

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK ss

SUPERIOR COURT DEPARTMENT OF
THE TRIAL COURT
C.A. NO.2001—04507E

Luyen Huu Nguyen, Bui Diem,)
Dinh Tu Nguyen, Sang P. Le,)
Ba Tuong Nguyen,)
Xuan M. Tran, Nam Nhat Phan,)
Liem Thanh Nguyen, and Chuc V. Nguyen,)
)
Plaintiffs,)

PLAINTIFFS CLAIM TRIAL BY
JURY ON ALL ISSUES
PURSUANT TO M.R.C.P. 38 & 39

vs.)

)
William Joiner Center for the Study of War)
and Social Consequences and the University)
Of Massachusetts, Boston)
)
Defendants.)
_____)

PLAINTIFFS' SECOND AMENDED COMPLAINT

Now Come the Plaintiffs and in their claims for relief state as follows:

BACKGROUND

1. On July 27, 1999, the Defendants, the William Joiner Center for the Study of War and Social Consequences (the "William Joiner Center") and the University of Massachusetts, Boston (the "University"), were awarded certain grant monies from the Rockefeller Foundation of New York for the partial funding of a research program entitled “ (Re)Constructing Identity and Place in the Vietnamese Diaspora.” (Project Proposal at 1).

2. The term "diaspora" is derived from a Greek term similar to dispersion, *diaspeirein*, and is generally used to refer to the breaking up and scattering of a people outside of their ancestral homelands, such as the settlement of scattered colonies of Jews outside Palestine after the

Babylonian exile. (*See* Merriam Webster's Abridged Dictionary at "diaspora" (1991)).

3. According to the "Conceptual Essay" for the 1999 Rockefeller Foundation Fellowship Program (the "Program"), submitted to the Rockefeller Foundation by the William Joiner Center, the Rockefeller Foundation Program grants would fund a number of "fellows" to provide research in Vietnamese "diasporic studies," addressing questions such as "how diverse constructions of Vietnamese identity and community as well as Vietnamese history, literature and culture are being shaped and reshaped in the contemporary post-war and post-refugee eras across generations throughout the diaspora." (Conceptual Essay at 1).

4. The Program would also "examine the . . . emergence of Vietnamese diasporic voices, perspectives, and communities." (*Id.*) The Program was not limited to only scholars and writers, because "[t]hese questions are neither rhetorical nor restricted to the privileged domain of writers and scholars." (*Id.* at 15).

5. During the first year of the Program, according to the "Program Description," one focus of the research would be how "oral histories from family members, community members and leaders (as evidenced in Vietnamese community newspapers and forums), who had direct experiences with colonial wars in Viet Nam, experiences in reeducation camps and resettlement in 'New Economic Zones' and escape journeys after 1975 help shape Vietnamese diasporic identities." (Program Description at 2).

6. As the Defendants' Conceptual Essay notes, the Vietnamese Diaspora "began roughly 25 years ago when the first wave of refugees fled Vietnam during the fall of Saigon in April 1975." (Conceptual Essay at 3).

7. This first wave of refugees consisted of over 130,000 Vietnamese who fled South Vietnam as the Communists from the North overtook the South by force and established a

Communist dictatorship. This exodus from South Vietnam was widely reported in the American media, with images of South Vietnamese citizens clinging to the last overcrowded U.S. military helicopters leaving the country. The U.S. Seventh Fleet rescued thousands of South Vietnamese fleeing the country. Saigon was renamed Ho Chi Minh City, in honor of the North Vietnamese Communist leader.

8. The second wave of refugees, also known as the "boat people," began in the late 1970s and continued through the 1980s. This wave of refugees consisted of ex-soldiers, teachers, and intellectuals associated with South Vietnam who had lost jobs and homes to the Communists before being sent to "re-education camps" and "new economic work zones."

9. The term "re-education camps" is a euphemism for the concentration camps or gulags that were established by the North Vietnamese Communists following their conquest of the South. It is estimated that at least 400,000 South Vietnamese civil servants, Army officers, doctors, lawyers, teachers, journalists, and other intellectuals were initially imprisoned in those camps. By some estimates, at least 250,000 people are believed to have died in these camps.

10. Many families repeatedly tried and failed to escape Vietnam during this period, and often intentionally separated to increase the odds of at least some family members escaping. By 1979, as many as 55,000 refugees were attempting to escape each month in overcrowded freighters, fishing junks, and makeshift rafts. Most of the refugees were required to pay bribes to government officials in order to leave the country, the best estimate being that Hanoi received an average of \$1,500 from each man, woman and child sent out to sea. Even after having paid to leave the country, the refugees were often fired upon by North Vietnamese police boat patrols.

11. Many countries began rejecting the refugees as their numbers increased. Malaysia actually towed some 40,000 boat people back out into open waters, where many died, and

Thailand, Indonesia, and the Philippines all stopped allowing boats to reach their shores. Ships began refusing to assist the refugees, or sailing to avoid them entirely, and pirates repeatedly attacked many of the refugees.

12. The third wave of refugees resulted from the brutal piracy and drowning that many suffered while trying to flee in boats that were not seaworthy. The United Nations arranged for almost a half-million political prisoners and their families and others to leave Vietnam.

13. By some estimates, as many as 2 million people have attempted to flee from the Communist government in Vietnam, with as many as 500,000 perishing through drowning, disease, starving, or being killed by the North Vietnamese Army while attempting to escape. Many of those escaping eventually languished in detention camps throughout Southeast Asia, with some remaining in camps as late as 2003. Vast numbers of the refugees have settled in the United States.

14. These groups of refugees constitute the "Vietnamese Diaspora" that the Rockefeller Foundation Fellowships were designed to study.

THE PARTIES

15. Plaintiff Luyen Huu Nguyen was born on April 2, 1933, in the Republic of Vietnam (also known as South Vietnam). After graduation from the Dalat National Military Academy, Luyen Huu Nguyen served as a Captain in the South Vietnam Airborne Division, was arrested by the Communists in North Vietnam in 1966 and was imprisoned in a re-education camp for 21 years. He was released in 1987 and attempted to escape Socialist Republic of Vietnam (the unified North and South Vietnam) twice, but was caught and imprisoned for another year. In 1991, he was acquitted of the charges against him and migrated to the United States. At all times relevant to the claims in this Complaint, the plaintiff Luyen Huu Nguyen was a resident of the City of

Boston, County of Suffolk, Commonwealth of Massachusetts.

16. Plaintiff Bui Diem, former ambassador of South Vietnam to the United States, was born in 1923 in the Republic of Vietnam. Bui Diem settled in the United States following the fall of Saigon in 1975. He has served as a scholar at the Woodrow Wilson Center for International Scholars and at the American Enterprise Institute, as well as a research professor at George Mason University. He is the author of the critically-acclaimed book about the Vietnam War, "In the Jaws of History," as well as hundreds of articles in American and Vietnamese newspapers dealing with international events. At all times relevant to the claims in this Complaint, Plaintiff Bui Diem was a resident of Rockville, Maryland.

17. Plaintiff Tu Dinh Nguyen was born on December 26, 1924, in South Vietnam. Tu Dinh Nguyen was a journalist in Vietnam and was arrested by the North Vietnamese Communists in 1975. He was imprisoned in a re-education camp for 13 years. He fled Vietnam by boat in 1989, sailing to Hong Kong and then was relocated to the United States. He has published thousands of news articles during his career as a journalist. At all times relevant to the claims in this Complaint, Plaintiff Tu Dinh Nguyen was a resident of Alexandria, Virginia.

18. Plaintiff Le Phuoc Sang was born on June 7, 1932, in the Republic of Vietnam. After graduating from Dalat National Military Academy in 1954, Le Phuoc Sang received a law degree from the University of Saigon and became a judge, then served in the South Vietnamese Cabinet as assistant to the Prime Minister. He obtained a Master's Degree in Public and International Affairs in 1970, and was eventually elected Deputy and Majority Leader to the National Constitutional Assembly convened to draft a Constitution for South Vietnam. He also served as President of Hao Hoa University. When Saigon fell in 1975, Sang fled to the U.S. Embassy and was rescued by the U.S. Seventh Fleet and transferred to Guam, then relocated to Pennsylvania.

He obtained a Ph.D. from the University of Pittsburgh. At all times relevant to the claims in this Complaint, Plaintiff Le Phuoc Sang was a resident of Sugarland, Texas.

19. Plaintiff Ba Tuong Nguyen was born on October 24, 1932 in the Republic of Vietnam. He graduated with a Doctor of Laws in 1958 from the University of Saigon, and was a practicing attorney in Saigon and Secretary General of the Bar Association. With the help of the U.S. Seventh Fleet, Ba Tuong Nguyen fled Vietnam by boat to the Philippines and then to Guam before settling in the United States in 1979. At all times relevant to the claims in this Complaint, Plaintiff Ba Tuong Nguyen was a resident of San Jose, California.

20. Plaintiff Xuan M. Tran, a writer and editor, was born on August 17, 1939 in the Republic of Vietnam. He graduated with a Bachelor's Degree in Social Psychology from the Saigon Literature College, and also took course work towards a Master's in Sociology until the University was closed. He left Vietnam in 1983 by boat to Indonesia before coming to the United States. He has authored over 30 books while living in the United States, and has served as a member of the Institute of East Asian Studies at the University of California at Berkeley. At all times relevant to the claims in this Complaint, Plaintiff Xuan M. Tran was a resident of Newark, California.

21. Plaintiff Nam Nhat Phan was born on December 28, 1942 in the Republic of Vietnam. Nam Nhat Phan graduated from the Dalat National Military Academy in 1961, and served as a Captain in the military and also as a writer and journalist until the fall of Saigon. He was arrested by the North Vietnamese in 1975 and imprisoned in a re-education camp for 15 years. He was released and required to live in a small village and report to the North Vietnamese each month until leaving Vietnam in 1993. He has published 14 books in Vietnam, the United States, Australia, and France. At all times relevant to the claims in this Complaint, Plaintiff Nam Nhat

Phan was a resident of Brooklyn Park, Minnesota.

22. Plaintiff Liem Thanh Nguyen was born in 1934 in the Republic of Vietnam. He graduated with a B.A. in Vietnamese Language and Literature and a French Bacculaureate II in Saigon, and worked as a high school teacher and principal before serving in the Prime Minister's Cabinet. Following the fall of Saigon, he fled Vietnam with the help of a friend in the Navy, and sailed by boat to Guam. He subsequently moved to Florida, then Iowa, where he obtained a Ph.D. in Research and Evaluation from Iowa State University. He has published numerous articles regarding Vietnamese and Indochinese refugees. At all times relevant to the claims in this Complaint, Plaintiff Liem Thanh Nguyen was a resident of Sacramento, California.

23. Plaintiff Chuc V. Nguyen was born on November 12, 1928, in the Republic of Vietnam. He obtained a Masters of French Law in Saigon in 1957, and served as a Senator in the Parliament in South Vietnam until the fall of Saigon when he fled the country by boat on April 30, 1975. He sailed to the Philippines then to Guam. He was relocated to Baton Rouge, Louisiana, where he obtained a Master's Degree from Louisiana State University and then moved to Texas. At all times relevant to the claims in this Complaint, Plaintiff Chuc V. Nguyen was a resident of Houston, Texas.

24. At all times relevant to the claims in this Complaint, the Defendants, the William Joiner Center and the University of Massachusetts were duly formed corporations or other legal entities under the laws of the Commonwealth. The William Joiner Center is a duly authorized part and subdivision of the University and has its principal place of business at the University of Massachusetts at Boston, City of Boston, County of Suffolk, Commonwealth of Massachusetts.

FACTS

25. According to the William Joiner Center's Program Description for the Rockefeller Foundation Fellowships, the "fellows will have all the privileges of university faculty, including

library borrowing, internet access, and email accounts. . . . Office space, a computer, telephone, fax, and mailing will be provided through the office of the Joiner Center." (Program Description at 4). In addition to their responsibilities for conducting research on the Vietnamese diaspora, the fellows' responsibilities included a requirement to "make at least two presentations during the period of their fellowships: one on campus and one at an appropriate site in the community." (*Id.*) They were also required to "meet with a core group of individuals from the Vietnamese community that may include teachers, librarians, human service providers, scholars, members of student organizations, artists, writers, and journalists." (*Id.*)

26. Under the provisions of the University of Massachusetts, Boston's Hiring Guide (the "UMass Boston Hiring Guide"), the Defendants were required to fill the Fellowship positions according to "a system of policies and procedures designed to prevent individuals from being excluded from participation, advancement or benefits because of their race, color, creed, sex, national origin, age, sexual orientation, disability, or status as a Vietnam era or disabled veteran." (*See* UMass Boston Hiring Guide at 2). In addition, "[t]he University's Affirmative Action Plan prohibits intentional or unintentional discrimination in any of its hiring practices, facilities, programs, or activities." (*Id.*)

27. Under the provisions of the UMass Boston Hiring Guide, the Rockefeller Foundation Fellowships were "Temporary and/or Grant-Funded Positions," and the William Joiner Center was required to "consult with HR prior to filling any temporary position" in order to insure that the University's hiring policies and procedures were followed and the appropriate search and advertising were performed. (*See* UMass Boston Hiring Guide at 3).

28. In awarding the Rockefeller Foundation Fellowships for the 2000-2001 academic year, the William Joiner Center did not consult with Human Resources and failed to comply with *any*

of the University's Hiring Guidelines or its Affirmative Action Plan.

29. The Defendants' Program Description also provided that the program would be "publicized widely," including notification of professional associations and advertisements in *"Indochina Digest, Refugee News, Amerasia Journal, Journal of Asian American Studies, Diaspora: A Journal of Transnational Studies, International Migration Review, Public Culture, Social Text, Bulletin of Concerned Asian Scholars, Positions: East Asia Cultures Critique."* (Program Description at 5). However, the Defendants failed to advertise in *any* of these publications.

30. The Program Description also provided that "[b]ilingual Vietnamese outreach materials will also be produced and disseminated to local and national Vietnamese community media outlets (newspapers, radio, cable television, websites)." (*Id.*) However, the Defendants failed to disseminate materials to *any* of these media outlets.

31. Despite having failed to comply with the University's Hiring Guidelines or Affirmative Action Plan, the Rockefeller Foundation Fellows were treated as "employees" by the Defendants. Each Fellow was the subject of a "Personnel Action Form" approved by the department head, indicating that each Fellow was "Professional Staff." Each Fellow was also required to sign an "Offer and Acceptance Form for Appointment or Rehire," which stated, *inter alia*, that "[a]ll members of the professional staff and faculty of the University are employed pursuant to and subject to the policies, rules and regulations adopted by the Board of Trustees," and provided certain other "conditions of employment." In addition, each Fellow completed an INS Form I-9, "Employment Eligibility Verification, an IRS Form W-4, "Employee's Withholding Allowance Certificate," and was issued a W-2 for income tax purposes. The Defendants also paid a share of the expenses and benefits of the Fellows.

32. Although the Rockefeller Foundation awarded the grant monies in July of 1999, the Defendants failed to disseminate information to the public about the Fellowships until on or about January 4, 2000, only 26 days before the application deadline of January 31, 2000.

33. On or about January 4, 2000, the William Joiner Center mailed copies of a press release and letter announcing the Fellowship for the first time, indicating that a poster would be mailed shortly with additional details, but intentionally failing to inform the Vietnamese-American community, including the Plaintiffs, of the application requirements and process. Further, the Defendants intentionally restricted the application period to some 26 days, allowing insufficient time for qualified candidates to learn of the program and submit a timely application.

34. Moreover, the poster outlining the application requirements was not distributed for some months after the closing date for applications. When the program requirements were published in the poster, the cut-off date for the first year of the Program was already months past.

35. None of the Plaintiffs were aware of the January 4, 2000 press release, the Fellowship application procedures or deadlines before April 11, 2000.

36. Plaintiff Luyen Huu Nguyen first learned that the Program had been established on or about April 11, 2000 -- over two months after the application deadline -- when he was given an envelope and a press release dated December 22, 1999, and mailed by the Center on January 4, 2000. The press release announced the Fellowships but gave no details as to requirements, procedures, or necessary supporting documentation. Not only was it too late to apply, but certain unpublished criteria and the lack of specifics would have made any application immediately defective and subject to rejection arbitrarily.

37. The advertisement and method of publication were illusory, false and misleading, and in violation of University policy, and were intended to preclude and discriminate against

Vietnamese-Americans over the age of 40 -- specifically, the refugees from South Vietnam who personally experienced the Vietnamese Diaspora.

38. On May 12, 2000, Plaintiff Luyen Huu Nguyen first learned the Fellowships had been awarded on an unlawful and discriminatory basis. The Defendants selected candidates with insufficient qualifications, no experience of the Vietnamese Diaspora, and in some instances are admitted agents of the Communist Party of the Socialist Republic of Vietnam (the unified North and South Vietnam), the very entity that caused the diaspora. Vietnamese-Americans over the age of 40 -- South Vietnamese refugees with the most knowledge and experience regarding the Vietnamese Diaspora -- were discriminated against in favor of two members of the Communist Party, one Caucasian-American by birth under the age of 40, and one person of Vietnamese-American descent of approximately 25 years of age. The candidates selected were far less qualified than the Plaintiffs.

39. The remaining Plaintiffs first learned of the Fellowships and the unlawful and discriminatory actions of the Defendants from Plaintiff Luyen Huu Nguyen in June of 2000.

40. The Defendants, through their officers, agents, servants, and employees deliberately chose not to advertise to the Vietnamese-American community (both in Boston and in the United States generally) the availability and the requirements of the program until it was too late for qualified Vietnamese-Americans to apply for the Fellowship positions.

41. The announcement for the positions was not placed in any Massachusetts-based Vietnamese-American daily, weekly newspaper, or magazine. Furthermore, there were no radio or television advertisements or notices of the proposed research program. The Defendants deliberately restricted advertisements for the position to two obscure and little-circulated publications -- *Hop Luu* and *Van Hoc* - all with the intent of excluding the Plaintiffs.

42. The actions of the Defendants, including the timing and methods of the advertisement, publication, and announcement of the Fellowships, and the evaluation and selection of the Fellowship recipients, were taken with the deliberate, improper, and illegal intent to exclude members of the Vietnamese-American community over the age of 40, including the Plaintiffs.

43. The Plaintiffs herein are all Vietnamese-American citizens or permanent United States residents, over the age of 40, with a national origin in South Vietnam, are well qualified, and would have applied for the Fellowships for the 2000-2001 academic year had they known of the positions and requirements prior to the application deadline.

44. For the academic years 2001-2001, and 2002-2003, the Plaintiffs did not apply for fellowships due to the legal proceedings instituted against the Defendants on October 27, 2000, before Massachusetts Commission Against Discrimination, and because, based on information and belief, the Plaintiffs reasonably believed they would have been discriminatorily rejected had they actually applied.

45. Each Plaintiff is ready, willing, able, and qualified to apply for a Rockefeller Foundation Fellowships in a properly organized, non-discriminatory program.

COUNT I
EMPLOYMENT DISCRIMINATION - DISPARATE TREATMENT

46. Plaintiffs repeat and reallege paragraphs 1-45 as their paragraph 46.

47. The Rockefeller Foundation Fellowships are positions of employment with the William Joiner Center and the University of Massachusetts, Boston.

48. The Plaintiffs herein are all Vietnamese-American citizens or permanent United States residents, over the age of 40, with a national origin in South Vietnam, are well qualified, and would have applied had each known of the positions and requirements.

49. The Plaintiffs were intentionally and discriminatorily excluded from and in the selection

process and the Program because of their national origin and age.

50. The advertisements, solicitations, and announcements of the positions were vague, did not contain any standard for evaluating applicants, and created bias in the selection process. The processes undertaken by the Defendants for the evaluation and selection of Fellowship recipients were biased against Vietnamese-Americans whose national origin was the former Republic of Vietnam (South Vietnam), including the Plaintiffs. The entire employment process contained uncontrolled subjectivity, resulting in the deliberate, biased and disproportionate exclusion of qualified Vietnamese-Americans over 40 years of age from selection, including the Plaintiffs.

51. At all material times, Plaintiffs did not know, could not have reasonably discovered, and in the exercise of reasonable diligence did not discover the true facts of the Defendants' misconduct. The Defendants, through their officers, agents, servants, and employees, actively misrepresented and concealed this misconduct. Furthermore, the Defendants, their agents, servants, and employees continued to misrepresent to and conceal from the Plaintiffs the status of these matters.

52. Plaintiffs have fulfilled all necessary conditions precedent to bringing these claims or are otherwise excused by virtue of the Defendants' acts, misconduct, and failures to abide by Massachusetts law.

53. As a direct and proximate result of the Defendants' intentional discrimination and violation of Massachusetts General Laws Chapter 151B, the Plaintiffs have been greatly damaged.

Wherefore the Plaintiffs pray judgment against the Defendants for all relief available pursuant to Massachusetts General Laws Chapters 151B, including compensatory and punitive damages, injunctive relief, attorneys fees and costs.

COUNT II
EMPLOYMENT DISCRIMINATION - DISPARATE IMPACT

54. Plaintiffs repeat and reallege paragraphs 1-53 as their paragraph 54.

55. The Defendants' actions in awarding the Rockefeller Foundation Fellowships were unlawful and discriminatory under Massachusetts General Laws Chapter 151B, due to the disparate impact of those actions on Vietnamese-Americans over the age of 40.

56. The Defendants awarded the Fellowships on the basis of an ideological employment test: Fellowships were available only to those who adhered or were sympathetic to the views of the Communist government of the Socialist Republic of Vietnam.

57. The practical result of the application of this ideological test was to exclude *all* Vietnamese Americans over the age of 40 -- virtually the entire Vietnamese Diaspora -- the only group of people with personal knowledge and firsthand experience of the brutalities inflicted on the diaspora by the Communist North Vietnamese government and the dislocation and adaptation of the diaspora community.

Wherefore, the Plaintiffs pray judgment against the Defendants for all relief available pursuant to Massachusetts General Laws Chapters 151B, including compensatory and punitive damages, injunctive relief, attorneys fees and costs.

COUNT III
DISCRIMINATION IN EDUCATION

58. The plaintiffs repeat and reallege paragraphs 1-57 as their paragraph 58.

59. In the alternative, the policies and procedures for the awarding of the Rockefeller Foundation Fellowships are governed by Massachusetts General Laws Chapter 151C, which prohibits discrimination in education on the basis of race, religion, creed, color or national origin.

60. The above-referenced actions by the Defendants were intentionally discriminatory against, or had a discriminatory disparate impact upon, the Plaintiffs on the basis of age and national origin, in violation of Massachusetts General Laws Chapter 151C.

61. The above-referenced actions by the Defendants were intentionally discriminatory against, or had a discriminatory disparate impact upon, the Plaintiffs on the basis of creed -- in this instance, adherence to or sympathy for the creed of Communism -- in the awarding of the Rockefeller Foundation Fellowships, in violation of Massachusetts General Laws Chapter 151C.

62. As a direct and proximate result of the discrimination and violation of Massachusetts General Laws Chapter 151C, the Plaintiffs have been greatly damaged.

Wherefore, the Plaintiffs pray judgment against the Defendants for all relief available pursuant to Massachusetts General Laws Chapter 151C, including compensatory and punitive damages, injunctive relief, attorneys fees and costs.

PRAYER FOR RELIEF

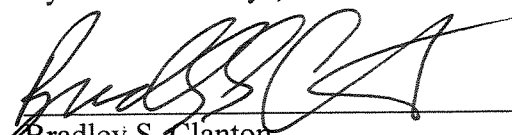
WHEREFORE, PREMISES CONSIDERED, Plaintiffs Luyen Huu Nguyen, et al., demand judgment against Defendants for compensatory damages, punitive damages, and all costs including attorneys fees.

This the 8th day of January, 2004.

Respectfully Submitted,

LUYEN HUU NGUYEN, ET AL

By Their Attorneys,


Bradley S. Clanton

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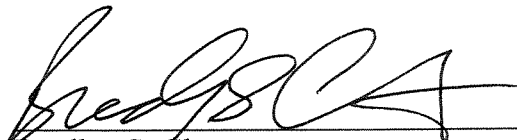
COUNSEL FOR LUYEN HUU NGUYEN, ET AL.

CERTIFICATE OF SERVICE

I certify that on this date a true and correct copy of the *Plaintiffs' Second Amended Complaint* was served via Federal Express to:

Michael P. Joyce, Esquire
University of Massachusetts
One Beacon Street, 26th Floor
Boston, Massachusetts 02108

DATED: January 8, 2004.


Bradley S. Clanton