

Issues with Assistance Animals in Summary Ejectment Cases

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Both federal and North Carolina fair housing laws make it unlawful for a housing provider to refuse to make a reasonable accommodation that a person with a disability may need to have an equal opportunity to enjoy and use a dwelling. ([42 U.S.C. 3601 et seq.](#), [G.S. Ch. 41A.](#)) On January 28, 2020, the U.S. Department of Housing and Urban Development (HUD) issued [FHEO Notice: 2020-01](#), hereinafter the “Assistance Animal Notice,” to provide guidance about how to assess a request to have an assistance animal in rental housing as a reasonable accommodation under the federal Fair Housing Act (FHA). The Assistance Animal Notice was a response to the rising number of complaints about the denial of reasonable accommodations for assistance animals and concerns about individuals with disabilities wasting their money on so-called “certificates” for assistance animals sold by websites that are not providing health care services by legitimate, licensed health care professionals to the individuals.

There are no magic words that a tenant must use when making a request for a reasonable accommodation. The request can be oral or written and may be made before or after the animal is acquired. Additionally, the timing of the request can be when the tenant is applying for a tenancy or during the tenancy. The tenant may even make the request for a reasonable accommodation after the landlord has taken actions to terminate the lease for breach of a “no pets” provision- although the timing of such a request after the initiation of summary ejectment proceedings may create an inference of bad faith on the part of the tenant.

Key Definitions in Assistance Animal Cases

To evaluate assistance animal cases, it is important to understand some definitions used in the Assistance Animal Notice which come from the federal FHA and the Code of Federal Regulations:

- Animals Commonly Kept in Households-dog, cat, small bird, rabbit, hamster, gerbil, other rodent, fish, turtle, or other small, domesticated animal that is traditionally kept in the home for pleasure rather than commercial purposes.
- Assistance Animal-service animals as defined by [the Americans with Disabilities Act \(ADA\)](#) or other animals that do work, perform tasks, provide assistance and/or provide therapeutic emotional support for a person with a physical or mental impairment that substantially limits at least one major life activity or bodily function (commonly referred to as assistance or support animals).
- Disability (handicap)-physical or mental impairments that substantially limit at least one major life activity, a record of having such impairment, or being regarded as having such impairment.
- Housing-all types of “dwellings” that are designed or used as a residence, and any land or vacant property that is sold or leased as residential property, excluding owner-occupied residences of four units or fewer, owner-occupied boarding houses, and private clubs operating for commercial purposes.
- Major Life Activity-functions, including, but not limited to, caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, eating, sleeping, lifting, bending, standing, breathing, learning, reading, concentrating, thinking, communicating, and working. A major life activity also includes the operation of a major bodily function, including, but not limited to,

functions of the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

- Physical or Mental Impairments-any psychological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disability; or diseases such as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.
- Reasonable Accommodation-a change in the rules, policies, or procedures of a housing provider that is needed by a person with a disability to fully use or enjoy the dwelling, including public or common areas.
- Unique Animals-reptiles (other than turtles), barnyard animals, monkeys, kangaroos, and other non-domesticated animals.

See [FHEO-2020-01](#). See also [Fair Housing for Tenants with Disabilities: Understanding Reasonable Accommodations and Reasonable Modifications, 2018 Updated Edition](#).

Summary Ejectment for Breach of a “No Pets” Clause

Judicial officials will see this issue arise in the context of summary ejectment when a landlord files an action against a tenant for violating a lease condition that prohibits the tenant from having a pet. The legal requirement of the landlord to accommodate a tenant who has an obvious disability requiring assistance from a service animal or an assistance animal is often less difficult to apply than when the tenant does *not* have an obvious disability.

The guidance from HUD in the Assistance Animal Notice attempts to help landlords distinguish between a person with a non-obvious disability who requires an assistance animal from a person without a disability who is trying to get around the landlord’s pet policies. For example, a blind person who is assisted by a service dog has an obvious disability, and it is a reasonable accommodation for the landlord to waive any pet-related policies to allow the tenant to reside in the property with the service dog, unless there is evidence that the service dog poses a direct threat to the health or safety of others that cannot be eliminated or reduced to an acceptable level.

In contrast, a military veteran who suffers from PTSD may not have an observable disability, but she may rely on an assistance animal to provide therapeutic support so that she can carry out major life activities. If the veteran requests as a reasonable accommodation that she be allowed to keep her assistance animal on the property, the landlord will comply with the law by allowing her to do so and waiving any pet fees or deposits. Pet fees and/or deposits are applicable only to pets, and assistance animals are not pets.

HUD's Assistance Animal Best Practices Framework for Landlords

The [Assistance Animal Notice](#) sets out a “best practices” framework for landlords to use when assessing a person’s request to have a service or assistance animal. The framework addresses whether or not an animal is a service animal or an assistance animal and, if so, how to navigate a request for a reasonable accommodation.

I. [Is This a Service Animal Under the ADA?](#)

1. Is the animal a dog? If the animal is not a dog, then it is not a service animal under the ADA, but it may be an assistance animal.
2. Is it readily apparent that the dog is trained to do work or perform tasks for the benefit of an individual with a disability? If the answer is “no,” proceed to the next question. If the answer is “yes,” then it is likely the housing provider should allow the service animal as a reasonable accommodation.
3. Is the animal required because of a disability? What work has the animal been trained to perform?

II. **Is This an Assistance Animal Other Than a Service Animal?**

4. Has the individual requested a reasonable accommodation to get or to keep an animal in connection with a physical or mental impairment or disability? If the individual has made the request, continue with the analysis. If the individual has not made a request, then the housing provider is not required to grant an accommodation without a request.

III. **Criteria for Assessing Whether to Grant a Reasonable Accommodation**

5. Does the person have an observable disability or does the housing provider (or their agent making the determination) already have information giving them reason to believe that the person has a disability? If the answer is “no,” proceed to question #6. If the answer is “yes,” go to question #7.
6. Has the person requesting the accommodation provided information that reasonably supports that the person seeking the accommodation has a disability? If the answer is “no,” the housing provider must allow the individual a reasonable time to provide information to support that the individual has a disability before denying the request and does not have to grant the accommodation if the individual fails to provide documentation. If the answer is “yes,” proceed to question #7.
7. Has the person requesting the accommodation provided information which reasonably supports that the animal does work, performs tasks, provides assistance, and/or provides therapeutic emotional support with respect to the individual’s disability? If the answer is “no,” the housing provider must allow the individual a reasonable time to provide information to support that the animal assists the individual or provides therapeutic support before denying the request and does not have to grant the accommodation if the individual fails to provide documentation. If the answer is “yes,” proceed to question #8.

IV. **Type of Animal**

8. Is the animal commonly kept in households? If the answer is “no” and the animal requested is a unique animal, the individual has a substantial (but not insurmountable) burden of showing a disability-related therapeutic need for this specific animal or this specific type of animal. If the answer is “yes,” then a reasonable accommodation should be provided under the FHA, unless the housing provider can prove one of the following:

- a. the specific animal requested poses a direct threat to the health or safety of others that cannot be eliminated or reduced to an acceptable level, or
- b. the specific animal requested would cause substantial physical damages to the property, or
- c. the requested accommodation would be an undue financial and/or administrative burden, or
- d. the requested accommodation would fundamentally alter the nature of the provider's operations.

If the animal does not meet the definition of a service animal or an assistance animal, then the animal is a pet for purposes of the [FHA](#) and may be treated as such with regard to the landlord's rules, policies, fees, or deposits. While the tenant does have to show a disability-related need for the animal, there is no requirement that the tenant provide documentation of specific training or certification of an assistance animal. Since there is no requirement for documentation, the certificates and other paraphernalia sold online have no legal bearing on whether the tenant is entitled to a reasonable accommodation, making them a waste of the tenant's money.

Animals that do meet the definition of either a service or an assistance animal are not pets, and it is a reasonable accommodation for the landlord to waive the "no pet" clause in a lease and associated fees. The tenant is still responsible for any damage, beyond normal wear and tear, done to the property by the animal but cannot be charged a "pet fee" or "pet deposit." A landlord cannot limit the breed or size of a dog used as a service or an assistance animal. However, a landlord can deny a request for an accommodation if certain criteria are met,, as explained above in Paragraph 8. The denial of a requested reasonable accommodation for the reasons listed in Paragraph 8 cannot be based on speculation or stereotypes, but on the actual risk posed by the specific animal.

The Judicial Official's Analysis of Assistance Animal Issues in Summary Ejectment Cases

Understanding the framework set out in the [Assistance Animal Notice](#) can assist judicial officials in analyzing whether a tenant can avoid summary ejectment because of the protections offered by the [FHA](#). As stated earlier, this issue is likely to come up in a summary ejectment action for breach of a lease condition for the tenant's alleged violation of the lease's "no pet" clause.

- A. First, the judicial official must determine if the property at issue is covered by either the [state](#) or [federal](#) fair housing statutes. Most rental housing will be covered, but both statutes exempt owner-occupied residences of four or fewer units, and the federal FHA also exempts single family homes rented by the owner without the use of a broker.
- B. Second, to establish a *prima facie* defense of failure to provide reasonable accommodations under the FHA, the tenant must prove:
 1. the tenant is disabled/handicapped within the meaning of the statute,
 2. the landlord knew or should reasonably be expected to know of the disability,
 3. the requested accommodation may be necessary to afford the disabled/handicapped person an equal opportunity to use and enjoy the dwelling,
 4. the accommodation is reasonable, *and*
 5. the landlord refused to make the requested accommodation.

See [Dubois v. Association of Apartment Owners of 2987 Kalakaua](#), 453 F.3d 1175 (9th Cir. 2006).

The landlord may be able to rebut the tenant's claim either by:

- A. Offering evidence that the tenant is not disabled or that the requested animal does not meet a disability-related need, *or*
- B. Demonstrating one of the following:
 1. the specific animal requested poses a direct threat to the health or safety of others that cannot be eliminated or reduced to an acceptable level, *or*
 2. the specific animal requested would cause substantial physical damages to the property, *or*
 3. the requested accommodation would be an undue financial and/or administrative burden, *or*
 4. the requested accommodation would fundamentally alter the nature of the provider's operations.

See [FHEO-2020-01](#).

Tenant's Defense of Retaliatory Eviction

The defendant may also raise the defense of retaliatory eviction under [G.S. 42-37.1\(a\)](#) if the tenant argues the eviction is substantially in response to protected activities that took place within the 12 months prior to filing. Protected activities might include a complaint to a government agency, such as the [North Carolina Human Rights Commission](#), regarding the landlord's denial of the tenant's request for a reasonable accommodation or the tenant's good faith attempt to exercise, secure, or enforce his/her rights existing under the [state](#) or [federal](#) FHA. This defense can apply more broadly to all actions for summary ejectment unlike the above scenario which just dealt with summary ejectment actions based on the tenant's breach of a lease condition for which reentry is specified.

However, [G.S. 42-37.1\(c\)](#) also provides a way for the landlord to rebut the affirmative defense of retaliatory eviction by showing one of the following:

1. The tenant breached the covenant to pay rent or any other substantial covenant of the lease for which the tenant may be evicted, and such breach is the reason for the eviction; *or*
2. In a case of a tenancy for a definite period of time where the tenant has no option to renew the lease, the tenant holds over after expiration of the term; *or*
3. The violation of [G.S. 42-42](#) complained of was caused primarily by the willful or negligent conduct of the tenant, member of the tenant's household, or their guests or invitees; *or*
4. Compliance with the applicable building or housing code requires demolition or major alteration or remodeling that cannot be accomplished without completely displacing the tenant's household; *or*
5. The landlord seeks to recover possession on the basis of a good faith notice to quit the premises, which notice was delivered prior to the occurrence of any of the activities protected by subsections (a) and (b) of this section; *or*
6. The landlord seeks in good faith to recover possession at the end of the tenant's term for use as the landlord's own abode, to demolish or make major alterations or remodeling of the dwelling unit in a manner that requires the complete displacement of the tenant's household, or to terminate for at least six months the use of the property as a rental dwelling unit.

Tenant's Remedies

The consequences of a landlord's failure to comply with federal and state fair housing laws can include actual damages, including pain and suffering, injunctive relief, civil penalties, punitive damages, and reasonable attorney's fees and costs. ([Fair Housing for Tenants with Disabilities: Understanding Reasonable Accommodations and Reasonable Modifications, 2018 Updated Edition.](#)) These types of damages can occur in civil actions filed for violations of the fair housing laws, which are unlikely to come before a magistrate in small claims.

A magistrate in small claims is much more likely to see the violation raised as a defense to summary ejectment. A district court judge may also see the defense on appeal from small claims for trial *de novo* in a summary ejectment action. If the tenant is entitled to keep the assistance animal as a reasonable accommodation and the landlord has wrongfully denied the request, the landlord is not entitled to a judgment for possession based on breach of a lease condition. In actions for summary ejectment based on other grounds, the tenant may be able to successfully prove the affirmative defense of retaliatory eviction, and the landlord would not be entitled to a judgment for possession.

Final Thoughts

The NC Legislature has recently shown an interest in nondiscrimination of support and service animals by the introduction of [House Bill 551 \(Senate Bill 553\)](#). Although the legislation has not passed this session, it is likely that the issue will be revisited in a future session, especially as the requests by tenants for reasonable accommodations for support or service animals and the complaints about landlords' failure to make reasonable accommodations for such animals are on the rise. While some definitions and requirements may differ slightly, the frameworks set out above will still help judicial officials faced with these issues in summary ejectment cases.