IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Income Tax

BOBBY ALAN MCNABB,	)	
	)	
Plaintiff,	)	TC-MD 050032E
	)	
v.	)	
	)	
DEPARTMENT OF REVENUE, State of Oregon,	)	
	)	
	)	
Defendant.	)	**DECISION**

Plaintiff appeals Defendant's assessment of personal income taxes for tax year 2001. A telephone trial in the matter was held May 3, 2005. Plaintiff appeared on his own behalf. Megan Denison, Auditor, appeared on behalf of Defendant. For ease of reference, the parties are referred to as "taxpayer" and "the department."

I. STATEMENT OF FACTS

During the tax year at issue, taxpayer relocated from his prior residence in the State of Tennessee to begin employment with Intel Corporation (Intel) in Hillsboro, Oregon. Taxpayer testified that he arrived in Oregon on March 18, 2001.[1] During his employment at Intel, taxpayer was suspended for several weeks following a substance abuse violation and given the opportunity to attend a rehabilitation program. On December 3, 2001, 37 weeks and 2 days after he began his employment, Intel fired taxpayer following an additional violation of the company's substance abuse policy. Taxpayer subsequently returned to Tennessee.

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[1] Taxpayer stated prior to trial that he arrived in Oregon on March 12, 2001. Receipts in the record indicate that taxpayer was present in Oregon on March 12, 2001. However, the court will consider taxpayer's date of arrival in Oregon to be March 18, 2001, the date taxpayer provided in his sworn testimony at trial.

On his 2001 Oregon tax return, taxpayer deducted $7,664 for moving expenses incurred during his move from Tennessee to Oregon. Defendant denied the deduction because taxpayer was not in Oregon 39 weeks.

II. ANALYSIS

Taxpayers are generally allowed to deduct moving expenses incurred while relocating to begin employment in another place. For tax year 2001, the law provided, in pertinent part:

> "(a) There shall be allowed as a deduction moving expenses paid or incurred during the taxable year in connection with the commencement of work by the taxpayer as an employee or as a self-employed individual at a new principal place of work."

IRC § 217(a).[2] In order to claim the deduction, taxpayers must meet certain conditions. One of those conditions is that the taxpayer must be a full-time employee at his new principal place of work "at least 39 weeks" during the "12-month period immediately following his arrival in the general location of his new principal place of work * * *." IRC § 217(c)(2)(A); *see also* Treas Reg § 1.217-2(c)(4)(ii); *Merlino v. C.I.R.*, 660 F2d 415, 416 (9th Cir 1981).

Taxpayer failed to meet the time requirement necessary to deduct his moving expenses under IRC section 217. Based upon taxpayer's own testimony, he arrived in Oregon on March 18, 2001. From that date, he remained in Oregon as a full-time employee at Intel until his termination on December 3, 2001. Taxpayer's total time of employment, as calculated under section 217, equaled 37 weeks and 2 days. Nonetheless, taxpayer argues he is exempt from the 39-week requirement because his departure was involuntary.

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[2] All references to the Internal Revenue Code (IRC) and federal regulations are to the 2001 provisions.

IRC section 217 provides, in pertinent part, that the 39-week requirement will not apply to taxpayers who fail to satisfy the time requirement due to:

> "(B) involuntary separation (other than for willful misconduct) from the service of * * * an employer after obtaining full-time employment in which the taxpayer could reasonably have been expected to satisfy such condition."

IRC § 217(d)(1)(B).

Taxpayer claims that his moving expenses may be deducted because he was involuntarily separated from his employment when Intel fired him. Under the statute, a taxpayer who has been involuntarily separated from his employment may deduct his moving expenses, unless that separation resulted from the taxpayer's own willful misconduct. *Id*. The department claims that taxpayer's violation of Intel's substance abuse policy is an act of willful misconduct and, as a result, he does not qualify for the exception to the 39-week requirement.

"Willful misconduct" entails a voluntary act of misconduct. *See generally Traynor v. Turnage*, 485 US 535, 108 S Ct 1372, 99 L Ed 2d 618 (1988). The court could find no precedent in the context of substance abuse under IRC section 217. However, many courts have considered whether substance abuse or addiction constitutes willful misconduct under other federal statutes. In *Traynor*, the United States Supreme Court upheld a Veterans' Administration regulation that characterized all instances of alcoholism as willful misconduct for the purposes of denying benefits to veterans. *Id*. The Court noted that, "even among many who consider alcoholism a 'disease' to which its victims are genetically predisposed, the consumption of alcohol is not regarded as wholly involuntary." *Id*., 485 US at 550.

Regulations governing the extension of veterans' benefits draw no distinction between alcohol and drug abuse. "[T]he progressive and frequent use of drugs to the point of addiction

will be considered willful misconduct." 38 CFR § 3.301(c)(3). In fact, courts have considered drug abuse to be even more affirmatively willful misconduct than alcohol abuse. In *City of Portland v. Employment Division*, the Oregon Court of Appeals court noted that, while an alcoholic may be lured to addiction from a lawful first drink of alcohol, a drug abuser commits an affirmative and illegal act when ingesting drugs for the first time. *City of Portland v. Employment Division*, 94 Or App 279, 282, 765 P2d 222, 223 (1988). Drug addiction, therefore, results from one or more affirmative wrongful acts. Thus, drug abuse may be considered more "willful" than its alcohol abuse counterpart.

In addition to laws governing veterans' benefits, substance abuse is recognized as willful misconduct under maritime laws protecting injured sailors. The United States Supreme Court recognized that shipowners are liable for the injuries incurred by sailors unless the sailor caused the injury through his own willful misconduct. *Aguilar v. Standard Oil Co.*, 318 US 724, 63 S Ct 930, 87 L Ed 1107 (1943). "Only some wilful misbehavior or deliberate act of indiscretion suffices to deprive the seaman of his protection." *Id*. at 731. Interpreting *Aguilar*, courts consistently hold repetitive alcohol or drug abuse to be willful misconduct under that standard. *See Smith v. Isthmian Lines, Inc.*, 205 F Supp 954, 956 (ND Cal 1962); *Blouin v. American Export Isbrandtsen Lines, Inc.*, 319 F Supp 1150, 1154 (SDNY 1970).

In addition to federal interpretations, the majority of states define drug abuse as willful misconduct in the area of unemployment benefits. *See generally*, 78 ALR4th 180 § 5-7, "*Drugs -- Unemployment Compensation.*" Where an individual is terminated due to his failure to comply with company substance abuse policies, he is generally precluded from receiving state unemployment benefits. "We believe that plaintiff's use of cocaine * * * constituted a deliberate

violation of her employer's policy * * * ." *Overstreet v. Dept. of Employment Sec.*, 168 Ill App 3d 24, 27, 522 NE2d 185, 187 (1988).[3] In *Overstreet*, a police officer was ineligible for unemployment benefits after being terminated following a positive drug test result. The court considered the police officer's abuse of cocaine "willful misconduct" under the applicable state unemployment statute. *Id*. Similarly, in this case, Intel terminated taxpayer following a violation of the company's substance abuse policy.

Intel afforded taxpayer the opportunity to seek rehabilitative care for his problem during his employment. The record reflects more than one drug abuse violation both before and after his opportunity for rehabilitation. The weight of authority in both federal and state law supports the inclusion of substance abuse in the category of misconduct considered willful. While the precedent cited in those areas does not control this case, the court is persuaded that substance abuse presumptively results from a voluntary act under these facts.

The court notes that taxpayer's efforts to treat his problem occurred during a difficult time and far from the support of his family and friends. A new job in a new city following the completion of higher education is a difficult transition, particularly for those struggling with substance abuse. The court commends taxpayer for his success in overcoming his struggle with substance abuse upon his return to the stable support system in his home state. However, notwithstanding, the court finds that taxpayer's drug use constitutes willful misconduct under IRC section 217. As a result, taxpayer does not qualify for the exception to the 39-week

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[3] Oregon requires a case-by-case determination of voluntariness in the context of unemployment benefits. *See City of Portland v. Employment Division*, 94 Or App 279, 281, 765 P2d 222, 223 (1988). The court notes that federal law controls the outcome of this case and is, therefore, persuaded by analogous federal statutory interpretations.

requirement. Because he was not employed for 39 weeks, taxpayer's moving expenses are not deductible.

III. CONCLUSION

The court finds that taxpayer's departure from Intel, although involuntary, was due to his own willful misconduct in violation of Intel's substance abuse policy. Consequently, the court concludes that taxpayer is not entitled to deduct his moving expenses under IRC section 217 for tax year 2001. Now, therefore,

IT IS THE DECISION OF THIS COURT that Plaintiff's appeal must be denied.

Dated this _____ day of July 2005.

COYREEN R. WEIDNER
MAGISTRATE

If you want to appeal this Decision, file a Complaint in the Regular Division of the Oregon Tax Court, by mailing to: 1163 State Street, Salem, OR 97301-2563; or by hand delivery to: Fourth Floor, 1241 State Street, Salem, OR.

Your Complaint must be submitted within 60 days after the date of the Decision or this Decision becomes final and cannot be changed.

This document was signed by Magistrate Coyreen R. Weidner July 8, 2005. The Court filed and entered this document July 8, 2005.