire summer of 2015, she was not monitored by any NDI management personnel. ALJ Decision, p. 9, ll. 4-6. The ALJ's conclusion that it was unreasonable to think that NDI did not believe that allegations against the charging party because of an ongoing investigation is not reasonable. ALJ Decision, p. 19, ll. 17-19. A charge of injury to a child, or school employee, if believed even before the so-called investigation was complete, would have, for the protection of NDI from lawsuit, resulted in at least monitoring or the imposition of an administrative leave. Neither happened.

In addition, had NDI actually believed that Orozco-Garrett had grabbed a child hard enough to make her say “Ow,” then it was under a duty to report this incident to a local law enforcement agency under New Mexico Statutes Annotated, NMSA, Sec. 32A-4-3. NDI offered no proof at trial that such a report was even considered, much less made. The ALJ did not consider this duty and NDI’s lack of adherence.

Rather, what did happen is that that NDI engaged in a scheme of retaliation, and utilized any event, regardless of how far-fetched and groundless, and disparately treated, as a basis to terminate Orozco-Garrett’s employment after 14 years.

Changing and Manufactured Evidence.

A rehearsal of the changing and manufactured evidence used by NDI to justify the termination is proof that improper motivation lay behind the discipline and termination of Orozco-Garrett. Although the ALJ recited the interaction between Baker and Orozco-Garrett, she failed to analyze it in the context of the environment in which Orozco-Garrett was on probation and subject to further discipline and termination. ALJ Decision, p. 7, l. 11 through p. 8, l. 45.

This activity occurred in both the injury allegation, and in the so-called profanity allegation, both utilized by NDI as justification for termination, rather than being seen in their proper light of retaliation.

a. Injury Incident

On May 27, 2015, Orozco-Garrett received a voice mail message on her phone from Russell Baker, Executive Director of NDI, that he wanted her to meet with him and Maria Wolfe, NDI Business Manager, to discuss an incident.

On the same date, she asked him what incident he wished to discuss. Exh. R-P.

The same date, he described the incidents as being the “interaction between you and the EA from Gonzales Elementary.” Exh. R-P. (The EA, Educational Assistant, was Maria Robledo).

On May 28th, she responded that before the meeting, she wanted the factual basis of allegations against her. Further she told him that since she wanted to be adequately prepared for this meeting, she needed to know specifically and in detail what allegations had been made against her for any actions that she may or may not have taken during the most recent event: (Who, what, where, when and how, and the evidence supporting such claim). Exh. G-C, bottom p 2 – top p 3.

On May 29th, Baker responded by stating he wanted to meet concerning “the interaction with the EA from Gonzales Elementary” Exh. R-Q.

On June 2nd, as a continued effort on her part to fully protect her employee status since she was on probation and subject to termination, she requested full disclosure of the basis for his concern regarding the “interactions” with the EA. Exh. GC-12

On June 8th, Baker finally advised her that he had a complaint from the EA that she had grabbed her arm so as to bruise her and had grabbed a visually impaired student hard enough for the student to say “Ow.” And he added the allegation that the incident was brought up by school representatives. Exh. GC-12a.

On June 22nd, Orozco-Garrett responded to Baker absolutely denying injury to anyone, and requested a copy of the EA’s statement, and a copy of the complaint by school representatives. Exh. GC-13.

The next day, June 23rd, Baker said he had “provided you with the information that I have concerning the complaint.” Exh. GC 13a. This statement was false: See p. 7, *supra*, items a-f. On June 29th, she outlined her attempts to get any factual information regarding the EA incident and his absolute refusal to provide her with same, and accused Baker that he was acting in bad faith. Exh. GC-14, p 2-5.

On July 9th, Baker accused Orozco-Garrett of refusing to meet with him. Exh. R-T

On July 13th, she told Baker that she had never refused to meet with him; that she had offered to meet with him in emails dated May 28, June 2 and June 22. She reiterated her request for the factual basis of any allegation against her. Exh. GC-16.

Although Orozco-Garrett provided Baker with NDI employee witnesses to the injury to her arm which would have prevented her grabbing anyone, Gemtria St. Clair and Meg Stuart, he, after four months of “investigation” did not interview either one of them to verify her disability. Exh. GC-14, p 4.

From July 9th until his termination letter to her on September 4, 2015, Exh. GC-27, Orozco-Garrett never received any of factual data that she had repeatedly requested, and, in fact, never heard another word regarding the injury to Robledo.

Just as in the September 2014 Sweeney Incident which lead to Orozco-Garrett being placed on probation , Baker made allegations against her based upon hearsay, and absolutely refused to provide her with any information by which she could intelligently respond to the accusation of bruising Ms Robledo. This “investigation” was a trap: just as in the incident that led to her probation, she was summoned to appear without any disclosure of the factual basis, if any, of the allegations against her.

b. Profanity Incident

The tactics employed by NDI in this allegation against Orozco-Garrett are strikingly similar to those recited above, and indicate the lack of a meaningful investigation, an indication of unlawful motivation.

On June 15, 2015, Emily Lowman, Orozco-Garrett’s immediate supervisor, issued to all staff an email directive about the common area kitchen sink, which according to her had been left in an unclean

condition, and described her anxiety at having to clean it up: “the grossest thing I have ever done.” Exh. R-II.

Orozco-Garrett discussed this email with several co-workers. She thought the tone of it was ridiculous, and commented that perhaps Lowman had never changed a diaper, and that she had done things much more gross at NDI including cleaning up a child’s fecal accident which occurred on stage. Discussion included such topics as Lowman’s assignment of janitorial duties to dance instructors (when she was not in charge), of her pettiness, exaggerations, controlling personality, and the inappropriate and demeaning words used by her in addressing staff (including Orozco-Garrett in her class filled with young students). Exh. R-ZZ. The ALJ does not even mention Orozco-Garrett’s assertion of the above regarding supervisor Lowman were the actual relevant topics of her comments about the kitchen sink email.

On July 13th, almost a month after the Lowman kitchen sink email, Salganek by email called Orozco-Garrett to a meeting to defend herself regarding comments she allegedly made to fellow employees about the management style of and working conditions imposed by Emily Lowman, which comments Salganek characterized as “teasing, bullying mean-spirited, personal digs and unnecessarily unkind.” Exh. GC-15. Note that there is no allegation of the use of “foul language” by Orozco-Garrett.

The same day she responded to Salganek that her allegations were in direct contravention of the March 2015 NLRB Settlement Agreement. Exh. GC-13.

Eighteen days later, on July 31st, Salganek replied that Orozco-Garrett’s response asserting protected activity under the NLRA and Settlement Agreement was “insubordinate, defiant and disrespectful.” For the first time Salganek added the allegation, previously unmentioned, that Orozco-Garrett had “used foul language within earshot of students.” Exh. R-U, paragraph 3, l. 7.

With no respect for the terms of the March 2015 Settlement Agreement with the NLRB, Salganek quoted language from the NDI-New Mexico Standards of Professional Conduct which had been outlawed by that agreement. Exh. R-F, p 4 (designated as Item 6)

Salganek then referred the matter to Baker for possible disciplinary action. Exh. R-U, p 2, 1st paragraph.

Nearly a month later, on August 27th, Baker took up Salganek’s complaint, and added for the first time the charge that Orozco-Garrett had used “foul language and were cussing within earshot of children and parents.” He mentioned the words “shit” and “shitty” as examples of cussing and foul language. Exh. GC-21. Paragraph 1.

As did Salganek, with no respect for the terms of the March 2015 Settlement Agreement with the NLRB, and with no respect for the Notice which the NLRB required NDI to post, signed by Baker himself, he quoted language from the NDI-New Mexico Standards of Professional Conduct which had been outlawed by that agreement. Exh. GC-21, paragraph 1, ll. 7-8.

Orozco-Garrett answered this last iteration of the NDI complaint the next day on August 28th. This email points out several matters to Baker: Exh. GC-25.

1. His blatant disregard for the terms of the NLRB Settlement Agreement
2. The obvious variation and escalation of the charges against her:
 - a. July 13th: she was unkind, etc. in statements regarding Emily Lowman (note there was never an allegation that she made any such comments directly to Lowman). Exh. GC-25, # 1,
 - b. July 31st: she used foul language within earshot of students, Exh. GC 25, # 2,
 - c. August 27th: she used foul language in front of students and parents, Exh. GC 25, # 3.
 - d. August 31st: she used profanity in front of children and parents at NDI New Mexico is not appropriate and cannot be tolerated, GC-25, # 4.
3. The final escalation did not occur until trial on this matter in December 2015:
 - a. Baker testified that she had used the phrases "F-this" and "F-that," in front of parents and children. Tr. p 182, ll. 8-16. Never before had Baker made this allegation.
 - b. Rachel Carpenter, the NDI employee that had first lodged the complaint against her about teasing Emily Lowman, also testified that she used the "F word" in front of children and parents. Tr. p 683, l. 18. Never before had Carpenter made this allegation.

It is clear that Baker, Salganek, Wolfe had been advised that comments about the management style of supervisory personnel were not actionable; therefore, in order to punish her, Baker deliberately began a process of escalation of the allegations from being "unkind to Lowman" to "using foul language within earshot of students," and then to "using foul language in front of students and parents," and to "using profanity," and finally at trial to "F-this" and F-that."

This process of escalation is given credibility by the testimony of Liz Salganek, Artistic Director of NDI. She stated during the months of July and August, 2015, she, Baker, Wolfe, and their attorney held weekly meetings for "investigation." Transcript pp. 313-315. The only incidents "under investigation" were the Robledo injury incident and the profanity incident. As to the injury matter, the only two persons with personal knowledge were Orozco-Garrett and Robledo. As of June 23rd, Baker had all the information that was ever going to be available.

However, the profanity incident gave him the opportunity, over nearly a two month period, with the connivance of Salganek, Wolfe and the NDI attorney, to create an actionable charge against Orozco-Garrett: Escalation from unkind words about a supervisor's management style to "shit," "shitty," "earshot of children," "in front of children and parents," to finally, at trial "F-this" and "F-that." The changing allegations and escalation all occurred during the same time that the meetings of Baker, Salganek Wolfe and NDI attorney were being held.

Viewed as a whole, it is absolutely clear what Baker was doing: Demanding response to constantly changing allegations, escalating the seriousness of the charges to create an actionable incident, and setting up grounds for termination of employment that did not exist originally.

All of the above interchange was characterized by the ALJ as evidence that “Baker repeatedly tried to meet with Orozco-Garrett to discuss the Robledo incident and Orozco-Garrett repeatedly thwarted his efforts to do so.” ALJ Decision, p. 19, ll. 26-27. And that “...Baker held the belief that the incident occurred as reported to him.” P. 19, Fn. 22.

Also the ALJ failed to analyze the raft of changing “profanity” allegations (“teasing” to “F-this”), and did not even discuss the evidence that the original complaint from Carpenter did not mention any “cuss words.” Exh. R-JJ.

To bolster Baker’s action, NDI produced Rachel Carpenter to testify at trial that Orozco-Garrett said “the F-word” in front of children and parents, Tr. p 683, l. 18. Her testimony is not creditable for several reasons:

1. Her complaint to Liz Salganek does not mention the using “F word”, Exh. R-JJ.
2. Her assertion that no parent or child complained about the supposed statements, Tr. p 694, ll. 4-6,
3. That the other NDI employees, Melissa Briggs and Hannah Foss, who allegedly overheard the words attributed to Orozco-Garrett did not mention cussing in their memos to NDI and were not called at trial to verify and corroborate Baker’s and Carpenter’s testimony.
 - a. Melissa Briggs, the summer program director, stated that the incident did not rise to the level of a complaint, Exh. R-JJ, p 1, ll. 12-14,
 - b. Melissa Briggs did not mention any cussing, Exh. R-KK
4. Had such a serious incident occurred, Melissa Briggs, the acting director of the summer program would have made the complaint. She did not. She was summoned by Salganek to bolster Carpenter’s complaint: she was asked to write a memo, but this result did not include an allegation of the use of “foul language”. Exhs. R-JJ, R-KK.
5. The content of Carpenter’s original complaint to Salganek and that of her Melissa Briggs are inconsistent with the testimony Carpenter gave at trial.
6. The documentation by NDI of Rachel Carpenter’s complaint closest in date to the incident is Exh. R-JJ. In Salganek’s notes with entries on June 19 and July 7th there is *no allegation of foul language*.
7. When Melissa Briggs and Rachel Carpenter (Exhibits R-KK and GC 18) are asked by Salganek to document their conversation with her, on July 14, only one day after Orozco-Garrett’s response asserting protected concerted activity, it should be noted that Melissa Briggs does not mention use of foul language contrary to Rachel Carpenter’s testimony (Exhibit KK). Even more significant is Carpenter’s statement that she did not know the words Orozco-Garrett used verbatim but that it was “cussing and belittling” (Exhibit GC18). Again, this speaks directly to the credibility that should be given to her testimony. If on July 14 she did not have a memory of the words allegedly used, how did the word “F-word” come to her so clearly 6 months later by the time of her testimony at trial?

8. Carpenter's testimony did not dispute Orozco-Garrett's testimony that the conversation about Lowman dealt with her management style.

Had Orozco-Garrett in fact said "F-this" and "F-that" in front of children and parents, this allegation would have been the first thing that was brought to Salganek and Baker's attention. It was not. And had she actually used those words, the original notice to her by Salganek would have most certainly made this same charge. It was not. Rather what is evident is the progressive level of accusations, concocted only to create NDI's justification for termination.

Of course, Orozco-Garrett absolutely denied these allegations: all of them and each of the different ones of them.

Although the ALJ decision credits Carpenter's testimony and finds that "she had nothing to gain or lose by being honest," ALJ Decision, p. 21, ll. 5-6, the ALJ does not even discuss the inconsistency between Carpenter's original report to NDI and her testimony at trial.

One possible motivation for Carpenter's testimony is her fear of being associated with Orozco-Garrett as being critical of management. Although she had spoken to Orozco-Garrett negatively regarding Emily Lowman, as had Alison Montoya, Exh. R-V, attachment to email, p 2, Orozco-Garrett's testimony, Tr. 570-571, the NDI workplace is ruled by fear and intimidation. Employees are afraid to speak their minds, but they would often come to Orozco-Garrett, since she is a licensed New Mexico attorney, with their complaints, but were afraid to pass these on to management.

Orozco-Garrett's conversations with Carpenter, and her and Montoya's conversations with Orozco-Garrett, are classic examples of Protected Concerted Activity, complaints about the management practices of supervisor Lowman.

Again and repeatedly, as in the Sweeney Incident and the injury Incident, Orozco-Garrett's multiple requests for the factual basis of all of these allegations have been ignored, denied, and characterized as being insubordinate, disrespectful and defiant.

And finally, as a **departure from past practices**, Baker did not punish other NDI employees who had used foul language in front of children. GC Exhs. 22 & 23. The ALJ does not credit this departure. ALJ Decision, p. 11.

The ALJ decision is surface only, and does not deserve adoption.

Lack of Meaningful Investigation.

No so-called investigation by NDI management was meaningful.

Beginning with the Internal Complaint that Orozco-Garrett filed regarding to being placed on probation, Wolfe, the Business Manager, rubber stamped the action of Baker, Salganek and Lowman, despite the outrageous behavior of sanctioning me without ever hearing a word from her. See P. 4, supra.

As to Baker's investigation of the "injury" incident, although he spoke to the school employee, all of the rest of his interviews were with NDI personnel, none of whom has any first-hand knowledge of the incident. ALJ Decision, p. 19, fn .22. What Baker did not do was to interview the witnesses that Orozco-Garrett provided to him: Allegra Lillard, Melissa Briggs, and Gemtria St. Clair. CG Exh. 14, p. 4.

In addition, he failed to explore her response to him that Ms Robledo's injury could well have been the result of the blind children holding on to her for dear life that she was shepherding through the "runs and jumps" portion of the program, as witnessed by Allegra Lillard, a manager at NDI. Also, he did not investigate her statement to him that the injury may well have resulted from the chaos created by the lack of "good judgment" in the poor planning and execution of the event by NDI employees Lowman and Ladas. ALJ Decision, p. 7, ll. 16-21.

As stated on page 11 of this brief, the "smoking gun" of a lack of meaningful investigation as an exercise of unlawful purpose is the report of the meetings held in July and August, 2015 among Salganek, Baker, Wolfe, and their attorney. They allegedly held weekly meetings for "investigation. " Transcript pp. 313-315. The only incidents "under investigation" were the injury incident and the profanity incident. The only rational inference from the "investigatory meetings" is that they, with the advice of the NDI attorney, were concocting a legal basis for termination. An investigation is conducted with witnesses; a scheme is conducted by decision makers.

The ALJ decision does not draw any inference from Baker's failure to interview Orozco-Garrett's proffered witnesses and failure to explore alternative proffered explanations for the school employee's bruise, and does not even mention the "investigatory" meetings of NDI management and attorney.

Protected Concerted Activity.

The ALJ found that "...Orozco-Garrett's complaints criticizing management were neither concerted nor protected." ALJ Decision, p. 14, ll. 43-44.

In her analysis of the complaints to management, ALJ Decision, p. 4, l. 30 through p. 5, l. 7, she focused upon "artistic choices" which she described as subjective and benefitting Orozco-Garrett at the expense of other teachers. ALJ Decision, p. 15, ll. 11-21.

The gravamen of Orozco-Garrett's complaint was that Lowman, at the last minute and after many students had been taught certain dance steps, wanted to change the step, *which would have required all of the teachers* to re-teach and the students to re-learn the choreography only days before a scheduled performance. Orozco-Garrett was engaged in classic concerted and protected activity: complaining about a management decision that affected all the teacher employees and their conditions of employment. NDI management, and unfortunately the ALJ, sidetracked the legitimate complaint into the "voo-doo doll" nonsense. ALJ Decision, p. 4, l. 37 through p. 5, l. 1-2, and fn. 9.

The same mischaracterization occurred with regard to the "profanity" incident. ALJ Decision, p. 9, l. 10 through p. 11, l. 45. Nowhere in the ALJ Decision is there a discussion of Orozco-Garrett's assertion that

the comments she made about Lowman related to her management style as being characterized by “pettiness, exaggerations, controlling personality, and the inappropriate and demeaning words used by her in addressing staff” (including Orozco-Garrett in her class filled with young students). Exh. R-ZZ.

It is not necessary that the recipients of complaints about management style agree with the complainant, as the ALJ noted, ALJ Decision, p. 15, ll. 24-29, for the activity to be concerted.

What Moneagle’s fellow employees may have thought about her motives has little bearing on whether Moneagle’s activity was concerted. Employees may act in a concerted fashion for a variety of reasons—some altruistic, some selfish—but the standard under the Act is an objective one. See *Ohio Valley Graphic Arts*, 234 NLRB 493 (1978). Under that objective standard, Moneagle’s September 21 letter to the Respondent’s employees and her conversations with employee Beard, on their face, were concerted. They solicited group action and invited the backing of the Respondent’s employees for efforts to improve their wages, hours, and other terms and conditions of employment. *Circle K Corporation & Moneagle*, 305 NLRB 932, 933 (1986).

It is not a large step to find that Orozco-Garrett’s complaint about Lowman’s management style were made to solicit group action to correct her pettiness, exaggerations, controlling personality, and the inappropriate and demeaning words used by her in addressing staff. The fact that it did not result in immediate group action does not invalidate its motivation, and long term goal of improving working conditions for all employees under Lowman’s supervision.

ALJ Relied Upon Hearsay

The ALJ discredits the arguments of both the General Counsel and Orozco-Garrett that there was no direct evidence presented that the charging party injured the school employee Robledo. ALJ Decision, p. 20, ll. 19-29.

There are only two people that have any direct eye-witness knowledge of the injury incident: Orozco-Garrett and the EA Robledo. No NDI staff member witnessed the alleged incident. Tr. p. 303, ll. 24-25; p. 397, ll. 20.21. Orozco-Garrett denied the incident. Robledo denied it to her immediately after she was accused by Salganek. Exh. GC-13, p 2, paragraph 6. Robledo’s primary language is Spanish and this is the language in which she communicated with Orozco-Garrett.

At trial, NDI did not present any admissible evidence regarding Robledo’s allegation that I bruised her. All the testimony was hearsay, and often hearsay upon hearsay, presented solely by NDI employees, none of whom witnessed the alleged incident. NDI had the opportunity to call Robledo to testify at the hearing, or, at a minimum, take her oral deposition for use as trial. NDI elected to do neither. Therefore, the only admissible evidence before the court is Orozco-Garrett’s denial that the incident occurred, and my explanation of my physical impairment which prohibited my grabbing anyone. Tr. p 481, 482, ll. 1-18, 24-25.

The ALJ finds that the minutes of the wrap up meeting, R-Exh. M, constitutes a record of a regularly-conducted business activity under Federal Rule of Evidence 803(6). ALJ Decision, p. 20, Fn. 23, ll. 4-6. This reliance is misplaced. FRE 803(6) A: “the record was made at or near the time by – or from information transmitted by – someone with knowledge.” NDI did not assert admission of the minutes under Rule 803, thereby giving the CG an opportunity to object, nor did NDI make an offer of proof under Rule 803 at trial.

A review of the minutes of the wrap up meeting reveals that Ms Robledo was not present at the meeting. R-Exh. M. The record was not made by someone with knowledge, or transmitted by someone with knowledge. The minute taker, NDI employee Montoya, had neither. Therefore, the entire contents of the minutes on this issue are hearsay, often hearsay upon hearsay. The so-called corroboration by reliable evidence is also hearsay – all notes by NDI personnel. Had there been some recording or document signed by Robledo, and incorporated therein, then arguably there could perhaps have been “reliable corroboration.” NDI presented neither. Every bit of so-called evidence presented by NDI on this issue at trial was hearsay, or double hearsay.

In fact, all objections of the General Counsel as to hearsay were met by the ALJ’s ruling that any hearsay would not be considered for the truth of the matter. The contrary happened. ALJ Decision, p. 20.

Unlawful Application of Overly Broad Employee Conduct Policy

The Settlement Agreement and the Notice to Employees, Exh. R-G, p 1, required that NDI eliminate the following language from its Employee Handbook

NDI New Mexico requires all employees to adhere to the highest standards of professional conduct and will presume that employees will not engage in activity contrary to the interest of the organization or that interfere improperly with the rights of other persons, their property, or the property of NDI New Mexico. Additionally, standards for professionalism (referred to in other sections of the Handbook) extend to appearance, behavior, language and mannerisms and should be adhered to at all times when representing NDI New Mexico, whether on or off NDI New Mexico premises, including in the community. Please keep in mind that as a representative of NDI New Mexico, you are inherently a role model for the children and the families we serve.

Rather than eliminating the offending language, on or about March 13, 2015, Baker, on his own and in violation the Employee Handbook, page 2, paragraph 3, Introductory Statement, which gave him the authority to waive application of any provision of the Handbook as necessary in carrying out the day-to-day operations of NDI New Mexico, in anticipation of the NLRB action, deleted only some parts of the rule, but maintained and published virtually the same overly

broad rule (in **bold face** in both), in relevant content, as follows: Exh. R-F, p. 4 (designated as “Page 6” on the cited page of the exhibit)

NDI New Mexico requires all employees to adhere to the highest standards of conduct in their appearance, behavior, language and mannerisms when representing NDI New Mexico, whether on or off NDI New Mexico premises. Please keep in mind that as a representative of NDI New Mexico, you are inherently a role model for the children and the families we serve.

Promulgation of a new standard was *ultra vires*, that is, beyond the scope of the authority of the executive director. Although the director could waive the application of a provision, he has no authority to rescind a provision, much less the authority to **replace** a provision of the Handbook. (Basic corporate law: only the Board sets policy, the corporate officer executes it) The legal result of the banning by the NLRB and the nullity of Baker’s action is that from March 13, 2015 until the adoption of the new Employee Handbook last week, *NDI had no Standards of Professional Conduct.*

In spite of the above, both Salganek and Baker continued to cite the banned standard to Orozco-Garrett as a legal basis for discipline against her. As stated above, Baker did so as late as a few hours before the Board initiated a revised Handbook. Exh. GC-37.

On August 28, 2015, Exh. GC-21, Baker by email threatened discipline against Orozco-Garrett based upon some of the allegations contained in the Salganek email dated July 13, 2015, Exh. GC-15. As a basis for the threat, he referenced the prohibited overly broad language in contained in the “revised” **standards of conduct**, promulgated on March 13, 2015:

...to adhere to the highest standards of conduct in their appearance, behavior, language and mannerisms when representing NDI New Mexico” as they “are inherently a role model for the children and the families we serve.”

At trial Maria Wolfe, the business manager, testified that the March revision of the hand book was “retroactively” approved by the NDI board. Tr. p 708, ll. 12-15.

And then, in his termination letter to Orozco-Garrett, Exh. GC-27, Baker cited provisions in the new Handbook, issued to the NDI employees on September 3, 2015, one day before Baker terminated me.

The termination letter stated in relevant parts:

...you acted improperly and in violation of NDI New Mexico Core Value and Employee Conduct and Office and Personal Etiquette policies.

Core Values are:

1. *Belief in Children*
2. *Social Responsibility*
3. *Excellence*

4. *Sustainability*
5. *Financial Integrity*

Employee Conduct policy (both of them) are stated above on pages 15 and 16, *supra*.

Office and Personal Etiquette Policies:

NDI New Mexico facilities area a community resource provided for the children of New Mexico by community dollars. Offices should be kept neat and professional at all times. Approval from the Director of Business and Administration must be obtained before walls are altered or fixtures are installed. Employees of NDI New Mexico are expected to represent the organization in a manner that supports the organization's mission (see page 6 of this Handbook). Regardless of assignment, the work an employee does is important and so in the way an employee looks, dresses and acts while at work or at NDI New Mexico events. Because of the professional nature of our organization, compliance with the following guidelines is required to maintain our professionalism in our office and in the schools:

The general rule for office dress is business casual.

All attire, including jeans, must be clean, neat, and in good condition at all times.

Attire must be modest and appropriate at all times. Some dance attire may too revealing for the NDI teaching setting; any clothing that reveals cleavage, the back, chest, stomach or underwear is not appropriate.

T-shirts with logos or sayings (except for NDI New Mexico t-shirts) and work our shoes, are prohibited

Beards, hair, and mustaches must be neatly trimmed and groomed.

Body odors, bad breathe (sic) cigarette smoke, and perfume or cologne can be offensive or hazardous to co-workers. Please take precautions with personal hygiene ban be considerate of others.

Employees are not allow to display body modifications or tattoos that are likely to elicit a strong negative reaction in the workplace, or are not in keeping with our child centered mission. Tattoos that are visible may not exhibit slogans, symbols or images that represent demeaning, discriminatory, criminal, or political beliefs or organizations, and may not feature sex, violence, or other messages that do not promote or enhance a safe, productive, and child friendly workplace.

Employees are to use good judgment and discretion at all times.

In his testimony at trial, Baker stated that Orozco-Garrett was terminated for being in violation of both the March 2015 and the September 2015 Employee Handbook. Tr. p 173, l. 14 to p 174, l. 4. The March revision was *ultra vires*, and allegedly retroactively approved, and the September Handbook was not in existence at the time of her alleged violations. NDI failed to produce the Board minutes for the alleged approval, nor did they provide a date of the so called retroactive approval.

In both cases, he cited standards of "excellence" and a standard of "good judgment" as being those which Orozco-Garrett supposedly violated. Tr. p 176-177. "Excellence" is a core value; "good judgment" is a part of office etiquette. These so-called standards are so overly broad as to be meaningless.

Although the ALJ found that the language of the Handbook was not overly broad, ALJ Decision, p. 22, ll. 21-22, she did not make a specific finding that the standards of “excellence” and “good judgment” are or are not overly broad. When viewed as a whole, “standards” of core values, employee conduct, and office and personal etiquette are so overly-broad as to be as meaningless. The cited standards of “excellence” and “good judgment,” which Orozco-Garrett was accused of violating, add no discernable specificity to terms of conduct which could conceivably give rise to discipline or termination. No rational person could consider these “standards of behavior” as sufficiently specific to give fair notice of the conduct that is proscribed.

Baker himself admitted at trial that NDI does not have any document that explains to employees the meaning of words used to describe the conduct proscribed the Handbook. Tr. p. 181, ll. 10-25.

The finding of the ALJ that “a reasonable employee would not construe the rule as restricting his or her rights under the Act,” ALJ Decision, p. 24, ll. 15-17, is insupportable. The rules are so general and overly broad that no employee could reasonably discern their meaning, and are so general and overly broad that management is given unbridled discretion to interpret them in a manner of their choosing to harass, discipline and ultimately terminate any disfavored employee.

A general finding of non-overly broad standards in the face of the testimony of the NDI director as to specific grounds for termination (excellence and good judgment) is not a finding that can be sustained.

NDI Has Not Met Its Burden of Proof

The standard allowing an employer an affirmative defense by proving that it would have taken the same adverse action even in the absence of the protected activity has not been met. *NLRB v. Transportation Management*, 393 US 401 (1983).

The recitation of the vindictive actions of NDI against Orozco-Garrett, triggered by her filing of her original NLRB case in reaction to the “kangaroo court” imposition of the September 2014 probation, is sufficient proof that adverse actions were in direct retaliation for protected activity. The falsity of the allegations, the grossly unfair method of NDI’s “change the facts and hide the facts” investigation, and the conspiracy of management and their attorney in July and August 2015 to come up with an actionable excuse for termination constitute the requisite proof that NDI has not met its burden that it would have fired her anyway .

The Board was justified in this case in concluding that Santillo would not have been discharged had the employer not considered his efforts to establish a union. At least two of the transgressions that purportedly would have in any event prompted Santillo’s discharge were commonplace, and yet no transgressor had ever before received any kind of discipline. Moreover, the employer departed from its usual practice in dealing with rules infractions; ... In addition, Patterson, the person who made the initial decision to discharge Santillo, was obviously upset with Santillo for engaging in such protected activity. It is thus clear that the Board’s finding

that Santillo would not have been fired even if the employer had not had an anti-union animus was "supported by substantial evidence on the record considered as a whole"... 393 U.S. at 405.

Prayer. Orozco-Garrett, the Charging Party, requests that the NLRB reject the opinion of the ALJ and find that NDI committed the alleged unfair labor practices and order an appropriate remedy, including a cease and desist order, notice to employees, rescission of the overly broad and discriminatory employee conduct rules, rescission of her discharge and back pay and reinstatement, and any other remedy to which she may be entitled.

Respectfully submitted,

/s/ Diana M. Orozco-Garrett

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was delivered electronically to Patricia Salazar Ives, attorney for NDI-NM, and to Cristobal Munoz, General Counsel for the NLRB, on this 6th day of April, 2016.

/s/ Diana M. Orozco-Garrett