

**IN THE DISTRICT COURT OF BOYD COUNTY, NEBRASKA**

**JEROME ENGELHAUPT,**

Plaintiff,

vs.

**FARM CREDIT SERVICES OF THE  
MIDLANDS, a United States corporation,**

Defendant.

Case No. 4662

**ORDER ON MOTION FOR  
SUMMARY JUDGMENT**

- DATE OF HEARING:** November 2, 2000.
- DATE OF RENDITION:** January 29, 2001.
- DATE OF ENTRY:** Date of filing by court clerk (§ 25-1301(3)).
- TYPE OF HEARING:** In chambers at O'Neill, Holt County, Nebraska.
- APPEARANCES:**  
For plaintiff: George H. Moyer, Jr. without plaintiff.  
For defendant: Christopher R. Hedican.
- SUBJECT OF ORDER:** Defendant's third motion for summary judgment on statute of limitations.
- PROCEEDINGS:** See journal entry rendered on November 13, 2000.
- FINDINGS:** The court finds and concludes that:
1. The decision in *Derr v. Columbus Convention Center, Inc.*, 258 Neb. 537, \_\_\_ N.W.2d \_\_\_ (2000), restates the oft-repeated principles that control this decision:
    - a. Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
    - b. The court views the evidence in a light most favorable to the nonmoving party and gives such party the benefit of all reasonable inferences deducible from the evidence.

c. The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.

d. A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. At that point, the burden of producing evidence shifts to the party opposing the motion.

2. Citing *Adkins v. Burlington Northern Santa Fe RR. Co.*, 260 Neb. 156, \_\_\_ N.W.2d \_\_\_ (2000), the defendant seeks a summary judgment based upon the statute of limitations. In *Adkins*, the Supreme Court held that § 48-1118(2) provides the applicable statute of limitations (300 days from date of occurrence of unlawful practice) for NFEPA claims brought pursuant to § 20-148.

3. In this case, the plaintiff brought his administrative claim before the Equal Opportunity Commission within the 300-day period. Thereafter, pursuant to § 48-1119(4), he commenced this action. At that time, there had not been any dismissal by the commission on the merits or for lack of cooperation. The commission had administratively “closed” the case upon notification of the plaintiff’s intention to pursue the claim in court rather than before the commission.

4. This court concludes that the 300-day limitation was satisfied when the plaintiff timely filed his administrative complaint. The only limitation on commencement of this action under § 48-1119(4) is to do so before dismissal, i.e., dismissal on the merits or for lack of cooperation, before the commission.

5. This court reads the relevant statutes to allow one such as the plaintiff to: (a) file an administrative complaint within 300 days of the alleged practice and prosecute the claim to final determination before the commission, (b) file an action directly in the district court pursuant to § 20-148 within 300 days of the alleged practice and prosecute the claim to final judgment in the district court, or, (c) file an administrative complaint within 300 days of the alleged practice, but prior to dismissal on the merits or for lack of cooperation before the commission, commence an action in the district court pursuant to § 48-1119(4).

6. All of these courses of action are consistent with the statutory scheme and the rationale discussed by the Supreme Court in *Adkins*. The defendant’s interpretation would eviscerate any right to “transfer” to the district court provided by the Legislature in § 48-1119(4). Notwithstanding the allegation

of § 20-148 in the plaintiff's petition, the court concludes that the plaintiff's claim in this court is based upon the authority of § 48-1119(4).

7. This court declined to allow the plaintiff to amend his petition at the summary judgment hearing to delete the reference to § 20-148. Certainly, the defendant is entitled to any judicial admission made by the plaintiff in the petition. But the nature of the claim is to be determined by the allegations of fact in the petition, not the pleader's conclusions or any title of the pleadings. This court is persuaded that the allegation concerning § 20-148 constitutes mere surplusage, and that, as alleged in the plaintiff's petition, having commenced his claim administratively under NFEPA, the commencement of this action is governed by § 48-1119(4) of NFEPA. The 300-day statute was satisfied by the commencement of the administrative process, and this court's jurisdiction under § 48-1119(4) thereafter properly and timely invoked prior to administrative resolution of the claim on the merits or for lack of cooperation.

8. The defendant's motion for summary judgment should be denied.

**ORDER:** IT IS THEREFORE ORDERED that:

1. The defendant's third motion for summary judgment is denied.

2. The pretrial conference is rescheduled for **Monday, April 9, 2001, at 1:40 p.m.**, or as soon thereafter as the same may be heard, in chambers at **O'Neill**, Holt County, Nebraska. All other provisions of the progression order, as amended, concerning the pretrial conference are reaffirmed. Counsel are reminded that, by the time for pretrial conference, all discovery should be completed, all pretrial motions heard and disposed, and the matter ready for trial.

Signed in chambers at Ainsworth, Nebraska, on January 29, 2001.  
DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

- Mail a copy of this order to all counsel of record and to any pro se parties.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- Note the decision on the trial docket as: [date of filing] Signed "Order on Motion for Summary Judgment" entered denying third motion for summary judgment and resetting pretrial conference for [date and time from order].  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

Mailed to:

BY THE COURT:

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William B. Cassel  
District Judge