

## Issues with Assistance Animals in Summary Ejectment Cases

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 from the federal and state FHAs and the [Code of Federal Regulations](#) that appear in the Assistance Animal Notice:

- [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 Animals](#)-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 oneself, 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 most often 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. *Fact Sheet on HUD's Assistance Animals Notice*, [hud.gov/sites/dfiles/PA/documents/AsstAnimalsGuidFS1-24-20.pdf](https://www.hud.gov/sites/dfiles/PA/documents/AsstAnimalsGuidFS1-24-20.pdf) (last visited Sept. 14, 2023).

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. *Id.* Pet fees and/or deposits are applicable only to pets, and assistance animals are not pets.

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. [24 C.F.R. § 100.204](#). See *Bronk v. Ineichen*, 54 F.3d 425 (1995) (If deaf tenants could show that their dog's presence in the property was necessary to improve the effects of their disability, waiving the landlord's no-pets policy would be a reasonable accommodation). 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. The denial of a requested reasonable accommodation cannot be based on speculation or stereotypes, but on the actual risk posed by the specific animal. See *Warren v. Delvista Towers Condominium Ass'n, Inc.*, 49 F.Supp.3d 1082 (2014) (Determining an animal poses a direct threat to the health and safety of others requires the existence of a significant risk posed by the specific animal at issue.)

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

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. To analyze the tenant's claim or defense, consider the following:

1. 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.

2. Second, to establish a *prima facie* claim or defense of failure to provide reasonable accommodations under the FHA, the tenant must prove:
3. the tenant is disabled/handicapped within the meaning of the statute,
4. the landlord knew or should reasonably be expected to know of the disability,
5. the requested accommodation may be necessary to afford the disabled/handicapped person an equal opportunity to use and enjoy the dwelling,
6. the accommodation is reasonable, *and*
7. the landlord refused to make the requested accommodation.

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

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

1. Offering evidence that the tenant is not disabled or that the requested animal does not meet a disability-related need, *or*
2. 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, *or*
  5. the tenant never made a request for the accommodation.

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 six ways for the landlord to rebut the affirmative defense of retaliatory eviction.

## Final Thoughts

The NC Legislature has recently shown an interest in nondiscrimination of support and service animals in residential rental units by the introduction of [House Bill 551 \(Senate Bill 553\)](#). While nondiscrimination of assistance animals is already covered by the North Carolina FHA, the proposed legislation sets out specific definitions, creates a private action for landlords if tenants or health professionals misrepresent an animal as an assistance animal, and clarifies the exemption of assistance animals from pet fees allowed by statute. 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.