

COOKING ODORS & NATIONAL ORIGIN

CAN YOU PASS THE SMELL TEST FOR FAIR HOUSING DISCRIMINATION?

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Is the Fair Housing Act violated if a landlord comments on or takes disciplinary action against a tenant of differing ethnicity for emitting smells from their dwelling unit caused by cooking food associated with other national origins (curry, cumin, ginger, etc.).

Without supplemental evidence of discrimination, it appears that comments about cooking smells alone are not sufficient to prove a claim for Fair Housing Act discrimination.

A U.S. District Court for the Northern District of Indiana denied a Plaintiffs' preliminary injunction motion, finding the Plaintiffs had no reasonable likelihood of success on the merits of their claims because comments about a curry order in a unit did not amount to circumstantial evidence of discriminatory intent. A property manager telephoned an absentee condo unit owner and complained about an offensive smell of curry frequently coming from the unit that he rented to tenants from India, and notified him of a bad curry odor in the unit after they vacated. Another unit owner commented to the manager about the curry smell and she told that owner to contact the unit owner. The leasing unit owner didn't mention the curry comments to the condominium Board until certain bylaw amendments were proposed later. Given this relationship between property manager and the leasing unit owner, "a report of a cooking odor carries no tinge of bigotry." There was no evidence that the odor didn't exist, or that the manager's reports were false. "A property manager with a wholly non-discriminatory heart would need to report a continuing cooking odor to an absent owner, whether it involved curry, garlic, or apple pie. That the odor was of curry and the tenants were Indian doesn't convert a business-related factual statement into evidence of discrimination." *Clark v. Oakhill Condo. Assoc., Inc.*, US Dist. Court For The N. Dist. Of IN, S. Bend Div., 2008 U.S. Dist. LEXIS 70215.

Similarly, comments made to Indian rental applicants during a Coop Board interview, by a Coop Board member, while discussing use of the laundry room, that, if Complainants were to cook they "could not have odor in the hallway" was not direct evidence of discrimination. *HUD v. Ramapo Towers Owners Corp.*, HUDALJ 02- 94- 0486- 8 HUDALJ 02- 95- 0008- 8 (1996). The HUD ALJ relied upon Black's Law Dictionary definition of direct evidence as evidence that "proves [the] existence of [the] fact in issue without inference or presumption." Since the Board member's statement concerning "cooking odors" was subject to differing interpretations, it was therefore, not direct evidence of discrimination.

* The information provided herein is intended solely for education and does not constitute legal advice by Marley Hochendoner or the Northwest Fair Housing Alliance. Please consult an attorney for advice on your specific situation.

An African woman who was evicted alleged retaliation by her landlord because she had complained about noise from her neighbors and cooked African food. A US District Court found that neither of these activities are rights guaranteed by the Fair Housing Act, the tenant failed to offer evidence of a causal link between these activities and her eviction, and it was only Plaintiff's speculation that the activities were the reason for the eviction. Plaintiff testified that the landlord told her that neighbors were complaining "about smelling from [her] apartment in the hall", and that the landlord complained about her cooking African food because it "smells bad." Other evidence showed that the landlord had spoken to the tenant about her cooking because of burned food and black smoke coming from her apartment. Defendant granted summary judgment as a matter of law on the fair housing retaliation claim. *Sandy Hill Apts. V. Kudawoo*, 2006 U.S. Dist. LEXIS 75229, US Dist. Court, Dist. of MN (2006).

When additional evidence of discrimination is present, comments about cooking smells may support a claim for national origin based housing discrimination.

A rapid response team in Sand Diego, including the Fair Housing Council of San Diego, assisted a Chinese family being harrassed by a neighbor to obtain legal assistance. The family's neighbor had installed a sign in his yard that read, "Boycott China", videotaped the family members, filed unsubstantiated charges about the family with child protective services, and sued the family, stating that he couldn't stand the smell of Chinese cooking. With a referall to legal counsel, the family was able to consider a countersuit, presumably based on the Fair Housing Act. The outcome is not reported. *CommUNITY 2000, Building Community in a Nation of Neighborhoods*, Leadership Conference on Civil Rights Education and the National Fair Housing Alliance. 2002.

Closer to home, in 2010 HUD issued a charge of discrimination in *HUD v. Lovejoy*, against a Defendants in Renton, Washinton for discriminating against current and propsective tenants at Summerhill Place Apartments based on national origin, familial status, and race. Among the multitude of violations cited in the charging document, were the following statements by the Defendant Property Manager:

- Indians destroy aparments
- "People from India live on dirt floors and cook over an open flame"
- "Go back to India if you can't use the appliances properly"
- "For God's sake, you come from a country with no running water and cook over an open flame."
- She "would prefer not to rent an apartment with new carpet or appliances to an Indian tenant because the apartment would be ruined in a year."
- She told Assistant Managers not to show certain units to black or Indian families because they ruin apartments and she did not want to smell their cooking

On March 8, 2011, the United States District Court for the Western District of Washington entered a **consent order** resolving the litigation brought by the United States Department of Justice based on the HUD charge.

Don't make assumptions about applicants

In responding to a condo owner faced with the dilemma of whether to rent to a Pakistani woman, an ideal candidate except for “the daily cooking with heavy spices which would make the curry smell impossible to remove”, a NY Times editorialist advised:

What you should do is stop making assumptions about what this woman would cook or even if she would cook. Perhaps she was raised in Rawalpindi by a Scottish nanny and now subsists on odorless oatmeal. Or she might want to embrace the tepid, tasteless diet that fueled America in the 50's. Or she, like me, might order too much takeout. Acting on your stereotype is not only unethical; it could also be illegal. One lawyer told me that were you to refuse to rent for the reason you give, "that would arguably constitute national origin discrimination in violation of Title VIII, the Fair Housing Act."

What you may do is make all tenants responsible for any noisome damage they do to the condo, whether with the curries of Pakistan, the stinky cheeses of France or the mysterious things my grandmother used to do with cabbages (science is baffled) or even by nonculinary aromas -- anyone keep a pet badger? That same lawyer suggests that you "include a provision in the lease specifically addressing that issue, and explaining the respective parties' rights and responsibilities if things get overly smelly." Thus you can abandon prejudice, accord your tenants fragrance freedom and protect yourself from property damage.

Technology offers another fix. As philosophers and building contractors have long observed (or should have): a problem that can be solved by installing a good exhaust fan is less a matter of morality than of duct work.

The NY Times, The Way We Live Now, THE ETHICIST; *Stinky Thinking*, Randy Cohen, Apr. 2, 2006.

What is a landlord or property manager to do when he or she receives a complaint based on ethnic cooking smells?

Nadeen Green, Senior Counsel with For Rent Media Solutions™, has the following advice:

- “take the expression “smells bad” out of your vocabulary. You (or your residents) may not like a particular cooking odor, but that is subjective.”
- “handle this exactly as you would handle that neighbor’s complaint if it were about cigarette smoke, cigar smoke, pipe smoke, too much Lysol®, too much perfume, garlic or burned Toll House cookies. No resident has the right to allow their odors, whatever they may be, to intrude into other apartments or the common areas. It is a lease violation. Deal with it accordingly, as an “odor”, and keep in mind that who the resident is, where they come from, how they worship, their race, color, or familial status has nothing to do with this.”

- “be sure that you can always demonstrate that you have a consistent process for all odor-related issues.”
- For a cooking odor-infused apartment: “handle this exactly as you would handle left behind odors from cigarette smoke, cigar smoke, pipe smoke, too much Lysol®, too much perfume, garlic or burned Toll House cookies. If you charge to remedy those odors, you can charge to remedy cooking odors.”

Dear Fair Housing Lady: Cooking Odors? Nadeen Green, Mar. 8, 2011, <http://blog.forrent.com/property-managers-owners/dear-fair-housing-lady-cooking-odors>.

Other advice:

Dan Zimberoff, an association attorney at Barker Martin in Seattle, recalls a situation where some condominium residents were bothered by cooking odors coming from the unit of a neighbor who routinely prepared meals from her native country. (Other residents were probably bothered that she did not invite them over for dinner.) Many associations would understandably be reluctant to address sensitive issues such as this one. But the best way to resolve an enforcement dilemma that may involve a “diversity”-related hot spot is to “put it on the table and face it head on in a way that is transparent and honest,” says Zimberoff. (In that case, the association considered placing restrictions on cooking times and even installing an “air scrubber,” but ultimately the owner spearheading the complaints moved out for other reasons.)

Changing Scenes of Communities, WA State Community Associations Institute, posted Apr, 12, 2011, <http://blog.wscai.org/>.