

**THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION AND
OSCAR T. BROOKINS,
Complainant,

v.

MCAD Docket No. 05-BEM-03009
EEOC/HUD Charge No. 16C-2006-00208

NORTHEASTERN UNIVERSITY
Respondent.

Appearances:

Michael L. Mason, Esquire for Professor Oscar T. Brookins
Scott A. Roberts, Esquire and Sandra Sue McQuay, Esquire for Respondent
Northeastern University

DECISION OF THE HEARING COMMISSIONER

I. PROCEDURAL HISTORY

On November 15, 2005, Complainant Oscar T. Brookins (“Complainant” or “Brookins”), an Associate Professor in the Economics Department at Northeastern University, filed a complaint with this Commission charging Northeastern University (“Respondent” or “Northeastern”) with discriminating against him on the basis of his race/color and age in violation of M.G.L. c. 151B, §4(1) because he was paid less than four younger, white Associate Professors and also paid less than recently hired, white Assistant Professors.

The Investigating Commissioner found probable cause to credit the allegations of discrimination on the basis of race/color and lack of probable cause regarding the allegation of age discrimination. Attempts to conciliate the matter failed and the

Investigating Commissioner certified the matter for a public hearing. A public hearing was held before me on April 5, 6, 7, and 8, 2010.¹ After careful consideration of the entire record and the post hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

On January 13, 2010, the parties submitted a Joint Pre-Hearing Conference Memorandum in which Northeastern identified the contested factual issues for the hearing as follows: (1) whether Professor Brookins performed at a level comparable to that of the other Associate Professors who received salary increases greater than his salary increases; (2) whether Professor Brookins received salary increases lower than his comparators as a result of racial animus; (3) whether Northeastern's proffered justification for Professor Brookins' salary increases relative to the other Associate Professors is pretextual; and (4) whether Professor Brookins suffered recoverable damages as a result of racially discriminatory practices by Northeastern.

II. FINDINGS OF FACT

1. Complainant, an African-American man, was born in Yazoo County, Mississippi in 1942. (Tr. p. 31). Complainant now lives with his wife, Kathryn, in the Mission Hill neighborhood in Massachusetts. (Tr. p. 32).

2. Complainant obtained his Bachelor of Science Degree from DePaul University and a Masters Degree in Economics from Northeastern University. (Tr. p.

¹ At the time of hearing, and until September 17, 2010, the undersigned served as Chairman of the MCAD and was Hearing Commissioner in this matter. By way of special designation by the Chairman of the Commission on September 20, 2010, the undersigned retained authority to issue this Hearing Officer decision on behalf of the Commission.

37). He earned a Ph.D. in Economics from the University of Perdue in 1976. (Tr. pp. 37-38).

3. Complainant commenced his teaching career in 1969 as a lecturer at the New York State University at Buffalo where he spent two years. He was also a lecturer at the University of Ghana from 1972 to 1974. (Tr. pp. 39-40). He also taught economics courses at the University of Notre Dame from 1974 to 1981. After being denied tenure, Complainant left the University of Notre Dame and spent one year teaching at the Virginia State University. (Tr. p. 40).

4. Complainant was hired by Northeastern as an Assistant Professor in the Economics Department in 1983. When Complainant was hired at Northeastern, his starting salary was \$32,000, which was roughly \$4,000 higher than the average starting salaries of the other associate professors who started around the same time. (Tr. pp. 40, 42; Joint Ex. 33, p. NU/BR 0694).

5. Northeastern University maintains three faculty tenure tracks: Assistant, Associate, and Full Professor. (Tr. pp. 42-44). Professors usually spend approximately seven years at the Assistant level before they are considered for promotion. (Tr. pp. 42 – 44). Unlike Associate Professors, Assistant Professors may have reduced teaching loads, do less research, and are not expected to have the same volume of committee responsibilities. (Tr. pp. 44-46); (Tr. p. 307). Associate Professors are expected to become highly involved in committee work. (Tr. p. 46).

6. In 1986 Complainant petitioned Northeastern to be considered for early promotion from Assistant to Associate professor. Northeastern promoted the Complainant to Associate Professor that same year. (Tr. pp. 43– 44).

7. Since 1986 Complainant has also had occasions to work at educational facilities in other countries. Complainant taught in Turkish North Cyprus in Famagusta in 1993 and 2002 (Tr. pp. 51-52), was a Fulbright scholar and lecturer at the Tallinn Technical University in Estonia (Tr. p. 53), and taught at Jackson State University and University of Konstanz in Germany. (Tr. pp. 57-58). Complainant also taught in the MBA program at McMasters College in Canada. (Tr. p. 51).²

8. Starting sometime in “the 1980’s” until the 2008/2009 academic year, Complainant was one of five associate professors in the Economics Department. The other associate professors were Alan Dyer, Neil Alper, Kamran Dadkhah, and Gregory Wassall.³ Professor Brookins testified that he believes Associate Professor Dadkhah is from Iran, and the other associate professors are white. (Tr.pp. 49-50).

9. The entire cohort of associate professors has been referred to as “terminal” or “lifetime” associates. By that designation these tenured professors are expected to remain associate professors for the duration of their careers at Northeastern. (Tr. pp. 47 – 48); (Tr. pp. 339 – 340); (Ex. 21).

10. As an Associate Professor, Complainant served on several committees at Northeastern , including the Salary Review Committee (SCR) to which he was nominated by the Faculty Senate Agenda Committee. (Tr. p. 61).

11. Complainant served for two years as the Executive Officer for Northeastern University’s Economics Department. (Tr. p 62).

² At the time of hearing Complainant was on leave from Northeastern University and was serving as a visiting Professor at Jackson State University.

³ Another Associate Professor, Maria Prado joined the ranks of associate professors subsequent to the filing of this complaint.

12. Complainant mentored assistant professors and helped to review the teaching of assistant professors. (Tr. pp 61 - 64).

13. Complainant mentored students, including one who lived with Complainant and his family, and who now works as an economist with the International Monetary Fund. (Tr. p. 70). Another student worked with Complainant on a joint project and article which was published. (Tr. pp 67 – 68). Complainant also helped another student - who lived with Complainant and his family - to design a survey on water pricing in Cyprus. That student now works with the World Bank. (Tr. pp 70 – 72).

14. Since 1992 Complainant and his wife have published the *Mission Hill News*, a publication that reports on events in the Mission Hill neighborhood. (Tr. pp. 538 – 539).

15. Steven Morrison (“Professor Morrison”) has served as Chair of the Northeastern Economics Department since 1998. (Tr. p. 289).

16. As Chair of the Economics Department, Professor Morrison reported to James R. Stellar, (Dean Stellar) Dean of the College of Arts & Sciences (Tr. pp. 347–348).

17. Dean Stellar was responsible for the faculty, students, and staff of the College, for the College’s teaching and research missions, and for working with Department Chairs and the faculty in their departments. Dean Stellar reported directly to the Provost of the University, and he worked with the Provost and the President to implement University policies. (Tr. pp. 502–504).

18. As part of its efforts to strengthen its Economic program, Northeastern has recruited a number of qualified and sought after assistant professors who are in demand

in the market. (Tr. p. 356) Northeastern recruited and hired these assistant professors who were deemed “better” qualified than their peers. (Tr. pp. 446– 447) (Ex. 21).

SALARY SETTING PROCEDURES

19. There are two processes through which faculty members at the University may receive an increase in salary: the merit review process and the market adjustment process. (Tr. pp. 114 – 115) (Ex. 1).

A. The Merit Increase Procedure

20. Within the Economics Department, all faculty members are subject to the same salary review procedures, which are based on merit. (Tr. pp. 356 – 357).

21. The merit review process in the Economics Department is governed by written guidelines that are set forth in the Department’s Merit Salary Increase Procedures (the “Merit Procedures”). The Merit Procedures were developed in the mid-1980s with the assistance of the Department’s then Chair, Morris Horowitz, a labor arbitrator. In 1987, the Department’s faculty voted upon and approved the Merit Procedures, which were also approved by University’s Provost. (Tr. pp. 357 – 358); (Tr. p. 524); (Ex. 1).

22. At the initial stage of the process, the Salary Review Committee (“SRC”), meets early each year to review and assess the performance and activities of each faculty member during the prior calendar year. (For example, in 2005, the SRC reviewed the faculty performance during the 2004 calendar year.) The SRC is usually comprised of six, randomly-selected tenured faculty (their names are drawn from a hat), as well as the Department Chair, who also chairs the SRC. (Tr. 1, p. 138); (Tr. pp. 358– 359); (Ex. 1).

23. All faculty members at Northeastern are evaluated using the same standard criteria that are generally used by institutions of higher learning, namely performance in the areas of Teaching, Research (Scholarship), and Service. (Tr. p. 576)

24. Complainant has periodically served on the SRC, and he has evaluated his colleagues using the Department's Merit Procedures. (Tr. p. 138); (Tr. p. 142).

25. At the commencement of the merit review process, each faculty member is invited to submit information to the SRC for its consideration, including whatever they believe is relevant to their accomplishments and performance in the areas of Teaching, Research, and Service, and "an up to date Curriculum Vitae." Applicants for merit increases are also invited to "highlight contributions to the department's and university's goals and aspirations." (Ex. 1). These submissions are first reviewed by the individual SRC members, and the SRC then meets as a group to discuss them. (Tr. p. 138); (Tr. pp. 359– 361).

26. Under the Merit Procedures, the individual members of the SRC rate the performance of each faculty member in the areas of Teaching, Research, and Service on a scale ranging from zero (0) to three (3), on which zero denotes unsatisfactory performance, one signifies satisfactory performance, two represents very good performance, and three represents excellent performance. (Tr. pp. 140 – 141); (Tr. pp. 142 – 143); (Ex. 1)

27. Under the SRC guidelines, half-points begin after a rating of 1.0, meaning that a faculty member cannot be rated 0.5. As such, a member of the SRC must determine whether a faculty member's performance has been unsatisfactory (which

would result in a 0 rating) or satisfactory (which would result in a 1 rating). The permissible scores are: 0, 1, 1.5, 2, 2.5, and 3. (Tr. pp. 141 – 142); (Tr. p. 362); (Ex. 1).

28. After reviewing and discussing each faculty member's performance at the SRC meeting, each member of the SRC marks a secret ballot assigning scores in the areas of Teaching, Research, and Service, and the ballots are given to the Chair's administrative assistant. After the ballots are received, the data are entered into a computer program which processes them in accordance with the Merit Procedures by dropping the highest and lowest scores in each category and then computing an average score for each category. (Tr. pp. 312 -313); (Ex. 1, p. 2).

29. Before calculating an overall average of the three mean scores, the data is calculated via a complex weighting system to account for the varying degree of importance assigned by Northeastern to each category, and to determine each faculty member's overall average. (Tr. pp. 138 – 139); (Tr. pp. 364 – 365, 366– 367, 370). (Ex. 1).

30. According to the Merit Increase Procedure, the weight assigned to Teaching is 0.35 – 0.55; the weight assigned to Research is 0.35 – 0.55; and the weight assigned to Service is 0.10 – 0.20. (Ex. 1).

31. A weight assigned to a faculty member in each category may be adjusted based upon the faculty member's teaching load. Each course above or below a base teaching load of six courses will result in an appropriate upward or downward adjustment of 0.05 in the Teaching category. A similar adjustment is made in the Research category. Where the teaching load is reduced due to increased service activities, the

Teaching category is reduced by 0.05 per course *and* the service weight increased by 0.05 per course. (Ex. 1).

32. In the Teaching category the SRC may examine both teaching quality and teaching loads. Included in the possible submissions are student evaluations, peer reviews, and documents such as syllabi and examinations. (Ex. 1).

33. In evaluating merit in the Teaching category, the SRC may also consider large section sizes, uncompensated extra teaching loads, and emergency teaching outside one's field of expertise. (Tr. p. 309); (Ex. 1).

34. In the Research category, the SRC examines a faculty member's work in three groups:

- a) Refereed Publications (such as articles in refereed journals, scholarly books and chapters in scholarly books);
- b) Unrefereed and Other Publications (such as papers in conference proceedings, government and consulting reports, textbooks, book reviews, papers in refereed trade and professional journals, presentation at national conferences, refereed working papers and refereed discussion papers); and
- c) Others (such as presentations at regional and local conferences, chairing a session at a conference, published abstracts, invited lectures and seminars, testimonials before legislature and similar bodies, submitted manuscripts and external research proposals, obtaining grants and funds for teaching or research from outside the university

(Ex. 1); (Tr. pp. 117 – 119).

35. There is no requirement that a journal must be identified as “mainstream” to qualify under the publication evaluation process. (Tr. p. 310).

36. I credit Complainant's testimony, and based upon review of the Merit Increase Procedures, find that there is no documented "impact factor" or "H-Score" factor that is uniformly used to evaluate publications at Northeastern University.

37. While Professor Brookins testified that he was unfamiliar with the term "H-index," he testified that that professors and researchers are rated by the frequency with which their articles are cited by others. (Tr. p. 225); (Tr. p. 226); (Ex. 20).

38. In the Service category, the SRC may examine service to the department and the university, including:

- a) Administrative activities for the department, college or university;
- b) Membership on or participation in department, college, and university committees;
- c) Academic advising and advising student activities and societies; student recruiting; student placement, including employment on financed research;
- d) Membership on dissertation committees;
- e) Service to the profession, such as membership on editorial boards, reviewing manuscripts and research proposals; and
- f) Professional community service, including membership on public bodies.

(Ex. 1); (Tr. p. 126).

39. Regardless of his/her final score, a faculty member who receives at least half of the votes as satisfactory in at least two categories will be deemed to have performed satisfactorily and will receive the basic percentage increase, and will be eligible to receive an increase from the "superior merit pool." (Ex. 1). Conversely, any faculty member who fails to receive satisfactory votes in at least two categories will be

ineligible for the basic percentage increase, or increase from the “superior merit pool.”
(Ex. 1).

40. During Professor Morrison’s time as Chair no professor in the Economics Department has been rated unsatisfactory. (Tr. pp 371-372).

41. Sometimes, no funding is available for merit raises. In one year, the Department conducted the merit evaluation process, only to learn that that there would be no salary increases for faculty members due to funding issues. Because the salary information of faculty members is confidential, the SRC never sees information regarding individual salaries and never discusses increments to salary in the evaluation process. Instead, the SRC evaluates and assesses the performance of faculty members on the basis of merit. That evaluation is translated into a merit raise, if there is to be one. (Tr. pp 370 – 374); (Tr. p. 506) As Chair of the Economics Department, Morrison has two opportunities to provide input during the annual SRC process. He votes as a member of the SRC and, subsequently, has discretion to add “Chair Points” to individual professors’ ratings. (Tr. pp. 312 – 313).

42. Once the SRC votes have been tabulated, and before their disclosure, the allocation of Chair Points serves to increase a faculty member’s score in a particular category based upon the prior year’s performance. The maximum number of discretionary points which the Chair may add is equal to 0.25 times the number of evaluated faculty. If the Chair chooses to award points for a faculty member, he cannot award less the 0.1 points or more than 0.5 points in any category, nor can the total amount of the additional points across the three categories exceed 1.0 for any faculty member. In deciding whether to add discretionary chair points, the Chair looks for

situations where he perceives the SRC's score to be lower than he would expect. (Tr. pp. 239 – 241); (Tr. pp. 368 – 370); (Tr. p. 438).

43. Professor Morrison testified that Chair points are not intended to be used to address salary disparities, including salary gaps resulting from the proper operation of the merit review process. (Tr. p. 438). Professor Morrison was aware that the addition of Chair Points would lead to a higher raise, even if Professor Morrison did not know whether there would be any increase or, if so, such amount. (Tr. p. 461).

44. Between 2002 and 2005, Professor Morrison awarded chair points to Professor Brookins to increase his scores from the SRC in the area of research, raising his score from 1.5 to 1.75 in 2002 and from 0.75 to 1.0 in 2004. (Tr. p. 241).

45. Professor Morrison testified that he performed an analysis of Professor Brookins' salary progression from the period 1995-2005 based on the assumption that no associate professor ever received chair points, and he determined that Professor Brookins' resulting salary in 2005 would have been only \$225 higher than it actually was, i.e., it would have been \$74,300 instead of \$74,075. (Tr. p. 439).

46. Northeastern provided evidence that in 1994, and from 2000 to 2005, after the merit review process was completed, Professor Brookins was advised of his or her scores in the areas of Teaching, Research, and Service, and how those scores compared to the average scores in the Economics Department, both before and after the award of chair points, as well as his right to appeal the scores he received. (Ex. 3 and 5).

47. Professor Brookins testified that he appealed a score if he thought there was “[a]n inaccuracy or unfairness in that particular year’s evaluation.” He further

testified that if he did not appeal a score that he received from the SRC, that meant he “was prepared to accept [the score] as given.” (Tr. pp. 143– 145); (Tr. p. 239).

During his tenure at Northeastern, Professor Brookins recalls appealing his SRC scores in only three years: 1991, 1994, and 2002. He cannot recall the result of the 1991 appeal. His 1994 appeal was successful, and the SRC raised his teaching score from a 1.13 to a 1.5 after re-balloting. (Exs. 3 and 4). His 2002 appeal (Ex. 9) resulted in no change in his scores. (Tr. pp. 145– 148).

48. In 1994 Professor Brookins received a SRC Teaching score of 1.13 compared to the Department average of 1.57, before Chair points, and 1.62 after Chair points were awarded. His Research score was 1.00 compared to a Department average of 1.34 (before Chair Points and 1.48 after Chair Points.) His Service score was 1.38 compared to before and after Chair Point Department average of 1.49 and 1.56 respectively. (Ex. 3).

49. Professor Brookins successfully appealed his 1994 Teaching score which was adjusted up to 1.50. (Ex. 4). Despite that adjustment, his teaching score remained below the Department average in the Teaching category. *See*, Ex. 3.

50. In 2000, Professor Brookins’ SRC scores fell below the Department average in all categories, even more so after Chair Points were included into the calculations. (Ex. 5).

51. In 2001 Professor Brookins’ SRC scores were below average in the Teaching and Service categories but were significantly above the Department average in the Research category. The same was true for his 2002 and 2003 scores. (Ex. 5).

52. Professor Brookins was unsuccessful in his appeal of his 2002 SRC scores (Ex.9).

53. In 2004, Professor Brookins' scores once again fell below the Department average in all categories. His 2005 scores were below average in the Teaching category but were above Department average in both Research and Service. (Ex. 5).

54. In a document created by Northeastern as part of its response to Professor Brookins' internal grievance, data suggests that, for the 10-year period from 1996 to 2005, Professor Brookins' scores from the SRC in the area of teaching ranked him last among the associate professors in eight of those years. His overall 10-year average placed him last as well. (Ex. 31).

55. Professor Brookins was aware that Morrison had concerns about the quality of Professor Brookins' teaching. Professor Brookins testified that he was aware that concerns had been raised about the quality of his teaching and he received a letter dated March 13, 2002 from Professor Morrison reflecting those concerns. Professor Morrison's letter stated that the SRC had expressed "serious concern about the quality of your teaching, as reflected in your teaching evaluations." Professor Morrison also stated that "[t]his appears not to be an aberration, but rather a continuation of recent poor performances," and he "urged" Professor Brookins to "work to improve [his] ratings." (Ex. 8).

56. On March 14, 2004, Professor Morrison again wrote to Professor Brookins, conveying the SRC's assessment that his "teaching evaluations continue to be below average." (Ex. 15).

57. The University requires that every course taught at the University (unless exempt) be evaluated by students using forms prepared by the University's *Center for Effective University Teaching*, which are also called Teacher-Course Evaluation Process forms, or TCEPs. (Ex. 2).

58. The Economics Department's Merit Procedures references the critical role of student evaluations in connection with the assessment of teaching performance, stating that "Evidence of teaching quality would include student evaluations conducted by the TCEP or the department and administered according to proper guidelines." (Ex. 2).

59. Professor Brookins knew it was mandatory for faculty members to complete and submit TCEP forms and that the Economics Department's Merit Procedures require consideration of student evaluations of teaching. Professor Brookins also testified that he was familiar with the TCEP form. (Tr. p. 180); (Ex. 55).

60. Professor Brookins does not believe student evaluations can or should measure teaching effectiveness and that he did not "put much stock" in them and that he did not "pay much attention" to the ratings that he received. (Tr. p. 180).

61. Professor Brookins stated that he considered a student rating that is "at or above the level of 'rarely effective' reflects an acceptable score" and indicative of "acceptable performance." (Tr. pp. 179 – 180).

62. Professor Brookins sent a memorandum to Professor Morrison in 2002 in which he stated that "[his] TCEP ratings were less than those received by several of [his] colleagues" but that the ratings assigned to him were "not unacceptable but 'average.'" (Tr. pp. 181– 184).

63. One 2004 document produced at hearing reflected student evaluations of Professor Brookins as 3.1 for course number U270 (Spring); 2.9 for course number U115 (Spring); 4.0 for course U115 (Summer I); 3.2 for course number U115 (Summer II); 3.1 for course number U115 (Fall); and 2.4 for course number U442 (Fall). (Ex. 17 – Brookins 2004 Teacher Evaluation summary showing Instructor Overall Rating).

64. Northeastern also submitted four undated submissions from Professor Wassall which included a transcription of student evaluations (Ex. 44, 48, 51, and 54) purporting to reflect assessments of (a) teaching effectiveness; and (b) the course taught. One submission reflects only a slight difference between the evaluations recited for Professor Brookins in the preceding paragraph. (Ex. 44).

65. Professor Brookins testified that the SRC evaluation of his teaching at Northeastern in 2002 should have included his work with a past student, Dr. Mumtaz Hussain, who was not a student during the 2002 school year, and Professor Brookins' daughter, who was never a student at Northeastern University. Neither name was submitted by Professor Brookins during the SRC process as a source for evaluating his teaching. Professor Brookins could not identify any other time or any other professor in the Economics Department who has received teaching credit for work with a non-Northeastern student. (Tr. pp. 185 - 192); (Tr. p. 200).

66. Northeastern's written Procedures for Evaluating Teaching describe three ways by which a faculty member may obtain a developmental review of teaching performance: (1) submitting a teaching portfolio to be reviewed by a team of faculty members; (2) having half of the faculty member's courses evaluated by students using forms prepared by the professor's department (in addition to the evaluation done by the

University's *Center for Effective University Teaching*; and (3) having his teaching evaluated by a team of at least two tenured faculty members based upon classroom visits. (Ex. 2).

67. Professor Morrison urged Professor Brookins to obtain a peer review from his colleagues, or to contact the University's *Center for Effective University Teaching*. The Center administers the process of obtaining evaluations from students to assess faculty teaching and works with faculty members who seek to improve their teaching. Professor Brookins did not avail himself of either option as he did not believe they would be effective in improving the scores given to him by students. (Tr. p. 425 - 426).

68. Between his arrival at Northeastern and the time he received tenure, Professor Brookins published two articles, one in 1983 and one in 1984. After receiving tenure in 1984, Professor Brookins' next publication occurred in 1993. Over the next several years, Professor Brookins' next Research qualified activity consisted of his attendance at a "conference proceeding" in 1995. (Tr. p. 220); (Tr. pp. 223– 224); (Ex. 10, p. NU/BR 1120).

69. In 1996, 1997, and 1998, the SRC's average scores for Professor Brookins in the area of research were below satisfactory. He received a 0.4 in 1996 (attributable to performance in calendar year 1995), a 0.2 in 1997 (for calendar year 1996), and a 0.5 in 1998 (for calendar year 1997). Professor Brookins did not appeal any of those scores. (Tr. pp. 218– 219); (Ex. 31).

70. During the period from 1996 through 2005, other associate professors also received average scores from the SRC in the area of research that on occasion were below satisfactory. (Ex. 31).

71. Between 1998 and 2004, Professor Brookins' research output increased, as did the corresponding average research scores he received from the SRC. *Compare* Ex. 17, p. NU/BR 1202 and Ex. 31.

72. In 1999, 2001, 2002, 2003, and 2005, Professor Brookins reported to the SRC that he had co-written and published an article in the prior year under review. In each of those years, Professor Brookins' average score from the SRC in the area of research was the highest among the five associate professors: he received a 1.67 in 1999, a 1.83 in 2001, a 1.5 in 2002, a 1.75 in 2003, and a 1.5 in 2005. *Compare* Ex. 17, p. NU/BR 1202 and Ex. 31; (Tr. pp. 213 – 215); (Tr. p. 385); (Ex. 39).

73. In 2000, Professor Brookins reported no publications or professional research to the SRC for the 1999 calendar year. (Tr. pp. 216 – 217). At least two other associate professors had publications in 1999. (Tr. pp. 217 – 218); (Ex. 41, p. NU/BR 1062); (Ex. 42, p. NU/BR 1092). Another professor reported ongoing, federally-funded research. (Ex. 48, p. NU/BR 1144).

74. Even with this decreased research performance, Professor Brookins received a satisfactory average score from the SRC in the area of research for his performance in 1999 (i.e., a 1.0), and his score was tied for fourth among the associate professors that year. (Ex. 31, p. NU/BR 0666).

75. Similarly, in 2004, Professor Brookins reported no publications of any kind in the year under review (2003), but reported three “works in progress.” *See* Ex. 14. Two other associate professors, however, reported both Category II publications and multiple works in progress in 2003. (Ex. 49, p. NU/BR 1150); (Ex. 51 p. NU/BR 1176). Nonetheless, Professor Brookins received a satisfactory score in the area of research

(1.0), which included the addition of 0.25 chair points from Professor Morrison, and Professor Brookins' adjusted score ranked him third among the associate professors that year. (Ex. 15); (Ex. 31, p. NU/BR 0666).

76. Through the award of chair points to Professor Brookins in 2004, Professor Morrison increased Brookins' research score to a satisfactory level (1.0) even though he had no published output in Category I or II. (Ex.14); (Ex. 37).

77. While Professor Dyer reported no publications in Category I or II in 2002 and 2004, Professor Dyer did report on the presentation of a conference paper in Siena, Italy (Ex. 43) and a work-in-progress (Ex. 50).

78. While Professor Morrison's chair points to Professor Brookins in the 2002 Research category were sufficient to give him a satisfactory score, Professor Morrison's awards of chair points to Professor Dyer in 2002 and 2004 were not. (Ex. 37).

79. The form that is distributed to faculty members to facilitate the assembly of information for review by the SRC states: **“DO NOT include in any category an item that has previously appeared in any category other than work in progress.”** (Resp. Ex. 1) Professor Brookins testified that he understood that the purpose of this written instruction was to “avoid undue and perhaps confounding duplications.”

80. Professor Brookins listed an article entitled *“On the Determinants of National Saving: an Extreme Bounds Analysis”* as a Category I publication in his 2001 SRC submission (Resp. Ex. 1), and he included the very same article as a Category I publication in his 2002 SRC submission. (Ex. 6).

81. I credit Professor Morrison's testimony that such repetition of research activity is not “standard practice” and is expressly against the rule that appears in bold

print on the top of the SRC form. (Ex. 6). No other SRC submissions from other associate professors that are in the record reflect similar duplication. (Exs. 41-54) (Tr. pp. 200– 201); (Tr. pp. 203– 204); (Tr. p. 209); (Tr. pp. 418– 419).

82. Overall, the 10-year average scores of the other associate professors were fairly close to Professor Brookins' score: 1.36 (the high), 1.02, 1.02, and 0.92. (Ex. 30); (Ex. 31).

83. For the 10-year period from 1996 to 2005, Professor Brookins' scores from the SRC in the area of service ranked him at or near the bottom among the associate professors in seven of those years (last or second to last), and his overall 10-year average (1.35) placed him tied for last with another professor (Professor Dadkhah). (Ex. 31).

84. From 1996 – 2005, Professor Brookins' scores from the SRC in the area of Service were 1.1, 1.6, 1.25, 1.5, 1.0, 1.0, 1.38, 1.5, 1.5, and 1.67. As such, his scores were above the “satisfactory” level (1.0) in all years, and his scores were at or above the “good” level (1.5) in half of those years. With the exception of his score in 2002 (when he received a 1.38), Professor Brookins did not appeal his scores. (Ex. 31); (Ex. 5).

85. At the public hearing, Professor Brookins described his service work with various committees and testified that he has been “a full participating member of all opportunities that normally avail themselves,” but he added, “I wouldn't say I have, you know, overdone it.” (Tr. p. 61).

86. During the period when Professor Brookins' service scores ranged between “satisfactory” and “good,” three other associate professors – Professors Alper, Dyer, and Wassall – routinely ranked higher, receiving scores at or near the level of “very good” (2.0) or between “very good” (2.0) and “excellent” (3.0).

87. For a number of years, Professor Dyer served as the Economics Department's Undergraduate Coordinator, one of the two administrative positions in the Department (other than chair). Professor Dyer held that position when the University was changing from the quarter-based system to a semester-based system, which added "significant additional burden" to his workload, as the course work of each class for each student had to be revalued from quarters to semesters. During that time, the SRC recognized Professor Dyer's overall "commendable" service and his "exceptional service on semester conversion and student advising," and Professor Morrison awarded additional chair points to Professor Dyer in the area of service. (Ex. 7, p. NU/BR 1471); (Ex. 11p. NU/BR 1473); (Ex. 37); (Ex. 43); (Ex. 47); (Ex. 50); (Tr. p. 434) – (Tr. p. 436). Professor Dyer received 0.25 chair points in 2003 (raising his score to a 2.5) and 0.2 chair points in 2004 (also raising his score to a 2.5). (Tr. p. 434); (Ex. 37).

88. In 2004, Professor Alper assumed the position of Undergraduate Coordinator and Head Advisor. Between 2001 and 2004, Professor Alper's accomplishments at Northeastern, included serving on and/or chairing several committees on the department, college, and university level (including the Senate Enrollment and Admissions Committee, the University Committees on Honors and Scholarships, and the Senate Grievance Committee), serving as a member of the Faculty Senate (since 2002), and serving on five dissertation committees (and chairing one of them). External to Northeastern, Professor Alper served as Executive Secretary/Treasurer of the Association of Cultural Economics International, refereed eight articles for academic journals, and served as a reviewer and consultant to textbook publishers on multiple occasions. (Ex. 7,

p. NU/BR 1469); (Ex. 11, p. NU/BR 1475). (Ex. 41, pp. NU/BR 1056, 1059); (Ex. 45, p. NU/BR 1112); (Ex. 49, p. NU/BR 1151); (Ex. 52); (Tr. pp. 400– 402).

89. In 2001 the SRC identified Professor Wassall’s “level of service was very good, beyond what is expected of faculty members in the department.” Between 2001 and 2004, Professor Wassall played important roles in the College’s interdisciplinary Law, Policy and Society Program, serving on its Executive Committee and Curriculum Committee. He also held the other administrative position in the Department, namely Graduate Coordinator, and in that role served as academic advisor to all Masters and Ph.D students. At the University level, he was a member of the Faculty Senate, the Graduate Academic Standings Committee, the Graduate Coordinators Committee, the Graduate Student Recruitment Committee, and Awards Committee. In 2004, after serving as a member of the Graduate Admissions, Aid and Academic Standings Committee for several years, he became the Chair of that committee that involved overseeing the review of applications for and allocations of the available financial aid. He served on 7 dissertation committees. External to the University, he served as a member of the Board of Trustees of the Northeast Business and Economics Association, and acted as referee for articles in academic journals on multiple occasions. (Ex. 7, p. NU/BR 1467); (Ex. 44, pp. NU/BR 1106-1107); (Ex. 48, pp. NU/BR 1145-1146); (Ex. 51, pp. NU/BR 1177-1178); (Ex. 54, pp. NU/BR 1219-1220).

90. The parties submitted as a joint exhibit four charts reflecting the service by the professors in the Economics Department on several standing committees and in various coordinator and advisor positions from the 2002/2003 academic year through the 2005/2006 academic year. These charts show that the service provided to the Economics

Department by Professors Dyer, Alper, and Wassall exceeded Professor Brookins' service during those years, substantively and quantitatively. (Ex. 40).

91. During the Economics Department's merit review process in 2005 (which addressed faculty performance in calendar year 2004), Professor Brookins received the following scores from the SRC: Teaching – 1.0 (satisfactory); Research – 1.5 (good); and Service – 1.67 (between good and very good). (Ex. 31).

92. With respect to Teaching, Professor Brookins testified that he expected and received a "satisfactory" rating from the SRC. Professor Brookins testified that the SRC's rating in the area of Teaching (1.0) was consistent with his own expectation. Professor Brookins' rating in the area of Teaching again placed him last among the associate professors. (Tr. pp. 229– 231); (Ex. 31).

93. With respect to Research, Professor Brookins' score (1.5) was the highest among the Associate Professors in the Economics Department. (Tr. pp. 235– 236).

94. With respect to Service, Professor Brookins' rating (1.67) ranked him third among the Associate Professors, behind Professor Alper (2.16) and Professor Wassall (1.88).

95. Professor Brookins does not contest the scores he received from the SRC in 2005 with respect to his performance in 2004 in the areas of Teaching, Research, and Service and, further, testified that his MCAD filing in 2005 was not specifically occasioned by any of the scores that he received from the SRC in 2005. (Tr. pp. 238 – 239).

96. At the end of the merit review process in 2005, Professor Brookins received a merit raise in the amount \$2,050, which raised his salary from \$72,025 to

\$74,075. The other associate professors received merit raises as follows: Wassall (\$2,600), Dyer (\$2,500), Alper (\$2,450), and Dadkhah (\$1,825). On a percentage basis, the merit raises received by Professors Alper, Dyer, and Wassall represented approximately 3% of the then current salary of each, Professor Brookins' merit raise was approximately 2.8 % of his then current salary, and Professor Dadkhah's merit raise was approximately 2.3% of his then current salary. (Ex. 38).

B. Market Adjustment

97. The second method through which Associate Professors in Northeastern's Economics Department may receive salary increases is Market Adjustments.

98. Market Adjustments are salary enhancements based upon the University's periodic assessment of compensation to professors relative to salaries at comparable colleges and universities, called "matchmate" institutions. (Tr. p. 73); (Ex. 21).

99. The market adjustment process is designed to remunerate meritorious faculty members in order to prevent them from being raided by other institutions, and to allow the University to respond to external market forces in a way that is sometimes not possible at the department level. (Tr. pp. 505 – 506).

100. Market adjustments occur only when the University's senior administration determines, on the recommendation of the University's Financial Affairs Committee, that "enough money" is available. Market adjustments do not happen every year. Even when funds are available for market adjustments, the amount of funding made available to the various colleges by higher administrative authorities at the University may vary drastically. (Tr. p. 75); (Tr. p. 440); (Tr. p. 506).

101. In a year when funds are available for market adjustments, the Provost typically informs the Deans how much funding will be available. The Provost may also place constraints on how much money will be allocated to a particular college, and even to an individual department. For example, while the University administration allocated \$800,000 for market adjustments at the University in 2004, Professor Morrison advised the faculty members in the Economics Department that “[u]nder the most optimistic scenario, the department will get a total of \$4,000 to allocate.” In fact, the market adjustments to the associate professors in 2004 totaled only \$3,000. (Tr. pp. 506 – 507); (Ex. 16, p. NU/BR 0286); (Ex. 38).

102. At the initial stage of the market adjustment process, faculty members make requests for adjustments to their Department Chairs, who provide an independent assessment of them. Within the College of Arts & Sciences, each Chair then provides his or her recommendations for market adjustments to the Dean. The Dean does not simply accept the recommendations for market adjustments that he receives from the Department Chairs, nor can he, as it is not unusual for the total dollar amount of such requests to be three or four times greater than the available funds. Instead, the Dean compiles the information to permit a review all of the requests across the entire College, and he then holds multiple meetings with the associate deans to discuss, debate, and prioritize their recommendations to the Provost regarding the use of the available market adjustment funds. The material is then submitted to the Provost, who makes the ultimate decision on market adjustments. Dean Stellar’s recommendations were not always accepted by the Provost, and the Provost occasionally increased or decreased the amounts recommended by the Dean. (Tr. pp. 507 – 509); (Tr. pp. 511– 512).

103. In determining whether to recommend a faculty member for a market adjustment, Professor Morrison reviews the professor's accomplishments as reflected in their previous several years of SRC scores and merit rankings, the impact of the professor's research, and salary data for faculty at a comparable level from "matchmate" universities. (Tr. pp. 304 – 305). In addition to considering the merit ranking of the faculty, Professor Morrison also takes into account whether a professor has been unrewarded for past merit in a year in which there were no merit raises. (Tr. pp. 440 – 442).

104. On February 18, 2004, Professor Morrison sent an e-mail memorandum to all professors in the Economics Department (including Professor Brookins) informing them that the University had allocated "\$800,000 for faculty market adjustments" and that they were invited to submit a "one page justification" if they sought a market adjustment. Under a caption stating "FYI below are the matchmate data for our department" the memo also contained three columns of figures titled "Rank," "NU Econ," and "Matchmates (adjusted for cost of living)." Ex. 16, p. NU/BR 0286. The document did not include any reference to "average salary" or the salaries that each professor was earning.

105. Subsequent e-mails in the string to Professor Morrison's 2004 e-mail included an e-mail from Professor Wassall to Professor Morrison (and blind copied to Professor Brookins), suggesting that the "six overpaid full professors [give] up \$5,000 in salary" and by reallocating the donations to the "five associate professors, then the associate professors' salaries would be pulled up to matchmate averages." Id. An e-mail from Professor Brookins responded "A very good idea Greg." Id.

106. As of the time of the 2004 memorandum (Ex. 16, p. NU/BR 0286), Professor Brookins' salary was \$70,725, below the average salaries for assistant and associate professors. (Ex. 38).

107. In an e-mail memorandum dated "1/28/2005" Professor Morrison again notified Northeastern's Economics professors about the availability of funds for "market adjustments" and invited faculty members who request a market adjustment to submit a "one-page justification." (Ex. 19). The memo further stated that the "Chair then prioritizes requests and submits them to the dean." Id. The memo then describes "data that may help [faculty members] make [their] case, as follows:

Rank	Our Average Salary	Matchmate Average Salary (adjusted for Cost of Living
Assistant	74,219	69,790
Associate	78,475	78,303
Full	127,050	101,456

108. In 2005, five faculty members, including Professor Brookins, submitted requests for market adjustments. (Ex. 19); (Ex. 21).

109. Professor Brookins had received market adjustments previously in 2002 and 2003, and subsequently in 2007 and 2008. (Tr. pp. 451-452); (Ex. 35).

110. Based upon the salary information in Professor Morrison's January 25, 2005 e-mail, Professor Brookins calculated the average salary of the other Associate Professors, upon which he identified a gap between his salary and the average salary of the other Associate Professors. (Tr. pp. 77- 78). Professor Brookins then reviewed the Associate Professor's CV and determined that "there was no objective basis for the disparity in pay." (Tr. p. 277). He became "incredulously upset" by the discovery of the pay disparity. (Tr. p. 79).

111. Professor Brookins discussed his pay disparity with Professor Morrison who confirmed to Professor Brookins that he was the lowest paid Associate Professor in the Economics Department. (Tr. p. 289). Professor Morrison suggested that Professor Brookins forward a memorandum regarding the issue, which Professor did on February 9, 2005. (Tr. pp. 79-80).

112. In his February 9, 2005 memo to Professor Morrison, Professor Brookins expressed that his salary was “\$8000 below the means of associates and approximately \$2000 that of Assistant Professors is hard to justify by the data.” Professor Brookins also observed that “objectively [his] research output exceeds that of all assistants and that of at least three in associate or higher rank.” Professor Brookins concluded by stating “We need to work out a correction of this situation.” (Ex. 20); (Tr. p. 443).

113. In a subsequent memo prepared by Professor Morrison to all the department professors, Professor Morrison acknowledged that Professor Brookins was the only associate professor in the Economics Department who earned less than any of the assistant professors in 2005. In that memo, Professor Morrison stated his first priority as “correcting the inequities” for the group of higher quality assistant professors and, secondly, to “relieve some of the compression and inversion at the associate level ... [who] deserve to make more of a premium over their assistant professor colleagues than they currently do (or, in Brookins’ case, don’t).” (Ex. 21).

114. Professor Morrison informed Professor Brookins that he had recommended an increase for Professor Brookins and suggested that Professor Brookins wait for salaries to be announced to see if a market adjustment had been made. (Tr. p. 80).

115. At the end of the market adjustment process in 2005, no associate professor in the Economics Department received a market adjustment. (Tr. p. 90); (Tr. p. 450); (Ex. 38).

116. Upon receiving his contract for the 2005/2006 academic year, Professor Brookins learned that he had received a merit raise in the amount \$2,050 but that he had not received a market adjustment. (Tr. p. 8); (Ex. 38).

117. I credit Professor Brookins testimony that Professor Morrison then instructed him to address his concerns to the Dean, James Stellar. (Tr. pp. 81-82).

118. On May 6, 2005, Professor Brookins sent an email to Dean Stellar in which he stated "I have attached a request regarding my contract." Professor Brookins' email also appended two documents that he had previously sent to Professor Morrison on February 9, 2005 (Ex. 20) and March 22, 2002 (Ex. 9 - memorandum appealing the SRC scores that he had received that year).

119. Neither Professor Brookins' email nor its attachments made any suggestion that he was raising a claim of race discrimination. (*See* Exs. 9, 20 and 22).

120. Dean Stellar, responded by e-mail dated May 6, 2005, informing Professor Brookins that he had received Professor Brookins' "request" and would study it "with Gayle" and "get back to [Professor Brookins] early next week." (Ex. 23).

121. On May 18, 2005, after receiving no response from Dean Stellar, Professor Brookins sent another email to Dean Stellar stating that he was surprised that he had not received a response to his "petition" and that he was "proceeding with other alternative, grievance procedures." (Ex. 23).

122. Professor Brookins next contacted Vice Provost Luis Falcon (Vice Provost Falcon) who referred Professor Brookins back to Dean Stellar. (Tr. pp.482-483). Dean Stellar advised Professor Brookins that he would have “preliminary” discussions with Vice Provost Falcon which would be “only the beginning.” (Comp. Ex. 1).

PROFESSOR BROOKINS’ GRIEVANCE

Northeastern’s Grievance Procedures

123. Northeastern affords multiple means by which a person may grieve about harassment or discrimination. One such means is going directly to the University’s Office of Affirmative Action and Diversity (“OAAD”)⁴. (Tr. pp. 565-566).

124. Dean Donnie J. Perkins (“Dean Perkins”) has been the Director of the OAAD since 1998, and he reports to the President of the University. In his role, Dean Perkins oversees all responsibilities of the OAAD, including preparing the University’s affirmative action plan, working with University leaders to implement that plan, conducting campus diversity initiatives, and providing education and training for matters of diversity, discrimination, harassment, and inclusion. Dean Perkins also oversees and administers the University’s grievance procedures for matters involving harassment and discrimination, and he has specific training and experience handling grievances relating to discrimination. (Tr. pp. 561-565).

125. The OAAD affords two processes by which a complaint of discrimination may be raised: an informal procedure and a formal procedure. (Tr. p. 567).

⁴ Since February 2009, the OAAD has been known as the Office of Institutional Diversity and Equity, but its mission remains the same. However, the name change was intended to emphasize that the office services the entire campus community and works with students, faculty, and staff. (Tr. pp. 563 - 564).

126. Under the informal procedure, the OAAD receives and reviews a grievance, and, if the matter appropriately belongs at the OAAD, brings the grievance to the attention of the party who is the subject of the complaint so that the other side of the story may be heard. The OAAD also asks the complainant whether he or she feels the particular concern may be resolved, and, if so, to provide their thoughts on a potential resolution. At that point, the parties have a discussion to determine if there are amicable ways of resolving the complainant's concerns. (Tr. pp. 567-568).

127. Under the formal procedure, a complainant submits a full, written complaint describing particular facts supporting the allegations. That information is shared with the party who is the subject of the grievance, who is afforded an opportunity to provide a written response. The OAAD then conducts a full investigation to enable an assessment of whether a violation of the University's equal opportunity policy has occurred. If the OAAD finds sufficient credible evidence to support the allegations in the grievance, it makes a recommendation for corrective action to the appropriate supervisor. If the OAAD finds that the grievance is not supported by sufficient credible evidence, the complaint is dismissed. (Tr. pp. 568-569).

128. Even if a complainant chooses to proceed with the informal grievance procedure, Dean Perkins has the ability and discretion to move a matter to the formal procedure if the allegations are egregious and serious. In addition, at the conclusion of the informal process, a complainant may also elect to proceed with the formal process, if he or she so desires. (Tr. p. 568); (Tr. pp. 569-570).

129. When a complainant brings a complaint to the attention of the OAAD, Dean Perkins' office reviews the entire grievance procedure with the complainant,

including both the formal and informal processes, confidentiality of the process, and assurance against retaliation. Even if a person comes to the OAAD expressing a desire to file an informal grievance, Dean Perkins nonetheless informs the party about the formal procedure as well because he believes parties should be “fully informed on what their options are.” (Tr. p. 567, 571).

Professor Brookins Informal Grievance

130. Subsequent to his exchange of e-mails with Dean Stellar regarding his pay disparity, Professor Brookins spoke with Dean Perkins about filing a grievance with the OAAD. (Tr. pp. 92 -94).

131. Dean Perkins reviewed the University’s grievance procedures with Professor Brookins, and they discussed both the informal and formal grievance procedures. Professor Brookins understood that the formal process was “more structured” and “potentially more adversarial,” and that the informal proceeding was akin to mediation. Professor Brookins proceeded with the informal grievance procedure. (Tr. pp. 93-95); (Tr. pp. 96-97); (Tr. pp. 570-571).

132. On June 21, 2005, Professor Brookins filed an informal grievance with the OAAD contending that the “Salary [he was] offered in [his] contract “reflects disparate treatment” on the basis of his color, race, and age (the “Grievance”). To resolve his Grievance, Professor Brookins stated that he wanted “[a]n increase in salary to approximately \$85,000 for the current year 2005/2006.” (Ex. 24).

133. In accordance with OAAD procedure, Dean Perkins brought Professor Brookins' Grievance to the attention of Professor Morrison, Dean Stellar, and Luis Falcon, the Vice Provost for Faculty. (Tr. 573 – 574).

134. Dean Perkins gathered information from Professor Morrison regarding the manner in which the performance of faculty members in the Economics Department had been evaluated and the merit ratings that Professor Brookins had received from the SRC over the years. In an email to Dean Stellar during the process of responding to Professor Brookins' Grievance, Professor Morrison reiterated Professor Brookins' salary level was the product of his performance over more than two decades, and not discrimination, stating: "I firmly [believe] that Oscar is not a victim of discrimination, be it based on age or race. His performance over the last 20+ years is what determines his salary." Professor Morrison expressed concern about a proposal to resolve Professor Brookins' Grievance by providing a raise only to him but not the other associate professors, noting that such a proposal would violate the human resources principle that "merit should be rewarded." Given Professor Morrison's concern about preserving the Department's merit-based salary review process, he offered an alternative proposal: provide raises to *all* of the associate professors so that the Department's "merit-based salary structure [remains] intact." (Ex. 29).

135. On November 11, 2005, Dean Stellar sent an email to Dean Perkins and Vice Provost Falcon in which he provided an analysis of Professor Brookins' average merit rankings over a 10-year period from 1995 to 2004 and addressed the University's monetary settlement proposal to resolve Professor Brookins' claims. Dean Stellar concluded:

His overall 10 year average for the entire group is at the bottom of the group and that is where his salary belongs. It is where our adjustment would leave it.

I had not wanted to bring this to his attention with such force, but if you must tell him the results. My conclusion is that [the settlement proposal to resolve Brookins' Grievance] is generous. If he wants more, let him file with an outside agency. I will bring this table to those hearings.

(Ex. 30).

136. After reviewing the 10-year history of Professor Brookins' performance, Professor Morrison, Dean Stellar, and Vice Provost Falcon looked back even further, assembling and reviewing data for a 19-year period from the 1986/1987 academic year (when the Merit Procedures were initiated) to 2005 (when the faculty members in the Economics Department were last evaluated). That data revealed as follows:

- In 11 out of 17 years, Professor Brookins' overall score from the SRC ranked him last among the five current associate professors evaluated in any given year.
- In 7 years, he ranked next to last among the current associate professors.
- Over the 19-year period, his overall average evaluation was last among the five associate professors.
- In the 57 individual scores in the areas of Teaching, Research, and Service over the 19 year period ($3 \times 19 = 57$), Professor Brookins ranked first in a category 10 times, second 4 times, third 12 times, fourth 14 times, and fifth 17 times.

For the 19-year period, Professor Brookins' total weighted average from the SRC was between satisfactory and good (1.3), while the weighted averages of the other four associate professors were between good and very good (1.81, 1.69, 1.65, and 1.56). As a result, Professor Morrison and Dean Stellar concurred that Professor Brookins' salary position relative to other associate professors was due "primarily to lower merit raises and, to a lesser degree, to lower equity [and other] raises." (Ex. 33).

137. Dean Perkins determined that the facts “did not yield information that would say that there had been a violation of the University’s equal opportunity policy,” and the matter “did not appear to rise to the level of discrimination.” Tr. 581-582).

138. Professor Brookins thereafter filed the instant charge of discrimination with the Commission.

139. Professor Brookins testified that he has suffered loss of pay as a result of the pay disparity. He also testified that he was stressed by the discovery of his pay disparity, and starting in 2005 his sleeping became disrupted as he would wake up early. (Tr. 127-129). Both Professor Brookins and his wife, Kathryn Brookins (Mrs. Brookins), testified that Professor Brookins experienced some sleeping difficulties prior to his discovery of pay disparity in 2005. (Tr. 127-128); (Tr. 258-259).

140. Professor Brookins testified that he has experienced impotency and high blood pressure since his discovery of pay disparity in 2005. (Tr. 130, 132).

III. CONCLUSIONS OF LAW

A. Timeliness of Complainant’s Charge of Race Discrimination

As a threshold issue, Northeastern asserts that Complainant’s charge of race discrimination is untimely and, therefore, must be dismissed. In order for a complaint of discrimination to be timely, it must be with filed with the Commission within 300 days after the alleged act of discrimination. M.G.L. c. 151B, §5. The Commission has refused to assert jurisdiction over claims of employment discrimination under the statute where a complainant has not brought a timely charge. *See, e.g., Eggert v. Cabot Corp.*, 21 MDLR 131, 138 (1999). The statute of limitations for claims under Chapter 151B begins to run

when the Complainant “knows or should have known that she has been harmed by the defendant’s conduct.” *Silvestris v. Tantasqua Regional School District*, 446 Mass. 756, 767-68 (Mass. 2006). See *Wheatley v. American Tel. & Tel. Co.*, 418 Mass. 394, 398 (1994) (limitations period does not begin to run in discrimination action until plaintiff knows or reasonably should know of replacement by younger employee). See also *Albrecht v. Clifford*, 436 Mass. 706, 714-715 (2002); *Franklin v. Albert*, *supra.* at 618-619.

In this case, Northeastern asserts that the trigger for the statute of limitations should have been the date that Professor Brookins was aware, or reasonably should have been aware, of the pay disparity amongst Associate Professors in the Economics Department. Northeastern believes that there is “undisputed evidence, which conclusively shows that he knew that his salary was markedly less than the average salaries of the other associate professors and the assistant professors no later than February 18, 2004, nearly a year before he claimed to have “discovered” that fact.” *Northeastern’s Post Hearing Brief*, p. 50. Northeastern argues that Professor Brookins’ November 15, 2005 Commission filing is, therefore, untimely. I disagree.

In applying the so called “discovery rule” for purposes of calculating statute of limitations, a complainant “need not apprehend the full extent or nature of an injury in order for a cause of action to accrue.” *Riley v. Presnell*, 409 Mass. 239, 243 (1991). However, the question of what Complainant knew, and when he knew it, must be determined by the factual situation of each case. See *Silvestris v. Tantasqua Regional School District*, *supra.* (Determination of when rights accrued was based upon what facts

were available to plaintiffs and evidence demonstrating when they knew or should have known of pay disparity).

In the instant case, Professor Brookins testified that he only became aware of the disparity after he received a January 28, 2005 notification, when, as part of the market adjustment process, he received an e-mail from Professor Morrison. (Ex. 19).

Northeastern contends that Professor Brookins knew of the disparity a year earlier when he received a February 18, 2004 Market Adjustment email from Professor Morrison. (Ex. 16). There is, however, nothing on the face of the 2004 e-mail from Professor Morrison, or otherwise produced in this hearing, that demonstrates that Professor Brookins knew of the pay disparity in 2004. That document purports to be “Matchmate Data for our Department,” lists only the three professor ranks, has a column heading of “NU Econ,” and nowhere contains the word “Average Salary.” Most importantly, the document does not list any information about the individual salaries of other Associate Professors or a ranking of Associate Professor salaries.

Contrary to Northeastern’s assertions, the e-mails between Professor Brookins and Professor Wassal that followed Professor Morrison’s February 2004 e-mail do not confirm that Professor Brookins knew of the pay disparity between himself and other Associate Professors. If it demonstrates anything at all, it is that Professor Brookins saw and understood that the e-mail documented the disparity between Associate Professors and Full Professors (who Professor Wassal describes as “overpaid” and who should contribute a portion of their salary to the Associate Professors, sentiments with which Professor Brookins concurred. *Id.*

The remaining question is whether Professor Brookins should have known of the disparity in 2004. The “should have known” prong used in evaluating the commencement of the statute of limitation carries with it the requirement that a party must ascertain sufficient information to believe he has been subjected to discriminatory treatment. *See Silvestris v. Tantasqua Regional School District, supra.* at 768 (“We conclude that they had ascertained sufficient information at that point to believe that they, as women, had been subjected to discriminatory treatment by the school district when the superintendent established their starting salaries”). Here, Professor Brookins did not know the individual salaries of his fellow Associate Professors in 2004 and there is nothing in the record to suggest that information was public knowledge. There is nothing in the record that demonstrates he had any reason in February 2004 to suspect that his salary was much lower than his colleagues and, in fact, the lowest in their ranks.

Finally, even if we were to conclude that Professor Brookins, should have deciphered that the heading “NU Econ” described a column of average salaries, we cannot conclude that Professor Brookins had sufficient information to suspect discriminatory pay disparity. Additional information such as the individual salaries of other Associate Professors was not provided to him. Finally, to determine if there were grounds to believe discriminatory pay disparity existed, Professor Brookins would have had to review the CV of his colleagues and then compare his accomplishments to theirs. These are not overly burdensome tasks, especially for a college professor of economics, and they were certainly tasks that Professor Brookins undertook a year later. We cannot assume, however, that on that on February 18, 2004, Complainant had sufficient detailed

information before him to lead him to suspect discrimination and to then proceed with such a rigorous comparative analysis.

I cannot conclude, as Respondent would urge, that the February 18, 2004 document presents “undisputed evidence, which conclusively shows” that Professor Brookins knew that his salary was markedly less than the average salaries of the other associate professors and the assistant professors, or that Northeastern engaged in discriminatory conduct . I find that Professor Brookins timely filed his charge of discrimination with the Commission.

B. Professor Brookins’ *Prima Facie* Showing of Race Discrimination

M.G.L. c. 151B, s. 4(1) prohibits discrimination in the terms and conditions of employment based on race. Absent direct evidence of discrimination, in order to establish a *prima facie* case for pay discrimination on the basis of his race or color, a complainant must establish by a preponderance of the evidence: (1) that he is a member of a protected class; (2) that he was subject to an adverse employment action; and (3) that he was treated differently from other similarly-situated persons not of his protected class. *Blare v. Husky Injection Molding Systems Boston, Inc.*, 419 Mass 437, 441 (1995). *See also Wheelock College v. MCAD*, 371 Mass. 130, 134-136 (1976). *See Lipchitz v. Raytheon Company*, 434 Mass. 493 (2001); *Abramian v. President & Fellows of Harvard College*, 432 Mass. 107 (2000); *Matthews v. Ocean Spray Cranberries, Inc.*, 326 Mass. 122, 129 (1997).

There is accord between the parties that the first two requirements of a *prima facie* case are satisfied. Each side agrees that Professor Brookins is a member of a protected class. There is mostly agreement, as well, that the adverse action he charges is

the comparatively low evaluations he has received, which have translated into significant and, as Professor Brookins alleges, unsubstantiated salary disparity. Each party has presented evidence that Professor Brookins has received low evaluation scores and that his salary is substantially below that of others not in his protected class. There is no similar agreement regarding the third prong.

A party seeking to state a *prima facie* claim for pay discrimination is required to show that his work “entailed the same primary functions” and “substantially equal skills, effort and responsibility” to others in his position. *See Eggert v. Cabot Corp.*, 21 MDLR, 131, 139-141, (1999). (Single Comm'r), finding violation of statute. *See also McMillan v. Massachusetts Soc'y for the Prevention of Cruelty to Animals*, 140 F.3d 288, 299, 302 (1st Cir.1998), *cert. denied* 525 U.S. 1104 (1999) (plaintiff can establish prima facie case of pay discrimination by offering evidence that skill, effort, and responsibilities of her position are comparable to other positions) Professor Brookins has met that burden.

The evidence demonstrates that Northeastern considered all Associate Professors to be at the same skill level. First, Professor Brookins, Department Chair Professor Morrison, and Dean Stellar testified that all then current Associate Professors in the Economics Department were considered by Northeastern to be terminable in their rank. As it was explained, none of the Associates were expected to progress beyond the Associate rank. Throughout the hearing, Northeastern presented evidence in support of that premise, including testimony that Northeastern was seeking to upgrade the profile and caliber of the department by hiring higher qualified Assistant Professors. Professor Morrison and Dean Stellar also testified that Northeastern faced an inversion situation because they had to pay newly hired Assistant Professors higher salaries to keep them at

Northeastern and that many of these Assistance Professors demonstrated skills “equal to or greater than” the existing cohort of Associate Professors. I credit that testimony.

Secondly, while there is no evidence in the record regarding the expected or required skill level of associate professors, a quantitative measure of their skills indeed places them in the same range. The summary of ten year SRC scores shows frequent but quantitatively small variation in the scores received by each Associate Professor, indicative of the substantially equivalent skill levels they possessed. *See* Ex. 30. While the range of scores ranged from 0 to 3, in most cases, over the span of ten years, scores, including Professor Brookins’, ranged from slightly below 1 up to just below 2. On only one occasion throughout that ten year period did an associate professor score greater than 2 and even then, only negligibly so. On only one occasion during that ten year period did Professor Brookins score below 1.

There is also evidence that Professor Brookins position required effort and responsibilities substantially equivalent to the white Associate Professors. Although Professor Brookins’ evaluation from the SRC reflected the degree to which the SRC valued Professor Brookins’ effort and how they measured the performance of his responsibilities, Professor Brookins’ position required him to put in the same effort, and perform the same responsibilities in the areas of Teaching Research and Service. All Associate Professors are required to carry a course load of at least six courses. Associate Professors must meet with students and mentor students. Professor Brookins did that. Associate Professors must review and observe Assistant Professors. Professor Brookins performed such task. Associate Professors were also required to conduct research, publish their work, and perform other activities in the research arena, such as attending

conferences. Professor Brookins presented evidence that he performed such tasks. Associate Professors were also required to perform service to the Department, the University and their profession. Again, Professor Brookins presented evidence that he performed such tasks.

The only difference between Professor Brookins and his colleagues is the SRC scores he received and the corresponding pay disparity. It is this pay disparity, caused by performance scores, that forms the basis of Professor Brookins' claim before me. For purposes of this *prima facie* analysis, I find that Professor Brookins has met his burden of showing that his performance was substantially equal to the performance of the other Associate Professors and that he has stated a *prima facie* claim of discrimination.

C. Northeastern's Justification for Professor Brookins' Pay Disparity

When, as here, a complainant sets forth a *prima facie* case of race discrimination, the burden shifts to the respondent to show, based on credible evidence, that the difference in compensation was based on a legitimate, nondiscriminatory reason. *Blare*, 419 Mass. at 441-442. "This burden of production is not onerous." *Blare*, 419 Mass. at 442, quoting, *Wheelock College v. MCAD*, 371 Mass. 130, 138 (1976). If the respondent satisfies this burden, the burden returns to the complainant to persuade the court, by a fair preponderance of the evidence, that the respondent's proffered justification was not the real reason, but is a pretext for actual discrimination. *Matthew v. Ocean Spray Cranberries, Inc.*, 426 Mass. 122, 128 (1997). At all times, "[t]he [complainant] bears the burden of persuasion on the ultimate issue of discrimination." *Id.* Additionally, a

complainant must prove that a respondent “acted with discriminatory intent, motive or state of mind.” *Lipchitz v. Raytheon Company*, 434 Mass. 493,504 (2001)..

Northeastern argues that Professor Brookins’ overall performance was consistently and substantially below the performance of his colleagues in the Associate rank, and it was that substandard performance that caused him to have a lower salary relative to his peers. The evidence supports Northeastern’s justification for a pay difference between Professor Brookins and the other Associate Professors.

Each professor in the Economics Department was subject to the same annual merit review process and was reviewed based on the same metrics (Teaching, Research, and Service) using the same numerically-driven Merit Procedures. The merit review process has built-in safeguards against bias, including the random selection of SRC members each year, the elimination of high and low scores, a weighted system, and the provision of a right of appeal. As an occasional member of the SRC, Professor Brookins used this same system to evaluate his colleagues, just as they in turn evaluated him. Northeastern’s evidence (Ex. 36) reflects the SRC votes which formed the basis of each Associate Professor’s score from 2002 to 2005. As a matter of fact, Professor Brookins testified that he has, and would only challenge his SRC scores where he disagrees with them. Professor Brookins further testified that he challenged his SRC score on only three occasions throughout his Northeastern career. One challenge resulted in an amendment, one did not, and the result of the other is unknown. Professor Brookins has not otherwise challenged the validity or integrity of the SRC selection and voting process. There is no evidence in the record that Professor Brookins’ colleagues who sat on the SRC were

biased against him on account of his race nor did he assert that any particular individual acted with discriminatory intent in evaluating his performance.

I conclude, therefore, that Professor Brookins accepted the operation and outcome of the SRC process as a fair process. It is similarly undisputed that the merit increase process is based upon those scores. I conclude, therefore, that Professor Brookins' lower salary was caused by his lower SRC scores.

Regarding the remaining issues raised by Professor Brookins' allegations, I note the record does not indicate that Northeastern employs a comparative scoring process when evaluating its Associate Professors. Based on this record, I conclude that Northeastern had no obligation to assign scores or merit increases to Professor Brookins based upon how his SRC submissions compared to other Associate Professor. It was not until January, 2005, when Professor Brookins commenced his comparison between his salary and the salaries of his colleagues, did he develop his suspicion and subsequent allegation of discrimination. Since it is that comparison that forms the basis of Professor Brookins' charge, I am required to address the only remaining question of whether Northeastern has demonstrated that the degree of pay disparity between Professor Brookins and his Associate Professor colleagues was based upon legitimate and non-discriminatory reasons.

Northeastern presented evidence showing that Professor Brookins' level of pay at the time he filed his charge was the cumulative product of his lower performance for "well over two decades." That performance included limited and questionable Research submissions, lower performance in the area of Teaching, and his relatively low performance in the area of Service. For the 10-year period from 1995 – 2005, Professor

Brookins' overall average score from the SRC was just 1.14, which placed him second in that area among the Associate Professors. Northeastern's evidence demonstrated that Professor Brookins received poor student evaluations over a prolonged period of time, which caused his Department Chair to urge him to obtain a peer review which he refused on the basis that he did not think it would have any benefit. For the 10-year period 1996-2005, Professor Brookins' average scores from the SRC in the area of Teaching were at or below the level of satisfactory in seven of those years. Indeed, Professor Brookins appealed only when his score dropped to 0.5, meaning that he accepted the other scores and saw no basis to contest them. For that same 10-year period, Professor Brookins' overall average ranking by the SRC was 0.98, the lowest of the associate professors. No other associate professor had an overall average score that fell below "1", the satisfactory level (the average scores for the other associate professors were 1.87, 1.81, 1.62, and 1.29).

For the 10-year period from 1996 to 2005, Professor Brookins' average Service scores from the SRC were last or second to last in seven of those years, and his 10-year average score was tied for last with another faculty member. With the exception of his score from 2003 (1.38), Professor Brookins did not appeal any of his Service scores. I am further influenced by Professor Brookins' statement that, regarding his service efforts, he had not "overdone it" in connection with committee work. By contrast, the three Associate Professors who rated higher than Professor Brookins in the area of Service assumed far greater responsibility for Service activities. By way of example, Professor Dyer was praised for his "commendable" and "exceptional" service during the process of semester-conversion, which added "significant additional burden" to his workload;

Professor Alper was recognized as “service-oriented” and had served the “department, college, and university well;” Professor Wassall’s service was “beyond what is expected of faculty members”). Like his colleagues, when Professor Brookins undertook a significant Service activity (as he did in 2004 with respect to the Fed Challenge), his score from the SRC reflected that effort.

Northeastern has met its burden of production by presenting evidence that the degree of disparity between Professor Brookins salary and that of his fellow Associates is based upon the accumulation and progression of his lower merit increases due to his relatively lower performance.

In light of Northeastern’s articulated reasons for Professor Brookins’ disparate salary level over the years, Professor Brookins is required to present evidence that would meet his burden of proving that those reasons were a pretext for discrimination. *See Wheelock College v. MCAD*, 371 Mass. 130, 137 (1976). Professor Brookins argues that since Northeastern considered all Associate Professors “terminal associates,” and the scores for Associate Professors generally fell in the satisfactory range, there is sufficient evidence that all Associate Professors were on the same performance level. Consequently, Professor Brookins argues, the disparity in their salaries should be less and the “accumulation” pay disparity justification proffered by Northeastern is pretext. Professor Brookins also argues that Northeastern’s admission that his “inferior” teaching was an anomaly is proof that the degree of disparity is unwarranted. Professor Brookins’ arguments fail. The record before me does not support his argument that variations in merit increases were controlled by the evaluation ranges available to the SRC scorers (i.e. that all scores within the satisfactory range should receive the same merit increases), or

that terminal associates could not be expected to perform at different levels. In fact, the record establishes that when Professor Brookins reported increased research activities, or better teaching evaluations from his students, or significant service activity, his scores from the SRC in those areas improved as well. (Ex. 12); (Ex. 31). Conversely, when Professor Brookins' submissions to the SRC reflected a decline in research activities or poor teaching evaluations by his students, his scores appropriately declined. (Ex. 15); (Ex. 31). Other Associate Professors also experienced a fall in their SRC scores when their reported performance declined. (Prof. Dyer – Ex.7); (Prof. Alper - Ex. 31); (Prof. Dyer – Ex. 50, Ex. 47). Professor Brookins and his colleagues received higher scores when they performed better and lower scores when they did not. Also, the record demonstrates that they did not all improve and decline in performance at the same time or at the same rate. It would be illogical then for their merit increases to rise and fall at the same time and at the same rate. Professor Brookins has failed to meet his burden with evidence of racial bias in the merit evaluation of his performance by the SRC.

Professor Brookins next argues that Northeastern's award of market adjustment increases to him in 2002, and 2003 (the years pertinent to this matter before the Commission) attests to his strong performance throughout his career. Professor Brookins argues that those awards demonstrate that Northeastern's cumulative pay disparity justification is pretext for discrimination. Again, that argument fails. The record reflects that the market adjustment process is intended to reward excellence and was made to Professor Brookins and other Associate Professors, at different times, based upon their performance at the time a determination for market adjustment was made. Like Professor Brookins, some Associate Professors received market adjustments in

some years despite lower scores in previous years. In sum, the record does not provide any evidence that Market adjustments were based only upon unwaveringly high performance evaluations. Professor Brookins has not satisfied his showing of pretext in that context.

Finally, Professor Brookins argues that the small disparity in his SRC score does not justify the broad discrepancy in pay. It is not the function of this Commission to sit as a “super personnel department, assessing the merits – or even the rationality – of employers’ nondiscriminatory business decisions.” *Sullivan v. Liberty Mutual Insurance Co.*, 444 Mass. 34, 56, (2005) quoting *Mesnick v. General Electric Co.*, 950 F.2d 816, 825 (1st Cir. 1991). Additionally, even if this Commissioner were to take on such a role, the record in this case presents me with no basis for calculating what merit increase should correspond to any particular score, or for determining how the appropriate cumulative disparity total should be calculated. Professor Brookins has failed in this and all other arguments to prove pretext.

With respect to Professor Brookins’ salary inversion vis-à-vis some assistant professors, Northeastern presented credible evidence showing that Professor Brookins’ situation was legitimately the result of many years of weaker performance that had kept his salary on the low end of the associate professors, and the robust market that had permitted newly-hired assistant professors to command higher salaries, thus contributing to both inversion and compression in the Economics Department. Professor Brookins presented no evidence at the hearing that would permit the Commission to conclude that his salary inversion was the result of discriminatory animus.

Northeastern has provided a legitimate non-discriminatory reason for the pay disparity between Professor Brookins and other Associate Professors outside of his protected category. I conclude, therefore, that Northeastern did not engage in unlawful discrimination based upon Professor Brookins' race or color and I hereby order that this matter be dismissed.

IV. ORDER

For the reasons stated above, the complaint in this matter is hereby dismissed.

This Decision constitutes the final order of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this 25th day of March, 2012.

MALCOLM S. MEDLEY
Hearing Officer