No. 10-12838

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

HIALEAH HOUSING AUTHORITY,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

REPLY BRIEF FOR THE UNITED STATES

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INTRODUCTION

This Fair Housing Act (FHA) case was brought on behalf of a Spanish-speaking Cuban immigrant (and his family) who was a public housing tenant and, when required to transfer to a different dwelling, requested a unit with a bathroom on the same floor as the living area as a reasonable accommodation for his disability. See U.S. Br. 2-18.[1] HHA's Answer Brief, and the numerous issues that

[1] Citations to "U.S. Br. __" are to page numbers in the Brief for the United States as Appellant. Citations to "HHA Br. __" are to page numbers in HHA's (continued…)

it raises – many of which were not addressed by the district court – obfuscates the straightforward and important issue that underlies this appeal. That issue concerns the burden placed on a person with a disability to put the housing provider on notice that he has a disability and requires an accommodation.

The district court granted HHA's motion for summary judgment. The court assumed that Mr. Rodriguez had a disability (R.E. 150 at 15-16), but concluded that HHA was entitled to judgment as a matter of law because no reasonable jury could conclude that HHA knew or should have known that (1) Mr. Rodriguez had a disability, and (2) required, as an accommodation, a dwelling with a bathroom on the main living level. R.E. 150 at 16, 19.

This Court should reverse and remand. The district court erred in concluding that, as a matter of law, Mr. Rodriguez failed to give HHA sufficient notice that he was disabled and required a disability. More specifically, the district court erred by failing to apply the correct legal standard to this determination. Mr. Rodriguez's burden in relaying to HHA that he had a disability and required an accommodation was not to give HHA all of the information it might need to make

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(…continued)
Answer Brief. Citations to "R.E. __ at __" refer to documents in the district court record, as numbered on the district court's docket sheet, and page numbers within the documents, included in the Record Excerpts filed by the United States in this appeal. Citations to "R. __ at __" refer to documents in the district court record, as numbered on the district court's docket sheet, and page numbers within the documents, in those documents not included in the Record Excerpts.

an informed decision, but rather to impart enough information to HHA under the particular circumstances so that a reasonable person would have been aware that, because of an asserted disability, he had special housing needs and was requesting an accommodation. Once Mr. Rodriguez imparted such information, HHA had an obligation to engage in the interactive process so that the parties could determine whether an accommodation was necessary and could reasonably be made. In other words, HHA's legal obligation to engage in the interactive process – a point not addressed by the district court – necessarily frames the determination of whether, as a matter of law, Mr. Rodriguez failed to give HHA sufficient notice that he was disabled and required an accommodation.[2]

Because the record makes clear, viewing the evidence in the light most favorable to the government, that Mr. Rodriguez *did* provide HHA with sufficient information concerning his disability and need for an accommodation to trigger the interactive process, and that HHA failed to engage in the interactive process, summary judgment for HHA was error. See *Abbes* v. *Embraer Servs., Inc.*, 195 F. App'x 898, 899 (11th Cir. 2006) (unpublished) (to defeat summary judgment, "the non-moving party must present enough evidence to demonstrate * * * that a jury could reasonably return a verdict in [its] favor"), cert. denied, 549 U.S. 1305, 127

[2] The United States addressed a housing provider's obligation under the FHA to engage in the interactive process in its opening brief. U.S. Br. 28-31. HHA does not dispute that it had this obligation.

S. Ct. 1891 (2007). A failure to engage in the interactive process is, where a reasonable accommodation is available, a failure to make a reasonable accommodation. See, *e.g.*, *Lowe* v. *Independent Sch. Dist. No. 1*, 363 F. App'x 548 (10th Cir. 2010) (unpublished) (Title I case). Further, at a minimum, the record reflects genuine issues of material fact as to whether HHA received sufficient notice that Mr. Rodriguez had a disability that limited his ability to climb stairs and required an accommodation to trigger the interactive process, also precluding summary judgment.

ARGUMENT

I

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR HHA ON THE GROUND THAT NO REASONABLE JURY COULD CONCLUDE THAT HHA KNEW OR SHOULD HAVE KNOWN THAT MR. RODRIGUEZ HAD A DISABILITY AND REQUIRED AN ACCOMMODATION

HHA first asserts that the district court properly granted summary judgment because: (1) the district court correctly determined that Mr. Rodriguez was not disabled; (2) the district court correctly determined that HHA was not aware of his alleged disability; (3) the district court correctly determined that HHA did not know, or have reason to know, that an accommodation was necessary; and (4) HHA did not refuse to provide an accommodation. HHA Br. 35-60. We have addressed the second and third issues in our opening brief. U.S. Br. 37-48. For

those reasons, as well as those set forth below, each of these arguments is incorrect and should be rejected.

1. First, HHA argues that "the district court correctly determined [that Mr.] Rodriguez was not disabled." HHA Br. 36; see generally HHA Br. 36-40. This assertion is incorrect.

In addressing the elements of an FHA failure to accommodate claim, the district court stated that "[t]he first question is * * * whether a reasonable jury could conclude that Mr. Rodriguez is disabled under the FHA." R.E. 150 at 14. The court made clear, however, that it was not resolving this issue. After briefly reviewing the United States' arguments, the court stated that "it is doubtful that Plaintiff can prove that Mr. Rodriguez suffered from * * * a disability at the relevant time period." R.E. 150 at 15 (footnote omitted). The court then stated: "Nevertheless, I need not address this issue because even assuming *arguendo* that Mr. Rodriguez is disabled, no reasonable jury could conclude that defendant knew or should have known that Mr. Rodriguez was disabled and that HHA knew the requested accommodation was necessary." R.E. 150 at 15-16. In a footnote, the court added that "although I do not reach this issue, it bears mentioning that Plaintiff would likely be unable to establish that Mr. Rodriguez's physical impairment substantially impairs a major life activity." R.E. 150 at 15 n.21.

The district court, therefore, expressly declined to resolve this issue. Although, as a general matter, the Court may affirm a grant of summary judgment on any legal ground raised below, even if it was not the basis for the district court's decision, see, *e.g.*, *Mahoney* v. *Nokia, Inc.*, 236 F. App'x 574 (11th Cir. 2007) (unpublished), this Court should not affirm summary judgment for HHA on this basis here. The extensive filings below addressing this issue make clear that there are issues of material fact that preclude summary judgment for the defendant. Compare R. 94 at 3-10 and R. 95 at ¶¶ 5-7, 31-36 with R. 129 at 4-8 and R. 125 at ¶¶ 5-7, 34-35.[3] This is particularly true given that the evidence must be viewed, and all reasonable doubts about facts resolved, in the light most favorable to United States. See, *e.g.*, *Denney* v. *City of Albany*, 247 F.3d 1172, 1181 (11th Cir. 2001).[4] Further, had the district court believed that summary judgment was

[3] We note that the United States did not file a cross-motion for summary judgment. Therefore, although the United States asserted below, in response to HHA's motion for summary judgment, that Mr. Rodriguez is disabled within the meaning of the FHA, and set forth facts supporting that conclusion, the thrust of the argument was that the district court could not find, as a matter of law, that Mr. Rodriguez was *not* "handicapped" within the meaning of the FHA. See R. 129 at 4-8.

[4] HHA also suggests (HHA Br. 36-37) that, regardless of the nature of Mr. Rodriguez's impairment, he cannot be considered disabled because "difficulty" in using the stairs is not a "substantial" limitation of a major life activity. The degree to which Mr. Rodriguez's impairment limits a major life activity, however, is a disputed fact in this case precluding summary judgment. Compare R. 95 at ¶¶ 7, 30-35 with R. 125 at ¶¶ 7, 30-35.

appropriate with respect to this issue, it could have resolved the issue, rather than simply assert that it is "doubtful" that the United States can establish this element of its claim. For these reasons, if this Court reverses the district court on the issues that court *did* resolve, the issue whether Mr. Rodriguez is disabled within the meaning of the FHA can be addressed on remand by the district court.[5]

2. Second, HHA argues (HHA Br. 40-53) that the district court correctly determined that HHA did not know or have reason to know that Mr. Rodriguez had a disability. HHA argues that the district court correctly found that each of the instances relied upon by the United States was insufficient to establish notice. Specifically, HHA argues that: (1) Mr. Rodriguez's receipt of social security disability benefits for a shoulder injury does not provide knowledge of a hip and back injury (HHA Br. 41-42); (2) at the January 20, 2005, informal hearing Mr. Rodriguez stated only that he was sick, which was not sufficient to put HHA on notice that he had a disability (HHA Br. 42-43); (3) Mrs. Rodriguez's January 21, 2005, letter addressing the new unit the Rodriguezes were offered was too vague to give HHA notice that Mr. Rodriguez had a disability and therefore required a unit

[5] In this regard, the United States' assertion (U.S. Br. 18) in its opening brief that this Court "must assume" Mr. Rodriguez was disabled means only that, for purposes of reviewing the district court's reasons for granting summary judgment, this Court must assume that Mr. Rodriguez has a disability, not that there has been a finding to that effect. Whether the United States can satisfy this element of its FHA claim is an issue that remains to be decided by the district court.

with a bathroom on the main living level (HHA Br. 43-48); and (4) the letter Mr. Rodriguez allegedly provided HHA at the June 30, 2005, state court eviction action from Dr. Nunez, assuming HHA received it, was insufficient to provide notice that Mr. Rodriguez was disabled and needed an accommodation (HHA Br. 48-53).

The United States addressed these events (and others) in its opening brief, arguing that the district court erred "by reviewing, and rejecting, *in isolation*, each instance where HHA was made aware that Mr. Rodriguez had a disability and that his physical condition affected his ability to use stairs." U.S. Br. 44.[6] HHA makes the same error in its Answer Brief. See HHA Br. 41 ("The district court correctly concluded *each of these facts* was insufficient, as a matter of law, to put HHA on notice that [Mr.] Rodriguez was disabled and that the requested accommodation

[6] The United States identified the four instances supporting its conclusion that HHA knew or should have known that Mr. Rodriguez had a disability and was requesting an accommodation as follows: (1) the January 20, 2005, informal hearing; (2) Mrs. Rodriguez's January 21, 2005, letter; (3) Mr. Rodriguez's May 17, 2005, answer filed in HHA's state court eviction action; and (4) the June 30, 2005, state court mediation in the eviction case. U.S. Br. 40-43. With respect to Mr. Rodriguez's receipt of social security benefits, the United States asserted that "[a]s an initial matter, HHA knew that Mr. Rodriguez suffered a work-related injury and that, as a result, he received social security benefits"; that his injuries prevented him from continuing to work as a night manager for HHA; and that HHA itself classified Mr. Rodriguez as disabled. U.S. Br. 39. Therefore, at the time the Rodriguezes rejected the transfer to the Hoffman Gardens unit because it did not have a bathroom on the main living level, HHA knew, at a minimum, that Mr. Rodriguez had a disability that prevented him from working. U.S. Br. 39. That knowledge necessarily informs HHA's response to information it later received from the Rodriguezes concerning Mr. Rodriguez's disability and need for an accommodation.

was necessary" (emphasis added)). In other words, looking at the evidence as a whole, and in the light most favorable to the United States, "HHA knew full well what Mr. Rodriguez claimed his disabilities were and what accommodation he was requesting. * * * Mr. Rodriguez's multiple attempts to give notice, along with his inability to continue to work as a night manager for HHA, are all relevant to HHA's overall knowledge, and the district court should have considered whether a reasonable juror could conclude that HHA had knowledge or constructive knowledge based on the cumulative weight of the available information." U.S. Br. 45-46.[7] As we have argued, the evidence makes clear that HHA was given ample information to trigger its obligation to engage in the interactive process, which it failed to do, effectively denying Mr. Rodriguez's request for an accommodation. U.S. Br. 23-24, 28-31.

HHA argues (HHA Br. 52) that "the moment HHA became aware of [Mr.] Rodriguez's hip and back problems at the June 30, 2005, mediation, * * * HHA engaged in an interactive process" and requested medical documentation. At best,

[7] See generally *Sacred Heart Rehab. Ctr.* v. *Richmond Twp.*, No. 08-12110, 2010 WL 3942847 at *3 (W.D. Mich. Oct. 6, 2010) (In rejecting argument that summary judgment was appropriate because plaintiff never explicitly asked for an accommodation, the court stated: "Without question, Defendants were aware of the residents' disabilities. * * * Plaintiff may not have ever requested an 'accommodation,' using that precise term, from Defendants, but it did present facts and information to the Township Commission sufficient to demonstrate that a reasonable accommodation may be needed to provide equal housing opportunities.")

this request came too late; at worst, this argument is simply disingenuous. For example, according to Mr. Rodriguez, he told HHA at the January 20, 2005, informal hearing that he needed a unit with a bathroom that was accessible without climbing stairs. See U.S. Br. 6-7. Further, had HHA not ignored Mrs. Rodriguez's January 21, 2005, letter "appealing" the transfer decision; stating her husband could not go upstairs each time he needed to use the bathroom; offering to bring HHA medical documentation; and asking the hearing officer to contact her "as soon as you can" (see U.S. Br. 8-9, 41), HHA could have engaged in the interactive process at that time.[8] Finally, in Mr. Rodriguez's May 17, 2005, answer to HHA's state court eviction action, Mr. Rodriguez expressly stated that he was "disabled due to hip and back problems and cannot constantly go up and down stairs to use a bathroom," and that HHA failed to offer him a reasonable

[8] HHA asserts that the letter cannot be considered a proper request for an accommodation because it was given to Chabela Aneiros, "a *neutral* hearing officer not acting as an employee or agent of HHA." HHA Br. 45; see also HHA Br. 24-25. This argument ignores facts in the record reflecting that after the Rodriguezes viewed the Hoffman Gardens unit and found it unacceptable, Mrs. Rodriguez went to see Mr. Bonilla – the HHA area supervisor involved in the matter – and Mr. Bonilla told her she had to see Ms. Aneiros. See R. 125 at ¶ 20; U.S. Br. 8 (citing to the record); cf. R. 95 at ¶ 19 (HHA's different version of these events). Moreover, there is a genuine issue of material fact as to whether Aneiros, as a full-time employee of HHA, was acting as HHA's agent in this matter. Compare R. 125 at ¶¶ 11, 20 with R. 95 at ¶¶ 11, 20.

accommodation for his disability. See U.S. Br. 11, 42.[9] Therefore, HHA was aware (or should have been aware) of the nature of Mr. Rodriguez's disability and the necessity of an accommodation well before the June 30, 2005, mediation. Indeed, there was a five-month gap between the informal hearing, Mrs. Rodriguez's letter, and HHA's notice to cure (notifying the Rodriguezes that they had seven days to move to the Hoffman Gardens unit) in January and the June 30th mediation. In any event, according to Mr. Rodriguez, he *did* provide HHA with medical documentation at the June 30, 2005, hearing (a letter from Dr. Nunez). See U.S. Br. 11-12, 42-43; R. 125 at ¶ 28.[10] In short, looking at the facts as a

[9] The district court acknowledged these assertions in reviewing the facts, see R. 150 at 7, but did not otherwise address whether this filing constituted adequate notice to HHA.

[10] The district court discredits this letter (see R. 127 Exh. FF-1), stating that there is no evidence supporting the assertion that it was given to HHA at the mediation and that, in any event, the letter "merely stated that * * * Mr. Rodriguez had chronic back pain and osteoarthritis"; did not explain the extent and nature of his diagnoses; and did not address "his alleged limited ability to climb stairs." R.E. 150 at 18-19. The court further stated that assuming this letter was given to HHA at the hearing in response to HHA's request, it "did not provide a basis from which HHA could determine whether Mr. Rodriguez was disabled and actually needed the requested accommodation." R. 150 at 19. In this regard, the district court erred by both looking at this letter in a vacuum and ignoring HHA's obligation to enter into the interactive process once it was generally apprised of Mr. Rodriguez's disability and need for an accommodation. For the same reasons, HHA's attempts to discredit this letter are also beside the point. See HHA Br. 30-31 (*e.g.*, "Dr. Nunez's note did not state which portion of the back suffered from pain"). Moreover, with respect to whether this letter was in fact given to HHA at the mediation, that issue presents a genuine issue of material fact.

whole, by the time of the June 30, 2005, mediation, HHA was well aware of Mr. Rodriguez's needs, and if it believed that the medical information provided was insufficient, or otherwise needed more information, HHA had an obligation through the interactive process to pursue and clarify the matter, not simply allow Mr. Rodriguez to abandon his tenancy. See U.S. Br. 45; see generally *Calero-Cerezo* v. *United States Dep't of Justice*, 355 F.3d 6, 25 (1st Cir. 2004) (Title I case) (employer has responsibility to engage in interactive process; factfinder might conclude that defendant failed to make a reasonable accommodation where, *inter alia*, "in the face of plaintiff's increasingly desperate requests for an accommodation, the defendants simply stonewalled").

Finally, HHA's arguments with regard to whether it had adequate notice that Mr. Rodriguez was disabled and required an accommodation highlight material issues of fact that exist with regard to this issue, which, along with HHA's failure to engage in the interactive process, preclude summary judgment. For example, according to the United States, at the January 20, 2005, informal hearing addressing the Rodriguezes' transfer to a new unit, Mr. Rodriguez expressed his need for a unit with a bathroom that was accessible without climbing stairs and provided documentation of his medical condition; according to HHA, there was no such discussion. See U.S. Br. 7 (citing to record); HHA Br. 22-23; R. 125 at ¶ 17; R. 95 at ¶ 17. Further, according to the United States, HHA responded that the

Hoffman Gardens unit had a half-bathroom on the main level; according to HHA, the Rodriguezes were not told that. See U.S. Br. 7 (citing to record); HHA Br. 22; R. 95 at ¶¶ 16-17 & n.19; R. 125 at ¶¶16-17.[11]

3. Third, HHA asserts (HHA Br. 54) that the United States failed to challenge the district court's conclusion that HHA did not know, or have reason to know, that an accommodation was necessary and that, in any event, the district court's conclusion was correct. We address the former point below (pp. 19-23). With respect to the latter, the United States' opening brief fully makes clear why the facts, properly viewed, preclude summary judgment for the defendant on this basis. See U.S. Br. 37-48. In short, looking at the evidence in the light most

[11] HHA also argues (HHA Br. 43-47) that this Court's decision in *Hawn* v. *Shoreline Towers Phase I Condominium Ass'n, Inc.*, 347 F. App'x 464 (11th Cir. 2009) (unpublished), supports the district court's decision. The United States distinguished *Hawn* in its opening brief (U.S. Br. 35-37); moreover, *Hawn* did not involve the claim that the defendant had sufficient information to trigger the interactive process. HHA now argues (HHA Br. 47-48) that, as in *Hawn*, Mrs. Rodriguez's January 21, 2005, letter was insufficient to give notice (even if HHA had read it) because HHA had reason to be skeptical of Mr. Rodriguez's rejection of the Hoffman Gardens unit because (1) the Rodriguezes' original unit was on the second floor (requiring the use of stairs to reach the unit) and (2) when the Rodriguezes viewed the Hoffman Gardens unit they stated that it was in poor condition and not air conditioned. We addressed the first point in our opening brief (U.S. Br. 38 n.7), noting that nature and required usage of the stairs was very different in the Hoffman Gardens unit compared to their original unit. In addition, even though the Rodriguezes were surprised by the condition of the Hoffman Gardens unit, Mrs. Rodriguez's January 21, 2005, letter makes clear that their overriding objection to the unit, consistent with that they told HHA at the January 20, 2005, informal hearing, was that it did not have a bathroom on the main floor. See U.S. Br. 8 (quoting letter).

favorable to the United States, there was ample evidence from which a jury could find that HHA received sufficient information such that it knew or should have known that Mr. Rodriguez both had a disability *and* was requesting as an accommodation a dwelling with a bathroom on the main level so that, given his disability that made it difficult to climb stairs, he would not have to do so to reach the bathroom. Moreover, as we have noted, this determination is framed by HHA's duty to engage in the interactive process, and therefore, in determining whether HHA had sufficient notice, the issue is not whether the Rodriguezes gave HHA all of the information it might need to resolve the issue, but whether HHA had sufficient information to trigger its obligation to open a dialogue to address Mr. Rodriguez's limitations and possible solutions (rather than move to evict him). Because, viewing the evidence in the light most favorable to the United States, there plainly was such evidence, the district court erred in granting summary judgment.

4. Finally, HHA argues that that this Court should find, as a matter of law, "that HHA did not refuse to provide an accommodation." HHA Br. 55. HHA gives three reasons: (1) Mr. Rodriguez unilaterally abandoned his tenancy at the June 30, 2005, mediation; (2) HHA offered to put the Rodriguezes on a waiting list for an appropriate unit; and (3) HHA never placed Mr. Rodriguez in a non-accommodating unit. HHA Br. 55-60. Although HHA raised this argument

below, see R. 94 at 12-15, the district court expressly declined to address it. R.E. 150 at 16-17 n.23 ("Having concluded that HHA did not have knowledge of Mr. Rodriguez's handicap and the necessity of his accommodation, I need not reach the issue of whether a request was ever in fact denied since Mr. Rodriguez chose to voluntarily leave HHA altogether"). In any event, HHA's arguments are not correct and, at minimum, material issues of fact preclude summary judgment on this basis.

With respect to the first two points, by the time Mr. Rodriguez agreed to settle the eviction action and abandon his HHA tenancy, HHA had violated its obligation to engage in the interactive process. As the United States argued in its opening brief, at least by the time of the June 30, 2005, mediation, "a reasonable jury could find that, rather than moving to evict Mr. Rodriguez and then allowing him to abandon his tenancy, HHA had an obligation to engage in the interactive process and seek a resolution of the matter." U.S. Br. 46. In other words, by this time, HHA could have stayed or dismissed the eviction action and worked with Mr. Rodriguez to address his needs. That it did not do so, but allowed Mr. Rodriguez to abandon his tenancy, does not mean that HHA was relieved of liability for failing to engage in the interactive process. Rather, it means that HHA's failure to engage in the interactive process effectively denied him the accommodation he sought. Moreover, it follows that, even if HHA told Mr.

Rodriguez that he could stay in his unit and be put on a waiting list if he provided medical documentation substantiating his disability, see HHA Br. 56, a fact the United States disputes, see U.S. Br. 12,[12] that offer also came too late.

Finally, HHA argues (HHA Br. 59-60) that it never placed Mr. Rodriguez in a non-accommodating unit, and therefore never denied his request for an accommodation. HHA bases this argument on the notion that it cannot be liable for failure to accommodate if the Rodriguezes never actually lived in an inaccessible unit. HHA notes that during the entire time the Rodriguezes lived in an HHA property (their original unit), there was a bathroom on the main living level, and that they never moved into the Hoffman Gardens unit. HHA Br. 60. This argument ignores the nature of the underlying claim in this action. HHA discriminated against Mr. Rodriguez when, after being put on notice that Mr. Rodriguez had a disability and needed a unit with a bathroom on the main level, it failed to engage in the interactive process and, rather than offering him an accessible unit, moved to evict him. As we have noted, the failure to engage in the interactive process, where a reasonable accommodation is available, is a failure to

[12] According to the United States, HHA insisted that the Rodriguezes had to move to the Hoffman Gardens unit even if they were placed on a waiting list. U.S. Br. 12. Also according to the United States, Mr. Rodriguez presented medical documentation at the June 30, 2005, mediation concerning his disability. U.S. Br. 12.

reasonably accommodate.[13] See U.S. Br. 29-31; see also *Astralis Condominium Ass'n* v. *HUD*, 620 F.3d 62, 69 (1st Cir. 2010) (upholding finding that landlord denied request for accommodation because, in part, landlord "effectively short-circuited the interactive process"); cf. *Pantazes* v. *Jackson*, 366 F. Supp. 2d 57, 70 (D.D.C. 2005) (Rehabilitation Act) ("Once this [interactive] process has begun, both the employer and the employee have a duty to act in good faith, and the absence of good faith, including unreasonable delays caused by an employer, can serve as evidence of an ADA violation") (internal citation omitted).

Moreover, it is not the case, as HHA suggests (HHA Br. 59), that a reasonable accommodation request is not denied "until the plaintiff is required to reside in a non[-]accommodating unit as a result of the defendant's denial of his request." If that were the case, there could never be an FHA failure to accommodate claim where a prospective tenant desires an apartment but requests, and is denied, a reasonable accommodation. See, *e.g.*, *Echeverria* v. *Krystie Manor, LP*, No. 07-1369, 2009 WL 857629 (E.D.N.Y. Mar. 30, 2009)

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[13] At this time, there were several three-bedroom units available that would have accommodated Mr. Rodriguez's needs. See R. 125 at ¶ 29. In fact, at the eviction mediation, Mr. Rodriguez's attorney presented a list of several available three-bedroom units. HHA, however, only offered the one unit that did not have a bathroom on the main level. R. 126 Exh. B at 111-112, 177-178, Exh. G at 70, 86, 157-159.

(unpublished) (denying motion to dismiss FHA action by prospective tenant who was denied an apartment because she required a companion dog).[14] In this case, although the Rodriguezes already lived in an HHA unit, the failure to accommodate claim stems from HHA's requiring them to move out of their original apartment (that had a bathroom on the main level) and offering them a different apartment, and, subsequently, ignoring and ultimately constructively denying Mr. Rodriguez's request for an accommodation. Therefore, as a practical matter, the Rodriguezes were situated no differently from any prospective tenant requesting, and being denied, a reasonable accommodation from a landlord.

II

THE UNITED STATES HAS CHALLENGED ON APPEAL THE DISTRICT COURT'S CONCLUSION THAT, AS A MATTER OF LAW, HHA DID NOT KNOW OR HAVE REASON TO KNOW THAT, BECAUSE OF HIS DISABILITY, MR. RODRIGUEZ REQUIRED AN ACCOMMODATION

HHA also argues (HHA Br. 63-64) that this Court must affirm the district court's decision because the United States "failed to challenge on appeal one of the

[14] HHA cites *Radecki* v. *Joura*, 114 F.3d 115 (8th Cir. 1997), in support of its position. HHA Br. 59. In that case, a tenant claimed that he was evicted because of his disability (depression). In addressing defendants' argument that they never knew the tenant suffered from a disability, the court stated that defendants' knowledge must be assessed as of the date the tenant was evicted because that was the date the alleged discrimination occurred. *Radecki*, 114 F.3d at 116. That reasoning does not mean that where, as here, a tenant's request for an accommodation is denied, the tenant does not have a cause of action if the tenant never lived in an inaccessible unit.

district court's independent grounds for entering summary judgment," *i.e.*, that the United States did not demonstrate that "HHA knew or should have known the specifically requested accommodation * * * [a unit with a bathroom on the main living level] *was necessary to accommodate the alleged disability*" (emphasis added). This argument is baseless.

The United States argued in its opening brief that, looking at the evidence in the light most favorable to the government, there was sufficient evidence to establish that a reasonable jury could find that HHA knew or should have known that, given his disability, Mr. Rodriguez requested an accommodation that would afford him equal opportunity to use and enjoy his dwelling. Although the United States generally couched this issue in terms of whether HHA knew or should have known that, given his disability, Mr. Rodriguez desired or requested an accommodation (*e.g.*, U.S. Br. 18, 37),[15] the brief makes clear that this argument is

[15] In *Hawn*, this Court set forth the elements of plaintiff's failure to accommodate claim as follows: "[A] plaintiff must establish that (1) he is disabled or handicapped within the meaning of the FHA, (2) *he requested a reasonable accommodation*, (3) such accommodation was necessary to afford him an opportunity to use and enjoy his dwelling, and (4) the defendants refused to make the requested accommodation." *Hawn*, 347 F. App'x at 467 (emphasis added); see U.S. Br. 26 (setting forth these elements); see also note 10, *supra*. Mirroring this articulation of the elements of a reasonable accommodation claim, the United States characterized the first two issues as whether HHA knew or should have known that Mr. Rodriguez was disabled and requested an accommodation. See also *Astralis*, 620 F.3d at 67 (characterizing claimant's burden as showing that "he *requested* a particular accommodation that is both reasonable and necessary to

(continued…)

directed at the district court's conclusion that HHA did not know that an accommodation was necessary.

For example, the United States argues that Mr. Rodriguez's May 17, 2005, answer to HHA's eviction action "squarely put HHA on notice that, because of his disability, Mr. Rodriguez could not live in a unit that required him to use the stairs to reach the bathroom, and that therefore he was requesting an accommodation." U.S. Br. 22. That argument *is* an assertion that HHA had notice that the requested accommodation was necessary, given his disability. The United States similarly asserts "the evidence was sufficient to establish that, at least at the time of the June 30, 2005, mediation, a reasonable person would have been aware, or should have been aware, that Mr. Rodriguez had a disability that prevented him from climbing stairs and therefore sought a unit with a bathroom on [the] same level as the living quarters – the type of unit HHA had readily available." U.S. Br. 23. Again, this is an assertion that HHA should have known that the requested accommodation was necessary to afford Mr. Rodriguez equal enjoyment of his dwelling. The United States' opening brief is replete with similar assertions,[16] which make clear that the

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(…continued)
allow him equal opportunity to use and enjoy the housing in question") (emphasis added).

[16] See, *e.g.*, U.S. Br. 44 ("[T]he district court erred by reviewing, and rejecting, *in isolation*, each instance where HHA was made aware that Mr.

(continued…)

United States squarely addressed the district court's second conclusion – that HHA could not have known that the requested accommodation was necessary.

Moreover, in the relatively straightforward context of this case, it is immaterial whether this issue is framed as whether HHA, assuming it had (or should have had) knowledge of Mr. Rodriguez's disability, also had (or should have had) knowledge that Mr. Rodriguez *was requesting* as an accommodation a unit with a bathroom on the main living level, or asserting that such an accommodation *was necessary for him to equally enjoy the dwelling*.[17] If, as this Court must assume, Mr. Rodriguez was disabled, and requested as an accommodation that he needed a unit with a bathroom on the main living level so that he would not have to use the stairs, Mr. Rodriguez has made clear why the requested accommodation is "necessary."[18] Put another way, if HHA had

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Rodriguez had a disability and that his physical condition affected his ability to use stairs."); U.S. Br. 45-46 ("[T]he court should have concluded that, at least at the time of the June 30, 2005, mediation, a reasonable person would have been aware, or should have been aware, that Mr. Rodriguez's disability required special housing needs and that he was requesting an accommodation.").

[17] See note 15, *supra*.

[18] See generally *Wisconsin Cmty. Servs., Inc.* v. *City of Milwaukee*, 465 F.3d 737, 749 (7th Cir. 2006) (en banc) (question whether an accommodation is "necessary" turns on whether "without the accommodation, the plaintiff will be denied an equal [housing] opportunity"; *i.e.*, will the accommodation "ameliorate
(continued…)

knowledge that a tenant had a disability that prevented him from climbing stairs, and knew that the tenant was requesting as an accommodation a dwelling that would not require him to use stairs to reach the bathroom, it necessarily follows that HHA would have had knowledge of, as the district court put it, "the necessity of his requested accommodation." R.E. 150 at 18; see generally *Astralis*, 620 F.3d at 68 ("[A] rational person could logically infer (and, thus, plausibly find) that the requested accommodation was both reasonable and necessary to allow the complainants equal use and enjoyment of their residence.").

For these reasons, HHA's argument (HHA Br. 64) that the United States "only addresses a single issue" – *i.e.*, "whether HHA knew or should have known Rodriguez was disabled and therefore it should have engaged in an interactive process" – is not correct. The United States' opening brief fully challenges the district court's reasons for granting summary judgment, and makes clear why the facts, properly viewed, preclude summary judgment for the defendant: given HHA's obligation to engage in the interactive process, there was ample evidence from which a reasonable jury could find that HHA was sufficiently apprised that Mr. Rodriguez both had a disability, and was requesting as an accommodation a

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(…continued)
the effect[s] of the plaintiff's disability" on his ability to have equal access to housing).

dwelling with a bathroom on the main level so that, given his disability that made it difficult to climb stairs, he would not have to do so to reach the bathroom.

III

SUMMARY JUDGMENT FOR HHA CANNOT BE AFFIRMED BASED ON HHA'S ASSERTION THAT AN ACCOMMODATION WAS NOT REQUIRED BECAUSE MR. RODRIGUEZ CONSTITUTED A "DIRECT THREAT"

HHA argues (HHA Br. 62-63) that the district court's decision should be affirmed because, even assuming Mr. Rodriguez was disabled, his family "posed a direct threat to the safety of other tenants" and, therefore, it was under no duty to provide Mr. Rodriguez with a reasonable accommodation. HHA bases this argument solely on the fact that the Rodriguezes' tenancy was terminated because the Rodriguezes and two neighboring families were involved in various altercations. See HHA Br. 61-62; see generally U.S. Br. 6. This argument is baseless.

HHA correctly states that the FHA does not require that a dwelling be made available, or that an accommodation be made, to someone who would constitute a "direct threat to the health or safety of other individuals." See 42 U.S.C. 3604(f)(9).[19] In its motion for summary judgment, HHA argued, *inter alia*, that it

[19] The question whether an individual constitutes a direct threat under the FHA is fact-specific, and the party asserting this defense has the burden of proof on this issue. See *Dadian* v. *Village of Wilmette*, 269 F.3d 831, 840-841 (7th Cir.

(continued…)

did not have to provide Mr. Rodriguez with an accommodation because, given his altercations with his neighbors, he posed a direct threat to the safety of other tenants. R. 94 at 10-11. HHA noted that on some occasions the police were called, and that the HHA area supervisor (Joel Bonilla) conducted an investigation. R. 95 at ¶¶ 8-9, 13. HHA acknowledged, however, that "Bonilla was unable to determine which individual and/or family was the cause of the disturbances." R. 95 at ¶ 9. It also acknowledged that the Rodriguezes asserted that the altercations were initiated by one of the other families. R. 95 at ¶ 13. Finally, HHA acknowledged that, at the informal hearing, the lease termination proceeding was resolved by HHA's agreeing to transfer the Rodriguezes to another HHA public housing unit. R. 95 at ¶ 15.[20]

The United States argued in response that HHA had the burden of proving that the Rodriguezes posed a direct threat; HHA's argument was undermined both by the fact that HHA was willing to transfer the Rodriguezes to another unit and by

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(…continued)
2001). Proof of direct threat requires objective evidence, not unsubstantiated inferences. *Ibid.*; *Howard* v. *City of Beavercreek*, 108 F. Supp. 2d 866, 875 (S.D. Ohio 2000); *Cason* v. *Rochester Hous. Auth.*, 748 F. Supp. 1002, 1009 (W.D.N.Y. 1990) ("unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion" from housing (citing H.R. Rep. No. 711, 100th Cong., 2d Sess. 18 (1988)).

[20] The two other families involved in the altercations were also transferred to other HHA public housing units. R. 95 at ¶¶ 15, 21.

Bonilla's conclusion that he could not determine which family was the cause of the disturbances; the evidence showed that the Amparo family was the source of the problem, and "it is far from clear that this dispute ever rose to the level where it posed a threat of actual harm to anyone." R. 129 at 15-16; see also R. 125 at ¶¶ 8-9; R. 132 at 9-12 (HHA's summary judgment reply brief addressing this issue).

As noted above, the district court did not address this issue. Although, again, as a general matter the Court may affirm a grant of summary judgment on any legal ground raised below, even if it was not the basis for the district court's decision, there is no reason for this Court to do so here. First, this argument is refuted by HHA's willingness to transfer the Rodriguezes to another unit. If HHA really believed the Rodriguezes posed a direct threat to the safety of other tenants, it is hard to see why it would allow them to simply switch units.[21] Further, given both HHA's acknowledgement that HHA hearing officer could not determine which family was the cause of the disturbances, and HHA's decision to allow the Rodriguezes to transfer to a different HHA unit, viewing the evidence in the light most favorable to the government, a reasonable jury could not find as a matter of law that the Rodriguezes posed a direct threat. Finally, at a minimum, the filings

[21] Indeed, the underlying issue in this case does not turn on whether the Rodriguezes were impermissibly denied *any* housing with HHA, but rather whether HHA should have offered them a unit that would accommodate Mr. Rodriguez's disability.

below make clear that there are issues of material fact with respect to this issue that preclude summary judgment for the defendant (*e.g.*, who was responsible for the altercations; according to the United States, "Amparo and his family were the cause of the 'disturbance'" (R. 125 at ¶ 9)). If this Court reverses and remands, this issue can be addressed by the district court.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the United States' opening brief, the judgment of the district court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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s/ Thomas E. Chandler
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Dated: November 8, 2010

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2010, I electronically filed the foregoing REPLY BRIEF FOR THE UNITED STATES with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the EDF system.

In addition, I hereby certify that on November 8, 2010, the original and six copies of the REPLY BRIEF FOR THE UNITED STATES were served by certified mail on the Clerk of the Court. I also certify that a copy of the foregoing brief was served by certified mail on the following:

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