JUDICIAL REVIEW OF ADMINISTRATIVE FINDINGS OF MENTAL DISTRESS RESULTING FROM SEX DISCRIMINATION

Section 10:5-4 of the New Jersey Law Against Discrimination[1] prohibits sex-based discrimination[2] in employment[3] and other areas.[4] New Jersey courts have construed the law to enable the Director of the Division on Civil Rights to award damages for pain, humiliation and mental suffering to victims of such discrimination.[5] Judicial review of such agency fact-finding determinations in on-the-record ad-

1. N.J. STAT. ANN. §§ 10:5-1 to -38 (West 1976 & Supp. 1979).

2. N.J. STAT. ANN. § 10:5-4 (West 1976). The law also outlaws discrimination on the basis of race, creed, color, national origin, ancestry, age and marital status. *Id.*

3. N.J. STAT. ANN. § 10:5-12 (West Supp. 1979) provides:

> It shall be an unlawful employment practice . . . . [f]or an employer, because of the race, creed, color, national origin, ancestry, age, marital status or sex of any individual, . . . to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment . . . .

4. N.J. STAT. ANN. § 10:5-4 (West 1976). The Act also forbids sex-based discrimination in obtaining accommodations, public housing, and other real property. *Id.*

5. Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399, 301 A.2d 754 (1973) (the New Jersey Supreme Court upheld the authority of the Division on Civil Rights to award compensatory damages for pain and mental suffering to a victim of sex-based discrimination in housing); Director, Div. on Civil Rights v. Slumber Inc., 166 N.J. Super. 95, 398 A.2d 1345 (1979) (the court affirmed the Director's award of damages for mental distress resulting from racial discrimination in hotel accommodations); Harvard v. Bushberg Bros. Inc., 137 N.J. Super. 537, 350 A.2d 65 (1975) (the court upheld the Director's award of damages for mental distress resulting from sex-based discrimination in employment). Courts base authority for such awards on the portion of the Act which grants the Division on Civil Rights the "power to prevent and eliminate" and "to take other actions" against unlawful discrimination, N.J. STAT ANN. § 10:5-6 (West 1976), and on the portion of the Act which provides that:

> If upon all evidence at the hearing the director shall find that the respondent has engaged in any unlawful employment practice or unlawful discrimination as defined in this act, the director shall state his findings of fact and conclusions of law and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful employment practice or unlawful discrimination and to take such affirmative action, including, but not limited to, hiring, reinstatment or upgrading of employees, with or without back

judicatory proceedings[6] generally requires application of the substantial evidence test.[7] Under this test, courts have a great deal of discretion,[8] often yielding uncertain applications.[9] This problem is apparent in the case of *Castellano v. Linden Board of Education*[10] where the New Jersey Supreme Court found insubstantial evidence to support an agency award of damages for mental distress.[11]

Complainant, a tenured first-grade school teacher employed by the Linden Board of Education, gave birth one week prior to the beginning of the school year.[12] Her physician certified that she could return to work one month after childbirth.[13] Pursuant to a collectively

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pay, . . . as, in the judgment of the director, will effectuate the purpose of this act . . . .

N.J. STAT. ANN. § 10:5-17 (West Supp. 1979).

Courts in other jurisdictions allow similar agencies to award damages for mental distress resulting from discrimination. *See, e.g.*, Massachusetts Comm'n Against Discrimination v. Franzaroli, 357 Mass. 112, 256 N.E.2d 311 (1970) (the Massachusetts Supreme Court upheld an award granted by the Massachusetts Commission Against Discrimination of $250 for damages of mental distress to a victim resulting from racial discrimination in housing); Williams v. Joyce, 4 Or. App. 482, 479 P.2d 513 (1971) (the Oregon Court of Appeals upheld a decision of the Commissioner of the Civil Rights Division of the Bureau of Labor awarding damages for mental distress to a victim of racial discrimination in housing).

6. The evidentiary support for agency fact-finding determinations must be on a public record compiled through formal adjudicatory proceedings. Judicial review of informal agency rulemaking and fact-finding determinations where there is no requirement that the evidence be on the record is usually governed by the arbitrary and capricious standard of review. This standard provides that an agency's determinations cannot be overturned unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1976).

7. *E.g.*, 5 U.S.C. § 706(2)(E) (1976) provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute . . . . *See* notes 26-35 and accompanying text *infra*.

8. *See* notes 62-67 and accompanying text *infra*.

9. *See* note 60 *infra*.

10. 79 N.J. 407, 400 A.2d 1182 (1979).

11. *See* note 21 *infra*.

12. Complainant gave birth on August 29, 1974. 79 N.J. at 408, 400 A.2d at 1182 (1979).

13. Her physician certified that she could return to work on September 27, 1974. *Id.* at 408, 400 A.2d at 1182.

negotiated agreement between the Board of Education and the teachers' union, the Board required her to take a one year maternity leave of absence.[14]

Complainant filed a complaint with the New Jersey Division on Civil Rights alleging sex discrimination.[15] The Director of the Division found discrimination in the Board's policies in violation of the New Jersey Law Against Discrimination.[16] The Director awarded complainant $3,557.10 for loss of pay,[17] and $600 damages for humiliation, pain and mental suffering.[18] The Appellate Division of the

14. The agreement stipulated that the teacher could return to work at the beginning of the next school year following termination of her pregnancy, or the commencement of the next succeeding school year subject to the approval of the Board of Education. *Id.* at 409 n.1, 400 A.2d at 1183 n.1.

15. The complaint charged that application of the Board's mandatory one-year maternity leave policy and refusal to allow complainant to use her accumulated sick leave for her absence due to childbirth constituted sex-based discrimination. Before a determination by the Director on the complaint, the Board, on December 9, 1974, permitted complainant to return to her teaching duties. *Id.* at 409, 400 A.2d at 1183.

16. *See* note 3 *supra.*

17 The Director awarded back pay for complainant's loss of pay from September 1974 to December 9, 1974 (the date she returned to work). The Director's order permitted the respondent to credit the complainant with 16 days of sick leave. The 16 days represented the period complainant was disabled following the birth of her child, and the Director concluded that these days should be charged against her accumulated sick leave. 79 N.J. at 409, 400 A.2d at 1183.

18 Evidence supporting the $600 award included letters received by the complainant from the Superintendent of Schools and the Board's counsel referring to the contractual provisions for maternity leave and sick leave. The Board notified complainant that it had granted her a maternity leave of absence from September 1, 1974 to June 30, 1975. At the hearing conducted by the Division on Civil Rights, complainant testified as to her personal reaction to these letters: "First upset—I couldn't believe it, I couldn't believe that this was happening to me. I saw no basis for this. Upset. Cried. Stayed in the house for a while." She then explained why she was upset

> Because I didn't think that something like this could happen to me. I was afraid of the way people would react to me; just the whole thing, the whole—just upset me
>
> Q. Did you cry on one occasion or on more than one occasion?
>
> A. No, many.
>
> Q. How long a period would you say this upset lasted?
>
> A Oh, a couple of weeks, I guess.

Complainant testified that she had known about the contractual provisions concerning maternity leave and sick leave for quite some time. She claimed that she was still depressed "because of this case." *Id.* at 411, 400 A.2d at 1183-84.

Complainant's husband also testified that his wife was upset because of a conversation he had with the superintendent of schools. The superintendent stated, "What

New Jersey Superior Court affirmed.[19] On appeal, the New Jersey Supreme Court upheld the finding of discrimination,[20] but struck down the award of $600 for pain, humiliation and mental suffering for lack of substantial evidence.[21]

Neither the New Jersey Law Against Discrimination[22] nor the state's Administrative Procedure Act[23] articulates the judicial standard for review of administrative agency fact-finding. Consequently, New Jersey courts have adopted[24] the federal Administrative Procedure Act standard[25] which allows rejection of an administrative agency's factual conclusions only if the court finds them unsupported by substantial evidence.[26] When applying the test, the reviewing

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kind of father are you or husband to have . . . [and] want your wife to go back so soon." *Id.* at 419, 400 A.2d at 1188. (Handler, J., concurring and dissenting).

19. Castellano v. Linden Bd. of Educ., 158 N.J. Super. 350, 386 A.2d 396 (1978).

20. The court found that while the one-year maternity leave may have been well intentioned (the intention being to effectuate the Board's policy of continuity of classroom instruction), in effect it discriminated against teachers because of their sex. The court also found it discriminatory not to allow a pregnant teacher who becomes physically disabled and unable to attend to her teaching duties to use her accumulated sick leave since it could be used for any other period of absence due to physical disability. 79 N.J. 407, 412-13, 400 A.2d 1182, 1184-85 (1979).

21. The majority felt there was no basis for any feeling of humiliation since mandatory maternity leaves were common. The court also took into consideration the fact that the Board of Education had acted in "good faith" in accordance with the negotiated contractual agreement which provided for a one-year maternity leave. *Id.* at 411, 400 A.2d at 1184.

Judge Handler dissented from this part of the decision. In his opinion it was obvious that the complainant was upset and disturbed as a result of the Board's discrimination against her. He noted the importance of court adherence to the Director's determination that the evidence of mental distress was substantial, since the Division of Civil Rights is better equipped to spot discrimination and realize its potential effects. Judge Handler stated:

> Discrimination frequently goes uncorrected because it is undetected. This is why governmental responsibility in the civil rights field has been placed in an administrative body that is expected to have the keenness to see through these forms of cultural blindness and spot discrimination where it exists . . . . And, this is why it is important for courts to defer to the factual assessments of such administrative agencies.

Id. at 420, 400 A.2d at 1189. (Handler, J , concurring and dissenting).

22. N.J. STAT. ANN. §§ 10:5-1 to -38 (West 1976 & Supp. 1979).

23. N.J. STAT. ANN. §§ 52:14B-1 to 15 (West 1976).

24. *See* note 26 *infra.*

25. *See* note 7 *supra.*

26. *See* Atkinson v. Parsekian, 37 N.J. 143, 179 A.2d 732 (1962) (appeal from a decision of the acting director of the Division of Motor Vehicles suspending two drivers' licenses for one year each after the motorists had been involved in a fatal automo-

court must consider whether a reasonable mind would accept the evidence as adequate to form a conclusion.[27] That the court would have reached a different conclusion on the same set of facts is irrelevant; courts cannot substitute their judgment for that of an agency merely because there is evidence to support the court's point of view.[28] This

bile accident). In discussing the standard of review applicable on this appeal, the court found that the factual determinations of the administrative agency must be sustained if they are supported by substantial evidence. *Id.* at 149, 179 A.2d at 735. *See also* Matter of Heller, 73 N.J. 292, 374 A.2d 1191 (1962) (review of a decision of the New Jersey State Board of Pharmacy revoking the license of a pharmacist on charges of grossly unprofessional conduct). The Board found that the pharmacist indiscriminately sold codeine-based cough syrup, classified as a controlled substance. On appeal, the New Jersey Supreme Court affirmed the Board's findings of fact, as based on substantial evidence.

The substantial evidence standard of review applies only when the evidentiary support for the fact-finding determinations is on the record and compiled through formal adjudicatory proceedings. 4 K DAVIS, ADMINISTRATIVE LAW TREATISE § 29.01 (1958).

27. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 596 (1965), in which Jaffe suggests that the test should be whether a *reasoning* mind would accept the evidence as adequate to support a conclusion. *See generally* W. GELLHORN, C. BYSE & P. STRAUSS, ADMINISTRATIVE LAW, CASES AND COMMENTS 257 (7th ed. 1979).

The court, in making such a determination, must review the entire record to determine if there is substantial evidence "in the record as a whole" to support the agency's determination. The court must consider evidence in the record which detracts from the evidence relied on by the agency. 5 B. MEZINES, J. STERN & J. GRUFF, ADMINISTRATIVE LAW § 51.02 (1979). This requirement does not negate the function of the agency as the one equipped to deal with a specialized field of knowledge, whose findings stem from an expertise which courts must respect. Nor does it mean that a court may choose between two conflicting inferences, even though the court would have made a different choice had the review been de novo. Review of the record as a whole merely means that a court may set aside agency findings if it cannot find substantial evidence to support them, viewing the record in its entirety, including the evidence opposed to the agency's view. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT § 29.03 (3d ed. 1972).

28 *See* Consolo v. Federal Maritime Comm'n, 383 U.S. 607 (1966) (appeal from a decision of the Federal Maritime Commission assessing damages for violation of the Shipping Act). The Court of Appeals reversed and vacated the award on the ground that there was substantial evidence to support a conclusion contrary to that reached by the Federal Maritime Commission. Reversing the Court of Appeals decision, the Supreme Court stated, "We have defined 'substantial evidence' as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'

. [T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Id.* at 619-20 (Quoting Consolidated Edison Co. v. Labor Bd., 305 U.S. 197, 229 (1938)).

standard of review is analogous to that applied by a trial judge in deciding whether to override a jury by issuing a directed verdict.[29]

In applying the substantial evidence standard of review, courts must give deference to the agency's expertise.[30] Expertise, however, is not a substitute for evidence in the record.[31] The responsibility for weighing evidence,[32] determining the credibility of witnesses,[33] and

29. NLRB v. Columbia Enameling and Stamping Co., 306 U.S. 292, 300 (1939). A different standard of review applies, however, to findings of a judge without a jury. Such findings may be overturned if they are clearly erroneous. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.02 (1958). This test is broader than the substantial evidence test because a finding is clearly erroneous when the reviewing court is left with the firm conviction that a mistake has been committed, regardless of whether or not there is evidence to support it. Under the substantial evidence test, courts may not substitute their judgement for that of an administrative agency if there is sufficient evidence to support the agency's findings. *Id.*

30. Giving proper respect to the expertise of the administrative agency frees the reviewing court from the task of weighing the evidence and drawing inferences and conclusions from it. Judicial deference to the agency's expertise helps promote the uniform application of the substantial evidence test and serves to protect the autonomy of the administrative agency. The rule also minimizes the opportunity for reviewing courts to substitute their judgment for that of an agency. Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620-21 (1966). Deference is necessary because administrative tribunals possess superior fact-finding abilities and are more efficient in disposing of controversies within the realm of their specialized field. These tribunals must be free of judicial control when they are carrying out their executive functions pursuant to policies enunciated by the legislature. L. Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 473 (1954).

31. Deference must be given to an administrative agency's expertise. If, however, substantial evidence cannot be found on the record, the reviewing court must reverse the agency's findings. The purpose of this rule is to place practical limits on agency discretion. Otherwise, "the requirement for administrative decisions based on substantial evidence and reasoned findings—which alone make effective judicial review possible—would become lost in the haze of so called expertise." Baltimore & Ohio R. Co. v. Aberdeen & Rockfish R. Co., 393 U.S. 87, 92 (1968).

32. *See In re* Grossman, 127 N.J. Super. 13, 316 A.2d 39 (1974) (male tenured teacher who underwent sex-reassignment surgery challenged the decision of the Board of Education to dismiss him from the public school system on the grounds that his retention would result in potential emotional harm to his students). Medical testimony supported both sides of the issue. The Commissioner resolved the conflicting medical evidence in favor of the Board. In upholding the Board's decision, the court reasoned that it was not within its competency to balance the persuasiveness of the evidence on one side as against the other. *Id.* at 23, 316 A.2d at 46. This rule recognizes that administrative tribunals are better able than a reviewing court to resolve controversies within the realm of their field. *See* note 30 *supra.*

33. *See* Pilon v. Board of Alcoholic Beverage Control, 112 N.J. Super. 436, 271 A.2d 611 (1970) (appeal from a determination of the Director of the Division of Alcoholic Beverage Control that holders of a plenary retail consumption license permitted

drawing inferences and conclusions from the evidence,[34] lies exclusively with the administrative agency. This standard serves to protect the autonomy of the administrative process by displaying respect for the agency's judgment.[35]

Application of the substantial evidence test to cases involving administrative agency awards of damages for mental distress to victims of discrimination has often been inconsistent and uncertain.[36] Some

a fight to take place on the licensed premises, hindered and delayed a police officer in the performance of his duty, sold and served alcoholic beverages after hours, and permitted one of the owners to work in the licensed premises while intoxicated). The police officer who was assaulted at the bar testified at the hearing about the alleged violations. The appeal challenged his credibility as a witness. The court held that "[t]he choice of accepting or rejecting the testimony of witnesses rests with the administrative agency, and where such choice is reasonably made it is conclusive on appeal." *Id.* at 441, 271 A.2d at 613. *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT § 29.06 (3d ed. 1972).

34. Drawing inferences from basic facts or from a witness' testimony is the heart of the fact-finding process. Courts may not choose between two conflicting inferences if there is substantial evidence to support the agency's conclusions. *See* note 28 and accompanying text *supra*. The test is whether a reasonable mind could have reached the same conclusions reached by the administrative agency. *See* Cooley's Anemia Blood & Research Foundation for Children, Inc., v. Legalized Games of Chance Control Comm'n, 78 N.J. Super. 128, 187 A.2d 731 (1963) (appeal from an order of the Legalized Games of Chance Control Commission suspending a charitable organization's bingo license for 18 months). The court held that the Commissioner's findings that the organization had not fully and accurately reported bingo game receipts and expenditures were supported by substantial evidence. The court explained: "The question in every case is whether a reasonable man, acting reasonably, could have reached the administrative agency decision under review, from the evidence found in the entire record, including the inferences to be drawn therefrom." *Id.* at 140, 187 A.2d at 737.

Reviewing courts may, however, substitute their judgment for that of an agency if they choose to turn a question of inference into a question of law. By holding that an inference is either required or unreasonable, the court in effect converts a question of inference into a question of law. Only when a court decides that an inference is reasonable does the question remain one of fact, within the realm of administrative determination. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.05 (1958).

35. The substantial evidence rule is defined to prevent the court from engaging in nonjudicial activities. Administrative agencies carry out executive functions pursuant to policies enunciated by the legislature. If courts were to exercise these same functions when reviewing an administrative determination, they would theoretically be in violation of the separation of powers doctrine. To avoid this result and to preserve the autonomy of the administrative agency, the substantial evidence rule imposes upon the court a duty to respect the agency's judgment, provided it is based upon sufficient evidence. *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT § 29.09 (3d ed. 1972).

36. *See* notes 57-67 and accompanying text *infra*.

courts employ a one-part test where substantial evidence of discrimination is sufficient to establish causation of mental distress.[37] Other courts apply a two-part test, requiring substantial evidence of mental distress as well as substantial evidence of discrimination.[38] This enables a court to find discrimination but still overturn an award of damages for mental distress.

The New Jersey Supreme Court in *Zahorian v. Russell Fitt Real Estate Agency*[39] applied the one-part test to uphold a decision of the Director of the Division on Civil Rights granting compensatory damages for pain and mental suffering to a victim of sex-based discrimination in housing. The court found sufficient evidence of discrimination[40] to establish causation of mental distress,[41] and deferred to the agency's finding of it.[42] *Zahorian* marked the first time the New Jersey Supreme Court recognized the Director's authority to

37. *See* notes 39-47 and accompanying text *infra.*

38. *See* notes 48-54 and accompanying text *infra.*

39. 62 N.J. 399, 301 A.2d 754 (1973).

40. Complainant, a 24 year-old, single, employed female sought a two bedroom apartment for herself and a female friend. In a telephone conversation, an agent of the Russell Fitt Real Estate Agency informed complainant that the agency had at least two two-bedroom apartments available. The agent, however, informed the complainant that the owners would not rent the apartments to single girls, and therefore she would not show them. She refused to show the apartment or give the names and addresses of the owners or apartment superintendents. Complainant testified that she had four such telephone conversations with the agent. Despite contradictory testimony given by the agent, the Hearing Examiner of the Division on Civil Rights found the complainant's testimony credible. The Director of the Division affirmed the Hearing Examiner's findings of discrimination and the New Jersey Supreme Court upheld the findings on appeal. *Id.* at 402-06, 301 A.2d at 756-58.

41. Due to the indignity visited upon victims of discrimination and the humiliation that is caused, the court recognized that mental distress may directly result from discrimination. Applying this to the present case, the court simply stated, "[T]here was ample evidence to establish causation . . . ." *Id.* at 416, 301 A.2d at 763.

42. The evidence of mental distress consisted of complainant's own testimony that the discriminatory treatment had humiliated her and caused her actual physical and emotional pain. She testified that as a result of her phone conversations, she suffered such severe stomach upset that she was forced to consult her physician on several occasions. Complainant's mother testified that her daughter was extremely upset, would not eat, and complained about headaches. She accompanied her daughter on visits to the physician who told her that her stomach distress was just nerves. Complainant and her mother both testified that when she abandoned her efforts to obtain a two-bedroom apartment for herself and her friend, and ultimately settled for a one-bedroom apartment in another area, her physical and emotional distress terminated. *Id.* at 404, 301 A.2d at 757.

award such incidental damages.[43]

New Jersey lower court decisions involving sex-based[44] and racial discrimination[45] have consistently applied the one-part test to reach similar results. Citing *Zahorian* as precedent, these courts affirmed the Director's award of compensatory damages for humiliation without discussing the evidence on the record regarding mental distress.[46] Both courts found ample evidence of discrimination to establish causation of mental distress.[47] In sustaining awards of damages for mental pain and suffering, these courts held that substantial evidence of discrimination alone could establish causation of mental distress.

Courts in other jurisdictions[48] sometimes apply the two-part test, however, requiring both substantial evidence of discrimination and substantial evidence of mental distress. In *School District No. 1 v. Nilsen*,[49] the Oregon Supreme Court reversed a decision of the Commission of the Bureau of Labor[50] which awarded damages for mental distress for sex discrimination in employment.[51] The court found sufficient evidence of discrimination, but held that the evidence failed

43 *Award of Damages for Humiliation and Mental Anguish by Civil Rights Division*, 96 N.J.L.J. 372 (1973).

44 *See* Harvard v. Bushberg Bros., Inc., 137 N.J. Super. 537, 350 A.2d 65 (1975) (complainant denied job promotion due to sex-based discrimination).

45 *See* Director, Div. on Civil Rights v. Slumber, Inc., 166 N.J. Super. 95, 398 A 2d 1345 (1979) (racial discrimination in hotel accommodations).

46 In *Harvard*, the court noted that complainant complained of physical ailments. The court, however, did not elaborate on the nature of those ailments. 137 N J Super. 537, 541, 350 A.2d 65, 68 (1975).

47 The court in *Harvard* simply stated that, "There was ample evidence to establish causation . . . ." No discussion of the issue followed. *Id.* at 541, 350 A.2d at 68. In *Slumber*, the court, infering that racial discrimination humiliates its victims, held that the finding of discrimination was based on substantial evidence, and that the resulting insult was sufficient to sustain an award of damages for mental distress. 166 N.J. Super. 95, 104-05, 398 A.2d 1345, 1350 (N.J. Super. 1979).

48. *See* notes 49-54 and accompanying text *infra*.

49. 271 Or. 461, 534 P.2d 1135 (1975).

50. *Id.*

51. A probationary teacher who became pregnant was forced to resign when her pregnancy advanced to the point where she was no longer able to teach. Under the school district rules, her resignation would cause her to lose the 2-1/2 years of probationary time she had accumulated towards tenure. If rehired, she would have to begin anew as a first-year probationary teacher. The Commissioner of the Bureau of Labor found discrimination and awarded $1000 damages for mental distress. *Id.* at 465-66, 534 P 2d at 1137.

to establish causation of mental distress.[52] The opinion distinguished evidence of sex-based discrimination from evidence of racial discrimination, which the court stated would establish causation.[53] The court found the evidence of mental distress did not meet the substantial evidence test.[54]

The New Jersey Supreme Court in *Castellano* apparently adopts the approach taken by the Oregon Supreme Court in *Nilsen*. Although it found a sexually discriminatory effect in the Board's mandatory, one-year maternity leave policy, the court neglected to apply the one-part test outlined in previous New Jersey decisions.[55] Applying the substantial evidence test directly to the facts supporting mental distress, the court dismissed the Director's finding as insubstantial.[56] But the court failed to discuss its rationale for application of the two-part test or its reasons for finding insubstantial evidence of

52. The court held that the alleged discrimination could not cause the mental distress claimed. The complaint filed on behalf of the complainant by the Attorney General challenged only the requirement that she resign and not the rule that she take a leave of absence for the remainder of the year. The complaint did not claim entitlement to any loss of money for the balance of the year, nor that she should receive any paid leave. The court found that complainant may well have considered her situation to be emotionally trying and that she became insecure and upset about what the future would bring. Her husband was starting a new business and needed the money provided from her employment. She was caught in a controversy between the old and the young factions among the teachers and between the two teachers' organizations. In effect, she found herself in a position of conflict and financial insecurity, resulting in anxiety. But the court held that this was not a direct result of the discrimination. *Id.* at 485-86, 534 P.2d at 1146.

53. Distinguishing this case from Williams v. Joyce, 4 Or. App. 482, 479 P.2d 513 (1971) (an earlier case in which the court upheld damages for mental distress), the court held that in a racial discrimination case, an award of mental distress would be proper "because of the indignity visited from the inference that black people are inferior." The court held that no similar inference could be drawn from this case. 271 Or. at 486, 534 P.2d at 1146.

54. The court reasoned that since no one had reveled the complainant, accused her of any impropriety or ridiculed her or embarrassed her because she was pregnant, there was no evidence of humiliation. "If any awards for emotional and mental suffering are made, such suffering must be of greater consequences and arise out of more aggravated circumstances than those which the evidence disclosed in the case of the present complainant." *Id.* at 498, 534 P.2d at 1152.

55. The court did not cite the *Nilsen* case, but it acted similarly in not acknowledging the causation test. It simply rejected the evidence of mental distress outright. Castellano v. Linden Bd. of Educ., 79 N.J. 407, 412, 400 A.2d 1182, 1184 (1979).

56. The court found that the finding of mental distress was based on insubstantial and "nebulous" evidence. *Id.* at 411, 400 A.2d at 1184.

mental distress.[57]

The reviewing court, by failing to apply the one-part test, places the burden of an additional element of proof upon victims of sex discrimination who claim damages for mental distress.[58] Courts can thus review the Director's determination of mental distress apart from the issue of discrimination. In practice, however, the application of the substantial evidence test allows the court considerable discretion[59] which often results in inconsistent and uncertain applications.[60] *Castellano* reflects this in its disregard for precedent without any reasoned elaboration.[61]

Since the facts of each case are unique, the test of whether a reasonable mind could find the evidence sufficient to support the conclusion reached in practice turns on whether the reviewing court *believes* a reasonable mind could find the evidence sufficient. In effect, the court is able to substitute its judgment for that of an administrative agency.[62] Theoretically, the reviewing court should not weigh the evidence, determine the credibility of witnesses, or choose from among

57. The majority opinion simply stated that there was no basis for humiliation on complainant's part because "[m]aternity leaves of absence of one kind or another are commonplace." *Id.* at 411, 400 A.2d at 1184.

58. Unlike victims of racial discrimination, victims of sex-based discrimination have to prove discrimination and then prove mental distress. No inference will be drawn that the discrimination itself would automatically cause the complainant to feel humiliated. *See* School Dist. No. 1 v. Nilsen, 271 Or. 461, 486, 534 P.2d 1135, 1146 (1975).

59. *See* notes 62-67 and accompanying text *infra.*

60. Due to the extent of judicial discretion, the substantial evidence standard of review cannot assure certainty of application. Because the facts of each case are unique, it is almost impossible to avoid inconsistency and uncertainty of application. Courts can and do take it upon themselves to see the administration of what they deem to be the needs of justice. Thus, different policy preferences may dictate different results in similar cases. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.02 (1958).

Only by limiting judicial discretion can this result be avoided. Otherwise, "the ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of informed professional critique upon its work." Universal Camera Corp. v. NLRB, 340 U.S. 474, 489 (1951).

61. *Castellano* marks the first instance in which the New Jersey Supreme Court, having found discrimination, reversed the Director's award of damages for mental distress. Before this case, New Jersey courts had consistently upheld awards of such damages, recognizing mental distress as a direct result of discrimination. *See* notes 40-48 and accompanying text *supra.*

62. *Cf.* R. Kramer, *The Place and Function of Judicial Review in the Administrative Process*, 28 FORDHAM L. REV. 1 (1959).

various reasonable inferences.[63] In fact, however, courts perform these functions when purportedly applying the substantial evidence test.[64] Because there is no clear line to distinguish between what is and what is not permitted by the rule[65] courts can use the substantial evidence test to effectuate their own policy preferences,[66]rendering application of the standard of review meaningless.[67]

The New Jersey Supreme Court's inability in *Castellano* to adequately explain its reasons for finding the evidence of mental distress insubstantial illustrates the inadequacy of the substantial evidence test. The primary purpose of judicial review of administrative action is to check overreaching by the agency, not to summarily disagree with it's conclusions.[68] A court should, then, have some responsibility for explaining how the agency exceeded its statutory powers or acted arbitrarily in violation of fairness and due process considerations.

The Division on Civil Rights seeks to eliminate discrimination and remedy its effects. This specialized agency has superior fact-finding ability, enabling it to recognize the potential harm caused by discrimination. Therefore, if a court finds sufficient evidence to support the agency's findings of discrimination, it should give deference to the administrative determination that the victim suffered mental distress. Application of this one-part causation test will eliminate judicial dis-

63. *See* notes 32-34 and accompanying text *supra.*

64. R. Kramer, *The Place and Function of Judicial Review in the Administrative Process*, 28 FORDHAM L. REV. 1, 84 (1959).

65. *Id.*

66. *See* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.02 (1958), in which Davis sets forth the proposition that in reality, the substantial evidence test is a variable. Courts are both willing and able to stretch it in accordance with what they deem to be the needs of justice. *Id.* This is apparent in *Castellano* where the court placed a great deal of emphasis on the fact that the Board of Education is a public body and any damages that it would have to pay would come directly from taxpayer money. Castellano v. Linden Bd. of Educ., 79 N.J. 407, 411, 400 A.2d 1182, 1184 (1979).

67. *See* E. Gellhorn & G. Robinson, *Perspectives in Administrative Law*, 75 COLUM. L. REV. 771 (1975), in which the authors state:

> At best, concepts such as 'substantial evidence' tend to be little more than convenient labels attached to results reached without their aid. As evidence of their unimportance, judicial opinions commonly do not even articulate the standards of review employed, and when they do the articulation is seldom useful to understanding the result or predicting future results. . . . [T]he rules governing judicial review have no more substance at the core than a seedless grape. . . .

Id. at 780.

68. *See generally* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.01 (1958).

cretion in reviewing agency findings of mental distress. The complainant will no longer be placed in the tenuous position of guessing what evidence will satisfy the court.

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