

PUBLICATION

Fifth Circuit Holds That Erroneous Provision Of FMLA Leave May Be Irrevocable

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January 8, 2007

In the recent case of *Minard v. ITC Deltacom Communications*, 447 F.3d 352 (5th Cir. 2006), the Fifth Circuit held that an employer's grant of leave under the Family and Medical Leave Act (FMLA) to an employee who was not qualified for FMLA leave may be irrevocable under some circumstances. The plaintiff, Minard, sought FMLA leave to undergo surgery to relieve a serious medical condition. Minard's employer, ITC Deltacom (ITC) granted her request for leave in a written memorandum which confirmed her eligibility for FMLA leave. After issuing the written leave approval, and after Minard had taken leave to undergo surgery, the employer discovered that Minard was not eligible for FMLA leave because ITC employed less than 50 employees at or within 75 miles of where she worked. Minard was discharged on the day she was scheduled to return to work.

Minard argued that, notwithstanding her non-eligibility for FMLA leave, ITC was estopped from revoking its grant of FMLA leave because, had she been informed that she was not eligible for FMLA leave, she would have sought alternative medical procedures to the surgery which required her to miss work. ITC argued that eligibility for FMLA leave was a jurisdictional prerequisite to maintaining suit under the FMLA; i.e., that there can be no lawsuit under the FMLA unless the employee was eligible for FMLA leave at the time of the questioned employment action.

The Fifth Circuit sided with Minard. The court found that the FMLA's definition of "eligible employee" was found in "the definitions section" of the FMLA, "separate from the jurisdiction section." Under the Fifth Circuit's holding in *Minard*, the issue of an employee's eligibility for FMLA leave essentially becomes an affirmative defense for employers.

The lesson in *Minard* for employers looking to avoid similar problems is clear: address the question of an employee's eligibility for FMLA leave at the time a leave request is submitted. Had ITC determined that Minard was not eligible for FMLA leave when she asked for leave, and simply denied her request for leave, it would not have exposed itself to suit under the FMLA by erroneously providing FMLA leave to an employee who did not qualify for leave under the FMLA.