

## COMPENSATORY OR PUNITIVE DAMAGES? *TARR V. CIASULLI* BLURS THE DISTINCTION

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### I. INTRODUCTION

Assigning a pecuniary value to emotional distress is inherently challenging because such injury is highly nebulous, hard to conceptualize, and difficult to accurately quantify.<sup>1</sup> As such, judicial reluctance to award damages for mental injury has been well-documented and is reflected in the structure of both substantive and remedial common law.<sup>2</sup> *Tarr v. Ciasulli*,<sup>3</sup> a recent New Jersey Supreme Court decision, may have opened the door to larger emotional distress awards in employment discrimination cases brought under New Jersey's Law Against Discrimination (NJLAD).<sup>4</sup> Although the precise issue before the *Tarr* court was determining the proper evidentiary threshold for recovery of emotional distress damages under NJLAD, the court suggested in dicta that victims of employment discrimination may be awarded damages for emotional distress based solely upon the reprehensibility of the defendant's conduct, as opposed to the degree of injury actually inflicted.<sup>5</sup>

This Comment argues that the *Tarr* court's suggestion regarding the scope of emotional distress damages under NJLAD is inconsistent with the most basic function of remedies in tort law: to make the victim whole by awarding money damages to compensate for tangible and intangible losses caused by the tort.<sup>6</sup> Furthermore, the *Tarr* court's suggestion is inconsistent with established precedent in New

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<sup>1</sup> See ELAINE W. SHOEN ET AL., REMEDIES 660 (3d ed. 2002) (1989).

<sup>2</sup> See *id.* (noting that contract claims generally do not support awards for emotional distress). Although there are a few exceptions, the general rule in tort is that damages for negligently-inflicted emotional distress are not awarded unless physical injury is present. *Id.*

<sup>3</sup> 853 A.2d 921 (N.J. 2004).

<sup>4</sup> See generally *id.* at 921.

<sup>5</sup> See *id.* at 927-28.

<sup>6</sup> See SHOEN ET AL., *supra* note 1, at 435.

Jersey jurisprudence regarding NJLAD, and diverges from interpretation of the federal analogues to NJLAD, Title VII of the Civil Rights Act of 1964, and 42 U.S.C. § 1983.<sup>7</sup> Although technically only dicta, the *Tarr* court's suggestion that emotional distress damages under NJLAD may be calculated by an assessment of the defendant's conduct, if subsequently adopted by New Jersey courts, could lead to awards based on the passions of an inflamed jury, rather than on reason. Additionally, because NJLAD permits punitive damages to be awarded on the basis of the degree of reprehensibility of the defendant's conduct, allowing emotional distress damages to be measured by the same criterion could permit an unjustified recovery.<sup>8</sup> Accordingly, it was erroneous for the majority in *Tarr* to suggest that emotional distress damages under NJLAD may be awarded based on the trier of fact's assessment of the defendant's conduct,<sup>9</sup> as opposed to the degree of emotional injury actually suffered by the plaintiff and proven by competent evidence.

This Comment is organized in five parts. Part II discusses NJLAD and how it traditionally awards emotional distress damages, and briefly describes the *Tarr* court's holding and troubling suggestion regarding emotional distress damages.<sup>10</sup> Part III makes the argument that, based on statutory interpretation, prior case law, and policy considerations, emotional distress damages under NJLAD should be based solely on the degree of injury inflicted and not on an assessment of the reprehensibility of the defendant's conduct.<sup>11</sup> Part IV considers whether, based on the evidence of emotional injury presented in the case, the plaintiff in *Tarr* should be awarded emotional distress damages.<sup>12</sup>

## II. BACKGROUND

The New Jersey State Legislature enacted NJLAD in 1945 for the purpose of eradicating "the cancer of discrimination."<sup>13</sup> In its current form, NJLAD prohibits discrimination in employment "because of race, creed, color, national origin, ancestry, age, sex, affectional or sexual orientation, marital status, familial status, liability for service in

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<sup>7</sup> See generally *Tarr*, 853 A.2d at 921.

<sup>8</sup> N.J. STAT. ANN. § 10:5-3 (West Supp. 2004).

<sup>9</sup> See *Tarr*, 853 A.2d at 927-28.

<sup>10</sup> See *infra* Part II.

<sup>11</sup> See *infra* Part III.

<sup>12</sup> See *infra* Part IV.

<sup>13</sup> *Fuchilla v. Layman*, 537 A.2d 652, 660 (N.J. 1988) (quoting *Jackson v. Concord Co.*, 253 A.2d 793, 799 (N.J. 1969)).

the Armed Forces of the United States, disability or nationality.”<sup>14</sup> In 1990, the legislature amended NJLAD to specifically authorize the recovery of emotional distress damages in employment discrimination cases.<sup>15</sup> In addition to the stated prohibition on employment discrimination, NJLAD now provides:

The Legislature further finds that because of discrimination, people suffer personal hardships, and the State suffers a grievous harm. The personal hardships include: economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from the strain of employment controversies; relocation, search and moving difficulties; anxiety caused by lack of information, uncertainty, and resultant planning difficulty; career, education, family and social disruption; and adjustment problems, which particularly impact on those protected by this act. Such harms have, under the common law, given rise to legal remedies, including compensatory and punitive damages. The Legislature intends that such damages be available to all persons protected by this act and that this act shall be liberally construed in combination with other protections available under the laws of this State.<sup>16</sup>

While the plain language of this declaration makes clear that the legislature intended to make emotional distress compensable in cases of employment discrimination, the severity of distress necessary to support such an award and the quantum of evidence a victim must present in order to be compensated remained unclear.<sup>17</sup>

In *Rendine v. Pantzer*,<sup>18</sup> the New Jersey Supreme Court attempted to clarify the quantity and quality of evidence necessary to support an award of emotional distress damages under NJLAD.<sup>19</sup> The plaintiffs in that case were two women who filed claims under NJLAD, alleging that their employment was wrongfully terminated because they became pregnant.<sup>20</sup> The claims went to a jury, which awarded damages

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<sup>14</sup> N.J. STAT. ANN. § 10:5-3 (West Supp. 2004).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Courts in other states have held that compensable claims of emotional distress must be serious by objective standards. *Rodrigues v. State*, 472 P.2d 509, 520 (Haw. 1970). According to the court in *Rodrigues*, “serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.” *Id.* If a plaintiff’s claim does not meet this threshold requirement, his or her claim is likely outside the rubric of true emotional distress. George G. Romain, *Distress Signals*, 21 LOS ANGELES LAW. 32, 33 (Feb. 1999) (on file with author).

<sup>18</sup> 661 A.2d 1202 (N.J. 1995).

<sup>19</sup> See generally *id.* at 1213–15.

<sup>20</sup> See *id.* at 1205–07.

for emotional distress, as well as economic loss.<sup>21</sup> The defendant argued that the award of emotional distress damages was excessive as a matter of law because neither of the plaintiffs presented expert testimony or other independent corroborating testimony to support the awards.<sup>22</sup> The *Rendine* court rejected the defendant's argument, holding that neither expert testimony nor independent corroborating evidence is necessary to support an award for emotional distress under NJLAD.<sup>23</sup> Although *Rendine* indicated that emotional distress resulting from employment discrimination is compensable under a lenient standard, without expert testimony or independent, objective corroboration, it left open the question of whether NJLAD imposes a threshold standard of severity for an award of emotional distress damages.<sup>24</sup>

In *Tarr v. Ciasulli*,<sup>25</sup> the New Jersey Supreme Court was asked to determine whether NJLAD imposes a threshold requirement of severe emotional injury before awarding compensation for emotional distress.<sup>26</sup> *Tarr* involved a claim of hostile work environment sexual harassment brought under NJLAD.<sup>27</sup> The plaintiff worked at one of the defendant's automobile dealerships for almost two years, and endured an extensive barrage of sexual harassment from her male co-workers for almost the entire duration of her employment.<sup>28</sup> The plaintiff maintained that her frustration with the abusive work environment caused her to quit, and that she suffered great emotional distress from the ordeal.<sup>29</sup>

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<sup>21</sup> See *id.* at 1213–14.

<sup>22</sup> See *id.* at 1214.

<sup>23</sup> See *id.* The *Rendine* court upheld the Appellate Division's conclusion that: Although defendant's discriminatory treatment did not cause plaintiffs to relocate or suffer illness or homelessness, both plaintiffs described in detail their inconvenience and economic loss, physical and emotional stress, anxiety in searching for reemployment, uncertainty, career and family disruption and other adjustment problems. Plaintiffs' problems seem precisely the type for which the Legislature intended compensation.

*Rendine*, 661 A.2d at 1214 (quoting *Rendine v. Pantzer*, 648 A.2d 233, 244 (N.J. Super. Ct. App. Div. 1994)).

<sup>24</sup> See *id.* at 1213–15.

<sup>25</sup> 853 A.2d 921 (N.J. 2004).

<sup>26</sup> See generally *id.*

<sup>27</sup> See *id.* at 922–23.

<sup>28</sup> Examples of the type of conduct to which she was subjected include: references to women in demeaning slang, repeated sexual advances, a co-worker describing his sexual organ to her in detail, the drawing of sexually explicit pictures on business documents, a proposition by a co-worker to have sex in a broom closet, and a co-worker describing to her his various sexual escapades. *Id.* at 923.

<sup>29</sup> *Id.*

To support the emotional distress component of her claim, the plaintiff testified that she was often embarrassed by the inappropriate comments made by her male co-workers, and that at times she wanted to crawl under her desk.<sup>30</sup> The plaintiff explained that her frustration with the abusive working environment led her to cry on the way home, and caused her to quit.<sup>31</sup> Several co-workers corroborated her testimony regarding sexual harassment.<sup>32</sup>

At the close of the plaintiff's case, the trial court dismissed her emotional distress claim, finding that the elements of emotional distress under NJLAD are the same as for the tort of intentional infliction of emotional distress.<sup>33</sup> Accordingly, the trial court posited that emotional distress resulting from employment discrimination is compensable only if severe enough to cause "discrete physical symptoms of illness or diagnosable psychological sequelae."<sup>34</sup> The appellate court reversed, finding that emotional distress under NJLAD was intended to be compensated under a more generous standard.<sup>35</sup> According to the appellate court, emotional distress under NJLAD is compensable even if not severe or substantial, and if the only evidence presented is the plaintiff's own testimony.<sup>36</sup>

The New Jersey Supreme Court upheld the appellate court's ruling, finding that NJLAD permits a lower evidentiary threshold for the recovery of emotional distress damages than is necessary under the tort of intentional infliction of emotional distress.<sup>37</sup> Justice Wallace, writing for the majority, asserted that the New Jersey State Legislature amended NJLAD in 1990 in order to authorize recovery for emotional harm in employment discrimination claims, and intended the amended provisions to be broadly construed.<sup>38</sup> He noted the physical, emotional, and economic hardships that employment discrimination has been known to produce, and acknowledged that the precedent of *Rendine v. Pantzer*<sup>39</sup> indicates that expert testimony and independent corroborative evidence are unnecessary for one to re-

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<sup>30</sup> *Id.*

<sup>31</sup> *Tarr*, 853 A.2d at 923.

<sup>32</sup> *Id.*

<sup>33</sup> *Tarr v. Bob Giasulli's Mack Auto Mall, Inc.*, 822 A.2d 647, 650 (N.J. Super. Ct. App. Div. 2003).

<sup>34</sup> *Id.*

<sup>35</sup> *See id.* at 653-54.

<sup>36</sup> *Id.*

<sup>37</sup> *Tarr*, 853 A.2d at 928.

<sup>38</sup> *Id.* at 925.

<sup>39</sup> 661 A.2d 1202 (N.J. 1995).

cover for emotional distress in such cases.<sup>40</sup> Analogizing NJLAD to Title VII of the Civil Rights Act of 1964, Justice Wallace bolstered his analysis by alluding to federal case law<sup>41</sup> in which the courts have held that damages for emotional distress can be recovered under Title VII without a finding of severe emotional distress and without independent corroborative evidence or expert testimony.<sup>42</sup>

In addition to holding that severe distress is not necessary for an award of emotional distress damages in cases of employment discrimination,<sup>43</sup> Justice Wallace went a step further. He suggested that in the case before him, the reprehensibility of the defendant's conduct, standing alone, warranted an emotional distress award.<sup>44</sup> Specifically, he quoted the following passage from the Appellate Division's opinion:

To suffer humiliation, embarrassment and indignity is by definition to suffer emotional distress. . . . The quantum of compensation . . . is dependent upon the relevant factors we have identified including duration of discriminatory conduct, its public nature, and its content and may be enhanced by such additional proofs of indicia of suffering as plaintiff may adduce. We add only that the duration and the content of the conduct asserted here clearly, in our view, warrants an award in some amount.<sup>45</sup>

### III. EMOTIONAL DISTRESS DAMAGES AND REPREHENSIBILITY OF THE DEFENDANT'S CONDUCT

The *Tarr* court's suggestion that a fact-finder may award damages for emotional distress based on the reprehensibility of the defendant's conduct likely stems from the nature of the legal violation at issue in that case. The plaintiff in *Tarr* established the defendant's liability for a hostile work environment under NJLAD, which requires a female plaintiff to prove that the complained-of conduct "would not have occurred but for the employee's gender; and it was . . . severe or

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<sup>40</sup> See *id.* at 1213–15.

<sup>41</sup> For example, Justice Wallace cited the cases of *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1045–46 (5th Cir. 1998); *Smith v. Norwest Fin. Acceptance, Inc.*, 129 F.3d 1408, 1413 (10th Cir. 1997); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1065 (8th Cir. 1997); and *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1215 (6th Cir. 1996). *Tarr*, 853 A.2d at 926.

<sup>42</sup> See *Tarr*, 853 A.2d at 926. However, legal scholars have posited that plaintiffs suffering from significant emotional distress should be expected to display some functional limitation in their day-to-day life. Romain, *supra* note 17, at 36.

<sup>43</sup> *Tarr*, 853 A.2d at 927.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* (quoting *Tarr v. Bob Ciasulli's Mack Auto Mall, Inc.*, 822 A.2d 647, 653–54 (N.J. Super. Ct. App. Div. 2003)).

pervasive enough to make a . . . reasonable woman believe that the conditions of employment are altered and the working environment is hostile or abusive.”<sup>46</sup> The *Tarr* court likely assumed that some degree of compensable emotional distress is necessarily concomitant to a viable hostile work environment claim under this framework.

Nonetheless, this suggestion is contrary to relevant case law and problematic from a policy perspective. Unlike federal hostile work environment law under Title VII of the Civil Rights Act of 1964, hostile work environment claims under NJLAD do not require the plaintiff to subjectively perceive the complained-of conduct as hostile or abusive.<sup>47</sup> The New Jersey Supreme Court has indicated that, “[u]nder our objective standard . . . a plaintiff would state a claim even if she personally did not experience the workplace as hostile or intimidating.”<sup>48</sup> Because a plaintiff can establish a viable hostile work environment claim under NJLAD without subjectively perceiving the work environment as hostile or abusive, it is erroneous to presume that he or she suffered emotional harm. Moreover, the *Tarr* court’s suggestion is contrary to prior New Jersey and federal case law and dangerous from a policy perspective.

A. *The New Jersey Law Against Discrimination*

There is nothing in the language of NJLAD that suggests that emotional distress damages may be awarded based on the defendant’s conduct.<sup>49</sup> The New Jersey Legislature enacted NJLAD because it recognized the inherent evil in discrimination, and all of the pernicious effects flowing therefrom.<sup>50</sup> NJLAD states that “discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State.”<sup>51</sup> After specifically mentioning emotional distress as one of the harms that may flow from discrimination, NJLAD states that compensatory and punitive damages are available remedies.<sup>52</sup>

The language in NJLAD mentions only common law remedies, including compensatory and punitive damages, as possible awards for

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<sup>46</sup> *Lehmann v. Toys ‘R’ Us, Inc.*, 626 A.2d 445, 453–54 (N.J. 1993).

<sup>47</sup> *Id.* at 458–59.

<sup>48</sup> *Id.* at 458.

<sup>49</sup> *See* N.J. STAT. ANN. § 10:5-3 (West Supp. 2004).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

victims of discrimination.<sup>53</sup> Nowhere in the text of NJLAD does it state or imply that compensation for emotional injury resulting from employment discrimination may be awarded pursuant to an assessment of the defendant's conduct alone.<sup>54</sup>

Under common law, compensatory damages were designed to place the plaintiff in the position he or she would have occupied had the loss or detriment never occurred.<sup>55</sup> The amount of money awarded should be equivalent to the loss or detriment, so as to neither improve nor subtract from the position of the plaintiff prior to the wrong.<sup>56</sup> In the context of emotional distress damages under NJLAD, compensatory damages should provide the plaintiff with a monetary sum equivalent to the emotional injury incurred, in order to make him or her whole.<sup>57</sup> Although the inherently nebulous nature of emotional distress makes it difficult to precisely quantify in monetary terms, the basic premise of compensatory damages cannot be reconciled with the idea of basing such awards upon the severity of the defendant's conduct, as opposed to the plaintiff's injury.<sup>58</sup>

#### B. *New Jersey Precedent*

New Jersey case law on emotional distress damages under NJLAD is devoid of any suggestion that such damages may be awarded in proportion to the reprehensibility of the defendant's conduct. In her dissenting opinion in *Tarr*, Justice LaVecchia asserted that the New Jersey Supreme Court's analysis of emotional distress damages under NJLAD in *Taylor v. Metzger*<sup>59</sup> should be controlling.<sup>60</sup> In *Taylor*, the plaintiff brought a hostile work environment claim under NJLAD after her supervisor directed a racist comment

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<sup>53</sup> After listing specific harms that employment discrimination has been known to cause, the text of the NJLAD indicates that:

[s]uch harms have, under the common law, given rise to legal remedies, including compensatory and punitive damages. The Legislature intends that such damages be available to all persons protected by this act and that this act shall be liberally construed in combination with other protections available under the laws of this State.

*Id.*

<sup>54</sup> *See id.*

<sup>55</sup> *See* JAMES M. FISCHER, UNDERSTANDING REMEDIES 17 (1999).

<sup>56</sup> *Id.*

<sup>57</sup> *See id.*

<sup>58</sup> *See id.*

<sup>59</sup> 706 A.2d 685 (N.J. 1998).

<sup>60</sup> *Tarr v. Ciasulli*, 853 A.2d 921, 931 (N.J. 2004) (LaVecchia, J., concurring in part and dissenting in part).

toward her.<sup>61</sup> The plaintiff sought redress for the emotional injury that she suffered as a result of the remark under both NJLAD and under the common law action of intentional infliction of emotional distress.<sup>62</sup> Interestingly, the New Jersey Supreme Court analyzed the emotional distress component of the plaintiff's claim under the framework of the common law tort of intentional infliction of emotional distress.<sup>63</sup> Nonetheless, nowhere in its opinion did the *Taylor* court suggest or imply that emotional distress damages in employment discrimination cases may be measured by the degree of reprehensibility of the defendant's conduct.<sup>64</sup>

In her dissenting opinion in *Tarr*, Justice LaVecchia maintained that the *Taylor* court did not alter the basic premise that only emotional injury reasonably proven is compensable under NJLAD.<sup>65</sup> In Justice LaVecchia's view, the majority's opinion in *Tarr* completely disregards the *Taylor* decision, despite the fact that it was rendered after the 1990 amendments to NJLAD.<sup>66</sup>

In addition, Justice LaVecchia alluded to the trial court's opinion in *Tarr*, which indicated that in order to recover for emotional distress resulting from employment discrimination, plaintiffs need to prove that they suffered from more than a temporary upset; they need to show substantial injury.<sup>67</sup> According to the trial court, compensatory damages are intended to make victims whole, not to punish litigants for wrongdoing.<sup>68</sup> Justice LaVecchia's citation of this portion of the trial court's opinion suggests that she believed that plaintiffs seeking emotional distress damages in actions brought under NJLAD must present substantial evidence of their emotional injury, and should only be compensated to the extent that they are actually

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<sup>61</sup> The plaintiff's supervisor called her a "jungle bunny." *Taylor*, 706 A.2d at 687.

<sup>62</sup> *Id.* at 688.

<sup>63</sup> *See id.* at 687.

<sup>64</sup> *See generally id.*

<sup>65</sup> *See Tarr*, 853 A.2d at 931-32 (LaVecchia, J., concurring in part and dissenting in part).

<sup>66</sup> *Id.* at 932.

<sup>67</sup> *Id.* at 933.

<sup>68</sup> *Id.* at 934. "There is universal agreement that the compensatory goal of tort law requires making the successful plaintiff 'whole,' a reasonably precise objective." Randall R. Bovbjerg, Frank A. Sloan & James F. Blumstein, *Public Policy: Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908, 909-10 (1989). Substantive law attempts to achieve this goal by compensating the victim for economic expense and nonpecuniary loss. *Id.* at 910. While substantive law provides only general, qualitative guidelines for determining the size of emotional distress awards, it has never been suggested that such awards should be measured by the conduct of the defendant. *See id.*

harmed.<sup>69</sup> While Justice LaVecchia recognized that plaintiffs seeking emotional distress damages in claims brought under NJLAD do not necessarily need to present expert testimony, she maintained that they do need to prove causation and show evidence of emotional harm before compensation can be awarded.<sup>70</sup>

New Jersey Supreme Court opinions have never deviated from the principle that emotional distress damages are to be awarded solely to compensate for emotional injury actually inflicted upon the plaintiff and reasonably proven.<sup>71</sup> In *Lehmann v. Toys 'R' Us, Inc.*,<sup>72</sup> the New Jersey Supreme Court held that a plaintiff need not show serious psychological harm in order to establish a viable claim for hostile work environment sexual harassment under NJLAD.<sup>73</sup> However, the *Lehmann* court explicitly stated that, "if a plaintiff suffers psychological harm and wishes to collect damages for that injury, she must show that she suffered psychological harm and to what extent."<sup>74</sup> The *Lehmann* court recognized the remedial nature of the NJLAD and that serious psychological injury is not necessary to establish a viable claim.<sup>75</sup> However, the *Lehmann* court maintained that emotional distress should only be compensated to the extent that it can be proven by competent evidence.<sup>76</sup> The *Tarr* court undermines this precedent by suggesting that damages for psychological injury may be measured by the trier of fact's impression of the egregiousness of the defendant's conduct.<sup>77</sup>

### C. Federal Case Law

To supplement the legislative history of NJLAD, the New Jersey Supreme Court has often looked to federal precedent governing Title VII of the Civil Rights Act of 1964 as a "key source of interpretive authority."<sup>78</sup> Substantive and procedural standards of NJLAD have been "markedly influenced by the federal experience."<sup>79</sup> Further-

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<sup>69</sup> See *Tarr*, 853 A.2d at 934 (LaVecchia, J., concurring in part and dissenting in part).

<sup>70</sup> *Id.* at 934-35.

<sup>71</sup> See generally *Taylor v. Metzger*, 706 A.2d 685 (N.J. 1998); *Rendine v. Pantzer*, 661 A.2d 1202 (N.J. 1995).

<sup>72</sup> 626 A.2d 445 (N.J. 1993).

<sup>73</sup> *Id.* at 455-56.

<sup>74</sup> *Id.* at 457.

<sup>75</sup> See *id.* at 456.

<sup>76</sup> *Id.* at 457.

<sup>77</sup> See *Tarr v. Ciasulli*, 853 A.2d 921, 927-28 (N.J. 2004).

<sup>78</sup> *Grigoletti v. Ortho Pharm. Corp.*, 570 A.2d 903, 906 (N.J. 1990).

<sup>79</sup> *Id.* at 906-07.

more, the procedural and substantive standards of 42 U.S.C. § 1983 have been used somewhat interchangeably with those of Title VII, as 42 U.S.C. § 1983 creates a civil cause of action for people who have been denied their constitutional or federal statutory rights.<sup>80</sup> Thus, both Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1983 serve as important sources for the interpretation of NJLAD, which codifies many of the same protections provided under the aforementioned federal statutes.<sup>81</sup>

In *Carey v. Phiphus*,<sup>82</sup> the United States Supreme Court determined when and to what extent emotional distress damages may be awarded under 42 U.S.C. § 1983.<sup>83</sup> *Carey* involved several high school students who were caught smoking what was believed to be marijuana.<sup>84</sup> The students were immediately suspended from school without a hearing or an explanation for the suspension, despite their contention that they were actually smoking ordinary cigarettes.<sup>85</sup> After obtaining representation from a legal aid clinic, the plaintiffs filed suit under 42 U.S.C. § 1983, charging that the summary suspension violated their right to due process of law guaranteed in the Fourteenth Amendment to the United States Constitution.<sup>86</sup>

The trial court held that the students had been suspended without procedural due process, but declined to award damages because they presented no evidence to quantify their damages.<sup>87</sup> On appeal, the United States Court of Appeals for the Seventh Circuit held that, even if the plaintiffs' suspensions were justified, they were entitled to recover substantial "non punitive" damages for the distress they endured in being denied procedural due process.<sup>88</sup> The United States Supreme Court granted certiorari to determine whether, in an action under § 1983, a plaintiff must prove that he was actually injured by the denial of procedural due process before he is entitled to recover substantial "non punitive" damages.<sup>89</sup>

In a unanimous decision, the United States Supreme Court held that, without proof of actual injury, the students were entitled to re-

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<sup>80</sup> See *Annis v. County of Westchester*, 136 F.3d 239, 245 (2d Cir. 1998).

<sup>81</sup> See *Grigoletti*, 570 A.2d at 912.

<sup>82</sup> 435 U.S. 247 (1978).

<sup>83</sup> See generally *id.*

<sup>84</sup> *Id.* at 249.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 249–50.

<sup>87</sup> *Id.* at 251–52.

<sup>88</sup> See *Carey*, 435 U.S. at 252–53.

<sup>89</sup> *Id.* at 253.

cover only nominal damages.<sup>90</sup> Justice Powell, writing the opinion of the Court, endorsed the idea that “the cardinal principle of damages in Anglo-American law is that of compensation for the injury caused to plaintiff by defendant’s breach of duty.”<sup>91</sup> According to Justice Powell, the Court has always maintained that damages are available under 42 U.S.C. § 1983 only “for actions ‘found . . . to have been violative of . . . constitutional rights and to have caused compensable injury.’”<sup>92</sup> Based on the applicable precedent in this area of law, Justice Powell concluded that damages under § 1983 should be awarded pursuant to the compensation principle.<sup>93</sup>

Regarding the emotional distress component of the § 1983 action, Justice Powell posited that “distress is a personal injury familiar to the law, customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff.”<sup>94</sup> With respect to emotional injury caused by the denial of due process, Justice Powell reasoned that, “[a]lthough essentially subjective, genuine injury in this respect may be evidenced by one’s conduct and observed by others.”<sup>95</sup> Justice Powell asserted that:

although mental and emotional distress caused by the denial of procedural due process itself is compensable under § 1983, we hold that neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused.<sup>96</sup>

Although the *Carey* Court decided the appropriate compensation for emotional distress caused by the deprivation of federal and constitutional rights, as opposed to employment discrimination under NJLAD, its holding is irreconcilable with the premise that emotional distress damages may be measured by the degree of reprehensibility of the defendant’s conduct. Because the plaintiffs in *Carey* were not permitted to recover for emotional distress due to their failure to show actual injury,<sup>97</sup> it seems incongruous to award compensatory damages under NJLAD based on the defendant’s conduct, without regard to the plaintiff’s actual injury.

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<sup>90</sup> *Id.* at 248.

<sup>91</sup> *See id.* at 255 (citing F. HARPER & F. JAMES, LAW OF TORTS 1299 (1956)).

<sup>92</sup> *Id.* (citing *Wood v. Strickland*, 420 U.S. 308, 319 (1975)).

<sup>93</sup> *See id.*

<sup>94</sup> *Carey*, 435 U.S. at 263–64.

<sup>95</sup> *Id.* at 264.

<sup>96</sup> *Id.*

<sup>97</sup> *See id.*

In *Memphis Community School District v. Stachura*,<sup>98</sup> the United States Supreme Court clarified and expanded upon the ruling in *Carey*.<sup>99</sup> *Stachura* involved a tenured public school teacher in Memphis, Michigan who taught seventh-grade life science.<sup>100</sup> The course he taught included a unit on human reproduction, during which he showed the class pictures of his wife during her pregnancy and two approved films concerning human growth and sexuality.<sup>101</sup> After several parents complained at an open school board meeting, he was summarily suspended with pay.<sup>102</sup> The teacher subsequently filed suit under 42 U.S.C. § 1983, seeking compensatory and punitive damages for the deprivation of both liberty and property without due process of law, in violation of the Fourteenth Amendment, and for infringement upon his First Amendment right to academic freedom.<sup>103</sup>

Writing for the Court, Justice Powell reiterated the principle, established in *Carey*, that the appropriate measure of damages for the deprivation of constitutional rights under § 1983 is to be derived from the common law of torts.<sup>104</sup> Justice Powell maintained that damages in tort cases have historically been designed to provide compensation for physical and emotional injury caused by the defendant's breach of duty.<sup>105</sup> Thus, where no emotional injury is present, no compensatory damages may be awarded.<sup>106</sup>

Importantly, Justice Powell declared that the jury instruction, which allowed emotional distress damages to be awarded pursuant to the jury's subjective determination of "the importance of constitutional rights as an abstract matter,"<sup>107</sup> is impermissible under *Carey*.<sup>108</sup> According to Justice Powell, "*Carey* . . . makes clear that the abstract value of a constitutional right may not form the basis for § 1983 damages."<sup>109</sup> Justice Powell dismissed the argument that the *Carey* ruling was inapplicable when dealing with deprivations of substantive (as opposed to procedural) constitutional rights, claiming that *Carey* did not "establish a two-tiered system of constitutional rights, with sub-

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<sup>98</sup> 477 U.S. 299 (1986).

<sup>99</sup> See generally *id.*

<sup>100</sup> *Id.* at 300.

<sup>101</sup> *Id.* at 300-01.

<sup>102</sup> See *id.*

<sup>103</sup> See *id.* at 301-02.

<sup>104</sup> *Stachura*, 477 U.S. at 306.

<sup>105</sup> *Id.* at 306-07.

<sup>106</sup> See *id.* at 308.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

stantive rights afforded greater protection than 'mere' procedural safeguards."<sup>110</sup> On the contrary, Justice Powell reasoned that, regardless of the basis for § 1983 liability, damages should be awarded solely to compensate for actual injury caused by infringement upon constitutional rights.<sup>111</sup>

Furthermore, Justice Powell maintained that damages based on the abstract "value" of constitutional rights are inherently nebulous and difficult to quantify, resulting in an arbitrary and capricious application of justice.<sup>112</sup> Justice Powell asserted that, "were such damages available, juries would be free to award arbitrary amounts without any evidentiary basis, or to use their unbounded discretion to punish unpopular defendants."<sup>113</sup>

Although the United States Supreme Court's reasoning in both *Carey* and *Stachura* is not binding on the New Jersey Supreme Court for purposes of interpreting NJLAD, both of the aforementioned cases stand for the proposition that emotional distress should only be compensated to an extent commensurate with the proof of actual injury that the plaintiff presents.<sup>114</sup> This principle is in direct conflict with the New Jersey Supreme Court's suggestion in *Tarr* that emotional distress damages in employment discrimination cases may be measured by the reprehensibility of the defendant's conduct, rather than the extent of the plaintiff's proven injury.<sup>115</sup> The *Tarr* court's suggestion is problematic because, by allowing emotional distress damages to be measured by the severity of the defendant's conduct, it ignores the concern expressed by Justice Powell in *Stachura*: that juries will have unbridled discretion to punish unpopular defendants by coloring compensatory damages with punitive considerations.<sup>116</sup> Furthermore, because the *Tarr* court's suggestion permits compensation for emotional distress resulting from employment discrimination to deviate from an amount proportionate to the actual injury in-

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<sup>110</sup> *Stachura*, 477 U.S. at 309.

<sup>111</sup> *See id.*

<sup>112</sup> *See id.* at 310.

<sup>113</sup> *Id.* Many legal scholars have argued that broad jury discretion and the absence of clear standards have resulted in disproportionately large awards. Bovbjerg, Sloan & Blumstein, *supra* note 68, at 917. According to Bovbjerg, Sloan and Blumstein, "it is frequently argued that the civil liability system is out of control, compensating claims far too generously." *Id.* More and more, plaintiffs and their contingency fee lawyers try to hold out for "jackpot" recoveries while even the slightest chance of an enormous verdict may force defendants to settle non-meritorious claims. *Id.*

<sup>114</sup> *See Stachura*, 477 U.S. at 309; *Carey v. Phipps*, 435 U.S. 247, 264 (1978).

<sup>115</sup> *Tarr v. Ciasulli*, 853 A.2d 921, 927-28 (N.J. 2004).

<sup>116</sup> *See Stachura*, 477 U.S. at 310.

flicted, it increases the chances that employment discrimination victims will receive an unjustified award.

*D. Policy Considerations*

There are two main reasons why the *Tarr* court's suggestion that emotional distress damages may be awarded pursuant to a subjective assessment of the defendant's conduct is problematic from a public policy standpoint. First, because NJLAD already permits punitive damages to be determined in part by the repugnancy of the defendant's conduct, allowing emotional distress damages to be measured by the same criterion could permit the defendant to be punished twice for the same wrong. In addition, allowing the jury to determine compensatory damages for emotional distress based on their assessment of the defendant's conduct could open the door to unjustified awards based more on juror passion than reason.

i. Punishing Twice for the Same Wrong

Because punitive damages under NJLAD are based in part on the reprehensibility of the defendant's conduct, permitting compensatory damages for emotional distress to be based on the same criterion permits the defendant to be punished twice for the same wrong. In *Lehmann v. Toys 'R' Us, Inc.*<sup>117</sup> the New Jersey Supreme Court held that there are two preconditions for an award of punitive damages under NJLAD: (1) upper management must have actually participated in the discriminatory conduct or shown willful indifference towards it and (2) the conduct complained of must have been "especially egregious."<sup>118</sup> In addition, the New Jersey Supreme Court has indicated that courts reviewing punitive damage awards under NJLAD must employ the substantive standards established in *BMW of North America, Inc. v. Gore*<sup>119</sup> to ensure that such an award bears some "reasonable relation" to the injury inflicted.<sup>120</sup> In *BMW*, the United States Supreme Court articulated three factors to be weighed when determining whether a punitive damage award is so large as to violate the Due Process Clause of the Fourteenth Amendment: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm or potential harm suffered and the size of the award; and (3) the difference between the award given and those in

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<sup>117</sup> 626 A.2d 445 (N.J. 1993).

<sup>118</sup> See *id.* at 464-65.

<sup>119</sup> 517 U.S. 559 (1996).

<sup>120</sup> *Baker v. Nat'l State Bank*, 736 A.2d 462, 468 (N.J. 1999).

comparable cases.<sup>121</sup> The *BMW* Court maintained that the “most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.”<sup>122</sup>

Because punitive damage awards under NJLAD are based in part on the “egregiousness” of the defendant’s conduct<sup>123</sup> and are reviewed for reasonableness according to a standard that takes into account the reprehensibility of the defendant’s conduct,<sup>124</sup> allowing compensatory damages for emotional distress to be based on the same criterion permits the defendant to be punished twice for the same wrong.<sup>125</sup> The *Tarr* court’s suggestion that emotional distress damages under NJLAD should be assessed according to the “duration,” “nature,” and “content” of the defendant’s conduct<sup>126</sup> is analogous to assessing the “egregiousness” and “reprehensibility” of the defendant’s conduct in the award of punitive damages. The coexistence of these two standards blurs the distinction between compensatory and punitive damages, potentially permitting the plaintiff to receive an unjustified award.

ii. Encouraging Awards Based on Passion

The *Tarr* court’s suggestion that emotional distress damages under NJLAD may be determined by an assessment of the reprehensibility of the defendant’s conduct may lead to unreasonably large awards based on enflamed juror passions, rather than reason. Scholars have suggested that punitive damages have “turn[ed] the civil justice system into a slot machine, paying off in jackpots for those who hit the right, randomly selected combination.”<sup>127</sup> In *Herman v. Sunshine Chemical Specialties, Inc.*<sup>128</sup> Justice Pollock of the New Jersey Supreme Court reasoned that:

[A]t the core of punitive damages lurks a volatile dilemma: the same findings necessary for the award of punitive damages can incite a jury to act irrationally. A condition precedent to a punitive-

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<sup>121</sup> See *BMW*, 517 U.S. at 575.

<sup>122</sup> *Id.*

<sup>123</sup> *Lehmann*, 626 A.2d at 464–65.

<sup>124</sup> *BMW*, 517 U.S. at 575.

<sup>125</sup> Jill McKee Pohlman, Comment, *Punitive Damages in the American Civil Justice System: Jackpot or Justice?*, 1996 UTAH L. REV. 613, 658. “Multiple punitive damages awards are inherently unfair. If the purpose behind punitive damages is truly to deter and to punish the defendant, then one punitive damages award should sufficiently serve those purposes and additional awards are unnecessary.” *Id.*

<sup>126</sup> *Tarr v. Ciasulli*, 853 A.2d 921, 927 (N.J. 2004).

<sup>127</sup> Mark Pennington, *Punitive Damages for Breach of Contract: A Core Sample from the Decisions of the Last Ten Years*, 42 ARK. L. REV. 31, 100 (1989).

<sup>128</sup> 627 A.2d 1081 (N.J. 1993).

damages award is the finding that the defendant is guilty of actual malice. The purposes of the award—the deterrence of egregious misconduct and the punishment of the offender—when mixed with a finding that the defendant is malicious, can readily inflame an otherwise-dispassionate jury.<sup>129</sup>

With substantive limits on punitive damages often only vaguely defined, critics argue that juries have been able to impose upon defendants unlimited awards, which lack any correlation to the compensatory damages designed to make the plaintiff whole.<sup>130</sup>

Justice O'Connor argued in her dissenting opinion in *Pacific Mutual Life Insurance Co. v. Haslip*,<sup>131</sup> that punitive damage awards in the United States are often excessive due to the lack of clear guidance that juries are given when determining them.<sup>132</sup> In *Haslip*, the United States Supreme Court considered whether an \$840,000 punitive damage award for insurance fraud that led to a compensable loss of \$200,000 was so excessive as to violate the Due Process Clause of the Fourteenth Amendment.<sup>133</sup> The Court held that the punitive damage award in that case did not violate the Due Process Clause because Alabama law provided adequate procedural protections to keep the award within the bounds of rationality, and an award of that size was justified in order to deter other insurers from committing the same malicious fraud.<sup>134</sup>

Fundamentally disagreeing with the Court's analysis, Justice O'Connor wrote a dissenting opinion in which she argued that the punitive damage award in *Haslip* violated the Due Process Clause of the Fourteenth Amendment because it was highly excessive in relation to the harm inflicted, and based on extremely vague jury instructions.<sup>135</sup> Justice O'Connor postulated that many states routinely au-

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<sup>129</sup> *Id.* at 1085.

<sup>130</sup> Pohlman, *supra* note 125, at 624. The most egregious example of this may be *BMW of North America, Inc. v. Gore*, where the jury awarded a wealthy doctor \$4 million in punitive damages because his new BMW had been scratched, and was then painted over and sold to him as new. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 563–65 (1996).

<sup>131</sup> 499 U.S. 1 (1991).

<sup>132</sup> *Id.* at 35–50 (O'Connor, J., dissenting).

<sup>133</sup> *Id.* at 4–7 (majority opinion). The plaintiff in this case, an employee of an Alabama municipality, was defrauded by an agent of Pacific Mutual Insurance Company, who misappropriated the plaintiff's insurance premiums. *Id.* at 4–5.

<sup>134</sup> *See id.* at 20–23. The Alabama Supreme Court has post-trial procedures for scrutinizing punitive damage awards: it undertakes a comparative analysis of other punitive damage awards for like conduct, and substantively reviews the award to ensure that it does not exceed an amount necessary to accomplish the social goals of deterrence and retribution. *Id.* at 20–21.

<sup>135</sup> *See Haslip*, 499 U.S. at 35–50 (O'Connor, J., dissenting).

thorize juries to award punitive damages without giving them any meaningful guidance as to how to do so.<sup>136</sup> According to Justice O'Connor, this can permit juries to "target unpopular defendants, penalize unorthodox or controversial views, and redistribute wealth."<sup>137</sup> Far too often, in Justice O'Connor's view, courts basically instruct the jury to "[t]hink about how much you hate what the defendants did and teach them a lesson."<sup>138</sup>

Part of the problem with punitive damages is that while compensatory damages are tied to an actual injury, punitive damages have no objective boundary.<sup>139</sup> The *Tarr* court's suggestion that compensatory damages for emotional distress under NJLAD may be ascertained based on the "duration," "nature" and "content" of the defendant's conduct<sup>140</sup> eviscerates this distinction, rendering compensatory awards exposed to all the inherent flaws and dangers of punitive damages. The *Tarr* court's blanket assertion that "[n]o reasonable woman can be expected to have endured the constant and prolonged barrage of the extraordinarily demeaning and degrading sexual harassment to which this plaintiff was subjected without humiliation, embarrassment and loss of personal dignity"<sup>141</sup> does not give the jury any reasonable guidance upon which to fashion an award.<sup>142</sup> The *Tarr* court suggests that the defendant's conduct was repugnant enough to warrant an award of some size,<sup>143</sup> but does not attempt to provide any guidance as to how to arrive at a just determination of damages. Such vagueness sets the stage for wildly large and varying awards, bearing little connection with the emotional distress actually inflicted.<sup>144</sup> Because the aim of compensatory damages is to compen-

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<sup>136</sup> *Id.* at 37. The jury in *Haslip* was instructed by the trial court that "should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and the necessity of preventing a similar wrong." *Id.* at 48. Such a vague instruction invites jurors to rely on emotion, bias and prejudice rather than reason. *See id.*

<sup>137</sup> *Id.* at 43.

<sup>138</sup> *Id.* at 49.

<sup>139</sup> *See Haslip*, 499 U.S. at 54 (O'Connor, J., dissenting).

<sup>140</sup> *Tarr v. Ciasulli*, 853 A.2d 921, 927 (N.J. 2004).

<sup>141</sup> *Id.*

<sup>142</sup> *See Romain*, *supra* note 17, at 36. Lack of objective guidelines from which juries can measure plaintiffs' emotional distress can lead to vast discrepancies in damage awards for seemingly similar injuries. *Id.* Plaintiffs' lawyers often use allegations of emotional distress as part of impassioned closing arguments for damages well above a victim's fairly ascertainable compensatory damages. *See id.* at 33.

<sup>143</sup> *Tarr*, 853 A.2d at 927.

<sup>144</sup> "[W]orkplace harassment claims, and other cases involving egregious conduct by the defendant should be carefully scrutinized by defense counsel because these types of cases are more likely to incite a jury to give the plaintiff greater compensa-

sate the victim for harm inflicted, presuming harm from reprehensible conduct opens the door to excessively high awards based on the vindictive or sympathetic passions of juries.

#### IV. EMOTIONAL DISTRESS DAMAGES IN *TARR*

The plaintiff in *Tarr* may not be entitled to emotional distress damages on remand if the trier of fact is only permitted to consider the evidence of emotional injury that was presented at trial. During the trial portion of *Tarr v. Ciasulli*, there was considerable testimony describing a hostile and discriminatory working environment at the defendant's place of business.<sup>145</sup> However, the plaintiff's testimony regarding her resulting emotional injury was not extensive: she testified as to her acute embarrassment and humiliation, and indicated that comments made to her in the presence of others made her turn "beet red" and "want to crawl under [her] desk."<sup>146</sup> The plaintiff also testified that she would on occasion cry "all the way home from being frustrated, from being intimidated . . . ."<sup>147</sup> Although a co-worker testified as to her impression of how the discrimination had affected the plaintiff, the "plaintiff herself introduced no other evidence of her emotional distress."<sup>148</sup>

The plaintiff's testimony in *Tarr* may not be enough to support an award of damages for emotional distress. Even though New Jersey case law clearly indicates that independent corroborating evidence of emotional distress is not necessary<sup>149</sup> and that emotional distress need not be "severe" in order for the victim to recover,<sup>150</sup> courts have dismissed claims for emotional distress when the testimony regarding emotional injury is vague and conclusory. For example, in *Spragg v. Shore Care and Shore Memorial Hospital*,<sup>151</sup> the Superior Court of New Jersey, Appellate Division, held that an award of \$42,500 for emotional distress resulting from employment discrimination amounted to a miscarriage of justice because the plaintiff presented insufficient evidence of emotional harm.<sup>152</sup> In *Spragg*, the plaintiff was a male home healthcare aide who filed a claim under NJLAD, alleging that

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tion for emotional injuries—even without expert testimony." Romain, *supra* note 17, at 57.

<sup>145</sup> *Tarr*, 853 A.2d at 932.

<sup>146</sup> *Id.* at 933.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 939.

<sup>149</sup> *Rendine v. Pantzer*, 661 A.2d 1202, 1214–15 (N.J. 1995).

<sup>150</sup> *Tarr*, 853 A.2d at 928.

<sup>151</sup> 679 A.2d 685 (N.J. Super. Ct. App. Div. 1996).

<sup>152</sup> *See id.* at 699–700.

he was a victim of sex discrimination due to a policy whereby male aides could only care for male patients, “whereas female aides were allowed to care for patients of both genders.”<sup>153</sup>

The court in *Spragg* held that there must be a substantial basis in the record for an award of emotional distress damages under NJLAD, and that the evidence presented by the plaintiff was “extremely thin, if not superficial, regarding the emotional suffering he endured as a result of defendant’s policy, as were his proofs regarding the disruption to his life following the loss of his job.”<sup>154</sup> While the court acknowledged that NJLAD authorizes recovery for emotional distress resulting from “economic loss, homelessness, relocation, and disruption to one’s career, education, family, and social life” caused by employment discrimination, it determined that none of these hardships were proven in the case before it.<sup>155</sup> The plaintiff was only out of work for three months, his “career” in the healthcare field lasted only nine months, he had comparable income available from other employment opportunities, had no family to support, and his greatest loss during three months of unemployment was having to trade in one old car for another.<sup>156</sup> While recognizing that there is no precise way to measure mental suffering, the court held that an award of \$42,500 for the plaintiff’s emotional distress, in light of the evidence presented, was “so excessive as to represent a miscarriage of justice.”<sup>157</sup>

Similarly, in *Patterson v. P.H.P. Healthcare Corp.*,<sup>158</sup> the United States Court of Appeals for the Fifth Circuit acknowledged that “hurt feelings, anger and frustration are part of life,” and held that the plaintiff in that case had not presented enough evidence to sustain a claim for emotional distress under Title VII of the Civil Rights Act of 1964.<sup>159</sup> The plaintiff in *Patterson* claimed that she experienced significant emotional distress when her employer allegedly fired her for hiring a black employee.<sup>160</sup> While she testified as to her mental anguish during the period of unemployment that ensued and to the resulting family turmoil that followed, she presented no other signifi-

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<sup>153</sup> *Id.* at 687.

<sup>154</sup> *Id.* at 699.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 699–700. Although the plaintiff had some trouble paying his bills during his period of unemployment, he had been in debt and unemployed before he ever started working for Shore Care. *Spragg*, 679 A.2d at 699–700.

<sup>157</sup> *Id.* at 700.

<sup>158</sup> 90 F.3d 927 (5th Cir. 1996).

<sup>159</sup> *Id.* at 940.

<sup>160</sup> *Id.*

cant evidence.<sup>161</sup> The Fifth Circuit found that, based on the evidence presented, the plaintiff was entitled to no more than nominal damages for her emotional distress.<sup>162</sup>

The Fifth Circuit addressed the issue of emotional distress damages again in *Brady v. Fort Bend County*.<sup>163</sup> In *Brady*, the plaintiffs were police officers who worked under a Republican Sheriff who lost a bid for re-election to a Democrat.<sup>164</sup> The plaintiffs, who had openly supported their former boss in his campaign for re-election, were subsequently not rehired by Fort Bend County.<sup>165</sup> They claimed that they were discriminated against based upon the exercise of their First Amendment rights of free speech and association.<sup>166</sup>

The plaintiffs testified that, as a result of the discrimination that they endured, they were “highly upset,” spent too much time on the couch, and could not “accept it mentally.”<sup>167</sup> The Fifth Circuit held that the plaintiffs’ testimony was “too vague and conclusory” to support emotional distress damages.<sup>168</sup> Furthermore, when the plaintiffs did describe specific manifestations of their emotional distress—such as nervousness and sleeplessness—they did not provide sufficient de-

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<sup>161</sup> *Id.* at 940–41. Although the plaintiff testified that the period of unemployment that followed her termination required her to relocate and live apart from her children, she presented no corroborating testimony, no medical or psychological evidence, and no evidence demonstrating the nature and extent of the emotional harm that she allegedly suffered. *Id.* at 941.

<sup>162</sup> *Id.* at 941.

<sup>163</sup> 145 F.3d 691 (5th Cir. 1998).

<sup>164</sup> *See id.* at 697.

<sup>165</sup> *See id.*

<sup>166</sup> *See id.*

<sup>167</sup> *Id.* at 719.

<sup>168</sup> *Id.* The Fifth Circuit looked for guidance from an Equal Employment Opportunity Commission (EEOC) official guidance statement:

Emotional harm will not be presumed simply because the complaining party is a victim of discrimination. The existence, nature, and severity of emotional harm must be proved. Emotional harm may manifest itself, for example, as sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self esteem, excessive fatigue, or a nervous breakdown. Physical manifestations of emotional harm may consist of ulcers, gastrointestinal disorders, hair loss, or headaches.

....

The Commission will typically require medical evidence of emotional harm to seek damages for such harm in conciliation negotiations.

EEOC POLICY GUIDANCE NO. 915.002 § II(A)(2) (July 14, 1992), available at <http://www.eeoc.gov/policy/docs/damages.html>.

tail.<sup>169</sup> According to the Fifth Circuit, such “failure of proof is unacceptable” and legally deficient for a claim of emotional distress.<sup>170</sup>

Similarly, in *Price v. City of Charlotte*,<sup>171</sup> the United States Court of Appeals for the Fourth Circuit held that the plaintiffs’ claims for emotional distress under 42 U.S.C. § 1983 were not buttressed with sufficient evidence to support an award of damages.<sup>172</sup> *Price* involved a reverse-discrimination charge brought by several white police officers who claimed that they suffered emotional distress by being subjected to a city policy that used race as a positive factor in promoting minorities, at their expense.<sup>173</sup> The only evidence that the plaintiffs in that case presented of their emotional distress was their testimony that they felt “betrayed,” “embarrassed,” and “degraded.”<sup>174</sup> Holding that the plaintiffs had not presented enough evidence to support a compensatory award for emotional distress, the Fourth Circuit reasoned that it must be established that the plaintiffs “suffered demonstrable emotional distress, which must be sufficiently articulated; neither conclusory statements that the plaintiff suffered emotional distress nor the mere fact that a constitutional violation occurred supports an award of compensatory damages.”<sup>175</sup> The Fourth Circuit stressed the need to show “genuine injury” before emotional distress can be compensable.<sup>176</sup>

The evidence presented by the plaintiff in *Tarr*, consisting primarily of testimony that she felt “bothered” and cried while driving home on one occasion, is not significantly different from that in *Patterson*, *Price*, *Brady*, or *Spragg*, where claims for emotional distress were denied.<sup>177</sup> Accordingly, if the New Jersey Supreme Court were strictly limited to an assessment of the evidence presented by the plaintiff, excluding its determination that “the duration and content of the conduct asserted here clearly . . . warrants an award in some

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<sup>169</sup> *Brady*, 145 F.3d at 719. The plaintiffs made statements indicating that their termination “caused marital problems” and that “there were sleepless nights,” but did not go into any further detail. *Id.*

<sup>170</sup> *Id.* at 719–20. On the other hand, the Fifth Circuit conceded that “[w]hen a plaintiff’s testimony is particularized and extensive, such that it speaks to the nature, extent, and duration of the claimed emotional harm in a manner that portrays a specific and discernable injury, then that testimony alone may be sufficient.” *Id.* at 720.

<sup>171</sup> 93 F.3d 1241 (4th Cir. 1996).

<sup>172</sup> *Id.* at 1254.

<sup>173</sup> *Id.* at 1243.

<sup>174</sup> *Id.* at 1255.

<sup>175</sup> *Id.* at 1254.

<sup>176</sup> *Id.*

<sup>177</sup> See *Tarr v. Ciasulli*, 853 A.2d 921, 940 (N.J. 2004).

amount,”<sup>178</sup> the plaintiff may not have been entitled to an amount greater than nominal damages for her emotional distress. Accordingly, unless she presents more specific testimony as to the harm that she suffered, the plaintiff should not receive emotional distress damages as a matter of law.

#### V. CONCLUSION

The New Jersey Supreme Court, in *Tarr v. Ciasulli*,<sup>179</sup> suggested that the quantum of compensation for emotional distress suffered by victims of employment discrimination may be determined by the trier of fact’s assessment of the content, duration, and degree of reprehensibility of the defendant’s conduct, in addition to proof of emotional injury presented by the plaintiff.<sup>180</sup> This suggestion is contrary to established precedent under NJLAD and inconsistent with the case law of its federal analogues, Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1983. Furthermore, because the degree of reprehensibility of the defendant’s conduct is taken into account under NJLAD when assessing punitive damages,<sup>181</sup> allowing the same criterion to be included in the calculus of emotional distress damages permits double compensation for the same wrong. More importantly, allowing juries to award compensatory damages for emotional distress based upon their assessment of the defendant’s conduct may permit unwarranted awards based more on the vindictive and sympathetic passions of the jury than on reason. In order to keep emotional distress damages for victims of employment discrimination reasonable and fair, plaintiffs should be required to present evidence of specific injury before compensation is awarded.

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<sup>178</sup> *Id.* at 927.

<sup>179</sup> *Id.* at 921.

<sup>180</sup> *See id.* at 927–28.

<sup>181</sup> N.J. STAT. ANN. § 10:5-3 (West Supp. 2004).