

**IN THE CIRCUIT COURT OF SAINT LOUIS CITY  
STATE OF MISSOURI**

CHRIS WHISTLER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 2019SMMT
	)	JURY TRIAL DEMANDED
OAK GARDENS EARTH RESIDENCE,	)	
	)	
Defendant.	)	

**PETITION**

COMES NOW Plaintiff Chris Whistler, by and through the undersigned counsel, and for her cause of action against Defendant, alleges and states as follows:

**PARTIES**

1. Plaintiff Chris Whistler ("Plaintiff") is a resident and citizen of St. Louis, Missouri who was employed by Defendant Oak Gardens Earth Residence ("Defendant") or ("OGER").
2. Defendant is and was at all times relevant to the allegations herein, a Missouri Corporation organized and doing business in the State of Missouri.
3. Defendant is an employer within the meaning of the Whistleblower's Protection Act, R.S.Mo. Section 285.575.
4. At all times relevant herein, the individual actors named herein, including but not limited to Plaintiff's supervisors and management-level employees of Defendant, were agents, servants and employees of Defendant and were at all times acting in the course and scope of their employment/agency relationship. Therefore, Defendant is liable for the actions of said persons.

**JURISDICTION AND VENUE**

5. The wrongful conduct alleged herein occurred in St. Louis City, Missouri, giving this Court jurisdiction over the Defendants and making this Court the appropriate forum for adjudication of Plaintiff's claim.

## **GENERAL ALLEGATIONS**

6. On or about January 3, 2017, Plaintiff was hired by Defendant as a cook.
7. Defendant is engaged in the business of operating a long-term care facility known as OGER.
8. During Plaintiff's employment with Defendant, Plaintiff observed numerous unlawful acts and serious misconduct committed by Defendant through its agents, servants and employees.
9. Plaintiff observed that Defendant, through its Director of Nursing, Aubrey Mills, repeatedly brought his/her dog to work, where he/she ignored it and permitted the dog to enter the kitchen and dining room in violation of 19 CSR 30-87.030(1), (2), (3), (9) and (13).
10. Plaintiff observed evidence of urination and defecation by the Director of Nursing's dog in the halls and dining room and notified her supervisor.
11. Plaintiff observed the dog enter the kitchen in violation of the regulations.
12. Plaintiff observed the dog create concerns about food sanitation.
13. Residents objected to the dog being in the dining room.
14. On June 10, 2019, the Plaintiff reported her concerns about the issues described in paragraphs 9-13 herein to Aubrey Mills.
15. On June 11, 2019, Plaintiff reported her concerns to the Missouri Department of Health and Senior Services.
16. On June 12, Plaintiff was discharged from her employment. Upon information and belief, Plaintiff's termination was motivated by her reporting of Defendant's unlawful acts and serious misconduct.

## **COUNT I**

### **Whistleblower's Protection Act, R.S.Mo. Section 285.575 - Violation of Sanitation Regulations**

17. Plaintiff hereby incorporates by reference all of the preceding paragraphs of the Petition for Damages as if fully set forth herein.
18. The State of Missouri recognizes a public policy imposing a duty upon operators of long-term care facilities to ensure proper sanitation.

19. Plaintiff developed a reasonable, good-faith belief that Defendant, through its employees, agents, and/or servants, violated the sanitation regulations in a way that could materially affect the health and safety of residents, by failing to control a dog.

20. As a result of Plaintiff's good faith belief that Defendant was in violation of State regulations, Plaintiff reported concerns to the administrator of Defendant, Aubrey Mills, and to Maize Arnold at the Missouri Department of Health and Senior Services.

21. Aubrey Mills and Maize Arnold are "proper authorities" within the meaning of R.S.Mo. Section 285.575(3).

22. Plaintiff was terminated on June 12, 2019, soon after reporting concerns.

23. Upon information and belief, Plaintiff's termination was motivated by Plaintiff's reporting of the serious misconduct by Defendant and/or the unlawful acts of Defendant described in this Count I to proper authorities, in violation of R.S.Mo. Section 285.575.

24. As a direct and proximate cause of Defendant's termination of Plaintiff in violation of the Whistleblower's Protection Act, the Plaintiff has incurred and will continue to incur lost income and benefits that she would have otherwise earned. Plaintiff is entitled to compensatory damages as a result.

WHEREFORE, Plaintiff prays for judgment in her favor and against Defendant on Count I of the Petition, for a finding that the Defendant's termination of Plaintiff's employment violates R.S.Mo. Section 285.575, for an award of compensatory damages, for her reasonable attorney fees and costs expended, pre-judgment and post-judgment interest as provided by law, and for such other and further relief as the Court deems just and proper, including equitable relief to the fullest extent allowed by law.

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                      )  
Defendant.         )

**STIPULATIONS**

Plaintiff Chris Whistler and Defendant Oak Gardens Earth Residence stipulate to the following:

- (1) The signatures on Exhibit 2 belong to Aubrey Mills.
- (2) Plaintiff drew Exhibit 1 while making her statement and both parties further agree that its contents are accurate and a smaller scale from the original.
- (3) OGER is a long-term care facility as that term is used in Exhibit 7.
- (4) Exhibit 9 is a copy of an email that originated from the email address assigned to Aubrey Mills at Olive Gardens.
- (5) The parties agree that the only materials used to argue pre-trial motions are those provided in the case packet and the Rules of Evidence.
- (6) Plaintiff is not seeking punitive damages, and any attorney's fees will be determined by the judge in a separate hearing after trial (meaning not in this mock trial).

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## Jury Instruction 1

### Verdict Directing--Wrongful Discharge in Violation of Public Policy (Whistleblower's Protection Act)

Your verdict must be for plaintiff if you believe:

First, plaintiff is a protected person, meaning that plaintiff reported serious misconduct of the employer that violates a clear mandate of public policy as articulated in a constitutional provision, statute, or regulation promulgated under statute, and

Second, defendant discharged plaintiff, and

Third, such conduct of plaintiff as submitted in the First paragraph (above) was the motivating factor in the defendant's decision to discharge plaintiff, meaning that the plaintiff's report actually played a role in and had a determinative influence on the decision to discharge plaintiff; and

Fourth, as a direct result of his/her discharge, plaintiff sustained damage.

[unless you believe plaintiff is not entitled to recover by reason of Instruction Number 2].

Source: R.S.Mo. Section 285.575, enacted 2017.

## Jury Instruction 2

### Affirmative Defense Instruction

Your decision must be for the defendant if:

- (a) The plaintiff is a supervisory, managerial, or executive employee or an officer of his or her employer and the unlawful act or serious misconduct reported concerns matters upon which the plaintiff is employed to report or provide professional opinion; or
- (b) The proper authority or person to whom the plaintiff makes his or her report is the person whom the plaintiff claims to have committed the unlawful act or violation of a clear mandate of public policy.

Source: R.S.Mo. Section 285.575, enacted 2017.

## **STATEMENT OF CHRIS WHISTLER**

1        I was born and raised right here in St. Louis, Missouri, and I have lived  
2        here all my life. I dropped out of high school in the middle of 10<sup>th</sup> grade, after I  
3        turned 16, so I could marry my high school sweetheart. I was a stay-home  
4        parent until my sweetheart turned into a snake and left me for a champion  
5        skateboarder. My spouse took off suddenly after my second child, Amy, was  
6        born. So now I am a single parent raising my two small children, Amy (age 5)  
7        and Bobby (age 7), who have never known my spouse. I had to find gainful  
8        employment so I went to work as a dishwasher at a local restaurant just to  
9        make ends meet. I worked at the restaurant for a few years until I landed a job  
10      as a cook at Oak Gardens Earth Residence (“OGER”), a local long-term care  
11      facility, or nursing home. I worked there from January 3, 2017 to June 12,  
12      2019, when that bottom-dweller good-for-nothing useless Director of Nursing  
13      fired me. I was out of work for three months until I got a job with the same  
14      hours and pay on September 12, 2019. My lawyer says that I can file a lawsuit  
15      because it is against the public policy of this State for the Director of Nursing  
16      to fire me. If I win, I can pay for little Amy’s dance lessons and Bobby’s karate.

17       I applied for the cook position at OGER by filling out an application in  
18      person. I got a call on my cell phone a few days later from Ollie, the Kitchen  
19      Manager, who asked me to come in for an interview. I was so excited! I first met  
20      with Ollie and told him I had no experience cooking other than heating up  
21      pizza rolls and hot dogs for the kiddos but I sure could follow the directions  
22      and I would do just fine. He asked me if I had experience with the elderly. Do I

23 ever! I have a 75-year-old grandpa who is still out takin' care of his farm in  
24 Southern Missouri, helping deliver baby calves, feeding them, bush hoggin' and  
25 rakin' and all kinds of things. I love taking the kids there. We go at least twice a  
26 year! My grandpa is super into the St. Louis Cardinals. He also loves the  
27 Boston Bruins because his dad, my great grandpa, was from Boston. He got me  
28 into hockey and I am a huge Bruins fan now myself. So I have definitely been  
29 around old folks. At the end of the interview, the Director of Nursing, Aubrey  
30 Mills, walked in and gave me a job description. Yeah that is it – Exhibit 3.  
31 Aubrey asked me if I could do it and I said I sure could and I was told I could  
32 start the next day!

33 As it turns out, Aubrey is in charge of everything and everyone. The  
34 Director of Nursing is actually the main administrator at OGER. The Director of  
35 Nursing calls all the shots. My direct supervisor was apparently Ollie the  
36 Kitchen Manager, who did the cooking in the morning, and I did the cooking  
37 during my shift. We basically did the same job, except he ordered the food. I  
38 was paid hourly.

39 Everything seemed fine until Aubrey showed up one day with this  
40 mongrel called "Poopsy." Yeah, that's a picture of that mangy mutt – Exhibit 6.  
41 I despise everything canine – especially Poopsy. Poopsy is an untrained puppy.  
42 Aubrey first brought her into the facility as a sort of "gift" to the residents.  
43 Aubrey told everyone that Poopsy was a "therapy pet" but everyone knew that it  
44 was Aubrey's own puppy and Aubrey was just bringing it to work. The "therapy  
45 pet" thing was just an excuse to get all of the staff at OGER to train that dumb

46 dog for Aubrey. Real therapy pets are trained by professionals BEFORE they  
47 come to the facility. Poopsy was not a trained therapy pet. She did nothing but  
48 urinate and defecate all over the nursing home all the time.

49         The facility was set up like a pentagon. Here, I will draw it for you based  
50 on my memory. This is a diagram of OGER (Exhibit 1). Every time I walked the  
51 halls near the resident rooms, I would find little yellow puddles on the floor and  
52 evidence of defecation. I figured one day someone would slip on a puddle and  
53 sue this place and that would finally put an end to that silly therapy dog  
54 nonsense. Every time I would find that nasty dog anywhere in the facility, I  
55 would take it to Aubrey's office and stick it in the crate. That is where it  
56 belonged if you ask me. Then five minutes later, that dog would be back out.  
57 The residents in the home agreed with me, too. They also thought it was wrong  
58 for Aubrey to bring that dog to work and expect all of us to clean up after it.  
59 One time I even found evidence in the kitchen. I took a picture of it – Exhibit 5.  
60 I went straight to Aubrey and handed Aubrey gloves and cleaning supplies and  
61 told Aubrey to clean it, yelling, "All the residents are tired of this disgusting  
62 dog!" Aubrey told me to keep the dog out of the kitchen. I am sure most of the  
63 residents in that part of the pentagon could hear me. I wanted them to know  
64 that I was doing my best to help. I don't know who cleaned it, but I know the  
65 puddle disappeared.

66         After the dog had been let loose to destroy OGER for over a month, I  
67 again approached Aubrey in her office. It was the morning of June 10, 2019. I  
68 told Aubrey, "You should take care of your own dog, train your own dog, and

69 keep it at home. If you have it here at OGER, you should lock it in your office.

70 Every time I prop open the kitchen door, that dog runs in.” In response, Aubrey

71 told me, “Poopsy cannot get through the kitchen doors when they are closed.

72 So close them and don’t prop them open, even if you find that makes your job

73 harder. Like I told you last month, if you are in the kitchen when Poopsy runs

74 in, take her out. That is your job so make sure to remove Poopsy if Poopsy goes

75 in there.” I told Aubrey, “That is impossible for me to do since I am handling

76 food and I cannot touch a dog. I have to change my gloves every time. I am not

77 going to be able to do that. Plus, I like to keep the door propped open so I can

78 keep an eye on the dining room and the residents, and it is easier to

79 communicate with them.” Aubrey then told me to just cook food, serve food,

80 and not talk to residents about anything other than whether they want

81 ketchup with their French fries and things like that. Aubrey then claimed I had

82 upset a resident by talking to a resident, Bea Toven, about not liking Poopsy

83 and by being rude to Poopsy. Aubrey claimed I made Bea cry. I was thinking to

84 myself, “Sure I definitely talked to lots of residents about how terrible that dog

85 was, but I don’t remember any specific conversation with Bea, and I never

86 made Bea cry.” I do remember one time that Bea spilled her milk, so I threw a

87 towel over it from the kitchen. I did not see her cry over the spilled milk. I

88 decided not to bring up the towel incident and just say “OK” to Aubrey. I was

89 already on her bad list over not liking that dumb dog that I did not want to

90 argue with her about what I did or did not say to residents or Bea.

91           On June 11, I called the Department of Health and Senior Services  
92 ("DHSS") and asked to speak with the person who inspects OGER, and he  
93 transferred me to Maize Arnold. I told Maize Arnold that we had a dog in the  
94 nursing home that was entering the kitchen. Maize said the Department would  
95 probably issue a citation or shut down the place if the dog were not removed  
96 from the facility.

97           The next day, on June 12, 2019, the Blues were in Game 7 of the Stanley  
98 Cup finals against the Boston Bruins. Aubrey decided it would be fun to move  
99 the big screen into the dining room and serve tailgate food like hot dogs and  
100 nachos - I am really good at cooking those, so that was no problem - to the  
101 residents. I agreed to work overtime since Ollie, our Kitchen Manager, already  
102 had plans with friends. Lots of nursing staff was in the dining room. I was the  
103 only one in the kitchen - I was also the only person at OGER wearing a Bruins  
104 t-shirt that night. A resident, Mr. Stillman, - no relation to Tom - asked me why  
105 I was a traitor. I told him that my Grandpa was a Bruins fan and I inherited it.  
106 Moments later, the final buzzer left the Blues Stanley Cup Champions. Right  
107 then, Mr. Stillman fell over on the dining bench and was unconscious. At least  
108 he got to see his precious lunkheads beat my Bruins. I had to return to my  
109 post in the kitchen but I believe he was rushed to the hospital.

110           After Mr. Stillman was taken away, Aubrey came up to me and said,  
111 "You're fired! I told you to stop interacting with residents about things other  
112 than their food! Now look what you did to Mr. Stillman! You can take your

113   Bruins loving, dog-hating big mouth up to the main office, turn in your badge,

114   and scoot!"

## **STATEMENT OF MAIZE ARNOLD**

115        I am originally from Iowa City, Iowa, where I was born and raised. I  
116    graduated from high school in 2012 – the same year that Mizzou joined the  
117    SEC. I always wanted to go to college at an SEC school, so I jumped at the  
118    opportunity to go to a place that was relatively close to home. I graduated in  
119    2016 with a bachelor's degree in health science, with an emphasis on  
120    leadership and policy, then stayed at Mizzou for one more semester and  
121    completed my graduate certificate in health ethics. My certification classes  
122    included "Health Policy and Politics" and "Health Law: The Regulation of  
123    Providers." Immediately upon graduation, I was offered a job as an Inspector in  
124    the Long Term Care Division of the Missouri Division of Health and Senior  
125    Services. I have held the same position ever since.

126        As Inspector, my duties include inspecting long term care facilities for  
127    compliance with the Division's regulations. We schedule regular visits to the  
128    facilities in our territories, and sometimes we make surprise visits, particularly  
129    when we receive a complaint that a regulation has been violated. Complaints  
130    can be initiated by anyone including a patient, a patient's relative, or an  
131    employee or member of the public. OGER was one of the facilities in my  
132    geographic territory. When I receive a complaint at one of my facilities, I do an  
133    on-site investigation. Usually if I find any potential failure to comply, I issue a  
134    Statement of Deficiencies. The Statement of Deficiencies is based on my

135 personal opinion. In response, the facility is required to provide a plan of  
136 correction that will bring the facility into compliance with the regulations.

137 On June 11, I received a phone call from Chris Whistler, a cook at  
138 OGER. Chris told me that OGER was allowing a dog to roam freely throughout  
139 the facility and into the dining room areas and food preparation areas. Chris  
140 also informed me that residents objected to the dog being present in the dining  
141 room but the facility did not adhere to resident desires. Also, Chris said that  
142 the dog had free run of the kitchen and food preparation areas because the dog  
143 was not locked in a crate or office during dining hours and the dog would find  
144 its way into those areas.

145 I immediately looked into the State regulations set forth by the Missouri  
146 Division of Health and Senior Services (DHSS). Since OGER is a long term care  
147 facility as defined by Missouri Statute, it must adhere to the Code of State  
148 Regulations, 19 CSR 30-87.030: Sanitation Requirements for Food Service.  
149 This section includes 97 specific paragraphs containing rules, sometimes two  
150 or three per paragraph, pertaining solely to food service. The rules range from  
151 requiring that glasses and cups be stored inverted, to forbidding the use of  
152 wood, other than hard maple, for food surfaces. Paragraph 9 provides that live  
153 animals must be excluded from food preparation areas, and dogs and cats can  
154 only be in dining areas if residents do not object. I mean there are so many  
155 regulations that it is literally impossible to follow every one of them all the time.  
156 We at DHSS get it. But I think some of the more important ones should be

157 taken very seriously so we can make sure residents don't get sick. Yes, Exhibit  
158 7 is a copy of the regulations specific to food service at long term care facilities.  
159 This set of regulations applied to OGER.

160 I decided I would pay a surprise visit to OGER on the morning of June  
161 12, 2019. When I arrived, I was greeted by the office assistant, Eliza. I told her I  
162 had come to investigate a complaint I had received about a dog. The office  
163 assistant immediately responded, "Oh you must be talking about Chris. Chris  
164 hates the puppy. Chris probably called you and told you we were breaking  
165 some law in having a puppy." I told her that I could not reveal the identity of  
166 the complainant, only that it was a cook in the kitchen who was concerned  
167 about a possible legal violation. The office assistant told me she would make  
168 sure to locate the Director of Nursing who could answer questions. I saw her go  
169 to the hall and stop Aubrey in her tracks. She said something to Aubrey, and I  
170 overheard Aubrey say something about taking care of that cook. Then she  
171 made a motion with her hand – she stuck her thumb up and out like a  
172 hitchhiker and pointed her thumb a few times at the front door as if to say  
173 someone or something needed to leave.

174 A few minutes later, both of them returned to the front office with about  
175 half of the nursing and custodial staff. We sat down around a conference table  
176 in the main office and I asked questions that centered on the dog, its  
177 whereabouts, whether residents objected to it being in the facility, and whether  
178 it was permitted to enter the kitchen. The office assistant told me that the

179 puppy's name was Poochie, and that Poochie would occasionally have  
180 accidents around the home, but the accidents were always cleaned up. The  
181 office assistant confirmed that the dog was permitted to be in the dining room  
182 and, to her knowledge, no residents had objected. Aubrey told me that Poochie  
183 was not allowed to go into the kitchen, but if she managed to squeeze into the  
184 kitchen, the cook was required to take Poochie out.

185 After our meeting, I walked out of the main office. I examined the kitchen  
186 and Poochie was not in there. She was in the courtyard doing her business. I  
187 knew I needed to talk to Chris in more detail to complete the investigation. I  
188 told the staff the investigation was not complete and I would get back to them.  
189 That night, the Blues won the Stanley Cup! I completely forgot about the  
190 complaint because I was making plans to attend the parade a few days later. I  
191 camped out on Market Street on Friday evening and I got to touch the Cup  
192 when Maroon had it. It was great. Then I went on vacation for a week and by  
193 the time I got back, I called OGER to follow up on my investigation and asked  
194 to talk to Chris. Eliza told me Chris no longer worked at OGER. I think if I had  
195 been able to talk to Chris again, I probably would have issued a Statement of  
196 Deficiencies. I just needed more specific information about which residents had  
197 lodged complaints, Chris' responsibilities with respect to the dog and kitchen,  
198 and the picture she had taken of the dog's contamination so I could follow up  
199 on any sanitation issues that may have been present.

200           Later I learned that the facility assigned a custodian to put Poochie on a  
201   leash during dining hours to make sure she did not go in the kitchen at all, or  
202   go into the dining hall when residents were present. I expect that took care of  
203   any issues that may have been present.

204           Of course, many long term care facilities are finding it beneficial to bring  
205   in pets for the residents to enjoy. We at DHSS recognize the potential emotional  
206   benefits that animals bring to the elderly and infirm. Research suggests older  
207   adults live longer, healthier, happier lives when they interact with pets on a  
208   regular basis. Pets provide companionship and unconditional love that  
209   improves the overall health of aging individuals. Loving a pet gives older adults  
210   more reasons to get up in the mornings. So we at DHSS do not want to make it  
211   impossible for a facility to have a pet as long as they comply with the  
212   regulations. We feel so strongly that pets are beneficial in long term care that in  
213   2013, the long term care division of DHSS dedicated an entire issue of "New  
214   Generations" magazine to the benefits of pets in long term care homes. Exhibit  
215   8 contains excerpts of Volume 11, Issue 2.

## **STATEMENT OF FRANCIS/FRANCES PELLEGRINI**

216        I don't know why Chris wants me to testify and I told him/her I was not  
217 interested but I guess I don't have a choice. His/her attorney sent me a  
218 subpoena so if I don't show up, I get thrown in jail. So I guess I have to answer  
219 questions but I don't want to. I am tired of dealing with legal issues involving  
220 Aubrey Mills.

221        I work as a custodian at OGER. I haven't always worked there. I actually  
222 worked at Deaconess Hospital from 2001-2004, the same place where Aubrey  
223 Mills worked as a registered nurse. At Deaconess Hospital, I was responsible  
224 for collecting soiled linens from patient rooms, cleaning them, and restocking  
225 the laundry closets with fresh linens. Aubrey was the charge nurse on the  
226 tenth floor, meaning that she assigned nurses to patients at the beginning of  
227 each shift. One time, in December 2002, I overheard an LPN named Bob tell  
228 Aubrey, who was his supervisor, that he believed the system the hospital had  
229 in place for recording patient health information violated the Health Insurance  
230 Portability and Accountability Act (HIPAA) because it did not keep patient  
231 information confidential. Bob stopped working at Deaconess in February 2003.  
232 After Bob left, he sued Deaconess hospital claiming Aubrey had wrongfully  
233 discharged him for complaining about HIPAA violations. I was called to testify  
234 about the conversation I overheard between Bob and Aubrey. I had no  
235 information about whether the nurse's termination had anything to do with his

236 complaint. I did not even know he was fired until I got a call from his attorney  
237 asking me to go to a deposition related to his whistleblower lawsuit.

238 Then, it just so happened that in 2008, I landed a higher paying job at  
239 Olive Gardens Nursing Home where I worked as a custodian. My job was more  
240 general – keeping hallways clean, emptying trash, cleaning up the dining room  
241 at the conclusion of mealtimes. I was even given an office and a computer at  
242 Olive Gardens. My managers used email to communicate special needs to me  
243 like notices to clean the main office and conference table after a meeting and  
244 other janitorial tasks. Once I received an email that probably was not meant for  
245 me. My name is Frances/Francis Pellegrini, but the home's administrator's  
246 name was Francine Pellegrina. That email is Exhibit 9. I had to get dragged to  
247 court when Roberta, the nurse mentioned in the email, filed a lawsuit alleging  
248 wrongful discharge in violation of public policy. Roberta claimed she was fired  
249 from Olive Gardens after reporting Medicaid fraud, and I had to testify that I  
250 had, in fact, received that email. What a nuisance.

251 Now here I am again, in court, to give my testimony relating to things  
252 Aubrey Mills said or did. I cannot believe that I have ended up working in the  
253 same place as Aubrey Mills three times! Well, I'll tell you what, this time I have  
254 no idea whether Aubrey overheard Chris complain about Poochie, or even if  
255 Chris ever complained about Poochie, or sanitation regulations, or anything at  
256 all. But what I can tell you is that Poochie is a nightmare to clean up after.  
257 Poochie is seven months old and still cannot figure out where to go to the

258 bathroom. I find little Poochie-sized defecation and urination nearly every day  
259 that I work at OGER. I always clean it immediately. I wipe up the excrement  
260 and immediately place it in a plastic biohazard bag and discard it, then I use  
261 disposable paper towels. I spray the area with a good, high quality disinfectant  
262 spray and make sure it is fully removed. None of the floors have carpeting,  
263 thank goodness. To my knowledge, no resident or employee has ever stepped  
264 on it or slipped on it, and I don't believe it has ever contaminated the food – at  
265 least not on my watch. I am only one of three custodians who work at OGER.

266 I do remember a time that Aubrey Mills came to me and asked me to  
267 clean up the floor in the kitchen. It was at 2:00 in the afternoon - a time when  
268 food was not being served so no one was in there. No one is allowed to go in the  
269 kitchen except the Kitchen Manager, cook and dishwasher, and both the  
270 Kitchen Manager and the dishwasher were off work that day. The three of them  
271 are the only people who do the cooking or cleaning of the kitchen. The doors  
272 are really heavy and they lock when they shut. They have a push bar to open  
273 them so someone must have let Poochie in there, and I have a strong suspicion  
274 that it was Chris, but I don't know for certain. I did clean it really well. I did a  
275 good job and I am certain there was no contamination of the food or any tables  
276 or equipment.

277 I would occasionally find a few Poochie puddles in the dining room, but  
278 there is always so much spillage on the floor that it is honestly hard to tell  
279 what is what. Either I or one of the other custodians mopped the dining room

280 floor every night after dinner. Speaking of spillage, it is not out of the ordinary  
281 for a resident to have an accident, and those are much more significant in  
282 terms of volume, whether it's bodily fluid or food and beverage spills. All of  
283 those were common. The residents are wonderful people and I am happy to be  
284 able to help them live comfortably, but they are elderly and some are sick, so  
285 some of that is to be expected.

286 I was off work the night the Blues won the Stanley Cup, but the next day  
287 everyone was talking about the Blues, Mr. Stillman, and Chris getting fired. I  
288 had to clean up the main office because everyone had used the conference  
289 table as the pot-luck storage area the day before, and it was covered in blue  
290 and yellow icing, blue and yellow sprinkles, and there were still streamers  
291 taped to the walls. While I was in the main office, Aubrey walked in to talk to  
292 Eliza, the office assistant. I was under the table picking up the sprinkles when  
293 I overheard Aubrey say to Eliza, "I sure hope Mr. Stillman recovers. That poor  
294 man had a serious heart condition. I told Chris to keep her mouth shut and do  
295 her cooking job so she would not upset the residents, but she just could not  
296 hold her tongue and mind her own business. And now Mr. Stillman is in a  
297 coma! Firing Chris may save our other residents from having the same thing  
298 happen to them as what happened to Mr. Stillman! Plus, now that Chris is out  
299 of here, maybe Maize will stop breathing down my back about not liking my  
300 dog." Eliza responded, "It's a good thing Chris is gone. Lots of residents  
301 complained that she talked too much and was really nosy. But we need to find

302 a new cook – maybe this time we should look for one who is not so  
303 insubordinate!"

304           Then Aubrey noticed I was in the conference room after I hit my head on  
305 the table while trying to get up. She seemed surprised to see me. She asked me  
306 if I would start putting Poochie on a leash during dining hours to ensure that  
307 Poochie could not enter the kitchen or dining room. I had no problem with that.  
308 I just kept Poochie with me on a leash. At least I now get the chance to take  
309 Poochie to the courtyard to do her business, and she is finally starting to figure  
310 it out.

## **STATEMENT OF AUBREY MILLS**

311        I am the Director of Nursing at Oak Gardens Earth Residence. We are a  
312        very small but quite lovely Residential Care Facility as that term is defined by  
313        the DHSS regulations. Larger residential homes would typically employ a  
314        Director of Nursing who reports to a Facility Administrator, but at OGER, I  
315        serve in both roles.

316        I have a bachelor's degree in nursing from Deaconess Hospital, back  
317        when it had a School of Nursing. I worked for about five years as a Registered  
318        Nurse at Deaconess Hospital, then I went back to school and got my master's  
319        in nursing from Saint Louis University. I also have a master's degree in health  
320        care administration from Saint Louis University. I worked as a Director of  
321        Nursing for a larger facility, Olive Gardens, in West St. Louis County, for 10  
322        years until 2016, when I applied for and obtained the position of Director of  
323        Nursing at OGER. I have the responsibility of caring for the patients' medical  
324        needs, ensuring compliance with the many regulations, implementing policies  
325        consistent with Missouri State public policy, and also the responsibility  
326        supervising the entire staff. My job duties include overseeing staff, supplying  
327        medical supplies, and financial matters.

328        I have a specific interest in pet therapy for elderly and disabled people.  
329        Pets can generate a happier, less stressful, and healthier lifestyle for all people.  
330        For these exact same reasons, more and more nursing homes are starting to  
331        incorporate pet therapy in their programs. The most common type of pet  
332        therapy is visitation therapy. It allows residents to experience the benefits of

333 having pets around without the magnitude of responsibility animals require.  
334 Cats and dogs are the most commonly used animals for visitation therapy. I  
335 have been asked to speak at Residential Care Facility seminars for new  
336 administrators across the state on the benefits of pet interaction with  
337 residents, and I have written and published two articles in Nursing Notes, "How  
338 to Incorporate Pet Ownership in Residential Facilities," and "Woof There It Is:  
339 The Dog Arrives."

340 In late April 2019, I saw a notice in the Riverfront Times that a number  
341 of puppies had been seized from a puppy mill somewhere in the State and had  
342 been brought to the Humane Society headquarters on Macklind. I raced over  
343 and found the most adorable little 8-week old Maltipoo (that is a Maltese-  
344 Poodle mix), weighing slightly more than one pound. I fell in love with this little  
345 puppy the moment I saw her. I decided to name her Poochie. Poochie is such a  
346 wonderful little dog. I thought, "Wouldn't it be so special to take Poochie with  
347 me to OGER so that all the residents could enjoy her?" I decided that it would  
348 be fun to have a therapy pet at OGER so I started taking her to work. Of course  
349 I was not able to dog-sit all day long, and that would not have been good for the  
350 residents. I wanted them to have the chance to interact with Poochie. You ask  
351 me if Poochie was potty trained? Ha! You must know that 8-week old puppies  
352 definitely have accidents every now and then, but Poochie was well on her way  
353 to figuring it out. There is a lovely courtyard in the middle of the facility, with  
354 five doors that went to the courtyard. The courtyard is grassy and enclosed,

355 and a great area for a pet. It was the perfect set-up for a successful therapy  
356 dog!

357 I held a meeting with all the nursing and custodial staff as soon as  
358 Poochie was moved to the facility. The meeting included all the Registered  
359 Nurses, Certified Nurse Assistants, and our three full-time custodians. They  
360 are the employees who are typically roaming the halls helping residents, where  
361 Poochie might be also roaming. They needed to know to let Poochie out into the  
362 courtyard frequently. I also notified them that if anyone saw any evidence of a  
363 little Poochie-sized accident - of course, Poochie's puddles would not likely be  
364 larger than a McDonald's Happy Meal hamburger patty, and the little poops  
365 would not be bigger than a baby carrot - they needed to clean them up  
366 immediately or find custodial staff to take care of it. No one expressed a  
367 problem with this. I don't recall any kitchen staff being present at the meeting.

368 Of course I recall when Chris Whistler was hired. As a nurse, I really  
369 don't pay that close attention to the kitchen staff employees. I mean, I have a  
370 lot on my plate and we have a Kitchen Manager, Cook and dishwasher. Ollie is  
371 the Kitchen Manager and Buddy is the dishwasher. Breakfast is served from 6-  
372 9, lunch from 11-1, and dinner from 4-6. There is always either the Kitchen  
373 Manager or Cook present, so there is always a cook in the kitchen as long as  
374 the dining room is open. The job descriptions for the Cook and Kitchen  
375 Manager are included as Exhibits 3 and 4, respectively. Those documents were  
376 provided to both of them when they started work.

377           Chris stands out because he/she was always causing a lot of problems.

378    Chris just could not stand to stay in the kitchen and do his/her job. Chris was

379    a social butterfly with the residents. He/she was always running around in the

380    halls when he/she should have been in the kitchen. I received complaints from

381    nurses that he/she would strike up conversations and get the residents all

382    riled up. He/She was always raising his/her voice and inciting people,

383    including residents. I cannot recall the specifics of all the reports I received, but

384    I do remember two major events. One of the residents, Jack/Jackie Beehive,

385    reported to me that Bea Toven had became upset because Chris was saying

386    horrible things about Poochie and mistreating Poochie. Jack/Jackie Beehive

387    reported that Bea had been in tears after the altercation. Bea is a somewhat

388    fragile elderly woman who is taking anti-depressants, and she needs to control

389    her mood or she may suffer additional health problems. After Jack/Jackie

390    Beehive came to me, I went straight to Chris and told him/her that he/she had

391    upset a resident with his/her tone and his/her discussion, and he/she was no

392    longer to have any conversations with residents unless the conversations were

393    related to what food they wanted. I explained to Chris that some residents are

394    very fragile, some have blood pressure or other health issues, and inciting them

395    or upsetting them can be dangerous to their health. Chris indicated he/she

396    understood and would not engage with residents again.

397           You asked me if Chris had any problems with Poochie? Yes. Chris did not

398    like dogs. He/she came to me and complained that Poochie was my dog, not

399 OGER's dog, and he/she did not want any responsibility for my personal dog. I  
400 told him/her Poochie was the facility dog, I had sold him to the facility by  
401 contract – Exhibit 2, but he/she did not need to have any responsibility for  
402 Poochie other than keeping Poochie out of the kitchen. I explained to him/her  
403 that he/she needed to manage the kitchen and make sure Poochie was not in  
404 there. It should have been an easy task – there are doors on the kitchen that  
405 Poochie could not get through unless the door was opened by a person. Chris  
406 was the only person who went in and out of the kitchen so he/she would  
407 always be there if Poochie were to ever escape from the dining room.

408           Chris did complain about being bothered by Poochie and not wanting to  
409 deal with Poochie in the kitchen, but he/she never mentioned any regulations  
410 to me. He/she never mentioned that he/she believed OGER was in violation of  
411 any regulation related to Poochie or anything else. He/She did threaten that  
412 “DHSS could shut us down for having a dog,” but that was a ridiculous  
413 statement because DHSS encourages pets in residential care facilities. I know  
414 because I have read “New Generations” magazine for years, and I recall reading  
415 Exhibit 8 in 2013.

416           On the evening of June 12, I stayed late to enjoy the festivities of the final  
417 Stanley Cup game with the residents. I had stepped out of the dining hall to  
418 catch up on paperwork in my office. I figured the Blues had it won since they  
419 were up 4-1 with only a few minutes left. Plus, I wanted to call my son in  
420 Nashville to celebrate the win. So I wasn't there at the final buzzer and I was

421 not there when Mr. Stillman collapsed. Immediately after the game ended, I  
422 was on the phone with my son, and one of our custodians ran into my office  
423 and said, "Come quick! It's Mr. Stillman! We called a bus already." So I ran to  
424 the dining hall and Mr./Mrs. Beehive shouted, "It was that nasty cook! He/she  
425 got him so upset! Did you know he/she is a Bruins fan? He/she was talkin' all  
426 kind o' smack and Mr. Stillman just fell kerplunk over because his/her big trap  
427 won't stay shut!"

428 Once Mr. Stillman was on his way to the hospital, I found Chris and I  
429 told him/her that he/she needed to turn his/her badge in to Eliza and that  
430 his/her assistance was no longer needed in the kitchen. I told Chris that  
431 he/she had been previously warned to not talk to residents and he/she failed  
432 to refrain from chatting up Mr. Stillman, causing detrimental health problems.  
433 I was happy to be rid of that cook. He/she was not a dog person and I have no  
434 tolerance for that.

435 I know Chris is saying that I fired him/her because he/she complained  
436 to DHSS on June 11. I did not know that he/she contacted DHSS, or that a  
437 complaint was even filed with DHSS. I do recall Maize Arnold coming in for a  
438 visit on the morning of June 12 to do a surprise inspection. I was not aware  
439 that Maize was investigating a complaint. My office assistant never mentioned  
440 anything about an official complaint to DHSS. When she went to get me, she  
441 told me Maize had arrived to ask about Poochie, and I motioned for her to let  
442 Poochie out to do her business. I don't think I said anything about the cook.

443           Maize told me he/she had received a report about a new therapy dog and  
444   wanted to meet Poochie. We introduced him/her to Poochie. All the staff at the  
445   meeting informed Maize that when Poochie had accidents, they were cleaned  
446   up quickly. Chris was not at the meeting with Maize. Maize did not issue a  
447   Statement of Deficiencies or ask for us to make any changes to what was  
448   currently happening with Poochie.

449           As for Mr. Stillman, I was correct that Chris should never have spoken to  
450   him. Mr. Stillman's doctor thinks that he suffered a stress-induced heart  
451   attack due to Takotsubo syndrome, even though even I know that Takotsubo  
452   syndrome generally affects women and not often men.

453           Francis/Frances Pellegrini is one of our custodians. I did not fire Bob at  
454   Deaconess hospital because of his HIPAA concerns. Bob had years of  
455   performance problems and I think he made that report in order to set me up,  
456   knowing I would have to fire him for his performance problems. Also, I did not  
457   send that email to Francis/Frances at Olive Gardens. Someone must have gone  
458   into my office and sent it. I would never have sent anything like that. Plus, I  
459   sent emails all the time to Francine Pellegrina and I would not have made that  
460   mistake in identity. I have always suspected that Roberta snuck in my office  
461   and typed it herself. She was pretty sure she was getting fired the next day so I  
462   think she set me up.

## **STATEMENT OF JACK/JACKIE BEEHIVE**

463        My name is Jack/Jackie Beehive. I have lived at OGER for about three  
464    years, ever since I suffered a stroke. I have made a substantial recovery, but I  
465    have difficulty hearing from my right ear. I don't need a hearing aid and I  
466    refuse to wear one because my left ear still works well enough. My eyesight is  
467    also not perfect but I can see well enough to recognize faces. I am 87 years old,  
468    so my kids think I need to be in this nursing home because I no longer drive,  
469    and they are afraid I am too weak to live on my own. They don't want me to fall  
470    down. Kids these days are so worried about everything. They come to visit me  
471    enough here so I really don't mind, but I do miss my house. I had a golden  
472    retriever named Cinnamon who was my best friend after my kids were gone  
473    and my spouse had passed. I really miss him.

474        One of the best things that happened at OGER was when Nurse Aubrey  
475    brought his/her puppy to work. It is a little peach furball that runs around all  
476    over the home. Sometimes I leave my door open when I am watching TV.  
477    Poochie comes in and jumps right up in my lap. Our favorite is "The Price is  
478    Right." She runs up and down the halls as if she were in a race but there is no  
479    other dog to race! Poochie has made me so happy. I used to be lonely and  
480    wonder what I was going to do from day to day, but now I wake up and I find  
481    that little puppy - or she finds me - and I pet her as much as she wants. She  
482    loves me.

483 Poochie used to go in the dining room during meals. I think I am her  
484 favorite because she would usually sit with me. It started that she would sit on  
485 my feet, but then she got interested in my food, so I let her sit on my lap.  
486 Occasionally I would slip her a treat on my lap so no one would notice. I think  
487 she might have snatched a few licks off my plate when no one was looking but  
488 who knows! Who cares anyway? Dog mouths are very clean, I am sure you  
489 have heard that. They don't let Poochie in the dining room any more so I really  
490 miss her when I eat. At least I still get to see her in the halls and in my room. I  
491 also miss her a lot when Aubrey Mills goes on vacation. She takes Poochie with  
492 her when she will be out for more than a day.

493 Some of the more picky residents in the home did not like having Poochie  
494 in the dining room. I remember Bea Toven lodging complaints to Chris the  
495 cook. One day when I was sitting in the dining room, I heard Bea tell Chris that  
496 she did not like the dog being in the home at all and wanted her out.  
497 Fortunately Bea was only at the home for about two weeks.

498 Yes, sometimes I have seen Poochie make a little "present" for the staff. It  
499 happened in the dining room and hallways. It was never very much and I doubt  
500 the staff cared much – I mean they are nurses and custodians in a nursing  
501 home – I am sure they are trained to clean everything. It is better now that  
502 Poochie is older. When Poochie was a puppy, I saw her enter the kitchen and  
503 leave the kitchen, but I never noticed whether she left any "presents" there.

504 Every time she went in the kitchen, I did see Chris the cook shove her back  
505 into the dining room.

506 Chris did not like little Poochie. He/She was downright mean to that  
507 innocent little thing. He/She would give Poochie a little kick with her foot when  
508 he/she removed Poochie from the kitchen. I thought that was not necessary. I  
509 remember one time in particular. I was in the corner of the dining room near  
510 the plant. Bea was sitting at the table by the door to the kitchen. I saw Chris  
511 throw the little dog out the kitchen door. It looked like Poochie was dropped  
512 from a couple feet above the floor. Bea Toven told Chris that he/she should be  
513 nicer to that animal. Chris immediately got very angry at Bea. Chris started  
514 yelling obscenities such as calling Poochie a “poop monster” and a “pesty rat.” I  
515 saw Bea start to cry when Chris raised his/her voice. Bea is on a medication  
516 that affects her emotions, and she gets upset very easily. Chris was so  
517 infuriated about little Poochie that he/she managed to cause Bea to have an  
518 emotional episode. I decided to report this incident to Aubrey because Bea had  
519 become so upset. I was worried about her health. I went to Aubrey’s office and  
520 told him/her everything. Aubrey assured me that he/she would talk to Chris  
521 about his/her demeanor and warn him/her not to talk to residents unless it is  
522 for a food-service-related issue. Aubrey did not ask me any questions about the  
523 altercation between Chris and Bea.

524 I was there the night the Blues won the Stanley Cup. I was sitting at a  
525 table with Mr. Stillman. Chris surprised all of us with his/her support for the

526 Bruins – wearing a Bruins t-shirt. Doesn’t he/she know he/she shouldn’t do  
527 that? There was only about one minute left in the game and Mr. Stillman  
528 yelled, “The Bruins are going down!” Then Chris came over to our table and  
529 gave Mr. Stillman an earful saying, “The Blues play garage hockey and they are  
530 a dirty team of lunkheads! The Bruins are going to pull off a win, just you see!”  
531 Mr. Stillman’s face turned really red, he leaned over and yelled to Chris that  
532 he/she was “out to lunch” and that his/her grandpa “needed to have a  
533 lobotomy.” Then Mr. Stillman immediately passed out and could not be  
534 awakened. He was taken off in an ambulance. It is too bad he did not get to see  
535 the Blues finally win the Stanley Cup. Mr. Stillman has not returned. That  
536 cook must have killed him!

537 I love living at OGER. It is expensive to live at such a nice facility. About  
538 10 years ago, I gifted all of my money to my children, and kept enough to  
539 survive 10 years in this nursing home. Unfortunately, I have run out of money.  
540 Last month, I wrote a bad check to OGER. It bounced immediately and I told  
541 Aubrey I was sorry but I just don’t have the funds to pay any longer.  
542 Fortunately he/she did not report me to the police, or I might have been in a  
543 lot of trouble. I asked my kids to pitch in so that I can stay there. I think they  
544 used most of the money I gave them, and now they are saying they will be able  
545 to pay starting in two months. I am hoping Aubrey will keep letting me live here  
546 until my kids are able to start paying again. I had a conversation with Aubrey  
547 in July 2019 about the problem, and I told him/her that I thought my kids

548 were going to start paying the monthly fees by November. He/She seemed  
549 upset at first, but then said he/she wasn't worried about the money because  
550 the nursing home was financially secure. Aubrey did mention that hopefully  
551 Chris wouldn't get a windfall at the October trial because that might affect the  
552 quality of care that OGER is able to afford for its residents. So I am really glad  
553 I get to testify today and help OGER.

## **STATEMENT OF DR. TAYLOR VERSE**

554        I am a physician at City Hospital in St. Louis, MO. I received my  
555 undergraduate degree in pre-med and history from the University of Missouri,  
556 and I completed medical school at St. Louis University School of Medicine  
557 where I received my M.D. degree. I did my residency at Saint Louis University  
558 School of Medicine. I am board certified in Internal Medicine, having completed  
559 the testing required to remain a member of the American Board of Internal  
560 Medicine for the last 20 years. I have a regular medical practice on Watson  
561 Road in St. Louis County.

562        Most of my patients are elderly, as I have a special interest in geriatric  
563 medicine. I am a member of AGS, or the American Geriatrics Society. I am on  
564 the committee for Geroscience. Members of this committee share a common  
565 interest in efforts to leverage our understanding of basic aging processes  
566 towards the discovery, validation and implementation of interventions to help  
567 promote health, function, and independence in late-life. I have spoken at three  
568 of the monthly meetings in the last 10 years. One of my speeches involved the  
569 benefits of pets in the promotion of independence in late-life.

570        Nursing homes have changed rather significantly since my medical  
571 school days. Nursing homes felt more like a hospital than a home: a sterile  
572 environment focused on meeting medical needs of the residents, with little to  
573 no focus on quality of life. Now nursing homes are starting to focus on the  
574 “home” part of that term. Many allow residents to remove draperies and replace  
575 with more aesthetically pleasing ones, and provide their own furniture. Some,

576 the better ones, allow visits from organizations that raise and train pets for the  
577 purpose of visiting the elderly. It is commonplace to find a nursing home with a  
578 resident pet these days, but that comes with a whole lot of responsibility.  
579 Nursing homes need to balance the benefits of the pet with the risk of having a  
580 tripping hazard, maintaining sanitation standards, ensuring updated shots,  
581 and preventing pet mischief that can result in sub-par medical care. It is clear  
582 to me that the Missouri Department of Human and Senior Services is  
583 committed to the public policy of having a safe pet presence in long term  
584 facilities. I have reviewed all of the statements of all the witnesses in this case  
585 and it is my opinion that OGEP established policies and practices, during  
586 Chris's employment, that were sufficiently safe in terms of sanitation. The  
587 custodians cleaned up after Poochie and the rule was that the cook or kitchen  
588 manager had to keep Poochie out of the kitchen. I cannot find any examples of  
589 a time when any resident's health was actually compromised. Of course, it  
590 would have been a good idea to remove Poochie from Jack/Jackie Beehive's lap  
591 during his/her meal for a variety of reasons, Poochie's presence does not  
592 appear to have hurt anyone. Plus, I sometimes eat pizza while watching hockey  
593 with my Labrador retriever on my lap and I'm fine.

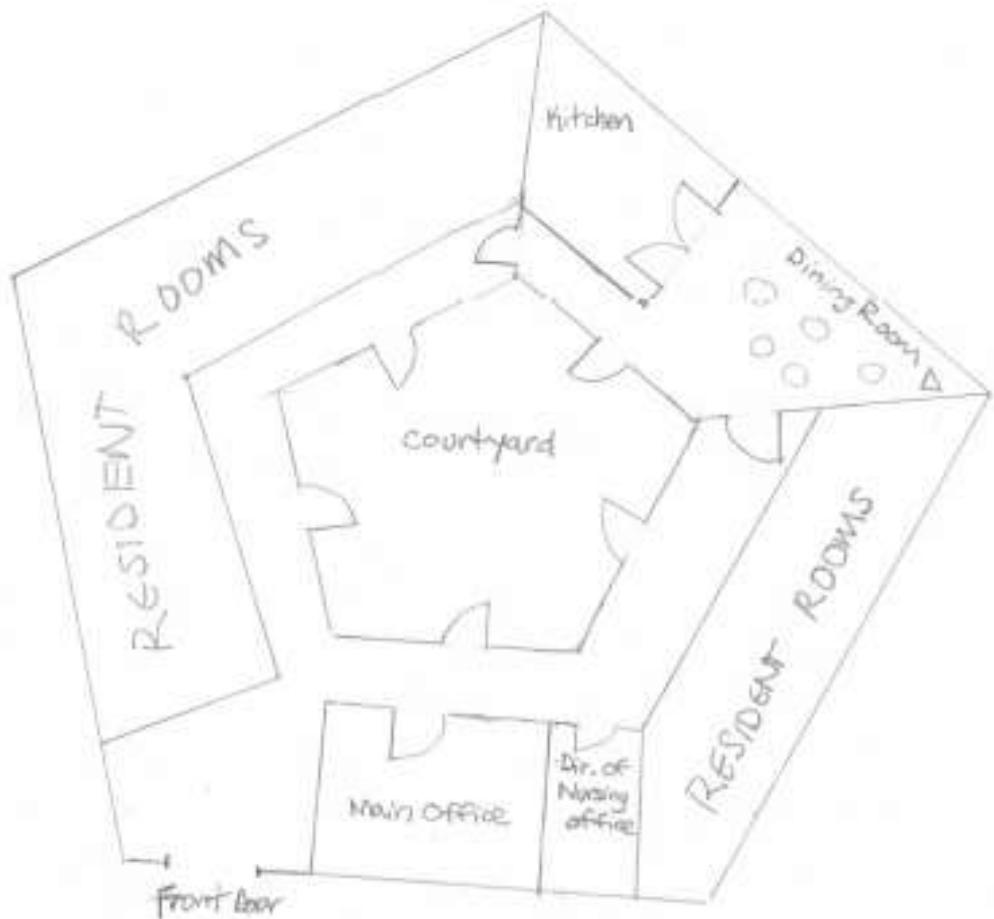
594 In addition to my own medical practice, I work in the emergency room at  
595 City Hospital one night per week. As luck would have it, I was scheduled to  
596 work in the emergency room the night of the final Blues Championship game. I  
597 recall an elderly man who was rushed to our ER shortly after the Blues game  
598 ended. I recall the time because all of the staff, myself included, were playing

599 "Gloria" on our phones and dancing around in the breakroom. One of the staff  
600 even poured a cold Gatorade on my head right as I was receiving the call to  
601 evaluate the patient. The patient's name was Stillman. I rushed out of the  
602 breakroom to evaluate the patient. He was unconscious when he arrived and  
603 he had no pulse. The Gatorade was dripping down my face while I tried to  
604 observe him. The respiratory therapist standing by grabbed the defibrillator,  
605 assessed him and shocked him. Rhythm stabilized and Mr. Stillman had some  
606 confusion but was mumbling something. I'm pretty sure it sounded like he was  
607 trying to say "kill the cook," but it might have been "kiss the cook." Then it  
608 sounded like he said "want the cup." Moments later, his blood pressure  
609 dropped and he was started on medications, but it was not sufficient and he  
610 fell back into a state of unconsciousness. He remains unconscious to date.

611 I knew Mr. Stillman because he was my patient at my private practice.  
612 Mr. Stillman had a tendency to become easily agitated or excited, and when he  
613 became agitated, his blood pressure would skyrocket. Research has shown that  
614 in the hour after an angry outburst or excitement, even a person with normal  
615 blood pressure has a slightly higher risk of having chest pain (angina), a heart  
616 attack, a stroke, or a risky heart rhythm. This is because anger causes an  
617 outpouring of stress hormones like adrenaline, which makes a patient's heart  
618 beat faster and blood pressure rise. Takutsubo syndrome is a form of sudden  
619 heart failure that can be caused by severe stress. It is my opinion that Mr.  
620 Stillman suffered from this syndrome, which caused a heart attack. You asked  
621 me if I think it was from the stress of the Blues winning the cup or from his

- 622 conversation with the cook? I cannot say either way. I can just say that  
623 something made him either angry, agitated or excited that led to a heart attack.

# DIAGRAM OF OGER



○ = Table/chair

▽ = Door

△ = Plant

**EXHIBIT 1**

Oak Gardens Earth Residence agrees to purchase “Poochie,” a Maltipoo puppy, born March 3, 2019, for \$1.00 from Aubrey Mills.

Seller Signature:

Aubrey Mills

Buyer Signature:

Aubrey Mills

**Job Description**  
**Cook**  
**Oak Gardens Earth Residence**

Oak Gardens Earth Residence is dedicated to the provision of quality health care and living accommodations for its residents. We believe that the foundation of Long Term Care is to serve our clients through a progressive nursing approach in a home-like setting, with the emphasis on individualized care.

**JOB RESPONSIBILITIES**

General responsibilities include but are not limited to:

- follow menus and recipes set by Kitchen Manager
- prepare all meals for residents
- maintain kitchen cleanliness
- read and follow diets and textures
- fill in for Kitchen Manager when he/she is not at work
- follow state guidelines and report any issues to Kitchen Manager or other supervisor
- monitor and maintain temperature control, portion control

**QUALIFICATIONS**

1-2 years prior experience in food service.

Job Type: Full-time, hourly pay, \$10 per hour.

Hours: 12:15-6:00 p.m., Every day but Monday, Tuesdays start at 6:00 p.m. and finish at 6:00 p.m.  
30 minutes for lunch.

Experience:

- Dietary Cook: 1 year (Preferred)
- Cooking: 1 year (Preferred)

**Job Description**  
**Kitchen Manager**  
**Oak Gardens Earth Residence**

Oak Gardens Earth Residence is dedicated to the provision of quality health care and living accommodations for its residents. We believe that the foundation of Long Term Care is to serve our clients through a progressive nursing approach in a home-like setting, with the emphasis on individualized care.

**JOB RESPONSIBILITIES**

General responsibilities include but are not limited to:

- establish menus and recipes
- prepare all meals for residents when cook is not there
- maintain kitchen cleanliness and manage kitchen
- read and follow diets and textures
- place orders for food and ingredient deliveries as needed
- follow state guidelines and report any issues to Director of Nursing
- monitor and maintain temperature control, portion control

**QUALIFICATIONS**

1-2 years prior experience in food service.

Job Type: Full-Time, salary

Hours: 6:00 a.m to 12:15, Every Day but Tuesday, Mondays work until 6:15 p.m., 30 minutes for lunch.

Experience:

- Dietary Cook: 1 year (Preferred)
- Cooking: 1 year (Preferred)
- Associate's Degree or some post-high school business education (Preferred)



**EXHIBIT 5**



**EXHIBIT 6**



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# Rules of Department of Health and Senior Services

## Division 30—Division of Regulation and Licensure Chapter 87—Sanitation Requirements for Long-Term Care Facilities

Title	Page
<b>19 CSR 30-87.010</b> Definitions .....	3
<b>19 CSR 30-87.020</b> General Sanitation Requirements for New and Existing Long-Term Care Facilities .....	3
<b>19 CSR 30-87.030</b> Sanitation Requirements for Food Service.....	6

**EXHIBIT 7**



shellfish or to fish in aquariums. Patrol dogs accompanying security or police officers, or service or guide dogs assisting residents or visitors shall be permitted in dining areas. Other dogs and cats may be permitted in the dining area if food service sanitation is not compromised and residents do not object. III

(10) Birds within enclosed aviaries may be in the dining area with the following stipulations:

(A) The facility ensures the aviary is cleaned at least twice a week and more often as needed to maintain a clean environment; III

(B) The facility provides proper hand washing instructions to those staff having access to the birds and monitors to ensure compliance; and III

(C) The facility contacts the local or county Health Department and informs that department that an aviary has been installed. III

(11) Food shall be in sound condition, free from spoilage, filth or other contamination and shall be safe for human consumption. Food shall be obtained from sources that comply with all laws relating to food and food labeling. The use of food in hermetically sealed containers that was not prepared in a food processing establishment is prohibited. Nothing in this section shall prohibit facilities from using fresh vegetables or fruits purchased from farmers' markets or obtained from the facility garden or residents' family gardens. I/II

(12) Fluid milk and fluid milk products used or served shall be pasteurized and shall meet the Grade A quality standards as established by law. Dry milk and dry milk products shall be made from pasteurized milk products. I/II

(13) At all times, including while being stored, prepared, displayed, served or transported to or from the facility, food shall be protected from potential contamination, including dust, insects, rodents, unclean equipment and utensils, unnecessary handling, coughs and sneezes, flooding, drainage and overhead leakage or overhead drippage from condensation. The temperature of potentially hazardous food shall be forty-five degrees Fahrenheit (45°F) or below or one hundred forty degrees Fahrenheit (140°F) or above at all times, except as otherwise provided in this section. In the event of a fire, flood, power outage or similar event that might result in the contamination of food, or that might prevent potentially hazardous food from being held at required temperatures, the

person in charge shall immediately contact the Department of Health and Senior Services (the department). Upon receiving notice of this occurrence, the department shall take whatever action that it deems necessary to protect the residents. II/III

(14) Food, whether raw or prepared, if removed from the container or package in which it was obtained, shall be stored in a clean covered container except during necessary periods of preparation or service. Container covers shall be impervious and nonabsorbent except that linens or napkins may be used for lining or covering bread or roll containers. III

(15) Containers of food shall be stored above the floor in a manner that protects the food from splash and other contamination and that permits easy cleaning of the storage area, except that metal pressurized beverage containers, and cased food packaged in cans, glass or other waterproof containers need not be elevated when the food container is not exposed to floor moisture; and containers may be stored on dollies, racks or pallets, provided the equipment is easily movable. III

(16) Food and containers of food shall be stored in a manner which protect it from contamination. The storage of food in toilet rooms or vestibules is prohibited. II/III

(17) Unless its identity is unmistakable, bulk food, such as cooking oil, syrup, salt, sugar or flour not stored in the product container or package in which it was obtained, shall be stored in a container identifying the food by common name. III

(18) Enough conveniently located refrigeration facilities or effectively insulated facilities shall be provided to assure the maintenance of potentially hazardous food at required temperatures during storage. Each mechanically refrigerated facility storing potentially hazardous food shall be provided with a numerically scaled indicating thermometer, accurate to plus or minus three degrees Fahrenheit ( $\pm 3^{\circ}\text{F}$ ), located to measure the air temperature in the warmest part of the refrigerated facility and located to be easily readable. Recording thermometers, accurate to plus or minus three degrees Fahrenheit ( $\pm 3^{\circ}\text{F}$ ), may be used in lieu of indicating thermometers. Where it is impractical to install thermometers on equipment such as bains-maries, steam tables, steam kettles, heat lamps, calrod units or insulated food transport carriers, a product thermometer must be available and used to check internal food temperature. III

(19) Potentially hazardous food requiring refrigeration after preparation shall be rapidly cooled to an internal temperature of forty-five degrees Fahrenheit (45°F) or below, utilizing such methods as shallow pans, agita-

tion, quick chilling or water circulation external to the food container so that the cooling period shall not exceed four (4) hours. Potentially hazardous food to be transported shall be prechilled and held at a temperature of forty-five degrees Fahrenheit (45°F) or below. I/II

(20) Frozen food shall be kept frozen and should be stored at a temperature of zero degrees Fahrenheit (0°F) or below. III

(21) Ice intended for human consumption shall not be used as a medium for cooling stored food, food containers or food utensils, except that such ice may be used for cooling tubes conveying beverages or beverage ingredients to a dispenser head. Ice used for cooling stored food and food containers shall not be used for human consumption. III

(22) Tubing conveying beverages or beverage ingredients to dispensing heads may be in contact with stored ice provided that, the tubing is fabricated from safe materials, is grommeted at entry and exit points to preclude moisture (condensation) from entering the ice machine or the ice storage bin and is kept clean. Drainage or drainage tubes from dispensing units shall not pass through the ice machine or the ice storage bin. III

(23) Enough conveniently located hot food storage facilities shall be provided to assure the maintenance of food at the required temperature during storage. Each hot food facility storing potentially hazardous food shall be provided with a numerically scaled indicating thermometer, accurate to plus or minus three degrees Fahrenheit ( $\pm 3^{\circ}\text{F}$ ), located to measure the air temperature in the coolest part of the hot food storage facility and located to be easily readable. Recording thermometers, accurate to plus or minus three degrees Fahrenheit ( $\pm 3^{\circ}\text{F}$ ), may be used in lieu of indicating thermometers. Where it is impractical to install thermometers on equipment such as bains-maries, steam tables, steam kettles, heat lamps, calrod units or insulated food transport carriers, a product thermometer must be available and used to check internal food temperature. III

(24) The internal temperature of potentially hazardous foods requiring hot storage shall be one hundred forty degrees Fahrenheit (140°F) or above, except during periods of preparation. Potentially hazardous food to be transported shall be held at a temperature of one hundred forty degrees Fahrenheit (140°F) or above. I/II



(25) Raw fruits and vegetables shall be thoroughly washed with potable water before being cooked or served. II/III

(26) Potentially hazardous foods requiring cooking shall be cooked to heat all parts of the food to a temperature of at least one hundred forty degrees Fahrenheit (140°F), except that poultry, poultry stuffings, stuffed meats and stuffings containing meat shall be cooked to heat all parts of the food to at least one hundred sixty-five degrees Fahrenheit (165°F) with no interruption of the cooking process. Pork and food containing pork shall be cooked to heat all parts of the food to at least one hundred fifty degrees Fahrenheit (150°F); rare roast beef shall be cooked to an internal temperature of at least one hundred thirty degrees Fahrenheit (130°F); and rare beef steak shall be cooked to a temperature of one hundred thirty degrees Fahrenheit (130°F) unless otherwise ordered by the resident. II/III

(27) Liquid, frozen, dry eggs and egg products shall be used only for cooking and baking purposes. II/III

(28) Only clean whole eggs, with shell intact and without cracks or checks, or pasteurized liquid or frozen, or dry eggs or pasteurized dry egg products shall be used, except that hard-boiled, peeled eggs, commercially prepared and packaged, may be used. II

(29) Potentially hazardous foods that have been cooked and then refrigerated shall be reheated rapidly to one hundred sixty-five degrees Fahrenheit (165°F) or higher throughout before being served or before being placed in a hot food-storage facility. II

(30) Steam tables, bains-maries, warmers and similar hot food-holding facilities are prohibited for the rapid reheating of potentially hazardous foods. II/III

(31) Nondairy creaming, whitening or whipping agents may be reconstituted on the premises only when they will be stored in sanitized, covered containers not exceeding one (1) gallon in capacity and cooled to forty-five degrees Fahrenheit (45°F) or below within four (4) hours after preparation. II/III

(32) Metal stem-type numerically scaled indicating thermometers, accurate to plus or minus two degrees Fahrenheit ( $\pm 2^{\circ}\text{F}$ ), shall be provided and used to assure the attainment and maintenance of proper internal cooking, holding or refrigeration temperatures of all potentially hazardous foods. II/III

(33) Potentially hazardous foods shall be thawed in refrigerated units at a temperature not to exceed forty-five degrees Fahrenheit (45°F); or under potable running water at a temperature of seventy degrees Fahrenheit (70°F) or below, with sufficient water velocity to agitate and float off loose food particles into the overflow; or in a microwave oven only when the food will be immediately transferred to conventional cooking facilities as part of a continuous cooking process or when the entire, uninterrupted cooking process takes place in the microwave oven; or as part of the conventional cooking process. II/III

(34) At time of service to the resident, food shall be at least one hundred twenty degrees Fahrenheit (120°F) or forty-five degrees Fahrenheit (45°F) or below. II/III

(35) Milk and milk products for drinking purposes shall be provided to the resident in an unopened, commercially filled package not exceeding one (1) pint in capacity, or shall be drawn from a commercially filled container stored in a mechanically refrigerated bulk milk dispenser, or shall be poured directly into glass(es) to be used by the resident(s) from a commercially filled gallon or half-gallon container provided the container is completely emptied in the process and then discarded, or if a portion of milk remains, that no milk may be returned to that container and is immediately refrigerated. Where a bulk dispenser for milk and milk products is not available and portions of less than one-half (1/2) pint are required for mixed drinks, cereal or dessert service, milk and milk products may be poured from a commercially filled container of not more than one (1) gallon capacity and no milk may be returned to that container. II/III

(36) Reconstituted dry milk and dry milk products shall not be used for drinking purposes but may be used in instant desserts and whipped products, or for cooking and baking purposes. III

(37) Cream or half-and-half or nondairy creaming agents or whitening agents shall be provided in an individual service container, protected pour-type pitcher or drawn from a refrigerated dispenser designed for such service. III

(38) Condiments, seasoning and dressings for self-service use shall be provided in individual packages, from dispensers or from protected containers. III

(39) Condiments provided for table or counter service shall be individually portioned, except that catsup and other sauces may be served in the original container or pour-type dispenser. Sugar for consumer shall be provided in individual packages or in pour-type dispensers. III

(40) Ice shall be dispensed only with scoops, tongs or other ice-dispensing utensils or through automatic self-service, ice-dispensing equipment. Ice-dispensing utensils shall be stored on a clean surface or in the ice with the dispensing utensil's handle extended out of the ice. Between uses, ice transfer receptacles shall be stored in a way that protects them from contamination. Ice storage bins shall be drained through an air gap. III

(41) To avoid unnecessary manual contact with food, suitable preparation and dispensing utensils shall be used by employees or provided to consumers who serve themselves. Between uses, during service, dispensing utensils shall be stored in a manner which would prevent contamination. III

(42) Once served to a resident, portions of leftover food shall not be served again except that packaged food, other than potentially hazardous food, that is still packaged and is still in sound condition may be re-served. III

(43) Food on display shall be protected from resident contamination by the use of packaging or by the use of easily cleanable counter, serving line or salad bar protector devices, display cases or by other effective means. Enough hot or cold food facilities shall be available to maintain the required temperature of potentially hazardous foods on display. III

(44) Equipment and utensils shall be constructed and repaired with safe materials including finishing materials; shall be corrosion-resistant and nonabsorbent; and shall be smooth, easily cleanable and durable under conditions of normal use. Single-service articles shall be made from clean, sanitary, safe materials. Equipment utensils and single-service articles shall not impart odors, color or taste nor contribute to the contamination of food. III

(45) Hard maple or equivalently nonabsorbent material may be used for cutting blocks, cutting boards, salad bowls and baker's tables. The use of wood as a food-contact surface under other circumstances is prohibited. III



(46) Safe plastic or safe rubber or safe rubber-like materials that are resistant under normal conditions of use to scratching, scoring, decomposition, crazing, chipping and distortion, that are of sufficient weight and thickness to permit cleaning and sanitizing by normal dishwashing methods, and which meet the general requirements of this rule, are permitted for repeated use. III

(47) Re-use of single service articles is prohibited. III

(48) Food-contact surfaces shall be easily cleanable, smooth and free of breaks, open seams, cracks, chips, pits and similar imperfections and free of difficult-to-clean internal corners and crevices. Cast iron may be used as a food-contact surface only if the surface is heated, such as in grills, griddle tops and skillets. Threads shall be designed to facilitate cleaning; ordinary "V" type threads are prohibited in food-contact surfaces, except that in equipment such as ice makers or hot oil-cooking equipment and hot oil-filtering systems, these threads shall be minimized. III

(49) Equipment containing bearings and gears requiring unsafe lubricants shall be designed and constructed so that the lubricant cannot leak, drip or be forced into food or onto food-contact surfaces. Only safe lubricants shall be used on equipment designed to receive lubrication of bearings and gears on or within food-contact surfaces. III

(50) All sinks and drain boards shall be self-draining. III

(51) Unless designed for in-place cleaning, food-contact surfaces shall be accessible for cleaning and inspection without being disassembled; or by disassembling without the use of tools; or by easy disassembling with the use of only simple tools such as a mallet, a screwdriver or an open-end wrench kept available near the equipment. III

(52) Equipment intended for in-place cleaning shall be so designed and fabricated that cleaning and sanitizing solutions can be circulated throughout a fixed system using an effective cleaning and sanitizing regimen; cleaning and sanitizing solutions will contact all interior food-contact surfaces; and the system is self-draining or capable of being completely evacuated. III

(53) Fixed equipment designed and fabricated to be cleaned and sanitized by pressure spray methods shall have sealed electrical wiring, switches and connections. III

(54) Surfaces of equipment not intended for contact with food, but which are exposed to splash or food debris or which otherwise require frequent cleaning, shall be designed and fabricated to be smooth, washable, free of unnecessary ledges, projections or crevices, and readily accessible for cleaning, and shall be of such material and in a repair as to be easily maintained in a clean and sanitary condition. III

(55) Ventilation hoods and devices shall be designed to prevent grease or condensation from collecting on walls and ceilings and from dripping into food or onto food-contact surfaces. Filters or other grease-extracting equipment shall be readily removable for cleaning and replacement if not designed to be cleaned in place. III

(56) Equipment that was installed in an existing licensed facility and that does not fully meet all of the design and fabrication requirements shall be deemed acceptable in that establishment if it is in good repair, capable of being maintained in a sanitary condition and the food-contact surfaces are nontoxic. Replacement equipment and new equipment shall meet the requirements for design and fabrication. III

(57) Equipment that is placed on tables or counters, unless portable, shall be sealed to the table or counter or elevated on legs to provide clearance between the table or counter and equipment and shall be installed to facilitate the cleaning of the equipment adjacent areas. Equipment is portable if it is small and light enough to be moved easily by one (1) person; and it has no utility connection, or has a utility connection that disconnects quickly, or has a flexible utility connection line of sufficient length to permit the equipment to be moved for easy cleaning. III

(58) Floor-mounted equipment, unless readily movable, shall be sealed to the floor; or installed on a raised platform of concrete or other smooth masonry in a way that meets all of the requirements for sealing or floor clearance; or elevated on legs to provide clearance between the floor and equipment, except that vertically-mounted floor mixers may be elevated to provide at least a four inch (4")-clearance between the floor and equipment if no part of the floor under the mixer is more than six inches (6") from the cleaning access. Equipment is easily movable if it is mounted on wheels or casters; and it has no utility connection or has a utility connection that disconnects quickly, or has a flexible utility

line of sufficient length to permit the equipment to be moved for easy cleaning. III

(59) Unless sufficient space is provided for easy cleaning between, behind and above each unit of fixed equipment, the space between it and adjoining equipment units and adjacent walls or ceilings shall not be more than one-thirty-second inch (1/32"); or if exposed to seepage, the equipment shall be sealed to the adjoining equipment or adjacent walls or ceilings. III

(60) Aisles and working spaces between units of equipment and walls shall be unobstructed and of sufficient width to permit employees to perform their duties readily without contamination of food or food-contact surfaces by clothing or personal contact. All easily movable storage equipment such as pallets, racks and dollies shall be positioned to provide accessibility to working areas. III

(61) Tableware shall be washed, rinsed and sanitized after each use. II

(62) Kitchenware and food-contact surfaces of equipment shall be washed, rinsed and sanitized after each use and following any interruption of operations during which time contamination may have occurred. Water pitchers which are for individual resident use shall be sanitized daily. II/III

(63) Where equipment and utensils are used for the preparation of potentially hazardous foods on a continuous or production-line basis, utensils and the food-contact surfaces of equipment shall be washed, rinsed and sanitized at intervals throughout the day on a schedule based on food temperature, type of food and amount of food particle accumulation. III

(64) The food-contact surfaces of grills, griddles and similar cooking devices and the cavities and door seals of microwave ovens shall be cleaned at least once a day, except that this shall not apply to hot oil-cooking equipment and hot oil-filtering systems. The food-contact surfaces of all cooking equipment shall be kept free of encrusted grease deposits and other accumulated soil. III

(65) Nonfood-contact surfaces of equipment shall be cleaned as often as is necessary to keep the equipment free of accumulation of dust, dirt, food particles and other debris. III

(66) Cloths used for wiping food spills on tableware, such as plates or bowls being



served to the consumer, shall be clean, dry and used for no other purpose. III

(67) Moist cloths or sponges used for wiping food spills on kitchenware and food-contact surfaces of equipment shall be clean and rinsed frequently in one (1) of the permitted sanitizing solutions and used for no other purpose. These cloths and sponges shall be stored in the sanitizing solution between uses. Moist cloths or sponges used for cleaning nonfood-contact surfaces of equipment such as counters, dining table tops and shelves shall be clean and rinsed and used for no other purpose. These cloths and sponges shall be stored in the sanitizing solution between uses. III

(68) For manual washing, rinsing and sanitizing of utensils and equipment, a sink with not fewer than three (3) compartments shall be provided and used. Sink compartments shall be large enough to permit the accommodation of the equipment and utensils and each compartment of the sink shall be supplied with hot and cold potable running water, except that in an existing licensed facility, the use of a two (2)-vat sink and a supplementary portable container to be used for sanitization is acceptable. Fixed equipment and utensils and equipment too large to be cleaned in sink compartment shall be washed manually or cleaned through pressure spray methods. III

(69) Drain boards or easily movable dish tables of adequate size shall be provided for proper handling of soiled utensils prior to washing and for cleaned utensils following sanitizing and shall be located so as not to interfere with the proper use of the dishwashing facilities. III

(70) Equipment and utensils shall be preflushed or prescraped and, when necessary, presoaked to remove gross food particles and soil. III

(71) Except for fixed equipment and utensils too large to be cleaned in sink compartments, manual washing, rinsing and sanitizing shall be conducted in the following sequence: sinks shall be cleaned prior to use; equipment and utensils shall be thoroughly washed in the first compartment with hot detergent solution that is kept clean; equipment and utensils shall be rinsed free of detergent and abrasives with clean water in the second compartment; and equipment and utensils shall be sanitized in the third compartment. III

(72) The food-contact surfaces of all equipment and utensils shall be sanitized by

immersion for at least one-half (1/2) minute in clean, hot water at a temperature of at least one hundred seventy degrees Fahrenheit (170°F); or immersion for at least one (1) minute in a clean solution containing at least fifty (50) parts per million of available chlorine as a hypochlorite and at a temperature of at least seventy-five degrees Fahrenheit (75°F); or immersion for at least one (1) minute in a clean solution containing at least twelve and one-half (12.5) parts per million of available iodine and having a pH not higher than five (5.0) and at a temperature of at least seventy-five degrees Fahrenheit (75°F); or immersion in a clean solution containing any other chemical sanitizing agent allowed under 21 CFR 178.1010 of the (Revised 2005), *Food and Drug Code* of the United States Food and Drug Administration, Department of Health and Human Services, 200 Independence Avenue SW, Washington, DC 20201, Telephone: 202-619-0257, Toll Free: 1-877-696-6775, that will provide the equivalent bactericidal effect of a solution containing at least fifty (50) parts per million of available chlorine as a hypochlorite at a temperature of at least seventy-five degrees Fahrenheit (75°F); or treatment with steam, free from materials or additives other than those specified in 21 CFR 173.310 of the (Revised 2005), *Food and Drug Code* of the United States Food and Drug Administration, Department of Health and Human Services, in the case of equipment too large to sanitize by immersion, but in which steam can be confined; or rinsing, spraying or swabbing with a chemical sanitizing solution of at least twice the strength required for that particular sanitizing solution in the case of equipment too large to sanitize by immersion. (21 CFR 178.1010 (Revised 2005) and 21 CFR 173.310 (Revised 2005) are incorporated by reference in this rule and available by Internet at: [www.access.gpo.gov](http://www.access.gpo.gov). This rule does not incorporate any subsequent amendments or additions.) II/III

(73) When hot water is used for sanitizing, as allowed by section (72) of this rule, the following facilities shall be provided and used: an integral heating device or fixture installed in, on or under the sanitizing compartment of the sink capable of maintaining the water at a temperature of at least one hundred seventy degrees Fahrenheit (170°F); and a numerically scaled indicating thermometer, accurate to plus or minus three degrees Fahrenheit ( $\pm 3^{\circ}\text{F}$ ), convenient to the sink for frequent checks of water temperature; and dish baskets of such size and design to permit complete immersion of the tableware, kitchenware and equipment in the hot water. II/III

(74) When chemicals are used for sanitization, they shall not have concentrations higher than the maximum permitted under 21 CFR 178.1010 of the (Revised 2005), *Food and Drug Code* of the United States Food and Drug Administration, Department of Health and Human Services, and a test kit or other device that accurately measures the parts per million concentration of the solution shall be provided and used. III

(75) Cleaning and sanitizing may be done by spray-type or immersion dishwashing machines or by any other type of machine or device if it is demonstrated that it thoroughly cleans and sanitizes equipment and utensils. In a facility with a licensed capacity of twelve (12) or fewer beds, a home-type dishwashing machine shall be acceptable. If a new machine is purchased, it shall be one with sanitizing capabilities. In a facility licensed for a larger capacity, if a dishwasher is used, it shall meet the requirements in sections (72)–(74) of this rule. Machines and devices shall be properly installed and maintained in good repair; shall be operated in accordance with manufacturers' instructions; and utensils and equipment placed in the machine shall be exposed to all dishwashing cycles. Automatic detergent dispensers, wetting agent dispensers and liquid sanitizer injectors, if any, shall be properly installed and maintained. II/III

(76) The pressure of final rinse water supplied to spray-type dishwashing machines shall not be less than fifteen (15) nor more than twenty-five (25) pounds per square inch measured in the water line immediately adjacent to the final rinse control valve. A one-fourth inch (1/4") IPS valve shall be provided immediately upstream from the final rinse control valve to permit checking the flow pressure of the final rinse water. III

(77) Machine- or water line-mounted numerically scaled indicating thermometers, accurate to plus or minus three degrees Fahrenheit ( $\pm 3^{\circ}\text{F}$ ), shall be provided to indicate the temperature of the water in each tank of the machine and the temperature of the final rinse water as it enters the manifold. III

(78) Rinse water tanks shall be protected by baffles, curtains or other effective means of minimizing the entry of wash water into the rinse water. Conveyors in dishwashing machines shall be accurately timed to assure proper exposure times in wash and rinse cycles in accordance with manufacturers' specifications attached to the machines. III



(79) Drain boards shall be provided and be of adequate size for the proper handling of soiled utensils prior to washing and of cleaned utensils following sanitization and shall be so located and constructed as not to interfere with the proper use of the dishwashing facilities. This does not preclude the use of easily movable dish tables for the storage of soiled utensils or the use of each movable dish table for the storage of clean utensils following sanitization. III

(80) Equipment and utensils shall be flushed or scraped and, when necessary, soaked to remove gross food particles and soil prior to being washed in a dishwashing machine unless a prewash cycle is a part of the dishwashing machine operation. Equipment and utensils shall be placed in racks, trays or baskets, or on conveyors, in a way that food-contact surfaces are exposed to the unobstructed application of detergent wash and clean rinse waters and that permits free draining. III

(81) Machines (single-tank, stationary-rack, door-type machines and spray-type glass washes) using chemicals for sanitization may be used provided that—the temperature of the wash water is not less than one hundred twenty degrees Fahrenheit (120°F), the wash water is kept clean, chemicals added for sanitization purposes are automatically dispensed; utensils and equipment are exposed to the final chemical sanitizing rinse in accordance with manufacturers' specifications for time and concentration, the chemical sanitizing rinse water temperature is not less than seventy-five degrees Fahrenheit (75°F) nor less than the temperature specified by the machine's manufacturer; chemical sanitizers used shall meet the requirements of 21 CFR 178.1010 (Revised 2005), *Food and Drug Code* of the United States Food and Drug Administration, Department of Health and Human Services and a test kit or other device that accurately measures the parts per million concentration of the solution is available and is used. II/III

(82) Machines using hot water for sanitizing may be used provided that they are operated in accordance with the manufacturer's instructions and are maintained in good repair. II/III

(83) All dishwashing machines shall be thoroughly cleaned at least once a day or more often when necessary to maintain them in a satisfactory operating condition. III

(84) After mechanical or manual sanitization, all equipment and utensils shall be air dried.

All utensils shall be stored in a self-draining position. III

(85) Cleaned and sanitized equipment and utensils shall be handled in a way that protects them from contamination. Spoons, knives and forks shall be touched only by their handles. Cups, glasses, bowls, plates and similar items shall be handled without contact with inside surfaces or surfaces that contact the user's mouth. III

(86) Cleaned and sanitized utensils and equipment shall be stored above the floor in a clean, dry location in a way that protects them from contamination by splash, dust and other means. The food-contact surfaces of fixed equipment shall also be protected from contamination. III

(87) Glasses and cups shall be stored inverted. Other stored utensils shall be covered or inverted, wherever practical. Facilities for the storage of knives, forks and spoons shall be designed and used to present the handle to the employee or consumer. Unless tableware is prewrapped, holders for knives, forks and spoons at self-service locations shall protect these articles from contamination and present the handle of the utensil to the consumer. III

(88) Single-service articles shall be stored above the floor in closed cartons or containers which protect them from contamination. III

(89) Single-service articles shall be handled and dispensed in a manner that prevents contamination of surfaces which may come in contact with food or with the mouth of the user. III

(90) Single-service knives, forks and spoons packaged in bulk shall be inserted into holders or be wrapped by a person who has washed his/her hands immediately prior to sorting or wrapping utensils. Unless single-service knives, forks and spoons are prewrapped or prepackaged, holders shall be provided to protect these items from contamination. III

(91) Prohibited Storage Area. The storage of food equipment, utensils or single-service articles in toilet rooms or vestibules is prohibited. III

(92) All storage and installation of equipment under exposed sewage or water line, except for automatic fire protection sprinkler heads, is prohibited. II

(93) Permanently fixed artificial light sources shall be installed to provide at least twenty (20) footcandles of light on all food preparation surfaces and at equipment or utensil-washing work levels. III

(94) Permanently fixed artificial light sources shall be installed to provide, at a distance of thirty inches (30") from the floor, at least twenty (20) footcandles of light in utensil and equipment storage areas and in lavatory and toilet areas, and at least ten (10) footcandles of light in walk-in refrigerating units, dry food-storage areas and in all other areas. This shall also include dining areas during cleaning operations. III

(95) Shielding to protect against broken glass falling onto food shall be provided for all artificial lighting fixtures located over, by or within food storage, preparation, service and display facilities, and facilities where utensils and equipment are cleaned and stored. III

(96) Infrared or other heat lamps shall be protected against breakage by a shield surrounding and extending beyond the bulb, leaving only the face of the bulb exposed. III

(97) Nothing in this rule shall prohibit a facility from hosting a resident/family picnic, carry-in dinner, fish fry or barbecue or allowing a local community or church group to sponsor such activities for residents. Reasonable practices shall be used for maintaining sanitation and appropriate temperatures of food brought to the facility. III

*AUTHORITY: sections 198.009, 198.076 and 198.079, RSMo 2000 and 198.005 and 198.073, RSMo Supp. 2006.\* This rule originally filed as 13 CSR 15-17.030. Original rule filed July 13, 1983, effective Oct. 13, 1983. Emergency amendment filed Aug. 1, 1984, effective Aug. 13, 1984, expired Dec. 10, 1984. Amended: Filed Sept. 12, 1984, effective Dec. 13, 1984. Amended: Filed Aug. 1, 1988, effective Nov. 11, 1988. Moved to 19 CSR 30-87.030, effective Aug. 28, 2001. Amended: Filed Aug. 23, 2006, effective April 30, 2007.*

\*Original authority: 198.005, RSMo 2006; 198.009, RSMo 1979, amended 1993, 1995; 198.073, RSMo 1979, amended 1984, 1992, 1999, 2006; 198.076, RSMo 1979, amended 1984; and 198.079, RSMo 1979.

# On the Road... to Culture Change



*The Center Court Dome*

## Visit to West Vue Nursing and Rehabilitation Center in West Plains

*by Sam Plaster, State Culture Change Coordinator*

In January 2012, I visited West Vue Nursing and Rehabilitation Center in West Plains. West Vue is a 120-resident, Medicare- and Medicaid-certified skilled nursing home operated by the Howell County Baptist Association. Interim Administrator Stacey Smith showed me around. The front lobby area used to house offices, but it has been transformed into a comfortable living room and gift shop for residents.

The center court, where the old institutional nurses' stations once stood, has changed into a beautiful community gathering place, with a waterfall, glider rockers and a large television. The space opens to the chapel and the Mon Café De Choix, meaning "My Café of Choice." The cafe name is quite appropriate, since the cafe is always open to residents, visitors and staff and is one of several dining choices in the home.

*continued on page 5*

**EXHIBIT 8**

## On the Road... continued from page 4



**West Vue Community Pet Turtle**



**West Vue Community Dog – Buddy**

The home has six neighborhoods, each with its own staff and dining area, and a full kitchen in the memory-care unit. The nurses serve only the residents in their neighborhood. Staff and residents take pride in their neighborhoods. They choose the colors for their individual dining alcoves and actually do the painting themselves. Residents may choose how to furnish and decorate their rooms. They may also have personal refrigerators and pets.

The home has many community pets, including a dog, birds, turtles and fish. It also has community computers with Internet access and two special areas for private get-togethers. As is the case with many homes that adopt culture change, this one stays full.

# Are there regulations regarding keeping pets in our home?



*Photo courtesy of Bethesda Dilworth in St. Louis*

**Pets should not be in the kitchen or food preparation areas. Please reference the following state regulations:**

***Rules of Department of Health and Senior Services***

***Division 30 - Division of Regulation and Licensure***

***Chapter 87 - Sanitation Requirements for Long-Term Care Facilities***

***19 CSR 30-87.030 Sanitation Requirements for Food Service***

(9) Live animals, including birds and turtles shall be excluded from the food storage service and preparation areas. This exclusion does not apply to edible fish, crustacea, shellfish or to fish in aquariums. Patrol dogs accompanying security or police officers, or service or guide dogs assisting residents or visitors shall be permitted in dining areas. Other dogs and cats may be permitted in the dining area if food service sanitation is not compromised and residents do not object. III

(10) Birds within enclosed aviaries may be in the dining area with the following stipulations:

(A) The facility ensures the aviary is cleaned at least twice a week and more often as needed to maintain a clean environment; III

(B) The facility provides proper hand washing instructions to those staff having access to the birds and monitors to ensure compliance; and III

(C) The facility contacts the local or county Health Department and informs that department that an aviary has been installed. III

In addition to state regulations, your home may need to comply with any city or county ordinances and requirements.

Federal tags related to pets include: F323 – Accident Hazards; F371 – Sanitary Conditions; and F441 – Infection Control.

# Pets Benefit Aging Adults' Health, MU Researcher Says

*Eldercare facility acknowledges benefits and accommodates residents' pet ownership*

by Jesslyn Chew



Aging adults benefit from relationships with pets, research has shown. Having a pet can lower the stress hormone, cortisol, while increasing oxytocin, prolactin and norepinephrine, hormones related to joy, nurturing and relaxation. Although the health benefits of pet ownership widely are acknowledged, many retirement communities and eldercare facilities do not allow or accommodate residents' pet ownership. Rebecca Johnson, an associate professor at the University of Missouri Sinclair School of Nursing and the College of Veterinary Medicine, says long-term care facilities should follow the lead of others in their industry, such as TigerPlace, in Mid-Missouri, that enables residents to have pets.

Johnson, director of MU's Research Center for Human-Animal Interaction (ReCHAI), says interacting with pets can improve older adults' quality of life.

"Research suggests older adults live longer, healthier, happier lives when they interact with pets on a regular basis," Johnson says. "Pets provide companionship and unconditional love that improves the overall health of aging individuals. Caring for animals gives older adults responsibility and more reasons to get up in the mornings."

Johnson says eldercare facilities should do more to help older adults keep their pets when they move into nursing homes or independent-living communities. The TigerPlace Pet Initiative offers a successful model other eldercare facilities can emulate, she says.

"Health care providers are quick to give walkers and canes to aging individuals to help with their physical needs, but they make it difficult for elderly individuals to keep their pets, key facilitators of emotional health," Johnson says. "TigerPlace recognizes the benefits of pet ownership and makes it easier for residents to own pets by having pet-friendly facilities and in-house services available to help residents care for pets."

TigerPlace's philosophy is to help individuals age in place, a concept that centers on helping residents maintain their independence in homelike settings while having supportive health services available to them as needed. Residents live in one-level apartments with screened-in porches that lead to an outdoor walking path, which facilitates pet ownership.

*continued on page 11*

# Pets Benefit Aging Adults' Health

continued from page 10

Students from MU's veterinary medicine and nursing programs visit TigerPlace three times a week to walk pets and clean litter boxes. Monthly, a retired veterinary medicine faculty member makes preventative care visits to pets. This service enables early detection of problems that pets' own veterinarians can treat. An on-site exam room provides a specialized facility for veterinary care.

Johnson's research specialties include gerontological nursing and human-animal interaction. She has authored scholarly articles, book chapters and most recently a book, "Walk a hound, lose a pound: How you and your dog can lose weight, stay fit and have fun together," about the health benefits of human and animal companionship.



***Rebecca A. Johnson, Director of MU's Research Center for Human-Animal Interaction***

To read this article online and view the video, please visit <http://munews.missouri.edu/expert-comment>.

To learn more about Rebecca Johnson, Ph.D., RN, FAAN, visit <http://nursing.missouri.edu/faculty>.

ReCHAI program information is available online at [www.rechai.missouri.edu/](http://www.rechai.missouri.edu/).

To: [fpelligrini@olivegardens.com](mailto:fpelligrini@olivegardens.com)  
From: [amills@olivegardens.com](mailto:amills@olivegardens.com)  
05/01/2014 5:34 pm

Hey there! I just wanted to bring to your attention that Roberta is saying that some of our docs are committing Medicare fraud by billing for services not rendered. Time for her to go bye-bye.

Let me know if you want me to take care of this first thing in the a.m.

Aubrey

Pre-Trial Motion No. 1

**IN THE CIRCUIT COURT OF SAINT LOUIS CITY  
STATE OF MISSOURI**

CHRIS WHISTLER, )  
                        )  
Plaintiff,         )  
                        )  
vs.                   ) Civil Action No. 2019SMMT  
                        )  
OAK GARDENS EARTH RESIDENCE, )  
                        )  
Defendant.         )

**PLAINTIFF'S MOTION TO STRIKE OR AMEND  
JURY INSTRUCTION NUMBER 2(A)**

Plaintiff Chris Whistler requests an order from this Court striking Jury Instruction Number 2(a) because the instruction is not applicable to the instant case. Plaintiff was a cook and not a manager or supervisor. Thus, no jury will ever conclude that Defendant is entitled to the affirmative defense contained in Jury Instruction Number 2(a). The Missouri Whistleblower Protection Act (MWPA) does not define who is a supervisor or manager, but it is clear that supervisors and managers must have the authority to hire and fire other employees. Plaintiff did not have that authority.

WHEREFORE Plaintiff requests that Jury Instruction Number 2(a) be stricken.

CALL ME FIRST LAW FIRM

By: *Call Me First*

Call Me First  
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St. Louis, Missouri 63101  
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*Attorney for Plaintiff*

**285.575. Citation of law — definitions — at-will employment doctrine codified — protected persons, prohibited discharge — action for damages, when, remedies.** — 1. This section shall be known and may be cited as the "Whistleblower's Protection Act".

2. As used in this section, the following terms shall mean:

- (1) "**Because**" or "**because of**", as it relates to the adverse decision or action, the person's status as a protected person was the motivating factor;
- (2) "**Employer**", an entity that has six or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. "Employer" shall not include the state of Missouri or its agencies, instrumentalities, or political subdivisions, including but not limited to any public institution of higher education, a corporation wholly owned by the state of Missouri, an individual employed by an employer, or corporations and associations owned or operated by religious or sectarian organizations;
- (3) "**Proper authorities**", a governmental or law enforcement agency, an officer of an employee's employer, the employee's supervisor employed by the employer, or the employee's human resources representative employed by the employer;
- (4) "**Protected person**", an employee of an employer who has reported to the proper authorities an unlawful act of his or her employer; an employee of an employer who reports to his or her employer serious misconduct of the employer that violates a clear mandate of public policy as articulated in a constitutional provision, statute, or regulation promulgated under statute; or an employee of an employer who has refused to carry out a directive issued by his or her employer that if completed would be a violation of the law. An employee of an employer is not a protected person if:

- (a) The employee is a supervisory, managerial, or executive employee or an officer of his or her employer and the unlawful act or serious misconduct reported concerns matters upon which the employee is employed to report or provide professional opinion; or
  - (b) The proper authority or person to whom the employee makes his or her report is the person whom the employee claims to have committed the unlawful act or violation of a clear mandate of public policy;
- (5) “**The motivating factor**”, the employee’s protected classification actually played a role in the adverse decision or action and had a determinative influence on the adverse decision or action.

3. This section is intended to codify the existing common law exceptions to the at-will employment doctrine and to limit their future expansion by the courts. This section, in addition to [chapter 213](#) and [chapter 287](#), shall provide the exclusive remedy for any and all claims of unlawful employment practices.
4. It shall be an unlawful employment practice for an employer to discharge an individual defined as a protected person in this section because of that person’s status as a protected person.
5. A protected person aggrieved by a violation of this section shall have a private right of action for actual damages for violations of this section but not for punitive damages. However, if a private right of action for damages exists under another statutory or regulatory scheme, whether under state or federal law, no private right of action shall exist under this statute.
6. Any party to any action initiated under this section may demand a trial by jury.
7. A protected person aggrieved by a violation of this section shall have a private right of action that may be filed in a court of competent jurisdiction. The only remedies available in such an action shall be:

- (1) Back pay;
- (2) Reimbursement of medical bills directly related to a violation of this section; and
- (3) Additionally, if a protected person proves, by clear and convincing evidence, that the conduct of the employer was outrageous because of the employer's evil motive or reckless indifference to the rights of others, then, such person may receive double the amount awarded under subdivisions (1) and (2) of this subsection, as liquidated damages. In applying this subdivision, the provisions of section 510.263 shall be applied as though liquidated damages were punitive damages and as though the amounts referenced in subdivisions (1) and (2) of this subsection were compensatory damages.

8. The court, in addition to the damages set forth in subsection 7 of this section, may award the prevailing party court costs and reasonable attorney fees; except that a prevailing respondent may be awarded reasonable attorney fees only upon a showing that the case was without foundation.

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(L. 2017 S.B. 43)

# Excerpts taken from:

Supreme Court of Missouri, Division No. 2.

STATE

v.

HEMENOVER.

May 16, 1905.

GANTT, J.

This is a prosecution by information, filed by the assistant prosecuting attorney of the St. Louis court of criminal correction, charging the defendant, as manager of the Banner Rubber Company, with having on the 19th of January, 1904, in the city of St. Louis, willfully and unlawfully suffered to be emitted and discharged from the smokestack or chimney of a certain building belonging to said Banner Rubber Company, and situated at the corner of Bittner and Kendrick streets in said city and within the corporate limits of said city, dense smoke into the open air, in violation of "An act to prohibit the discharge into the open air of dense smoke," approved March 21, 1901 (Laws 1901, p. 73).

The defendant contends that, as he was charged as a manager of said corporation, there was no proof that he bore that relation to the said company, and therefore he was entitled to acquittal. Asked what connection Mr. Hemenover had with that company, he stated that no one had the exclusive charge of the place; that Mr. Hemenover had charge of some of the departments. He was asked what was the character of the work he did there, and answered: "Well, I help do a good many things. I do some of the buying, and others do some of it, and I look after the manufacturing department." "Q. What supervision, if any, do you exercise over the engine room? A. About the same as I do over the other departments." On cross-examination he was asked: "You are the president of the factory, are you not? A. A corporation has no such office. Q. Aren't you known as the president? A. By courtesy; yes, sir. Q. You knew the firemen were green? A. Well, only from my observation. I had observed their work." Considering, then, the evidence before us, was there or not sufficient evidence to justify the finding of the court that the defendant was a manager of said corporation within the meaning and spirit of the act? According to the defendant's own evidence, he was the secretary, purchasing agent, and had charge of the manufacturing department of that company. The further evidence shows that he exercised supervision over the engine room in which the dense smoke was generated. The evidence further shows that he was regarded by the other employés and officers of the company as a de facto president. The term "manager" is defined in 19 Am. & Eng. Enc. of Law, 707, as "a person appointed or elected to manage the affairs of another. The term is applied to those officers of a corporation who are authorized to manage its affairs." The

effort of the defendant in this case was to show that he was not the exclusive manager of the said plant, but it does not follow that, because other officers also manage said plant, the defendant, who was a director and secretary of the company, and who, according to his own evidence, had charge of the manufacturing and control of other departments except the office room, was not thereby a manager within the meaning of the act. If so, then all that the company would have to do to escape responsibility for the violation of this act would be to decline to name any one person as manager, and then all the directors and officers would be exempt, though they jointly manage the plant. We think there was evidence from which the court was justified in finding that the defendant was the principal manager, at least of this establishment, and that he acted as such.

The question, therefore, is whether a person who is thus manager de son tort—manager in his own wrong—whether he can protect himself from the liability cast upon a manager under section 27 by saying, 'I am not manager de jure.' I think he cannot. Our conclusion is that the demurrer to the evidence was properly overruled, and that the conviction must stand, and it is accordingly so ordered.

BURGESS, P. J., absent. FOX, J., concurs.

# Excerpts taken from:

Missouri Court of Appeals,

Western District.

CENTRAL COUNTY EMERGENCY 911, Appellant,

v.

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS LOCAL 2665, Respondent.

No. WD 54519.

April 28, 1998.

**ULRICH**, Chief Judge, Presiding Judge.

Central County Emergency 911 ("Central"), a fire and emergency dispatching center, appeals the decision of the circuit court affirming the decision of the State Board of Mediation ("Board") finding that shift supervisors were not "supervisory employees" and affiliated with management and, therefore, were appropriately included in the International Association of Fire Fighters, Local 2655 ("IAFF") bargaining unit with the dispatchers. The decision of the State Board of Mediation is affirmed.

## **II. THE SHIFT SUPERVISORS ARE NOT SUPERVISORY EMPLOYEES**

As its second point on appeal, Central argues that the Board's conclusion that shift supervisors are not supervisory employees is unsupported by competent and substantial evidence. Supervisors are generally defined as those employees who formulate, determine or effectuate policies on behalf of their employer. *Baer v. Civilian Personnel Div.*, 747 S.W.2d 159, 163 (Mo.App.1988). To determine the supervisory status of employees, the Board has set forth seven factors:

(1) The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees; (2) the authority to direct and assign the work force; (3) the number of employees supervised and the number of other persons exercising greater, similar, or lesser authority with respect to the same employees; (4) the level of pay, including an evaluation of whether the supervisor is paid for his skill or for his supervision of employees; (5) whether the supervisor is primarily supervising an activity or is primarily supervising employees; (6) whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employees; (7) the amount of independent judgment and discretion exercised in the supervision of employees.

*Id.*

Central first argues that the Board was bound by the statutory definition of supervisors contained in the National Labor Relations Act. The N.L.R.B. test for determining supervisory status is

set forth at [Title 29, section 152\(11\) of the United States Code. 29 U.S.C. § 152\(11\) \(1994\)](#). Section **152(11)** defines a supervisor as one:

having authority in the interest of the employer, to hire, transfer suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees or responsibility to direct them, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

*Id.*

The decision of the State Board of Mediation is affirmed.

All concur.

NATIONAL LABOR RELATIONS ACT

Also cited NLRA or the Act; 29 U.S.C. §§ 151-169

[Title 29, Chapter 7, Subchapter II, United States Code]

DEFINITIONS

Sec. 2. [§152.] When used in this Act [subchapter]--

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11 of the United States Code [under title 11], or receivers.

...

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Pre-Trial Motion No. 2

**IN THE CIRCUIT COURT OF SAINT LOUIS CITY  
STATE OF MISSOURI**

CHRIS WHISTLER, )  
vs. )  
Plaintiff, )  
OAK GARDENS EARTH RESIDENCE, )  
Defendant. ) Civil Action No. 2019SMMT

**DEFENDANT'S MOTION IN LIMINE TO EXCLUDE TESTIMONY OF  
FRANCIS/FRANCES PELLEGRINI REGARDING PRIOR ALLEGATIONS OF  
WRONGFUL DISCHARGE AGAINST AUBREY MILLS**

Defendant Oak Gardens Earth Residence seeks an order, in limine, to exclude evidence of other, prior complaints by employees of wrongful discharge against Aubrey Mills or her prior employers for engaging in whistleblowing. The testimony of Mr./Ms. Pellegrini does not establish a sufficient similarity in circumstances to be probative of Aubrey Mills' motivation for discharging Plaintiff in this case.

WHEREFORE, Defendant requests an order from this Court excluding testimony relating to prior complaints of wrongful discharge involving Aubrey Mills.

HELP IS ON THE WAY LAW FIRM

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*Attorney for Defendant*

Excerpts taken from:

United States Court of Appeals, Eighth Circuit.

Michael E. McPHEETERS, Appellant, v. BLACK & VEATCH CORPORATION, Appellee.

No. 04-2268.

Decided: November 04, 2005

Before WOLLMAN, HANSEN, and BENTON, Circuit Judges. Gene P. Graham, Jr., argued, Independence, MO (Deborah J. Blakely, on the brief), for appellant. Thomas R. Buchanan, argued, Kansas City, MO (Linda C. McFee, on the brief), for appellee.

Michael E. McPheeters filed this lawsuit against his former employer, Black & Veatch Corporation, alleging age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621-634 (2000), and the Missouri Human Rights Act, Mo. Rev. Stats. § 213.010-.137 (2000). Mr. McPheeters now appeals the judgment entered by the district court <sup>1</sup> following a jury verdict in favor of Black & Veatch. After carefully reviewing the record, we affirm.

I.

Mr. McPheeters presented evidence at trial that he was fired after working 28 years for Black & Veatch Corporation, an engineering/construction firm in Kansas City, Missouri, that specializes in large, coal-fired power plants and municipal water and wastewater plants. In 1988, he was promoted to Director of Photography, a division within the Corporate Communications Department. In the 1990s, he supervised a staff of two other photographers until the two staffers were fired in 1996 in an effort to cut company costs. Mr. McPheeters worked long hours and traveled all around the world to complete his photographic assignments. By all accounts, his photography work was outstanding. Nevertheless, Black & Veatch terminated his employment in 2001, when Mr. McPheeters was 54 years old, after several cost-benefit studies recommended outsourcing the photography work.

Mr. McPheeters attempted to prove that he was fired on the basis of age discrimination. He presented evidence that in August 2000, William Cole, Vice President of Corporate Development, allegedly instructed Laura Luckert, Director of Creative Resources in the Corporate Communications Department and Mr. McPheeters' supervisor at the time, to try to eliminate the "gray hairs" in her department. Specifically, Luckert testified that Cole told her, "You've got a lot of gray hairs in your department, and I think we could save some money in that area. I'd like you to do a cost-analysis on those folks." (Trial Tr. at 329.) She said she was offended by the comment, and when she asked what he meant by "gray hairs," Cole named Bruce Erickson, a videographer, as an

example. "He's been there a long time. He's older. He's at the top of his pay scale. I think we could get what he does for us cheaper." (Trial Tr. at 335.) Luckert said that Cole told her to check into outsourcing the work and also asked her to work on drawing up a freelance photography contract to "see if we can get Mike McPheeters off the payroll." (Trial Tr. at 337.) Luckert testified that she was shocked and offended by the alleged "gray hairs" comment and said that she immediately determined to leave Black & Veatch. Luckert voluntarily ended her employment with Black & Veatch on November 2, 2000.

[omitted factual background]

Following the trial, the jury entered a verdict in favor of Black and Veatch. On appeal, Mr. McPheeters challenges several rulings made by the district court both before and during trial.

## II.

### A. Pretrial Rulings.

Prior to trial, Mr. McPheeters' attorney sought a ruling on the admissibility of . . . every complaint of age discrimination brought against Black & Veatch from 1998 through the present, and Plaintiff's Exhibit 4, an Excel spreadsheet created by Retzke, listing all complaints of discrimination against the company from 1999 through 2002. Mr. McPheeters argues that the district court erred by excluding this evidence, but the district court did not order a blanket exclusion of this evidence.

We . . . find no abuse of discretion in the district court's pretrial ruling concerning the Excel spreadsheet and Interrogatory No. 7, which listed other complaints of discrimination in the workplace. Consistent with our opinion in Callanan v. Runyun, 75 F.3d 1293, 1297-98 (8th Cir.1996), the district court cautiously refused to order a blanket exclusion of this evidence. The court concluded that on the pretrial record, these documents were overly broad and not specifically relevant to Mr. McPheeters' claim of discrimination. While background evidence of an employer's discriminatory policies or practices "may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive," Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1103 (8th Cir.1988), overruled in part on other grounds by Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), as recognized in Foster v. Univ. of Ark., 938 F.2d 111, 115-16 (8th Cir.1991), the evidence must nevertheless "assist in the development of a reasonable inference of discrimination within the context of each case's respective facts," Callanan, 75 F.3d at 1298 (internal quotations omitted). The district court specifically left open the possibility that the plaintiff at some point in the trial could make a more specific record showing the relevance of these other complaints of discrimination, but indicated that such a record did not yet exist at the pretrial stage.

We see no abuse of discretion. The evidence of other complaints as listed in these documents did not reveal that any particular discriminatory policy or practice was prevalent at Black & Veatch. No witnesses were prepared to testify to any specific factual allegations of other discrimination. Additionally, neither the spreadsheet nor the interrogatory answer indicated what decisionmakers or departments were involved in those complaints, and thus, the other complaints were not shown to bear a connection to the employees allegedly involved in discriminating against Mr. McPheeters. See id. We cannot say that the district court abused its discretion as it “was in a unique position to adjudge the relevance and probative value of the testimony.” Id. The plaintiff made no further offer of proof regarding this evidence or any of the specific claims listed.

Accordingly, we affirm the judgment of the district court.

HANSEN, Circuit Judge.

Excerpts taken from:

Missouri Court of Appeals, Western District.

G. Steven COX, Appellant, v. KANSAS CITY CHIEFS FOOTBALL CLUB, INC., Respondent.

No. WD 76616.

Decided: August 05, 2014

Before Division Four: ALOK AHUJA, Chief Judge, Presiding, CYNTHIA L. MARTIN, Judge and WAYNE P. STROTHMANN, Special Judge. Chad C. Beaver and Lewis M. Galloway, Kansas City, MO, for appellant. Anthony J. Romano, Alison P. Lungstrum and Eric E. Packel, Kansas City, MO, for respondent.

G. Steven Cox ("Cox") appeals a judgment in favor of the Kansas City Chiefs Football Club ("Chiefs") entered following a jury verdict in an age discrimination suit. Cox claims the trial court abused its discretion in the exclusion of certain evidence at trial, and committed plain error in failing to intervene during the Chiefs' closing argument. Finding no error, we affirm the trial court's judgment.

Cox was hired in 1998 by the Chiefs as a maintenance manager.

[facts omitted]

Cox was terminated . . . on October 14, 2010. Cox was told that he was being terminated for poor performance, and was given examples, including the unauthorized Crowley pay raise. Cox later told another Chiefs' employee, Brenda Sniezek, that he had been terminated because he gave Crowley a raise in violation of Donovan's instructions. At the time of his termination, Cox was 61 years old. His position was later filled by a 37-year old.

Cox filed a Charge of Discrimination with the Missouri Commission on Human Rights ("MCHR"). In the Charge, Cox stated that the Chiefs told him he had been fired for performance reasons, including the Crowley pay raise. Cox alleged in his Charge a single, discrete act of age discrimination on the day of his termination. When Cox filed suit following issuance of a right to sue letter, his petition similarly alleged a single, discrete act of age discrimination on the date of his termination.

Cox's case was tried to a jury. After a 14-day trial, the jury returned a verdict in favor of the Chiefs on Cox's claim of age discrimination. Cox appeals.

Point One

In his first point on appeal, Cox claims that the trial court abused its discretion "in ordering a blanket exclusion of testimony and evidence from and about 17 or more former employees." Cox claims that the excluded evidence was "related to [the Chiefs'] systematic elimination of older front office employees." Cox claims the excluded evidence was "highly relevant" because "it would have demonstrated [the Chiefs'] discrimination against other front office employees on the basis of their age," and "would have demonstrated [the Chiefs'] discriminatory motives and/or intent." Cox thus sought to offer evidence about the termination of 17 other employees for two distinct reasons: (i) to establish a pattern and practice by the Chiefs' on the business side of its operations of discriminating against older employees; and (ii) as circumstantial evidence permitting an inference that the stated reason for terminating Cox was pre-textual.

#### (ii) The Trial Court's Exclusion of Testimony From and About 17 Former Chiefs' Employees and Cox's Related Offers of Proof

The Chiefs sought an in limine ruling to exclude testimony from or about 17 former employees of the Chiefs<sup>2</sup> whom the Chiefs anticipated Cox would call to testify about the circumstances of their departures from employment. The Chiefs argued that these former employees were not sufficiently similarly situated to Cox's circumstances to be probative of his discrete claim of discriminatory termination, and that the evidence could not be separately offered to establish a pattern or practice of discrimination because Cox did not allege this form of discrimination in his MCHR Charge or in his petition. The Chiefs thus argued that the evidence was irrelevant and unduly prejudicial. On February 8, 2013, the trial court granted the Chiefs' in limine motion without explanation.

....

Generally, it is true that " 'evidence of other acts of [a] defendant are admissible if those acts are sufficiently connected with the wrongful acts that they may tend to show defendant's disposition, intention, or motive in the commission of the acts for which . damages are claimed.' " Kline v. City of Kansas City, 334 S.W.3d 632, 643 (Mo.App.2011) (quoting Brockman v. Regency Fin. Corp., 124 S.W.3d 43, 51 (Mo.App.W.D.2004) (emphasis in original)). "In determining whether [such] evidence is admissible in a discrimination case, the trial court must ascertain whether the proffered evidence would allow 'a rational finder of fact to infer a discriminatory motive or . [to] conclude that the employer intended to discriminate in reaching the decision at issue.' " Id. (quoting West v. Conopco Corp., 974 S.W.2d 554, 556 (Mo.App.W.D.1998)).

Here, Cox hoped to have 17 former employees testify about the circumstances of each employee's departure from employment with the Chiefs for the purpose of circumstantially establishing that the Chiefs possessed a discriminatory motive or intent in terminating Cox. "There is no blanket exclusion in discrimination cases of [such "me too"] evidence. Rather, the relevancy of such evidence must be reviewed on a case-by-case basis." Hurst v. Kansas City, Missouri School Dist., No. WD76534, 2014 WL 1677822, at \* 11 (Mo.App. W.D. April 29, 2014). Though "me too" evidence cannot be summarily excluded, "me too" evidence from or about other employees is not logically

relevant to tend to prove discriminatory intent or pretext unless it is established that the circumstances of the plaintiff and the other employees are “sufficiently similar,” a relationship which the plaintiff bears the burden of establishing. Williams v. Trans States Airlines, Inc., 281 S.W.3d 854, 874 (Mo.App.E.D.2009).

First, though Cox correctly observes that the admissibility of “me too” evidence must be assessed on a case-by-case basis, Cox's Brief curiously fails to address the circumstances of the 17 former employees on a case-by-case basis.

Moreover, even were we to conclude (which we do not) that the trial court abused its discretion [in refusing to admit the evidence] Cox would still be required to establish that the trial court abused its discretion in alternatively ruling that the offers of proof were not legally relevant. “Legal relevance involves a process through which the probative value of the evidence (its usefulness) is weighed against the dangers of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time or needless presentation of cumulative evidence.” Porter v. Toys ‘R’ Us–Deleware, Inc., 152 S.W.3d 310, 318 (Mo.App.W.D.2004) (citations omitted). A trial court must weigh the probative value of evidence against any possible prejudice which might occur due to its admission because “[l]ogically relevant evidence is not necessarily admissible; the evidence must also be legally relevant.” Id. Here, the trial court held that “any probative value of the testimony proposed by the plaintiff from these witnesses would be outweighed by the prejudicial effect it would have upon the jury . I believe the testimony of these other past employees would only serve to confuse and distract the jury.”<sup>19</sup> Point one is denied.<sup>20</sup>

The trial court's judgment is affirmed.

CYNTHIA L. MARTIN, Judge.

All concur.