

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**CHRISTI M BURGESS**  
Claimant

**APPEAL NO. 12A-UI-08526-JT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**PRAIRIE MEADOWS  
RACETRACK & CASINO**  
Employer

**OC: 06/17/12  
Claimant: Appellant (1)**

871 IAC 24.23(10) – Leave of Absence

**STATEMENT OF THE CASE:**

Christi Burgess filed a timely appeal from the July 13, 2012, reference 01, decision that denied benefits effective June 17, 2012 based on an agency conclusion that she was on an approved leave of absence that she had requested. After due notice was issued, an in-person hearing was held on August 14, 2012. Ms. Burgess participated. Tracy Casey, human resources generalist, represented the employer. Exhibits One and A were received into evidence.

**ISSUE:**

Whether Ms. Burgess has been on an approved leave of absence that she requested and that was approved by the employer.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Christi Burgess has been employed by Prairie Meadows Racetrack & Casino as a full-time security officer since 2010 and last performed work for the employer on or about June 17, 2012. At that time, Ms. Burgess commenced a leave of absence that she requested and that Gina Vitiritto, human resources manager, approved. Ms. Burgess had notified the employer at the end of May of her need to be away from work in connection with a colon surgery her teenage daughter was to undergo on June 19, 2012 at the University of Iowa Hospitals and Clinics. Prior to the start of the leave of absence, Ms. Vitiritto notified Ms. Burgess that she only had 26 days of Family and Medical Act Leave (FMLA) leave remaining. Ms. Burgess had used up a substantial amount of FMLA leave in late 2011 in connection with her own need to undergo surgery. The employer had an additional leave program available to Ms. Burgess to address the time after Ms. Burgess exhausted available FMLA leave. Under that additional leave program, Ms. Vitiritto could return to work within 12 months of going off work and retain her job classification and seniority. Ms. Burgess understood that once the FMLA leave expired, Ms. Burgess would not be guaranteed the same position upon her return, but a similar security office position would be made available to her. Ms. Burgess elected to commence that leave of absence under the belief that she would be eligible for unemployment insurance benefits during the time she was off work.

At the time Ms. Burgess commenced her leave of absence in June 2012, she had accrued sufficient attendance points to be in jeopardy of being discharged from the employment in connection with *future* absences. Some of Ms. Burgess' prior attendance points had been based on Ms. Burgess' need to care for her daughter and Ms. Burgess' associated inability at times to give the employer the required two-hour notice of an absence. The employer had directed Ms. Burgess to provide a doctor's note regarding her daughter's medical condition and her need at times to provide less than two-hours notice of an absence. Ms. Burgess provided the requested documentation. The employer adjusted its expectation to accommodate the doctor's note. But, the employer did not rescind the prior attendance points. The employer had placed Ms. Burgess on a "points probation" for 90 days. The clock on the 90-day probation continued to run even if Ms. Burgess was on leave.

Ms. Burgess' daughter's June 19, 2011 surgery went well. By July 5, 2012, Ms. Burgess' daughter's recovery had progressed to a point where the daughter, 15, no longer needed Ms. Burgess' assistance with cares.

Ms. Burgess did not return to work once her daughter no longer needed her home. Instead, because Ms. Burgess was still concerned with where she was on the employer's attendance point system, Ms. Burgess elected to remain off work until the 90-day points probation expires. The 90-day points probation period had not yet expired as of the August 14, 2012 appeal hearing and Ms. Burgess continued to be voluntarily off work as of that time.

Sometime during the week that included July 9, 2012, Ms. Burgess went to Prairie Meadows for recreation and had a casual conversation with her supervisor, who indicated that another security office had been placed in Ms. Burgess' day position. The supervisor did not tell Ms. Burgess that the employer no longer had work for her or that she could not return to her same position if she returned to work.

After Ms. Burgess went off work for her leave of absence, she did not have any further contact with the employer's human resources department, despite the fact that it was the human resources department that had approved the leave. Ms. Burgess' FMLA time expired on July 17, 2012. On July 16, 2012, the employer sent Ms. Burgess notice that her FMLA leave had expired and that she was now deemed to be on the employer's 12-month leave. Ms. Burgess has made no contact with the employer about returning to work. Ms. Burgess intended to remain off work another month or so until the 90-day points probation period expires. Both parties anticipate that Ms. Burgess will return to the employment at that time.

#### **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Administrative Code rule 871 IAC 24.23(10) provides as follows:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

24.23(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

The evidence in the record establishes that since Ms. Burgess established the claim for unemployment insurance benefits that was effective June 17, 2012, she has been on an approved leave of absence that she requested and that the employer approved. The leave was initially an FMLA leave based on Ms. Burgess' need to care for her teenage daughter. Though the employer deemed the FMLA leave time to have expired on July 17, 2012, there had been no medical basis for the FMLA leave beyond July 5, 2012. Beyond that date, the sole basis for Ms. Burgess' leave was her desire to delay her return to work until the 90-day points probation period expired and her desire to receive unemployment insurance benefits in the meantime. Ms. Burgess' entire absence since June 17, 2012 is a voluntary absence from the employment. This is especially so for the period beyond July 5, 2012. Ms. Burgess has not been available for work since June 17, 2012 and is not eligible for benefits. But for the employer's generous 12-month leave program and the parties' mutual assertions that Ms. Burgess continues job-attached and on an approved leave, the evidence would have established a voluntary quit based on Ms. Burgess' failure to return to work on or about July 5, 2012, once there was no further need to be off work to care for her daughter.

Ms. Burgess' erroneous belief, or the employer's erroneous belief, that Ms. Burgess would be eligible to collect unemployment insurance benefits is immaterial. Ms. Burgess is voluntarily unemployed and is not eligible for benefits.

**DECISION:**

The Agency representative's July 13, 2012, reference 01, is affirmed. The claimant has been on an approved leave of absence that she requested since she established her claim for benefits. The claimant is voluntarily unemployed, does not meet the work availability requirement, and is not eligible for benefits. Benefits are denied effective June 17, 2012. The claimant continues to be ineligible for benefits at this time and will continue to be ineligible for benefits on the same basis so long as she remains off work on the leave of absence.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw