

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL HARRISON, MARK SMITHERS, CODY LUCAS, DAVID OKKER, MARVIN L. RAGLAND, JACOB P. MILLER, KYLIE SMITHERS, FAITH TAPPAN, AND BERNARD BROOKS,	Case Nos. 17-5067 17-5069 17-5071 17-5073 17-5075 17-5077 17-5079 17-5081 17-5411
Petitioners,	
vs.	
THE MG HERRING GROUP, INC.,	
Respondent.	

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RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings (Division) conducted the final hearing in this matter on December 1, 2017, in Gainesville, Florida.

APPEARANCES

For Petitioners: Robert W. Bauer, Esquire  
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For Respondent: Carrie Stolzer Robinson, Esquire  
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STATEMENT OF THE ISSUE

Whether Respondent, The MG Herring Group, Inc. (MG Herring), was an employer of Petitioners.

PRELIMINARY STATEMENT

Michael Harrison, Mark Smithers, Cody Lucas, David Okker, Marvin L. Ragland, Jacob P. Miller, Kylie Smithers, Faith Tappan, and Bernard Brooks filed charges of discrimination with the Florida Commission on Human Relations (Commission) against MG Herring and Xencom Facility Management, LLC (Xencom), under the Florida Civil Rights Act of 1992, chapter 760, Florida Statutes (2016).<sup>1/</sup> Mark Smithers alleged that MG Herring discriminated against him in employment on account of his sex by harassing him and retaliated against him for complaining. Michael Harrison alleged that MG Herring discriminated against him in employment on account of his sex by harassing him and retaliated against him for complaining. The other seven Petitioners alleged that MG Herring retaliated against them because they had opposed a practice that was unlawful under section 760.10. All Petitioners asserted that MG Herring was their employer by virtue of a joint employer relationship with Xencom.

The same nine Petitioners filed charges of discrimination by discharge from employment against Xencom under the Florida Civil Rights Act of 1992 with the Commission. Mr. Harrison claimed

Xencom discriminated against him on account of his sex and retaliated against him for complaining. Mr. Smithers claimed that Xencom discriminated against him on account of his sex and retaliated against him for complaining. All Petitioners claimed that Xencom retaliated against them for opposing an unlawful employment practice.

In each case, the Commission issued a "Determination: No Reasonable Cause." The Commission concluded that MG Herring did not employ Petitioners. The Commission also concluded that Xencom terminated Petitioners' employment because it lost the contract under which Petitioners were working, not for the reasons charged. All nine Petitioners filed a Petition for Relief challenging the Commission's determination. The Commission transmitted the cases to the Division for conduct of a final hearing and issuance of a recommended order.

The claims against Xencom were consolidated under DOAH Case No. 17-5010. The claims against MG Herring were consolidated under DOAH Case No. 17-5067. For purposes of discovery and final hearing, the consolidated cases traveled together. The undersigned bifurcated the issues of the cases. Whether MG Herring was Petitioners' employer and whether Xencom unlawfully terminated Petitioners' employment were separated from the issues of whether MG Herring and Xencom committed the unlawful actions alleged. The issues of whether MG Herring was Petitioners'

employer and why Xencom discharged Petitioners were heard first. All evidence admitted at the final hearing was accepted and considered in each case.

At the final hearing, Petitioners presented testimony from Norine Bowen, Michael Harrison, Kylie Smithers, and Tina Wilson. Petitioners' Exhibits 3 and 17 were admitted into evidence.

MG Herring presented the testimony of Norine Bowen and Tina Wilson. MG Herring Exhibits 1 through 3, 8 through 17, 41, 59, 61, and 63 were admitted. Xencom presented testimony from Michael Ponds. Xencom Exhibits 1 through 32 were admitted.

After the hearing, the parties ordered a transcript of the proceedings. It was filed January 10, 2018. The parties timely filed proposed recommended orders. They have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Xencom provides general maintenance, landscaping, housekeeping, and office cleaning services to retail facilities. In September of 2015, Xencom entered three contracts for services with CREFII Market Street Holdings, LLC (CREFII). The contracts were to provide maintenance, landscaping, and office cleaning services for a mall known as Market Street @ Heathbrook (Market Street) in Ocala, Florida.

2. Michael Ponds, Xencom's president, executed the contracts on behalf of Xencom. Two individuals executed the

contracts on behalf of CREFII. One was Gar Herring, identified as Manager for Herring Ocala, LLC. The other was Bernard E. McAuley, identified as Manager of Tricom Market Street at Heathbrook, LLC. MG Herring was not a party or signatory to the contracts. MG Herring does not own or operate Market Street. A separate entity, The MG Herring Property Group, LLC (Property Group) operated Market Street.

3. The contracts, in terms stated in an exhibit to them, established a fixed price for the year's work, stated the scope of services, and detailed payment terms. They also identified labor and labor-related costs in detail that included identifying the Xencom employees involved, their compensation, and their weekly number of hours. The contract exhibits also identified operating costs, including equipment amortization, equipment repairs, fuel expenses, vacation costs, health insurance, and storage costs. The contracts ended December 31, 2016.

4. The contracts specify that Xencom is an independent contractor. Each states: "Contractor is an independent contractor and not an employee or agent of the owner. Accordingly, neither Contractor nor any of Contractor's Representatives shall hold themselves out as, or claim to be acting in the capacity of, an agent or employee of Owner."

5. The contracts also specify that the property manager may terminate the contract at any time without reason for its

convenience. The contracts permit Xencom to engage subcontractors with advance approval of the property manager. They broadly describe the services that Xencom is to provide. Xencom has over 80 such contracts with different facilities.

6. As the contracts contemplate, only Xencom exerted direct control of the Petitioners working at Market Street. Property Group could identify tasks and repairs to be done. Xencom decided who would do them and how.

7. In 2013, Xencom hired Michael Harrison to work as its Operations Manager at Market Street. He was charged with providing services for which Property Group contracted. His immediate supervisor was Xencom's Regional Manager. In 2016, that was David Snell. Mr. Snell was not located at Market Street. Property Group also did not have a representative on site. Before Xencom hired him, Mr. Harrison worked at Market Street for Property Group.

8. Xencom hired the remaining Petitioners to work at Market Street under Mr. Harrison's supervision. Each of the Petitioners completed an Application for Employment with Xencom. The application included a statement, initialed by each Petitioner, stating, "Further, I understand and agree that my employment is for no definite period and I may be terminated at any time without previous notice." All of the Petitioners also received Xencom's employee handbook.

9. As Xencom's Operations Manager and supervisor of the other Petitioners, Mr. Harrison was responsible for day-to-day management of Petitioners. He scheduled their work tasks, controlled shifts, established work hours, and assigned tasks.

10. Mr. Harrison also decided when Petitioners took vacations and time off. His supervisor expected him to consult with Property Group to ensure it knew what support would be available and that he knew of any upcoming events or other considerations that should be taken into account in his decisions. As Operations Manager, Mr. Harrison was also responsible for facilitating payroll, procuring supplies, and managing Xencom's equipment at the site.

11. Xencom provided Petitioners work uniforms that bore Xencom's name. Xencom required Petitioners to wear the uniforms at work. Xencom provided the supplies and equipment that Petitioners used at work.

12. Only Xencom had authority to hire or fire the employees providing services to fulfill its contracts with the property manager. Only Xencom had authority to modify Petitioners' conditions of employment. Neither MG Herring, Property Group, nor Xencom held out Petitioners as employees of MG Herring or Property Group.

13. There is no evidence that MG Herring or Property Group employed 15 or more people.

14. Property Group hired Tina Wilson as Market Street's on-site General Manager on February 1, 2016. Until then there was no Property Group representative at the site. The absence of a Property Group representative on-site left Mr. Harrison with little oversight or accountability under the Xencom contracts for Market Street. His primary Property Group contact was General Manager Norine Bowen, who was not located at the property.

15. Ms. Wilson's duties included community relations, public relations, marketing, leasing, litigation, tenant coordination, lease management, construction management, and contract management. She managed approximately 40 contracts at Market Street, including Xencom's three service agreements. Ms. Wilson was responsible for making sure the contracts were properly executed. Managing the Xencom contracts consumed less than 50 percent of Ms. Wilson's time.

16. During the last weeks of 2016, Mr. Harrison intended to reduce the hours of Kylie Smithers. Ms. Wilson requested that, since Ms. Smithers was to be paid under the contract for full-time work, Ms. Smithers assist her with office work such as filing and making calls. Mr. Harrison agreed and scheduled Ms. Smithers to do the work. This arrangement was limited and temporary. It does not indicate Property Group control over Xencom employees.



17. Ms. Wilson was Xencom's point of contact with Property Group. She and Mr. Harrison had to interact frequently. Ms. Wilson had limited contact with the other Xencom employees at Market Street.

18. Friction and disagreements arose quickly between Mr. Harrison and Ms. Wilson. They may have been caused by having a property manager representative on-site after Mr. Harrison's years as either the manager representative himself or as Xencom supervisor without a property manager on-site. They may have been caused by personality differences between the two. They may have been caused by the alleged sexual and crude comments that underlie the claims of discrimination in employment. They may have been caused by a combination of the three factors.

19. On November 21, 2016, Norine Bowen received an email from the address xencomemployees@gmail.com with the subject of "Open your eyes about Market Street." It advised that some employees worked at night for an event. It said that Ms. Wilson gave the Xencom employees alcohol to drink while they were still on the clock. The email said that there was a fight among Xencom employees. The email also said that at another event at a restaurant where Xencom employees were drinking, Ms. Wilson gave Ms. Smithers margaritas to drink and that Ms. Smithers was underage.

20. The email claimed that during a tree-lighting event Ms. Wilson started drinking around 3:30 p.m. It also stated that Ms. Wilson offered a Xencom employee a drink. The email went on to say that children from an elementary school and their parents were present and that Ms. Wilson was "three sheets to the wind." The email concludes stating that Ms. Wilson had been the subject of three employee lawsuits.

21. On December 14, 2016, Ms. Wilson, Ms. Bowen, and Mr. Snell met at Property Group's office in Market Street for their regular monthly meeting to discuss operations at Market Street. Their discussion covered a number of management issues including a Xencom employee's failure to show up before 8:00 to clean as arranged, security cameras, tenants who had not paid rent, lease questions, HVAC questions, and rats on the roof. They also discussed the email's allegations. The participants also discussed a number of dissatisfactions with Mr. Harrison's performance.

22. Near the end of a discussion about the anonymous email, this exchange occurred:<sup>2/</sup>

Bowen: Okay, so I know that David [Snell], I think his next step is to conduct his own investigation with his [Xencom] people, and HR is still following up with John Garrett, and you're meeting with Danny [intended new Xencom manager for Market Street] tonight?

David Snell: Yes.

Bowen: To finish up paperwork, and, based on his investigation, it will be up to Xencom to figure out what to do with people that are drinking on property, off the clock or on the clock, you know, whatever, what their policy is.

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Bowen: So, I don't know what to make of it. I'm just here to do an investigation like I'm supposed to do and David is here to pick up the pieces and meet with his folks one-on-one, and we'll see where this takes us.

23. This exchange and the remainder of the recording do not support a finding that Property Group controlled Xencom's actions or attempted to control them. The participants were responsibly discussing a serious complaint they had received, their plan to investigate it, and pre-existing issues with Mr. Harrison. The exchange also makes clear that all agreed the issues involving Xencom employees were for Xencom to address, and the issues involving Property Group employees were for Property Group to address.

24. At the time of the December 14, 2016, meeting, the participants were not aware of any complaints from Mr. Harrison or Mr. Smithers of sexual harassment or discrimination by Ms. Wilson.

25. On December 15, 2016, Gar Herring and Norine Bowen received an email from Mr. Harrison with an attached letter to Xencom's Human Resources Manager, and others. Affidavits from Petitioners asserting various statements and questions by

Ms. Wilson about Mr. Harrison's and Mr. Smithers' sex life and men's genitalia and statements about her sex life and the genitalia of men involved were attached. Xencom President Michael Ponds received a similar email with attachments on the same day. On December 21, 2016, Mr. Ponds received a letter from Herring Ocala, LLC, and Tricom Market Street at Heathbrook, LLC, terminating the service agreements. Their agreements with Xencom were going to expire December 31, 2016. They had been negotiating successor agreements. However, they had not executed any.

26. Xencom terminated Petitioners' employment on December 21, 2016. Xencom no longer needed Petitioners' services once MG Herring terminated the contract with Xencom. This was the sole reason it terminated Petitioners.

#### CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties. §§ 120.569 and 120.57(1), Fla. Stat. (2017).

28. Petitioners must prove their claim that MG Herring was their employer by a preponderance of the evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., Inc., 670 So. 2d 932 (Fla. 1996); City of Hollywood v. Hogan, 986 So. 2d 634, 642 (Fla. 4th DCA 2008).

29. Petitioners seek relief from an unlawful employment practice under section 760.10(1) and (7). These sections prohibit an employer from discriminating against an employee on account of sex and from retaliating against an employee opposing an unlawful employment practice.

30. Section 760.02(7) defines employer as "any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person." Petitioners did not prove that MG Herring was an employer as the law defines employer. For that matter, Petitioners did not prove that any MG Herring-related entity was an employer as section 760.02(7) defines the term.

31. Recognizing this, Petitioners argue that MG Herring was their joint employer with Xencom. Joint employment is primarily a factual issue. Supervision of day-to-day activities, authority to hire or fire, promulgation of work rules, and authority to make work assignments can all be indicia of a joint employment relationship. Holyoke Visiting Nurses Ass'n v. NLRB, 11 F.3d 302, 306 (1st Cir. 1993). The record in this cause does not prove the existence of any of these factors.

32. The opinion in Morrison v. Magic Carpet Aviation, 383 F.3d 1253 (11th Cir. 2004), at 1255, identifies three factors to consider when deciding whether an entity is an individual's employer. They are (1) whether the alleged employment took place

on the premises of the alleged employer, (2) how much control the alleged employer exerted over the alleged employee, and (3) whether the alleged employer had the authority to hire or fire the alleged employee or modify her conditions of employment. See also Jerome v. Hertz Corp., 15 F. Supp. 3d 1225, 1236-37 (M.D. Fla. 2014). Petitioners proved only the location factor. MG Herring and Property Group did not establish tasks, work hours, employee schedules or the means of accomplishing tasks for Petitioners. MG Herring and Property Group did not have any authority to hire or fire Petitioners or modify the conditions of their employment. The only control MG Herring and Property Group had over Petitioners was to insist that their employer, Xencom, provide services as required by the contract. In addition, if the facts showed that MG Herring pressured Xencom to discharge an employee, "[t]he simple fact that a major client can pressure an employer into firing a particular individual does not transmute that client into that individual's employer." Morrison v. Magic Carpet Aviation, 383 F.3d 1253, 1255 (11th Cir. 2004). Petitioners did not prove by a preponderance of the evidence that MG Herring or Property Group was their joint employer with Xencom.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Florida Commission on Human Relations enter a final order denying the Petitions of all Petitioners.

DONE AND ENTERED this 11th day of May, 2018, in Tallahassee, Leon County, Florida.



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JOHN D. C. NEWTON, II  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 11th day of May, 2018.

ENDNOTES

<sup>1/</sup> All citations to Florida Statutes are to the 2016 codification unless otherwise noted.

<sup>2/</sup> Mr. Harrison testified that he accidentally recorded the meeting by leaving his recorder in the meeting room earlier in the day. The recording was admitted over objection. When Mr. Harrison initially disclosed the recording, he lied about how it was created. This admitted willingness to lie affected the credibility and persuasiveness of Mr. Harrison's testimony.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.