



ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

CASE SUMMARY

MADELINE SHOTWELL v. THE HONORABLE GARY DONAHOE and Real Parties in Interest SMITH PAINTING, INC.; MICHAEL SMITH and LINDA SMITH , CV-03-0122-PR

Parties and Counsel:

Petitioner : Smith Painting, represented by Richard A. Steiner and Norris C. Livoni, Steiner & Steiner, P.C.

Respondent: Madeline Shotwell, represented by Bobbie J. Rasmusson and Michael R. Pruitt, Jackson White.

Facts:

In September 1996, Smith Painting hired Shotwell as a painting foreman. She claims her supervisors did not provide the equipment she needed, and made remarks such as “you are just a woman” and “you have big tits.” Her appeal to Smith for assistance resulted in a transfer. One supervisor allegedly told her not to check the men’s work because “they will not take orders from a bitch.” She was demoted to painter after complaining to Smith about one of the supervisors. Smith allegedly stated that he did not discriminate against “Blacks, Mexicans or big boobs.”

Shotwell resigned in October 1997. She filed a charge of discrimination with the Arizona Attorney General’s Civil Rights Division, based on sexual harassment by coworkers and supervisors at Smith Painting. The Equal Employment Opportunity Commission (EEOC) investigated. It issued a determination, finding “reasonable cause to believe” Smith discriminated against Shotwell.

Shotwell timely filed a complaint in superior court alleging sexual harassment in violation of Title VII. Smith filed a motion in limine to exclude “any letter of violation, or decision and order of the EEOC.” The trial court granted the motion, finding the EEOC determination should be excluded; its probative value was outweighed by prejudice because

it essentially told the jury how to decide liability issues. The trial awaits resolution of this petition for review.

Issues:

“A. Can an Arizona trial court in a Title VII action apply state rules of evidence to exclude a probable cause determination made by the Equal Opportunity Employment Commission?

“B. Was the ‘Determination’ letter properly excluded from evidence in a jury trial by the trial court?”

Definitions:

<i>EEOC</i>	Federal agency responsible to investigate charges of workplace discrimination based on, for example, race, sex, or disability. It works cooperatively with the state Attorney General’s Office Civil Rights Division (also known as ACRD).
<i>determination</i>	investigative finding of probable cause to believe discrimination occurred. It is not the same as a judgment following trial, in which only a finder of fact such as a jury or trial judge may find that discrimination in fact occurred.
<i>exclusion</i>	a trial court decision that particular evidence will not be presented at trial or considered in deciding a case
<i>motion in limine</i>	Request that a trial court issue an order that some evidence or testimony be excluded because of a specific claimed problem with it
<i>prejudice</i>	The bad light that information or evidence would unfairly cast on the party or witness. Under the Arizona Rules of Evidence, only <i>unfair</i> prejudice is grounds to exclude evidence.
<i>probative value</i>	The quality of evidence that tends to show that something is or is not true. For example, testimony that shows a person was born fifteen years ago has probative value to establish that the person is a minor. Without it being admitted into evidence, minority might not be proven.

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CASE SUMMARY

Clark R. Kerr and Billie Sue Kerr, husband and wife, Susan Moran, Steve Allen and John Udall, individually and as representatives of the class of federal employees who paid Arizona income taxes on federal retirement contributions during one or more of the years 1984 to date v. Mark J. Killian, in his capacity as Director of the Arizona Department of Revenue, Defendants-Appellants, Cross-Appellees, State of Arizona, Department of Revenue, v. Clark J. and Billie Sue Kerr, husband and wife and their Attorneys, Bonn, Luscher, Padden & Wilkins, Chartered and O'Neil, Cannon & Hollman 1 CA-TX 00-0023
CV-03-0110-PR

Parties and Counsel:

Petitioner: The Department and its Director Mark Killian are represented by Michael Worley, Assistant Arizona Attorney General

Respondents: The plaintiffs, the Kerr's, Ms. Moran, Mr. Allen and Mr. Udall, individually and as class representatives, are represented by Bonn & Wilkins, by Paul Bonn, Randall Wilkins, D. Michael Hall and Eugene Duffy of O'Neil, Cannon & Hollman, S.C. Milwaukee, Wisconsin.

Facts:

The taxpayers challenge the constitutionality of Arizona's taxing scheme which imposes individual income tax on those parts of federal employees' pay that the employees are required to contribute toward federal employee retirement plans, but exempts from taxation the mandatory contributions of state and local employees to state employee retirement plans. A.R.S. §43-1001(2), which states that Arizona will utilize the federal adjusted gross income of an individual as a starting point for calculating a person's adjusted gross income for purposes of assessing Arizona income tax.

The issue presented was already determined by the court of appeals in *Kerr v. Waddell*, 183 Ariz. 1, 899 P.2d 162 (App. 1995)(*Kerr I*)(vacated on other grounds by *Kerr v.*

Waddell, 185 Ariz. 457, 467, 916 P.2d 1173, 1183 (App. 1996).¹ In this matter, the tax court found it was not bound by this Court's vacated decision in *Kerr I*. However, the court considered *Kerr I* to be persuasive. The court ruled for the Taxpayers and held that for tax years after 1990, A.R.S. § 43-1001(2) violated the intergovernmental tax immunity doctrine. However, the tax court denied the Taxpayers' motion for class certification.

The Department appealed. The taxpayers cross-appealed as to class certification. The court affirmed in part, ruling that Arizona's income taxing scheme applicable from tax years 1991 to the present violates the intergovernmental tax immunity doctrine because the result of § 43-1001(2) is that state/local employees' contributions to § 414(h) retirement plans (see quote of statute on the next page) are not only excluded from gross income for federal tax, they are also excluded from gross income for Arizona income tax. However, federal employees' retirement plan contributions are included in gross income for federal income tax purposes and, under § 43-1001(2), those contributions are included in gross income for Arizona income tax. *Kerr I*, 183 Ariz. at 14. The court reversed in part, ruling that a recently issued case required a remand for reconsideration of the taxpayers' motion for class certification².

The State seeks review in this Court and argues that the court of appeals erred in ruling that Arizona's adoption of federal adjusted gross income as the definition of "Arizona gross income" in A.R.S. § 43-1001(2) violates the Public Salary Act, 4 U.S.C. § 111, because

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Upon this Court's grant of review in *Kerr I*, the case was remanded for reconsideration in light of the U.S. Supreme Court's opinion in *National Private Truck Council, v. Okla. Tax Comm'n*, 515 U.S. 582, 115 S.Ct. 2351 (1995), and the court vacated *Kerr I*, holding that taxpayers' actions are subject to the exhaustion of administrative remedies.

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The original opinion in this phase of the lengthy litigation is *Kerr v. Killian*, 201 Ariz. 125, 32 P.3d 408 (App. 2001) (*Kerr III*), wherein the court of appeals held that the taxing scheme in issue did not violate the intergovernmental tax immunity doctrine, the trial court did not abuse discretion by refusing to certify the class, and the Department's refund policy did not violate equal protection principles. After *Kerr III* issued, this Court decided *Arizona Dept. of Rev. v. Dougherty*, 200 Ariz. 515, 522, ¶ 24, 29 P.3d 862, 869 (2001) ("Ladewig II"), which held that a tax refund action may be brought as a class action and that a tax refund plaintiff class is not restricted only to taxpayers who exhausted their administrative remedies. Based largely on *Ladewig II*, the taxpayers, who are current and former federal employees, moved for reconsideration. The court granted the motion for reconsideration, amended its opinion, and held that Arizona's income taxing scheme applicable to tax years 1991 onward, A.R.S. § 43-1001(2) (Supp. 2002), violates the intergovernmental tax immunity doctrine. In a ruling that is not before this Court, the court of appeals held that *Ladewig II* requires remand for reconsideration of the taxpayers' class certification motion.

the adopting of the federal definition of adjusted gross income results in discriminatory taxation under Arizona's income tax system of contributions to federal deferred compensation plans, as compared to contributions to state and local governmental deferred compensation plans.

Issue: “Did the court of appeals err in holding that the State’s adoption of the same definition of income for all Arizona taxpayers was discriminatory taxation of federal employees, violating the Public Salary Tax Act, 4 U.S.C. § 111?”

Statutes: 26 U.S.C. § 414(h)(2) concerns the tax treatment of certain contributions by employees and employers to an employees’ mandatory retirement. In the case of any plan established by the government of any state or political subdivision thereof, or any agency or instrumentality of any of the foregoing, where the contributions of the employing units are designated as employee contributions, but where the employing unit picks up the contributions, the contributions so picked up shall be treated as employer contributions. 4 U.S.C. § 111 provides in relevant part: “The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a . . . taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.” That legislation effectively codifies the constitutional intergovernmental tax immunity doctrine. *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803, 109 S.Ct. 1500 (1989).

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