DISABILITY LAW — FAIR HOUSING — ELEVENTH CIRCUIT HOLDS THAT HOUSING PROVIDERS CANNOT DELAY REVIEW OF REASONABLE ACCOMMODATIONS BY REQUESTING EXTRANEOUS INFORMATION. — *Bhogaita v. Altamonte Heights Condominium Ass'n*, 765 F.3d 1277 (11th Cir. 2014).

The passage of the Fair Housing Amendments Act of 1988[1] expanded federal protection against housing discrimination by, among other things, adding disabled persons as a protected class[2] and broadening the definition of discrimination to include "refusal[s] to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."[3] Despite this legislative reform, homelessness and housing discrimination continue to be major issues for disabled persons, particularly those with mental disabilities.[4] In *Bhogaita v. Altamonte Heights Condominium Ass'n*,[5] the Eleventh Circuit held that the Fair Housing Act[6] (FHA) prevents housing providers from avoiding a finding of constructive denial of a reasonable accommodation request by using requests for "extraneous information" as evidence that they are still undertaking meaningful review.[7] While the principle announced in *Bhogaita* is a substantial step in the right direction, the court ultimately defined too broadly what constitutes extraneous information. The housing rights of the disabled would be better protected if courts were to borrow from the employment context and impose an interactive-process requirement for reasonable accommodations under the FHA.

In July 2008, Ajit Bhogaita, a United States Air Force veteran suffering from Post-Traumatic Stress Disorder (PTSD), acquired a dog named Kane.[8] While Kane was not prescribed for Bhogaita initially, Bhogaita's psychiatric symptoms improved significantly and he "began to rely on the dog to help him manage his condition."[9] On May 4,

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[1] Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601–3631 (2012)).

[2] *Id.* sec. 6, § 804(f), 102 Stat. at 1620–22 (codified as amended at 42 U.S.C. § 3604(f)).

[3] *Id.* sec. 6, § 804(f)(3)(B), 102 Stat. at 1621 (codified as amended at 42 U.S.C. § 3604(f)(3)(B)).

[4] NAT'L FAIR HOUS. ALLIANCE, MODERNIZING THE FAIR HOUSING ACT FOR THE 21ST CENTURY: 2013 FAIR HOUSING TRENDS REPORT 4 (2013) ("Discrimination against people with disabilities continues to represent the largest share of housing discrimination . . . ."); Rick Jervis, *Mental Disorders Keep Thousands of Homeless on Streets*, USA TODAY, http://www.usatoday.com/longform/news/nation/2014/08/27/mental-health-homeless-series/14255283 (last visited May 8, 2015) [http://perma.cc/7HUT-3GKV].

[5] 765 F.3d 1277 (11th Cir. 2014).

[6] 42 U.S.C. §§ 3601–3631.

[7] *Bhogaita*, 765 F.3d at 1287.

[8] Bhogaita v. Altamonte Heights Condo. Ass'n, No. 6:11-cv-1637, 2012 WL 6562766, at *1 (M.D. Fla. Dec. 17, 2012).

[9] *Bhogaita*, 765 F.3d at 1281.

2010, Altamonte Heights Condominium Association, Inc. (AHCA), which managed the condominium unit Bhogaita owned, demanded that Bhogaita remove Kane from the unit because Kane exceeded the twenty-five-pound weight limit in AHCA's rules.[10] Bhogaita responded by providing two letters from his psychiatrist, Dr. Shih-Tzung Li, explaining his condition, his need for an emotional support animal, and his "therapeutic relationship" with Kane.[11]

In July 2010, AHCA sent Bhogaita a request for information, asking him to provide further details regarding the "exact nature" of his condition[12] and length of treatment with Dr. Li, whether Kane had received specific training, and why he needed a dog that weighed over twenty-five pounds.[13] Bhogaita responded later that month with a third letter from Dr. Li describing how Bhogaita's condition "limits his ability to work directly with other people," and how, without the emotional support of Kane, "his social interactions would be . . . overwhelming."[14] Shortly thereafter, Bhogaita sent another letter authored by himself that answered each of AHCA's questions in turn.[15]

On August 17, 2010, AHCA sent a second request for information, again asking Bhogaita to explain all the disabilities he was claiming and the relevant treatment, provide documentation for why he needed a dog that exceeded the weight limit, and give proof of service-animal training.[16] Bhogaita did not respond to this letter, and on November 3, AHCA sent a third information request seeking additional information about Bhogaita's medications, the number of counseling sessions he attended each week, how his diagnosis was made, the duration of his condition, and details of the prescribed treatment moving forward.[17] The letter concluded with a warning that unless Bhogaita responded by December 6 or removed Kane from his unit by December 10, AHCA would file for arbitration.[18]

Bhogaita instead filed a complaint with the United States Department of Housing and Urban Development (HUD) and the Florida Commission on Human Relations (FCHR), claiming that AHCA's actions constituted a failure to make a reasonable accommodation.[19] In January 2011, HUD and FCHR issued findings of cause against

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[10] *Id.*

[11] *Id.* (quoting Plaintiff Ajit Bhogaita's Motion for Summary Judgment, Exhibit F (under seal) at 3, *Bhogaita*, No. 6:11-cv-1637 [hereinafter MSJ]).

[12] *Id.* (quoting MSJ, *supra* note 11, Exhibit G).

[13] *Id.* at 1282.

[14] *Id.* (quoting MSJ, *supra* note 11, Exhibit F (under seal) at 4).

[15] *Id.*

[16] *Id.* at 1282–83.

[17] *Id.* at 1283.

[18] *Id.*

[19] *Id.*

AHCA, which agreed to allow Bhogaita to keep Kane as a result.[20] In October 2011, Bhogaita filed suit in the United States District Court for the Middle District of Florida, claiming that AHCA's denial of his request for a reasonable accommodation violated federal and Florida fair housing laws.[21]

In district court, Judge Presnell granted in part Bhogaita's motion for summary judgment, finding that AHCA had constructively denied Bhogaita's request for a reasonable accommodation[22] by using requests for extraneous information to delay.[23] The case went to trial, and the jury returned a verdict for Bhogaita — finding that he was disabled within the meaning of the FHA, he requested an accommodation for his disability, and the accommodation requested was necessary and reasonable — and awarded him $5000 in compensatory damages.[24]

On appeal, the Eleventh Circuit affirmed. Writing for the panel, Judge Dubina[25] first reviewed whether Bhogaita had been entitled to summary judgment that AHCA had constructively denied his request for a reasonable accommodation.[26] Although noting that the FHA "does not demand that housing providers immediately grant all requests for accommodation,"[27] Judge Dubina recognized that "an indeterminate delay has the same effect as an outright denial" and therefore constitutes a constructive denial.[28] In determining whether there had been a constructive denial, Judge Dubina focused on whether the defendant "was still undertaking meaningful review."[29] The court found that AHCA's review of Bhogaita's reasonable accommodation request was limited to two inquiries: whether his PTSD "amounted to a qualifying disability" and whether "Kane's presence alleviated the effects of the disorder."[30] To answer these questions, AHCA was entitled to "only the information necessary to apprise [it] of the disability and the de-

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[20] *Id.*

[21] Bhogaita v. Altamonte Heights Condo. Ass'n, No. 6:11-cv-1637, 2012 WL 6562766, at *3 (M.D. Fla. Dec. 17, 2012).

[22] In order for a plaintiff to establish an FHA reasonable accommodation claim, he must prove that: "(1) he is handicapped within the meaning of the FHA, (2) he requested reasonable accommodation, (3) such accommodation was necessary to afford him an opportunity to use and enjoy the dwelling, [and] (4) Defendants refused to make the requested accommodation." *Id.* at *4.

[23] *Id.* at *7.

[24] *Bhogaita*, 765 F.3d at 1284. The court also awarded Bhogaita $127,512 in attorneys' fees. *Id.*

[25] Judge Dubina was joined by Chief Judge Carnes and Judge Siler, sitting by designation from the Sixth Circuit.

[26] *Bhogaita*, 765 F.3d at 1285–87.

[27] *Id.* at 1285–86.

[28] *Id.* at 1286 (quoting Groome Res. Ltd., L.L.C. v. Parish of Jefferson, 234 F.3d 192, 199 (5th Cir. 2000)) (internal quotation mark omitted).

[29] *Id.*

[30] *Id.* at 1287.

sire and possible need for an accommodation."[31] Since Bhogaita had provided such information in the three letters he sent from Dr. Li, AHCA had everything it needed to make a determination after its first request for information.[32] Further, Bhogaita's silence in the face of the second and third requests was irrelevant, since housing providers are not "entitle[d] . . . to extraneous information."[33] Thus, AHCA could not support the inference that it had still been in the process of undertaking meaningful review, and the court determined that there had been a constructive denial of Bhogaita's reasonable accommodation.[34]

Judge Dubina then turned to the question of whether a reasonable jury could find that Bhogaita had a disability as defined by the FHA: "a physical or mental impairment [that] substantially limits one or more of [a] person's major life activities."[35] More specifically, since the parties agreed that Bhogaita suffered from a mental impairment and that working is a major life activity, the issue turned on whether PTSD substantially limited Bhogaita's ability to work.[36] To answer this question, the court applied the standard from *Sutton v. United Air Lines, Inc.*,[37] where the Supreme Court held that an impairment substantially limits the ability to work "only where it renders a person 'unable to work in a broad class of jobs.'"[38] Because Bhogaita presented ample evidence that his PTSD "limit[ed] his ability to work directly with other people"[39] and because the number of jobs that require significant social interaction amounted to a "broad class," the court declined to reverse the jury's finding that Bhogaita was disabled.[40]

Finally, Judge Dubina upheld the jury's conclusion that the requested accommodation was necessary.[41] The court noted that "neces-

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[31] *Id.* (citing Colwell v. Rite Aid Corp., 602 F.3d 495, 506 (3d Cir. 2010)).

[32] *Id.* at 1286–87.

[33] *Id.* at 1287.

[34] *See id.* at 1286.

[35] *Id.* at 1287 (quoting 42 U.S.C. § 3602(h) (2012)) (internal quotation marks omitted). While the text of the FHA uses the word "handicap," "disability" is the preferred term, as the *Bhogaita* court recognized, *id.* at 1285 n.2, and this comment will follow suit.

[36] *Id.* at 1287–88.

[37] 527 U.S. 471 (1999).

[38] *Bhogaita*, 765 F.3d at 1288 (quoting *Sutton*, 527 U.S. at 491). Although *Sutton* was an Americans with Disabilities Act (ADA) case, the standard was applicable because of the similarity between the definitions of "disability" in the pre-amendment ADA and "handicap" in the FHA. *See id.*

[39] *Id.* (quoting MSJ, *supra* note 11, Exhibit F (under seal) at 4).

[40] *Id.*

[41] *Id.* For an FHA accommodation claim to be successful, it must be both reasonable and necessary. *Id.* at 1289. Because AHCA did not raise the reasonableness question on appeal, Judge Dubina declined to "engage in the 'highly fact-specific' reasonableness inquiry" of whether Bhogaita's condition could have been equally ameliorated with a dog under the twenty-five pound limit. *Id.* (quoting Oconomowoc Residential Programs, Inc. v. City of Milwaukee, 300 F.3d 775, 784 (7th Cir. 2002)).

sary" means that the requested accommodation "alleviates the effects of a disability"[42] and found that Bhogaita produced enough evidence for a reasonable factfinder to conclude that Kane alleviated the effects of his disability.[43]

By determining that a housing provider cannot delay timely review of an accommodation request by asking for extraneous information, the Eleventh Circuit put a good faith limitation on housing providers' affirmative burden to seek documentation when reviewing a tenant's request. However, the court supplied too narrow a standard for what constitutes the necessary information to review a reasonable accommodation request. Further, instead of making ex ante determinations of what information housing providers need, courts would better protect the housing rights of the disabled by requiring an interactive process between the housing provider and the requester.

Bhogaita improves the reasonable accommodation process by being the first federal appellate decision to recognize a limit on housing providers' ability to stonewall requesters through an inundation of information requests.[44] A separate line of cases has established that once a reasonable accommodation request is made, the housing provider has the burden of "open[ing] a dialogue" and seeking the necessary documentation.[45] With only this mandate to seek out additional information, there was no countervailing pressure to keep housing providers, like AHCA in this case, from asking for a gratuitous amount of documentation. Regardless of whether these requests are unintentionally excessive or made in bad faith, they create a substantial hindrance for persons with disabilities. *Bhogaita* gives requesters the ability to fight back against this practice by holding that excessive queries for information do not constitute meaningful review, and thus

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[42] *Id.* at 1288.

[43] *Id.* at 1289. Additionally, the court upheld the jury instructions, the district court's decision to allow Kane to remain in the courtroom, and the district court's awarding of attorneys' fees. *Id.* at 1289–91.

[44] *Cf.* Dinah Luck, *Advocating Emotional-Support Animals in No-Pets Housing*, 48 CLEARINGHOUSE REV. 38, 41 (2014) (citing the lower court opinion for the claim that "a housing provider who makes intrusive and excessive requests for information after a tenant has submitted documentation supporting the tenant's requests can be held to have constructively denied the accommodation"). The Sixth Circuit has stated this proposition in dicta in an unreported opinion. *See* Overlook Mut. Homes, Inc. v. Spencer, 415 F. App'x 617, 622 (6th Cir. 2011) ("In some circumstances, a housing provider that refuses to make a decision unless a requestor provides unreasonably excessive information could be found to have constructively denied the request by 'stonewalling' and short-circuiting the process."). Indeed, a few months before *Bhogaita* was decided, a lower court within the Eleventh Circuit's jurisdiction used *Overlook* as a framework to find a similar constructive denial. *See* Sabal Palm Condos. of Pine Island Ridge Ass'n v. Fischer, 6 F. Supp. 3d 1272, 1288–92 (S.D. Fla. 2014).

[45] *See* Jankowski Lee & Assocs. v. Cisneros, 91 F.3d 891, 895 (7th Cir. 1996); *see also* Douglas v. Kriegsfeld Corp., 884 A.2d 1109, 1122 & n.22 (D.C. 2005) (en banc).

housing providers are still on the hook for constructive denials of reasonable accommodations.

Further, *Bhogaita* empowers requesters to decline to respond to extraneous information requests. Prior to *Bhogaita*, if a housing provider had all the information necessary to evaluate a reasonable accommodation request yet asked for more, the requester was left with two undesirable options: either acquiesce to the information request or suffer through a delayed review.[46] After *Bhogaita*, requesters can refuse to provide the extraneous information and raise a constructive denial claim if the housing provider delays review. Thus, *Bhogaita* gives requesters a sphere of information that they can keep private, and protects them against intrusive inquiries that can contravene the purposes of the FHA by delving too far into the nature and severity of requesters' disabilities.[47]

However, *Bhogaita* defines what constitutes necessary information too narrowly by limiting it to "only the information necessary to apprise [housing providers] of the disability and the desire and possible need for an accommodation."[48] This misstep is elucidated by the fact that the *Bhogaita* court drew from an ADA employment case, *Colwell v. Rite Aid Corp.*,[49] to supply its definition.[50] While courts sometimes draw from the ADA to clarify terms in the FHA,[51] there is a significant difference between the ADA and the FHA in the present context that requires distinct definitions for what constitutes necessary information. In *Colwell*, the "information to know of 'both the disability and desire for an accommodation'"[52] is merely the *trigger*[53] for the

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[46] It is also possible that a housing provider might reject the accommodation request outright. However, the provider would likely avoid rejecting a request that is plausibly legitimate, since the denial of a reasonable accommodation request exposes the housing provider to a straightforward failure-to-accommodate claim under the FHA.

[47] *See* 24 C.F.R. § 100.202(c) (2014) (forbidding inquiries related to disabilities of housing applicants); U.S. DEP'T OF JUSTICE & U.S. DEP'T OF HOUS. & URBAN DEV., REASONABLE ACCOMMODATIONS UNDER THE FAIR HOUSING ACT 11–14 (2004), http://www.hud.gov/offices/fheo/library/huddojstatement.pdf [http://perma.cc/VG3B-9TGK] (describing limitations on types of disability-related information housing providers can request from tenants in response to reasonable accommodation requests and explaining the need for confidentiality).

[48] *Bhogaita*, 765 F.3d at 1287.

[49] 602 F.3d 495 (3d Cir. 2010).

[50] *Bhogaita*, 765 F.3d at 1287 (citing *Colwell*, 602 F.3d at 506). The court also cited a guidance document prepared by the Department of Justice (DOJ) and HUD regarding fair housing, but only to support the proposition that detailed medical records — an inquiry particular to *Bhogaita* — are usually not necessary. *See id.* (citing U.S. DEP'T OF JUSTICE & U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 47, at 14).

[51] *See supra* note 38.

[52] *Colwell*, 602 F.3d at 506 (quoting Conneen v. MBNA Am. Bank, N.A., 334 F.3d 318, 332 (3d Cir. 2003)).

[53] *See id.* at 507 (describing the previously mentioned standard for necessary information as "proper notice," *id.*, that, once provided, initiates a duty on both parties "to assist in the search for

interactive process,[54] a requirement unique to reasonable accommodations in the employment context.[55] After the interactive process is triggered, more information gathering is conducted.[56] Thus, the standard for necessary information used by the *Bhogaita* court was never meant to cover the entire universe of information needed to make a reasonable accommodation decision; rather, it merely defines what is necessary to put the housing provider or employer on notice of the need for a reasonable accommodation. Indeed, there are several reasons housing providers should be entitled to more information than the narrow formulation stated by the *Bhogaita* court allows.

First, housing providers may simply need more information in order to adequately review the request. For instance, AHCA had asked Bhogaita several times why he needed a dog over the twenty-five pound weight limit,[57] a question that is quite relevant to whether the accommodation is necessary. Even though there may have been an obvious answer — that Bhogaita had a particular emotional attachment to Kane that helped alleviate his symptoms — AHCA needed to confirm that information in order to properly review the reasonable accommodation request.

Second, more information may be needed to allow the parties to negotiate and reach an optimal arrangement. If a requester refuses to provide information beyond the narrow definition supplied by *Bhogaita*, a housing provider will have little to work with. As a result, it may just reject the request when more information could have revealed a less burdensome alternative. Ideally, housing providers should be encouraged to seek creative alternative arrangements, with

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an appropriate reasonable accommodation and to act in good faith," *id.* (quoting *Conneen*, 334 F.3d at 332) (internal quotation mark omitted)).

[54] Endorsed through administrative rules by the Equal Employment Opportunity Commission for employment-related reasonable accommodations, *see* 29 C.F.R. § 1630.2(o)(3) (2014), the "interactive process" requires the employer to (1) "[a]nalyze the particular job involved and determine its purpose and essential functions"; (2) "[c]onsult with the [requester] to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation"; (3) in conjunction with the requester, "identify potential accommodations and assess the effectiveness [of] each"; and (4) "[c]onsider the preference of the [requester] and select and implement the accommodation that is most appropriate," *id.* pt. 1630, app. § 1630.9 (2014).

[55] Federal appellate courts have generally rejected the idea that an interactive process is required for FHA reasonable accommodations. *See, e.g.*, Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of Scotch Plains, 284 F.3d 442, 446 (3d Cir. 2002); Groner v. Golden Gate Gardens Apartments, 250 F.3d 1039, 1047 (6th Cir. 2001).

[56] An employer can demonstrate that it has met the good faith requirement of the interactive process by "meet[ing] with the employee who requests an accommodation [and] request[ing] information about the condition and what limitations the employee has." Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 317 (3d Cir. 1999).

[57] *See Bhogaita*, 765 F.3d at 1282–83.

proper deference to the needs of the requester,[58] rather than denying requests outright.

Finally, additional information may be needed in order to allow the housing provider to better determine whether the accommodation request is genuine or fraudulent. Abuse of reasonable accommodation law is a significant problem and a major reason why housing providers are suspicious about exemptions, particularly those regarding no-pet policies.[59] While AHCA went too far in the present case by asking for very specific details regarding duration of treatment, treatment history, and diagnostic method,[60] housing providers should be entitled to some amount of evidence regarding the legitimacy of the request. Ultimately, better detection of fraudulent accommodation requests benefits all parties involved since the skepticism created by false requests creates problems for persons with disabilities who have legitimate claims.[61]

While future courts could address this issue by expanding what is considered necessary information, imposing a bright-line rule may not be the best approach for this context.[62] Instead, it may be preferable to borrow fully from employment law and impose an interactive process requirement within fair housing.[63] Doing so would create opportunities for good-faith, open discussions that allow the two parties to shape the exchange of information to the specific needs at hand and achieve the appropriate balance between information disclosure and privacy.[64]

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[58] *See* U.S. DEP'T OF JUSTICE & U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 47, at 8 ("[P]roviders should be aware that persons with disabilities typically have the most accurate knowledge about the functional limitations posed by their disability, and an individual is not obligated to accept an alternative accommodation suggested by the provider . . . .").

[59] *See, e.g.*, Patricia Marx, *Pets Allowed*, NEW YORKER, Oct. 20, 2014, http://www.newyorker.com/magazine/2014/10/20/pets-allowed [http://perma.cc/BVT3-ATTS].

[60] *See Bhogaita*, 765 F.3d at 1282–83.

[61] *See* Susan Stellin, *Do You Have a Doctor's Note? Getting a Dog into a No-Pet Building*, N.Y. TIMES (Sept. 29, 2013), http://www.nytimes.com/2013/09/29/realestate/getting-a-dog-into-a-no-pet-building.html.

[62] *Cf.* Note, *Three Formulations of the Nexus Requirement in Reasonable Accommodations Law*, 126 HARV. L. REV. 1392, 1410–11 (2013) ("Perhaps because disability law is an inherently subjective discipline, drawing its substance from deeply personal identities and interactions, no single logical model can satisfactorily meet every situation it confronts.").

[63] HUD and DOJ have recognized the benefits of the interactive process and recommended its use. *See* U.S. DEP'T OF JUSTICE & U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 47, at 7 ("An interactive process in which the housing provider and the requester discuss the requester's disability-related need for the requested accommodation and possible alternative accommodations is helpful to all concerned . . . .").

[64] For further commentary on the benefits of using the interactive process within the fair housing context, see Gretchen M. Widmer, Note, *We Can Work It Out: Reasonable Accommodation and the Interactive Process Under the Fair Housing Amendments Act*, 2007 U. ILL. L. REV. 761, 782.