ONTARIO COURT RULES THAT EMPLOYEES CAN "RIDE TWO HORSES AT THE SAME TIME", SIMULTANEOUSLY PURSING EMPLOYERS IN THE COURTS AND BEFORE THE ONTARIO HUMAN RIGHTS COMMISSION OVER THE SAME ALLEGATIONS

Farris v. Staubach Ontario Inc. et al., unreported decision, Ont. SCJ, dated March 24, 2004

The Staubach Company (and several named company managers) had argued that the Plaintiff, a former employee, had no right to simultaneously purse a civil action for damages for wrongful dismissal and a harassment complaint with the Ontario Human Rights Commission against them where the facts alleged in the civil action and the complaint were substantially similar.

The Defendants relied on Justice Echlin's recent decision in *McKelvey v. D'Ercole*, [2003] O.J. 4172. In that case, Justice Echlin had held that it was inappropriate for an employee to simultaneously pursue a civil claim and a human rights complaint and ordered that the employee's civil action be stayed until the final disposition of her human rights complaint. Justice Echlin emphasized that "it is important to ensure that litigants do not abuse the process by initiating a multiplicity of proceedings", stating:

> A common practice has developed in employment law under which aggrieved parties have tried to place pressure on an employer by initiating multiple proceedings. This practice is clearly inappropriate and an abuse of process. [Emphasis added.]

Justice Echlin held that to "allow a plaintiff to attempt to ride two horses at the same time" is improper because of "the potential of inconsistent findings of fact, the possibility of separate damage assessments and a potential for double recovery".

However, Justice Lederman rejected Staubach's arguments and refused to follow *McKelvey v. D'Ercole*, *supra*, allowing the Plaintiff in that case to simultaneously pursue claims in both forums. Justice Lederman reasoned:

> Where both a civil action and a complaint arise from an employer-employee relationship, some similarities in evidence and allegations are inevitable. However, given the important remedial purpose of human rights legislation, where the litigation contains some claims independent of the provisions in the *Code*, mere similarities should not impair the pursuit of a civil remedy. A plaintiff should not be put to the choice: proceed in the courts but only if the human rights process is halted. The threat of a stay in a civil action where a plaintiff has also brought a complaint under the *Code* would be a disincentive for future plaintiffs to use human rights legislation, and could result in fewer complaints being brought forward. Furthermore, it could result in employer respondents not being held accountable for their human rights violations. [Emphasis added.]

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Justice Lederman also disagreed with Justice Echlin's "pressure tactic/abuse of process" policy rationale, stating:

> [I]t cannot be said that a citizen who exercises her quasi-constitutional right to vindicate an alleged human rights violation and at the same time pursues an alleged civil breach of her employment relationship is attempting to improperly pressure her employer and is thereby abusing the process. <u>The mere filing of two claims by an employee, one in furtherance of her human rights, and one in relation to independent employment issues, cannot, without more, be the basis of a finding of inappropriate conduct or an abuse of process</u>. [Emphasis added.]

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